Case No. 25-6072

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

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BLOUNT PRIDE, INC., *et al.*

*Plaintiffs – Appellants*,

v.

RYAN K. DESMOND, *et al.*,

*Defendants – Appellees.*

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

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# APPELLANTS' PRINCIPAL BRIEF

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Date: February 19, 2026

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, the Appellants make the following disclosures:

(1) Is said party a subsidiary or affiliate of a publicly owned corporation? **No.**

(2) Does a publicly owned corporation or its affiliate, not a party to the appeal, have a financial interest in the outcome? **No.**

## STATEMENT REQUESTING ORAL ARGUMENT

The Appellants request oral argument. This case presents important questions about when plaintiffs may enjoin government officials' attempts to suppress or interfere with First Amendment rights and whether threats of criminal enforcement constitute "adverse action" that would deter ordinary citizens from exercising First Amendment rights. The Appellants believe that the Court would benefit from hearing oral argument on these serious issues of public concern.

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## III. STATEMENT OF JURISDICTION

The U.S. District Court for the Eastern District of Tennessee had original jurisdiction over this action under 28 U.S.C. § 1331. Because the Appellants have timely appealed the final judgment of the district court, this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

## IV. INTRODUCTION

When District Attorney Ryan K. Desmond learned that the Plaintiffs were planning to hold a family-friendly drag performance[1] at an upcoming Pride festival, he searched for legal authority to stop it.[2] Unable to find any, he settled for threatening the Plaintiffs days before the festival was scheduled to begin, sending them a letter warning that "violations of the [Adult Entertainment Act] can and will be prosecuted by my office."[3] Desmond then sent a copy of his threat to all local law enforcement officials and to leadership at Maryville College, the host site of the Plaintiffs' event.

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[1] "Drag" refers to musical-dance performances popular within the LGBTQI+ community that involve the donning of make-up, wigs, props, and highly stylized, sometimes stereotypically gendered costumes. Drag is performed by anyone regardless of their identity and does not always involve someone of one gender wearing clothing associated with another gender. For instance, there are people assigned female at birth who dress in stereotypically female clothing and perform drag. The modern LGBTQI+ community is home to multiple styles of, and opinions about, drag. The through-line across these differences is that drag is a freeing, exploratory, sometimes political, sometimes confrontational, artform that celebrates beauty, humor, and non-conformity. *Understanding Drag: As American as Apple Pie*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/understanding-drag#:~:text=A%20Celebration%20of%20Non%2DConformity,a%20much%20older%20cultural%20history (last visited Feb. 19, 2026).

[2] Amend. Compl., R. 64, Page ID ##681–84.

[3] Letter, R. 1-3, Page ID #98.

Armed with Desmond's threat letter, Maryville Chief of Police Tony Crisp made several visits and calls to Maryville College.[4] In doing so, Crisp warned Maryville College leadership that they, too, could be arrested if they allowed Blount Pride to go forward as planned.[5]

Desmond's and Crisp's threats were so credible that the district court granted the Plaintiffs a temporary restraining order based on them.[6] Later, though, the district court dismissed the Plaintiffs' Amended Complaint for failure to state a claim, reasoning that the same threat did not qualify as "adverse action."[7] The district court also dismissed the Plaintiffs' claim for injunctive relief for lack of standing based on its erroneous belief that the Plaintiffs were challenging the constitutionality of the Adult Entertainment Act (AEA), the statute that Desmond used to threaten them.[8]

The district court's analysis is unsupportable. The First Amendment protected the contemplated performance (advertised simply with a picture of Plaintiff Lovegood in drag) regardless of how the AEA

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[4] Amend. Compl., R. 64, Page ID ##683–84.
[5] *Id.*
[6] Order, R. 22, Page ID #494.
[7] Order, R. 84, Page ID ##893–96.
[8] *Id.*

ultimately was interpreted, making any threat of prosecution related to the planned performance improper. Afterward, this Court confirmed the impropriety of the threat involved by holding that the AEA did not even "arguably" apply here.[9]

Desmond's retaliatory conduct has long been clearly prohibited. Decades ago, the Supreme Court established that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around[.]" *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963). This Court, like numerous others, has embraced that prohibition against government threats of legal sanctions, prior restraints, and other forms of coercion to deter speech. *Novak v. City of Parma*, 932 F.3d 421, 433 (6th Cir. 2019) ("Under *Bantam Books*, a threat of prosecution can trigger a prior restraint, even if the threat is non-binding."). Consistent with *Bantam Books*, this Circuit has recognized "there are no doubt stand-alone threats that would deter a person of ordinary firmness from exercising their protected rights." *Hornbeak-Denton v. Myers*, 361 F. App'x 684, 689 (6th Cir. 2010).

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[9] Amend. Compl., R. 64, Page ID #684 (citing *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 436–40 (6th Cir. 2024), *cert. denied*, 145 S. Ct. 1178 (2025)).

Indeed, "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." *Pasley v. Conerly*, 345 F. App'x 981, 985 (6th Cir. 2009) (citing *Smith v. Yarrow,* 78 F. App'x 529, 543 (6th Cir. 2003)); *see also Hill v. Lappin*, 630 F.3d 468, 472 (6th Cir. 2010) ("Even the threat of an adverse action can satisfy [the adverse action] element if the threat is capable of deterring a person of ordinary firmness from engaging in the protected conduct.").

Under this standard, precedent requires this Court only to determine whether Desmond's threat could reasonably be considered more than a "de minimis" harm to Plaintiffs. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999) ("We emphasize that while certain threats or deprivations are so de minimis that they do not rise to the level of being constitutional violations, this threshold is intended to weed out only inconsequential actions."). "[U]ndoubtedly[,]" the answer is yes: "[T]hreats of arrest and incarceration would undoubtedly be sufficient to deter a person of ordinary firmness from persisting in protected conduct." *Beck v. City of Plainwell*, No. 1:11-CV-735, 2014 WL 1207353, at *5 (W.D. Mich. Mar. 24, 2014); *see also, e.g.*, *Kinross Charter Twp. v. Osborn*, No.

2:06-CV-245, 2007 WL 4284861, at *12 (W.D. Mich. Dec. 3, 2007) ("The threat of facing unwarranted criminal charges would deter a person of ordinary firmness from engaging in future protected conduct."). Indeed, as other courts of appeals have observed, "[t]he threat of arrest is the *quintessential* retaliatory conduct that would deter a person of ordinary firmness from exercising First Amendment rights." *Turner v. Williams*, 65 F.4th 564, 580 (11th Cir. 2023) (emphasis added); *see also Nazario v. Gutierrez*, 103 F.4th 213, 237 (4th Cir. 2024) ("The threat of an arrest is 'likely [to] deter a person of ordinary firmness from the exercise of First Amendment rights.'" (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) (internal quotation marks omitted))). And "[t]he standard is reduced even more in this case because of the plaintiff before the court—an ordinary citizen." *Rudd v. City of Norton Shores*, 977 F.3d 503, 514–15 (6th Cir. 2020).

For these reasons, the district court erred by granting Desmond qualified immunity. The district court also erred by dismissing the Plaintiffs' claims for injunctive relief for lack of standing, given that the district court materially mischaracterized the nature of that claim and failed to address the relief the Plaintiffs actually demanded: to

"permanently enjoin the 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."[10] Thus, the district court's judgment should be **REVERSED.**

[10] *Id.* at Page ID #690.

## V. STATEMENT OF THE ISSUES

1. Whether the district court erred by holding that (1) the Plaintiffs lack standing to pursue injunctive relief; (2) the Plaintiffs lack standing to bring § 1983 claims; and (3) the "[P]laintiffs' First Amended Complaint seeks a 'functional' declaration that the AEA is unconstitutional."

2. Whether the district court erred by dismissing the Plaintiffs' First Amendment retaliation claim against Desmond and granting Desmond qualified immunity.

3. Whether, even if Desmond's constitutional violation were not clearly established at the time of the violation, this Court should establish that Desmond's conduct violated the First Amendment.

## VI. STATEMENT OF THE FACTS AND OF THE CASE

### A. DESMOND THREATENS THE PLAINTIFFS, AND THE DEFENDANTS USE THEIR LAW ENFORCEMENT AUTHORITY TO TRY TO SHUT DOWN BLOUNT PRIDE'S PRIDE FESTIVAL.

Plaintiff Blount Pride, Inc., is a non-profit organization.[11] Blount Pride organizes and hosts an annual Pride festival in Blount County, Tennessee.[12] The festival includes vendors, events, and entertainment, "including drag performances by a number of individual artists."[13] Blount Pride's third annual Pride festival was scheduled to begin Saturday, September 2, 2023.[14]

Plaintiff Matthew Lovegood is a drag artist.[15] Lovegood was scheduled to perform at Blount Pride's September 2, 2023 festival.[16]

Leading up to Blount Pride's September 2, 2023 festival, Blount Pride published "promotional materials includ[ing] social media posts on Facebook and Instagram."[17] "The posts included lists of vendors, planned entertainment, and photos of entertainers, including several photos of

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[11] *Id.* at Page ID #677.
[12] *Id.*
[13] *Id.*
[14] *Id.* at Page ID #681.
[15] *Id.* at Page ID #677.
[16] *Id.*
[17] *Id.* at Page ID #681.

Plaintiff Lovegood's drag persona, 'Flamy Grant.'"[18] None of the posts was remotely sexual in nature.[19] None of the posts advertised or even implied that any component of Blount Pride's planned festival would include adult-oriented performances lacking serious literary, artistic, political, or scientific value for a reasonable 17-year-old.[20] All of Blount Pride's promotional materials were protected by the First Amendment.[21]

Nevertheless—and "strictly because Blount Pride planned to feature drag performances"—Defendant Ryan K. Desmond, the District Attorney General of Blount County, Tennessee—"issued a threat letter threatening the Plaintiffs" that was "intended to stop them from advertising, hosting, and performing drag."[22] "In his threat letter, Defendant Desmond warned that 'violations of [Tennessee's Adult Entertainment Act (the "AEA")] can and will be prosecuted' and that the Plaintiffs' 'marketing' materials promoting Blount Pride 'raise[d] concerns that the event may violate' the AEA."[23]

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[18] *Id.*
[19] *Id.*
[20] *Id.* at Page ID ##681–82.
[21] *Id.*
[22] *Id.* at Page ID ##682.
[23] *Id.* at Page ID #681.

Desmond sent his threat not only to Blount Pride, but also "to a mayor, two city managers, local law enforcement, and a university [that was hosting Blount Pride's festival] explicitly targeting Blount Pride and the drag artists who were scheduled to perform" at the festival.[24] Before doing so, Desmond had tried to locate legal authority that would allow him to secure a prior restraint against Blount Pride, but he could not find any.[25] Thus, before sending his threat letter, Desmond "tried to violate Plaintiffs' First Amendment rights by imposing a prior restraint against them, and when he determined that 'no mechanism' of Tennessee law enabled him to do so, he opted to cast Plaintiffs' advertisements and planned activities as 'potentially criminal' before an audience of local law enforcement, the event host, and city management instead."[26]

Had Desmond merely wished to notify the public that he intended to enforce the AEA, he could have issued a public statement to that effect. Instead, he sent a detailed threat letter to a mayor, two city managers, local law enforcement, and a university explicitly targeting Blount Pride

[24] *Id.* at Page ID #683.
[25] *Id.* at Page ID #682.
[26] *Id.*

and the drag artists who were scheduled to perform.[27]

Desmond's letter was a naked attempt to chill the Plaintiffs' protected speech based on Blount Pride's promotional materials and the Plaintiffs' stated intent to host and perform drag.[28] Desmond's widely transmitted threat letter aimed to chill the Plaintiffs' speech.[29] His letter also in fact deterred the Plaintiffs from proceeding with their festival without protection from the judiciary, and it forced the Plaintiffs to seek and obtain a TRO from the district court to secure their safety.[30]

Desmond was not the only government official who sought to stop Blount Pride's festival, either. Defendant Tony Crisp—"the Maryville City Police Chief"—participated in the effort as well.[31] Shortly before Blount Pride's 2023 festival, "Defendant Crisp contacted Maryville College and requested that Maryville College provide a copy of the contract between Plaintiff Blount Pride and Maryville College."[32] The next day, Defendant Crisp called Bryan Coker, President of Maryville

[27] *Id.* at Page ID #683.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at Page ID ## 678, 683–84.
[32] *Id.* at Page ID ## 683.

College (the festival's host), to notify Mr. Coker of Defendant Desmond's threat letter. During that phone call, Defendant Crisp warned Coker "that officials at Maryville College—including Mr. Coker—could face arrest if they permitted Blount Pride to go forward as planned."[33]

### B. THE PLAINTIFFS SEEK AND OBTAIN A TRO AND PRELIMINARY INJUNCTION.

After Desmond threatened the Plaintiffs and Crisp threatened their hosts, the Plaintiffs filed suit.[34] The Plaintiffs sought an immediate TRO to protect themselves and their planned festival from the Defendants' threats.[35] Over the Defendants' opposition, on September 1, 2023, the district court granted the Plaintiffs' motion for a TRO.[36] In its order, the district court emphasized (among other things) that: (1) "District Attorney Desmond cannot seriously argue that [Plaintiff] Lovegood's upcoming musical performance is not speech under the aegis of the First Amendment"; (2) "District Attorney Desmond appears to concede that Plaintiffs would pose no harm to children through their onstage performances"; and (3) the Plaintiffs had shown that the Defendants'

[33] *Id*. at Page ID #684.
[34] *Id*. at Page ID #683; Compl., R. 1, Page ID ##1–134.
[35] Mot. for TRO, R. 2, Page ID ##135–59.
[36] Order, R. 22, Page ID ##480–95.

threats were credible enough to warrant a TRO.[37] The Defendants then stipulated that the district court's TRO should be converted to a preliminary injunction, and the district court entered a preliminary injunction against the Defendants by consent.[38]

### C. THIS COURT HOLDS THAT THE STATUTE DESMOND USED TO THREATEN THE PLAINTIFFS DOES NOT EVEN "ARGUABLY" PROSCRIBE THEIR CONDUCT.

After the district court entered its preliminary injunction, this Court strengthened the Plaintiffs' claims. It did so by confirming, in *Friends of George's, Inc.*, 108 F.4th at 436–40, that the AEA "did not even 'arguably' proscribe the Plaintiffs' planned festival and performance."[39] Thus, based on *Friends of George's*, the Defendants lacked even theoretical authority to threaten the Plaintiffs under the AEA for hosting or performing a mere drag performance.

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[37] *Id.* at Page ID ##493, 488–91.
[38] Order, R. 43, Page ID #536.
[39] Amend. Compl., R. 64, Page ID #684 (quoting *Friends of George's*, 108 F.4th at 436–40).

### D. THE DEFENDANTS CONTINUE TO ATTEMPT TO INTERFERE WITH BLOUNT PRIDE EVEN WITH A TRO AND PRELIMINARY INJUNCTION IN EFFECT.

Under the protection of the district court's TRO, Blount Pride moved forward with its 2023 festival, and Plaintiff Lovegood performed as planned.[40] But despite the district court enjoining the Defendants from "interfering with Blount Pride's festival scheduled for September 2, 2023, by any means, including but not limited to, discouraging third parties including, but not limited to, the event venue, Maryville College, from hosting the event or making modifications to the event[,]" the Defendants continued their efforts to interfere with the event.[41]

On the morning of the 2023 festival, Defendant Crisp announced that the Maryville Police Department would withdraw its planned security for the event, claiming dubiously that the district court's TRO prohibited the Maryville Police Department from providing normal security to Blount Pride.[42] As a result, Blount Pride was required to secure less-qualified, unarmed, private security—including untrained

[40] *Id.* at Page ID #685.
[41] *Id.*
[42] *Id.*

volunteers—at substantial expense.[43]

The Plaintiffs' attorneys warned that they would file a motion for contempt should Defendant Crisp alter his plans to provide police protection.[44] Afterward, the Maryville Police Department was instructed to be present,[45] but its officers did not provide meaningful security for the event, which quickly became the site of protests due to the controversy stirred by Desmond's illicit actions.[46] Because the Maryville Police Department neglected to provide meaningful security, anti-LGBTQ+ protesters were able to enter the event, creating a chaotic and stressful environment.[47]

Because of the Defendants' actions in 2023, anticipated costs for security for Blount Pride ballooned in 2024.[48] As a result, Maryville College declined to host Blount Pride's 2024 festival, citing safety concerns and exorbitant security expenses.[49] Thus, Blount Pride had to expend significant resources finding an appropriate alternative host site

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[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at Page ID #686.
[48] *Id.*
[49] *Id.*

for the 2024 Pride event.[50] Eventually, because of security concerns and expense, Blount Pride settled on having a rally in Maryville, rather than a ticketed event.[51]

Even with a preliminary injunction in place, the Defendants continued their misbehavior through 2025. In 2025, because of Crisp's obstructionist activities and unresponsive behavior, Blount Pride felt unsafe holding a festival in his jurisdiction, and its Board of Directors applied for a permit to hold the 2025 Blount Pride Festival in nearby Alcoa instead.[52]

Once again, Blount Pride marketed a drag performance in anticipation of its 2025 festival.[53] Shortly afterward, an Alcoa police lieutenant informed Blount Pride's President that Blount County's district attorney "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."[54] For what it's worth, Desmond disputes that this

[50] Decl., R. 80-1, Page ID #865.
[51] *Id.*
[52] *Id.*
[53] Second Decl., R. 81-1, Page ID #872.
[54] *Id.*

happened.[55] No factfinder has ever adjudicated the factual disputes involved, however.

## E. THE PLAINTIFFS' CLAIMS AND THE DISTRICT COURT'S DISMISSAL OF THEM

After amending their complaint, the Plaintiffs asserted two claims under 42 U.S.C. § 1983: (1) a claim for permanent injunctive relief against both Defendants and (2) a First Amendment retaliation claim for money damages against Desmond.

### 1. Injunctive Relief

The Plaintiffs sought a permanent injunction against both Defendants.[56] The Plaintiffs demanded that the district court "permanently enjoin the 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."[57] The Plaintiffs did *not* challenge the AEA's constitutionality, given this Court's ruling that the AEA did

[55] Resp., R. 82, PageID #877.
[56] Amend. Compl., R. 64, Page ID #686–88.
[57] *Id*. at Page ID #690.

not even arguably proscribe their conduct.

**2. First Amendment Retaliation**

The Plaintiffs asserted a First Amendment retaliation claim for money damages against Desmond.[58] The Plaintiffs noted, among other things, that "Desmond sent a targeted letter threatening Plaintiffs and transmitted a copy of it to local law enforcement" and that "Desmond's threat letter was a blatant attempt to chill Plaintiffs' speech and expression, all of which was protected by clearly established First Amendment law."[59] Thus, the Plaintiffs sought money damages against Desmond in his individual capacity.[60]

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The Defendants moved to dismiss the Plaintiffs' Amended Complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).[61] On October 24, 2025, the district court granted the Defendants' motions to dismiss on both grounds.[62]

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[58] *Id.* at Page ID #688–90.
[59] *Id.* at Page ID #689.
[60] *Id.*
[61] Mot. to Dismiss, R. 67, PageID ##715–18; Mot. to Dismiss, R. 70, PageID ##746–49.
[62] Order, R. 84, Page ID ##893–96.

As to the Plaintiffs' claim for injunctive relief: Although the Plaintiffs explicitly did *not* challenge the AEA's constitutionality,[63] the district court ruled that the Plaintiffs lacked standing to seek injunctive relief because they (1) were seeking "a 'functional' declaration that the AEA is unconstitutional"[64] and (2) had "failed to show that their intended future conduct is arguably proscribed by the AEA."[65] The district court also ruled that, "even if plaintiffs had made such showing, they cannot show that they possessed a constitutional interest in exhibiting indecent material to minors that would have been arguably proscribed by the AEA"[66] (which is not something the Plaintiffs sought to do, either).

Based on its material mischaracterization of the Plaintiffs' claim for injunctive relief, the district court applied the pre-enforcement standing analysis used to evaluate constitutional challenges to statutes.[67] After doing so, the district court determined—contrary to its TRO ruling—that Desmond's "threat of enforcement was uncertain and not substantial."[68]

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[63] *See generally* Amend. Compl., R. 64, Page ID ##676–92; *see also* Resp, R. 76 at Page ID #798.
[64] Order, R. 84, Page ID # 901
[65] *Id.* at Page ID #895.
[66] *Id.*
[67] *Id.* at Page ID ##893–96.
[68] *Id.* at Page ID #896.

On these grounds, the district court ruled that the Plaintiffs lacked standing to seek injunctive relief.

As to the Plaintiffs' claim for First Amendment retaliation: The district court granted Desmond qualified immunity.[69] As grounds, the district court determined that Desmond's threat letter was "not sufficient to satisfy the adverse action requirement" and "would not chill a person of ordinary firmness."[70] "As a result," the district court held that the "plaintiffs have not met their burden of showing that General Desmond retaliated against them for exercising a constitutional right."[71] Afterward, the Plaintiffs timely appealed.[72]

[69] *Id*. at Page ID #900.
[70] *Id*.
[71] *Id*.
[72] Notice of App., R. 86, Page ID ##907–09.

## VII. SUMMARY OF ARGUMENT

1. The district court erred by dismissing the Plaintiffs' claim for injunctive relief for lack of standing. The district court materially mischaracterized the Plaintiffs' claim for injunctive relief and rejected claims they never asserted. Contrary to the district court's analysis, the Plaintiffs did not assert a pre-enforcement challenge to the AEA's constitutionality, nor did the Plaintiffs seek the right to exhibit indecent material to minors. Instead, as permitted by *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), and reaffirmed in *National Rifle Association v. Vullo,* 602 U.S. 175 (2024), the Plaintiffs sought an injunction enjoining the Defendants' unlawful threats and interference with their First Amendment rights. Thus, the district court's judgment dismissing the Plaintiffs' claim for injunctive relief for lack of standing should be reversed. At minimum, this Court should remand with instructions to consider the claim for injunctive relief that the Plaintiffs actually asserted.

2. The district court erred by finding that Desmond's threat was not adverse action and granting him qualified immunity on that basis. As the Supreme Court explained in *Bantam Books*, "[p]eople do not

lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around[.]" 372 U.S. at 68. Here, Desmond's threat letter was capable of deterring the Plaintiffs from engaging in constitutionally protected conduct. Controlling precedent also clearly established that his threat was adverse action.

3. Even if it were not clearly established that Desmond's threat letter was adverse action, this Court should follow the protocol contemplated by *Saucier v. Katz,* 533 U.S. 194, 201 (2001), and establish that now.

# VIII. ARGUMENT

## A. THE DISTRICT COURT MATERIALLY MISCHARACTERIZED THE PLAINTIFFS' MERITORIOUS CLAIM FOR INJUNCTIVE RELIEF AND ERRONEOUSLY DISMISSED THE PLAINTIFFS' MISCHARACTERIZED CLAIM.

Standing is a "jurisdictional question" that this Court "review[s] de novo." *In re Flint Water Cases*, 63 F.4th 486, 497 (6th Cir. 2023). Where, as here, a court is tasked with "reviewing a facial attack [on a plaintiff's standing], a district court takes the allegations in the complaint as true." *Gentek Bldg. Prods. v. Sherwin–Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). Thus, "[u]nder a facial attack, all of the allegations in the complaint must be taken as true, much as with a Rule 12(b)(6) motion." *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012).

### 1. The district court materially mischaracterized the injunctive relief the Plaintiffs' Amended Complaint sought.

The Plaintiffs alleged at length why they needed an injunction "permanently enjoin[ing] the 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."[73] By contrast, the Plaintiffs did *not* challenge the AEA's constitutionality or seek an injunction to that effect.[74] The Plaintiffs' Amended Complaint also did not seek a declaration that the AEA was unconstitutional, and it did not challenge the AEA either facially or as applied.

The Plaintiffs' response in opposition to the Defendants' motion to dismiss was explicit: "Plaintiffs do not bring a pre-enforcement challenge to the AEA—or any challenge to the AEA"—and "Plaintiffs are not seeking a ruling that a statute is facially unconstitutional."[75] They explained, "[r]ather, Plaintiffs seek to enjoin Defendants' *conduct* that harms them."[76]

Despite the clarity of the Plaintiffs' claim for injunctive relief, the district court erroneously construed the Plaintiffs' Amended Complaint as a pre-enforcement challenge to the AEA's constitutionality and ruled that "plaintiffs have failed to show that their intended future conduct is

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[73] *See* Amed. Compl., R. 64, Page ID #686–88.
[74] *See generally id.* at Page ID ##676–92; *see also* Resp., R. 76 at Page ID #798.
[75] Resp., R. 76, Page ID #798.
[76] *Id.*

arguably proscribed by the AEA."[77] Such analysis is unfaithful to the Plaintiffs' Amended Complaint and the injunctive relief they sought. Thus, the district court unilaterally transformed the Plaintiffs' claim for injunctive relief as to Desmond's actions into something else entirely and then dismissed a claim for injunctive relief against the AEA that the Plaintiffs never asserted.

This was error. The district court lacked authority to "reinterpret . . . [Plaintiffs' Amended Complaint] to reach a result." *McGirr v. Rehme*, No. 16-464, 2016 WL 7371061, at *5 (S.D. Ohio Dec. 20, 2016) ("Under the well-known maxim that 'the plaintiff is the master of his complaint,' courts refuse to reinterpret or add claims to the complaint to reach a result."); *see also Roddy v. Grand Trunk W. R.R.*, 395 F.3d 318, 322 (6th Cir. 2005) ("The well-pleaded complaint rule recognizes that the plaintiff is the master of his complaint" and district courts may not "recharacterize[]" a plaintiff's claims). Thus, the Plaintiffs are—at minimum—entitled to a remand with instructions that the district court evaluate the claim for injunctive relief that the Plaintiffs actually asserted.

[77] Order, R. 84, Page ID #895.

The rest of the district court's analysis of the Plaintiffs' claim for injunctive relief suffers from the same deficiencies. The district court ruled that "even if plaintiffs had [shown that their intended future conduct is arguably proscribed by the AEA], they cannot show that they possessed a constitutional interest in exhibiting indecent material to minors that would have been arguably proscribed by the AEA."[78] But this analysis eschews the actual claims in the Plaintiffs' Amended Complaint, which did not seek an injunction permitting the Plaintiffs to exhibit indecent material to minors. To the contrary, the Plaintiffs pleaded that: (1) "Mere, non-obscene drag performance is not even arguably criminalized by the AEA";[79] and (2) the Plaintiffs intend to promote and hold mere drag performances that would *not* "include adult-oriented performances lacking serious literary, artistic, political, or scientific value for a reasonable 17-year-old."[80]

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[78] *Id.*

[79] Amend. Compl., R. 64, Page ID #689.

[80] *Id.* at Page ID ##681–82 ("None of the posts advertised or implied that any component of Blount Pride's planned festival would include adult-oriented performances lacking serious literary, artistic, political, or scientific value for a reasonable 17-year-old."); *see also id.* at Page ID #688 ("In the future, Plaintiff Blount Pride and Plaintiff Lovegood intend to continue hosting Blount Pride and performing in drag, respectively, within the Defendants' jurisdiction. . . . The Plaintiffs intend to promote

Given these circumstances, the district court's ruling that the Plaintiffs are not entitled to injunctive relief because they "cannot show that they possessed a constitutional interest in exhibiting indecent material to minors that would have been arguably proscribed by the AEA" makes little sense.[81] That is not relief the Plaintiffs sought. The district court's analysis—and its corresponding dismissal order—thus bears little connection to the Plaintiffs' actual claims.

Neither does the district court's finding that it "agrees with Chief Crisp's assessment" that the Plaintiffs were seeking "a 'functional' declaration that the AEA is unconstitutional"[82] hold water. The Plaintiffs' Amended Complaint did not seek a "functional declaration" that the AEA is unconstitutional. Indeed, it did not seek a declaration at all. That much is clear, not only because the Plaintiffs' Amended Complaint does not seek a declaration,[83] but also because—in their responsive briefing below—the Plaintiffs emphasized repeatedly that: (1) "Plaintiffs do not bring a pre-enforcement challenge to the AEA—or any

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that performance in the same way they promoted Plaintiff Lovegood's 2023 performance.").

[81] Order, R. 84, Page ID #895.

[82] *Id.* at Page ID #901.

[83] *See generally* Amend. Compl., R. 64, Page ID ##676–92.

challenge to the AEA"; and (2) "Plaintiffs are not seeking a ruling that a statute is facially unconstitutional."[84] Thus, the district court erred by treating the Plaintiffs' claim for injunctive relief as a pre-enforcement challenge to the AEA's constitutionality and then dismissing it on that erroneous basis. Nor did the Plaintiffs plead any kind of *Monell* claim against Chief Crisp, which the district court irrelevantly addressed and then rejected as well.[85] *See Monell v. Dep't of Soc. Svcs.*, 436 U.S. 658 (1978).

As for the actual claim for injunctive relief that the Plaintiffs pleaded: The Plaintiffs alleged facts that demonstrated they needed and were entitled to receive the protective injunction they sought. The Defendants' threat letter and corresponding pressure campaign were threats to the Plaintiffs' First Amendment rights that may appropriately be enjoined.[86] Of note, Desmond also sent his letter not only to the primary target of the threat (Blount Pride), but also to any law enforcement agency that could arrest the Plaintiffs.[87] Beyond that,

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[84] Resp., R. 76, Page ID #798.
[85] Order, R. 84, Page ID ## 903–04.
[86] Am. Compl., R. 64, Page ID #682; Letter, Doc. 1-3, Page ID ##98–100.
[87] Am. Compl., R. 64, Page ID #680; Letter, Doc. 1-3, Page ID ##98–100.

Desmond sent his threat letter to others who did not have law enforcement authority: the Blount County Mayor, the Alcoa and Maryville City Managers, the Director of Events for Maryville College, and the President of Maryville College.[88] The trial court correctly found that Desmond performed no immunizing prosecutorial function when he sent this letter; his role as a judicial advocate had "not yet begun."[89] There was no purpose for sending his threat letter to these recipients—including Maryville College, the host of Plaintiffs' event—other than the obvious: to encourage county-wide efforts to stop the Pride festival and drag performances.

In an attempt to chill performance of drag, Desmond sought to amplify his threat, establish its credibility, and send a clear message to everyone in Blount County that anyone who performed drag or hosted a drag performance could be arrested.[90] At minimum, the Plaintiffs are entitled to those reasonable inferences at this stage in proceedings. And that misbehavior—as the Plaintiffs explained to the trial court in a lengthy defense of their claim for injunctive relief, none of which the

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[88] *Id.*
[89] Order, R. 84, Page ID #897.
[90] Am. Compl., R. 64, Page ID ##687–88.

district court addressed[91]—merits injunctive relief under longstanding authority, because "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around[.]" *Bantam Books, Inc.*, 372 U.S. at 68; *see also id.* at n.8 (noting over 60 years ago that such "[t]hreats of prosecution . . . have been enjoined in a number of cases" (collecting authority)); *Vullo*, 602 U.S. at 191 ("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.").

Whether the Plaintiffs had standing to press their claims for injunctive relief based on the Defendants' actions is not a close call. The Plaintiffs' Amended Complaint alleged facts supporting all three irreducible requirements of standing.[92] The Plaintiffs also were the specific objects of the Defendants' actions, and when "the plaintiff is himself an object of the action . . . at issue[,]" "there is ordinarily little

[91] Resp., R. 76, Page ID ##793–803.
[92] Amend. Compl., R. 64, Page ID ##686–88.

question that [challenged] action . . . has caused him injury[.]" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Whether the Plaintiffs had standing to seek an injunction also is necessarily distinct from the merits of the Plaintiffs' claims, which must be accepted as valid for standing purposes. *See F.E.C. v. Cruz,* 596 U.S. 289, 298 (2022) ("For standing purposes, we accept as valid the merits of appellees' legal claims[.]").

For these reasons, the district court erred by involuntarily mutating the Plaintiffs' claim for injunctive relief into a pre-enforcement constitutional challenge to the AEA and then dismissing it on that basis. Thus, the district court's judgment dismissing the Plaintiffs' claim for injunctive relief should be reversed. At minimum, the Plaintiffs are entitled to a remand with instructions to consider the claim for injunctive relief that the Plaintiffs' Amended Complaint actually asserted.

**2. The Plaintiffs' actual claim for injunctive relief was meritorious.**

The Supreme Court has blessed the Plaintiffs' theory of injunctive relief under materially similar circumstances. *See Vullo,* 602 U.S. at 197. As here, in *Vullo*, a government official exaggerated the scope of the plaintiff's claims and argued that an injunction would "hamper legitimate enforcement efforts[.]" *Id.* at 197. The Supreme Court

rejected those concerns, reasoning that Vullo's unlawful threats to use her lawful powers could be enjoined without issue. *Id.*

"Just like the commission in *Bantam Books*," the Supreme Court noted that "Vullo could initiate investigations and refer cases for prosecution. Indeed, she could do much more than that." *Id.* at 192. "What she cannot do is use the power of the State to punish or suppress disfavored expression. . . . In such cases, it is 'the application of state power which we are asked to scrutinize.'" *Id.* at 188. (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958). Here, for the same reasons, the Plaintiffs appropriately sought an injunction forbidding—among other illicit efforts—the Defendants' illegal threats to enforce the AEA against them because of their protected speech, rather than an injunction enjoining the AEA itself.[93]

The Plaintiffs' theory is valid. Under *Bantam Books* and *Vullo*, "to state a claim that the government violated the First Amendment through

[93] *Id.* at Page ID #688 (Plaintiffs demanded that the District Court "permanently enjoin the 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.").

coercion . . . , 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 (citing *Bantam Books*, 372 U.S. at 67–68). This Court has also explained that "[u]nder *Bantam Books*, a threat of prosecution can trigger a prior restraint, even if the threat is non-binding." *See Novak*, 932 F.3d at 433 (finding plaintiff plausibly alleged under *Bantam Books* that police department violated First Amendment where it sent letter to Facebook demanding removal of plaintiff's page and issued a press release threatening to take legal action against plaintiff).

Here, the Plaintiffs plausibly alleged a claim under *Bantam Books* and its progeny. Indeed, Desmond's and Crisp's conduct conforms to *Bantam Books* almost identically. *See Bantam Books*, 372 U.S. 58. In *Bantam Books*, government officials sought to limit the circulation of "impure" literature threatening to "corrupt" Rhode Island's youth. *Id.* at 66. Here, government officials sought a means of prior restraint to stop drag performances, also harmfully mischaracterized as inappropriate for

minors.[94] In *Bantam Books*, a government commission sent "notices" of possible criminal prosecution to book publishers under the guise of being "mere legal advice." *Id.* at 68. Here, Desmond sent a letter to Blount Pride and others "advising" that their event may violate criminal laws.[95] In *Bantam Books*, the Commission's notices were "invariably followed up by police visitations." *Id.* Here, Chief of Police Crisp called and visited the Pride event host to repeat Desmond's threat of arrest and prosecution.[96] In *Bantam Books*, book publishers—fearing prosecution—stopped the circulation of targeted books. *Id.* at 70. Here, fearing prosecution, the Plaintiffs sought the protection of a TRO to safely hold their 2023 event, but they canceled later events given the Defendants' ongoing misbehavior.[97]

Although the similarities between the Plaintiffs' circumstances and those presented in *Bantam Books* are unmistakable, "the facts of *Bantam Books* need not be perfectly analogous for the rule to apply." *Novak*, 932 F.3d at 433. Instead, plaintiffs need only plausibly allege that a

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[94] *Id.* at Page ID #682.
[95] Letter, R. 1-3, Page ID #98.
[96] Amend. Compl., R. 64, Page ID #683–84.
[97] *Id.* at Page ID #684; Decl., R. 80-1, Page ID #865; Second Decl., R. 81-1, Page ID ##871–72.

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." *Vullo*, 602 U.S. at 191.

The Plaintiffs did that. Taking the allegations of their Amended Complaint as true and drawing all reasonable inferences in their favor, the Plaintiffs plausibly alleged that Desmond's letter was reasonably understood to convey a threat of adverse government action if the Plaintiffs carried out their planned performance. But because the district court mischaracterized the Plaintiffs' claims and rejected claims they never made, the district court did not mention either *Bantam Books* or *Vullo* in its decision below.[98] It failed to do so despite those cases being essential to the Plaintiffs' claims and the Plaintiffs having thoroughly briefed their claims under them.[99] Thus, the district court's judgment dismissing the Plaintiffs' claim for injunctive relief for lack of standing should be reversed.

### B. THE DISTRICT COURT ERRONEOUSLY FOUND THAT DESMOND'S THREAT LETTER WAS NOT ADVERSE ACTION.

"This Court reviews a district court's grant of a motion to dismiss

[98] *See* Order, R. 84, Page ID ##887–905.
[99] *See id.*

*de novo*." *Werner v. Young*, No. 22-5197, 2023 WL 639103, at *3 (6th Cir. Jan. 27, 2023). When doing so, this Court "must accept the complaint's well-pleaded factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor." *Luis v. Zang*, 833 F.3d 619, 626 (6th Cir. 2016) (citing *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008)). This Court also reviews a district court's order granting a defendant qualified immunity de novo. *O'Donnell v. Yezzo*, No. 21-3396, 2022 WL 130885, at *5 (6th Cir. Jan. 14, 2022) ("Plaintiffs appeal the grant of qualified immunity, which we review de novo." (citing *Shanaberg v. Licking Cnty.*, 936 F.3d 453, 455 (6th Cir. 2019))); *Green v. City of Southfield*, 759 F. App'x 410, 413 (6th Cir. 2018).

The district court dismissed the Plaintiffs' First Amendment retaliation claim against Desmond and granted him qualified immunity because it found that "plaintiffs have not shown that General Desmond's letter constitutes an adverse action in the context of a retaliation claim."[100] But the district court's analysis is unsupportable.

This Court has clearly established that "there are no doubt stand-

[100] *Id.* at Page ID #899.

alone threats that would deter a person of ordinary firmness from exercising their protected rights." *Hornbeak-Denton*, 361 F. App'x at 689; *see also Pasley*, 345 F. App'x at 985 ("[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*, 78 F. App'x at 543)); *Hill v. Lappin*, 630 F.3d 468, 472–75 (6th Cir. 2010) ("Even the threat of an adverse action can satisfy [the adverse action] element . . . .").

This Court has also clearly established that everyday people—like the Plaintiffs in this case, a nonprofit and a drag performer—only have to clear a low threshold to plausibly allege that a threat could deter them from exercising their rights. *See, e.g.*, *Fritz v. Charter Tp. of Comstock*, 592 F.3d 718, 724 (6th Cir. 2010) ("Plaintiff is not a public employee, official, or prisoner, and so the level of injury she must allege would be the lower limit of a cognizable injury for a First Amendment retaliation claim."); *Hill*, 630 F.3d 472–73 ("[B]ecause 'there is no justification for harassing people for exercising their constitutional rights,' the deterrent effect of the adverse action need not be great in order to be actionable.").

This Court even has clearly established that threats a tier below

the prosecutorial threat at issue here qualify as adverse action in the context of retaliation against prisoners, who are "required to tolerate *more* . . . than average citizens." *Thaddeus-X*, 175 F.3d at 398 (emphases added); *see also, e.g.*, *Pasley*, 345 F. App'x at 985 (threats to transfer an inmate out of his unit so that he would lose his job and to a new location where his family would struggle to visit him constituted adverse action).

Finally, nobody seriously disputes that government-sanctioned threats of arrest and incarceration deter everyday people from speaking. *Beck*, 2014 WL 1207353, at *5 ("[T]hreats of arrest and incarceration would undoubtedly be sufficient to deter a person of ordinary firmness from persisting in protected conduct."); *Kinross Charter Twp.*, 2007 WL 4284861, at *12 ("The threat of facing unwarranted criminal charges would deter a person of ordinary firmness from engaging in future protected conduct."). Indeed, "[t]he threat of arrest is the *quintessential* retaliatory conduct that would deter a person of ordinary firmness from exercising First Amendment rights." *See Turner*, 65 F.4th at 580 (emphasis added); *see also Nazario*, 103 F.4th at 237 ("The threat of an arrest is 'likely [to] deter a person of ordinary firmness from the exercise of First Amendment rights.'" (quoting *Constantine*, 411 F.3d at 500

(internal quotation marks omitted))).

Here, then, the facts and the law are in perfect harmony: Plaintiffs are everyday people, expected to bear the lowest amount of harm, and Desmond's letter threatened them with criminal sanctions for performing drag (after explaining that he looked for other ways to shut down their event). As Plaintiffs also alleged, Defendant Crisp read Desmond's letter the exact same way, as evidenced by his tour de threats of Maryville College officials.

There also is no question that "the violative nature of [*Desmond's*] particular conduct" has been clearly established. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (emphasis added). More than 60 years ago, the Supreme Court established that threats like Desmond's would deter a person of ordinary firmness from exercising their rights. *See Bantam Books*, 372 U.S. at 68 ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and Silverstein's reaction, according to uncontroverted testimony, was no exception to this general rule.").

"[T]he *Bantam Books* decision made clear that the use of 'threat[s] of invoking legal sanctions and other means of coercion, persuasion, and

intimidation' intended to stifle protected speech constitutes a prior restraint." *Dirks v. Bd. of Cnty. Comm'rs of Ford Cnty.*, No. 15-CV-7997-JAR, 2016 WL 2989240, at *7 (D. Kan. May 24, 2016). In controlling jurisprudence that predates Desmond's retaliation here, this Court read *Bantam Books* the same way. *See Novak*, 932 F.3d at 433 ("Under *Bantam Books*, a threat of prosecution can trigger a prior restraint, even if the threat is non-binding.").

That Desmond is a prosecutor is of no consequence for the Plaintiffs' *Bantam Books* claim. As this Court has held, "the facts of *Bantam Books* need not be perfectly analogous for the rule to apply." *Id.* Indeed, *Novak* involved police officers threatening to arrest an everyday person who created a social media page mocking law enforcement, and in line with this Circuit, scores of courts have found that a gamut of public officials engage in retaliation when they send threatening and coercive letters. *See, e.g.*, *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991) (First Amendment claim adequately alleged where village trustee sent coercive letter to newspaper publisher decrying plaintiff's recently published ad); *Culinary Workers Union, Loc. 226 v. Del Papa*, 200 F.3d 614, 618 (9th Cir. 1999) (First Amendment claim adequately alleged where attorney

general threatened criminal enforcement via letter if union did not stop distributing handbill); *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (First Amendment claim adequately alleged where borough president sent threatening letter to billboard company displaying plaintiff's speech); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015) (First Amendment claim adequately alleged where sheriff sent letters on official stationery to credit card companies threatening criminal liability for continuing to contract with plaintiff).

In his letter, Desmond, an elected government official with tremendous criminal enforcement power under state law, told a group of people that he could and would criminally prosecute them for anything in their upcoming family-friendly drag performance that his office deemed violated the AEA.[101] Desmond also said he conducted "a diligent search of relevant statutory authority" to shut down the Plaintiffs' event before the Plaintiffs could speak.[102] That is a prior restraint threat under *Bantam Books*. And even though Desmond was unsuccessful at finding a prior restraint "mechanism," he scared Plaintiffs enough that they

[101] Letter, R. 1-3, Page ID #99.
[102] *Id.*

rushed to court to (successfully) secure temporary injunctive relief.

No amount of nomenclature—prior restraint, coercion, threat—or difference in form permits such behavior in this Circuit. "Such a rule would allow government officials to cloak unconstitutional restraints on speech under the cover of informality." *Novak*, 932 F.3d at 433. As a result, the district court erred by dismissing the Plaintiffs' claim for First Amendment retaliation against Desmond, and this Court should reinstate the Plaintiffs' First Amendment retaliation claim and remand.[103]

### C. EVEN IF IT WERE NOT CLEARLY ESTABLISHED THAT DESMOND'S THREAT LETTER WAS ADVERSE ACTION, THIS COURT SHOULD ESTABLISH THAT NOW.

In *Saucier v. Katz*, the Supreme Court held that "[a] court required

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[103] In other retaliation cases involving threats from government officials, this Court also has considered *parallel* harms, rather than identical ones. *See, e.g.*, *MacIntosh v. Clous*, 69 F.4th 309 (6th Cir. 2023) (an elected official received fair notice that "it was impermissible to brandish a firearm in response to a citizen's request that he condemn violence" from an "analogous" case that established that "threatening gun violence to silence a political opponent constitutes adverse action."); *Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir. 1994). This approach makes particularly good sense in the context of retaliation, where the severity of adverse action a plaintiff must endure scales up and down based on a plaintiff's status. *See, e.g.*, *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 724 (6th Cir. 2010); *Thaddeus-X v. Blatter*, 175 F.3d 378, 397 (6th Cir. 1999).

to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." 533 U.S. 194, 201 (2001). The Supreme Court later held that "the *Saucier* protocol should not be regarded as mandatory in all cases," though. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Thus, this Court has discretion to "consider [the] requirements [of qualified immunity] in the order of [its] choosing." *Frenchko v. Monroe*, 160 F.4th 784, 795 (6th Cir. 2025) (citing *Pearson*, 555 U.S. at 227).

Despite this Court's discretion over the order in which it addresses qualified immunity claims, *see id.*, the Supreme Court has explained that adhering to *Saucier*'s protocol "is often beneficial[,]" *see Pearson*, 555 U.S. at 236. That is particularly true when "the qualified immunity situation . . . threatens to leave standards of official conduct permanently in limbo." *Camreta v. Greene*, 563 U.S. 692, 706 (2011). "To prevent that problem, [the Supreme] Court has permitted lower courts to determine whether a right exists before examining whether it was clearly established." *Id.* Thus, even if a court ultimately grants qualified immunity to a

defendant, rulings at the first step of the analysis are "[n]o mere dictum" and "create[] law that governs the official's behavior." *Id.* at 708 ("No mere dictum, a constitutional ruling preparatory to a grant of immunity creates law that governs the official's behavior.").

Here, even if this Court grants Desmond qualified immunity, following *Saucier*'s protocol is appropriate for three reasons.

*First*, apart from whether controlling precedent clearly established that Desmond's threat letter constituted adverse action, the district court held that "plaintiffs have not shown that General Desmond's letter constitutes an adverse action in the context of a retaliation claim."[104] That is not—or at least, it does not appear to be—a ruling that controlling precedent did not clearly establish that Desmond's threat was adverse action for purposes of a First Amendment retaliation claim. Instead, the district court held that Desmond's threat was not an adverse action at all.[105] *But see Bantam Books*, 372 U.S. at 68 ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around[.]"). Thus, the

[104] Order, R. 84, Page ID #900.
[105] *Id.*

district court itself adjudicated the merits of the Plaintiffs' constitutional claim in the first instance, and this Court should consider the district court's judgment on appeal.

*Second*, given the serious disruption caused by Desmond's threats and the Defendants' ongoing efforts to interfere with the Plaintiffs' First Amendment rights, the Plaintiffs will suffer serious harm if the standard is left "in limbo." *See Camreta*, 563 U.S. at 706. The Supreme Court prefaced this concern in *Camreta*, explaining:

> Consider a plausible but unsettled constitutional claim asserted against a government official in a suit for money damages. The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive. Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements. *See, e.g., ibid.*; *Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Qualified immunity thus may frustrate "the development of constitutional precedent" and the promotion of law-abiding behavior. *Pearson v. Callahan*, 555 U.S. 223, 237, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

*Id.*

That concern exists here. Despite his efforts to threaten and

intimidate the Plaintiffs from exercising their First Amendment rights, Desmond has now escaped liability on the theory that his threat was not sufficiently "adverse" to deter a reasonable person from exercising constitutionally protected rights. But the district court's understanding of how reasonable citizens react when they receive a threat like Desmond's is vastly out of step with practical reality and doctrine that the Plaintiffs thought was settled decades ago. *See Bantam Books*, 372 U.S. at 68 ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and Silverstein's reaction, according to uncontroverted testimony, was no exception to this general rule."). Thus, to prevent the Defendants' recurring threats from interfering with the Plaintiffs' annual festivals, this Court should follow the *Saucier* protocol.

*Third*, if anything, the Plaintiffs' constitutional claim strengthened after the Plaintiffs filed it. Now, threats of mere "adverse government action"—which the Supreme Court has explained need not rise to the level of a threatened criminal prosecution—are sufficient to establish a First Amendment violation even if achieved through indirect coercion of a third party. *See Vullo*, 602 U.S. at 191 ("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."). Thus, to afford all Parties involved appropriate clarity on whether the Defendants are permitted to threaten the Plaintiffs for hosting or conducting a mere drag performance, this Court should follow *Saucier*'s protocol and adjudicate the constitutionality of Desmond's threat first even if it ultimately grants Desmond qualified immunity afterward.

## IX. CONCLUSION

For the foregoing reasons, the district court's judgment should be **REVERSED**.

Respectfully submitted,

By: /s/ Daniel A. Horwitz

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## X. CERTIFICATE OF COMPLIANCE

Excluding the parts Federal Rule of Appellate 32(f) exempts, this Brief contains 8,594 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 Version 2409. *See* Fed. R. App. P. 32(a)(5) & (6).

By: /s/ Daniel A. Horwitz
DANIEL A. HORWITZ (TN #032176)

## XI. CERTIFICATE OF SERVICE

I hereby certify that on February 19, 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.

By: /s/ Daniel A. Horwitz
DANIEL A. HORWITZ (TN #032176)

# XII. APPENDIX

## DESIGNATION OF RELEVANT DOCUMENTS

| Docket Entry No. | Description | Page ID # |
|---|---|---|
| 1 | Plaintiffs' Complaint | 1–134 |
| 2 | Plaintiffs' Motion for Temporary Restraining Order | 135–59 |
| 22 | Memorandum Opinion and Order Granting Temporary Restraining Order | 480–95 |
| 43 | Order Granting Preliminary Injunction and Staying Proceedings | 536–37 |
| 64 | Plaintiffs' First Amended Complaint | 676–92 |
| 67 | Defendant Crisp's Motion to Dismiss | 715–18 |
| 70 | Defendant Desmond's Motion to Dismiss | 746–49 |
| 76 | Plaintiffs' Consolidated Response in Opposition to Motions to Dismiss | 784–819 |
| 80 | Plaintiffs' Response to Supplement | 861–66 |
| 81 | Plaintiffs' Supplement to Consolidated Response in Opposition to Motions to Dismiss | 867–74 |
| 82 | Response to Plaintiffs' Supplement by Desmond | 875–83 |
| 84 | Memorandum Opinion and Order | 887–905 |
| 86 | Notice of Appeal | 907–09 |