No. 20-20535

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ANTHONY BARILLA,

Plaintiff–Appellant

V.

CITY OF HOUSTON, TEXAS,

Defendant–Appellee.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No: 4-20-CV-00145, Hon. Vanessa D. Gilmore, Judge

PLAINTIFF-APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

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USDC No. 4:20-CV-00145 (S.D. Tex.)

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Anthony Barilla respectfully requests oral argument. The district court's dismissal applied a heightened pleading standard for establishing standing in First Amendment cases, contravening Supreme Court and Fifth Circuit precedent. This Court's resolution of the questions raised in this appeal will affect the ability of future plaintiffs to assert their First Amendment rights in federal court. Furthermore, the district court denied—without explanation—Mr. Barilla's motion in the alternative for leave to amend to add allegations about the City's enforcement of the challenged restrictions. Oral argument will give these important issues the attention they warrant and aid the Court in its careful and comprehensive consideration of this case.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Anthony Barilla brought this lawsuit in the district court pursuant to 42 U.S.C. § 1983 and the First Amendment to the United States Constitution. ROA.5. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. ROA.6. This appeal arises from the district court's order granting Defendant-Appellee's motion to dismiss the complaint for lack of standing under Fed. R. Civ. P. 12(b)(1). ROA.164–69. The district court entered its judgment on June 15, 2020, ROA.164–69, and denied Appellant's motion for reconsideration on September 11, 2020, ROA.209. Appellant filed a timely Notice of Appeal on October 9, 2020. ROA.210. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Plaintiff-Appellant Anthony Barilla is an accomplished accordionist who wishes to "busk" (perform music for tips) on public sidewalks in the City of Houston. He alleges that the reason he self-censors and does not busk is to avoid prosecution for violating City ordinances that prohibit or restrict busking. Does he have standing to bring a First Amendment challenge to (1) the City's prohibition on busking anywhere outside its Theater District and (2) the City's

requirement that he get a permit before he is allowed to busk in the Theater District?

2. Did the district court abuse its discretion by denying Mr. Barilla leave to amend his Complaint without providing an explanation or justification?

STATEMENT OF THE CASE

The City of Houston prohibits busking (performing music in public for tips) anywhere other than a small area known as the Theater District. The City broadly allows public speech and expression throughout Houston, including publicly protesting, panhandling, and even playing music; musicians just cannot ask their audiences for tips. Even within the Theater District, performers may only busk if they first obtain a City permit, which requires both paying a fee to the City and obtaining written permission from the owner(s) of property adjacent to the proposed performance site.

Plaintiff-Appellant Anthony Barilla is a professional musician who wants to busk as an accordionist on the public sidewalks of Houston. For Mr. Barilla, busking is a way to improve his musicianship and performance skills while getting paid to perform. Mr. Barilla brought a

lawsuit challenging the City's restrictions under 42 U.S.C. § 1983 and the First Amendment. The district court dismissed Mr. Barilla's case on the ground that he failed to establish an injury-in-fact and therefore lacked standing.

I. The City of Houston's Busking Restrictions

The City of Houston broadly prohibits busking in public places.[1] ROA.6–8. Doing so is considered a nuisance that subjects the busker to a fine of up to $500 per violation. ROA.8. The prohibition on busking does not extend to other kinds of speakers, including protesters, panhandlers, or even people who want to perform or play music without soliciting tips. ROA.8. Such persons are free to engage in their preferred speech or expression without fear of punishment by the City. ROA.8. It is only

[1] The ordinance prohibiting busking reads as follows:

> The playing of bands upon the streets or in other public places in the city, with a view to taking up a collection from the bystanders by someone, for the benefit of the members composing such band, shall be a nuisance and unlawful. Every member of such band who plays with a view to taking up or having taken up a collection from the bystanders shall be guilty of committing a nuisance; provided, however, this section shall not be construed to apply . . . to sidewalk performers performing within the "theater/entertainment district" . . . pursuant to a permit issued under . . . this Code.

Houston, Tex., Code of Ordinances, ch. 28, art. I, § 6.

performers who want to ask their audiences for voluntary donations whose speech is prohibited. ROA.8.

The sole exception to the City's broad busking ban is in a small part of the City known as the Theater District—an area comprising only a few city blocks out of the City's more than 650 square miles.[2] ROA.7. This limited area excludes many of Houston's dynamic cultural centers that lend themselves to busking. ROA.7. Even within the Theater District, performers can only busk if they have first secured a permit from the City.[3] ROA.6. A permit is required regardless of whether the performance is solo or with others in a band or group, and regardless of how large a crowd the performers intend to, or do in fact, attract. ROA.7.

To obtain a permit, a performer must submit an application and pay a nonrefundable fee—$10 for a 30-day permit and $50 for a 1-year permit. ROA.7. The application must include a map designating a single location (or at most two locations; one for the daytime and one for the nighttime) within the Theater District to which the performer will

[2] The Theater District is defined by City ordinance. *See Houston, Tex., Code of Ordinances*, ch. 40, art. XI, § 261.

[3] *See Houston, Tex., Code of Ordinances*, ch. 40, art. XI, § 262.

remain confined.[4] ROA.7. If he wants to perform anywhere else, even one block away, he must secure an additional permit. ROA.7.

As part of the permit application, a performer must obtain and submit written permission from the abutting property owner(s) of the site where he intends to play.[5] ROA.7–8. Hence, whether an applicant is able to obtain a permit to busk in the Theater District depends on the consent of other members of the community, who together enjoy a "Heckler's Veto" over the applicant's ability to perform for tips. ROA.7–8. This limitation, like the City's other busking restrictions, does not apply to other kinds of speakers, including panhandlers, protesters, and musicians who do not solicit tips. ROA.8.

II. Anthony Barilla and His Pursuit of Busking

Appellant Anthony Barilla is a professional musician who lives in Houston. ROA.5. He composes, produces, and performs a wide variety of music, primarily on the accordion. ROA.8. Mr. Barilla has written and recorded theme music for the nationally syndicated NPR program, *This American Life*, for over twenty years. ROA.8. Last year, he released an

[4] *Houston, Tex., Code of Ordinances*, ch. 40, art. XI, § 263(2).

[5] *Houston, Tex., Code of Ordinances*, ch. 40, art. XI, § 263(3).

album, "A Record of Deported Persons," which features songs that were adapted from interviews with individuals who have been deported from the United States. ROA.8.

Mr. Barilla enjoys busking, which he sees as both a means of expressing himself and a way to earn extra income. ROA.8. Although he was dismayed to find that the City has banned busking everywhere else, in 2018 Mr. Barilla decided to apply for a permit to play in the Theater District. ROA.8. After navigating the City's disorganized permitting process, he paid the required fee and obtained a 1-year permit in August 2018. ROA.8. But after the permit expired, Mr. Barilla decided not to renew it, for three reasons. ROA.8–9.

First, based on his experience as an artist and resident of the community, Mr. Barilla believes that the City's busking ordinances exclude many cultural sites with pedestrian activity that would be good areas for busking. ROA.8–9. By comparison, the Theater District does not have consistent foot traffic to make busking profitable, particularly given the permit fee and the permit limitation to busking in only one (or at most two) pre-selected sites. ROA.8–9. Second, Mr. Barilla was dissuaded from reapplying by the Heckler's Veto provision that mandates that he

ask permission to play from nearby property owner(s). ROA.9. When he first went through the application process, he found it difficult to track down the relevant property owner(s) to request their permission. ROA.9. Third, Mr. Barilla came to believe that the busking restrictions violated his First Amendment rights, which led him to pen an op-ed in the local newspaper calling on the City to repeal the offending ordinances.[6] ROA.4 n.4, 9. The City did not respond and did not repeal its busking restrictions.

Because of the City's restrictions on busking in the Theater District and prohibition on busking elsewhere, Mr. Barilla has stopped busking entirely. ROA.9. He has thus self-censored from an activity protected by the First Amendment because he is unwilling to break the law and risk fines, citations, and possible arrest. ROA.9.

III. Procedural History

Mr. Barilla brought this civil rights lawsuit in January 2020 to vindicate his First Amendment rights and to challenge the City's busking restrictions. ROA.5–14. His Complaint alleges that but for the City's

[6] Anthony Barilla, *Busking the Streets of Houston*, Houston Press (Sept. 17, 2018 4:00 AM), https://www.houstonpress.com/music/houstons-regulations-about-busking-10865671. ROA.8.

busking restrictions, he would start busking in Houston. ROA.7–9. The reason he has refrained from busking since his permit expired is because he is unwilling to risk penalties for violating the City's ordinances. ROA.9. Thus, the City's busking restrictions have chilled his speech and caused him to self-censor. ROA.9, 11. The Complaint further alleges that the City's busking ordinances are a content-based regulation of speech, and therefore subject to strict scrutiny, because an official must examine the content of speech to determine whether it is subject to the busking restrictions. ROA.10–11. That is, a musician can legally play music on the public sidewalks of Houston, but as soon as he asks for tips, the busking prohibition is triggered. ROA.10. And the only way to determine whether a musician is asking for tips is to consider the content of his speech. ROA.10. Finally, the Complaint alleges that the City's permit requirement for busking in the Theater District constitutes a prior restraint on speech in violation of the Constitution. ROA.11. Mr. Barilla seeks a judgment declaring that the busking ordinances violate the First Amendment and the entry of a permanent injunction enjoining City officials from enforcing the busking restrictions.[7] ROA.12.

[7] Mr. Barilla also sought nominal damages in the amount of $1. ROA.12.

The City moved to dismiss, arguing that Mr. Barilla lacked standing, that he failed to state a claim, and that his claims were barred by the statute of limitations. ROA.59–81. Mr. Barilla opposed the motion, citing Fifth Circuit and Supreme Court precedent that supports both his standing and his First Amendment claim. ROA.105–28.

Without holding oral argument, the district court granted the City's motion to dismiss for lack of subject matter jurisdiction on standing grounds. ROA.164–69. Specifically, the court held that Mr. Barilla failed to establish an Article III injury because his fears that the busking prohibition would be enforced against him "are nothing more than conjecture and speculation." ROA.168. According to the district court, Mr. Barilla's allegations of self-censorship and chilled speech do not arise to the level of injury needed to establish standing because Mr. Barilla "has not provided any evidence[ ] that he has been cited under the Ordinances or have [sic] been threatened with possible citations;" nor has he "been arrested . . . [or] shown that he is in immediate danger of being arrested." ROA.168. Thus, the district court held, "[e]ven if Plaintiff fears

of [sic] prosecution or citation amount to an injury, his fears are not distinct, concrete nor imminent." ROA.168.[8]

Mr. Barilla filed a motion for reconsideration, or alternatively, for leave to amend to add allegations about the City's enforcement of the busking restrictions. ROA.170–89. Mr. Barilla urged that reconsideration was warranted because the district court had erroneously adopted a heightened pleading standard, contravening Supreme Court and Fifth Circuit precedent. ROA.171–72, 179–81. Further, he argued that he had adequately alleged a threat of enforcement because the City's acceptance of his application and fee and issuance of a permit to perform in the Theater District shows that it enforces its busking restrictions. ROA.172. Thus, prospective relief was warranted because the City's ordinances force him to choose between abiding by an unconstitutional law or breaking the law and busking illegally. ROA.172.

To support his alternative motion for leave to amend, Mr. Barilla offered new evidence that police have shut down street performers, which

[8] The district court did not address the City's arguments for dismissal under Rule 12(b)(6) and the statute of limitations.

demonstrates that his self-censorship and fear of enforcement are well-founded. ROA.178–79. Specifically, Mr. Barilla attached a declaration from Mr. Ishola Muhammad, a fellow would-be busker in Houston who contacted Mr. Barilla's counsel after hearing about this lawsuit. ROA.183–89. Mr. Muhammad founded Boys-Into-Men, a 501(c)(3) mentorship program in Houston that guides young, at-risk men about how to lead a responsible life, including by teaching them entrepreneurial skills through busking. ROA.178. Mr. Muhammad attested that the City had enforced the busking restrictions against him in the past, including an incident in 2017 when an officer told Mr. Muhammad he could sing outside a city park, but was prohibited from asking for tips while doing so. ROA.179. Based on his experience with enforcement of the City's busking restrictions, Mr. Muhammad abandoned a project called "Bayou Buskers," a busking group that he started for Boys-Into-Men's members. ROA.178–79.

The district court denied Mr. Barilla's motion for reconsideration and alternative request for leave to amend in a two-sentence order that gave no justification or reasons for the denial. ROA.209. Mr. Barilla timely appealed. ROA.210.

SUMMARY OF ARGUMENT

This case is resolved by the Court's recent decision in *Speech First, Inc. v. Fenves*, which concluded, as this Court has "repeatedly held," that "in the pre-enforcement context, . . . [c]hilling of plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." 979 F.3d 319, 330–31 (5th Cir. 2020). Here, the district court thought differently and applied a heightened pleading standard contravening not only *Speech First*, but also a long line of cases from this Court and the Supreme Court. Specifically, the district court dismissed Mr. Barilla's First Amendment challenge because he did not provide a history of past enforcement of the busking restrictions or allege that he had been "threatened with possible citations" or "is in immediate danger of being arrested." ROA.168. But that is an unduly restrictive standard for an alleged First Amendment violation.

Under the proper and well-established relaxed standard that applies to First Amendment speech claims, which this Court reaffirmed in *Speech First*, the decision below should be reversed. Mr. Barilla has adequately alleged that the City's busking restrictions have injured him. He has alleged that (1) he wants to busk in Houston and his intended

conduct is speech or expression protected by the First Amendment; (2) his intended future conduct is proscribed by the City's busking restrictions; and (3) the threat of future enforcement is substantial. *See Speech First*, 979 F.3d at 330. While a history of past enforcement is one means of showing a substantial threat of future enforcement, such allegations are not necessary. Instead, where a law on its face prohibits the desired expression, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Id.* at 335 (citing cases). That is because "the threat [of future enforcement] is latent in the existence of the statute." *Id*. at 336 (cleaned up). Thus, a plaintiff who mounts a pre-enforcement challenge to a law on First Amendment grounds "need not show that the authorities have threatened to prosecute him." *Id.*

Even if this Court were to agree that Mr. Barilla lacks standing, it should require the district court to allow him to amend his Complaint to add allegations about the City's enforcement of the busking restrictions. The district court denied Mr. Barilla's alternative motion for leave to amend without providing any justification. This was an abuse of discretion. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("[O]utright refusal to grant the leave [to amend] without any justifying reason

appearing for the denial is not an exercise of discretion; it is merely abuse of discretion and inconsistent with the spirit of the federal rules."). Accordingly, this Court should vacate the district court's judgment and remand for further proceedings.

ARGUMENT

I. Standard of Review

This Court reviews de novo a district court's grant of a motion to dismiss under Rule 12(b)(1). *Houston Chronicle Pub. Co. v. City of League, Tex.*, 488 F.3d 613, 617 (5th Cir. 2007). At the motion to dismiss stage, a plaintiff need only "allege facts that give rise to a plausible claim of . . . standing." *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009). In determining whether a plaintiff has plausibly alleged standing, this Court takes "the well-pled factual allegations of the complaint as true and view[s] them in the light most favorable to the plaintiff." *Stratta v. Roe*, 961 F.3d 340, 349 (5th Cir. 2020). A motion to dismiss for lack of standing should be granted "only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

The Court reviews "the decision to deny a party leave to amend its complaint for abuse of discretion." *U.S. ex rel. Adrian v. Regents of the Univ. of Cal.*, 363 F.3d 398, 403 (5th Cir. 2004).

II. Mr. Barilla Has Article III Standing

To establish standing, a plaintiff must demonstrate (1) a concrete and particularized injury that (2) is fairly traceable to the defendant's actions and which (3) is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The only standing element disputed by the City is the first one—whether Mr. Barilla has sufficiently alleged an injury. The district court erroneously held that this element was not satisfied because Mr. Barilla did not allege that he has been cited, arrested, or threatened with citation/arrest, making his fears of prosecution speculative. That sets an unjustifiably heightened standard and is contrary to Supreme Court and Fifth Circuit precedent regarding First Amendment claims. Under the correct standard, this Court should conclude that Mr. Barilla has adequately alleged an Article III injury and that he has standing to challenge the City's busking restrictions.

A. The district court improperly applied a heightened standard for pleading a First Amendment injury.

This Court recently emphasized the three factors that typically are required to establish the injury prong in a constitutional case seeking prospective relief:

> A plaintiff has suffered an injury in fact if he (1) has an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) his intended future conduct is arguably . . . proscribed by [the policy in question], and (3) the threat of future enforcement of the [challenged policies] is substantial.

Speech First, 979 F.3d at 330 (cleaned up). At the motion to dismiss stage, a plaintiff need only plausibly allege that these factors are met. *See id.* at 329 ("At earlier stages of litigation . . . the manner and degree of evidence required to show standing is less than at later stages.").

However, when evaluating First Amendment claims, "standing rules are relaxed . . . so that citizens whose speech might otherwise be chilled by fear of sanction can prospectively seek relief." *Justice v. Hosemann*, 771 F.3d 285, 294 (5th Cir. 2014). Accordingly, as this Court emphasized in *Speech First*, it "has repeatedly held, in the pre-enforcement context, that chilling a plaintiff's speech is a constitutional

harm adequate to satisfy the injury-in-fact requirement." *Speech First*, 979 F.3d at 330–31 (cleaned up; citing cases).

Because a chilling effect is sufficient to establish an injury in this context, "[n]o history of past enforcement" is required to establish standing. *Rangra v. Brown*, 566 F.3d 515, 519 (5th Cir.), *dismissed as moot on reh'g en banc*, 584 F.3d 206 (5th Cir. 2009). Instead, a threat of enforcement is presumed. *See id.* ("When dealing with statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will *assume* a credible threat of prosecution in the absence of compelling contrary evidence.") (emphasis added; cleaned up); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (concluding that where "the State has not disavowed any intention of invoking" the challenged law, plaintiffs are "not without some reason in fearing prosecution"). This makes sense because a law's chilling effect means that most, if not all, covered persons will self-censor, remaining silent rather than exercising their speech rights and facing prosecution.

Likewise, "a plaintiff who mounts a pre-enforcement statutory challenge on First Amendment grounds 'need not show that the authorities have threatened to prosecute him . . . ; the threat is latent in

the existence of the statute.'" *Speech First*, 979 F.3d at 336 (quoting *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003)); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("It is not necessary that [a party] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").

This Court's explanation in *Speech First* of the relaxed standard applicable to speech cases is consistent with decades of precedent in this Court, other circuit courts, and the Supreme Court. *See, e.g.*, *Babbitt*, 442 U.S. at 298 (holding that a plaintiff may have standing even where the law "has not been applied or may never be applied"); *Reeves v. McConn*, 631 F.2d 377, 381 (5th Cir. 1980) ("[T]he Supreme Court has often rejected the rule of standing that would require a plaintiff to submit to arrest or point to the arrest of another before he may challenge the subject ordinance in federal court."); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 766 (6th Cir. 2019) (holding that the "fact that there is no evidence in the record of past enforcement misses the point") (internal quotation marks omitted); *Majors*, 317 F.3d at 721.

The district court, however, failed to apply the relaxed standard for First Amendment claims and instead applied a heightened standard. It held that Mr. Barilla's fears of enforcement were speculative and that he lacked standing because he did not "provide[ ] any evidence" "that he has been cited under the Ordinances or . . . threatened with possible citations" and because he "has not been arrested and has not shown that he is in immediate danger of being arrested." ROA.168. Essentially, because Mr. Barilla did not allege that City officials had *already* punished, prosecuted, or threatened him for the exercise of his First Amendment rights, he lacked standing. That is directly contrary to the standard established in numerous cases by the Supreme Court and this Court. *See Steffel*, 415 U.S. at 459; *Babbitt*, 442 U.S. at 298; *Speech First*, 979 F.3d at 336; *Rangra*, 566 F.3d at 519; *Houston Chronicle*, 488 F.3d at 618; *Fairchild v. Liberty ISD*, 597 F.3d 747, 754–55 (5th Cir. 2010); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006).

B. Mr. Barilla has standing to challenge the City's busking restrictions.

1. He has alleged an intent to engage in constitutionally protected activity.

Under the correct standard, Mr. Barilla has adequately pleaded an injury. *See Speech First*, 979 F.3d at 330. First, he has alleged that he

wants to busk in Houston "as a means of improving his musicianship and performance skills while getting paid to perform," ROA.8, and that he would do so were it not for the City's prohibition and permit requirement, ROA.9. He has also alleged that his intended conduct is speech or expression protected by the First Amendment. ROA.10–11. Busking consists of playing music and requesting monetary donations and therefore combines two types of protected speech: musical expression and solicitation. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 ("Music, a form of expression and communication, is protected under the First Amendment."); *United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment."). Therefore, Mr. Barilla has sufficiently alleged that he intends to engage in conduct "affected with a constitutional interest." *Speech First*, 979 F.3d at 330.

2. His protected speech or expression is prohibited by the City's busking restrictions.

Second, it is undisputed that Mr. Barilla's intended future conduct is "proscribed" by the City's busking restrictions. *Speech First*, 979 F.3d at 330. According to the City's Code, "[t]he playing of bands upon the streets or in other public places in the city, with a view to taking up a

collection from the bystanders . . . shall be a nuisance and unlawful." *Houston, Tex., Code of Ordinances*, ch. 28, art. I, § 6. Although there is an exception for the Theater District, it is "unlawful for any person who is not *a permittee* to . . . conduct sidewalk performances in the theater/entertainment district." *Houston, Tex., Code of Ordinances*, ch. 40, art. XI, § 262 (emphasis added). These provisions forbid Mr. Barilla from engaging in his intended course of conduct, and the City has not argued otherwise.

3. The chilling effect of the City's busking restrictions satisfies the substantial threat of the enforcement prong.

Third, Mr. Barilla's allegations regarding self-censorship and a chilling effect obviate the need for a more specific showing as to enforcement of the busking restrictions. As noted above, in the First Amendment context, the "chilling" effect of an ordinance is sufficient to establish standing—no allegations about a specific history of enforcement are needed. *See Speech First*, 979 F.3d at 330–31 ("[C]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement . . . ."); *id.* at 336–37. Instead, in facial pre-enforcement challenges to non-moribund statutes, "courts will assume a credible

threat of prosecution in the absence of compelling contrary evidence." *Id.* at 335 (citing cases). By assuming a credible threat of prosecution even absent specific allegations of past enforcement, courts allow First Amendment plaintiffs like Mr. Barilla who allege self-censorship and a chilling effect to bring suit.

Similarly, a complaining party need not himself have been specifically cited or threatened with prosecution to have standing to bring a First Amendment challenge. *See Steffel*, 415 U.S. at 459; *Reeves*, 631 F.2d at 381. And for good reason. Requiring a plaintiff to subject himself to enforcement penalties in order to bring suit leaves him "between the Scylla of intentionally flouting the state law and the Charybdis of forgoing what he believes to be constitutionally protected activity." *Steffel*, 415 U.S. at 462. As this Court put it in *Speech First*, "[w]here the [challenged] policy remains non-moribund, the claim is that the policy causes self-censorship among those who are subject to it, and the [plaintiffs'] speech is arguably regulated by the policy, there is standing." 979 F.3d at 336–37; *see also Carmouche*, 449 F.3d at 660 ("Controlling precedent . . . establishes that a chilling of speech because of the mere

existence of an allegedly vague or overbroad [law] can be sufficient injury to support standing.").

This Court's decision in *Reeves* is illustrative. That case was a First Amendment challenge to a City of Houston ordinance that restricted sound amplification. 631 F.2d at 380. The city argued that the plaintiff lacked standing because the ordinance had never been enforced against the plaintiff or anyone else. *Id.* at 381. This Court rejected the city's argument, holding that when a challenged ordinance "has not yet been enforced . . . , the proper question is whether the plaintiff faces a realistic danger of sustaining a direct injury as a result of the statute's operation and enforcement." *Id.* (cleaned up). Because there was "abundant evidence in the record that Reeves wanted to engage in conduct prohibited by the challenged ordinance and the ordinance was 'not moribund,'" the plaintiff's fear of prosecution was not "hypothetical." *Id.*

Here, at the motion to dismiss stage, Mr. Barilla has adequately alleged facts sufficient to establish standing. His allegations show that Mr. Barilla has self-censored for fear of enforcement, a chilling effect that this Court has repeatedly held constitutes an injury-in-fact. *See Babbitt*, 442 U.S. at 302; *see also* ROA.9 ("But for the busking restrictions,

[Mr. Barilla] would busk again in Houston."); ROA.9 ("[Mr. Barilla] is unwilling to risk fines of up to $500 for violating the ordinance, and therefore, has refrained from busking since his permit expired."). And, of course, it is only common sense for Mr. Barilla to think he risks penalties if he breaks the law. After all, the City demonstrated its willingness to enforce the busking regime when it processed his prior permit application. No further allegations are needed to establish standing.

4. The City has not disclaimed an intent to enforce its busking restrictions.

The City has not abandoned or renounced its busking restrictions. Except to say that Mr. Barilla has not alleged that he nor anyone else has been cited under the ordinances, ROA.68, the City has done nothing to show that the busking restrictions are moribund. Most glaringly, it has not "disavowed any intention" of enforcing its ordinances. *Babbitt*, 442 U.S. at 302. And even the City's argument that its busking restrictions have not been enforced in the past is belied by Mr. Barilla's allegations, which must be taken as true at this stage. After all, in 2018 the City accepted Mr. Barilla's permit application and $50 payment and issued him a permit to busk as a street performer in the Theater District. ROA.7–8. If its busking restrictions were moribund, it would have simply

returned the fee and permit application as unnecessary.[9] That it did not do so shows that the City is enforcing its busking restrictions.

Moreover, the City's intent to enforce its restrictions on busking is evident from its detailed explanation, in its motion to dismiss, as to what Mr. Barilla is permitted to say and do under the restrictions. The City argued that although he cannot busk,

> [t]he Ordinances leave open a variety of other ways in which Barilla can raise money by his music, including but not limited to informing passerby about his website, suggesting they subscribe to his podcast or YouTube channel, asking them to purchase his music online, or asking them to attend upcoming concerts for which he will be compensated.

ROA.78. This assertion all but admits that the City's busking restrictions are not moribund, but are in full force and effect. And even if the City were to suddenly promise now that it has no intention of enforcing the busking restrictions, such "in-court assurances do not rule out the possibility that it will change its mind and enforce the law more aggressively in the future." *Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019).

[9] Mr. Barilla contends that his payment of the unconstitutional permit fee alone constitutes an injury. ROA.177 n.6.

Because the City's busking restrictions prohibit his desired speech, Mr. Barilla has self-censored out of fear of violating the law and facing the possibility of a steep fine. Under controlling precedent, that satisfies the injury-in-fact requirement, and Mr. Barilla has standing.

III. The District Court Abused Its Discretion in Denying Leave to Amend

In a two-sentence order, and without explanation, the district court denied Mr. Barilla's alternative motion for leave to amend to add allegations to support his standing.[10] ROA.209. If this Court were to agree that Mr. Barilla lacks standing, it should reverse that denial and allow Mr. Barilla to amend the Complaint to add allegations about the City's enforcement of the busking restrictions.

Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that "the court should freely give leave to amend when justice so requires." Fed. R. Civ. P. 15(a)(2). Leave should be given unless there is a substantial reason not to—such as undue delay, bad faith, or undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

[10] The court's denial in its entirety stated: "The Court hereby denied Plaintiff's Motion for Reconsideration (Dk. 20). Plaintiff's request for leave to amend made as alternative relief in his Motion for Reconsideration (Dk. 20) is likewise denied."

While whether to grant or deny a motion to amend is within the district court's discretion, "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of discretion and inconsistent with the spirit of the federal rules." *Id.* at 182; *see also U.S. ex rel. Adrian*, 363 F.3d at 403 ("[O]utright refusal to grant leave to amend without a justification . . . is considered an abuse of discretion.").

Here, the district court abused its discretion when it denied Mr. Barilla's motion for leave to amend without providing any justification. That alone warrants reversal.

Nor was the district court's error simply a failure to give its reasons. There is no justification for denying leave to amend to add allegations about the enforcement threat that Mr. Barilla faces. There has been no undue delay or bad faith; nor would amendment cause undue prejudice to the City. And if allowed to amend, Mr. Barilla could add allegations to support his standing, such as details from Mr. Muhammad's declaration about his experience with enforcement of the busking restrictions. ROA.184–87. This evidence demonstrates that amendment would not be futile. And it would "facilitate determination of [Mr. Barilla's] claims on

the merits" and "prevent litigation from becoming a technical exercise in the fine points of pleading." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597–98 (5th Cir. 1981). If this Court were to agree that Mr. Barilla's allegations do not adequately establish standing, he should be given leave to amend to bolster those allegations.

CONCLUSION

Mr. Barilla respectfully requests that this Court reverse the district court's dismissal for lack of subject matter jurisdiction. If the Court concludes that Mr. Barilla has not adequately alleged standing, it should reverse the district court's unexplained denial of his motion for leave to amend.

Dated: December 21, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2020, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Mollie R. Williams
Counsel for Plaintiff-Appellant

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