Case No. 22-0210

IN THE

United States Court of Appeals for the Ames Circuit

ALEXANDRA LILLIANFIELD,

Plaintiff-Appellant,

v.

AVA NATHANSON, IN HER OFFICIAL CAPACITY AS THE GOVERNOR OF THE STATE OF AMES,

Defendant-Appellee,

ON APPEAL FROM A FINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

BRIEF FOR PLAINTIFF-APPELLANT

The Mary Tape Memorial Team

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Oral Argument

QUESTIONS PRESENTED

1. Does the First Amendment protect Ms. Lillianfield from Governor Nathanson censoring her posts on the official social media page of the Governor's office after she criticized the Governor's controversial policy announcement?
2. Does the First Amendment protect Ms. Lillianfield from Governor Nathanson leveraging state subsidies to pressure a social media company into removing Ms. Lillianfield from its platform after she criticized the Governor's controversial policy announcement?
3. Does the *Ex parte Young* exception to the Eleventh Amendment apply to a First Amendment suit for injunctive and declaratory relief against the Governor of Ames in her official capacity?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

OPINIONS AND ORDERS

The memorandum opinion and order of the United States District Court for the District of Ames granting defendant-appellee's motion to dismiss are on pages 13–14 of the Joint Appendix (JA). This Court's procedural orders on appeal are on JA-17.

STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343. The District Court entered its final judgment on January 7, 2022. JA-15. Plaintiff-Appellant timely appealed to this Court on January 14, 2022 pursuant to FED. R. APP. P. 4(a)(1)(A). JA-16. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

RELEVANT PROVISIONS

This case involves U.S. CONST. amends. I, XI, XIV and 42 U.S.C. § 1983. These provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

In 2021, the Ames Legislature passed legislation to control the use of guns. JA-4. The governor of Ames, Defendant-Appellee Ava Nathanson, vetoed this legislation. *Id.* On June 15th, 2021, Governor Nathanson publicized her veto of the Legislature's gun control legislation on her official Snapface page. *Id.*

Snapface is a social media platform. JA-6. News organizations publish articles about local governance on Snapface. JA-4. Local elected

officials maintain official pages as well. *Id.* For example, the Governor's official Snapface page, @AmesGov, is "administered by the Governor and her official communication staff," who "routinely post[] news concerning the Governor's official actions" on the page. *Id.* The page is open for "Snapface users to publish comments responding to or commenting on the Governor's posts." *Id.*

Plaintiff-Appellant Ms. Alexandra Lillianfield has used Snapface as a platform for civic engagement since 2020. *Id.* She used it "frequently [to] consume news articles about local governance from a variety of sources." *Id.* And she used it to interact "with political leaders in Ames and in her hometown of Langdell." *Id.* For instance, Ms. Lillianfield frequently participated in conversations on the @AmesGov page by writing comments in response to the Governor's posts. *Id.* She disagreed with many of the Governor's political positions, and she used her comments to express those critical viewpoints. *Id.*

Ms. Lillianfield is particularly concerned about the problem of gun violence in the state of Ames. JA-5. She was frustrated to learn that Governor Nathanson had vetoed the gun control legislation. *See id.* On June 15th, 2021, Ms. Lillianfield posted three responses to the Governor's official announcement on the @AmesGov page. *Id.* She said: (1) "Typical nonsense from our Governor. Doing nothing to address the problem of gun violence in our state. Making Ames safe only for the

killers."; (2) "It'd be a real 'shame' if someone were to exercise their Second Amendment rights against the Governor. Ha!"; and (3) "For any of you gun-toting 'patriots' out there who is as outraged as I am, remember that the Governor lives in Wasserstein City," followed by the Governor's home address. *Id.*

Governor Nathanson then blocked Ms. Lillianfield from the @AmesGov page on or around June 16th, 2021. *See* JA-5. This block involved a "shadow ban" that hides every comment Ms. Lillianfield wrote on the @AmesGov page over the course of seven days. *Id.* To this day, that week's worth of comments remain invisible to all Snapface users. *See* JA-6.

Governor Nathanson went on to pressure Snapface to permanently ban Ms. Lillianfield from the entire platform. She did so in two ways. First, she responded to a question at a press conference about Ms. Lillianfield's posts by saying:

> I'm really disappointed in Snapface. They're a great Ames company, but they've really fallen down on the job here. They really need to do more to stop people from spouting hate speech and promoting violence. Nobody's been a bigger supporter of Snapface for what they do for the Ames community, but I'm really disappointed in them. They need to do more, and I'm going to tell them that.

JA-7.

Second, her chief of staff contacted the CEO of Snapface directly. During that conversation, the Governor's office complained about Ms.

Lillianfield's posts, "made clear that [the Governor] wanted Snapface to rectify the situation," and said the Governor would "take a closer look at Snapface's government subsidies if [Snapface] refused to act." JA-7–8.

Snapface depends on these subsidies to support its business operations. JA-6. It has benefited from Ames's financial support and Governor Nathanson's political support since it was founded. *See* JA-6–7. Snapface is headquartered in Ames, where it operates a major campus. JA-6. But more importantly, Ames has given Snapface millions of dollars in tax credits and subsidies over the past decade. *Id.* These subsidies would be compromised without Governor Nathanson's political support. JA-7. In light of these dependencies, Snapface has made extensive political donations to Governor Nathanson, and Snapface's CEO hosted at least one public fundraiser for her in the most recent state election cycle. *Id.*

Within days of the conversation between Snapface and the Governor's office, Snapface permanently banned Ms. Lillianfield from the entire platform. JA-8. Snapface notified her through an email, in which they claimed that Ms. Lillianfield had violated the platform's terms of service. *Id.*

In response to being blocked and deplatformed, Ms. Lillianfield initiated this suit under 42 U.S.C. § 1983 against Governor Nathanson in her official capacity as Governor of Ames. JA-2. Ms. Lillianfield

alleged two violations of her First Amendment rights to free speech and sought injunctive and declaratory relief from the United States District Court for the District of Ames. JA-2–3, 9. Governor Nathanson filed a motion to dismiss, JA-11–12, which the District Court granted, JA-13–14. The District Court held that the shadow ban was not a First Amendment violation, the permanent ban was not a state action, and the Eleventh Amendment barred the court's jurisdiction. *Id.* Ms. Lillianfield filed a timely appeal, JA-16, bringing the case before this Court, JA-17.

SUMMARY OF THE ARGUMENT

Ms. Lillianfield engaged in constitutionally protected speech when she commented on Governor Nathanson's Snapface post about her veto of gun control legislation. The Governor penalized her by censoring her speech on Snapface. The First Amendment prohibits a governor from silencing a constituent for criticizing her controversial policy announcement. Ms. Lillianfield now seeks injunctive and declaratory relief from this Court.

When Ms. Lillianfield responded to the Governor's announcement on @AmesGov, the Governor's official Snapface page, the First Amendment protected her speech. Her comments do not fall into any of the narrow exceptions to the First Amendment. They were not

government speech, they were not true threats, and they were not incitements to violence.

Nevertheless, Governor Nathanson blocked Ms. Lillianfield from the @AmesGov page, shadow banning one week's worth of Ms. Lillianfield's posts in that designated public forum. The shadow ban is unconstitutional viewpoint discrimination because it targeted Ms. Lillianfield based on her criticism of the Governor. Even if the shadow ban were instead content-based discrimination, it would still be unconstitutional because it fails strict scrutiny. Furthermore, by imposing a forward-looking shadow ban on one week's worth of Ms. Lillianfield's posts, the Governor imposed an unconstitutional prior restraint on her speech.

Governor Nathanson went on to pressure Snapface to remove Ms. Lillianfield's speech from its platform. By issuing a coercive threat to Snapface's CEO, targeting the company's government subsidies, the Governor transformed Ms. Lillianfield's permanent removal from the platform into state action. Therefore, Governor Nathanson is constitutionally responsible for that violation of Ms. Lillianfield's constitutional rights.

Ms. Lillianfield seeks injunctive and declaratory relief for these two constitutional violations. Although the Governor attempts to invoke the Eleventh Amendment, Ms. Lillianfield falls well within the

boundaries of the Supreme Court's longstanding *Ex parte Young* exception. *See generally* 209 U.S. 123 (1908). By suing Governor Nathanson in her official capacity for exclusively prospective relief to ongoing constitutional violations, Ms. Lillianfield empowers this Court to protect the rule of law.

ARGUMENT

Appellate courts review *de novo* a district court's dismissal under FED. R. CIV. P. 12(b)(6). *See, e.g.*, *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 610 (D.C. Cir. 2017). The question here is thus "whether [the plaintiff's] complaint was sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521, 529–30 (2011). A 12(b)(6) motion should be denied where the complaint is facially plausible such that it pleads enough facts to support a "reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). This Court must accept all factual allegations and take them in the light most favorable to Ms. Lillianfield as the non-movant. *See, e.g.*, *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). Appellate courts also review *de novo* a district court's dismissal under FED. R. CIV. P. 12(b)(1) on Eleventh Amendment grounds. *See, e.g.*, *Hudson v. City of New Orleans*, 174 F.3d 677, 682 (5th Cir. 1999).

I. The shadow ban on Ms. Lillianfield's comments violates the First Amendment.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. This protection applies against the state of Ames because of the Fourteenth Amendment's Due Process Clause. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Whatever one may think of the wisdom or grace of Ms. Lillianfield's comments, the protections of the First Amendment are not reserved for the wise and gracious. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988). This section demonstrates that (1) the First Amendment protects Ms. Lillianfield's comments on the Snapface page of the Ames Governor, (2) blocking Ms. Lillianfield from that page is state action, and (3) such state action contravenes the First Amendment.

A. Ms. Lillianfield's speech is protected by the First Amendment.

Speech is protected by the First Amendment unless it falls under "certain well-defined and narrowly limited" categories. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). On matters of political or public concern, the Supreme Court has consistently "tolerate[d] insulting, and even outrageous, speech in order to provide 'adequate

breathing space to the freedoms protected by the First Amendment.'" *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler*, 485 U.S. at 56).

Three categories of unprotected speech are potentially relevant but ultimately inapplicable here: (1) government speech; (2) true threats; and (3) incitements to violence. Because Ms. Lillianfield's comments do not fall under any of these exceptions, her speech is protected by the First Amendment.

1. Ms. Lillianfield's comments were not government speech.

The First Amendment does not protect government speech because the state is entitled "to select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009). There are two types of government speech. First, speech by public employees made "pursuant to their official duties." *Garcetti v. Ceballo*, 547 U.S. 410, 421 (2006). Second, speech by private citizens through which "the government intends to speak for itself" as indicated by history, social custom, and past restrictions, *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1589–90 (2022), such as vehicle license plates, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208–209 (2015), and public monuments, *Summum*, 555 U.S. at 471–73.

The Supreme Court "exercise[s] great caution before extending [its] government-speech precedents." *Matal v. Tam*, 137 S. Ct. 1744,

1758 (2017). Private speech does not become government speech simply because the private citizen speaks in a space where the government also happens to express its views. *See Summum*, 555 U.S. at 478 (emphasizing that a state's ability to limit monuments in a public park has no bearing on its ability to regulate public speakers in the same park). Consequently, at the circuit court level, comments on a public official's social media page by private citizens are treated as private speech, even if the official's own posts are government speech. *Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019).

Ms. Lillianfield's comments were not government speech. Ms. Lillianfield is a private citizen, and there is no historical tradition, social custom, or past restriction indicating that the Governor intends to speak for herself via other people's comments on her Snapface page.

Given the novelty of social media, states have no historical tradition of speaking publicly via private citizens' comments on social media. *Cf. Matal*, 137 S. Ct. at 1759 (noting that the Court had held public monuments were government speech in part because "[g]overnments have used monuments to speak to the public since ancient times").

Social custom and the absence of previous restrictions also cut decidedly against finding that Ms. Lillianfield's comments were government speech. *See Shurtleff*, 142 S. Ct. at 1592–93 (holding that a

city's "lack of meaningful involvement in the selection of flags" was "the most salient feature" rendering its flag-raising ceremony private speech). The *Davison* court held that comments on a county official's Facebook page were private speech because the page identified who commented and lacked "formal limitations" on comments. 912 F.3d at 686. Similarly, Ms. Lillianfield's comments were private speech because Snapface demarcates such comments and identifies their source, and the @AmesGov page openly permits external commentary. *See* JA-4–5.

2. Ms. Lillianfield's comments were not "true threats."

The First Amendment does not protect "true threats," which are statements "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992); *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976) (defining a true threat as one that is "so unequivocal, unconditional, immediate[,] and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution").

The circuits are split on the proper application of *Black*. The Ninth and Tenth Circuits require proof of the speaker's subjective intent to threaten. *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 746 (9th Cir. 2021); *United States v. Heineman*, 767 F.3d 970, 982 (10th Cir. 2014).

The Eleventh Circuit requires that a reasonable recipient would perceive an intent to commit violence. *United States v. Fleury*, 20 F.4th 1353, 1365 (11th Cir. 2021). Under either test, the determination of whether speech constitutes a true threat is based on context. *Watts v. United States*, 394 U.S. 705, 708 (1969). Taken in context, Ms. Lillianfield's Snapface comments did not amount to a true threat under either test.

Applying the subjective test, Ms. Lillianfield likely had no intent to threaten the Governor with gun violence. She is a vocal gun control proponent addressing "gun-toting 'patriots'", JA-5, who were likely the Governor's own political allies.

Applying the objective test, a reasonable reader would not perceive a serious intent to commit violence from Ms. Lillianfield's political hyperbole. Ms. Lillianfield posted her comments in response to a press release about the Governor's decision to veto gun control legislation. JA-4–5. Her opening lines were: "Typical nonsense from our Governor. Doing nothing to address the problem of gun violence in our state." JA-4. A reasonable reader of her comments would understand that Ms. Lillianfield opposes gun violence and supports gun control. Any statement seeming to contradict her viewpoint on gun violence is likely to contain some element of sarcasm, irony, or hyperbole. *See Novak v. City of Parma*, 932 F.3d 421, 427–28 (6th Cir. 2019) (explaining that a

reasonable observer would use the social and conversational context of a statement to evaluate its sincerity). This facetious tone is reinforced by Ms. Lillianfield's use of quotation marks around the words "shame" and "patriots" to indicate sarcasm, and confirmed by her laughter at her own joke. JA-5 ("Ha!").

Furthermore, Ms. Lillianfield's statements were conditioned on a highly unlikely event, which indicates a lack of serious intent. In *Watts*, the Supreme Court considered the following statement made by a protester during a political rally: "I have already received my draft classification . . . . I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706. In finding that the statement was political hyperbole rather than a true threat, the Court noted that it "was expressly made conditional upon an event—induction into the Armed Forces—which [the protester] vowed would never occur." *Id.* at 707. Ms. Lillianfield's comments were likewise conditioned on a highly unlikely premise—that any "gun-toting 'patriots'" would be "as outraged as" she was about the Governor's veto of gun *control* legislation, JA-5. Like the speech in *Watts*, Ms. Lillianfield's speech was merely a "crude[,] offensive method of stating a political opposition." 394 U.S. at 707.

Ms. Lillianfield's comments do not become true threats because they included the Governor's home address. Forty-five states provide

their governors with official residences at publicly known addresses. *See Residences of the American Governors*, BALLOTPEDIA, https://ballotpedia.org/Residences_of_the_American_governors (last visited Feb. 10, 2023), *archived at* https://perma.cc/YY6T-Q6AU. In fact, most states actively publicize their governors' addresses.[1] Addresses may also be discovered in address books, court filings, or any number of public records. "[S]haring public information, while potentially offensive and disagreeable, does not rise to the level of a true threat." *United States v. Cook*, 472 F. Supp. 3d 326, 335 (N.D. Miss. 2020) (finding the public disclosure of a person's home address and the names of that person's family members insufficient to constitute a true threat).

Ms. Lillianfield's comments were conditioned on a highly unlikely premise, clearly political in context, and a part of the dialogue over gun control in Ames. *Cf. United States v. Dierks*, 978 F.3d 585, 589–90 (8th Cir. 2020) (finding the statement "I'll beat ur ass in front of ur widow I

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[1] At least twenty-nine states display their governors' residential addresses on the official state website: Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, and Wisconsin. *See, e.g.*, Governor's Executive Residence, WIS. DEP'T OF ADMIN., https://doa.wi.gov/Pages/AboutDOA/Governors-Executive-Residence.aspx (last visited Feb. 10, 2023), archived at https://perma.cc/Y846-N99A.

promise that," tweeted at a senator, to be a true threat because it was "not conditional, not clearly political in context, and do[es] not in any sense contribute to the values of persuasion, dialogue, and the free exchange of ideas") (internal quotations omitted). Ms. Lillianfield's speech was perhaps "vituperative, abusive, and inexact," *Watts*, 394 U.S. at 708, but it was not a true threat.

3. Ms. Lillianfield's comments were not incitements to violence.

The First Amendment "do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation" unless (1) the speaker intends that her speech will result in violent action, (2) the imminent use of violence is the likely result of the speech, and (3) the speech specifically encourages its audience to take violent action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Speech that fails to advocate for listeners to take an actual course of action cannot constitute incitement. *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973). The First Amendment protects even speakers who seek to persuade their audience that violence is morally necessary, as long as their speech remains an expression of abstract ideas rather than a call to specific action. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982).

In order to strip speech of constitutional protection in the name of incitement, all three elements—intent, imminence, and advocacy of

action—must be satisfied. None of the three are present here. First, Ms. Lillianfield did not intend to advocate for violent action. *See supra* Section I.A.2. Her comments were meant to protest against gun violence, JA-5, not encourage it. Second, there was no imminent use of violence likely to result from Ms. Lillianfield's speech. Unsurprisingly, the record shows no violence resulting from Ms. Lillianfield's few sarcastic comments on a social media post. *See Claiborne Hardware*, 458 U.S. at 928 (finding the fact that no violence resulted from political speech significant in the determination of whether imminent violence was *likely* to result from the speech). Even in conjunction with the Governor's home address, the natural response to Ms. Lillianfield's call to "remember that the Governor lives in Wasserstein City," JA-5, could plausibly be legal picketing, letter-writing—or, most likely, nothing.

Indeed, the very fact that one might speculate any number of responses demonstrates that Ms. Lillianfield's open-ended language did not advocate for a definite course of action—which means that the third required element is missing as well. *Compare Hess*, 414 U.S. at 107–09 (finding that demonstrator's statement of "we'll take the [expletive] street again" did not constitute incitement because "at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time"), *with Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 256, 263–65 (4th Cir. 1997) (finding incitement where a highly detailed

130-page manual providing step-by-step instructions for murder, created expressly to assist in the commission of such crimes, was relied upon by a reader who actually committed homicide). Because Ms. Lillianfield's posts lack intent, imminence, and advocacy of definite violent action, the incitement exception to the First Amendment does not apply to this case.

B. The Governor's shadow ban was state action because the Snapface page and its maintenance are inextricable from the Governor's public office.

The First Amendment only applies to "such action as may fairly be said to be that of the States." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 169 (1970) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)). An act by a public official, like the Governor, is fairly attributable to the state if the official acted in her official capacity or pursuant to state law. *West v. Atkins*, 487 U.S. 42, 49–50 (1988); *see also American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 & n.8 (1999) (noting that the state action and "under color of state law" doctrines are identical).

Lacking Supreme Court precedent, circuit courts have generally found a public official blocking a private citizen from the official's social media page to be state action based on one or more of three criteria: (1) the page is the official state account; (2) the page is maintained by state resources; or (3) the page has an official purpose and appearance. *See Davison v. Randall*, 912 F.3d 666, 680–81 (4th Cir. 2019); *Campbell v.*

Reisch, 986 F.3d 822, 826–27 (8th Cir. 2021); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 234–6 (2d Cir. 2019), *vacated as moot sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1220-21 (2021). *But see Lindke v. Freed*, 37 F.4th 1199, 1204 (6th Cir. 2022) (holding that while either (1) or (2) may be sufficient, (3) is not).

The Governor's Snapface page satisfies all three of these conditions. First, the Governor blocked Ms. Lillianfield from engaging with the official Snapface page of the Ames Governor. *See* JA-4; *Lindke*, 37 F.4th at 1204 ("[S]ome social-media accounts belong to an office, rather than an individual officeholder. When that's true, the account is 'fairly attributable' to the state."). Second, the Governor's "official communication staff" manage the page. JA-4; *see Lindke*, 37 F.4th at 1204 (noting that using state employees to manage a social media page can "transform it into state action"). And third, the page is official both in appearance—the handle is "@AmesGov"—and purpose—the account "routinely posted news concerning the Governor's *official* actions." JA-4 (emphasis added); *see Davison*, 912 F.3d at 680–81 (holding county official blocking plaintiff from her personal Facebook page was state action where "the title of the page includes [her] title" and the page was used . . . to "provide[] information to the public about her and the Loudoun Board's official activities").

C. The @AmesGov page is a designated public forum.

To "evoke First Amendment concerns," "a speaker must seek access to [either] public property or to private property devoted to public use." *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985). That property may be one of three types of public fora: traditional, designated, or limited.[2] This Court should find that @AmesGov is a designated public forum. For a space to be considered any type of public forum, the government must be in charge of that space. *See Christian Legal Soc'y Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez,* 561 U.S. 661, 679 (2010). To create a designated public forum, the government must also "intentionally" open the space for "public discourse." *Cornelius*, 473 U.S. at 802.

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[2] The Supreme Court is inconsistent about forum taxonomy; sometimes it uses the term "nonpublic forum" instead of "limited public forum." *Compare Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (using the tripartite structure of traditional, designated, and limited public fora), *with Minn. Voters All. v. Mansky*, 138 S.Ct. 1876, 1885 (2018) (using the tripartite structure of traditional, designated, and nonpublic fora). To avoid confusion with spaces that are simply not fora, this brief exclusively uses the phrase "limited public forum" and not "nonpublic forum."

1. The Ames government is in charge of @AmesGov because it retains substantial control over the page.

The government is in charge of a space if it directly owns the space or otherwise retains control over it. *See Southeast Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547, 555 (1975) (holding that "a privately owned Chattanooga theater" under a "long-term lease to the city" was a public forum).

Applying this principle, the Fourth Circuit found that a county board chair made her Facebook page a public forum when she "retained and exercised significant control over the page" in her official capacity. *See Davison v. Randall*, 912 F.3d 666, 683–84 (4th Cir. 2019). That control was evident because she "designated her Facebook page as belonging to a government official" and "clothed the page in the trappings of her public office." *Id.* at 683 (internal quotations omitted). The state of Ames similarly controls Governor Nathanson's Snapface page because public staff administer it, it uses the handle "@AmesGov", and it is the "official" Ames governor's page. JA-4.

2. Governor Nathanson intentionally opened @AmesGov for public discourse.

When determining whether the government intended to create a designated public forum, courts consider (1) "the nature of the property and its compatibility with expressive activity" and (2) "the policy and practice of the government." *Cornelius*, 473 U.S. at 802. Circuit courts

have interpreted this second factor to mean that, if a forum is not regulated by consistently enforced policies restricting its use, it is a designated public forum. *See Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991) (finding that a school district created a designated public forum after considering both its published policy manual and actual past use of the facility in question); *Hopper v. City of Pasco*, 241 F.3d 1067, 1078 (9th Cir. 2001) (holding that a city's "so-called policy of non-controversy became no policy at all" because it was inconsistently enforced and "lacked any definite standards").

a. The @AmesGov Snapface page is compatible with expressive activity.

Courts have found social media pages to be "inherently compatible with expressive activity." *See Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1178 (9th Cir. 2022); *see also Davison*, 912 F.3d at 682; *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (emphasizing that the "vast democratic forums of the Internet," particularly social media, are the most important places for the exchange of views) (quoting *Reno v. American Civil Liberties Union,* 521 U.S. 844, 868 (1997)). @AmesGov "routinely posted news" about the Governor's "official actions" and allowed Snapface users to "publish comments . . . on the Governor's posts." JA-4. Therefore, this Court

should find that the Governor's Snapface page is compatible with expressive activity, just as the Ninth Circuit did with Facebook and Twitter in *Garnier*. 41 F.4th at 1178.

b. There is no evidence that Ames had or consistently enforced any policies or practices to regulate speech in the @AmesGov comment section before Ms. Lillianfield posted her comments.

The Ninth Circuit has found the Facebook pages of school board members to be designated public fora based on a factual analysis of "what the government actually does"—or does not do—to regulate its fora. *Garnier*, 41 F.4th at 1178 (quoting *Hopper*, 241 F.3d at 1075). The school board members claimed to have an "unspoken" policy regulating comments on their page, but the court found that the policy did not constitute a consistently enforced regulation. *Id*. There is no evidence that Governor Nathanson had even an unspoken policy established anytime before she shadow banned Ms. Lillianfield, let alone "[s]tandards for inclusion and exclusion" that were "unambiguous and definite." *See id.* (quoting *Hopper*, 241 F.3d at 1077).

Therefore, when Governor Nathanson "intentionally open[ed]" the @AmesGov page "for public discourse," she created a public forum by designation. *Davison*, 912 F.3d at 682 (quoting *Cornelius*, 473 U.S. at 802).

D. The shadow ban is unconstitutional discrimination against Ms. Lillianfield's speech.

Governor Nathanson's decision to shadow ban Ms. Lillianfield is unconstitutional viewpoint-based discrimination. In the alternative, the shadow ban is unconstitutional content-based discrimination and fails the requisite strict scrutiny analysis.

1. The shadow ban is unconstitutional viewpoint-based discrimination.

"[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). Put differently, viewpoint-based discrimination is categorically forbidden—regardless of whether the forum is traditional, designated, or limited. *See Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (prohibiting viewpoint-based discrimination in traditional and designated fora); *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (requiring regulations in limited public fora to be viewpoint-neutral).

A government discriminates based on viewpoint when it targets "particular views taken by speakers on a subject." *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995); *see also Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 49 (1983)

(explaining that the government may not "discourage one viewpoint and advance another"). Moreover, "[i]t is firmly settled under our Constitution that the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969).

Once the Governor opened a forum for constituents to comment on her official acts, JA-4, she could not then block Ms. Lillianfield because of her criticism of the Governor's veto of gun control legislation. In *Rosenberger*, the Supreme Court found that a public university had committed unconstitutional viewpoint discrimination when it withheld school funds from a Christian student magazine, because it had "not exclude[d] religion as a subject matter but select[ed] [religious editorial viewpoints] for disfavored treatment." 515 U.S. at 831. Just as the university in *Rosenberger* allowed all of its student publications to discuss various subjects (e.g., music, pregnancy, and racism) but impermissibly forbade that discussion from a religious perspective, *see id.* at 826, 846, Governor Nathanson allowed constituents to discuss various official actions on the @AmesGov page but impermissibly forbade Ms. Lillianfield's critical perspective on one of those actions—her veto of gun control legislation, *see* JA-4–5.

The Governor's critique of Ms. Lillianfield's commentary as hateful or "promoting violence," *see* JA-7, does not absolve the Governor

of the First Amendment's categorical ban on viewpoint-based speech suppression. In *Robinson v. Hunt County*, the Fifth Circuit held that state actors may not suppress speech just because it is "highly offensive." 921 F.3d 440, 445, 449 (2019) (finding that a plaintiff's complaint "sufficiently pleaded an official policy of viewpoint discrimination" by a sheriff's office that deleted anti-police comments, including offensive remarks about a deceased officer). It is unconstitutional for the Governor to block Ms. Lillianfield because she was offended by Ms. Lillianfield's facetious political hyperbole.

Even if there are questions about whether the Governor blocked Ms. Lillianfield because she was genuinely worried about Ms. Lillianfield's tone, Supreme Court precedent indicates that Ms. Lillianfield's case should at least be allowed to proceed to discovery. *See Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). In *Cornelius*, the Court remanded on the issue of whether the government's justification for suppressing speech was a pretextual "facade for viewpoint-based discrimination." *Id.* Following *Cornelius*, this Court should grant Ms. Lillianfield the opportunity to ascertain easily obtainable evidence about Governor Nathanson's practice of blocking users on Snapface. For example, did the Governor previously block other Snapface users? If so, who? And, why? Such evidence would

expeditiously give the court the necessary context to determine whether viewpoint-based discrimination occurred.

2. Even if this Court were to find that the shadow ban was not viewpoint-based discrimination, it would still fail strict scrutiny as a content-based discrimination in a designated public forum.

If the Governor claims that she blocked Ms. Lillianfield because her posts were "hate speech" or "promoting violence" and not because they were critical, she would have imposed a content-based restriction. *See Rosenberger*, 515 U.S. at 819–20 (defining content-based discrimination as "discrimination against speech because of its subject matter"); *see also Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 793–94 (finding an impermissible content-based restriction where a state regulated video games that depicted or promoted violence). The standard of review for content-based discrimination in a designated public forum is strict scrutiny. *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1885 (2018). "[T]he restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

The shadow ban fails this two-part strict scrutiny analysis. First, there is no evidence in the record of a compelling government interest in blocking Ms. Lillianfield. Evaluating whether a government interest is "compelling" is a fact-based inquiry; courts do not simply take state

actors at their word. *See, e.g.*, *Brown*, 546 U.S. at 799 (holding that the absence of a direct causal link between harm to minors (the purported government interest) and violent video games was fatal to the government's case); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1180–81 (9th Cir. 2022) (examining the record to determine whether the government's alleged interest suppressing speech was actually "significant"). As in *Brown*, the record does not support any link between Ms. Lillianfield's—or anyone's—posts involving strong or violent language and *any* risk of actual violence. The burden to demonstrate the compelling government interest fell squarely on Governor Nathanson; "ambiguous proof will not suffice." *Brown*, 564 U.S. at 800.

Even if Governor Nathanson had a compelling government interest in blocking Ms. Lillianfield's comments, her decision nevertheless fails the "narrowly tailored" prong of strict scrutiny analysis. The Governor's approach "burden[ed] substantially more speech than is necessary." *Garnier*, 41 F.4th at 1179, 1182 (9th Cir. 2022) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)) (finding it unconstitutional for a school board to completely block parents who made lengthy, repetitive posts on the board's social media pages because the block "prevented [the parents] from leaving any comments at all, no matter how short, relevant, or non-duplicative they might be."). Similarly, the Governor's shadow ban extended far beyond

preventing Ms. Lillianfield from making strongly worded or even violent posts. It prevented her from making *any* posts, on any subject introduced by the Governor on @AmesGov, regardless of how they might be written.

Furthermore, the Governor had alternative means that would have been less burdensome on protected speech. *See Fasking v. Merrill*, No. 2:18-CV-809-JTA, 2023 WL 149048, *13 (M.D. Ala. 2023) (holding that a state official's decision to block a constituent from posting critical comments on Twitter was not "narrowly drawn."). The *Garnier* court offers at least two alternatives: (1) deleting or hiding specific comments (though even this option does not necessarily survive strict scrutiny), or (2) establishing and enforcing clear rules of etiquette for public engagement on a social media page. 41 F.4th at 1182. Governor Nathanson did neither of these.

Instead, she chose to shadow ban Ms. Lillianfield, rendering one week's worth of Ms. Lillianfield's comments on @AmesGov invisible to any other Snapface user. *See* JA-5–6. A shadow ban is the digital equivalent of a box made of one-way mirrors. No one outside the box can see or hear Ms. Lillianfield inside the box. Ms. Lillianfield might as well never have spoken. No matter what she said on @AmesGov, nobody can hear her.

E. The shadow ban is an unconstitutional prior restraint.

Governor Nathanson's shadow ban preemptively censored any comments Ms. Lillianfield made on @AmesGov for seven days. Prior restraints are presumptively unconstitutional. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). Traditionally, prior restraints are "administrative [or] judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). Increasingly, however, courts define prior restraints broadly to include even unofficial directives. *See, e.g.*, *Novak v. City of Parma*, 932 F.3d 421, 433 (6th Cir. 2019) (explaining that "[a] government official should not have to declare his order official . . . to create a prior restraint" because "[s]uch a rule would allow government officials to cloak unconstitutional restraints on speech under the cover of informality").

Scholars also recognize that many speech controls on the internet "operate like prior restraints, whether or not they require government licenses or employ judicial injunctions." Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2299 (2014); *see also* Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 867 (2012) (explaining that online government censorship through methods "more indirect than a straightforward statutory

prohibition" are especially dangerous). The application of prior restraint doctrine to the internet comports with its historical roots in English common law. English common law's strong rejection of prior restraints originated in response to licensing laws imposed by the English crown on printing presses in the sixteenth and seventeenth centuries. *See* 5 William Blackstone, Commentaries *119; Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 674–691 (1985) (explaining the licensing laws). "Like the internet in our own day, the printing press was a powerful technology of mass distribution and therefore feared by the state, which sought to control its dangers." *See* Jack M. Balkin, *Free Speech Is A Triangle*, 118 COLUM. L. REV. 2011, 2018 n.19 (2018).

While courts have yet to confront whether a shadow ban constitutes a prior restraint, the Fourth Circuit has found an unconstitutional prior restraint where a police chief's "general order" amended the department's social media policy to prohibit officers from posting anything negative about the department. *Liverman v. City of Petersburg*, 844 F.3d 400, 404, 407–08, 411 (4th Cir. 2016). Governor Nathanson's shadow ban went even further. It preemptively and unilaterally rendered *every* post Ms. Lillianfield made on the Governor's page for the next seven days invisible to any Snapface user. *See* JA-5–6. This Court should find a prior restraint when the government's chief

executive initiates a shadow ban against a private citizen on a social media platform.

"One of the prerogatives of American citizenship is the right to criticize public [officials] and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944). Governor Nathanson's shadow ban violated the fundamental freedom guaranteed to Ms. Lillianfield by the First Amendment. It is unconstitutional.

II. Ms. Lillianfield's permanent ban from Snapface is state action that violates the First Amendment.

The Governor not only shadow banned Ms. Lillianfield from the Governor's Snapface page, she also pressured Snapface to further restrict Ms. Lillianfield's protected speech. *See* JA-7–8, *supra* Section I.A. Snapface did so by permanently banning her from its platform. *See* JA-8. Under the state action doctrine, a state's involvement with a private party's decision to censor speech can render the state constitutionally responsible for that action. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). The state action doctrine implements the constitutional principle that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from

accomplishing indirectly." *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990). This section explains (1) why Governor Nathanson is constitutionally responsible for Snapface's decision to permanently ban Ms. Lillianfield, and (2) that Ms. Lillianfield's permanent ban from Snapface violated her First Amendment Rights.

A. Snapface permanently banning Ms. Lillianfield was state action because the Governor coercively threatened Snapface's public subsidies.

The Supreme Court attributes private conduct to the government "when the government compels [a] private entity to take a particular action," *Manhattan Comty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019), through "significant encouragement, either overt or covert." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). For state officials, the First Amendment thus proscribes "the threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression of [speech] deemed 'objectionable.'" *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). To determine whether a state actor is responsible for private conduct, the Court calls for a "necessarily fact-bound inquiry." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

1. The threat to "take a closer look" at Snapface's subsidies was objectively coercive because Snapface depends on the Governor's political support.

A state official's encouragement of private conduct constitutes a coercive threat when it can "reasonably be interpreted as intimating

that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983). Even an official who "lacks direct regulatory or decisionmaking authority" over a private party can coerce that party under this objective test. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015) (quoting *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam)).

The Governor made an objectively coercive threat when her office implied that she would seek to cut Snapface's subsidies if it did not restrict Ms. Lillianfield's speech. *See* JA-7–8. The Supreme Court in *Bantam Books* found a coercive "threat of invoking legal sanctions" in a state commission's notices "reminding" book distributors that it could "recommend" the attorney general prosecute them for selling the plaintiff's book. *See* 372 U.S. at 62, 66–67. Here, the Governor's office went a step further by implying that the Governor herself could punish Snapface. *See Lombard v. Louisiana*, 373 U.S. 267, 272–73 (1963) (finding state action in a restaurant's expulsion of Black men given the "coercive effect" of public statements by the mayor and police chief that they would not permit sit-in demonstrations); *see also Rattner v. Netburn*, 930 F.2d 204, 206–07, 210 (2d Cir. 1991) (finding a sufficient threat for a First Amendment claim because statements by a village

trustee to a business group listed several local businesses he supported and thereby implied that he might cease his support).

Both the Second and Seventh Circuits have explained why open-ended threats issued by executive officials, like Governor Nathanson's, are coercive. The Second Circuit held that a billboard publisher would reasonably fear retaliation because a municipality's chief executive made an ominous reference to the publisher's economic vulnerability. *See Okwedy*, 333 F.3d at 344 (reversing dismissal on state action grounds where publisher removed plaintiff's billboard in response to a letter from borough president that "invoked his official authority" and "pointed out" the publisher's "substantial economic benefits" in the borough). Rather than making an "even-handed, nonthreatening" request of Snapface, *see NRA v. Vullo*, 49 F.4th 700, 716–18 (2d Cir. 2022), Governor Nathanson made a threat even more coercive than the borough president in *Okwedy* by explicitly mentioning the state subsidies on which Snapface depends. *See* JA-8.

Judge Posner, writing for the Seventh Circuit, held that a sheriff's letter was objectively coercive because it invoked executive authority and did not disclaim the possibility that such authority would be brought to bear against the companies. *See Backpage*, 807 F.3d at 231–34 (granting a preliminary injunction where Visa and Mastercard stopped processing payments for the plaintiff's website after receiving a

letter on "Office of the Sheriff" stationary "request[ing] that [they] immediately cease and desist" processing such payments). Governor Nathanson possesses far more leverage over Snapface, *see* JA-7–8, than a county sheriff does over two major national companies. Dependent on state support from Ames, Snapface invested heavily in Governor Nathanson's election as Ames's chief executive, securing her support for its business. JA-6–7. In the Governor's words, "[n]obody's been a bigger supporter of Snapface" than her. JA-7. Without that support, Snapface's "subsidies would be compromised." *Id.* Furthermore, Governor Nathanson's threat, like the sheriff's, did not disclaim her ability to carry it out. *Cf. VDARE Foundation v. City of Colorado Springs*, 11 F.4th 1151, 1164 (10th Cir. 2021) (finding no state action where a resort canceled a conference criticized by the mayor, but the mayor disclaimed that the city "does not have the authority . . . to direct private businesses" regarding the events they host).

2. Snapface's subjective motivation for banning Ms. Lillianfield is legally irrelevant to state action doctrine.

Snapface claimed to permanently ban Ms. Lillianfield because of "alleged violations of Snapface's terms of service agreement." JA-8. But because the state action inquiry is objective, *see supra* Section II.A.1, a private party's conduct conforming to state coercion is state action regardless of that party's subjective motivation. *Peterson v. City of*

Greenville, 373 U.S. 244, 248 (1963); *see Backpage*, 807 F.3d at 233 (granting a preliminary injunction against a sheriff's coercion of Visa despite a Visa executive's affidavit stating that "at no point did Visa perceive [the sheriff] to be threatening Visa"); *Mathis v. Pac. Gas & Elec. Co.*, 891 F.2d 1429, 1434 (9th Cir. 1989) ("The mere fact that [a private company] might have been willing to act without coercion makes no difference if the government did coerce." (citing *Carlin Comm., Inc. v. Mountain States Tel. and Tel. Co.*, 827 F.2d 1291, 1295 (9th Cir. 1987)).

Even if this Court could give weight to Snapface's subjective motivation, any alternative explanations for Snapface's behavior merely create a factual dispute that this Court cannot adjudicate at the motion to dismiss stage. *See Helvey v. City of Maplewood*, 154 F.3d 841, 844 (8th Cir. 1998) (reversing summary judgment due to a factual issue wherein the plaintiff alleged that she was fired for protected speech and her employer claimed she was fired due to altercations at work).

B. Because she is permanently banned, any posts Ms. Lillianfield might wish to make on Snapface are preemptively barred in violation of the First Amendment.

When courts find state action in a purportedly private suppression of speech, they repeatedly hold that the plaintiff stated a plausible claim for a First Amendment violation. For example, in *Bantam Books*, the Supreme Court looked "through forms to substance" and found a prior restraint in a state commission's informal notices

coercing a publisher to refrain from publishing particular books. *See* 372 U.S. at 67–68; *see also Okwedy*, 333 F.3d at 340–41 ("A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights."); *Carlin*, 827 F.2d at 1296 (holding that a private phone company's termination of an adult message service's phone number was an "unlawful prior restraint" because the termination followed a pressuring letter from deputy county attorney).

This Court should be especially concerned about restrictions on the use of social media, including the restraint on Ms. Lillianfield's speech on Snapface. As the Supreme Court explained in *Packingham v. North Carolina*, "to foreclose access to social media . . . is to prevent the user from engaging in the legitimate exercise of First Amendment rights" in the "modern public square." 137 S. Ct. 1730, 1736–7 (2017). Ms. Lillianfield used Snapface to keep up with local news and interact with her elected officials. JA-4. Snapface was Ms. Lillianfield's "modern public square," *id.* at 1737, and she is now permanently excluded from it. JA-6, 8.

By upholding the Constitution's protection of political commentary such as Ms. Lillianfield's, this Court defends the essential democratic principle "that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic,

and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Ms. Lillianfield's permanent ban from Snapface is state action that violates the First Amendment. It is unconstitutional.

III. Federal courts have the power to grant Ms. Lillianfield relief from the Governor's unconstitutional actions.

The Eleventh Amendment bars suits against a State "by Citizens of another State," U.S. CONST. amend. XI, or by citizens of that same State, *Hans v. Louisiana*, 134 U.S. 1, 15, 20–21 (1890). However, the Supreme Court "has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984) (citing *Ex parte Young*, 209 U.S. 123 (1908)). To determine if the *Ex parte Young* exception to the Eleventh Amendment applies, the Court must "conduct a straightforward inquiry into whether [the] complaint [1] alleges an ongoing violation of federal law and [2] seeks relief properly characterized as prospective." *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) (first alteration in original) (internal quotations omitted) (quoting *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002)). Ms. Lillianfield's complaint satisfies both components of this "straightforward inquiry."

A. The complaint alleges that Governor Nathanson is violating Ms. Lillianfield's First Amendment rights.

The first prong of the straightforward inquiry requires that the complaint "alleges an ongoing violation of federal law." *Virginia Off.*, 563 U.S. at 255. When the defendant engages in a violation of federal law, she is "stripped of [her] official or representative character." *Ex parte Young*, 209 U.S. at 159–60.[3] In such cases, "[t]he state has no power to impart to [the state official] any immunity from responsibility" through the Eleventh Amendment. *Ex parte Young*, 209 U.S. at 160. The exception focuses "on cases in which a violation of federal law by a state official is *ongoing* as opposed to cases in which federal law has been violated at one time or over a period of time in the past." *Papasan v. Allain*, 478 U.S. 265, 277–78 (1986) (emphasis added). When determining if the *Ex parte Young* exception applies, the Court does not analyze the merits of the underlying claim, *Verizon*, 535 U.S. at 646, but

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[3] Governor Nathanson being stripped of her representative character for the purposes of the Eleventh Amendment is not in tension with her actions constituting state action for the purposes of the First Amendment incorporated through the Fourteenth Amendment, discussed *supra* Sections I.B, II.A. "There is a well-recognized irony in *Ex parte Young*; unconstitutional conduct by a state officer may be "state action" for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh." *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982).

asks merely whether the allegations sufficiently establish the Court's jurisdiction.

In this case, Ms. Lillianfield alleges two ongoing violations of her federal First Amendment rights. *See* JA-2–3; *Verizon*, 535 U.S. at 646 (holding mere allegations to be sufficient).

1. Governor Nathanson's block of Ms. Lillianfield constitutes ongoing censorship of the posts Ms. Lillianfield made during her week-long shadow ban.

The Governor's office blocked Ms. Lillianfield's account on or around June 16th, 2021. *See* JA-4–5. This block includes a shadow ban that prevents any user other than Ms. Lillianfield from ever seeing the posts she made on the @AmesGov page that week. *See* JA-5–6. Ms. Lillianfield did make posts that week, JA-6, but those posts remain censored to this day, *see* JA-5 ("[S]hadow-banned posts are not visible to other users accessing the site."). This ongoing censorship of Ms. Lillianfield's posts from that week allegedly contravenes the First Amendment, *supra* Parts I, II, and thus entitles Ms. Lillianfield to *Ex parte Young*'s exception to the Eleventh Amendment, *see Papasan*, 478 U.S. at 277–78.

2. Governor Nathanson's standing threat regarding Ms. Lillianfield's posts and Snapface's state subsidies constitutes ongoing censorship.

Circuit courts have recognized that an ongoing constitutional violation exists where a state official's standing threats continue to limit

speech. *See, e.g.*, *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015). In *NiGen Biotech, L.L.C. v. Paxton*, the Texas Attorney General sent threatening letters to retailers responsible for presenting the plaintiff's products to the general public. 804 F.3d 389, 392 (5th Cir. 2015). These letters threatened imminent enforcement actions because of the content of the plaintiff's speech, which led the retailers to remove the plaintiff's products from their shelves. *See Id.* at 392, 397. The Fifth Circuit held that the state official's "continued refusal . . . to justify its threatening letters still inflicts . . . constitutional violations." *Id.* at 395. Similarly, Governor Nathanson's office threatened the social media platform responsible for presenting Ms. Lillianfield's posts to the general public which led Snapface to ban Ms. Lillianfield permanently from the platform. JA-7–8. Moreover, Governor Nathanson's continued refusal to revoke her threats inflicts ongoing constitutional violations that entitle Ms. Lillianfield to *Ex parte Young*'s exception to the Eleventh Amendment.

B. The complaint seeks prospective injunctive and declaratory relief, neither of which impose financial liability on the state of Ames.

The second prong of the straightforward inquiry requires that the complaint "seeks relief properly characterized as prospective." *Virginia Off.*, 563 U.S. at 255. Unlike the prospective injunction granted in *Ex parte Young*, complaints that seek to secure money damages are barred

by the Eleventh Amendment. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 664, 668 (1974). "The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other." *Quern v. Jordan*, 440 U.S. 332, 337 (1979). This distinction was drawn because monetary damages suits more directly implicate the sovereign immunity interests protected by the Eleventh Amendment. *See Dugan v. Rank*, 372 U.S. 609, 620 (1963) ("[A] suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." (quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947)) (internal quotations omitted)). To determine if the relief is *properly* characterized as retrospective, courts "look to the substance rather than to the form of the relief sought and will be guided by the policies underlying the decision in *Ex parte Young*." *See Papasan*, 478 U.S. at 279 (citation omitted). Ms. Lillianfield seeks two types of relief, both of which are sufficiently prospective.

1. Ms. Lillianfield seeks prospective relief to enjoin the Governor's ongoing constitutional violations.

Count I of the complaint regarding Governor Nathanson's ongoing censorship of Ms. Lillianfield's shadow banned posts, *see supra* Section III.A.1, requests injunctive relief. JA-9. This remedy requires

merely that Governor Nathanson un-block Ms. Lillianfield's account. Count II of the complaint regarding Governor Nathanson's standing threat against Snapface about Ms. Lillianfield, *see supra* Section III.A.2, also requests injunctive relief. JA-9. Revoking the threat will likely be just as financially insignificant as originally issuing the threat was for Governor Nathanson. *See* JA-7–8 ("[H]er chief of staff reached out to Snapface's CEO to complain about Plaintiff's posts.").

Because neither of the two forms of injunctive relief sought by Ms. Lillianfield impose financial burdens on the State of Ames to remedy past violations, they are sufficiently prospective for the second prong of the straightforward inquiry.

2. Ms. Lillianfield seeks declaratory relief ancillary to her prayer for injunctive relief.

Prospective relief can also include declaratory relief in the form of a notice of past misconduct if it is "ancillary to the prospective relief already ordered by the court." *Quern*, 440 U.S. at 349. However, declaratory relief is barred when it would be more properly characterized as retrospective because it would be functionally equivalent to money damages. *Compare Green v. Mansour*, 474 U.S. 64, 73 (1985) (rejecting federal declaratory relief that would exclusively be used to establish res judicata in an action for monetary damages in state court), *with Verizon*, 535 U.S. at 646 (permitting the consideration of

declaratory relief because "[i]nsofar as the [monetary] exposure of the State is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction").

In addition to the requests for injunctive relief specified in counts I and II, "Ms. Lillianfield asks this Court to declare that the Governor's actions were unlawful." JA-3. Such a declaration by the Court may guide Snapface's future decisions about restoring Ms. Lillianfield's account without creating monetary exposure for the state. Therefore, declaratory relief ancillary to the injunctions against Governor Nathanson's ongoing constitutional violations satisfies the prospective requirement in the Court's straightforward inquiry regarding the *Ex parte Young* exception.

C. Federal courts regularly exercise jurisdiction over claims like Ms. Lillianfield's to protect the rule of law.

Federal courts frequently exercise jurisdiction over § 1983 claims arising under the First Amendment, notwithstanding the Eleventh Amendment. *See, e.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 827–28 (1995). Federal courts also exercise their jurisdiction against state governors in particular. *See, e.g.*, *Sterling v. Constantin*, 287 U.S. 378, 393 (1932).

The Court exercises its jurisdiction in such cases to protect the rule of law. In *Sterling*, the governor of Texas was sued for

unconstitutionally declaring martial law. *Id.* at 387–88. The Court found that it had jurisdiction to provide appropriate relief to injured persons when state officials, acting under state authority, violate constitutional rights. *Id.* at 393. Similarly, this Court has jurisdiction to provide appropriate relief to Ms. Lillianfield because Ava Nathanson, acting as the Governor of Ames, violated Ms. Lillianfield's First Amendment rights. To hold otherwise would give the Governor's actions "the quality of a supreme and unchallengeable edict" such that "the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land." *Id.* at 397–98.

CONCLUSION

For the foregoing reasons, we respectfully request a reversal of the District Court's decision.

Respectfully submitted,
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APPENDIX

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the

same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.