No. 23A820

In the Supreme Court of the United States

SPECTRUM WT, ET AL.,

Applicants,

v.

WALTER WENDLER, ET AL.,

CHANCELLOR SHARP AND DR. THOMAS'S RESPONSE IN OPPOSITION TO SPECTRUM WT'S APPLICATION FOR INJUNCTION PENDING APPEAL

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PARTIES TO THE PROCEEDINGS

Applicants, plaintiffs-appellants below, are Spectrum WT, Barrett Bright and Lauren Stovall (collectively, "Plaintiffs").

Respondents, defendants-appellees below, are Dr. Christopher Thomas, in his official capacity as Vice President of West Texas A&M University, and John Sharp, in his official capacity as Chancellor for the Texas A&M University System (A&M System) (collectively, "Defendants"). Additional defendant-appellee below is Walter Wendler, in his official capacity as President of West Texas A&M University.

RELATED PROCEEDINGS

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

> *Spectrum WT v. Wendler*, 2:23-CV-048-Z (Sep. 21, 2023), order denying Plaintiffs' motion for preliminary injunction.
>
> *Spectrum WT v. Wendler*, 2:23-CV-048-Z (Feb. 5, 2024), court notice that Plaintiffs' motion for injunction pending appeal would follow the briefing schedule set forth in the court's local rules.
>
> *Spectrum WT v. Wendler*, 2:23-CV-048-Z (Feb. 20, 2024), order denying Plaintiffs' motion for injunction pending appeal as moot following Plaintiffs' notice of withdrawing the motion.

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

> *Spectrum WT v. Wendler*, 23-10994 (October 11, 2023), order denying Plaintiffs' request to expedite the appeal.
>
> *Spectrum WT v. Wendler*, 23-10994 (Feb. 22, 2024), order carrying Plaintiffs' motion for injunction pending appeal with the case.

INTRODUCTION

Chancellor John Sharp and Dr. Christopher Thomas are not proper defendants in this matter. Whatever one thinks of the merits of Plaintiffs' underlying claims, neither Chancellor Sharp nor Dr. Thomas has remotely engaged in viewpoint discrimination, content discrimination, or a prior restraint of Plaintiffs' speech. Indeed, Chancellor Sharp and Dr. Thomas submit that Plaintiffs lack Article III standing to sue either of them—and that for similar reasons both are entitled to sovereign immunity—because neither is responsible for the decision that Plaintiffs challenge. Plaintiffs' emergency Application to this Court does not meaningfully argue otherwise. It is also highly unlikely that this Court would grant review of this case—especially given its current interlocutory posture, its need for factual development related to threshold jurisdictional issues, and that the Fifth Circuit has not yet even ruled on Plaintiffs' appeal from the denied preliminary injunction, let alone evaluated the merits of Plaintiffs' First Amendment claims. Plaintiffs accordingly have not carried their heavy burden of demonstrating that an injunction against Chancellor Sharp or Dr. Thomas is warranted pending appeal, and their Application should be denied.

Furthermore, even putting aside basic principles of justiciability, Plaintiffs' own conduct confirms that emergency relief is unwarranted. They unexplainably waited almost four months to seek interim injunctive relief from the district court. And then rather than allowing the district court to decide their motion in accordance with that court's longstanding local rules, they attempted to leap-frog ahead to the Fifth Circuit. Given this attempt to sidestep the required process, the Fifth Circuit understandably chose to carry Plaintiffs' procedurally deficient motion with the case. What is more, Plaintiffs admittedly had not completed all steps necessary for their event to be confirmed by West Texas A&M before seeking emergency injunctive relief from this Court. This Court should not exercise its emergency docket to address Plaintiff's' self-created exigency.

STATEMENT OF THE CASE

I. PRESIDENT WALTER WENDLER'S DECISION TO CANCEL PLAINTIFFS' 2023 EVENT.

The Texas A&M University System is one of the largest public university systems in the nation. ROA.545.[1] It consists of eleven universities, a health science center, eight state agencies, and the "RELLIS Campus"—a cooperative effort across all eleven member institutions to form the first integrated education, research, and testing institution in the State of Texas. ROA.545. In addition to educating over 150,000 students a year, these institutions are at the forefront of agricultural research, natural resource management, and emergency responder training for Texas and beyond.

John Sharp, as the A&M System Chancellor, is responsible for general management of the A&M System, including its $7.2 billion budget. ROA.545. He oversees the A&M System Central Administration Office, which in turn is primarily responsible for system-wide planning, coordination, and execution of Board of Regents' policies. ROA.545. Chancellor Sharp is also tasked with representing the A&M System before the Texas Legislature and handling legislative relations. ROA.546. Chancellor Sharp answers directly to the Board of Regents, and he cannot take actions against any university president without majority approval of the Board of Regents secured during a public meeting vote. ROA.548.

Each component university is a stand-alone legal entity with its own duly appointed president, leadership team, mission, and goals. ROA.547. Walter Wendler was appointed President of West Texas A&M University by the Board of Regents, and he is responsible for the day-to-day operations and activities of West Texas A&M. ROA.21, 547. President Wendler is subject to annual evaluations by the Chancellor and Board of Regents, but neither the Chancellor nor the Board of Regents possess general "veto power" over the daily decisions of President Wendler or any other component university president.

[1] All "ROA" citations are to the Fifth Circuit's record on appeal. Defendants cite to their own appendix as "App.__." They cite to the Plaintiffs' appendix as "Pl.App.__."

ROA.548.

On March 20, 2023, President Wendler canceled Plaintiffs' 2023 drag show event that was scheduled to take place in a campus facility. ROA.540; Pl.App.199. Plaintiffs' facility reservation application had proceeded through West Texas A&M's normal process, but that morning President Wendler informed all West Texas A&M vice presidents—including the Vice President for Student Affairs, Dr. Thomas—of his decision. ROA.540; Pl.App.199. At President Wendler's request, Dr. Thomas informed Plaintiffs of President Wendler's decision and informed Plaintiffs that it was not his own decision. ROA.540; Pl.App.59, 199-200. Dr. Thomas reports directly to President Wendler and does not have authority to overrule his decisions. ROA.540. Shortly after Dr. Thomas told Plaintiffs of President Wendler's decision, President Wendler emailed the university community explaining why he decided to cancel the event. Pl.App.59, 91-93, 200. Plaintiffs do not assert that they attempted to contact Chancellor Sharp regarding President Wendler's decision. Pl.App.61. Plaintiffs' 2023 event went forward at an off-campus location. ROA.540; Pl.App.62.

II. The District Court's Denial of Plaintiffs' Motion for Preliminary Injunction.

Plaintiffs submitted a facilities reservation request for a 2024 drag show in April 2023, and Plaintiffs filed their operative motion for preliminary injunction on April 20, 2023. Pl.App.63-64, 201, 230; ROA.281-394. Their motion alleged that Plaintiffs were fearful that future events were "in imminent peril due to President Wendler's edict." ROA.302.

Plaintiffs, however, provided precious few allegations against Chancellor Sharp or Dr. Thomas to demonstrate their involvement with President Wendler's 2023 cancellation of Plaintiffs' event or any allegedly ongoing violation of Plaintiffs' First Amendment rights. Chancellor Sharp is charged with managing the entire Texas A&M University System. ROA.218, 545. Plaintiffs assert that he violated their First Amendment rights because he did not somehow stop or intervene when President Wendler canceled their local student event. ROA.215, 218. But Plaintiffs do not allege that they attempted to contact Chancellor

Sharp related to President Wendler's 2023 decision. Pl.App.61. They instead claim that Chancellor Sharp should have stepped in because he has a "history of involving himself in university free speech matters," citing one instance in 2017 when he responded to direct requests from the Texas Legislature related to a planned White Lives Matter rally. ROA.871. They claim President Wendler is "subject to, and under the authority of" Chancellor Sharp, ignoring that he does not have authority over the day-to-day decisions at any component university and cannot take actions toward a component university president without approval of the Board of Regents. ROA.871. Plaintiffs speculate that Chancellor Sharp's failure to countermand President Wendler's 2023 decision shows that he intends to let President Wendler's allegedly unconstitutional actions continue. ROA.248.

Plaintiffs argue that Dr. Thomas somehow violated their constitutional rights by "implementing President Wendler's directive canceling Plaintiffs' event and on-campus drag shows generally" and suggest that he may continue to enforce "President Wendler's content- and viewpoint-based prohibition" on drag shows going forward. ROA.218, 248. Yet Plaintiffs' events thus far have gone forward without issue since the cancelled 2023 event, including drag show practices, protests, and planning for the 2024 drag show. ROA.541. More importantly, Plaintiffs make no specific allegations against Chancellor Sharp or Dr. Thomas with respect to any of their past events, the upcoming 2024 drag show, or their alleged prior restraint claim. ROA.250-53; Pl.App.201-203, 237-238.

Chancellor Sharp and Dr. Thomas opposed Plaintiffs' preliminary injunction motion by filing a motion to dismiss based on their sovereign immunity from Plaintiffs' claims and Plaintiffs lack of standing to assert these claims against them. ROA.518-549, 837-844. The district court denied Plaintiffs' preliminary injunction motion on September 21, 2023, because they did not demonstrate a substantial likelihood of success on the merits, and it was "doubtful that Plaintiffs will suffer irreparable harm in the coming months while this issue is litigated." Pl.App.28. The district court did not address Plaintiffs' claims against Chancellor Sharp or Dr. Thomas specifically but did deny their motion to dismiss because,

given the early stage of the proceedings, the district court could not rule out that Plaintiffs may be able to prove some set of facts to support claims against them. Pl.App.27.

III. Plaintiffs' Belatedly Filed Motions for Injunctive Relief Pending Appeal.

After the preliminary injunction was denied, Plaintiffs appealed to the U.S. Court of Appeals for the Fifth Circuit and requested expedited consideration, which was denied on October 11, 2023. Pl.App.31. Plaintiffs thus were on notice that day that the Fifth Circuit would not decide their appeal before their anticipated March 2024 event; after all, the median time from filing a notice of appeal to issuance of an opinion is over eight months. *See, e.g.*, Practitioner's Guide to the United States Court of Appeals for the Fifth Circuit, p. 4.

Plaintiffs submitted a standard risk assessment for the 2024 drag show on January 9, 2024, but amended it on January 31, 2024, to indicate for the first time that they intended to permit minors to attend the event. Pl.App.237, 240-43. As of the date of Plaintiffs' emergency Application to this Court, Plaintiffs' amended request remained pending because it was incomplete. Pl.App.238. It had proceeded to "Tentative" status, indicating that the standard risk assessment had been completed but there were still certain outstanding items that Plaintiffs needed to submit before the reservation could be "Confirmed." Pl.App.237. Plaintiffs were required to provide proof of liability insurance and submit proposed marketing materials if they planned to advertise their event as indicated in their application. Pl.App.237. As with all student events, West Texas A&M understandably reserves the right to cancel the event if it becomes apparent that the event will violate A&M System policies or regulations or West Texas A&M rules or procedures. Pl.App.238.

Plaintiffs nonetheless waited almost four months after learning the Fifth Circuit would not consider their appeal on an expedited basis—until January 31, 2024—to file a Motion for Injunction Pending Appeal in the district court. Pl.App.33. Plaintiffs did not allege that

they had suffered any harm or irreparable injury in the interceding months, but instead speculated that their March 2024 event may be cancelled by President Wendler. Pl.App.202-203. They offered no new evidence or allegations with respect to Chancellor Sharp or Dr. Thomas; in fact, their motion mentioned these officials only one time. CA5 ECF 114-1. Instead, Plaintiffs contend that President Wendler will cancel their drag show based on his March 20, 2023, statement, a television interview President Wendler gave in April 2023, and an argument made in President Wendler's Appellee Brief to the Fifth Circuit. Pl.App.202-203. The motion was filed the same day Plaintiffs amended their risk assessment submission to West Texas A&M for their planned March 2024 drag show—an assessment that was required to be completed before the event could be confirmed. Pl.App.237. Plaintiffs acknowledged in their motion that they had not completed all steps yet to hold their event. Pl.App.199, 202-203.

Plaintiffs, however, argued that the district court should treat their belated motion as an emergency and requested a ruling within nine days. Pl.App.33. The district court issued a notice declining to deviate from its local rules; its opposed-motion briefing deadlines are "a longstanding norm [and] the Court declines to alter it here," instead ordering Defendants to respond by February 21, 2024—well in advance of Plaintiffs' planned event. Pl.App.33. Plaintiffs subsequently filed a notice to withdraw their motion, and the district court denied the motion as moot based on Plaintiffs' notice. App.1a-4a.

Rather than waiting for the district court to resolve their motion, Plaintiffs sought relief in the Fifth Circuit on February 9, 2024. CA5 ECF 114. Defendants opposed the motion in large part due to Plaintiffs' failure to follow the proper procedure for seeking an injunction pending appeal from that court. CA5 ECF 118. Unsurprisingly given Plaintiffs' delay in seeking interim relief, the Fifth Circuit ordered that Plaintiffs' motion would be carried with the case. Pl.App.36.

On March 8, 2024—after seeking emergency relief from this Court—Plaintiffs completed the remaining steps of the facility reservation process, their 2024 drag show

event reservation request was "Confirmed," and they have begun to publicly advertise for their event.[2] Plaintiffs will still have to submit release forms for each performer and additional details related to the performances, including music selections and technology needs. Pl.App.202; ROA.232-33.

ARGUMENT

This Court should deny the Application. There is no basis for this Court's intervention given Plaintiffs' procedurally defective path to this Court and the early, factually under-developed nature of this case. This is especially true with respect to Chancellor Sharp and Dr. Thomas, who are not responsible for the decision that Plaintiffs' challenge.

This Court will grant an injunction pending appeal only when an applicant can demonstrate (1) "a reasonable probability that this Court would eventually grant review," (2) "a fair prospect that the Court would reverse," and (3) "that the applicant would likely suffer irreparable harm absent" the injunction. *Merrill v. Milligan*, 142 S.Ct. 879, 880 (2022) (Kavanaugh J., concurring in grant of applications for stays) (citing *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam)). The applicant must show that the "legal rights at issue" are "indisputably clear." *Lux v. Rodrigues,* 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers). Failure to meet any one factor is fatal to an application.

I. EMERGENCY EQUITABLE RELIEF IS NOT WARRANTED FOR THIS SELF-CREATED EXIGENCY.

This Court will not entertain an application for injunction "unless the relief requested was first sought in the appropriate court or courts below" absent "the most extraordinary of circumstances." U.S. Supreme Ct. Rule 23. Plaintiffs' motion for relief to the Fifth Circuit was "patently procedurally defective" for failing to first secure a decision in the district court or demonstrate that doing so was impracticable. *Whole Woman's Health v. Paxton*, 972 F.3d 649, 653 (5th Cir. 2020). Accordingly, their Application is procedurally defective

[2] *See* Spectrum WT's Eventbrite page: https://www.eventbrite.com/e/the-dont-be-a-drag-drag-show-tickets-840272205787. Plaintiffs' event is also listed on West Texas A&M's facilities reservation calendar, found at: https://tinyurl.com/WTfacilities

and should not be entertained by this Court.

Before seeking relief from a federal court of appeals, an applicant must show "that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested." Fed. R. App. P. 8(a). Particularly where the movant offers new evidence as part of its motion for injunction, Fifth Circuit precedent—which Plaintiffs do not challenge—is plain that the "district court should have the opportunity to rule on the reasons and evidence presented in support" of the motion. *Ruiz v. Estelle*, 650 F.2d 555, 567 (5th Cir. 1981). Such evidence should be "presented to the district judge and should be so considered by him prior to any action" by the circuit court. *Id.*

Here, Plaintiffs filed a motion and new evidence with the district court but withdrew the motion before the district court could resolve it. App.1a-4a. Plaintiffs did so after the district court instructed Defendants to respond in accordance with the court's local rules, a timeline that would have resulted in a ruling before Plaintiffs 2024 event but that Plaintiffs unilaterally decided was untenable given their own self-imposed timeframe. Pl.App.33. Yet Plaintiffs' failure to timely protect their interests artificially constrained the timeframe for securing a district court ruling and subsequent relief, if necessary, from the higher courts. Plaintiffs' motion for preliminary injunction was denied in September 2023, and they have known since October 2023 that the Fifth Circuit would not consider their appeal on an expedited basis. Pl.App.4-29, 31. Despite this, Plaintiffs waited months before seeking an injunction pending appeal from the district court. Pl.App.33. The district court was well within its discretion to follow its ordinary rules.

Plaintiffs' self-created exigency was not the district court's emergency. Nor was it out-of-bounds for the Fifth Circuit to carry Plaintiffs' belated motion with the case given its procedural deficiencies. Pl.App.36. Further, there is no basis for this Court to grant Plaintiffs' Application for emergency equitable relief now. Only "critical and exigent circumstances" justify injunctive relief from this Court in the first instance. *South Bay*

United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring) (internal quotation marks omitted). An injunction "requires 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 Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quotation omitted) (cleaned up). By any measure, the extraordinary remedy of injunctive relief is not intended to save "a litigant whose claim of urgency is belied by its own conduct." *West Virginia v. B. P. J., by Jackson*, 143 S. Ct. 889, 889 (2023) (Alito, J., dissenting from denial of application to vacate injunction). After all, equitable remedies are "not intended for those who sleep on their rights." *Covey v. Ark. River Co.*, 865 F.2d 660, 662 (5th Cir. 1989). This Court can and should deny the Application for this reason alone.

II. THIS COURT SHOULD NOT DISTURB THE LEGAL STATUS QUO.

"By seeking an injunction, applicants request … an order *altering* the legal status quo." *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1301 (1993) (emphasis in original). Such a change in the status quo requires a compelling showing in any event, and certainly when the applicant seeks emergency relief in this Court. Here, Plaintiffs' Application should also be denied because they have not demonstrated (1) "a reasonable probability that this Court would eventually grant review," (2) "a fair prospect that the Court would reverse," or (3) "that the applicant would likely suffer irreparable harm absent" the injunction. *Merrill*, 142 S.Ct. at 880 (Kavanaugh J., concurring in grant of applications for stays) (citation omitted).

A. Plaintiffs Have Not Demonstrated a Clear Entitlement to Relief.

Plaintiffs make little effort to demonstrate "a fair prospect that the Court would reverse" the district court's preliminary injunction denial as it pertains to Chancellor Sharp or Dr. Thomas. In fact, Plaintiffs spend little time discussing these Defendants at all. Moreover, the Fifth Circuit's decision to carry Plaintiffs' request for an injunction pending

appeal with the case is "entitled to great deference." *Garcia-Mir v. Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, C.J., in chambers).

An injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). Yet Plaintiffs' claimed entitlement to relief against Chancellor Sharp and Dr. Thomas here is far from clear. As set forth in their briefing to the Fifth Circuit, Plaintiffs lack standing to bring claims against Chancellor Sharp and Dr. Thomas in the first place, and they are entitled to sovereign immunity regardless.

Federal courts are limited to resolving only "Cases" or "Controversies." U.S. Const. Art. III, § 2. "The doctrine of standing implements this requirement by insisting that a litigant 'prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.'" *Carney v. Adams*, 592 U.S. 53, 58 (2020) (citation omitted). In the preliminary-injunction context, plaintiffs "must make a clear showing of standing[.]" *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 178 (5th Cir. 2020). Standing to sue one defendant does not, on its own, confer standing to sue a different defendant. *Daves v. Dallas Cnty., Tex.*, 22 F.4th 522, 542 (5th Cir. 2022). Rather, a plaintiff's requested remedy must be tailored to redress that plaintiff's particular injury, and "standing is not dispensed in gross." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (quotation omitted). Plaintiffs cannot satisfy any of the requirements for standing against Chancellor Sharp or Dr. Thomas.

1. *Injury-in-fact*. Plaintiffs have failed to show a concrete and particularized injury-in-fact attributable to Chancellor Sharp or Dr. Thomas. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). As Plaintiffs concede (at 7), the decision to cancel Plaintiffs' 2023 event was made by President Wendler and no one else; Dr. Thomas was just tasked with telling Plaintiffs the bad news. ROA.540; Pl.App.59, 199-200. Neither Dr. Thomas nor Chancellor Sharp was involved in President Wendler's

decision or his public statement. Even if they had been, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Plaintiffs do not allege facts demonstrating that these Defendants, individually, will disallow Plaintiffs' future events. Pl.App.201-203. Plaintiffs' "subjective fear[s]" to the contrary do "not give rise to standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).

Plaintiffs only allegation related to Dr. Thomas is that he informed Plaintiffs of President's Wendler's decision to cancel the 2023 event. ROA.540; Pl.App.59, 199-200. To permit suit against Dr. Thomas because he conveyed the decision of his superior is the sort of "boundless theory of standing" that this Court has consistently rejected. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013). In any event, Plaintiffs make no attempt to show an allegedly ongoing First Amendment injury connected with Dr. Thomas. They speculate that he will enforce President Wendler's 2023 decision going forward, but their own evidence demonstrates otherwise. Even before Plaintiffs sought emergency injunctive relief from this Court, Plaintiffs' 2024 facilities reservation application had proceeded through West Texas A&M's reservation process, undertaken by Departments overseen by Dr. Thomas, to "Tentative" status based on the materials Plaintiffs had provided. Pl.App.237. Plaintiffs admittedly had not submitted all necessary items for the event to be "Confirmed." Pl.App.201-202. Plaintiffs subsequently submitted the remaining materials after filing their Application with this Court, and their event status is now "Confirmed" with Plaintiffs actively advertising their event. *See supra,* fn. 2. There is no evidence that Dr. Thomas has impeded their 2024 event to demonstrate a particularized injury-in-fact, and thus Plaintiffs lack standing to sue him for any allegedly ongoing First Amendment violations.

Plaintiffs have not alleged *any* direct or indirect involvement by Chancellor Sharp in President Wendler's 2023 decision or any subsequent decision at West Texas A&M. Pl.App.201-203. Instead, Plaintiffs hang their proverbial hat on Chancellor Sharp's alleged

general authority over component university presidents. But an official must have more than "the general duty to see that the laws of the state are implemented." *City of Austin v. Paxton*, 943 F.3d 993, 999-1000 (5th Cir. 2019) (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). The Chancellor is not tasked with managing student events or the day-to-day activities at each component institution, and Plaintiffs cannot refute this. ROA.546-57. Since there is no injury to trace to Chancellor Sharp, there can be no claim against him for an alleged ongoing violation of Plaintiffs' First Amendment rights, and Plaintiffs' Application for emergency injunctive relief against him should be denied.

2. *Traceability*. Plaintiffs complained of injury is also not traceable to Chancellor Sharp or Dr. Thomas. Traceability is not satisfied when the injury is the result of a third party's independent action that was not "produced by determinative or coercive effect" of the defendant. *Bennett v. Spear,* 520 U.S. 154, 168–69 (1997). Plaintiffs cannot impute any alleged injury posed by President Wendler to Chancellor Sharp or Dr. Thomas. Neither coerced President Wendler to cancel Plaintiffs' 2023 event or to make a public statement regarding his rationale for doing so. Plaintiffs have also not asserted any new or additional harm attributable to Chancellor Sharp or Dr. Thomas to support an injunction pending appeal—they specifically cite their fear that President Wendler will cancel their event based on his own past actions and statements. Pl.App.202-203.

3. *Redressability*. Finally, Plaintiffs' harm cannot be remedied by an injunction against Chancellor Sharp or Dr. Thomas. "Remedies … operate with respect to specific parties" and the court enjoins the acts of the official, not the statute or policy at issue. *California v. Texas,* 141 S. Ct. 2104, 2115 (2021 (quotation omitted). "[A]bsent any allegations tying [defendants] to the specific decisions at issue, it cannot be plausibly inferred that [defendants] played any role in the decisions [the plaintiff] challenges as unconstitutional." *Haverkamp v. Linthicum*, 6 F.4th 662, 671 (5th Cir. 2021).

Plaintiffs have failed to establish any "real and immediate threat of repeated injury" that is fairly traceable to Chancellor Sharp or Dr. Thomas. *O'Shea v. Littleton*, 414 U.S.

488, 496 (1974). Viewed another way, an injunction against these officials will not redress any future injuries to Plaintiffs. Plaintiffs repeatedly identify President Wendler's decision and public statement as the source of their injury, not any action by or decision of Chancellor Sharp or Dr. Thomas. Pl.App.202-203. Injunctions against Chancellor Sharp and Dr. Thomas thus will not stop President Wendler from acting with respect to Plaintiffs' events.

For the same reasons, Plaintiffs' claims are likely barred by sovereign immunity, so Plaintiffs have also not demonstrated a clear entitlement to interim injunctive relief against Chancellor Sharp or Dr. Thomas. While "*Ex parte Young*, 209 U.S. 123 (1908) allows suits for injunctive or declaratory relief against state officials [in their official capacities], provided they have sufficient 'connection' to enforcing" the challenged decision, where there is no such connection, "the suit is effectively against the state [entity] itself and thus barred by the Eleventh Amendment and sovereign immunity." *In re Abbott,* 956 F.3d 696, 708 (5th Cir. 2020) (citations omitted), *cert. granted, judgment vacated as moot sub nom, Planned Parenthood Ctr. for Choice v. Abbott*, 141 S.Ct. 1261 (2021). To be sure, under *Ex parte Young* a court is permitted to "command[] a state official to do nothing more than refrain from violating federal law." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011). Yet that is not the situation here; Chancellor Sharp and Dr. Thomas are not violating federal law, and so cannot be ordered to refrain from continuing to do so. Plaintiffs simply want to hold Dr. Thomas liable for the decision of his superior that Dr. Thomas could not override, while attempting to hold Chancellor Sharp liable for a local decision about a student event. For all these reasons, Plaintiffs have failed to demonstrate a fair prospect that the court will reverse the district court's refusal to grant preliminary injunctions against Chancellor Sharp and Dr. Thomas.

B. Plaintiffs' Requested Injunction Is Overly Broad.

For similar reasons, Plaintiffs' requested injunction pending appeal is overly broad, violates traditional equitable principles, and should be denied. Any interim injunction

should "be tailored as precisely as possible to the exact needs of the case." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 184 (1968). An injunction must "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Plaintiffs' request (at 34) that this Court enjoin President Wendler, Chancellor Sharp, and Dr. Thomas from "denying Plaintiffs' use of campus facilities open to expressive activity based on the content or viewpoint of Plaintiffs' planned March 22, 2024, drag show performance." The requested injunction sweeps far beyond what is necessary to address any cognizable harm to Plaintiffs for at least two reasons.

First, the requested injunction is overly broad because no injunction is even plausibly warranted against Dr. Thomas or Chancellor Sharp *at all*. The rule that a "plaintiff's remedy must be tailored to redress the plaintiff's particular injury" recognizes a federal court's "constitutionally prescribed role ... to vindicate the individual rights of the people appearing before it." *Gill v. Whitford*, 585 U.S. 48, 72-73 (2018). Plaintiffs have not demonstrated that an injunction against anyone other than President Wendler is even arguably necessary to address their alleged harms.

Second, Plaintiffs' requested injunction is overly broad because it would effectively exempt them from complying with the same reasonable A&M System and West Texas A&M policies, procedures, and regulations that apply to all other student groups that seek to hold events in an on-campus facility. Plaintiffs admittedly sought emergency injunctive relief from this Court without completing all the steps required on *their end* for the event reservation to be analyzed and confirmed by West Texas A&M. The application status for their 2024 event is now "Confirmed," but Plaintiffs must still submit release forms for all performers and additional details about the show, including a list of the performers with song selections. Pl's App.202; ROA.232-33. Plaintiffs' requested injunction would prevent West Texas A&M officials from intervening if any later-disclosed event details violate a

policy, procedure, or regulation applicable to all on-campus student events, or if Plaintiffs deviate from their prior representations.

C. This Court Is Unlikely to Grant Review.

There also is no reasonable prospect that this Court will grant certiorari. The case is in its infancy and the record has not been developed. Discovery has not been completed, and neither the district court nor Fifth Circuit have reached the merits of Plaintiffs' First Amendment claims. The Fifth Circuit has not yet even reached the merits of Plaintiffs' preliminary injunction request. Unresolved factual questions would make it difficult to address Plaintiffs' contentions at this early stage. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 635-36 (2019) (Alito, J.). Relatedly, Chancellor Sharp and Dr. Thomas have raised threshold jurisdictional challenges that require factual development and that will be revisited at summary judgment. Discovery will only confirm that Plaintiffs lack standing to sue Chancellor Sharp and Dr. Thomas, and that each of these officials is entitled to sovereign immunity.

Plaintiffs argue that this case presents a split with other circuits that would likely result in this Court granting review. The supposedly relevant cases, however, did not arise in remotely comparable circumstances, let alone in this unusual posture and with such significant vehicle issues. And even if they did, the Fifth Circuit has not decided this case yet. Plaintiffs' reliance on recent instances and cases where other universities or officials have allegedly overstepped the First Amendment's boundaries, moreover, does not suggest that review would be granted *in this case* against *these Defendants*.

Finally, the Court should similarly decline to treat the Application as a certiorari petition for the same reasons. A petition for a writ of certiorari to review a case before the Court of Appeals has entered judgment should "be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Supreme. Ct. R. 11; 28 U.S.C. § 2101(e). That demanding standard is not in the least satisfied here.

CONCLUSION

This Court should deny the Application.

Respectfully submitted.

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APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

SPECTRUM WT, *et al.*, Plaintiffs, v. WALTER WENDLER, *et al.*, Defendants.	Case No.: 2:23-cv-00048-Z Hon. Matthew J. Kacsmaryk

PLAINTIFFS' NOTICE OF WITHDRAWAL OF MOTION FOR INJUNCTION PENDING APPEAL [ECF 82]

Plaintiffs Spectrum WT, Barrett Bright, and Lauren Stovall, have filed a motion for injunction pending appeal in the U.S. Court of Appeals for the Fifth Circuit (Case No. 23-10994) upon the Court declining to expedite consideration of Plaintiffs' Motion for Injunction Pending Appeal [ECF 82, 85]. For that reason, and to avoid an inconsistent outcome between the district and circuit courts, Plaintiffs withdraw their Motion for Injunction Pending Appeal [ECF 82].

Dated: February 16, 2024

Respectfully submitted,

/s/ JT Morris .

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2024, a true and correct copy of the foregoing document was transmitted via using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ JT Morris
JT Morris
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

SPECTRUM WT, *et al.*, Plaintiffs, v. WALTER WENDLER, *et al.*, Defendants.	2:23-CV-048-Z

ORDER

Before the Court is Plaintiffs' Opposed Rule 62(d) Motion for Injunction Pending Appeal ("Motion") (ECF No. 82), filed January 31, 2024. On February 16, 2024, Plaintiffs submitted a notice withdrawing the Motion, due to the Court "declining to expedite consideration of Plaintiffs' Motion" and to "avoid an inconsistent outcome between the district and circuit courts." ECF No. 86 at 1. In light of the foregoing, the Court **DENIES** Plaintiffs' Motion as moot.

SO ORDERED.

February 20, 2024

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE