No. 25-6072

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BLOUNT PRIDE, INC., *et al.*,

Plaintiffs-Appellants,

v.

RYAN K. DESMOND, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Tennessee
No. 3:23-cv-00316

APPELLEE RYAN K. DESMOND'S BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee Ryan K. Desmond respectfully submits that oral argument is not necessary in this case. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Appellee nevertheless stands ready to present oral argument should the Court determine argument would aid its consideration of the issues presented.

STATEMENT OF THE ISSUES

This case is about whether a District Attorney General violates the First Amendment when he informs a group of people that a law has not been enjoined in his jurisdiction, is constitutional, and, therefore, he may prosecute them if charges are brought and review of the evidence substantiates those charges. The issues presented are:

I. Can Plaintiffs obtain an injunction against General Desmond based on their speculation that he will seek to interfere with a future Blount Pride event?

II. Did General Desmond's accurate description of the state of the law and his intent to enforce violations of it constitute unlawful retaliation that entitles Plaintiffs to money damages?

INTRODUCTION

This is a lawsuit in search of a constitutional violation. This case began when General Desmond sent Plaintiffs a letter regarding Tennessee's Adult Entertainment Act. Letter, R.1-3, at 98-100.[1] He explained that the Act, although enjoined elsewhere, still applied in Blount County. And he said that if he received "sufficient evidence" that Plaintiffs violated it at the 2023 Blount Pride event, he would prosecute.

Plaintiffs sued. They argued that the Act violated the First Amendment and obtained a temporary restraining order on that basis. But this Court then held that "there is no constitutional interest in exhibiting" the speech the Act proscribes—and made clear that nothing Plaintiffs planned to do at the Blount Pride event ran afoul of the Act. *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 434-39 (6th Cir. 2024).

Faced with a constitutional law and no plans to violate it, Plaintiffs could have taken the "real-world win." *Christian Healthcare Ctrs., Inc. v. Nessel*, 117 F.4th 826, 860 (6th Cir. 2024) (Murphy, J., concurring). Instead, they pivoted. Plaintiffs now accept the Act is constitutional—

[1] All record pincites refer to the "Page ID" numbers in the ECF file stamps for the district court's docket, No. 3:23-cv-00316.

and insist they don't intend to violate it. Nevertheless, they seek to enjoin General Desmond from "interfering" with their First Amendment rights by enforcing the Act (or other, unstated laws) against them. And they seek damages for retaliation. They are entitled to neither.

Plaintiffs' request for injunctive relief stumbles out of the gate. To seek forward-looking relief—and to establish the irreparable harm required to obtain an injunction—Plaintiffs must allege an imminent injury. They don't have one. At best, they have a past harm (the so-called "threat letter") and a fear of wrongful prosecution. As has been the law for at least fifty years, neither does the trick.

Plaintiffs' retaliation claim fares no better. Plaintiffs cast General Desmond's letter as a threat to prosecute them for a planned drag performance. But the letter is not a threat, let alone one that qualifies as an adverse action. Nor can Plaintiffs establish that General Desmond retaliated against them for their past speech by pointing to a threat against *future* speech. At minimum, no decision clearly established that General Desmond's letter violated Plaintiffs' constitutional rights. General Desmond is thus protected by qualified immunity.

This Court should affirm.

STATEMENT OF THE CASE

A. Legal Background

1. The Adult Entertainment Act

Like all States, Tennessee has long regulated obscenity and adult entertainment. For decades, Tennessee law has made it a crime to knowingly produce, sell, or distribute "obscene matter" or "direct, present or produce any obscene … live performance." Tenn. Code Ann. § 39-17-902(a); *see* 1989 Tenn. Pub. Ch. 591. And for just as long, Tennessee has provided heightened protections for minors. For example, Tennessee law prohibits the admission of minors to "premises … exhibit[ing] a motion picture, show or other presentation which … depicts nudity, sexual contact, excess violence, or sad-masochistic abuse, and which is harmful to minors." Tenn. Code Ann. § 39-17-911(b). And Tennessee law prohibits the admission of minors to adult-oriented establishments and adult cabarets that feature "topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers," and provides that such establishments cannot be located "within one thousand feet (1,000') of a child care facility, a private, public, or charter school, a public park, family recreation center, a residence, or

a place of worship." *Id.* §§ 7-51-1109(a)(7), 7-51-111(3)(c), 7-51-1401(2), 7-51-1407(a)(1).

Passed in 2023, the Adult Entertainment Act builds on and operates in tandem with these other statutes. In the years before the enactment of the Act, videos emerged of events "where entertainers or performers simulated anal sex, oral sex, [and] other graphic activities with children sitting a few feet away" in various "places across the state." Legislative Hearing, R.10-2, at 270; *accord id.* at 224. And a drag show occurred "where an adult performer … rubb[ed] their genitalia, grinding on the ground and spreading their legs in front of children." *Id.* at 234. These reports prompted "hundreds, if not thousands, of … constituents" to call their representatives "wanting to know why … overtly sexual entertainment could be taking place in a public area where kids are present." *Id.* at 251; *see id.* at 224.

Presented with these concerns, Tennessee's legislators investigated whether additional legislation was needed to protect minors and determined that the law needed to provide more clarity in restricting sexual performances in publicly accessible spaces. *Id.* at 225, 271. To that end, the Act adds provisions to Tennessee's longstanding statutory

framework governing adult establishments, Tenn. Code Ann. § 7-51-1401, *et seq.*, to clarify that it is unlawful "for a person to perform adult cabaret entertainment: (A) [o]n public property; or (B) [i]n a location where the adult cabaret entertainment could be viewed by a person who is not an adult." Tenn. Code Ann. § 7-51-1407(c)(1).

Drawing on existing law, the Act defines "adult cabaret entertainment" to have two components: (1) "adult-oriented performances that are harmful to minors, as that term is defined in § 39-17-901," and (2) "that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers." *Id.* § 7-51-1401(3)(A). The first component defines "harmful to minors" by cross-referencing an existing obscenity law, Tenn. Code Ann. § 39-17-901. That law, in turn, uses a definition of "harmful to minors" that adapts for minors the three-factor obscenity standard from *Miller v. California*, 413 U.S. 15 (1973): "any description or representation … of nudity, sexual excitement, sexual conduct, excess violence, or sadomasochistic abuse" that (1) "[w]ould be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests *of minors*;"

(2) "[i]s patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable *for minors*;" and (3) "[t]aken as a whole lacks serious literary, artistic, political or scientific values *for minors*." Tenn. Code Ann. § 39-17-901(6) (emphasis added). The second component (referring to "topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers") mirrors the longstanding definition of regulated "adult cabaret." Tenn. Code Ann. § 7-51-1401(2).

So, putting it together, the Act "takes (1) adult-oriented performances lacking serious literary, artistic, political, or scientific value for a reasonable 17-year-old that (2) feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers and (3) prohibits them both in public and where minors may view them." *Friends of George's*, 108 F.4th at 436.

2. The Friends of George's Litigation

Shortly before the Act's effective date, a drag-centric theatre company filed a lawsuit in Memphis seeking injunctive and declaratory relief against enforcement of the Act. On June 2, 2023, a district court in the Western District of Tennessee declared the Act unconstitutional

under the First Amendment and the void-for-vagueness doctrine and permanently enjoined the District Attorney General for Shelby County from enforcing the Act within his jurisdiction. *Friends of Georges, Inc. v. Mulroy*, 675 F.Supp.3d 831, 878 (W.D. Tenn. 2023), *rev'd and remanded sub nom. Friends of George's, Inc. v. Mulroy*, 108 F.4th 431 (6th Cir. 2024).

General Mulroy appealed, and this Court reversed. *Friends of George's*, 108 F.4th at 433. The Court confirmed that a plaintiff seeking pre-enforcement relief against a statute must establish "(1) an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) that the challenged statute proscribes, and (3) the plaintiff's intention generates a *certainly impending* threat of prosecution." *Id.* at 435 (quotation marks and internal citations omitted). And it found each lacking.

First, the Court determined that the plaintiff did not intend to engage in a course of conduct proscribed by the Act. Again, the Act "takes (1) adult-oriented performances lacking serious literary, artistic, political, or scientific value for a reasonable 17-year-old that (2) feature topless dancers, go-go dancers, exotic dancers, strippers, male or female

impersonators, or similar entertainers and (3) prohibits them both in public and where minors may view them." *Id.* at 436. By the plaintiff's own account, its shows had "artistic value for a 17-year-old." *Id.* at 436-37. So, Plaintiffs "failed to show any intention to even arguably violate" the Act. *Id.* at 437.

Second, the Court reasoned that "even if [the plaintiff] alleged an intention to engage in a course of conduct arguably proscribed" by the Act, the plaintiff could not "show that this alleged intention to breach" the Act "is 'arguably affected with a constitutional interest.'" *Id.* at 438. "[T]he law in this area is clear—there is no constitutional interest in exhibiting indecent material to minors." *Id.* So, if the plaintiff "deal[t] in adult content *lacking* value for reasonable 17-year-olds,"—as required to violate the Act—then it "ha[d] no constitutional interest in violating the [Act] by exhibiting those performances to minors." *Id.* at 439.

Third, even assuming "for the sake of argument that [plaintiff] successfully alleged an intention to engage in a course of conduct arguably affected with a constitutional interest that is also arguably proscribed by the [Act]," the plaintiff would still need to "show a '*certainly impending*' threat of prosecution." *Id.* And the plaintiff could not do so

because, among other deficiencies, nothing suggested the District Attorney General for Shelby County sought to enforce the Act against their specific speech or had ever enforced the Act against similar speech in the past. *Id.* at 439-40. Mere "fear [of] wrongful prosecution and conviction under the [Act]," the Court explained, "is 'inadequate to generate a case or controversy the federal courts can hear.'" *Id.* at 440 (quoting *Glenn v. Holder*, 690 F.3d 417, 422 (6th Cir. 2012)).

B. Procedural Background

The events underlying this appeal arose while the preliminary injunction in *Friends of George's* was in place and the appeal was pending. Plaintiffs Blount Pride, Inc. and Matthew Lovegood planned to stage a drag performance at Blount Pride, an annual festival hosted at Maryville College in Blount County. Am. Compl., R.64, at 681. At the time, there was great uncertainty in the State as to the scope of the still-in-effect injunction from *Friends of George's*. *See, e.g.*, NPR, *A federal judge rejects Tennessee's anti-drag law as too broad and vague* (June 3, 2023), https://perma.cc/UZB8-NMY3. So Defendant Ryan Desmond, the District Attorney General for Blount County, sent a letter to officials from Blount County, Maryville, and Blount Pride explaining his "office's

prosecutorial position relative to the Adult Entertainment Act." Compl., R.1, at 14; Letter, R.1-3.

Specifically, the letter stated General Desmond's position that the relief provided by the district court in *Friends of George's* applied only in Shelby County, and that the Act was constitutional and applicable in Blount County. Letter, R.1-3, at 98. General Desmond thus advised that violations of the Act "can and will be prosecuted by [his] office." *Id.* But, he explained, his office did "not prematurely evaluate the facts or evidence related to a potential investigation into possible criminal conduct." *Id.* at 98-99; *accord id.* at 100. On the contrary, "[i]t is only after review of all the relevant evidence that [his] office will reach a position as to whether criminal conduct has occurred." *Id.* at 99. Accordingly, General Desmond took no position on whether Plaintiffs' planned event would violate the Act. *Id.* at 100. And he further clarified that Tennessee law provided "no mechanism" under which he "could petition for a temporary injunction to enjoin an individual or group from organizing and holding an event that would be violative of the" Act. *Id.* at 99.

Plaintiffs sued in the Eastern District of Tennessee. Compl., R.1, at 16. They contended General Desmond's letter retaliated against them for their social medial posts promoting Blount Pride. *Id.* at 20-21. And they contended that the Act violated the First Amendment and was unconstitutionally vague, *id.* at 19-20, 21-22, and sought a temporary restraining order against the Act on those bases, TRO Mot., R.2, at 136, 144-154.

The district court granted Plaintiffs their requested temporary restraining order, relying on the reasoning of the Western District of Tennessee in *Friends of George's*. Mem. Op., R.22. The parties stipulated to a preliminary injunction that would bar Defendants from enforcing the Act against Plaintiffs until after this Court issued its mandate in the *Friends of George's* appeal. Joint Stipulation, R.35, at 519. The district court then stayed the case pending that appeal, which all agreed raised "the same or substantially similar legal issues as those" presented here. Order, R.43, at 537. Indeed, Plaintiffs intervened in *Friends of George's* in this Court and fully participated in that appeal. *See* Order, *Friends of George's, Inc. v. Mulroy*, No. 23-5611 (6th Cir. Sept. 15, 2023) (Dkt. 35-1).

But, as explained, Plaintiffs' position did not prevail in *Friends of George's*. *See* 108 F.4th at 433. So in the wake of that decision, the district court lifted the stay and asked the parties to brief whether *Friends of George's* called for dismissal. Order, R.54, at 556-57.

Both parties agreed that *Friends of George's* prevented Plaintiffs from bringing a constitutional challenge to the Act. Def. Desmond's Resp., R.58, at 601; Pltfs' Resp., R.57, at 588. Plaintiffs, however, amended their complaint to omit their challenges to the constitutionality of the Act. Am. Compl., R.64. Plaintiffs maintained their claim that General Desmond's letter constituted unlawful retaliation against them in violation of the First Amendment. *Id.* at 688-90. And Plaintiffs added a claim that General Desmond, by means of his letter, unconstitutionally "interfered" with their First Amendment rights. *Id.* at 686-90. For this latter claim, Plaintiffs sought only injunctive relief; specifically, an injunction preventing "Defendants from taking any further adverse action against the Plaintiffs or anyone with whom the Plaintiffs contract—including, without limitation, by threatening to enforce the AEA against them—for promoting a drag performance, holding a drag performance, or hosting Blount Pride." *Id.* at 688.

The district court dismissed the amended complaint. Mem. Op., R.84. It explained that Plaintiffs lacked pre-enforcement standing to challenge the Act, including because General Desmond's letter, even if construed as a "threat of prosecution," was "uncertain and not substantial." *Id.* at 893-896. It also determined that Plaintiffs' retaliation claim against General Desmond failed to allege a constitutional violation and was thus barred by qualified immunity. *Id.* at 901. The court explained that General Desmond's letter did not constitute an adverse action because, "absent any attempts to shut down or otherwise prevent plaintiffs from hosting the Pride Festival," a letter reminding plaintiffs that the District Attorney General will enforce the law if he finds it violated "would not chill a person of ordinary firmness." *Id.* at 900.

This appeal followed.

SUMMARY OF THE ARGUMENT

I. The district court correctly dismissed Plaintiffs' interference claim.

A. Plaintiffs lack standing to pursue this claim. Plaintiffs' interference claim seeks only prospective relief, but their Amended Complaint alleges only (at most) a past injury. A "previously harmed plaintiff may not seek a forward-looking remedy … without evidence that the harmful conduct will reoccur." *Davis v. Colerain Twp.*, 51 F.4th 164, 171 (6th Cir. 2022). Here, that evidence is nowhere to be found.

B. Even if Plaintiffs could surmount this jurisdictional hurdle, this Court should nevertheless affirm because Plaintiffs failed to state a claim. The only conduct Plaintiffs point to—General Desmond's letter—does not rise to the level of interference. And even if it did, that letter addressed only the 2023 Blount Pride event. Plaintiffs cannot establish the irreparable injury needed to obtain an injunction based on interference with *past* speech absent any "showing of any real or immediate threat that [they] will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Plaintiffs did not make that showing here.

C. This Court can also affirm the dismissal of Plaintiffs' claim based on judicial estoppel. Plaintiffs obtained preliminary relief from the district court by asserting that their planned performances at least arguably violated the Act, which provided them with the pre-enforcement standing they needed to challenge the constitutionality of the Act. But after this Court's decision in *Friends of George's*, Plaintiffs changed tack. Plaintiffs now argue that General Desmond interfered with their First Amendment rights because he allegedly threatened criminal prosecution even though the Act did *not* arguably proscribe their planned conduct. Judicial estoppel bars Plaintiffs from obtaining relief based on inherently contradictory positions.

II. The district court likewise correctly dismissed Plaintiffs' retaliation claim.

A. Plaintiffs' retaliation claim runs headlong into qualified immunity. To allege retaliation, Plaintiffs needed to establish that General Desmond took an adverse action against them motivated, at least in part, by constitutionally protected conduct. But all Plaintiffs have is General Desmond's letter, which is too benign to constitute an adverse action. Nor did Plaintiffs present a coherent retaliation theory.

General Desmond's letter addresses Plaintiffs' *future* conduct, not their past speech. And there is no such thing as a "pre-retaliation" retaliation claim.

B. Regardless, it was not clearly established that General Desmond's letter, even if read as a threat of criminal prosecution, violated the First Amendment. If anything, the precedent refutes Plaintiffs' positions. This Court has held that threats generally do *not* constitute adverse actions. And Plaintiffs identify no case finding a First Amendment violation on facts similar to those here.

STANDARD OF REVIEW

This Court "review[s] de novo a district court's decision to dismiss for lack of subject-matter jurisdiction." *Glenn*, 690 F.3d at 420. This Court likewise reviews de novo a district court's decision to dismiss on qualified immunity grounds. *Crawford v. Tilley*, 15 F.4th 752, 762 (6th Cir. 2021).

ARGUMENT

I. The District Court Correctly Dismissed Plaintiffs' "Interference" Claim.

Plaintiffs contend that General Desmond's letter constituted an "illicit attempt to interfere with [their] planned festival and

performances" and seek equitable relief to prevent any further "interfere[nce]." *See* Am. Compl., R.64, at 688. That claim fails three times over.

First, as the district court correctly held, Plaintiffs lack standing to pursue this claim. Article III requires a plaintiff seeking injunctive relief to identify a non-speculative future injury, and Plaintiffs do not have one.

Second, Plaintiffs failed to state a claim. General Desmond's letter did not interfere with their constitutional rights. And even if it did, that letter addressed only the 2023 Blount Pride event. In the absence of a "certainly impending" future injury, Plaintiffs cannot establish the irreparable harm required to obtain equitable relief.

Third, judicial estoppel bars Plaintiffs' claim. After obtaining a temporary restraining order by contending that the Act "arguably proscribed" their speech, Plaintiffs cannot now switch gears and premise their interference claim on the theory that the Act did *not* arguably proscribe their speech.

A. Plaintiffs lack standing to prevent hypothetical "interference."

"A party may not invoke the federal judiciary's coercive powers against an adversary unless their dispute has taken the shape of the

'Cases' or 'Controversies' that fall within Article III's text." *Tenn. Conf. of the NAACP v. Lee*, 105 F.4th 888, 901 (6th Cir. 2024) (per curiam) (quoting U.S. Const. art. III § 2). To satisfy that requirement a plaintiff must allege the three elements of standing—namely, "an injury in fact … fairly traceable to the challenged conduct of the defendant … that is likely to be redressed by the requested relief." *FEC v. Cruz*, 596 U.S. 289, 296 (2022).

To establish standing, "plaintiffs must show a proper connection between the injury and the *remedy*." *Bowles v. Whitmer*, 120 F.4th 1304, 1310 (6th Cir. 2024). Where, as a here, the plaintiffs seek injunctive or declaratory relief, they "must show that they face a potential future harm." *Id.* at 1311. Past harm will not suffice, as "[t]hese forward-looking preventative remedies will do nothing to redress an already-occurred injury." *Id.*

To rise to the level of an Article III injury that entitles a plaintiff to seek forward-looking relief, the threatened injury must be "real, immediate, and direct." *Crawford v. United States Dep't of Treasury*, 868 F.3d 438, 454 (6th Cir. 2017) (quotation omitted). In other words, the injury "must be *certainly impending*"; "allegations of *possible* future

injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2012) (cleaned up).

On Plaintiffs' account, General Desmond's letter interfered with their First Amendment rights by threatening to "enforce the AEA against them" because they "promoted and planned to hold drag performances" at the 2023 Blount Pride event. Am. Compl., R.64, at 687. But Plaintiffs admit they will not violate the Act, as it does not criminalize any of their "planned activities." *Id.* at 682. It simply "does not apply to the conduct they want to undertake." *Id.* at 685 (citation omitted). "So why are Plaintiffs here?" *Glenn*, 690 F.3d at 422.

"Plaintiffs answer that they fear wrongful prosecution and conviction under the Act." *Id.* at 422; Am. Compl., R.64, at 686-88. But fear alone is "inadequate to generate a case or controversy the federal courts can here." *Glenn*, 690 F.3d at 422. Plaintiffs instead need a "certainly impending" injury. *Friends of George's*, 108 F.4th at 440. They don't allege one.

Plaintiffs' Amended Complaint contains no allegations—none—detailing any action General Desmond plans to take against them in the future. *See* Am. Compl., R.64. Instead, Plaintiffs point to the letter

General Desmond sent about the Act in 2023, which Plaintiffs contend harmed them at that time. *Id.* at 686-88. But Plaintiffs cannot obtain an injunction based on past harm. As explained, Article III requires a plaintiff to establish the relief he seeks will redress his injury—and an injunction does not redress past harm. *See Kanuszewski v. Mich. Dep't of Health & Human Servs.*, 927 F.3d 396, 407-08 (6th Cir. 2019).

Plaintiffs also cannot use allegations of past harm to establish the requisite future injury. "[T]hat a harm occurred in the past 'does nothing to establish a real and immediate threat that' it will occur in the future, as is required for injunctive" and declaratory relief. *Id.* at 406 (quoting *Lyons*, 461 U.S. at 106). This firmly established rule stems from the fact that illegal conduct by government officials is not automatically presumed to continue. *See, e.g.*, *Lyons*, 461 U.S. at 105-06 (reasoning that a plaintiff's alleged unconstitutional injury during a traffic stop and fear of a similar injury in the future was insufficient to support standing for prospective relief). An alleged injury resulting from a defendant's potential future unlawful conduct is simply "too remote or attenuated to sustain … jurisdiction under Article III." *Bell v. Keating*, 697 F.3d 445, 451 (7th Cir. 2012).

Despite the absence of a certainly impending injury, Plaintiffs insist they have standing. They first argue that they have standing because they "were the specific objects of the Defendants' actions." Plaintiffs-Br. 40-41 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up)). But whether Plaintiffs *were* the specific object of General Desmond's *past* actions is irrelevant to whether General Desmond will injure them in the future. And, as just explained, only a future injury is relevant here because Plaintiffs seek forward-looking relief. *Lyons*, 461 U.S. at 106.

Plaintiffs also argue that they have standing because General Desmond's letter "sen[t] a clear message to everyone in Blount County that anyone who performed drag or hosted a drag performance could be arrested." Plaintiffs-Br. 39. Even assuming "that this supposed threat of false *arrest* could then amount to a threat of false *prosecution*, 'fear [of] wrongful prosecution and conviction under the [AEA]' is 'inadequate to generate a case or controversy the federal courts can hear.'" *Friends of George's*, 108 F.4th at 440 (alterations in original) (quoting *Glenn*, 690 F.3d at 422). "It is the *reality* of the threat of repeated injury that is

relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Lyons*, 461 U.S. at 107 n.8.

At minimum, "the risk of false prosecution" faced by the plaintiffs *here* "is too speculative to confer standing." *White v. United States*, 601 F.3d 545, 553 (6th Cir. 2010). Again, Plaintiffs' claim against General Desmond stems from the letter he sent them in advance of the 2023 Blount Pride event stating his intention to enforce the Act if Plaintiffs were charged with a violation and sufficient evidence supported that charge. Am. Compl., R.64, at 687-88; *see also* Plaintiffs-Br. 38-39. But any misunderstanding General Desmond may have had about the Act's scope when he sent his letter to Plaintiffs has been remedied by the Sixth Circuit's decision in *Friends of George's*. *See* 108 F.4th at 435-37. And General Desmond has issued no threats regarding future performances. To credit an assumption that General Desmond would violate the law to target Plaintiffs would be to ignore "[t]he presumption of regularity" that the Supreme Court applies to prosecutorial decisions. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quotations omitted). In the absence of "clear evidence to the contrary," courts presume that prosecutors

"properly discharge[] their official duties." *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926).

Plaintiffs argue that they are at least "entitled to a remand" because the district court assessed whether they had alleged an imminent injury according to the framework that applies in pre-enforcement challenges. Plaintiffs-Br. 35. No remand is necessary.

For one, even if the district court applied the wrong framework, whether Plaintiffs have standing to pursue their interference claim is a straightforward question of law that this Court can resolve in the first instance. This Court reviews standing *de novo*, *Glenn*, 690 F.3d at 420, and often resolves questions of standing for the first time on appeal, *e.g.*, *Newsome v. Batavia Loc. Sch. Dist.*, 842 F.2d 920, 922 (6th Cir. 1988). In all events, this Court "may affirm the district court's determination on any grounds, including grounds not relied upon by the district court." *Codrigan v. Dolak*, 142 F.4th 884, 891 n.1 (6th Cir. 2025) (quoting *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012)).

For two, the district court addressed the crux of Plaintiffs' standing argument. Plaintiffs argued below, and repeat here, that the letter was a speech-chilling threat of prosecution that entitles them to an injunction

to prevent future speech-chilling threats. *See, e.g.*, MTD Resp., R.76, at 794-95; Plaintiffs-Br. 39-40. The district court correctly rejected the premise of this argument, explaining that "[w]hile th[e] letter may constitute a threat of prosecution, … this threat of enforcement was uncertain and not substantial." Mem. Op., R.84, at 896. This "uncertain and not substantial" threat of prosecution certainly does not portend any "real and immediate" future threat of prosecution sufficient to support standing to seek an injunction. *Lyons*, 461 U.S. at 106.

B. Plaintiffs' interference claim lacks merit.

Plaintiffs argue that not only do they have standing to pursue their interference claim, their claim for injunctive relief is "meritorious." Plaintiffs-Br. 41. Plaintiffs are wrong on both counts. As just explained, Plaintiffs lack standing to pursue their interference claim. This Court can affirm on this basis alone. But even if Plaintiffs alleged "an existing case or controversy"—and they have not—Plaintiffs have not stated a claim for relief.

"A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law." *Lee v.*

City of Columbus, 636 F.3d 245, 249 (6th Cir. 2011). Plaintiffs' allegations fail to satisfy these requirements.

Actual Constitutional Violation. Plaintiffs fail to allege any interference with their First Amendment rights.

Plaintiffs ground their claim on the contention that General Desmond's letter threatened to prosecute them for performing drag at the 2023 Blount Pride event. Am. Compl., R.64, at 686-88. And they argue that *NRA v. Vullo*, 602 U.S. 175 (2024), along with *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), establish that they stated a First Amendment claim. According to Plaintiffs, those decisions provide that a plaintiff states a claim if she "plausibly allege[s] that a government official's conduct, 'viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech." Plaintiffs-Br. 44-45 (quoting *Vullo*, 602 U.S. at 191). And, Plaintiffs argue, they plausibly alleged that General Desmond's letter "was reasonably understood to convey a threat of adverse government action if the Plaintiffs carried out their planned performance." *Id.* at 45.

As an initial matter, it's not clear that *Bantam Books* and *Vullo* provide the correct test for this case. *Vullo* and *Bantam Books* both involved the coercion of a third party by government officials to suppress the plaintiff's speech. *Bantam Books*, 372 U.S. at 61-62; *Vullo*, 602 U.S. at 180. And the test they establish is for that context: "To state a claim that the government violated the First Amendment *through coercion of a third party*, a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech." *Vullo*, 602 U.S. at 191 (emphasis added). This Court, in contrast, has particular tests for when the government coerces against a plaintiff *directly*—retaliation and prior restraint. *Novak v. City of Parma*, 932 F.3d 421, 427, 432 (6th Cir. 2019) (*Novak I*); *accord Vullo*, 602 U.S. at 201 (Jackson, J., concurring) ("[U]nder our precedents, determining whether government actions violate the First Amendment requires application of different doctrines that vary depending on the circumstances.").

Regardless, Plaintiffs cannot meet the test they lay out. As explained below, General Desmond's letter cannot be reasonably understood as a threat to prosecute Plaintiffs for engaging in protected

speech. *Infra* 45-47. And *Bantam Books* and *Vullo* look nothing like this case. The course of conduct at issue in *Bantam Books* rose to the level of a "scheme of state censorship effectuated by extralegal sanctions." 372 U.S. at 72; *infra* 60-61. *Vullo*, in turn, involved multiple instances of coercive conduct by the defendant—including a meeting at which she told an entity she regulated that she favored gun control and would be less interested in pursuing the entity's infractions if it disassociated with the National Rifle Association. 602 U.S. at 175. Both *Bantam Books* and *Vullo* involve conduct more extreme and direct than General Desmond's singular letter.

Continuing Irreparable Injury. Even if Plaintiffs stated a valid interference claim (and they did not), Plaintiffs nevertheless failed to allege "an adequate basis for equitable relief." *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974). A party cannot state a viable forward-looking "interference" claim by asserting a need for an injunction that tells government officials to follow the law.

A plaintiff seeking injunctive relief must establish, among other things, irreparable harm. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57-58 (1975). In the First Amendment context, a plaintiff makes this

showing by establishing that the defendant will violate his First Amendment rights in the imminent future. *See Fischer v. Thomas*, 78 F.4th 864, 868-69 (6th Cir. 2023). An allegation that a government official "interfered" with the plaintiff's First Amendment rights in the past will not do absent "a showing of any real or immediate threat that the plaintiff will be wronged again." *Lyons*, 461 U.S. at 111; *accord O'Shea*, 414 U.S. at 502 (same); *Fischer*, 78 F.4th at 869 (holding that the plaintiffs failed to establish irreparable harm where "the only speech threatened by the [defendant] has already occurred").

As already explained, *supra* 21-25, Plaintiffs failed to make that showing here. *Lyons* and *O'Shea* are instructive. In both cases, the Supreme Court held that the plaintiffs' failure to identify a certainly impending violation of their constitutional rights meant they could show neither "a present case or controversy regarding injunctive relief" *nor* the "irreparable injury" required to obtain an injunction. *Lyons*, 461 U.S. at 102, 105, 111; *O'Shea*, 414 U.S. at 495-96, 502. Plaintiffs' claim here suffers from the same deficiency.

The failure to allege a certainly impending injury is particularly acute in the context of a request for an injunction against "state officers

engaged in the administration of the states' criminal laws." *Lyons*, 461 U.S. at 112. As the Supreme Court has explained, in such circumstances, "recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions … in the absence of irreparable injury which is both *great* and *immediate*." *Id.* (emphasis added); *accord O'Shea*, 414 U.S. at 499 (same). Because Plaintiffs point to nothing that establishes that General Desmond will "interfere" with their First Amendment rights in the future, *supra* 21-25, Plaintiffs fall short of establishing that type of irreparable injury here.

Plaintiffs counter that the Supreme Court "blessed" their "theory of injunctive relief under materially similar circumstances" in *Vullo*. Plaintiffs-Br. 41. But *Vullo* involved only claims for damages. 602 U.S. at 185; *accord NRA v. Vullo*, 144 F.4th 376, 380 (2d Cir. 2025) (holding on remand that qualified immunity barred the NRA's claims). Far from "bless[ing] the Plaintiffs' theory of injunctive relief," Plaintiffs-Br. 41, *Vullo* highlights that a plaintiff alleging past harm cannot seek a forward-looking remedy.

* * *

In short, Plaintiffs point only to an alleged past injury to support their forward-looking interference claim and muster nothing more than "subjective apprehensions" that they will again be subject to unlawful conduct. *Lyons*, 461 U.S. at 107 n.8. That satisfies neither Article III nor states an interference claim for forward-looking relief.

C. Judicial estoppel bars Plaintiffs' claims.

This Court can also affirm the dismissal of Plaintiffs' "interference" claim on estoppel grounds.

Plaintiffs originally contended that the Act was unconstitutional, Compl., R.1, at 19-22, and sought (and obtained) a temporary restraining order against enforcement of the Act on that basis, TRO Mot., R.2, at 144-55; Mem. Op., R.22. Plaintiffs established the pre-enforcement standing they needed to obtain that relief by alleging that their planned drag performances at the 2023 Blount Pride event at least arguably violated the Act. TRO Reply, R.13, at 365-66; *see* Mem. Op., R22, at 487-88; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014) (requiring challengers to show that their "intended future conduct is arguably proscribed by the statute they wish to challenge"). After *Friends of*

George's, however, Plaintiffs amended their complaint. *See* Am. Compl., R64. Plaintiffs no longer contend the Act is unconstitutional or that it arguably proscribed their conduct; now they argue that General Desmond interfered with their First Amendment rights because the Act did *not* "arguably proscribe" their speech. *Id.* at 684, 686-88.

Judicial estoppel prevents Plaintiffs from pursuing relief against General Desmond on the basis that the Act does not arguably proscribe their conduct after obtaining relief against him on a contradictory assertion. Rooted in equity, the principle of judicial estoppel "prohibits a litigant from convincing a court to adopt one position at one time and then seeking the opposite position at a later time." *MacKey v. Rising*, 106 F.4th 552, 567 (6th Cir. 2024). Although judicial estoppel resists "any general formulation," three factors "typically inform the decision whether to apply the doctrine:" (1) the "later position must be clearly inconsistent" with the earlier one; (2) the court must accept the litigant's earlier position; and (3) the party seeking to change its position "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (citations omitted). These factors are not "inflexible prerequisites or an

exhaustive formula" for determining the doctrine's limits. *Id.*at 751. The question is simply whether estoppel is necessary "to protect the integrity of the judicial process." *Id.* at 749-50 (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)). Here, it is.

Clearly Inconsistent Positions. Plaintiffs have taken polar-opposite positions on whether the Act arguably applies (and applied) to their conduct. As explained, to obtain preliminary relief, Plaintiffs asserted that their planned performances at least arguably violated the Act, which provided them pre-enforcement standing to challenge the constitutionality of the law. *See* TRO Reply, R.13, at 365-66. Now, though, Plaintiffs rest their "interference" claim on the notion that General Desmond unconstitutionally "interfered" and retaliated against them by sending them a "threat letter" when "the AEA did *not even 'arguably' proscribe the Plaintiffs' planned festival and performance*.'" Am. Compl., R.64, at 684, 686-88 (citation omitted and emphasis added). As Plaintiffs put it, "Defendant Desmond had no lawful basis for threatening the Plaintiffs or their event, given that … the AEA did not criminalize the Plaintiffs' planned activities." *Id.* at 682; *accord* Plaintiffs-Br. 42 (arguing that Plaintiffs "appropriately sought an

injunction forbidding" General Desmond's "*illegal* threats to enforce the AEA against them" (emphasis added)). Plaintiffs' positions on whether the Act arguably proscribed Plaintiffs' conduct are diametrically opposed.

Achieved Preliminary Relief. Plaintiffs successfully obtained preliminary relief based on the theory that their performances *arguably violated the Act*. General Desmond opposed Plaintiffs' request for a temporary restraining order because Plaintiffs failed to "allege[] an intention to stage performances that are 'harmful to minors'" under the Act. TRO Opp'n, R.10, at 190. But the district court disagreed, determining that Plaintiffs *had* "sufficiently alleged … intent on [Plaintiff] Lovegood's part to perform in a way that, at least in District Attorney Desmond's view, is likely to be harmful to minors under the Act." Mem. Op., R.22, at 488. So preliminary relief rested on the notion that Plaintiffs' performances at least arguably violated the Act. That the Court adopted Plaintiffs' position to award *preliminary* relief changes nothing. A plaintiff "need not finally prevail on the merits" for estoppel to apply. *Edwards*, 690 F.2d at 599 n.5.[2]

[2] Plaintiffs argued below that they did not prevail on the merits because this Court rejected their interpretation of the Act in *Friends of George's*. Resp. to MTD, R.76, at 804. While this Court's reasoning in *Friends of*

Unfairness. Allowing Plaintiffs' change-in-position would be the height of unfairness. Unfair advantage arises when a party is allowed to take a "heads I win/tails you lose" position. *Occidental Petroleum Corp. v. Wells Fargo Bank, N.A.*, 117 F.4th 628, 639 (5th Cir. 2024). This Court has invoked this principle to bar plaintiffs from taking "inconsistent positions" to manipulate federal court jurisdiction. *Han v. Hankook Tire Co.*, 799 F. App'x 347, 349 (6th Cir. 2020). That is what happened here.

Plaintiffs established jurisdiction (standing) to seek a temporary restraining order by representing that the law was unconstitutional and that their conduct was arguably covered by it. That was the position they took in the district court. TRO Reply, R.13, at 365-66. And, when Plaintiffs sought to intervene in the *Friends of George's* appeal, they told this Court that "all agree" that the *Friends of George's* appeal, which addressed the constitutionality of the Act and Friends of George's standing to challenge it, "will be outcome-determinative as to nearly all

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George's informs this case, the Court there did not weigh in on the question on which Plaintiffs switched sides: Whether the Act arguably proscribed Plaintiffs' conduct. This Court addressed only whether *Friends of George's* performances were "proscribed by the statute," not *Plaintiffs'*. 108 F.4th at 435-39.

of" Plaintiffs' claims in this case. Mot. to Intervene, *Friends of George's*, No. 23-5611, at 11 (6th Cir. Sept. 8, 2023) (Dkt. 30-1).

Yet after this Court made clear that the Act did not apply to Plaintiffs' conduct, they did not accept the real-world win. They instead turned around and asked for the "quintessential second bite at the apple" based on a theory that directly contradicts prior assertions. *Brandenburg Tel. Co. v. Sprint Commc'ns Co., L.P.*, 658 F. Supp. 3d 427, 468 (W.D. Ky. 2023). And they seek to force a state prosecutor into protracted discovery over a theory that flies in the face of their prior representations to this Court. This is the exact type of "cynical gamesmanship" that judicial estoppel is designed to prevent. *Id.* at 462-63 (quoting *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002)); *accord New Hampshire*, 532 U.S. at 750. Plaintiffs' about-face falls comfortably within the estoppel doctrine's elastic scope.

II. The District Court Correctly Dismissed Plaintiffs' Retaliation Claim.

As the district court determined, Plaintiffs' retaliation claim runs headlong into qualified immunity.

The federal courts have long interpreted 42 U.S.C. § 1983 to incorporate a "qualified immunity" defense. *Buckley v. Fitzsimmons*, 509

U.S. 259, 267-68 (1993). Under this defense, courts "generally provid[e] government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The doctrine "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 355, 341 (1986)).

To overcome this "formidable" shield, *Hall v. Navarre*, 118 F.4th 749, 759 (6th Cir. 2024), a plaintiff must show that the defendant violated legal rights that were "clearly established at the time of the challenged actions," *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). The federal courts have identified two components to that standard, which they may analyze in any order. *Pearson v. Callahan,* 555 U.S. 223, 236 (2009). The first component requires the "violation of a constitutional right." *Id.* at 232. The second component requires courts to analyze whether that

constitutional violation was "clearly established" under binding authority. *Latits v. Phillips*, 878 F.3d 541, 552-53 (6th Cir. 2017).

The second component imposes a high bar. "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Zorn v. Linton*, 146 S.Ct. 926, 930 (2026) (per curiam) (quoting *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021)). "[E]xisting precedent" must "place the constitutional question *beyond debate*." *Id.* (internal quotation marks omitted) (emphasis added). In other words, Plaintiffs must prove "it would have been clear to [Desmond] that his 'actions were unlawful in the situation [he] confronted,'" at the time he confronted it. *Hall*, 118 F.4th at 759 (quoting *Lanman v. Hinson*, 529 F.3d 673, 688 (6th Cir. 2008)). This generally requires a plaintiff to "'identify a case where an officer acting under similar circumstances … was held to have violated' the Constitution." *Zorn*, 146 S.Ct. at 930 (alteration in original) (quoting *Escondido v. Emmons*, 586 U.S. 38, 43 (2019)).

Critically, to clearly establish a right, "[t]he relevant precedent must define the right with a 'high degree of specificity' so that 'every reasonable official would interpret it to establish the particular rule the

plaintiff seeks to apply.'" *Id.* (quoting *Dist. of Columbia v. Wesby*, 583 U.S. 48, 63 (2018)). "Principles stated generally, such as that 'an officer may not use reasonable and excessive force,' do not suffice." *Id.* (quoting *Kisela v. Hughes*, 584 U.S. 100, 105 (2018)). "In short, officers receive qualified immunity unless they could have 'read' the relevant precedent beforehand and 'know[n] that it proscribed their specific conduct." *Id.* (alteration in original) (quoting *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 616 (2015)).

Here, to state a retaliation claim, Plaintiffs needed to allege that they (1) "engaged in constitutionally protected conduct;" (2) "an adverse action was taken against [them] that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) "the adverse action was motivated at least in part by the plaintiff's protected conduct." *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 584 (6th Cir. 2012) (cleaned up).

And to overcome qualified immunity, Plaintiffs need to show precedent that clearly establishes "not the general right to be free from retaliation for one's speech, *but the more specific right* to be free from" conduct like General Desmond's here. *Reichle v. Howards*, 566 U.S. 658,

665 (2012). That is why "plaintiffs generally cannot defeat qualified immunity simply by arguing that they have a clearly established right not to suffer an 'abridgment' of the 'freedom of speech.'" *Hall*, 118 F.4th at 760 (quoting *DeCrane v. Eckart*, 12 F.4th 586, 593 (6th Cir. 2021)). Plaintiffs must show that *each* of the three elements was clearly established, and General Desmond's "*particular* conduct" violated all of them. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quotation omitted).

Plaintiffs flunk both components of qualified immunity. They identified no constitutional violation—let alone one that is clearly established.

A. Plaintiffs failed to identify a constitutional violation.

Plaintiffs' allegations fail to establish that General Desmond retaliated against them in violation of their First Amendment rights.

Protected Conduct. Plaintiffs alleged that General Desmond retaliated against them "based on the [their] promotional materials and planned non-obscene drag performances." Am. Compl., R.64, at 689. Plaintiffs sufficiently alleged that they "engaged in protected conduct" when they advertised their planned event. *See Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985). But to

the extent Plaintiffs ground their retaliation claim in their "planned non-obscene drag performances," Am. Compl., R.64, at 689, their claim cannot proceed.

First Amendment jurisprudence maintains a "time-honored distinction between barring speech in the future and penalizing past speech." *Alexander v. United States*, 509 U.S. 544, 553 (1993). Whether government action against an individual "for their *past* speech" violates the First Amendment is analyzed under the rubric of retaliation. *Blick v. Ann Arbor Pub. Sch. Dist.*, 105 F.4th 868, 877-79 (6th Cir. 2024). Whether government action barring *future* speech violates the First Amendment, in contrast, is analyzed under the distinct rubric of prior restraint. *Id.* The Supreme Court has "admonish[ed] that courts not 'blur the line separating'" the two. *Novak I*, 932 F.3d at 432 (quoting *Alexander*, 509 U.S. at 554).

Accordingly, Plaintiffs can satisfy the requirement that they allege that they "*engaged* in constitutionally protected conduct" only by pointing to past conduct. *Wurzelbacher*, 675 F.3d at 583-84 (emphasis added) (quotations omitted). And the only past conduct Plaintiffs allege is their advertisements. Am. Compl., R.64, at 689. As explained below, *infra* 50-

53, that poses a problem for Plaintiffs because the advertisements were not the but-for cause of the supposed adverse action Plaintiffs point to.

Adverse Action. Plaintiffs claim that General Desmond's letter was an adverse action. This Court's caselaw establishes that it was not.

For an action to be constitutionally adverse, the Sixth Circuit requires that it "deter a person of ordinary firmness from exercising protected conduct." *Wurzelbacher*, 675 F.3d at 584 (cleaned up). Actions that rise to that level can include "an arrest, a prosecution, or a dismissal from government employment." *Reguli v. Russ*, 109 F.4th 874, 880 (6th Cir. 2024) (per curiam) (quoting *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 477 (2022)). But not every action suffices. It "trivializes the First Amendment to allow plaintiffs to bring claims for *any* adverse action, no matter how minor." *Wurzelbacher*, 675 F.3d at 584 (cleaned up).

This Court accordingly has held that "threats alone are generally not adverse actions for retaliation purposes." *Sensabaugh v. Halliburton*, 937 F.3d 621, 629 n.2 (6th Cir. 2019). To be sure, "[i]n some cases, 'threats alone can constitute an adverse action if the threat is capable of deterring a person of ordinary firmness from engaging in protected

[speech].'" *Hernden v. Chippewa Valley Sch. Dist.*, No. 24-1842, 2025 WL 2652993, at *6 (6th Cir. Sept. 26, 2025). But such a threat must be "credible" and "specific." *Id.* at *6-7; *accord Kubala v. Smith*, 984 F.3d 1132, 1140 (6th Cir. 2021) (threat must be "clear" and not "ambiguous"). Thus, a prison official's threat to make a prisoner's "life 'a living hell' if he did not drop his lawsuits" was "simply too vague" to rise to the level of an adverse action. *Hardy v. Adams*, No. 16-2025, 2018 WL 3559190, at *3 (6th Cir. Apr. 13, 2018). Also insufficient was a government employer's threat that a plaintiff "would never coach football again anywhere." *Sensabaugh*, 937 F.3d at 629 n.2.

The "general rule that bare threats are insufficient to constitute adverse actions" applies even when the threat invokes legal process. *Hornbeak-Denton v. Myers*, 361 F. App'x 684, 689 (6th Cir. 2010) (O'Connor, J.). This Court has held that a State's threat to sue individuals over a land ownership dispute, allegedly in retaliation for earlier criticism of the State's permitting process, was not alone sufficient to satisfy the adverse action requirement. *Id.* at 688-89. Nor was an email from a school board member to the Department of Justice regarding the plaintiff's conduct and statements at school board meetings

sufficient to make out a retaliation claim. *Hernden*, 2025 WL 2652993, at *6-7.

These principles resolve this case. General Desmond's letter comes nowhere near the type of action this Court has held would "deter a person of ordinary firmness from exercising protected conduct." *Wurzelbacher*, 675 F.3d at 584.

To refresh, General Desmond's letter stated his position that the Act remained enforceable in Blount County during the pendency of the *Friends of George's* appeal. Letter, R.1-3, at 98. When General Desmond sent his letter, there was genuine confusion about the effect of the *Friends of George's* decision—at that time, media outlets (and Plaintiffs) had contended that the Act had been enjoined statewide. *See, e.g.*, NPR, *A federal judge rejects Tennessee's anti-drag law as too broad and vague* (June 3, 2023), https://perma.cc/UZB8-NMY3; *see also* TRO Mot., R.2, at 141-44 (arguing that the declaration in *Friends of George's* applied statewide). The letter thus clarified that the law remained in effect in Blount County—a conclusion ultimately vindicated by this Court. *See* Order, *Friends of George's*, No. 23-5611, at *2 (6th Cir. Sept. 15, 2023)

(Dkt. 35-1) ("[T]he injunction … on appeal applies only in Shelby County.").

True, the letter also stated General Desmond's intent to enforce the Act—but only if local law enforcement brought charges under the statute and "review of the evidence substantiate[d] the charges." Letter, R.1-3, at 99. Far from making a "specific" or "clear" threat of criminal prosecution, *Hernden*, 2025 WL 2652993, at *6; *Kubala*, 984 F.3d at 1140, the letter stated expressly that General Desmond had not reached a particular prosecutorial decision with respect to Blount Pride's planned festival and that he would not "prematurely evaluate … facts." Letter, R.1-3 at 100. The letter further clarified that General Desmond had no mechanism to enjoin the planned festival under the Act. *Id.* at 99.

A neutral recitation of the law, and statement that a District Attorney General may enforce it, is not an adverse action that would deter a person of ordinary firmness from engaging in protected conduct. The letter "did not itself impose" any consequences on Plaintiffs. *Sensabaugh*, 937 F.3d at 628. It "did not shut down" Blount Pride, "did not require plaintiffs to omit the planned drag performance, did not impose sanctions, or otherwise physically deter the event." Mem. Op.,

R.84, at 900. Nor did it even suggest the possibility that Plaintiffs' advertisements—the relevant protected conduct, *supra* 41-43—violated any State law. As the district court put it, "[t]he only consequence that could flow from the distribution of th[e] letter is that plaintiffs could be prosecuted if criminal conduct occurred" at Blount Pride. Mem. Op., R.84, at 900. But it "should not have been news to plaintiffs" that the district attorney general was "obligated to enforce the criminal law." *Id.*

At most, then, the letter "may have deterred [Plaintiffs] from engaging in [the] *unlawful* (i.e., unprotected) speech" proscribed by the Act. *Beck v. City of Plainwell*, No. 1:11-cv-735, 2014 WL 1207353, at *6 (W.D. Mich. Mar. 24, 2014) (emphasis added). But "such cannot be said to deter a person of ordinary firmness from engaging in *protected* speech." *Id.* (emphasis added). Otherwise, "individuals would be able to assert claims of retaliation every time a police officer or other government official offered a warning concerning the potential unlawfulness of certain speech or conduct." *Id.* As Plaintiffs' own authority explains, "[s]uch a result would be absurd." *Id.*; *see* Plaintiffs-Br. 48 (citing *Beck*). "[O]ur democracy can function only if the government can effectively enforce the rules embodied in legislation; by its nature, such enforcement

often involves coercion in the form of legal sanctions." *Vullo*, 602 U.S. at 201 (Jackson, J., concurring).

Plaintiffs nevertheless argue that General Desmond's letter constitutes an adverse action because it "threatened them with criminal sanctions for performing drag (after explaining that he looked for other ways to shut down their event)." Plaintiffs-Br. 49. But "threats alone are generally not adverse actions for retaliation purposes." *Sensabaugh*, 937 F.3d at 629 n.2. And, again, General Desmond's letter did not threaten Plaintiffs with criminal sanctions for performing drag. *Supra* 45-47. Indeed, General Desmond knew Plaintiffs planned to stage a drag performance at their event. *See* Am. Compl., R.64, at 688-89. Yet his letter stated that "[i]t is certainly possible that the event in question will not violate any of the criminal statutes." Letter, R.1-3, at 100. A "person of ordinary firmness" would not have been deterred by the letter.

That the letter stated General Desmond was aware of "no mechanism" "to enjoin … an event that would be violative of the [Act]" does not change anything. Letter, R.1-3, at 99. It is quite a leap to read a statement that no legal action will be taken as a threat of criminal prosecution, let alone a threat concrete enough to constitute an adverse

action. *Cf. Kubala*, 984 F.3d at 1141 (rejecting argument that "true" statement that offered plaintiff a new job classification that most "prefer[red]" was an adverse action). Unsurprisingly, Plaintiffs cite no authority for this counterintuitive proposition. *See* Plaintiffs-Br. 51-52.

Plaintiffs' suggestion that Defendant Crisp read Desmond's letter as a threat to impose criminal sanctions on Plaintiffs for performing drag likewise does not move the needle. *Id.* at 49. That appellate reimagining cannot be found in Plaintiffs' amended complaint. *See, e.g.*, Am. Compl., R.64, at 687 (stating that Defendant Crisp "threatened" Plaintiffs "based strictly on the fact that the Plaintiffs promoted and planned to hold drag performances"). Nor does it square with the text of the letter which, as explained, was not a threat at all, let alone a threat "capable of deterring a person of ordinary firmness from engaging in protected speech." *Hernden*, 2025 WL 2652993, at *6 (cleaned up).

To the extent Plaintiffs mean to suggest Defendant Crisp's alleged "tour de threats of Maryville College officials" constitutes an adverse action, Plaintiffs-Br. 49, that contention fails to sustain their claim against General Desmond because conduct by Defendant Crisp is "not adverse action *by*" *General Desmond*. *Whiting v. City of Athens*, 170 F.4th

439, 450 (6th Cir. 2026). Indeed, this Court recently held that a retaliation claim that alleged only adverse actions by third parties to the litigation was frivolous. *Id.*

The upshot: As the district court correctly held, Plaintiffs failed to identify an adverse action. Mem. Op., R.84, at 900. Plaintiffs therefore cannot show a constitutional violation, and qualified immunity bars their claim.

Causal Connection. Plaintiffs' failure to allege an adverse action is sufficient for this Court to affirm the dismissal of their retaliation claim. But this Court can also affirm based on Plaintiffs' failure to allege a causal connection between their protected conduct (the advertisements) and General Desmond's alleged adverse action (the letter).

To show causation, a plaintiff must show a "but-for" causal relationship between "protected speech" and the constitutionally adverse action. *Lemaster v. Lawrence County*, 65 F.4th 302, 309 (6th Cir. 2023). This is a high bar, because an "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Nieves v. Bartlett*, 587 U.S. 391, 398-99 (2019) (quotation omitted).

Although demanding, in most retaliation cases, the causation theory is fairly straightforward: An adverse act follows directly from prior speech. For example, in *Lemaster*, a plaintiff posted something on Facebook that a city official did not like, and the city official suspended their ability to tow cars for the city. 65 F.4th at 304-06. Similarly, in *Blackwell v. Nocerini*, 123 F.4th 479 (6th Cir. 2024), a plaintiff criticized a city manager, and city officials convinced prosecutors to charge and arrest the criticizer. *Id.* at 482-83. Generally, there is a clear causal line between the plaintiff's speech and the adverse action taken.

That is *not* the legal theory presented here. Plaintiffs' theory is not that General Desmond sent the letter because he disliked and wanted to halt Plaintiffs' *pre-show* advertising posts. On the contrary, Plaintiffs expressly allege that General Desmond retaliated against them "because he disagreed with the content and message of Plaintiffs' *planned* speech and expression." Am. Compl., R.64, at 690 (emphasis added). Plaintiffs reiterate that theory here, stating that General "Desmond's letter threatened [Plaintiffs] with criminal sanctions *for performing drag*." Plaintiffs-Br. 49 (emphasis added).

Plaintiffs' theory defeats their claim. Again, there is no such thing as future-speech retaliation: "One cannot retaliate for something that has not yet happened." *Susselman v. Washtenaw Cnty. Sheriff's Off.*, 109 F.4th 864, 871-72 (6th Cir. 2024) (cleaned up) (quoting *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 529 (6th Cir. 2008) (Batchelder, J., concurring)); *see also supra* 42. And by Plaintiffs' own account, General Desmond's alleged adverse action was not motivated by their advertisements—the only past speech they allege. Plaintiffs thus fail to establish causation.

Plaintiffs resisted this conclusion below, insisting that General Desmond retaliated "because of their pre-show advertising posts," which "also featured drag and announced their intent to perform drag." MTD Resp., R.76, at 817. But as just explained, that's not what Plaintiffs alleged, Am. Compl., R.64, at 690 (alleging retaliation based on "Plaintiffs' *planned* speech" (emphasis added)), nor is it what they said in their brief to this Court, Plaintiffs-Br. 49 (alleging General "Desmond's letter threatened them with criminal sanctions for *performing* drag" (emphasis added)). And General Desmond's letter references only a concern that the planned *future* "event may violate certain criminal

statutes within the State of Tennessee." Letter, R.1-3, at 98. There is no suggestion in General Desmond's letter, even on the most generous reading, that he might enforce the Act against the advertisements. Plaintiffs cannot show that General Desmond would have sent the letter "but for" the advertisements, *Lemaster*, 65 F.4th at 309, and thus cannot establish causation.

B. General Desmond's conduct did not violate clearly established law.

General Desmond is also entitled to qualified immunity because Plaintiffs failed to establish that his conduct violated clearly established law.

1. Plaintiffs identify no decision holding that a prosecutor's statement that he will enforce the law as written without prejudgment constitutes an adverse action. If a bar advertised a "college night," surely a prosecutor could inform the bar that it would enforce the law limiting the sale of alcohol to minors. The same goes here.

The Supreme Court has expressly contemplated that conduct like General Desmond's would *not* run afoul of the First Amendment. In *Bantam Books*, the Court explained that the First Amendment did not require "law enforcement officers [to] renounce all informal contacts with

persons suspected of violating valid laws prohibiting obscenity." 372 U.S. at 71-72. On the contrary, "[w]here such consultation is genuinely undertaken with the purpose of aiding [a] distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms." *Id.* at 72. For a prosecutor in General Desmond's situation, it was simply "not beyond debate" that providing his position on the applicability and enforceability of the Act violated the First Amendment. *Hall*, 118 F.4th at 763. "That is enough to prevail on an assertion of qualified immunity." *Id.* And that is enough to affirm the dismissal of Plaintiffs' retaliation claim.

2. Even misreading General Desmond's letter as a threat of criminal prosecution or arrest, as Plaintiffs urge, no law clearly holds that such a threat violates the First Amendment. Just the opposite. This Court's caselaw *rejects* the notion that a threat necessarily satisfies the adverse action requirement. *Wood v. Eubanks*, 25 F.4th 414, 429 (6th Cir. 2022); *accord Hornbeak-Denton*, 361 F. App'x at 689.

Particularly here, it would not "have been clear" to a reasonable official in General Desmond's position that a threat to enforce the Act would constitute unlawful retaliation. *See Hall*, 118 F.4th at 759. The

scope of the Act was not clearly established at the time General Desmond sent his letter.[3] And especially given that claims of retaliatory prosecution cannot proceed where probable cause supports the underlying charges, *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006), a reasonable prosecutor would not have known that it violated the First Amendment to *threaten* prosecution for conduct that could violate the Act.

Plaintiffs nevertheless attempt to cobble together a clearly established rule from four principles Plaintiffs say are clearly established in this Court's caselaw. *First*, "there are no doubt stand-alone threats that would deter a person of ordinary firmness from exercising their protected rights." Plaintiffs-Br. 46-47.[4] *Second*, "everyday people … only have to clear a low threshold to plausibly allege that a threat could deter

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[3] This Court eventually clarified that the Act applies only to content that lacks value to a reasonable 17-year-old minor and thus did not proscribe Plaintiffs' planned drag performance. *See Friends of George's*, 108 F.4th at 436-39. But General Desmond sent the letter before this decision—at a time when Plaintiffs themselves contended the Act could be read to prohibit all drag performances. *See* Compl., R.1, at 10-11; TRO Mot., R.2, at 146; *supra* 34-35.

[4] Quoting *Hornbeak-Denton*, 361 F. App'x at 689, and citing *Pasley v. Conerly*, 345 F. App'x 981, 985 (6th Cir. 2009), and *Hill v. Lappin*, 630 F.3d 468, 472-75 (6th Cir. 2010).

them from exercising their rights." *Id.* at 47.[5] *Third*, "threats a tier below the prosecutorial threat at issue here"—like "threats to transfer an inmate … so that he would lose his job and … his family would struggle to visit him"—have been held to qualify as adverse action. *Id.* at 47-48.[6] And *fourth*, "government-sanctioned threats of arrest and incarceration deter everyday people from speaking." *Id.* at 48.[7] From there, Plaintiffs contend that General Desmond's letter was a clearly established adverse action because "Plaintiffs are everyday people, expected to bear the lowest amount of harm, and [General] Desmond's letter threatened them with criminal sanctions for performing drag (after explaining that he looked for other ways to shut down their event)." *Id.* at 49.

This does what the Supreme Court has "repeatedly told courts" not to do: "define clearly established law at a high level of generality." *Kisela*,

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[5] Citing *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 724 (6th Cir. 2010), and *Hill*, 630 F.3d at 472-73.

[6] Citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999), and *Pasley*, 345 F. App'x at 985.

[7] Citing *Beck*, 2014 WL 1207353, at *5; *Kinross Charter Twp. v. Osborn*, No. 2:06-CV-245, 2007 WL 4284861, at *12 (W.D. Mich. Dec. 3, 2007); *Turner v. Williams*, 65 F.4th 564, 580 (11th Cir. 2023); and *Nazario v. Gutierrez*, 103 F.4th 213, 237 (4th Cir. 2024).

584 U.S. at 104 (quotations omitted). And from mostly "out-of-circuit or unpublished decisions" to boot, which cannot "clearly establish anything" as to General Desmond. *Bell v. City of Southfield*, 37 F.4th 362, 368 (6th Cir. 2022); *see also id.* (holding that clearly established law must be "on-point caselaw that would bind a panel of this court").

Regardless, not one of Plaintiffs' principles—nor the cited cases from which Plaintiffs derive them—would have put General Desmond on notice that a prosecutorial threat to enforce the law constitutes an adverse action because none involved that "*particular* conduct." *Mullenix*, 577 U.S. at 12. On the contrary, Plaintiffs' cited decisions (at 45-49) involve government officials who are not prosecutors and adverse actions that are not threats to prosecute.[8]

[8] *See Nazario*, 103 F.4th at 237 (adverse action where police officer threatened to arrest plaintiff if he complained about the officer's behavior); *Turner*, 65 F.4th at 580 ("likely" adverse action where sheriff threatened to arrest plaintiff or reassign him to teleserve); *Hill*, 630 F.3d at 472-74 (adverse action where inmate alleged that prison staff threatened to transfer him to a "more restrictive living environment with fewer privileges"); *Fritz*, 592 F.3d at 726-29 (adverse action where plaintiff alleged that township and township supervisor threatened her livelihood through conversations with her employer and denial of her requested zoning variances); *Hornbeak-Denton*, 361 F. App'x at 689 (no adverse action where officers of a state agency and a state commission threatened to institute legal proceedings against plaintiffs); *Pasley*, 345 F. App'x at 985 (holding, in review of complaint dismissed on screening,

Faced with no precedent that clearly establishes that a threat of prosecution constitutes an adverse action, Plaintiffs switch gears. Plaintiffs argue that *Bantam Books* "made clear that the use of threats of invoking legal sanctions and other means of coercion, persuasion, and intimidation intended to stifle protected speech constitutes a prior restraint." Plaintiffs-Br. 49-50 (cleaned up) (quotation omitted). And Plaintiffs argue that this Court has read *Bantam Books* the same way. *Id.* at 50 (citing *Novak I*, 932 F.3d at 433).

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that prison official's threats to transfer inmate "*could* constitute 'adverse action'" (emphasis added)); *Smith v. Yarrow*, 78 F. App'x 529, 543 (6th Cir. 2003) (allegation that prison official threatened to change drug results would satisfy adverse action requirement, but plaintiff provided insufficient evidence of threat); *id.* (no adverse action where prison official threatened to move plaintiff to another prison does not constitute adverse action); *Thaddeus-X*, 175 F.3d at 398 (adverse action where inmate alleged "[h]arrassment, physical threats, and transfer" to a dangerous area of the prison by prison officers); *Beck*, 2014 WL 1207353, at *5 (adverse action where director of public safety threatened plaintiff with arrest and incarceration, but no causal connection where threats stemmed from fact that plaintiff's proposed conduct would violate protective order); *id.* at *6 (no adverse action where detective admonished plaintiff that additional communication with a potential witness may subject her to charges of witness tampering); *Kinross Charter Twp.*, 2007 WL 4284861, at *12 (adverse action where government worker planted drug box in plaintiff's car); *id.* at *13 (adverse action where Township issued plaintiff a formal reprimand and suspended him).

As a preliminary matter, whatever *Bantam Books* and *Novak I* clearly established with respect to *prior restraints*, they established nothing with respect to what constitutes an *adverse action* for purposes of a retaliation claim. This distinction is not merely one of "nomenclature." Plaintiffs-Br. 52. This Court and the Supreme Court have been clear that courts are "not [to] 'blur the line separating prior restraints from subsequent punishments' for speech." *Novak I*, 932 F.3d at 432 (quoting *Alexander*, 509 U.S. at 554); *accord Vullo*, 602 U.S. at 201 (Jackson, J., concurring) ("[D]etermining whether government action violates the First Amendment requires application of different doctrines that vary depending on the circumstances."). At minimum, nothing in Plaintiffs' cited cases would have put General Desmond on notice that threatening criminal prosecution for *future* speech constituted an unconstitutional adverse action against Plaintiffs' *past* speech. No case supports Plaintiffs' attempt to blend a retaliation and a prior restraint claim.

Even apart from that fundamental flaw in Plaintiffs' arguments, *Bantam Books* did not clearly establish that "the threat of invoking legal sanctions" alone constitutes a prior restraint. *See Vullo*, 602 U.S. at 200

(Jackson, J., concurring) (quotation omitted); *see id.* at 201 (Jackson, J., concurring) (*Bantam Books* "does *not* hold that government coercion alone violates the First Amendment"). On the contrary, as this Court explained, *Bantam Books* holds only that "a threat of prosecution *can* trigger a prior restraint" when "the facts in th[e] case are close enough" to the facts in *Bantam Books*. *Novak I*, 932 F.3d at 433 (emphasis added). Indeed, that is why the Second Circuit on remand in *Vullo* granted the defendants qualified immunity even though the Supreme Court held their conduct violated *Bantam Books*'s prohibition on coercing a private party to suppress another's speech. *See Vullo*, 144 F.4th at 391-95.

And looking at *Bantam Books* with the required "high degree of specificity," *Wesby*, 583 U.S. at 63 (cleaned up), it looks nothing like this case. The facts in *Bantam Books* were "extreme." *Novak I*, 932 F.3d at 433. Rhode Island created a commission—the Rhode Island Commission to Encourage Morality in Youth—that sent at least 35 notices to the distributor of the plaintiffs' books saying that certain books were too objectionable to sell, thanking or soliciting the distributor for his "cooperation," and reminding him that violators may be referred to the Attorney General for prosecution. *Bantam Books*, 372 U.S. at 59-61. And

the notices were followed by a visit from a police officer asking what action the distributor had taken. *Id.* at 63. The Court held that the Commission's actions amounted to "a form of effective regulation superimposed upon the State's criminal regulation of obscenity." *Id.* at 69. This bears no resemblance to the singular letter General Desmond sent.

Nor did *Novak I* clearly establish that General Desmond's conduct was unlawful. Plaintiffs suggest *Novak I* held that a "threat[] to arrest an everyday person who created a social media page mocking law enforcement" constituted a prior restraint under *Bantam Books* and argue that it is thus clearly established that "public officials engage in retaliation when they send threatening and coercive letters." Plaintiffs-Br. 50. But *Novak I* did not establish that rule, nor did it hold any particular conduct unconstitutional. *Novak I* held only that a "threat of prosecution *can* trigger a prior restraint" and remanded for the district court to determine "in the first instance" "whether the facts in th[e] case [were] close enough" to *Bantam Books*. 932 F.3d at 433 (emphasis added). And when the case came back to this Court, it rejected the argument that the announcement of a criminal investigation into the

plaintiff's parody social media page rose to the level of a threat of criminal prosecution, let alone one that could constitute a prior restraint. *Novak v. City of Parma*, 33 F.4th 296, 308 (6th Cir. 2022) (*Novak II*).

Plaintiffs' out-of-circuit decisions fare no better. *See* Plaintiffs-Br. at 50-51. For one, they cannot clearly establish anything in this Circuit. *Bell*, 37 F.4th at 368. For two, none held that threats of criminal prosecution by a prosecutor constituted unlawful retaliation, let alone in circumstances where a reasonable official might have thought there would be probable cause for a prosecution. *Supra* 54-55 & n.3.[9]

3. Plaintiffs request that if this Court determines it was not clearly established that General Desmond's conduct constituted an adverse action, it should nevertheless establish that now. Plaintiffs-Br. 52. A holding that General Desmond's conduct did not violate clearly established law would render that constitutional holding unnecessary. *See Pearson*, 555 U.S. at 236. But if the Court decides to reach it, as

[9] *Culinary Workers Union, Loc. 226 v. Del Papa*, 200 F.3d 614 (9th Cir. 1999) (per curiam), held that a threat of criminal enforcement by a prosecutor sufficed for pre-enforcement standing to challenge the constitutionality of a statute. *Id.* at 616, 618-19. It did not address adverse actions or the merits of a First Amendment retaliation claim.

already explained, General Desmond did not violate the Plaintiffs' First Amendment rights. *Supra* 37-53.

* * *

In sum, Plaintiffs' retaliation claim fails multiple times over. Plaintiffs failed to allege an adverse action. They failed to establish causation. And they failed to identify any case that holds that General Desmond's particular conduct violated the Constitution—even misreading General Desmond's letter as a threat. Any of these grounds are sufficient to affirm the district court's correct determination that qualified immunity bars Plaintiffs' claim.

CONCLUSION

This Court should affirm.

Dated: April 22, 2026

Respectfully submitted,

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s/ Madeline W. Clark
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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's type-volume limitations because it contains 12,031 words, excluding portions omitted from the Court's required word count.

This brief complies with the Court's typeface requirements because it has been prepared in Microsoft Word using fourteen-point Century Schoolbook font.

s/ Madeline W. Clark
Madeline W. Clark

CERTIFICATE OF SERVICE

On April 22, 2026, I filed an electronic copy of this brief with the Clerk of the Sixth Circuit using the CM/ECF system. That system sends a Notice of Docket Activity to all registered attorneys in this case. Under 6 Cir. R. 25(f)(1)(A), "[t]his constitutes services on them and no other service is necessary."

s/ Madeline W. Clark
Madeline W. Clark

ADDENDUM

DESIGNATION OF COURT DOCUMENTS

Blount Pride, Inc., et al. v. Desmond, et al.,
No. 3:23-cv-00316 (E.D. Tenn.)

Docket Entry No.	Description	Page ID #
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1-3	Exhibit, General Desmond's Notice Regarding the Adult Entertainment Act	98-100
2	Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction	135-159
10	Defendant Desmond's Opposition to Plaintiffs' Motion for a Temporary Restraining Order	182-210
10-2	Exhibit, Legislative Hearing Regarding Tennessee Adult Entertainment Act	214-337
13	Plaintiffs' Reply in Support of Motion for a Temporary Restraining Order and Preliminary Injunction	362-372
22	Memorandum Opinion and Order Granting Plaintiffs' Motion for a Temporary Restraining Order	480-495
35	Stipulation to Preliminary Injunction	518-522
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54	Order for Briefing regarding *Friends of George's*	555-557
57	Plaintiffs' Response to the Court's Briefing Order	585-594
58	Defendant Desmond's Response to Order for Briefing	595-620
64	Plaintiffs' First Amended Complaint	676-692

70	Defendant Desmond's Motion to Dismiss	746-749
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85	Judgment	906
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