No. 23A820

In the Supreme Court of the United States

SPECTRUM WT, ET AL.,
Applicants,

v.

WALTER WENDLER, ET AL.,
Respondents.

To the Honorable Samuel Alito, Associate Justice
of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit

CONSOLIDATED REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

IMMEDIATE RELIEF REQUESTED

Adam B. Steinbaugh
Jeffrey D. Zeman
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
510 Walnut St.
Suite 900
Philadelphia, PA 19106

Robert Corn-Revere
JT Morris
Counsel of Record
Conor T. Fitzpatrick
Joshua T. Bleisch
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
700 Pennsylvania Ave. SE
Suite 340
Washington, DC 20003
215-717-3473
jt.morris@thefire.org

Counsel for Applicants

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INTRODUCTION

West Texas A&M President Wendler's response is a signed confession, confirming "his policy" to censor "any show, performance, or artistic expression which denigrates others." Wendler Resp. 4. This concession cements that Wendler is imposing a viewpoint-based prior restraint over free expression at a public university. No more is needed to establish the extraordinary threat that will irreparably harm Spectrum WT and its student members' First Amendment rights if the Court does not intervene before March 22.

Protecting student speech "presents a high-stakes issue for our Nation's system of higher education." *Speech First, Inc. v. Sands*, 601 U.S. ___, 6 (2024) (Thomas, J., dissenting). When a year-long prior restraint threatens student speech at a public university, those stakes grow even higher. Spectrum WT and its student members have been anything but dilatory, acting at every turn in the courts below to lift the edict barring them from the public campus stage. But the judicial safety net against prior restraints, "the most serious and the least tolerable infringement" of the First Amendment, broke down. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The Court should intervene in these extraordinary circumstances and grant Plaintiffs' application for an injunction pending appeal.

ARGUMENT

I. Plaintiffs Acted Diligently Before Seeking Emergency Relief and the Court Has Jurisdiction to Grant an Injunction.

Respondents' arguments about jurisdiction are wrong. *See* Wendler Resp. 11. The Court has before granted an application under the All Writs Act to enjoin First

Amendment violations pending appeal to prevent irreparable harm and preserve jurisdiction. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020). It should do so again here. Unless the Court enjoins Respondents now, Wendler's prior restraint will once again harm *these* university students irreparably and frustrate the Court's later jurisdiction. A prior restraint has a pernicious effect that can wear down even the most determined speaker's will, let alone the will of a recognized student group having endured a prior restraint for a year. The Court cannot unwind that harm through later review, no different than in *Roman Catholic Diocese,* where churchgoers faced harm pending appeal from being forced to watch weekly services on television rather than worship in person. 592 U.S. at 19. Prospects of future in-person services did not render the All Writs Act inapt.

Though Respondents urge the Court to withhold acting until after the Fifth Circuit rules on the merits (Wendler Resp. 2, Sharp Resp. 15), the Court's decision in *National Socialist Party of America v. Village of Skokie* shows why the Court can and should act now. 432 U.S. 43 (1977) (per curiam). There, the Court stayed a prior restraint after the lower courts' refusal to act pending appeal. *Id.* at 43–44. That refusal "determined the merits of petitioners' claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review which, in the normal course, may take a year or more to complete." *Id.* at 44. Just as the Court swiftly halted the prior restraint in *Skokie*, it should swiftly halt President Wendler's prior restraint pending appeal after the courts below declined to do so.

Plaintiffs are not asking this Court for emergency relief because of some "self-created exigency." Sharp Resp. 7–9; *see also* Wendler Resp. 9–11. Instead, Plaintiffs have maintained an "active litigation posture" that is "far from . . . neglect or delay." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 379 (2004) (finding a request timely under the All Writs Act). Plaintiffs immediately moved for a temporary restraining order in March 2023, swiftly sought a preliminary injunction to safeguard their March 22, 2024 performance, immediately appealed the denial of the same, moved to expedite that appeal, sought no briefing extensions in the Fifth Circuit, and moved in both courts below for an injunction pending appeal.

Wendler argues Plaintiffs could have sought emergency relief in September 2023 when the district court denied a preliminary injunction. Wendler Resp. 10. That clashes with Respondents' recent Fifth Circuit briefing arguing that Plaintiffs' harm was "far from imminent" and "entirely speculative." Ct. App. Dkt. 89 at 44; *id.*, 94 at 38. And under Wendler's logic, parties should run to the Court any time the need for emergency relief might arise in the future. That would overwhelm the Court's emergency docket. Plaintiffs sought this Court's intervention only after they had completed essential steps to reserve West Texas A&M facilities[1] and the courts below declined to act in time to preserve Plaintiffs' First Amendment rights pending appeal, making the circumstances extraordinary enough to justify an emergency application.

[1] On March 8, 2024, West Texas A&M staff moved Plaintiffs' reservation of Legacy Hall for their performance from "tentative" to "confirmed," cementing that only Wendler stands in the way of Plaintiffs exercising their First Amendment rights.

II. Stage Performances Like Drag Shows Are Protected Expression.

Trying to escape First Amendment scrutiny, President Wendler claims drag shows are unprotected because they "do[] not obviously convey or communicate a discernible, protectable message." Wendler Resp. 14. But that would exclude ballet, orchestral music, interpretative dance, Lewis Carroll's poetry, and Jackson Pollock's paintings from the First Amendment's guard. This Court rightfully has rejected Wendler's misguided view. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995); *see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 657 (2018) (Thomas, J., concurring in part and concurring in the judgment) (quoting *Hurley* and reiterating "a 'particularized message' is not required").

Plus, Wendler *insisted* he acted because he did not like what he thinks drag shows express. App. 91–93. To that end, his argument that drag shows are non-expressive is "self-defeating," as his published edict leaves no doubt he is censoring drag shows because he disagrees with the message conveyed. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 392 (4th Cir. 1993); App. 91–93. Stage performance is protected. *E.g., Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554–58 (1975). Getting on stage and performing in front of an audience, like using a paintbrush on a canvas, is inherently expressive. President Wendler knows this, calling drag shows "artistic expression" and "performance." App. 91–93.

Contrary to Wendler's argument (Wendler Resp. 7, 13–14), *FAIR* did not suddenly exclude a significant portion of humanity's artistic achievements from First Amendment protection. *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47 (2006) (*FAIR*); *see also 303 Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023)

("No government, *FAIR* recognized . . . may 'interfer[e] with' [a speaker's] 'desired message'" (quoting *FAIR*, 547 U.S. at 64)). The Court in *FAIR* looked to explanatory speech because there was no inherently expressive conduct at hand. *FAIR*, 547 U.S. at 66. But an accompanying explanation surely does not divest *inherently expressive* conduct—like drag shows—of First Amendment protection. Nor could it. An explanation often augments the message that inherently expressive conduct conveys, like an inscription under a painting, the liner notes of a music album, or a violinist responding to a listener's question about a piece's meaning.

III. Wendler Has No Constitutionally Permissible Reason for Imposing a Viewpoint-Based Prior Restraint.

Wendler makes no effort to overcome his admitted prior restraint and the "heavy presumption against its constitutional validity." *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 70 (1963); Wendler Resp. 4. *See generally* Wendler Resp. 1–26. Instead, Wendler focuses on denying he engaged in viewpoint discrimination and claiming he really wants to prevent "lewd" and "sexually-charged" conduct. None come close to a legitimate reason for imposing a blanket ban on a category of protected speech at a public university, let alone meet strict scrutiny.

Wendler's prior restraint is viewpoint-based. Wendler's words refute his claim that his "prohibition is viewpoint neutral." Wendler Resp. 20. Wendler explains his "policy" reaches *any* expression which "denigrates" others and concedes he is exercising his subjective "judgment" that Plaintiffs' performance is "degrading to women." Wendler Resp. 4, 12. Regulating expression because of its potential to offend others is the essence of viewpoint discrimination. *Matal v. Tam*, 582 U.S. 218, 243

(2017). That Wendler claims he is evenhandedly protecting all groups from offense changes nothing—it is still viewpoint discrimination. *Id.* at 242–43; *see* Wendler Resp. 8. And whether Wendler misinterprets Plaintiffs' intended message also changes nothing. He is acting "because of its message," and that is viewpoint discrimination. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also Matal*, 582 U.S. at 242–43.

Setting aside Wendler's dispute about forum classification (Wendler Resp. 17), his censorship is doomed because viewpoint discrimination is prohibited even in non-public forums. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). Wendler also cannot justify viewpoint discrimination by cloaking it as a pedagogical interest. For one, this Court recognizes that universities' special role calls for *less* deference to administrators, not more. *Healy v. James*, 408 U.S. 169, 180 (1972) (holding the First Amendment's "vigilant protection" is "nowhere more vital" than on college campuses). And Plaintiffs' non-classroom, non-academic performance implicates no pedagogical interests. The record also undermines Wendler's newfound "pedagogical" pretext: The university opens Legacy Hall for weddings, parties, religious services, beauty pageants, and cattle shows. App. 46–49 ¶¶ 31–33, 38, 40.

Wendler's concerns about "lewd" and "sexualized" conduct fail. While Wendler might fancy himself a campus Comstock, the Constitution wisely recognizes that courts should not defer to university administrators who single out speech they consider "indecent" to censor it. *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 668–70 (1973) (per curiam); *Healy*, 408 U.S. at 180. Though Wendler argues (only

after Plaintiffs sued) that his ban prevents "lewd" or "sexualized" conduct (*see* Wendler Resp. 3–5, 20)[2] the Court rejected the same excuse for a prior restraint in *Southeastern Promotions*. 420 U.S. at 550, 554–55, 557–58. And "lewdness" is no license to censor speech at a public university. *Papish*, 410 U.S. at 668–70.

Nor is there any First Amendment exception for "sexualized" expression—and for good reason, as the breadth of the term could ensnare everything from Michelangelo's David to religious texts. The mere prospect of "sexualized" speech (Wendler Resp. 5, 20) does not justify a prior restraint on protected expression on a university campus, and Wendler offers no authority otherwise. *Papish*, 410 U.S. at 669–70 (holding "conventions of decency" cannot justify campus censorship, over dissent's qualms, at 676, about "lewd" speech). Wendler can only hazard a guess about Spectrum WT's show, having stopped it before the students took the stage or knowing if the guest emcee he complains about, "Miss Myka," will even appear, let alone what Miss Myka's emceeing might entail. *See* Wendler Resp. 3–4. Banning speech based on speculation about its content—sexual or otherwise—highlights the "perils of prior restraint." *Se. Promotions*, 420 U.S. at 561. Wendler's prior restraint punishes even those with the tamest performances, whether punishable conduct occurs at all.

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[2] This Court should reject any of Wendler's post-lawsuit excuses because "government justifications for interfering with First Amendment rights must be genuine, not hypothesized or invented post hoc in response to litigation." *Kennedy v. Bremerton Sch. Dist*, 597 U.S. 507, 543 n.8 (2022) (cleaned up) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Wendler explained his reasoning for canceling drag shows at length, focusing on his expectation that campus drag shows will offend women, never hinting at concerns about lewdness, "sexualized" conduct, or "Miss Myka" emceeing the event. App.91–93.

IV. Plaintiffs Have Standing as to Chancellor Sharp and Vice President Thomas.

To ensure Plaintiffs' complete relief, this Court should also enjoin Respondents Thomas and Sharp. Chancellor Sharp and Vice President Thomas's response boils down to standing. Sharp Resp. 10–13. Plaintiffs have shown standing against both at this stage, as the district court recognized in denying Sharp and Thomas's motion to dismiss. App. 26–27. Thomas and Sharp both have authority over the "application or threatened application" of Wendler's prior restraint against Plaintiffs' March 22 show. *See Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 297 (2022). Thomas carried out President Wendler's edict the first time Wendler cancelled Spectrum WT's show, and Thomas will do it again. App. 59 ¶¶ 103–04; App. 236 ¶ 2. Chancellor Sharp has legal authority over President Wendler.[3] But rather than denounce Wendler's ongoing censorship, Sharp departed from his history of intervening in campus speech controversies,[4] effectively authorizing Wendler's censorship. That supports standing. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977) (an "injury may be indirect" if it is "fairly traceable to the defendant's acts or omissions").

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[3] *E.g.*, Tex. A&M Univ. Sys. Office of the Chancellor, Sys. Pol'y 02.02 §§ 1.12, 2.1 (May 20, 2021), https://policies.tamus.edu/02-02.pdf [permalink: https://perma.cc/NAE6-EFRK]; Tex. A&M Univ. Sys. President of Sys. Member Univs., Sys. Pol'y 02.05 (Aug. 26, 2021), https://policies.tamus.edu/02-05.pdf [permalink: https://perma.cc/M4D6-S7KA].

[4] *See, e.g.,* Michael Hardy, *Country Revival*, Tex. Monthly (Aug. 2017), https://features.texasmonthly.com/editorial/country-revival [permalink: https://perma.cc/DCK5-C56C]; Shannon Najmabadi, *Texas House Calls on Texas A&M Chancellor to Halt White Nationalist Rally*, Tex. Trib. (Aug. 14, 2017), https://www.texastribune.org/2017/08/14/texas-house-calls-texas-m-chancellor-stop-white-nationalist-rally-occu [permalink: https://perma.cc/4M5S-XEZC].

CONCLUSION

For these reasons and those in Plaintiffs' application, they respectfully ask the Court to grant their emergency application for an injunction pending appeal.

Respectfully Submitted,

/s/ JT Morris
Robert Corn-Revere
JT Morris
Counsel of Record
Conor T. Fitzpatrick
Joshua T. Bleisch
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Ave. SE
Suite 340
Washington, DC 20003
215-717-3473
jt.morris@thefire.org

Adam B. Steinbaugh
Jeffrey D. Zeman
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut St.
Suite 900
Philadelphia, PA 19106

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Counsel for Applicants