FIRE
Foundation for Individual Rights and Expression

March 21, 2023

Walter Wendler, Ph.D.
Office of the President
West Texas A&M University
Old Main 302
Canyon, Texas 79016

URGENT

Sent via U.S. Mail and Electronic Mail (wwendler@wtamu.edu)

Dear President Wendler:

FIRE[1] is seriously concerned by your statement that West Texas A&M University will cancel a charity drag show organized by Spectrum, a registered student organization, because you believe a "harmless drag show" is "not possible," citing your view that drag shows are "[d]emeaning" and your belief that "[b]eing created in God's image is the basis of Natural Law."[2]

As the president of a public university bound by the Constitution, your opinions on Natural Law are subordinate to your obligations under—as you dismissively put it—"the law of the land," that is, the First Amendment, which protects student expression regardless of whether you "condone" it.[3] Additionally, Texas law explicitly protects the right to "listen to or observe the expressive activities of others."[4]

Drag shows, like other forms of theatrical performance, are expressive conduct shielded from government censorship. The freedom of expression enshrined in the First Amendment "does

[1] As you may recall from recent correspondence, the Foundation for Individual Rights and Expression has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses for more than 20 years. You can learn more about our recently expanded mission and activities at thefire.org.

[2] David Gay, *WTAMU President provides reasoning on canceling on-campus drag show in letter to students, staff, faculty*, MyHighPlains.com (Mar. 20, 2023), https://www.myhighplains.com/news/local-news/wtamu-president-provides-reasoning-on-canceling-on-campus-drag-show-in-letter-to-students-staff-faculty. The recitation of facts here reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

[3] *Healy v. James*, 408 U.S. 169, 180 (1972).

[4] Tex. Educ. Code § 51.9315(b)(2) (Ensuring individuals' First Amendment rights are protected, including the rights for "all persons" to "assemble peaceably on the campuses of institutions of higher education for expressive activities, including to listen to or observe the expressive activities of others").

not end at the spoken or written word."[5] Instead, conduct "intend[ed] to convey a particularized message" likely to "be understood by those who view[] it" is expression entitled to First Amendment protection.[6] Conduct within a broader genre—such as art, theater, and dancing—is also protected even if it does not convey a "narrow, succinctly articulable message."[7] The First Amendment's protection of expressive *conduct* is what protects the act of saluting or refusing to salute a flag,[8] wearing black armbands to protest war,[9] raising a "seditious" red flag,[10] burning an American flag,[11] picketing or leafletting,[12] and participating in a sit-in.[13] These are long-standing and basic First Amendment principles.

At the core of our national commitment to expressive freedom is that it cannot be curtailed on the basis that others—including students, faculty, donors, lawmakers, or university presidents—find certain ideas demeaning or offensive. That's because government officials are "inherently" incapable of making "principled distinctions" between offensive and inoffensive speech, and the state has "no right to cleanse" public expression such that it is "palatable to the most squeamish among us."[14] And "no matter how offensive to good taste" some may find it, expression "on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[15]

Decades of First Amendment jurisprudence have repeatedly upheld these limits on state power. Take, for example, the case of *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, which is particularly on point here. In that case, the university imposed sanctions on a fraternity for hosting an "ugly woman contest" riddled with "racist and sexist" overtones, including contestants "dressed as caricatures of different types of women[.]"[16] GMU administrators cited many of the same concerns you now advance: that the event was degrading, amounted to harassment, and ran contrary to the institution's mission.

But the United States Court of Appeals for the Fourth Circuit rejected each of these assertions, holding that the fraternity's drag skit was constitutionally protected because it intended to convey a message, both through the mode of dress and use of a theatrical medium.[17] The court

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[5] *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

[6] *Id.* at 404, 406.

[7] *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995).

[8] *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943).

[9] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969).

[10] *Stromberg v. California*, 283 U.S. 359, 369 (1931).

[11] *Johnson*, 491 U.S. at 414.

[12] *United States. v. Grace*, 461 U.S. 171, 176 (1983).

[13] *Brown v. Louisiana*, 383 U.S. 131, 383 (1966).

[14] *Cohen v. California*, 403 U.S. 15, 25 (1971).

[15] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973).

[16] 993 F.2d 386, 388 (4th Cir. 1993). While organizers of drag shows would balk at the suggestion that their events are morally comparable to the fraternity's contest, whether speech is protected by the First Amendment is a "legal, not moral, analysis." *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

[17] *Id*. at 392.

found that "some forms of entertainment are so inherently expressive as to fall within" the scope of freedom of expression "regardless of their quality," as "[e]ven crude street skits come within the First Amendment's reach."[18] The Fourth Circuit's application of the First Amendment to GMU reflects the First Amendment's longstanding protection for expressive events some people nonetheless find offensive, such as certain musical or theatrical productions,[19] blackface performances,[20] and broadcast radio and motion pictures with potentially divisive content,[21] regardless of their informative or entertainment value.[22]

Against this backdrop, your avowed defiance of your constitutional obligations comes into sharp relief. In yesterday's statement, you repeatedly boasted that you are motivated by personal animus for the message and the content you presumed the performance will include. The suppression of speech "because of its message" is viewpoint discrimination, an "egregious form" of censorship.[23]

Admitting that you are aware your authority as a state official is circumscribed by the First Amendment but that you nonetheless intend to violate the law to censor student speech is particularly stunning. Accordingly, we remind you that a public college administrator who violates clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights,[24] including punitive damages if their actions show a "reckless or callous indifference to the federally protected rights of others."[25]

As a citizen, the First Amendment recognizes your right to criticize others' expression. But as a public university president, you may not employ state power to censor it. Students' exercise of First Amendment rights does not mean that you *condone* that exercise. The expressive freedoms of students are not "at the mercy of the *noblesse oblige*,"[26] and the "proposition that schools do not endorse everything they fail to censor is not complicated."[27]

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[18] *Id.* at 389–90.

[19] *Se. Promotions. v. Conrad*, 420 U.S. 546, 557–58 (1975).

[20] *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).

[21] *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

[22] *Winters v. New York*, 333 U.S. 507, 510 (1948) (holding offensive magazine enjoyed First Amendment protection because "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right. . . . What is one man's amusement, teaches another's doctrine."); *see also Matal v. Tam,* 137 S. Ct. 1744, 1763 (2017) ("Giving offense is a viewpoint.").

[23] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

[24] *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gerlich v. Leath*, 861 F.3d 697, 709 (8th Cir. 2017).

[25] *Smith v. Wade*, 461 U.S. 30, 56 (1983).

[26] *United States v. Stevens*, 559 U.S. 460, 480 (2010).

[27] *Bd. of Educ. v. Mergens By & Through Mergens*, 496 U.S. 226, 250 (1990) (plurality op.).

Given the urgent nature of this matter, we request a substantive response to this letter no later than the close of business tomorrow, Wednesday, March 22, confirming that you will restore the event and will not stand in the way of WTAMU students' First Amendment right to express themselves.

Sincerely,

Sabrina Conza
Program Officer, Campus Rights Advocacy