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INTRODUCTION

This appeal is about a drag show ban threatening Plaintiffs' First Amendment right to perform a drag show scheduled for March 2024. It is not about standing or sovereign immunity, as Defendants John Sharp and Christopher Thomas claim. The facts prove why. *See* ROA.871–72 (denying Thomas and Sharp's motion to dismiss on standing and sovereign immunity).

Since March 2023, West Texas A&M University officials have censored Plaintiffs, a recognized student organization and its undergraduate leaders at the public university. Days before Plaintiffs were scheduled to perform a PG-13 charity drag show in a campus public

Plaintiffs intend

trample the First Amendment. Their roles, their authority, and their acts closely connect them with the ongoing violations of Plaintiffs' First Amendment rights, even if President Wendler made the initial decision to muzzle Plaintiffs' protected expression. That meets Article III standing, especially because the drag show ban is imperiling Plaintiffs' First Amendment right to

Preventing that irreparable First Amendment harm requires an injunction

46. Even more, they fail to address Plaintiffs' thoroughly briefed First Amendment arguments, including those that cover all Defendants, not just President Wendler. *See id*; *see also* ROA.527–37.

As Plaintiffs' arguments show, this Court should find the district court erred on the First Amendment questions controlling the likelihood-of-success factor. Should the Court do so, it should also hold the district court abused its discretion and reverse the denial of the preliminary injunction not only as to President Wendler, but also as to Sharp and Thomas, as both have the authority to once again stifle Plaintiffs' protected expression.

II. Thomas and Sharp's

c.f., Appellants' Br. 67 n. 13 (intentionally waiving arguments as to standing against

Plaintiffs' brief details Vice President Thomas's role and responsibilities in cancelling Plaintiffs' 2023 performance, and how he will again enforce Wendler's ban by cancelling Plaintiff's March 2024 performance. Appellants' Br. 6, 68. Plaintiffs also identify Texas A&M system policy establishing Chancellor Sharp's authority over President Wendler and his refusal to denounce or override Wendler's edict, despite evidence of Sharp intervening in past free speech disputes within the Texas A&M system. *Id.* at 7, citing, among others, Tex. A&M Univ. Sys., Sys. Pol'y 02.02, Office of the Chancellor, §§ 1.12, 2.1; ROA.218 ¶ 18; ROA.235 ¶ 120; ROA.243 ¶ 158. Plaintiffs also explain how Thomas and Sharp are propping up President Wendler's censorship, and detail how both are contributing to Plaintiffs' irreparable injuries. Appellants' Br. 13, 68. And Plaintiffs identify this Court's decision in *Freedom From Religion Foundation v. Abbott*, 955 F.3d 417, 424–25 (5th Cir. 2020) as supporting subject matter jurisdiction. Detailing fact, policy, and law supporting an argument is not the cursory, unsupported reference tantamount to forfeiture.

To be sure, Plaintiffs' principal brief centers on the First Amendment violations resulting from President Wendler's viewpoint-

driven decision. And for good reason: The district court's errors centered on the First Amendment merits of Plaintiffs' claims, not whether Plaintiffs had standing to bring them. Although Sharp and Thomas complain that Plaintiffs' standing discussion is brief (Defs. Br. 24), it is not Plaintiffs' burden to challenge the district court's correct conclusions on the uncontroversial questions of standing and lack of sovereign immunity.

All of this confirms that Plaintiffs have not forfeited their arguments, and the Court should refuse Defendants' arguments on the issue.

III.

against them for a preliminary injunction, as "[a]t earlier stages of litigation . . .

officials "review" the content of student events during the permit process). This gag on Plaintiffs' expression meets the injury-in-fact requirement—an injury traceable to both Sharp and Thomas. Thus, a preliminary injunction against them is necessary to redress Plaintiffs' injuries.

A. Plaintiffs have shown an ongoing Article III injury-in-fact.

Plaintiffs have alleged and shown First Amendment injuries that satisfy Article III. *See* Appellants' Br. 16–66. The constitutional injury-in-fact requirement asks whether the plaintiff has a "personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (internal quotation omitted). To satisfy Article III, an injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (cleaned up). Both allegations of ongoing injury and allegations of threatened injury can show an injury-in-fact. *Driehaus*, 573 U.S. at 158.

There is an ongoing ban on campus drag shows at West Texas A&M. As President Wendler announced in his March 20, 2023 email, "West Texas A&M University will not host a drag show on campus" and a "harmless drag show" is "[n]ot possible". ROA.265–67. Even more, his

edict informed students, staff, and administrators that his personal criteria for what is "inappropriate" controls Plaintiffs' right to use campus venues for expressive activity. *Id.* Those clampdowns on protected expression are currently impeding Plaintiffs' ability to plan their March 2024 campus drag show at Legacy Hall, a campus public forum. *E.g.*, ROA.237 ¶ 130(b); ROA.272–73; ROA.327–32 ¶¶ 6–16; ROA.343–83. That more than meets Article III's injury-in-fact requirement. *See Three Expo Events*, 907 F.3d at 341–42; *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 818 (5th Cir.1979) (whether a plaintiff "is seriously interested in disobeying, and the defendant seriously intent on enforcing, the challenged measure," informs the "case or controversy" requirement).

Sharp and Thomas insist President Wendler's edict is a one-off act and claim Plaintiffs' injury-in-fact is purely speculative. They are wrong. Defs. Br. 32–33. Above all, they ignore that Wendler has not rescinded his unequivocal campus drag show ban—and that Chancellor Sharp has not reversed or even denounced Wendler's actions. ROA.235 ¶ 119; *see generally* ROA.538–49. Those refusals to override Wendler's unconstitutional campus drag show ban establishes an injury-in-fact. *See*

Freedom From Religion Found., 955 F.3d at 424–25 (concluding an ongoing case or controversy existed based on a non-rescinded letter from the Texas governor leading to a potential First Amendment violation).

Sharp and Thomas also downplay the viewpoint-based campus drag show ban as inert because it is not set forth in "any A&M University System Policy or any formally adopted WT policy or rule." Defs. Br. 30. But that does not negate standing. Whether by formal rule, policy, or the acts and omissions of those with authority like Wendler, Sharp, and Thomas, if government officials even informally stifle protected expression under the color of state law, the result is an injury-in-fact to those who want to exercise their First Amendment rights. *See*, *e.g.*, *Missouri v. Biden*

a threatened injury, Plaintiffs must show (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest"; (2) that the "intended future conduct is arguably proscribed by the statute"; and (3) that "the threat of future enforcement is substantial." *Driehaus*, 573 U.S. at 161–64 (citations omitted) (cleaned up). Plaintiffs meet all three elements.

First, Plaintiffs have started planning and intend to put on the same drag show at Legacy Hall in March 2024 as the one triggering Wendler's edict in 2023. ROA.229–30 ¶¶ 76–83, ROA.237 ¶ 130(b). As Plaintiffs explain, that is First Amendment protected expression. Appellants' Br. 16–36. Second, President Wendler's viewpoint-based drag show ban—which Thomas enforces and Sharp has essentially backed—proscribes Plaintiffs' "intended future conduct." ROA.265–67. Third, Wendler has not rescinded his ban on drag shows or otherwise indicated that he will not cancel Plaintiffs' next drag show. ROA.235 ¶ 119. Instead, he proclaimed soon after Plaintiffs sued that he "wouldn't have done anything any differently." ROA.623 at 25:00–27:47. Those facts establish a threatened injury-in-fact. *Driehaus*, 573 U.S. at 161–64; *see*

expression. Defendants have already wielded those requirements to impose and maintain a ban on that protected expression. Appellants' Br. 61–66. In all cases, there is a prior restraint stifling Plaintiffs' right to perform their March 2024 drag show. And that only underpins Plaintiffs' standing here. *See Speech First*, 979 F.3d at 336 ("[p]ast enforcement of speech-related policies can assure standing . . . ."); *Austin*

C. Because Thomas has authority over student events, Plaintiffs have standing as to him.

As Plaintiffs explained in their principal brief, Vice President Thomas carried out President Wendler's unconstitutional edict and will continue to do so. Appellants' Br. 6, 68; *see also* ROA.540. That alone belies Thomas's arguments on standing, as Thomas has at least a "scintilla of enforcement" causing an injury that can be redressed by enjoining Thomas from injury tht -1 (a24 0 0 1 (om e(u) -1 ( ) -19(n) -1 (ET Q q r) 2 5

For these reasons, Plaintiffs' ongoing and threatened injuries are fairly traceable to Vice President Thomas, as they stem from Thomas's "application or threatened application of an unlawful enactment. . . ." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 297 (2022). While Thomas insists that Plaintiffs lack standing because their claims turn on the actions of "third party" President Wendler, that argument fails for three reasons. *See* Defs. Br. 34. First, Thomas will have a direct role in cancelling Plaintiffs' March 2024 show, just as he did in 2023, because his duties encompass "all matters related to student . . . activities." ROA.539 ¶ 2. Second, Wendler is not an independent third party; he is Thomas's superior. ROA.540 ¶ 5. Third, even if Wendler's continuing edict is an independent "third party" decision, it is enough to show standing for Thomas, because Wendler is "likely to react in predictable ways" by once again censoring Plaintiffs' March 2024 show because he disagrees with its viewpoint. *Biden*, 83 F.4th at 369–70 (quoting *California v. Texas*, 141 S. Ct. 2104, 2117 (2021)).

For these reasons, a preliminary injunction against Thomas from enforcing the drag show ban or the viewpoint-based criteria in Wendler's edict is necessary to redress Plaintiffs' First Amendment injuries.

Enjoining Thomas will also provide a backstop to safeguard Plaintiffs' First Amendment rights should President Wendler ignore a preliminary injunction.

D.

Wendler's superior and has the power and duty to stop President Wendler from continuing to violate Plaintiffs' constitutional rights . . . ." ROA.218 ¶ 18. While the declaration of Billy Hamilton, the deputy chancellor and chief financial officer for the Texas A&M University system, claims C

the system." Tex. A&M Univ. Sys., Sys. Pol'y 02.02, § 2.1. In fact, Sharp offered no declaration below distancing himself from President Wendler's acts, let alone any other statement denouncing Wendler's viewpoint-driven edict banning drag shows. *See generally* ROA.538–49.

Likewise, Sharp's history of involving himself in university free speech matters contradicts the hands-off picture he now paints. In December 2016, noted white supremacist Richard Spencer was scheduled to speak at Texas A&M University. But Chancellor Sharp did not censor Spencer's talk. Rather, he and then-president Michael Young supported "Aggies United," a counter-speech event at Kyle Field.[3] On the other hand, Chancellor Sharp has also shown a willingness to block expressive events on campus. When Spencer was scheduled to speak again at Texas A&M in 2017, Sharp was key to cancelling the event.[4]

That past involvement in campus speech reveals Sharp's authority to facilitate the ongoing drag show ban at West Texas A&M, as the

[3] ROA.610 (citing Michael Hardy, "Country Revival," Texas Monthly (July 2017) https://features. texasmonthly.com/editorial/country-revival [Permalink: https:// perma.cc/DCK5-C56C]).

district court correctly concluded. ROA.871–72. And it underscores why Plaintiffs meet Article III's case or controversy requirement for Sharp—even more so given Sharp's direct authority over President Wendler and "all things necessary" to ensure West Texas A&M's success. *E.g.*, *Jackson*, 82 F.4th at 367–69 (concluding plaintiff had standing against public university board members who had "direct governing authority over the UNT officials that are allegedly continuing to violate" the plaintiff's rights, "including authority to countermand the decisions of the subordinate UNT officials."); *see also Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047–49 (6th Cir. 2015) (denying motion to dismiss a First Amendment challenge on Article III grounds, as secretary of state had authority for the challenged law and showed a willingness to enforce it).

On the same basis, Plaintiffs' injuries-in-fact are traceable to Chancellor Sharp. *See* Defs. Br. 34–

252, 261 (1977). As the district court concluded in rejecting Sharp's standing arguments, even though Sharp "did not make the decision to cancel" the March 2023 drag show, "he does hold the authority to permit or deny future ones." ROA.872. The district court was correct.

Like Thomas, Sharp also claims that Plaintiffs lack standing because their injury results from the actions of a "third party." Defs. Br. 34–35. And like Thomas, he is wrong. Again, Wendler is no third party. He is Chancellor Sharp's ward, as Texas A&M system policy commands. Tex. A&M Univ. Sys., Sys. Pol'y 02.02, Office of the Chancellor, § 1.12. Even if the Court looks to the "determinative or coercive effect upon the action of someone else" guideline Sharp identifies to assess traceability through a third-party's act, Plaintiffs meet it. Defs. Br. 34 (citing *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997)). If the person responsible for President Wendler and having the ultimate authority to end Wendler's censorship has effectively ratified it, as Sharp has, that only encourages Wendler to maintain his present course—creating precisely that determinative effect on Wendler. Thus, Wendler has every reason to believe Sharp will back him if he once again banishes Plaintiffs' protected expression from a camu3 T58 8la c8.0032 Tc 58 0 0 4ted

With that in mind, an injunction against Sharp will redress Plaintiffs' First Amendment injuries and ensure Sharp does not encourage or even coerce West Texas A&M staff to censor Plaintiffs' campus drag show. It will also ensure Chancellor Sharp does not keep up the campus drag ban at West Texas A&M, even if President Wendler decides to relent and obey the Constitution. This is no mere hypothetical. Just recently, Sharp initiated the investigation of a professor, at the lieutenant governor's request, who criticized the lieutenant governor. If anything, that event is just another example showing Sharp is more than willing to exercise his authority over expression on campus. An injunction against Sharp is needed to fully redress the harm to Plaintiffs' expressive freedoms, and the Court should reverse.

IV. For the Same Reasons Plaintiffs Have Standing, Thomas and Sharp Lack Sovereign Immunity.

The district court rightly denied Thomas and Sharp's motion to dismiss on sovereign immunity. ROA.872 n. 31. Because of the "significant overlap between standing and *Ex parte Young*'s

Under that standard, neither Sharp nor Thomas have sovereign immunity. *Ex parte Young* applies to Plaintiffs' claims against Vice President Thomas. He is responsible for enforcing President Wendler's directives, like the viewpoint-based ban on drag shows. And as shown, he will enforce that directive again. That meets the "some connection" requirement.

So too does *Ex parte Young* authorize Plaintiffs' claims for prospective relief against Chancellor Sharp. Sharp argues that he has sovereign immunity "[f]or the same reasons Plaintiffs lack standing . . . ." Defs. Br. 41. But he offers no other argument in support of sovereign immunity. Nor can he, because Sharp is connected to the ongoing and threatened censorship of Plaintiffs' protected expression. *See* Section III.D, *supra*. And in any case, because Plaintiffs have standing against Sharp, sovereign immunity is no bar here. *Air Evac EMS*, 851 F.3d at 513–14.

Lastly, Thomas and Sharp miscast Plaintiffs' requested relief as "affirmative relief that is barred by sovereign immunity." Defs. Br. 42–43. But Plaintiffs are not asking for a mandatory injunction. They are asking for an injunction *prohibiting* Defendants from "enforcing

President Wendler's ban on drag shows in campus facilities generally available for student group use" or otherwise "enforcing any of the viewpoint- and content-discriminatory prohibitions" contained in Wendler's edict. ROA.281–83 (preliminary injunction motion); ROA.286–

show" because he finds drag shows offensive to women. ROA.235 ¶ 119, ROA.265–67. His edict pledged that the university "will not" host a drag show because a "harmless" show is never possible, and he renewed that pledge even after Plaintiffs sued him. ROA.623 at 25:00–27:47.

Despite all of that, Sharp and Thomas still insist that "Plaintiffs' injury is premised on a fear of future injury that has not yet materialized and that is far from imminent." Defs. Br. 44. In other words, Sharp and Thomas simply ignore the realities of the ongoing campus drag show ban that threatens Plaintiffs' weeks-away performance and the protected expression it embodies. And while Sharp and Thomas suggest that "drag

The imminent harm Plaintiffs face warrants a preliminary injunction, including against Sharp and Thomas. They both play a part in the ongoing and threatened violations of Plaintiffs' First Amendment rights that underscore irreparable harm here. *See* Section III; *supra*; Appellants' Br. 68; *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

To that end, Sharp and Thomas's roles in violating Plaintiffs' First Amendment rights show that this is not a case about vicarious liability, despite what they otherwise argue. Defs. Br. 26–28. Of course, *respondeat superior* is no bar to Vice President Thomas because he is not President Wendler's superior. And all the cases Defendants rely on involve the unavailability of vicarious liability in Section 1983 or *Bivens* damages claims against individual capacity defendants.

Defs. Br. 26–27 (*Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (*Bivens* damages claim); *Pierce v. Tex. Dep't of Crim. Just.*, 37 F. 3d 1146, 1150 (5th Cir. 1994) (personal capacity Section 1983 claim); *Coleman v. Houston Indep. Sch. Dist*., 113 F.3d 528 (5th Cir. 1997) (same); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (same). The Court has suggested that the unavailability of vicarious liability against individuals in Section 1983 cases extends to injunctive relief, although it is unclear if it extends to official capacity claims seeking a prospective injunction. *Mitchell v. Scott*, 95 F.3d 1148 (5th Cir. 1996) (per curiam) ("the district court's denial of injunctive relief was not an abuse of discretion because a defendant cannot be held liable under § 1983 on a theory of vicarious liability. . . .").

In any case, Plaintiffs do not seek a preliminary injunction against Sharp and Thomas to hold them to account for a disconnected third-party's action. Plaintiffs seek an injunction against Sharp and Thomas to prevent irreparable harm caused by their roles in violating Plaintiffs' First Amendment rights. And they have met their burden on all the preliminary injunction factors against both Sharp and Thomas. Prompt reversal is needed to prevent more irreparable harm to Plaintiffs' First Amendment freedoms.

CONCLUSION

For all these reasons and the reasons explained in Plaintiffs' principal brief, the Court should reverse the district court's denial of Plaintiffs' preliminary injunction motion, including as to Defendants Sharp and Thomas.

Dated: January 3, 2024

Respectfully,

/s/ JT Morris

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CERTIFICATE OF SERVICE

This certifies that on January 3, 2024, in compliance with Rules 25(b) and (c) of the Federal Rules of Appellate Procedure, the undersigned served the foregoing via the Court's ECF filing system on all registered counsel of record.

/s/ JT Morris

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. App. P. 32(a)(7)(B) because this brief contains 5,904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Local Rule 32.2.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Local Rule 32.1 and the type style requirements of proportionally spaced typeface using 14-point Century Schoolbook font for text and 12-point Century Schoolbook font for footnotes.

Dated: January 3, 2023

/s/ JT Morris
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