No. 23A820

In the Supreme Court of the United States

SPECTRUM WT, ET AL.,
Applicants,

v.

WALTER WENDLER, ET AL.
Respondents

PRESIDENT WALTER WENDLER'S RESPONSE IN OPPOSITION TO THE APPLICATION FOR WRIT OF INJUNCTION PENDING APPEAL OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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PARTIES TO THE PROCEEDING

Applicants (plaintiffs-appellants below) are Spectrum WT; Barrett Bright; and Lauren Stovall.

Respondent (defendants-appellees below) are President Walter Wendler; Dr. Christopher Thomas; John Sharp; Robert L. Albritton; James R. Brooks; Jay Graham; Tim Leach; Bill Mahomes; Elaine Mendoza; Michael J. Plank; Cliff Thomas; Demetrius L. Harrell, Jr.; and Michael A. Hernandez, III.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Spectrum WT v. Wendler, No. 2:23-cv-48 (Sept. 21, 2023).

Spectrum WT v. Wendler, No. 2:23-cv-48 (Feb. 5, 2024).

United States Court of Appeals (5th Cir.):

Spectrum WT v. Wendler, No. 23-10994 (Feb. 22, 2024).

INTRODUCTION

Applicants ask for perhaps the most difficult form of relief this Court can offer: an injunction pending appeal under the All Writs Act (either with or without a grant of certiorari before judgment). "Such a request 'demands a significantly higher justification' than a request for a stay, because unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Respect Me. PAC v. McKee*, 562 U.S. 996 (2010) (mem.) (citing *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). That is particularly so because though denominated as interim, Applicants are effectively seeking the ultimate relief they believe they are entitled to in the present appeal: to be permitted to hold a "drag show" on the campus of West Texas A&M University before a final judgment on the merits. Although "authorized by 28 U.S.C. § 1651(a)," "such an extraordinary writ . . . is not a matter of right," but instead by rule and by practice, a matter of "discretion sparingly exercised." Sup. Ct. R. 20.1; *see also, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers). Indeed, it is a form of relief reserved for "the most critical and exigent circumstances." *Ohio Citizens*, 479 U.S. at 1313.

Applicants' own conduct demonstrates why they are not entitled to the extraordinary relief they seek. Applicants knew no later than *last October* that their appeal was not likely to be resolved in time to hold a "drag show" on March 22, 2024. Yet they waited until just weeks before their proposed event to cry "emergency." Even apart from the heightened showing required by this Court's rules, such a delay would preclude relief. After all, any "injunction is an equitable remedy," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982), and "[e]quity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person." *Upton v. Tribilcock*, 91 U.S. 45, 55 (1875). In other words, "[r]elief is not given to those," like the Applicants, "who sleep on their rights." *Id.*; *accord Benisek v. Lamone*, 585 U.S. 155, 159 (2018). The

Court should not rescue Applicants from their own choices, especially when doing so requires short-circuiting the very process that this Court relies upon to ensure it has the information it needs to resolve what Applicants insist is an "issue of great national importance," Appl. 32, extending to everything from racial slurs, *id.* at 30, to debates over the Israel–Hamas conflict, *id.* at 31.

Moreover, apart from the delay, Applicants are not entitled to relief on the merits because they have shown neither that an injunction pending appeal is necessary and appropriate in aid of this Court's jurisdiction, nor that their legal rights are indisputably clear. As Applicants intend to host annual drag shows, nothing that is going to happen next Friday will deprive this Court of jurisdiction to consider the controversy, which Applicants admit presents an open question in this Court. *See id.* at 25 (asserting that the question was "all *but* settled in *Papish*"). If anything, their putative alternative request demonstrates the point: As Applicants acknowledge, *id.* at 32, the Fifth Circuit has already set the case for argument. If the law is as clearly in Applicants' favor as their request for injunctive relief suggests, the Fifth Circuit will quickly rule for Applicants, obviating any need for this Court's intervention. That Applicants nonetheless seek such review demonstrates that either the law is *not* as clear as they suggest, or that they are trying to short-circuit the normal appellate process to obtain the final relief that the Fifth Circuit would order in this already interlocutory appeal. Neither is an appropriate basis for the extraordinary relief they seek.

STATEMENT OF THE CASE

I. Factual Background

In March 2023, President Wendler learned that Applicants intended to use a university facility within the West Texas A&M Student Center to host a drag show. App.59. Although Applicants currently emphasize their intent to host a "drag show" that is "PG-13," they have previously conceded that "[s]ome drag performances are intentionally risqué." App.55. And, at the time that President Wendler made his decision, "Spectrum WT forbade

anyone under 18 from attending the event unless accompanied by a parent or guardian," which is hardly consistent with the ordinary meaning of "PG-13." *Id.* Moreover, Applicants' online advertisement boasted that the event's master of ceremonies would be a performer with a history of lewd drag shows, and its participants would *compete* to see who could be the most over-the-top. ROA.514; ROA.516.[1] Specifically, the advertisement boasted that "[t]he night's emcee is popular Amarillo drag queen Myss Myka," and that the events would "feature drag performers from an array of student organizations stomping it out to see who's the fiercest of them all." ROA.515. Although conspicuously omitted from the application, just weeks before the scheduled show "Myss Myka" participated in an extraordinarily lewd drag show in Lubbock during which he simulated masturbation (ROA.516 at 3:14), rubbed his crotch (at 4:16), and simulated frottage with one of the members of the audience (at 5:20).[2] *See also* App.19.

Exercising his responsibility to foster a healthy campus culture and effective educational environment, President Wendler made the difficult decision to cancel the show and announced that school resources would be unavailable for such purposes going forward. App.91. In a University-wide email explaining his decision, President Wendler made clear that the prohibition was limited to hosting a drag show on campus. Far from withdrawing the University's substantial backing for Applicants' other student activities, President Wendler pointedly expressed his support for their charitable purpose of raising money for an LGBTQ+ suicide prevention group—which he celebrated as "a noble cause," App.91—and urged students to donate in lieu of attending the show, App.93. Nor did President Wendler's email place into doubt West Texas A&M's ongoing provision for Applicants'

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[1] "ROA" refers to the record on appeal in *Spectrum WT v. Wendler*, No. 23-10994 (5th Cir.).

[2] *See* Elies Baltimore, *Myss Myka Peforming 2-23-24*, YouTube (Feb. 27, 2023), https://www.youtube.com/watch?v=QR9BjFpPeK0 (last accessed on March 12, 2024).

other campus events, such as Lavender Prom, Queer History Night, and Queer Movie Night, App.42, which have continued unabated since President Wendler's email announcement. ROA.541. West Texas A&M likewise continues to support its LGBTQ+ community by, among other things, recognizing Applicants' LGBTQ+ affinity group as an official student organization, App.41, and providing extensive campus resources to LGBTQ+ students. *See e.g.*, *Trans/Non-Non-binary Resources*, W. TEX. A&M UNIV., http://tinyurl.com/bdz4a7uv (listing "Dos" and "Don'ts" for LGBTQ+ allies); *WTAMU Resources*, W. TEX. A&M UNIV., http://tinyurl.com/2hu38rtj (providing general resources, such as university counseling, for LGBTQ+ students).

But University policy prohibits "[p]ublic behavior that is disruptive, lewd, or indecent." App.18. Drag shows of the type "Myss Myka" hosted just weeks earlier violate this policy by celebrating conduct that causes many to feel demeaned and objectified. App.91. As President Wendler explained in his email, such shows "exaggerate[] aspects of womanhood" and "stereotype women in cartoon-like extremes for the amusement of others." App.91. President Wendler concluded that "[s]uch conduct runs counter to the purpose of [West Texas A&M]" because it "denigrates others." App.92. Regardless of "stated intent," such drag shows are "derisive, divisive and demoralizing" to many students on campus. *Id.* And just as he would "not support 'blackface' performances in our campus, even if told the performance is a form of free speech or intended as humor," President Wendler announced that his policy extended to "any show, performance or artistic expression which denigrates others." *Id.*

II. Procedural Background

Applicants filed their complaint four days after President Wendler's email. App.38. They initially requested a temporary restraining order to shield their planned March 2023 show, but subsequently withdrew that motion and hosted the event off campus and without the use of school resources. App.6; ROA.540. Neither President Wendler nor anyone at the University made any effort to stop students from participating in (or advertising for) the

off-campus event. Nevertheless, Applicants continued to seek injunctive and declaratory relief to force the University to open its own venues to their performances. App.6.

The district court denied Applicants' motion for a preliminary injunction because they were unlikely to succeed on the merits of their First Amendment claim for two independent reasons. App.28. *First*, "[a]s pled," the district court explained, Applicants failed to demonstrate a likelihood that the First Amendment even applied to their "proposed event" because it "does not obviously convey or communicate a discernable, protectable message." App.9. As the district court pointed out, this Court has rejected the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." App.8-9 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Instead, First Amendment protection extends only to "conduct that is inherently expressive." App.13 (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.* (*FAIR*), 547 U.S. 47, 66 (2006)). And Applicants failed to identify the "communicative elements . . . [that] bring the First Amendment into play" here. App.14 (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

Second, even assuming Applicants' proposed "drag show" involved protected expressive conduct, the district court concluded that Applicants failed to identify, let alone conduct, the relevant forum analysis. App.9. Because the First Amendment does not grant students an unlimited right to use school resources as they please, the district court explained, it is incumbent on the student to show whether the campus facility to which he seeks access is "a 'traditional public forum,' 'designated public forum,' limited public forum,' or 'nonpublic forum' for purposes of the First Amendment analysis." *Id.* Rather than doing so, Applicants offer a mashup of favorable quotations from a cacophony of undifferentiated First Amendment cases involving a variety of unrelated contexts.

Applicants also failed to adequately account for the sexualized nature of their event, which was offered (albeit discouraged) to children. App.9. At this stage of the proceeding, we know little of the planned event other than that Applicants advertised their event as

"PG-13," a designation which, according to the Motion Picture Association, describes content that "may go beyond the PG rating in theme, violence, nudity, sensuality, language, adult activities or elements." App.18 n.21 (citation omitted). And they boasted that their event's emcee would be an individual who, the district court noted, had a reputation for crude stage performances and "frequent presentation of his barely covered crotch." App.19 (citation omitted).

Applicants appealed and sought an expedited briefing schedule. *Spectrum WT v. Wendler*, No. 23-10994, ECF 1 (5th Cir. Sept. 27, 2023); *id.* ECF 12 (5th Cir. Oct. 5, 2023). But when that request was denied in October 2023, they took no further action to expedite their case, such as filing their briefs early. App.31. More importantly, though Applicants have been planning their March 2024 drag show since they initially filed suit in March 2023, App.201, they inexplicably waited to seek interim relief from the Fifth Circuit until February of 2024—more than three months after their request to expedite the appeal had been denied, App.36. That is, knowing that litigation would continue in the due course, they waited until the show was imminent—and the time for careful decisionmaking had passed—to rush the courts claiming emergency. Recognizing that any such exigency was of Applicants' own making, the district court and Fifth Circuit denied relief. App.36. This Application followed and should meet the same fate.

SUMMARY OF THE ARGUMENT

I. Whether sought pending appeal or pending resolution of a petition for a writ of certiorari, a writ of injunction is an extraordinary remedy available only under the All Writs Act, *Brown v. Gilmore*, 533 U.S. 1301 (2001) (Rehnquist, C.J., in chambers), and granted only in the exercise of the Court's equitable discretion, *e.g.*, Sup. Ct. R. 20.1. This Court has long recognized that a party seeking interim equitable relief "must generally show reasonable diligence." *Benisek*, 585 U.S. at 159 (collecting cases); *see also, e.g.*, S. *Pac. Co. v. Bogert*, 250 U.S. 483, 500 (1919) ("[W]hen a party with full knowledge of the facts, acquiesces in a transaction, and sleeps upon his rights, equity will not aid him."). True, what

constitutes reasonable diligence depends on the circumstances. But whatever the outer bounds of reason, a party cannot claim to have been diligent in protecting his rights when he waited almost six months after filing his appeal and nearly four months after the court declined to accelerate its decision before seeking any sort of interim "emergency" appellate relief.

II. Apart from sleeping on their rights Applicants cannot meet either aspect of this Court's test for altering the status quo pending appeal. *First*, Applicants cannot show that an injunction now is necessary and appropriate in aid of the Court's *jurisdiction*. This is a separate question from whether an injury Applicants may suffer during the pendency of appeal is irreparable. The Court will be able to redress any *injury* that occurs in the interim. *E.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1404 (2012) (Sotomayor, J., in chambers). Because Applicants seek a permanent injunction against what they alleged to be a permanent facility-use policy, App.85, nothing that happens between now and next Friday will prevent this Court's exercise of appellate jurisdiction to decide the merits of Applicants' appeal in the ordinary course.

Second, for the reasons the district court explained in its opinion, it is far from indisputably clear that Applicants have *pleaded* a First Amendment right to use University facilities to host a drag show. As the district court noted, to avoid subjecting all regulations of conduct to First Amendment scrutiny, this Court treats as expressive only conduct carrying an intended message understandable by the audience. *FAIR*, 547 U.S. at 66. Because at no point in its briefing (let alone pleading) did Applicants demonstrate that their desired "drag show" has such a message, they have not shown the First Amendment is implicated by President Wendler's actions.

Moreover, even assuming the First Amendment is implicated, Applicants entirely failed to conduct the proper forum analysis. Universities may preserve campus property for its intended use, so long as conditions on that use are reasonable and do not discriminate based on viewpoint. *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 685 (2010). President

Wendler's decision that West Texas A&M's policies do not permit drag shows or other performances that denigrate other groups of students on campus meet these hurdles—or, at least, it is far from indisputably clear that they *fail* to meet them. Although Applicants insist (at 25), that this Court "all but settled" the issue in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), they pointedly rely most heavily on district and circuit court opinions that are not even from the Fifth Circuit. That hardly shows an indisputable right to relief when President Wendler has narrowly prohibited conduct that, in his reasonable professional judgment, undermines the educational environment without regard to whether the show is designed to support or humiliate the LGBTQ+ community, while still permitting Applicants to express any message they choose. *Cf. Brown*, 533 U.S. at 1301 (Rehnquist, J.) (denying an injunction pending certiorari without "attempting to predict" the views of the Court because the applicants' position on the merits was "less than indisputable").

III. Finally, Applicants cannot evade their failure to meet the standard for an injunction pending appeal by restyling it as a request for an injunction pending a writ for certiorari before judgment. To start, both putative "alternatives" ask this Court to grant injunctive relief that the lower courts deemed inappropriate. Moreover, this Court grants such relief only when time is of the essence to resolve questions of unusual national salience. For the reasons already discussed, time clearly is not of the essence—even to Applicants. And beyond that, this case involves whether a fundraiser for a campus organization at a West Texas University can be held on campus or must be held down the street. It bears no resemblance to the types of cases in which this Court has deemed it appropriate to bypass ordinary appellate procedures—for example, to pause implementation of a $430 billion loan-forgiveness program that would be impossible to unwind, to address the United States' standing to challenge a law addressing time-sensitive medical procedures, or to determine whether a citizenship question should be added to the 2020 census, to name a few.

ARGUMENT

I. Applicants' Dilatory Conduct Precludes Any Form of Equitable Relief.

"[I]t is a wise rule in general that a litigant whose claim of urgency is belied by its own conduct should not expect discretionary emergency relief from a court." *West Virginia v. B. P. J., by Jackson*, 143 S. Ct. 889, 889 (2023) (Alito, J., dissenting from denial of application to vacate injunction). That is particularly true here where the emergency relief sought takes the form of an injunction, which wherever sought, and in whatever form, "is an equitable remedy," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). "From the earliest ages, Courts of equity have refused their aid to those who have neglected, for an unreasonable length of time, to assert their claims." *Elmendorf v. Taylor*, 23 U.S. 152, 168 (1825).[3]

That rule applies with no less force to requests for relief under the All Writs Act than to any other instance when equity is asked to remedy a putative failure of remedies at law. *Compare Benisek,* 585 U.S. at 159 (collecting cases requiring "reasonable diligence"), *with Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 379 (2004) (finding a request timely under the All Writs Act where a petitioner took an "active litigation posture" that "was far from . . . neglect or delay"). For good reason. "A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify" such extraordinary interim relief. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (3d ed. 2023); *see also Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers) (noting, as an "additional factor[] militating against" a writ of injunction, that "the applicants delayed unnecessarily").

Applicants have not acted with the diligence required for an injunction pending either

[3] *See also, e.g.*, *Barnette v. Wells Fargo Nev. Nat'l Bank of S.F.*, 270 U.S. 438, 444-45 (1926); *Chapman v. Bd. of Cnty. Comm'rs of Douglass Cnty.*, 107 U.S. 348, 355 (1883); *Sample v. Barnes*, 55 U.S. 70, 75 (1852).

resolution of their appeal in the Fifth Circuit or a petition for certiorari in this Court. By their own account, Applicants' March 2024 drag show has been in the works for nearly a year, *see* App.201, and this appeal has been pending for almost six months. *See* 5th Cir ECF No. 1. The normal time to seek emergency relief would have been in September of 2023, and if denied, Applicants "could have made an immediate application to a Justice of this Court." *Brown v. Gilmore*, 533 U.S. 1301, 1304 (2001) (Rehnquist, C.J., in chambers). They likewise could have moved for such relief immediately after their motion to expedite was denied in October, ECF No. 22, knowing that briefing would not resolve sooner than late December, Fed. R. App. P. 31. Under the Fifth Circuit's publicly available internal practices, such a schedule precludes argument before March 4, 2024.[4] Applicants could not reasonably have assumed that the Fifth Circuit would resolve an issue that they insist is one of "great national importance," Appl. 32, in under three weeks. Their failure to move at either of these times is more than "somewhat inconsistent with the urgency they now assert." *Brown*, 533 U.S. at 1305 (Rehnquist, C.J., in chambers)

Applicants actions have prejudiced both President Wendler and this Court. Though nominally a request for interim relief, the injunction Applicants currently seek would effectively grant them the relief that they have sought on appeal: the preliminary injunction denied them by the district court. After all, Applicants putatively seek to hold an *annual* "drag show." App.199. The district court refused such relief because they were unlikely to succeed on the merits, *supra* pp. 5-6, and in the Fifth Circuit, their briefing has focused on the need for relief before the March 2024 drag show, *Spectrum WT v. Wendler*, No. 23-

[4] *See e.g.*, Fifth Circuit Clerk's Office, *Most Frequently Asked Questions* 11, https://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/faqs/faqs.pdf (last accessed March 12, 2024) ("We generally provide you with 60 days notice that your case will be argued during a particular week."); Oral Argument Hearings for March, 2024, U.S. Court of Appeals for the Fifth Circuit, https://www.ca5.uscourts.gov/oral-argument-information/court-calendars/MonthYear/2024/3/ (setting March 4 as the earliest hearing date in the month).

10994, ECF 48 at 67 (5th Cir. Nov. 13, 2023). They now demand that *same relief* from this Court, only this time without affording President Wendler the opportunity for full briefing on the merits or this Court the opportunity for reflection before making a consequential decision on matters of first impression. Equity does not permit Applicants to ask this Court to save them from the false emergency created by their own dilatory tactics.

II. Relief Under the All Writs Act is Unwarranted.

Even if this Court were willing to drop everything and consider Applicants' tardy request for relief, Applicants must still identify a "'significantly higher justification' than a request for a stay, because unlike a stay, an injunction 'does not simply suspend the judicial alteration of the status quo but grants judicial intervention that has been withheld by the lower courts.'" *Respect Me. PAC*, 562 U.S. at 996 (quoting *Ohio Citizens*, 479 U.S. at 1313); *see also, e.g.*, *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers). Such a justification requires Applicants to show *both* that an injunction pending appeal is necessary and appropriate in aid of this Court's jurisdiction *and* that their legal rights are indisputably clear. *Hobby Lobby Stores*, 568 U.S. at 1403 (2012) (Sotomayor, J., in chambers). Applicants can show neither.

A. A writ of injunction is neither necessary nor appropriate in aid of this Court's jurisdiction.

Applicants have not even attempted to show that an injunction is necessary or appropriate in aid of this Court's jurisdiction. They can't. Even without an injunction, Applicants may continue to press their challenge to West Texas A&M's policy in the lower courts and "[f]ollowing a final judgment, they may, if necessary, file a petition for a writ of certiorari in this Court." *Id.* at 1404. *See also Turner Broad.*, 507 U.S. at 1303 (noting that implementation of a challenged law does not prevent this Court's appellate jurisdiction to decide the merits of the challenge). Although Applicants' current appeal focuses on the fate of their March 2024 show, their claim extends to one for a permanent injunction to protect an annual event. App.74-75. That means these difficult issues are not going anywhere. The

Court should stay its hand and take them up in the ordinary course because "whatever the ultimate merits of [Applicants'] claims," they also cannot show that their entitlement to relief is . . . 'indisputably clear.'" *Hobby Lobby Stores*, 568 U.S. at 1403 (quoting *Lux*, 561 U.S. at 1307).

B. The legal rights at issue are not indisputably clear.

To determine whether the second condition for a writ of injunction has been met, members of this Court have looked to whether its own authority ends debate on the legal question at issue. An indication of what the Court *may* hold in a future case does not suffice, and where there is on-point precedent, rules of stare decisis apply even when the lower court relied upon authority that "has been undermined by [this Court's] more recent decisions." *Lux*, 561 U.S. at 1307. In *Hobby Lobby*, for example, Justice Sotomayor declined to halt implementation of the Affordable Care Act's contraceptive mandate because the Court had not yet addressed whether the First Amendment or the Religious Freedom Restoration Act protected for-profit corporations' religious exercise. 568 U.S. at 1402-04. And in *Turner Broadcasting*, Chief Justice Rehnquist refused to enjoin a law requiring cable television systems to carry most local broadcast television channels because the Court had not yet "decided whether the activities of cable operators are more akin to that of newspapers," which enjoy heightened First Amendment protection, "or wireless broadcasters," which enjoy less. 507 U.S. at 1303-04. *See also Fishman*, 429 U.S. at 1328 (denying application after noting "there is little precedent dealing specifically" with the question at issue).

Here, the best Applicants can do is to assert the issue is "all but settled," Appl. 25, by a case that involved political cartoons in a university newspaper—not a school-subsidized sexually charged drag show, the message of which has never been articulated, and that a university official determined in his professional judgment to be degrading to women. *See Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973); Appl. 25. That does not suffice. Notwithstanding Applicants' attempt to make the issues appear straightforward,

the district court correctly observed (at App.8) that such simplicity is only obtained by "stretch[ing] a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." *FAIR*, 547 U.S. at 70.

1. The First Amendment does not apply to non-expressive conduct.

To start, "it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). Applicants have not met their burden in this Court to show, "indisputabl[y]," *e.g.*, *Brown*, 533 U.S. at 1304 (Rehnquist, C.J., in chambers), that they met that burden in the district court. Applicants vaguely assert (at 14) that "the audience would know Spectrum WT's performers are trying to communicate a message" based on the context of their desired drag show. Given that even now Applicants cannot identify what that message is, it is hard to say that the district court abused its discretion in refusing a preliminary injunction—let alone that the question is beyond cavil.

a. Starting with *O'Brien*, which held that burning a draft card in protest of the Vietnam War was *not* expressive conduct (and thus subject to regulation), 391 U.S. at 375, this Court has repeatedly refused to "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Spence v. State of Wash.*, 418 U.S. 405, 409 (1974) (quoting *O'Brien*, 391 U.S. at 376). Instead, to determine "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," this Court has "asked whether 'an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.'" *Johnson*, 491 U.S. at 404 (alterations omitted) (quoting *Spence*, 418 U.S. at 410-11).

The Court elaborated on this test most recently in *FAIR*, where an association of law schools and law school faculty argued that a statute requiring law schools to grant military recruiters equal access to their campuses violated the First Amendment. 547 U.S. at 52-53. Beginning with *O'Brien*'s teaching that "conduct can[not] be labeled 'speech' whenever the

person engaging in the conduct intends thereby to express an idea," *id.* at 65-66 (quoting *O'Brien*, 391 U.S. at 376), *FAIR* reiterated that First Amendment protections extend "only to conduct that is *inherently expressive*." *Id.* (emphasis added). Barring recruiters, the Court explained, failed to meet that test because it carried communicative value only to the extent that "the law schools accompanied their conduct with speech explaining it." *Id.* Absent explanation, an outside observer "has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.*

Particularly pertinent here, the Court explained that the Solomon Amendment fell outside the First Amendment because "[t]he expressive component of a law school's actions [was] not created by the conduct itself but by the speech" accompanying it. *Id.* The Court noted that the "fact that such explanatory speech is necessary" represents "strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection." *Id.* After all, "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* The Court emphasized that if combining speech and conduct were sufficient to raise a First Amendment issue, then if someone said "that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes," the courts "would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment." *Id.* "Neither *O'Brien* nor its progeny supports such a result." *Id.*

Notwithstanding that whether *FAIR* can be applied outside the scope of the Solomon Amendment is being actively litigated in one of the most hotly contested cases of the Term,[5]

[5] *E.g.*, Transcript of Oral Argument at 19-20, *Moody v. Netchoice*, No. 22-277 (Feb. 26, 2024), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-277_8n59.pdf ("Well, Mr. Chief Justice, it's difficult for me to argue with you very much about what Rumsfeld versus FAIR means . . . . But let me just take a crack.").

Applicants confine their discussion of *FAIR* to a footnote, brushing off this important decision by asserting that their drag show is "inherently expressive" in a way that the presence of military recruiters is not. Appl. 18 n.5. Respectfully, that begs the central question: whether Applicants made a showing sufficient to justify a preliminary injunction of what their message is, and that others could be expected to understand it *without further explanation*. *FAIR*, 547 U.S. at 66; *Johnson*, 491 U.S. at 404. They did not. Indeed, the closest they come (at 6) to explaining what their annual drag shows are intended to or would convey is to "express support and advocate for the LGBTQ+ community." But if anything, President Wendler amplified that message by spreading it to a broader campus audience in his email announcement encouraging readers to "send the dough" to Applicants' LGBTQ+ charity. App.93.

b. Apparently unable to satisfy the test established in *FAIR*, Applicants cite a scattershot of inapposite cases. Most notably, they cite (at 13) *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), for the remarkable proposition that the First Amendment applies to *all* stage performances. *Conrad* said no such thing, and it would be shocking if it had given that defamation is still actionable whether it is printed in the newspaper or announced from a podium—as are obscenity, fighting words, threats, and fraud. None of it is protected by the First Amendment. *United States v. Stevens*, 559 U.S. 460, 468 (2010). Instead, *Conrad* stands for the unremarkable—and far more narrow—proposition that "[e]ach medium of expression … must be assessed for First Amendment purposes by standards suited to it." 420 U.S. at 557.

Applicants also cite (at 14-15) the Fourth Circuit's decision in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (1993). Not only is this (1) a lower-court decision, which (2) predates *FAIR* by over a decade, it expressly applied *Johnson*. *Id.* at 391-92. The Fourth Circuit noted that defendants had effectively conceded they were engaging in viewpoint discrimination. *Id.* at 392. More importantly, the Fourth Circuit held that the plaintiffs showed both an intent to convey a particularized message and that the

message was clear to its intended audience and the defendants effectively conceded they were engaging in viewpoint discrimination. *Id.* at 391-93. In other words, the plaintiffs in *Iota* did what Applicants failed to do here: proffered the necessary allegations and supporting proof that their conduct was inherently expressive.

Applicants insist (at 16) that under *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995), "a narrow, succinctly articulable message is not a condition of constitutional protection." But, as the district court correctly noted, App.14 n.14, *Hurley* did not overrule *Johnson*. It merely held that the First Amendment's protections are "not limited to banners and songs" but extends in certain circumstances to a compilation of curated messages. 515 U.S. at 569. But there still must be communication: An idea still must be shared and understood. As *Hurley* explained, parades throughout history have been understood to "mak[e] some sort of collective point," even if like a mosaic, they do so through the amalgamation of different colors and shapes. *Hurley*, 515 U.S. at 568. Moreover, parades are uniquely "a form of expression, not just motion" because there is an "inherent expressiveness of marching." *Id.* Because Applicants have identified neither a message that can be gleaned from, nor a similar cultural significance of, drag shows—conduct that when recorded and muted conveys nothing about the performers' message[6]—Applicants' "efforts to cast themselves just like . . . the parade organizers in *Hurley*" like the law schools before them, "plainly overstates the expressive nature of their activity and the impact of the [challenged action] on it, while exaggerating the reach of [this Court's] First Amendment precedents." *FAIR*, 547 U.S. at 70. It is thus far from indisputable that

[6] To see why explanation is necessary to understand the message of a drag show, one need only mute the sound and compare three such performances: *A Bit of Fry and Laurie*'s "Iron Skit," Season 2, Episode 1, https://www.youtube.com/watch?v=dUM6MxqaMDA (last accessed on March 12, 2024); "Ladies of the Chorus" in Ronald Reagan's movie *This is the Army*, http://tinyurl.com/mu664msb (last accessed on March 12, 2024); and Miss Myka's performance, https://www.youtube.com/watch?v=QR9BjFpPeK0 (last accessed on March 12, 2024).

they are entitled to an injunction pending appeal.

2. Even if the First Amendment applies, the challenged policy satisfies the applicable forum analysis.

Applicants' conclusory insistence (at 21) that the campus venue they wish to use for their drag performance is a designated public forum also does not entitle them to the extraordinary equitable relief they seek. At *most*, the record they offered the district court would support a conclusion that Legacy Hall is a limited-public forum upon which University administrators may, consistent with the First Amendment, place reasonable- and viewpoint-neutral conditions. The challenged policy is such a condition.

a. To preserve places of higher education for their pedagogical purposes, courts typically examine student requests to use school resources—including campus facilities—under the framework applicable to limited public fora. In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), for example, this Court held that an analogous "case fit[] comfortably within the limited-public-forum category" because the plaintiff student group was not asking to be freed from a state prohibition, but to be extended "a state subsidy." *Id.* at 682. Hastings College of Law gave officially recognized student groups' access to campus facilities and student activities fees. *Id.* But official recognition was premised on adherence to the law school's all-comers policy, under which a community of Christian students would have been required to welcome members that did not adhere to the community's statement of faith. *Id.* Although the denial of these university subsidies may have applied some "indirect pressure" on the students to adopt the all-comers policy, the policy was not a mandate. *Id.* Noting that its "decisions have distinguished between policies that require action and those that withhold benefits," the Court determined that "[a]pplication of the less restrictive limited-public-forum analysis better accounts for the fact that" the defendant "is dangling the carrot of subsidy, not wielding the stick of prohibition." *Id.* at 682-83.

Just as the student group in *Christian Legal Society* could continue to meet—albeit

without the benefit of school funding and uninhibited use of campus facilities—President Wendler's policy does not prevent students from meeting off campus to put on a drag show on their own dime (as Applicants in fact did in March 2023). West Texas A&M is not seeking to "interfere" with Applicants' "desired message," Appl. at 18 n.5, but to preserve its facilities for use by all students consistent with its school mission. Moreover, just as the students in *Christian Legal Society* could continue to speak whatever message they wished, the President's policy does not prohibit students to soapbox on the quad, canvass fliers, or author missives in the student paper. They simply may not use the University's resources to put on a "drag show" that the President has determined could be demeaning to others who must live, work, and learn on the same campus. "In sum," the "limited-public-forum precedents adequately respect both [Applicants'] speech and expressive . . . rights, and fairly balance those rights against [West Texas A&M University's] interests as a property owner and educational institution." *Christian Legal Soc'y*, 561 U.S. at 683.

b. In arguing to the contrary, Applicants insist (at 20) that there is no distinction between the municipal stage treated as a public forum in *Southeastern Promotions* and a campus venue. The Model Code of Student Conduct published by Applicants' own counsel recognizes that unlike municipal facilities, colleges are not open to all and recommends campus prohibitions on "[u]nauthorized entry to, or use of, College facilities, property, or resources." Model Code of Student Conduct, Foundation for Individual Rights in Education (FIRE) 13, https://tinyurl.com/48scr44y. The unique features of a university setting have also led this Court to long recognize that institutions of higher education may "preserve the property under its control for the use to which it is lawfully dedicated." *Christian Legal Society*, 561 U.S. at 679 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)). That is, the fact that the University is a university and not a municipal property is relevant because it is not a high-dollar venue for student events. And "a defining characteristic of limited public forums" is that "the State may 'reserve them for certain groups,'" and to serve certain purposes. *See also id.* at 681 (quoting *Rosenberger v. Rectors*

and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (alterations omitted)). Because a "[u]niversity's mission is education," federal courts "have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981).

True, universities do not enjoy unbridled authority to restrict access to its limited public fora. Conditions on the use of school facilities must be based in distinctions that (a) are "reasonable in light of the purpose served by the forum" and (b) do not "discriminate against speech on the basis of viewpoint." *Christian Legal Society*, 561 U.S. at 685. But West Texas A&M's prohibition on drag shows clears both of these hurdles.

Beginning with reasonableness, this Court has instructed courts considering restrictions on the use of university property to bear three things in mind. *First*, the reasonableness analysis must be "shaped by the educational context in which it arises." *Id.* at 686. *See also Widmar*, 454 U.S. at 267 n.5 (explaining that First Amendment rights must be analyzed "'in light of the special characteristics of the school environment.'"). *Second*, in assessing whether a restriction is in fact necessary to serve the ends of education, courts should be chary to "substitute their own notions of sound educational policy for those of school authorities." *Bd. of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176, 206 (1982)). Indeed, the Court took pains in *Christian Legal Society* to admonish "due decent respect," 561 U.S. at 687, to the law school's "determination of what constitutes sound educational policy," *id.* n.16. *Third*, the authority of school officials to shape the educational environment applies both in and out of the classroom. A university's "commission" to "choose among pedagogical approaches" extends to "extracurricular programs" like the proposed drag show at issue here. *Id.* at 686; *see also id.* at 687 n. 16 (deferring to law school's determination of "what goals a student-organization forum ought to serve").

With these principles in mind, the district court could properly find President Wendler's determinations here reasonable. As just discussed, the purpose of a public

university is education. Access to university property may therefore be lawfully curtailed when necessary to serve the ends of education. President Wendler is a veteran educator with a doctorate in Curriculum and Instruction. He has served in university administrations for decades, including as Chancellor of Southern Illinois University Carbondale and as Vice Chancellor for the entire Texas A&M University system. Dr. Walter V. Wendler, WEST TEXAS A&M, https://tinyurl.com/mr3mmtuz. In President Wendler's professional judgment, drag shows involve "conduct [that] runs counter to the purposes of [West Texas A&M University]" because such conduct is "derisive, divisive and demoralizing." App.92. President Wendler voiced particular concern over the way in which drag shows sexualize and objectify people, and thereby undermine the University's goal of creating an educational environment that "elevate[s] students based on achievement and capability, performance in a word, without regard to group membership." App.92. He also explicitly invoked the University's "educational mission." App.92. In doing so he acknowledged that the campus culture to which West Texas A&M aspires is "implacable and exacting"—yet it is the one "sanctioned by the legislature, the governor and numerous elected and appointed officials." App.92.

Also notable is what President Wendler's prohibition does not entail—a speech code or other policy closing down all "substantial alternative channels" for Applicants to convey their as-yet-unarticulated message. *See Christian Legal Soc.*, 561 U.S. at 690 (deeming law school's all-comers policy "all the more creditworthy in view of the" fact that students could still "use chalkboards and generally available bulletin boards to advertise events"). President Wendler has never tried to prevent discussion of drag shows—much less the voicing of a disfavored opinion on that subject. He has not prohibited pure speech activities like inviting speakers to campus, putting up posters, or handing out flyers. And Applicants' other activities promoting the LGBTQ+ community—such as proms, movie nights, and historical discussions—have been fully welcomed on campus. ROA.541.

The prohibition is also viewpoint neutral. Drag shows are forbidden regardless of their

intended purpose—whether to poke fun at the LGBTQ+ community or to express solidarity with it. The prohibition thus "draws no distinction between groups based on their message or perspective." *Id.* at 694. That critical fact distinguishes this case from *Widmar* and *Rosenberger*, both of which involved university actions that "singled out religious organizations for disadvantageous treatment." *Id.* at 684. Far from disfavoring Applicants' student organization, West Texas A&M provides extensive support for their activities and membership. In addition to hosting its other activities, the University provides significant resources specifically tailored to its LGBTQ+ community. *See supra* at 4.

c. Applicants also insist (at 24) that President Wendler's reasoning must be discredited because "[d]rag shows present no tangible harm to women." But their say-so cannot be enough to demonstrate that President Wendler's concerns, anchored as they are in his intimate understanding of college campuses, were indisputably unreasonable. After all, in *Christian Legal Society*, the law school's all-comers policy was deemed to be reasonable in part because the Court accepted the university's position that the policy would "encourage[] tolerance, cooperation, and learning among students." 561 U.S. at 689. That was President Wendler's explicit objective here as well. He stated that he would not support *any* show or performance that "denigrates others." App.92.

Applicants are also wrong to assert (at 20-22) that the prohibition is viewpoint discriminatory because it was justified by President Wendler's determination that drag shows "may offend." Citing this Court's decisions in *Papish v. Board of Curators of the University of Missouri*, 401 U.S. 667, and *Matal v. Tam*, 582 U.S. 218 (2017), Applicants declare any school rule based in concerns about offensiveness to be "dead on arrival." App.23. Morbid rhetoric like "lethal blow[s]," *id.* at 21, "nail[s] in the coffin," *id.* at 22, notwithstanding, it is premature to sound the death knell on campus facility-use policies because President Wendler reasonably prohibited the expenditure of university resources on offensive and lewd conduct.

Papish and *Matal* both involved pure speech: in *Papish*, a political cartoon in a campus

newspaper, 410 U.S. at 667; in *Matal*, the registration of a trademark, 582 U.S. at 223. President Wendler has not disputed that, when it comes to pure speech, "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *See Papish*, 410 U.S. at 670. But it is equally true that a university may enforce "nondiscriminatory application of reasonable rules governing conduct," even when that conduct carries some independent expressive value. *Id.* at 671. Put another way, the First Amendment may (or may not) protect the right to draw a racist cartoon about a fellow member of the university community.[7] Assuming it does, that does *not* necessarily mean that the First Amendment applies the same to a student who hangs a noose in a public space,[8] or requesting to use university facilities to reenact an act of domestic violence while wearing blackface.[9] Such a deplorable display may be intended to convey a message, but "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element"—such as preservation of mission-consistent use of school property—"can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. Because President Wendler's actions do not indisputably cross that line, Applicants are not entitled to an injunction pending appeal

[7] Kaitlyn Bancroft, *A Black USU grad says a professor drew a racist cartoon of him. Now he's suing*, KSL.com (Mar. 21, 2023), https://www.ksl.com/article/50605040/a-black-usu-grad-says-a-professor-drew-a-racist-cartoon-of-him-now-hes-suing.

[8] Lorraine Boissoneault, *Noose Found in National Museum of African American History and Culture*, Smithsonian Magazine (May 31, 2017), https://www.smithsonianmag.com/smithsonian-institution/noose-found-national-museum-african-american-history-and-culture-180963519/.

[9] Mone Bassu & Daphne Sashin, Students in blackface re-enact Chris Brown beating Rihanna, CNN (Oct. 17, 2012), https://www.cnn.com/2012/10/16/us/new-york-blackface-skit/index.html

or resolution of their parallel request for certiorari before judgment.[10]

III. Certiorari Before Judgment is Unwarranted.

Not unlike a writ of injunction pending appeal, certiorari before judgment is rarely granted. The overwhelming presumption is that a case should percolate through the courts of appeals. Certiorari before judgment is thus reserved for when "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct R. 11. Moreover, although certiorari before judgment has become noticeably more common in recent years, Jamelle Bouie, *The Supreme Court is Turning Into a Court of First Resort*, NEW YORK TIMES (Dec. 7, 2022), https://tinyurl.com/42kfmnb2; Steve Vladeck, *The rise of certiorari before judgment*, SCOTUSBLOG (Jan. 25, 2022), https://tinyurl.com/2bdpe39e, the rule still remains that the relief is not available simply because a case presents important questions of national concern. After all, a case that does not present such "compelling reasons," would not be cert-worthy even *after* judgment. Sup. Ct. R. 10.[11] Instead, "[t]he public interest in a *speedy* determination must be exceptional . . . to warrant skipping the court of appeals." STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 4.20 (11th ed. 2019) (emphasis added).

This case does not present the type of time-sensitive questions of national import that merit early resolution in this Court. For example, the Court granted such relief most recently in *Moyle v. United States*, 144 S. Ct. 540 (2024), which pits state protections of unborn babies against federal actions to allow their termination—perhaps the ultimate time-sensitive question. By contrast, just a few months earlier, the Court *denied* certiorari

[10] Though denominated an alternative request for relief, App. 32, because Applicants seek an interim injunction under either scenario, it is better understood as an additional request for relief.

[11] For the avoidance of doubt, President Wendler does not take any position regarding whether the Fifth Circuit's yet-to-be-written opinion will present cert-worthy issues.

before judgment in a case involving former President Trump's immunity from a trial that prosecutors are hoping to squeeze in before the upcoming election because nothing prevented the Court from accepting review after the D.C. Circuit provided its analysis, *United States v. Trump*, 144 S. Ct. 539 (2023) (mem)—which the Court ultimately did, *Trump v. United States*, No. 23A745, 2024 WL 833184, at *1 (U.S. Feb. 28, 2024).

Other instances in which this Court has deemed such relief appropriate reinforce that the tool is reserved for controversies of unusual national salience in which time is of the essence such as to prevent the expenditure of billions of dollars that will be difficult to unwind, *see e.g.*, *Dep't of Educ. v. Brown*, 143 S. Ct. 541 (2022); *Biden v. Nebraska*, 143 S. Ct. 477 (2022); when a statute is alleged to have a widespread and deliberate chilling effect on a then-recognized constitutional right that must be exercised (if it existed) in real time, *United States v. Texas*, 142 S. Ct. 14 (2021); *Whole Woman's Health v. Jackson*, 142 S. Ct. 415 (2021); or a question of what information may be solicited during an upcoming nationwide census, *Dep't of Com. v. New York*, 139 S. Ct. 953 (2019).

Although the issue of drag shows on campus has certainly become politically charged, it is no more time sensitive than any other First Amendment issue that this Court regularly considers in accordance with the usual process in due course. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). Nor is Applicants' ability to host a particular "drag show" in March of 2024 on a small campus in West Texas of *national* importance. The Court should therefore permit this case to proceed in the ordinary course before announcing a rule that will bind campus administrators nationwide.

Tellingly, to justify bypassing the Fifth Circuit, which is set to hear argument in just 6 weeks, Applicants attempt (at 3-4, 30) to coopt other disputes on other campuses raising different First Amendment interests. For example, California Clovis Community College's alleged refusal to permit students to post anti-communist and pro-life flyers implicates pure speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("[H]anding out

leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression."). The same is true of Long Island University's alleged punishment of students for politically sensitive social media posts and Georgia Gwinnett College's alleged censorship of a Christian student who sought to share his faith. *See generally Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2047. In this, as throughout much of their briefing, Applicants fail to appreciate that a student's right to speak his or her mind using his or her own resources is altogether different from the asserted right to perform on a university's stage on the university's dime. Because nothing this Court would say in this case would affect these other cases without a sea change in several areas of this Court's First Amendment jurisprudence, invoking them here does nothing to change the fact that though this case about drag shows at West Texas A&M may raise important First Amendment questions, it is not of such immediate national importance that this Court should ignore ordinary rules of appellate procedure.

CONCLUSION

The Court should deny the Application.

Respectfully submitted.

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March 2024