

No. 23-10994

IN

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed person and entity as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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CORPORATE DISCLOSURE STATEMENT

The Secular Student Alliance is a 501(c)(3) nonprofit corporation. There is no parent corporation or publicly held corporation that owns 10% or more of Secular

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INTRODUCTION

Fewer issues have caught the American political attention in the past year like that of drag performances. Despite drag having a long artistic tradition and history as a source of expression supporting LGBTQIA+ rights, it appears that the question of when and where drag may be performed is reaching a fever pitch in the American consciousness. See Jeff McMillan, *Explainer: Drag Queens and How They Got Pulled Into Politics*, Associated Press (Oct. 2022), available at <https://bit.ly/3QE1fEA>. As with all issues that enter the public discourse, there are a range of opinions surrounding drag. But while misinformation surrounding drag has led some to call for bans on it, there are few values more critical to democracy than that of free speech. First Amendment jurisprudence places strict limits on when and how government actors may restrict speech — our Constitution ensures that government actors may not censor a particular opinion simply because they disagree with it.

From funding decisions to student organization regulations, university presidents hold a significant amount of power and responsibility regarding all aspects of student life. Unfortunately for the students of West Texas A&M University, President Wendler has decided to forgo that responsibility in favor of enforcing his personal religious beliefs as a matter of university policy. By placing

an ongoing ban on drag performances, President Wendler has engaged in

ARGUMENT

I. President Wandler engaged in unconstitutional viewpoint

R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).

These limited areas include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See U.S. v. Stevens*, 559 U.S. 460, 468 (2010); *U.S. v. Richards*, 755 F.3d 269, 273–74 (5th Cir. 2014). But these are extremely narrow exceptions that have been applied sparingly by courts. The general rule remains:

or even expressive conduct . . . because of disapproval of the ideas expressed.

Content-

R.A.V., 505 U.S. at 382. The

Rosenberger, 515 U.S. at 828.

There is a subset of content-based restrictions on speech that are even *more* anathema to the free speech principle embodied in our First Amendment.

808 F.3d 1321, 1336 (Fed. Cir. 2015)

a content-

or the authority of any government actor to place a prior restraint on speech for potentially violating religious principles. This has been the law since at least 1952, when the Supreme Court held in *Joseph Burstyn, Inc. v. Wilson* that a New York statute authorizing state officials and free press. *See* [343 U.S. 495](#) (1952). The Court summarized its reasoning quite enough to point out that **the state has no legitimate interest in protecting any or all religions from views distasteful to them** which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious

Id. at

505 (emphasis added).

There are few issues more subjective than that of religious belief. There are

See, Religious Landscape Study, Pew Research Center (2014), *available at* <https://pewresearch.org/religion/religious-landscape-study>. Even within the same religious identity rarely do any two given adherents share identical views on every topic. This kind of subjective access be narrow, objective, and d

reason. Giving any single public university administrator unilateral power to decide what speech can or cannot occur on campus based on their personal moral compass would have a disastrous impact on the right to free speech. A Christian president of a public university would be able to ban any secular winter

depicts the prophet Mohammed because it is against Islamic belief. An Orthodox Jewish president could ban women from wearing pants on campus due to their belief that it is sinful. Any university president could essentially co-opt the power of their office to turn a publicly funded university into a religious one that suits their personal belief system.

First Amendment jurisprudence creates strict guidelines for when and how a government actor may utilize their power to place limitations on speech, so that no single individual may abuse said power. West Texas A&M *has* a set of objective and definite standards for determining which events can occur on its campus one that Spectrum WT followed, and, under those objective criteria received approval until President Wendler intervened, substituting his personal preferences f

See First Am. Compl. for C.R. Violations,

create a very real and imminent threat not only to Spectrum WT, but to any other

Cross-dressing bans first rose to prominence in the late nineteenth and early twentieth centuries, and were commonly interpreted by law enforcement and judges across the country as bans on drag performances. *See*, Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963-86*, 40 *L. & History Rev.* 679 (2023). As the twentieth century progressed, and LGBTQIA+ communities in the United States became increasingly visible, religious anxieties surrounding gender nonconformity heightened. Drag queens were frequent, explicit targets of The Moral Majority, with leaders like Mary Whitehouse, Anita Bryant, and Jerry Fallwell Sr. contributing to the social stigma surrounding LGBTQIA+ identities. *See* Simon Doonan, *Drag the Complete Story*, 214, Laurence King Pub. (2019) (Amicus Br. for many LGBTQIA+ youth, including social isolation, suicidal ideation, and being displaced from their homes. In major cities, such as New York, many of these you Drag families groups of performers who provide each other with mentorship and community began forminC9.1 0 0 1 7oups.ent93004C>7005100031

Criales-Unzueta, *From Underground Subculture to Global Phenomenon: An Oral History of Ballroom Within Mainstream Culture*, Vogue Magazine (June 2023), available at <https://vogue.com/article/oral-history-ballroom-pride-2023>.

As a result of the continued clash between gender non-conformity and Christian fundamentalism in the United States, drag plays a critical role in countering religiously motivated repression. For example, when conservative street preachers began flooding Sa Castro, in the 1970s, neighborhood drag performers began to explicitly co-opt the attire of Catholic nuns in order to satirize the religious extremism being used to attack their community. This group came to

extremist attacks on gender expression. *See Doonan, supra* at 214 . It is

to depression and suicide, 17 PLoS One 12 (Dec. 2022), available at <https://ncbi.nlm.nih.gov/pmc/articles/PMC9778603>.

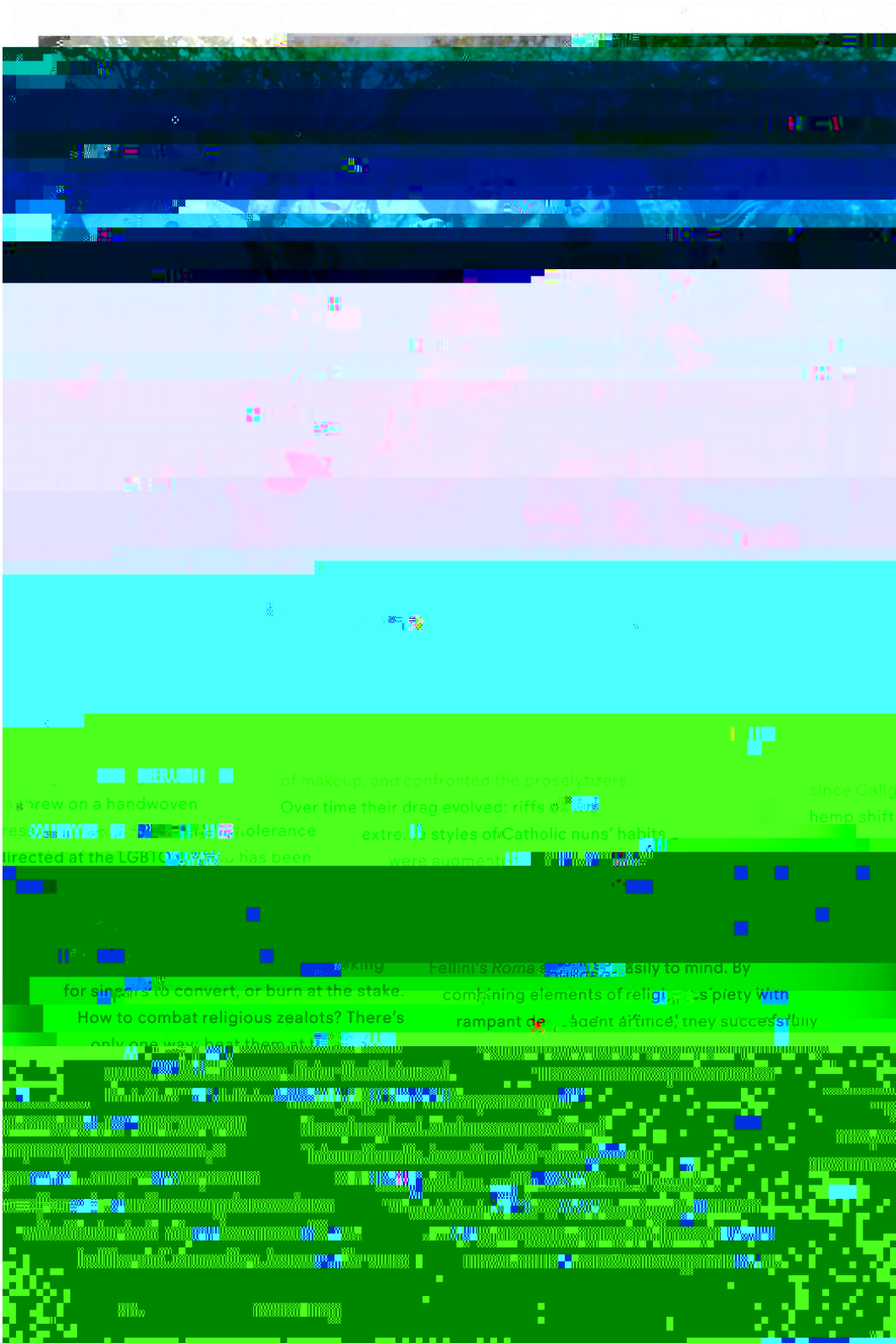
The current political context is important, because it makes the intended message of the Spectrum WT fundraiser all the more apparent. Spectrum WT intentionally formulated its fundraiser to be a show of support for the LGBTQIA+ community, and to offer messaging that counters the uptick in anti-LGBTQIA+ discourse. *See* First Am. Compl. for C.R. Violations, ¶ 74 (ECF No. 28). The inherently expressive about the Spectrum WT fundraiser is akin to ruling that there is nothing inherently expressive about wearing a black armband to protest the Vietnam War, because sometimes armbands are worn for fashion purposes. *But see Tinker v. Des Moines Indep. Sch. Dist.*, [393 U.S. 503](#) (1969).

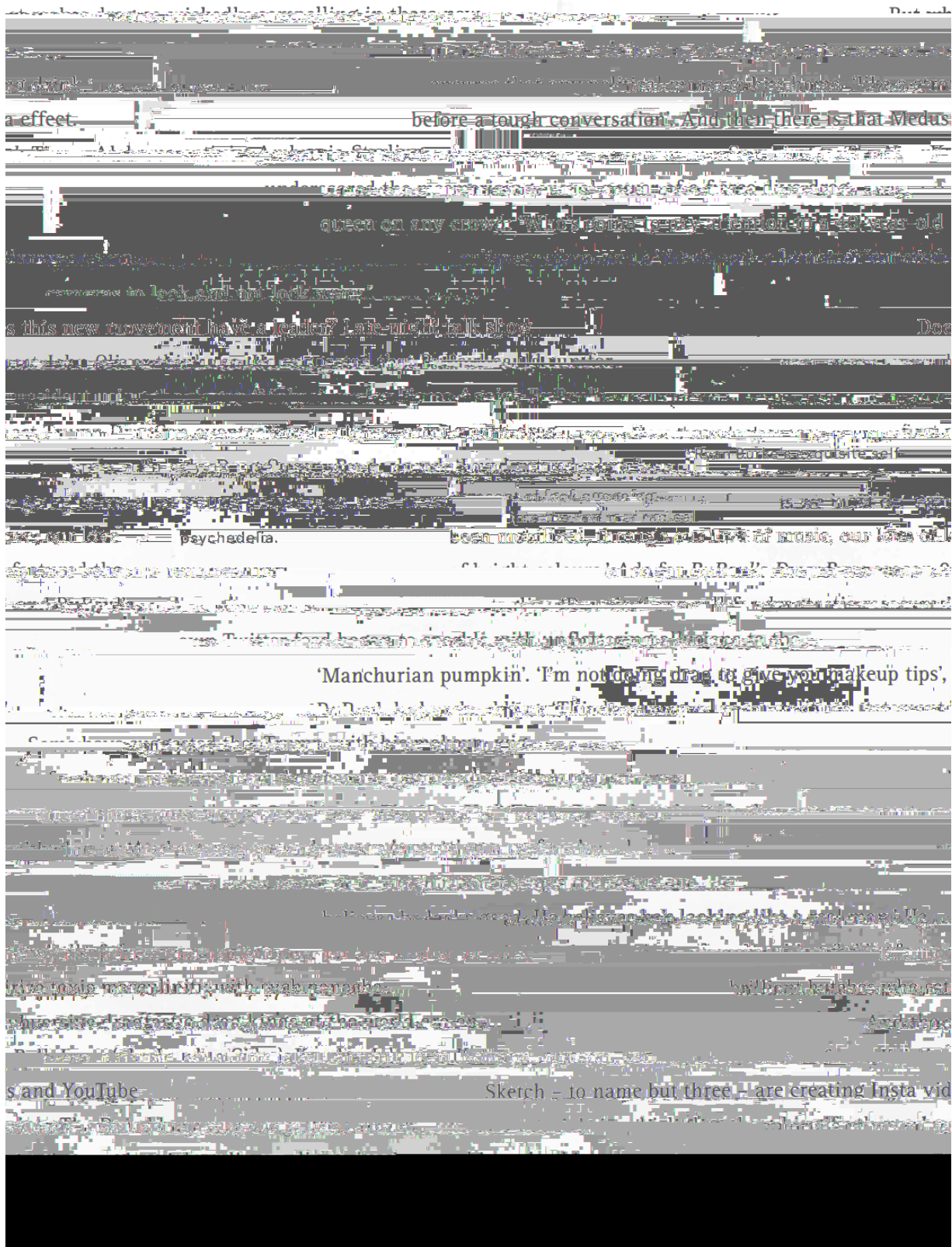
Like all art, drag does not exist in a vacuum, but as a response to the world around it. Though the historical cross-dressing bans of the nineteenth and twentieth centuries have been overturned, there is no way to separate modern drag from its historical roots of resisting legalized religious oppression. The proponents of modern Christian nationalism have made clear their intention to reinstate these Christian morality laws, and to criminalize forms of gender expression that do not align with their personal religious beliefs, regardless of what the Constitution requires. The Spectrum WT fundraiser was an explicit and obvious reaction to the

impact of the Christian nationalist movement on both the state and national levels.

When one considers both the history of American drag and the political conditions

APPENDIX A





C

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2023, the foregoing amicus brief was filed electronically with the Clerk of the Court for the United States Court of Appeals participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Samuel T. Grover
Samuel T. Grover