

Case No. 25-6072

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BLOUNT PRIDE, INC., *et al.*

Plaintiffs – Appellants,

v.

RYAN DESMOND, *et al.*,

Defendants – Appellees.

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

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III. INTRODUCTION

No reasonable person would disregard a prosecutorial threat from a district attorney about an upcoming event. That is especially true when the district attorney copies on the correspondence every local law enforcement agency, jailer, and municipal official who could carry out the threat, along with the institution hosting the event. Certainly, no reasonable person would discount such a threat when the chief of police reinforces it through calls and in-person visits to the event’s host.

Even so, Appellees Desmond and Crisp insist that their saber-rattling was too trivial to take seriously. But “objectively reasonable people” interested in exercising their First Amendment rights do “not lightly disregard” government officials’ threats—even when those threats are not immediately enforceable or depend on subsequent court action. *First Choice Women’s Res. Ctrs., Inc. v. Davenport*, 146 S. Ct. 1114, 1127 (2026) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963)).

Threats by their very nature carry special potency. Indeed, “[t]he value of a sword of Damocles is that it hangs—not that it drops.” *First Choice*, 146 S. Ct. at 1127 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 231

(1974) (Marshall, J., dissenting)). Nevertheless, Desmond tries to minimize his threats by reimagining his letter as a “benign” update on the status of the Adult Entertainment Act (“AEA”). Desmond’s Br. at 27. But Plaintiffs have sufficiently alleged that Desmond’s letter, *by its own terms*, was an effort, joined by Crisp, to stop drag performances in Blount County—precisely the kind of coercive scheme that *Bantam Books*, 372 U.S. 58, and its progeny forbid.

The district court misconstrued Plaintiffs’ claims and erred by dismissing them at the pleading stage. Thus, rather than defend the district court’s reasoning, Desmond offers a new slate of arguments never adopted (or, in some cases, even raised) below. But those arguments lack merit and need not be considered in the first instance here. Furthermore, the standard that governs motions to dismiss precludes them. *See DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).

This Court should reverse.

IV. ARGUMENT

A. THIS COURT SHOULD REVERSE AND REMAND, RATHER THAN CONSIDERING DESMOND’S ALTERNATIVE ARGUMENTS IN THE FIRST INSTANCE.

Only Crisp defends the district court’s reasoning below. *See* Crisp’s

Br. at 26–28 (asserting that “[t]he Plaintiffs lack standing to mount either a direct or indirect challenge to the validity of the AEA.”). But the district court materially mischaracterized the relief the Plaintiffs’ Amended Complaint sought—the Plaintiffs’ Amended Complaint did not challenge the AEA’s validity—and the Plaintiffs’ actual claim for injunctive relief was meritorious. *See* Appellants’ Principal Br. at 33–45. Thus, in an effort to salvage dismissal, Desmond seeks affirmance on other grounds and asks this Court to address his arguments “in the first instance.” Desmond’s Br. at 35; *see also id.* at 35–63 (presenting arguments for dismissal the district court did not consider).

This Court should decline Desmond’s request. The district court never adjudicated the central issues in controversy here. And “[b]ecause this is ‘a court of review, not of first view,’” the proper approach is to “remand the case to the district court to resolve these issues in the first instance[,]” including when “standing[]” is one of the “alternative grounds” on which an appellee urges affirmance. *VanderKodde v. Mary Jane M. Elliott, P.C.*, 951 F.3d 397, 404 (6th Cir. 2020) (cleaned up). Thus, this Court should reverse the district court’s judgment dismissing the Plaintiffs’ Complaint and remand to consider, in the first instance,

the Appellees' alternative arguments for dismissal.

B. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF.

1. Plaintiffs still face a real and immediate threat from Desmond and Crisp.

Should this Court reach Desmond's alternative arguments for affirmance, those arguments fail. Desmond and Crisp pose a real and immediate threat to Plaintiffs' exercise of their First Amendment rights—and they certainly posed one when Plaintiffs filed their Complaint. *See Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 524 (6th Cir. 2001) (plaintiffs have standing to seek injunctive relief where unlawful conduct was occurring when complaint was filed) (collecting cases). The challenged behavior also has continued throughout this case—and this Court has recently granted injunctions under circumstances far less dangerous than those presented here. *See Boddy v. Grech*, No. 25-3490, 2026 WL 1678609, at *8 (6th Cir. June 10, 2026) (reversing denial of injunction concerning speaker even though the district court had found that “no Board member, nor anyone associated with the Board, ha[d] indicated to her that she cannot speak at the next Board meeting[.]” *see Boddy v. Grech*, No. 3:24-CV-327, 2025 WL 1615761, at *9 (S.D. Ohio June 6, 2025), *rev'd and remanded*, No. 25-

3490)). Desmond and Crisp therefore should be permanently enjoined “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.”¹

Time alone has not eliminated this threat. Desmond remains District Attorney, and Crisp remains Chief of Police. Plaintiffs also will continue to host and perform drag where Desmond and Crisp have the legal authority to arrest and prosecute them.

Desmond’s letter also was not a one-off event. He described it as his office’s “prosecutorial position on the issues at hand.”² And while this Court later clarified the scope of the AEA, Desmond has never rescinded his “prosecutorial position[,]” he has never filed an affidavit attesting that he has changed his mind about it, and he has never sent a letter to its many recipients disclaiming it. Nor has he disclaimed it during the course of this case; instead, he has maintained at every opportunity that he did nothing wrong. *Cf. Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95

¹ Amend. Compl., R. 64, PageID #688.

² Letter, R. 1-3, PageID #98.

F.4th 1019, 1027 (6th Cir. 2024) (lack of disavowal increases credibility of a threat of prosecution). “[N]o more is required under this Court’s precedents[]” for the Plaintiffs to demonstrate standing. *Chiles v. Salazar*, 146 S. Ct. 1010, 1019 n* (2026).

Nor was Desmond’s conduct limited to the AEA. To the contrary, his letter stated that he first sought legal grounds to stop the event through methods *other than* the AEA.³ Thus—at Plaintiffs’ urging—when the district court initially enjoined Desmond and Crisp, it barred them not only from enforcing the AEA against Plaintiffs, but from “interfering” with Blount Pride’s event altogether.⁴

Given this context, this Court’s later clarification of the AEA’s scope does little to prevent Desmond from continuing to interfere illicitly with Plaintiffs’ protected expression. Nothing prevents Desmond from sending a similar threat letter citing a different statute or from taking a less direct approach the next time Blount Pride advertises or hosts drag performances in his jurisdiction. Thus, the issue here is not the AEA: it is that Desmond’s hostility to Plaintiffs’ protected expression motivates

³ *Id.* at PageID #99.

⁴ Mem. Op., R. 22, PageID #494.

his interference.⁵

Crisp is no different. He repeatedly threatened the host site and initially refused to provide security for the event *even when a temporary restraining order enjoining him from interfering with Blount Pride's event was in effect*.⁶ Maryville College has refused to host Blount Pride ever since.⁷ And like Desmond, Crisp has never disavowed his conduct. To the contrary, both Parties continue to defend their behavior here while opposing an injunction prohibiting the conduct about which the Plaintiffs have complained. Desmond's Br. at 28–47; Crisp's Br. at 23–36.

Understandably, Plaintiffs have self-censored due to the ongoing threat Desmond and Crisp pose. *Cf. Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (“self-censorship” is “a harm that can be realized even without an actual prosecution[]”). They also have been harmed by it. In 2024, Maryville College refused to host Blount Pride—citing safety concerns and exorbitant security expenses resulting from Desmond and Crisp's prior conduct.⁸ Plaintiffs thus were forced to scale

⁵ Amend. Compl., R. 64, PageID #688.

⁶ *Id.* at PageID #685.

⁷ *Id.* at PageID #686.

⁸ *Id.* at PageID #686.

back to a much smaller rally in Maryville.⁹ In 2025, Plaintiffs self-censored by holding some events outside Maryville.¹⁰ Even there, Desmond’s ongoing threats reached them.¹¹

Desmond insists there are “no allegations—none—detailing any action General Desmond plans to take against them in the future.” Desmond’s Br. at 31. But that overstates Plaintiffs’ burden. The question here is not whether Desmond has issued a fresh threat (although Plaintiffs have alleged he has¹²)—it is whether “there is a sufficient likelihood that [Plaintiffs] will again be wronged in a similar way[.]” *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); see also *Sullivan v. Benningfield*, 920 F.3d 401, 408–09 (6th Cir. 2019) (plaintiffs who experience “[p]ast exposure to illegal conduct” could pursue injunctive relief where their injuries had “continuing, present adverse effects’ at the time they filed their complaint.”) (collecting cases). Plaintiffs have

⁹ *Id.*

¹⁰ Second Decl. of S. Bryant, R. 81-1, PageID #872.

¹¹ Plaintiffs allege an Alcoa police lieutenant informed Blount Pride’s President that Desmond “had told him that ‘the 6th Circuit Court had upheld the Adult Entertainment Act,’ and ‘burlesque outfits and things like that’ are against the law.” *Id.* at PageID ##872–73. Desmond disputes this. See Resp., R. 82, PageID #877.

¹² *Id.*

alleged facts demonstrating there is.

2. **Desmond’s standing argument—which differs from what the district court ruled—is an unsupported mootness claim.**

What Desmond is really arguing when he says Plaintiffs lack standing is that their claim for injunctive relief is *moot*. “The doctrine of standing generally assesses whether [a constitutionally adequate] interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings.” *Uzuegbunam v. Preczewski*, 592 U.S. 279, 282 (2021). Thus, “[s]tanding and mootness, albeit related, are distinct doctrines with separate tests to evaluate their existence at different times of the litigation.” *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 559 (6th Cir. 2021). Put another way: “[S]tanding applies at the sound of the starting gun, and mootness picks up the baton from there.” *Sumpter v. Wayne Cnty.*, 868 F.3d 473, 490 (6th Cir. 2017).

In urging affirmance, Desmond insists that Plaintiffs lack standing because “whether Plaintiffs *were* the specific object of General Desmond’s *past* actions is irrelevant to whether General Desmond will injure them in the future.” Desmond’s Br. at 33. Desmond also claims—or, more

accurately, his *counsel* claims, because Desmond has said nothing about it himself—that “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*.” *Id.* at 34. He also claims for the first time here that he is entitled to a “presumption of regularity” that he believes should overcome the Plaintiffs’ fact-based, well-pleaded allegations that he will continue to “violate the law to target Plaintiffs” in the future. *Id.* (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

These are not standing arguments. Instead, they are *mootness* arguments. Desmond insists that, whatever his past misbehavior, Plaintiffs cannot reasonably expect it to continue in the future. More than that, although dressed up as a standing defense, the argument is a *voluntary cessation* claim: Desmond suggests that, based on this Court’s intervening guidance in *Friends of George’s*, his earlier “misunderstanding” has now been clarified, and he cannot reasonably be expected to continue his misbehavior going forward. *Id.*

The record does not support Desmond’s mootness defense. “Defendants bear a ‘heavy’ burden to demonstrate mootness in the

context of voluntary cessation.” *Benningfield*, 920 F.3d at 410 (quoting *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003)). And “[a] defendant’s voluntary cessation of a challenged practice moots a case only in the ‘rare instance’ where ‘subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and ‘interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.’” *Id.* (citations omitted). Further, while “cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties[,]” *id.* (citation omitted), that standard requires a misbehaving official to demonstrate—with evidence—that their illegal conduct *has actually ceased*.

Here, as stated above, Desmond has not done that—or even attempted to. He claims there was nothing wrong with his past conduct, and he asks this Court to bless its legality. *See* Desmond’s Br. at 64–73. More than that, Desmond himself has never presented evidence—by way of a declaration, a new office policy, or anything else—that, based on clarification provided by *Friends of George’s*, he no longer intends to threaten the Plaintiffs over drag performances. Instead, Desmond’s

counsel alone has supplied a pure litigation position—without accompanying evidence—while asserting in the same Brief that Desmond can repeat his threatening conduct without consequence. *See id.*

At least three defects preclude this theory.

First, Desmond’s argument falls well short of disavowal. Desmond says there is nothing wrong with repeating his conduct, which he insists the First Amendment allowed. *Id.* at 72–73. This is insufficient to procure mootness. As the Supreme Court has explained, a “defendant seeking to moot a case by abandoning his injurious conduct carries a ‘heavy burden[,]’” and he “‘must prove no reasonable expectation remains that [he] will return to [his] old ways.’” *First Choice*, 146 S. Ct. at 1130 (cleaned up). And here, because Desmond continues to defend his conduct and has offered no *evidence* that he will not repeat it, “[t]hat is a standard [Desmond] cannot meet.” *See id.* Thus, Desmond has not met his heavy burden of making it “absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur[.]” *Benningfield*, 920 F.3d at 410 (cleaned up).

Second, if it can be characterized as a disavowal at all, Desmond’s disavowal is no more than a litigation position—and an alternative one,

at that—supplied by his counsel alone. But this Court recently clarified that a disavowal must come “in a non-litigation context” and that “the government’s disavowal must be more than a mere litigation position.” *Yoder v. Bowen*, 146 F.4th 516, 525 (6th Cir. 2025) (quoting *Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010)).

Third, Desmond’s counsel cannot bind him. See *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1106 (6th Cir. 1995) (“[W]e know of nothing that *requires* us to accept representations from the City’s counsel under the circumstances presented here. To begin with, it is not at all clear what representations we received, if any. Second, it is not clear that counsel can bind either the legislative body of the City or its police department.”). And nothing requires this Court to accept manufactured claims from counsel anyway. See *id.* That holds especially true for a prosecutor, who “may change his mind about the meaning of the statute[]” (or “may be replaced in office”). *Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990).

At most, counsel offers a litigation position unsupported by evidence. But that is not enough to establish mootness. So Desmond’s implied voluntary cessation claim fails.

3. Plaintiffs’ interference claim is not judicially estopped.

This Court need not reach Desmond’s judicial estoppel argument. Desmond briefed this claim before the district court; the district court did not credit it; and this Court should not consider it in the first instance.¹³ See *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 554 (6th Cir. 1998) (declining to decide collateral estoppel issue not first decided in the district court). Thus, at most, remand would be proper. See *Freed v. Thomas*, 976 F.3d 729, 741 (6th Cir. 2020); see also *supra*, at Section IA.

In any event, estoppel does not apply. Judicial estoppel prevents a party from using one theory to win and then unfairly using a clearly inconsistent theory to win again elsewhere. *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001). None of these prerequisites—inconsistent arguments, judicial acceptance, or unfair advantage—is satisfied here.

Prior Position. Plaintiffs’ positions are not inconsistent—much less *clearly* inconsistent. See *Mackey v. Rising*, 106 F.4th 552, 567 (6th Cir. 2024) (rejecting judicial estoppel where the party had “arguably reconciled” its positions, which “lacked any ‘inconsistency,’ let alone a

¹³ Mot. to Dismiss, R. 71, PageID ##766–67; Mem. Op., R. 84, PageID ##887–905.

‘clear inconsistency’). In challenging the AEA’s application to them and the credible threat of enforcement arising from it, the Plaintiffs and the district court simply took Desmond and Crisp at “[their] word,” finding that “*at least in District Attorney Desmond’s view*,”¹⁴ Plaintiffs’ planned performances could violate the AEA. See *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14 (2024) (Kavanaugh, J., dissenting from certiorari denial).

In fact, at the time, Desmond faulted Plaintiffs for *not alleging* that the AEA reached their conduct, insisting they “did not even try” to claim their performances lacked value for minors.¹⁵ He was right: Unlike the plaintiffs in *Friends of George’s*, the Plaintiffs here never argued that their performances were sexual or indecent. *Contra Friends of George’s, Inc. v. Mulroy*, 108 F.4th 431, 437 (6th Cir. 2024) (“FOG presented videos [that] show FOG performers talking about masturbation, simulating sex acts behind a curtain, and engaging in phallic humor.”). Plaintiffs argued

¹⁴ Mem. Op., R. 22, PageID #488 (emphasis added).

¹⁵ Resp. in Opp. to TRO, R. 10, PageID #191. See also Mem. Op., R. 22, PageID #486 (“According to District Attorney Desmond, Plaintiffs fail to meet [the standing] requirement because **they have not alleged** an intention to stage performances that are harmful to minors under the Act”) (emphasis added).

the opposite: that their “marketing’ materials **did not state any intention to violate the law**, and yet based on his review of those materials, [Desmond] has threatened to prosecute them.”¹⁶

In sum, despite the First Amendment-protected nature of the Plaintiffs’ expression, the AEA “arguably” applied to the Plaintiffs only *because Desmond and Crisp said it did*.¹⁷ This is no different from what Plaintiffs plead now, the only difference being that this Court has since held that Desmond and Crisp misinterpreted the AEA. *See id. at 436* (limiting AEA to performances that lack any “serious literary, artistic, political, or scientific value for a reasonable 17-year-old”).

Judicial Acceptance. The district court did not adopt Plaintiffs’ supposed prior position. *See Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990) (finding judicial estoppel requires judicial acceptance of the earlier position). In granting the temporary restraining order, the district court found that Plaintiffs sufficiently alleged an intent

¹⁶ TRO Reply, R. 13, at PageID #364 (emphasis added). Likewise, in their original complaint, Plaintiffs argued that it was unclear whether the AEA applied because “Blount Pride’s social media posts contain no sexual, obscene, or indecent content, yet under Defendant Desmond’s reading of the Act, the promotional posts give him reason to believe Plaintiffs may intend to violate the law.” Compl., R. 1, PageID #22.

¹⁷ Letter, R. 1-3, PageID ##98–100.

to perform in a way that—“*at least in District Attorney Desmond’s view*”¹⁸—was likely to violate the AEA. Like Plaintiffs, the district court merely took a prosecutor at his word. And if Plaintiffs’ position on the AEA’s scope could be understood differently, this Court *disagreed* with it. *Friends of George’s*, 108 F.4th at 436–39.

Unfairness. Finally, there is no risk of “inconsistent court determinations” or unfair advantage here. See *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010). Plaintiffs have maintained a consistent factual position throughout: They engaged in lawful, protected expression and were wrongly threatened with criminal prosecution for it. And having refused to “lightly disregard” government threats, Plaintiffs cannot now be faulted for pursuing their remaining claims in light of this Court’s clarification of the law. See *First Choice*, 146 S. Ct. at 1127 (“[o]bjectively reasonable people” do “not ‘lightly disregard’” official threats whether the “penalties were immediately enforceable or depended on subsequent court action”) (quoting *Bantam Books*, 372 U.S. at 68).

Putting these issues aside, judicial estoppel—an equitable

¹⁸ Mem. Op., R. 22, PageID #488 (emphasis added).

doctrine—should not be used to corner Plaintiffs into maintaining untenable legal positions this Court has rejected. After this Court clarified the scope of the AEA, *Friends of George’s, Inc.*, 108 F.4th at 436, Plaintiffs amended their complaint to remove constitutional challenges to the statute.¹⁹ That is not gamesmanship; it is what litigants are expected to do when controlling law changes. *Law Office of John H. Eggertsen, P.C. v. C.I.R.*, 800 F.3d 758, 766 (6th Cir. 2015) (“Judicial estoppel does not usually apply to shifting legal arguments[.]”); *cf. Teledyne*, 911 F.2d at 1217–18 (suggesting a party is not bound to an unsuccessful argument not adopted by the court).

Desmond relies on *Edwards v. Aetna Life Insurance Co.* to argue even a fleeting win locks Plaintiffs into a legal theory. Desmond’s Br. at 45 (citing *Edwards*, 690 F.2d at 599 n.5). But “[t]he court in *Edwards* could not have meant a party must stand by a position taken and accepted in a lower court that was found to be clearly erroneous by a higher court.” *In re Taylor*, 72 B.R. 696, 699 (Bankr. E.D. Tenn. 1987). The same situation exists here. Thus, judicial estoppel does not apply.

¹⁹ Amend. Compl., R. 64, PageID ##676–92.

4. **Plaintiffs’ interference claim states a First Amendment violation.**

Desmond separately contends that *Bantam Books* and *Vullo* supply the wrong legal test because those cases involved coercion of third parties rather than threats made directly to a plaintiff. Desmond’s Br. at 38. But the argument defeats itself. Desmond did not send his letter to Plaintiffs alone—he sent it to Maryville College, the venue hosting Plaintiffs’ expression, and to every local official with power to arrest Plaintiffs and shut down the event.²⁰ Crisp then personally warned Maryville College’s president that College officials could face prosecution if the event proceeded.²¹ Coercing the “conduit” through which a speaker expresses herself is precisely what *Bantam* condemns. See *N.R.A. v. Vullo*, 602 U.S. at 201–02 (2024) (Jackson, J., concurring) (describing that paradigm as government coercion of “a distributor, purveyor, or conduit of expression”). And the governing test—whether the alleged 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[]”—is the same “no matter the permutation” of who is coerced.

²⁰ Letter, R. 1-3, PageID ##98–100.

²¹ Amend. Compl., R. 64, PageID #684.

N.R.A. v. Vullo, 144 F.4th 376, 385 (2d Cir. 2025) (quoting *Vullo*, 602 U.S. at 191), *cert. denied*, 224 L. Ed. 2d 5 (Feb. 23, 2026). In any case, why should Desmond be permitted to do directly what he is forbidden to do indirectly?

Desmond’s complaint that Plaintiffs seek an unnecessary injunction that inappropriately interferes with the administration of Tennessee’s criminal laws fares no better. Desmond’s Br. at 39–41. Plaintiffs’ requested injunction is tethered to specific unconstitutional conduct: threatening, because of Plaintiffs’ protected expression, Plaintiffs and those who host or contract with them.²² Such relief is neither novel nor abstract: “[T]hreats of prosecution . . . on the part of chiefs of police or prosecutors[] have been enjoined in a number of cases.” *Bantam Books*, 372 U.S. at 67 n.8. Plaintiffs’ Amended Complaint adequately alleges the need for such an injunction—and an injunction against unconstitutional threats leaves the AEA fully enforceable against whatever conduct it actually proscribes. What the Defendants cannot do, however, “is use the power of the State to punish or suppress disfavored expression.” *Vullo*, 602 U.S. at 188. Plaintiffs are entitled to an injunction

²² *Id.* at PageID #688.

as a result. *Cf. Boddy*, 2026 WL 1678609, at *8 (granting injunction because official threatened to cut a speaker’s microphone and then did so).

5. Plaintiffs’ injuries are traceable to Crisp, and relief against him is not speculative.

Crisp’s arguments also lack merit. He insists that Plaintiffs’ injuries are not fairly traceable to him because he was “only a recipient of” Desmond’s letter. Crisp’s Br. at 31. But that is not what Plaintiffs’ Amended Complaint alleges.²³ And Maryville College has refused to host Blount Pride ever since Crisp warned Maryville’s president that Maryville College officials could face prosecution if Blount Pride’s event went forward as planned.²⁴

Crisp also claims that relief against him is “entirely chimerical” because Plaintiffs’ future events may occur outside Maryville. Crisp’s Br. at 35. But he concedes Blount Pride scheduled an event featuring Flamy Grant “within Chief Crisp’s jurisdiction on August 17, 2025.” *Id.* (citing First Decl. of S. Bryant, R. 80-1, Page ID #866). And Plaintiffs’ relocation of their events is not a reason to deny them relief—it is the injury.

²³ *Id.* at PageID ##684–85.

²⁴ *Id.* at PageID #686.

Plaintiffs moved and scaled back their events *because of* Defendants’ threats and Maryville College’s resulting refusal to host them.²⁵

Finally, Crisp repeats the district court’s characterization of Plaintiffs’ claims as seeking “a functional declaration that the AEA is unconstitutional.” Crisp’s Br. at 21. As they have made clear repeatedly, though, Plaintiffs seek nothing of the kind. Plaintiffs’ Amended Complaint accepts *Friends of George’s* construction of the AEA and challenges Defendants’ *conduct* alone: threatening criminal enforcement against First Amendment-protected expression that the AEA does not even reach. *See* Appellants’ Principal Br. at 33–45.

C. DESMOND IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE PLAINTIFFS STATE A CLAIM FOR RETALIATION AND DESMOND’S CONDUCT VIOLATED CLEARLY ESTABLISHED LAW.

1. Plaintiffs adequately pleaded a First Amendment retaliation claim.

In response to Blount Pride advertising a non-obscene drag performance by Flamy Grant, Desmond issued a targeted letter—sent to the event’s host and every local official with power to make arrests and shut down the event—announcing that he “can and will” prosecute

²⁵ *Id.*

violations of the AEA.²⁶ That enforcement threat would deter a person of ordinary firmness from speaking. See *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999). And because *Bantam* clearly established decades ago that such behavior violates the First Amendment, 372 U.S. at 68, Desmond is not entitled to qualified immunity.

Desmond argues his letter was not an adverse action and was not causally connected to Plaintiffs' protected expression. Desmond's Br. at 53–63. In so doing, he asks this Court to ignore his own letter's contents and resolve every inference in his favor. But the controlling standard requires the opposite. See *Treesh*, 487 F.3d at 476.

Protected conduct. Desmond concedes Plaintiffs engaged in protected conduct when they advertised their planned event. Desmond's Br. at 51.

Adverse action. Desmond's letter was an adverse action that was “capable of deterring a person of ordinary firmness from engaging in protected conduct[,]” and “this element is not an overly difficult one for the plaintiff to meet[.]” *Hill v. Lappin*, 630 F.3d 468, 474 (6th Cir. 2010). Imagine being the board member of a small non-profit, busily planning

²⁶ Letter, R. 1-3, PageID ##98–100.

your annual, family-friendly event when you receive Desmond’s letter. It is addressed not just to you—Blount Pride’s event organizer—but to the Blount County mayor and sheriff, Maryville city manager and police chief (Crisp), Alcoa city manager and police chief, and the president and directors of events of Maryville College.²⁷ It identifies your organization by name, your event by its date, your advertisements, and asserts that, based on your marketing materials, your event may violate “criminal statutes” that Desmond and the other addressees enforce.²⁸ It declares that Desmond “can and will” prosecute violations of the cited law.²⁹ Most alarmingly, it states that Desmond tried to find a way to stop your event before it happened but had to settle for a criminal enforcement mechanism.³⁰

No reasonable recipient could have understood that letter as a neutral legal update. It was not. Instead, it was a targeted prosecutorial threat that was intended to be perceived that way and was.

“[T]here are no doubt stand-alone threats that would deter a person

²⁷ *Id.* at PageID #98.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at PageID #99.

of ordinary firmness from exercising their protected rights.” *Hornbeak-Denton v. Myers*, 361 F. App’x 684, 689 (6th Cir. 2010); *see also Pasley v. Conerly*, 345 F. App’x 981, 985 (6th Cir. 2009) (“[A] mere threat is actionable if it otherwise meets the standard that it would deter a person of ordinary firmness from engaging in a protected activity.”) (citing *Smith v. Yarrow*, 78 F. App’x 529, 543 (6th Cir. 2003)). This was such a threat, especially because Crisp personally reinforced it.

Desmond argues his letter was not sufficiently adverse because it does not say he was certainly going to prosecute Plaintiffs and did not impose any immediate consequences. Desmond’s Br. at 66. But a threat of criminal prosecution can be sufficiently adverse even when the person making it does not have the power to prosecute. *See Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764 (6th Cir. 2019) (citing *Bantam Books*, 372 U.S. at 68). And “the ability to immediately carry out a threat is not required.” *MacIntosh v. Clous*, 69 F.4th 309, 317 (6th Cir. 2023); *cf. First Choice*, 146 S. Ct. at 1127.

“[E]ven acts that are normally permissible can be ‘adverse’ when they deter speech and the persons acting intended to intimidate their target.” *MacIntosh*, 69 F.4th at 318. For example, just the *possibility* of

referring student misconduct to an entity that could criminally prosecute is sufficient. *Speech First*, 939 F.3d at 765. Displaying a gun on camera during a virtual meeting is sufficient. *MacIntosh*, 69 F.4th at 318. Phone calls to an employer complaining about an employee’s conduct at a public meeting are sufficient, too. *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 724 (6th Cir. 2010).

Desmond complains that sufficiently adverse threats must be “credible” and “specific.” Desmond’s Br. at 54 (quoting *Hernden v. Chippewa Valley Sch. Dist.*, No. 24-1842, 2025 WL 2652993, at *6–7 (6th Cir. Sept. 26, 2025)). But a prosecutor saying he “can and will” prosecute *is* credible—much more credible than a school administrator’s threat that a coach “would never coach football again anywhere” followed by assurances that there would be “no detrimental effect” on the coach’s job. *Sensabaugh v. Halliburton*, 937 F.3d 621, 629 n.2 (6th Cir. 2019). Furthermore, a prosecutor identifying the exact law he will enforce against identified people, on a certain date, at an identified event, is *specific*—much more specific than a prison official’s threat to make a prisoner’s “life a living hell.” *Hardy v. Adams*, No. 16-2055, 2018 WL 3559190, at *3 (6th Cir. Apr. 13, 2018).

At base, “nothing justifies ‘harassing people for exercising their constitutional rights,’ so the deterrent effect on speech ‘need not be great’ to be actionable.” *Rudd v. City of Norton Shores*, 977 F.3d 503, 514 (6th Cir. 2020) (quoting *Thaddeus-X*, 175 F.3d at 397). Plaintiffs have plausibly alleged that Desmond’s letter was “capable of deterring a person of ordinary firmness from exercising” their constitutional rights. *Id.* No more is required.

Causation. This is the “rare[]” case in which “an official’s retaliatory intent” is “supported by direct evidence.” *Bloch v. Ribar*, 156 F.3d 673, 682 (6th Cir. 1998). The letter’s opening sentence explains that Desmond’s office became aware of the event—and acted—because Blount Pride was “marketing itself in a manner which raises concerns that the event may violate certain criminal statutes[.]”³¹ The marketing was protected conduct, and by Desmond’s own account, it is what prompted the letter.

Unable to escape what his own threat letter said, Desmond now argues he was responding to the *marketing* of the drag event, not the drag event itself. Desmond’s Br. at 60. This post-hoc distinction is

³¹ *Id.* at PageID #98.

meaningless. The advertisement was an image of Flamy Grant performing in drag.³² The conduct Desmond threatened was Flamy Grant performing in drag. The disfavored speech is identical in both.

Following Desmond’s logic, because a depiction of drag performance is different from drag performance itself, the advertisements for the event did not cause Desmond to target the event. *Id.* at 62. But even assuming this tortured logic and blatant misreading of his own letter, the First Amendment forbids the government from seeking to stop speech before it happens, too. See *Bantam Books, Inc.*, 372 U.S. at 70. Thus, Desmond’s “defense” just admits a separate, “quintessential” First Amendment violation. See *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) (“Threatening penalties for future speech goes by the name ‘prior restraint,’ and a prior restraint is the quintessential first-amendment violation.”) (collecting cases).

Nonetheless, by drawing a flimsy distinction between a marketed drag performance and the performance itself, Desmond argues that Plaintiffs have alleged some kind of impossible “future-speech retaliation” paradox. Desmond’s Br. at 62. But Plaintiffs allege ordinary

³² Promotional Posts, R. 1-4, PageID ##101–15.

retaliation. Retaliation *always* looks backward—to what a speaker has already said—and forward to whether the speaker was reasonably deterred from saying more. Desmond cites no authority for his novel rule that a plaintiff must show the expression they were deterred from pursuing matches the medium of the speech that prompted the threat. *Id.* at 60–63. Indeed, Plaintiffs need not show that they were actually deterred from speaking again at all. *Hill*, 630 F.3d at 472 (“*Actual* deterrence need not be shown.”) (citation omitted).

Finally, Desmond misstates Plaintiffs’ causation burden. He argues that, to establish “but-for” causation, Plaintiffs must prove conclusively that Desmond’s action would not “have been taken anyway[,]” implying Plaintiffs must plead away every non-retaliatory explanation for the letter. Desmond’s Br. at 60 (citing *Lemaster v. Lawrence Cnty.*, 65 F.4th 302, 309 (6th Cir. 2023); *Nieves v. Bartlett*, 587 U.S. 391, 398–99 (2019)). This inverts the governing framework. Under this Court’s en banc decision in *Thaddeus-X*, a First Amendment retaliation plaintiff carries the burden only of showing that his protected conduct was “a motivating factor” behind the adverse action; once he does, “the burden of production shifts to the defendant[,]” who prevails only if *he* shows “that he would

have taken the same action in the absence of the protected activity[.]” 175 F.3d at 399 (en banc) (applying *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). Thus, the would-have-done-it-anyway theory Desmond invokes is the *defendant’s* burden, not Plaintiffs’—and it is an evidentiary showing, not a pleading element. *Thaddeus-X* states it directly: a defendant who has “done little more than deny the allegations” has not carried that burden. *Id.* at 399–400.

2. Desmond’s conduct violated clearly established law.

“The law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional, and ‘retaliation claims’ have been asserted in various factual scenarios.” *Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir. 1994) (collecting cases). Officials also “‘can still be on notice that their conduct violates established law even in novel factual circumstances,’ and prior cases need not be ‘fundamentally similar’ to the facts at hand to put defendants on notice.” *MacIntosh*, 69 F.4th at 319 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). Thus, the “salient question” is whether “the state of the law” gave Desmond “fair warning” that his actions were unconstitutional. *Hope*, 536 U.S. at 741.

Desmond had that warning. *Bantam* condemned the same mechanism he used: official notices targeting disfavored speech, invoking prosecutorial authority, and leveraging the threat of enforcement to suppress expression. 372 U.S. at 61–72. Desmond followed the same blueprint. He singled out Plaintiffs’ event, declared that AEA violations “can and will” be prosecuted, and circulated that threat to the event host and every official with power to shut the event down.³³ A decades-old, seminal Supreme Court decision on substantially similar facts is about as clearly established as the law gets. And this Court reaffirmed *Bantam*’s teachings as recently as 2019. See *Novak v. City of Parma*, 932 F.3d 421, 433 (6th Cir. 2019) (*Novak I*).

The qualified immunity holdings Desmond invokes do not help him. See Desmond’s Br. at 70. In *Vullo*, qualified immunity turned on the fact that the coerced third party was not itself engaged in expressive activity. *Vullo*, 144 F.4th at 395. Maryville College, by contrast, was the platform for Plaintiffs’ expressive conduct.

The Second Circuit also took care to explain that, based on *Bantam*, (1) existing law was already clear where coercion is “aimed at expressive

³³ Letter, R. 1-3, at PageID #98.

activity, either through the speaker or some conduit for the speaker[]” or “[t]he conduct sought to stop the speech itself[]”; and (2) the NRA’s claim faltered only because it never alleged that *Vullo* “coerced a convention center into canceling the NRA’s annual meeting.” *Id.* at 392 (quoting *Vullo*, 602 U.S. at 202) (Jackson, J., concurring). This case alleges exactly what *Vullo* lacked. And as to retaliation, the Second Circuit granted immunity only because its precedents “had addressed only instances in which a defendant retaliated *directly against the plaintiff and for the plaintiff’s speech activity*”—which, again, is precisely what Plaintiffs allege Desmond did here. *Id.* at 394–95.

Novak II involved a genuinely difficult question about whether the speech at issue was protected at all. See *Novak v. City of Parma*, 33 F.4th 296, 305 (6th Cir. 2022) (*Novak II*). Here, by contrast, Desmond concedes Plaintiffs’ advertisements are protected expression. Desmond’s Br. at 51. And inarguably, non-obscene drag is protected expression.

This case also is more troubling than *Novak II* in an important respect. Desmond did not test his theory through an arrest, which affords the ordinary safeguards of the criminal process. Cf. *Novak II*, 33 F.4th at 303. He used a threat instead. That was the very “vice” *Bantam*

condemned. See *Bantam*, 372 U.S. at 69–70. Per *Bantam*, notices threatening prosecution “obviate[] the need to employ criminal sanctions[]” while “eliminat[ing] the safeguards of the criminal process.” *Id.* That tactic endangers protected speech in a way that is “markedly greater” than reliance on criminal law itself. *Id.* *Bantam* was decided in 1963. Desmond had fair warning.

V. CONCLUSION

This Court should reverse.

Respectfully submitted,

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VI. CERTIFICATE OF COMPLIANCE

Excluding the parts Federal Rule of Appellate 32(f) exempts, this Brief contains 6,359 words as calculated by Microsoft Word. *See Fed. R. App. P. 32(a)(7)(B).* This Brief has been prepared in proportionally spaced typeface and in 14-point Century Schoolbook font using Microsoft Word. *See Fed. R. App. P. 32(a)(5) & (6).*

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VII. CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2026, a copy of the foregoing was filed electronically through the appellate CM/ECF system and sent via CM/ECF to all parties or parties' counsel.

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VIII. APPENDIX**DESIGNATION OF RELEVANT DOCUMENTS**

Docket Entry No.	Description	PageID #
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2	Plaintiffs' Motion for Temporary Restraining Order	135-59
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13	Plaintiffs' Reply in Support of Motion for Temporary Restraining Order	362-72
22	Memorandum Opinion and Order Granting Temporary Restraining Order	480-95
64	Plaintiffs' First Amended Complaint	676-92
80-1	First Decl. of S. Bryant	864-66
81-1	Second Decl. of S. Bryant	871-74
82	Response to Plaintiffs' Supplement by Desmond	875-83
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