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 THE DEFENDANT-APPELLEE

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MARCH 7, 2023, 6:30 P.M.
THE AMES COURTROOM
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Oral Argument

QUESTIONS PRESENTED

1. Whether the district court correctly dismissed Appellant's suit for failing to state valid claims under the First Amendment that (1) her temporary suspension from Governor Nathanson's Snapface page was a violation of protected speech, and (2) Snapface's decision to deplatform her for violating its terms of service was attributable to Governor Nathanson under the state action doctrine.

2. Whether the district court correctly dismissed Appellant's suit because the Eleventh Amendment bars relief that is not properly prospective or that seeks to remedy alleged violations of federal law that are not ongoing.

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INTRODUCTION

Responsive government is built on communication. Government officials, at their best, keep the public informed and foster connections between the people and their representatives. In our digital age, that communication increasingly happens online. And in Ames, it happens on Snapface.

On June 15, 2021, Ames Governor Ava Nathanson updated her Snapface followers with a post about her administration's work. That post drew some criticism—as her posts often did. But one user went beyond political disagreement to deeply personal threats. In response, Governor Nathanson spoke out against online harassment and temporarily limited that user's ability to post on the Governor's page.

That user now invokes the First Amendment's protections. If her vision is given legal force, it would embolden the most corrosive voices in the most common medium for modern communication. Public officials would be forced to either accept all threats, spam, harassment, and bots—or withdraw from social media altogether. Either option undermines our contemporary conception of responsive government and warps the purpose of the First Amendment: to protect public discussion, not to stymie it.

The same principle of responsive government undergirds the Eleventh Amendment, which enshrines state immunity to suit.

Government needs space to innovate, and local officials cannot properly serve their communities if they must constantly convince federal judges of the wisdom of their ideas.

The motion to dismiss exists for cases like this one. To the dangers that elected officials face from online threats, Appellant would add the chilling prospect of burdensome litigation and judicial sanction. The questions posed here do not turn on this case's twenty-first century facts, but on longstanding principles of law. Those principles foreclose this suit.

OPINIONS AND ORDERS

The opinion and order of the United States District Court for the District of Ames granting the Defendant-Appellee Governor Ava Nathanson's motion to dismiss is reproduced beginning at page 13 of the Joint Appendix ("JA"). The district court's judgment dismissing the complaint is reproduced at JA-15. This Court's procedural order on appeal is reproduced at JA-17.

STATEMENT OF JURISDICTION

The United States District Court for the District of Ames issued an order granting Governor Nathanson's motion to dismiss on January 7, 2021. JA-15. Appellant asserted that the district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because this case raises federal questions under the First, Eleventh, and Fourteenth

Amendments, as well as 42 U.S.C. § 1983. The district court disagreed. Appellant timely appealed. JA-16. This Court would ordinarily have appellate jurisdiction under 28 U.S.C. § 1291, but jurisdiction remains disputed.

RELEVANT PROVISIONS

This case involves the First, Eleventh, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Those provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

Plaintiff-Appellant Alexandra Lillianfield alleges First Amendment violations arising from a series of events that began with three comments she made on Ames Governor Ava Nathanson's Snapface page. JA-2–3.

Snapface

Governor Nathanson maintains an official account on Snapface, a social media platform. JA-4. She uses the page to provide updates to Ames citizens and share "news concerning [her] official actions." JA-4. Though users may reply to the Governor's posts, they may not begin a new thread. JA-4. All users must agree to Snapface's terms of service, which prohibit disruptive behavior. JA-8.

In 2020, Appellant created a Snapface account. JA-4. She followed various Ames politicians and regularly responded to Governor Nathanson's posts with criticisms of her policies. JA-4.

Snapface is a private company headquartered in Ames. JA-6. While it receives substantial state tax credits and subsidies, which Governor Nathanson supports, it is a "hugely profitable business." JA-6. Snapface has donated to Governor Nathanson's campaign, and its CEO has hosted a fundraiser for her. JA-7. Snapface is not a party to this suit.

Appellant's Comments

On June 15, 2021, Appellant made three comments in response to Governor Nathanson's post about gun-control legislation. JA-4–5. Appellant's first comment criticized Governor Nathanson's political stance. JA-5. Her second said "[i]t'd be a real 'shame' if someone were to exercise their Second Amendment rights against the Governor." JA-5. Her third comment encouraged "any of you gun-toting 'patriots' out there" who were "as outraged as" she was to "remember that the Governor lives in Wasserstein City," and then listed Governor Nathanson's home address. JA-5.

Temporary Suspension

Within a day, Governor Nathanson used Snapface's built-in feature to temporarily suspend Appellant's ability to make public

comments on her page. JA-5. The suspension, which may only be used once, lasts for up to a week, after which access is fully restored. JA-5. During that time, Appellant could still post on her own page or on any other Snapface page. JA-5. She also never lost access to Governor Nathanson's page and could still view posts and comments. JA-5. The suspension expired by June 23, 2021—nearly five months before she filed suit. *See* JA-5, 10.

Deplatforming

Shortly after Appellant's comments, Governor Nathanson stated at a press conference that she would "tell [Snapface]" that "they need to do more to stop people from spouting hate speech and promoting violence." JA-7. Governor Nathanson's chief of staff subsequently contacted Snapface's CEO to explain that Governor Nathanson might reconsider her support for Snapface's tax subsidies if the company did not take violent posts, such as Appellant's, seriously. *See* JA-7–8.

A few days later, Snapface notified Appellant that she had "violated Snapface's terms of service by promoting violence" and would be deplatformed. JA-8.

Proceedings Below

On November 15, 2021, Appellant filed suit under 42 U.S.C. § 1983. JA-8–10. Appellant alleged that Governor Nathanson violated her First Amendment rights by (1) temporarily suspending her ability

to make public comments on Governor Nathanson's page and (2) compelling Snapface to deplatform her. *See* JA-8–9. Appellant requested injunctive relief enjoining Governor Nathanson's actions and restoring access to her Snapface account and to the Governor's page, as well as declaratory relief. JA-3, 9. Governor Nathanson moved to dismiss both counts for failure to state a claim and for lack of jurisdiction. JA-11–12.

The district court granted the motion. JA-13–14. It reasoned that Governor Nathanson's temporary suspension did not violate the First Amendment, and that Snapface's deplatforming did not constitute state action for First Amendment purposes. JA-13. The court also held that it lacked jurisdiction under the Eleventh Amendment. JA-13–14.

Appellant timely appealed. JA-16.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's order granting the motion to dismiss.

I. The justiciability doctrines of standing and mootness preclude this Court from hearing Appellant's case. Federal judicial power is constitutionally limited to cases and controversies involving redressable harms and live issues. First, her case is not redressable because Appellant's requested relief does not remedy her alleged

injuries. Second, her first count is moot because the violation took place in the past and can never recur. This suit is nonjusticiable and must be dismissed.

II. Appellant's first count runs afoul of multiple lines of First Amendment doctrine, each of which independently strips her temporary suspension claim of constitutional protection. The First Amendment applies to state action, but Governor Nathanson's decision to temporarily suspend Appellant's account was a personal choice to protect her own safety. Even if that decision can be imputed to Ames, Appellant's comments are not protected speech because they constitute credible threats of violence, incitements to lawlessness, and posts on a channel reserved for government speech that is not susceptible to forum analysis. Further, even if Governor Nathanson has opened a public forum, she may still moderate that forum. Appellant's alleged facts demonstrate that Governor Nathanson's decision to protect safety and privacy would survive any level of scrutiny.

III. Appellant's second count contravenes the state action doctrine, which requires her to attribute Snapface's deplatforming decision to the state in order to receive First Amendment protection. Appellant's claim fails because Governor Nathanson has not used the coercive force of law to transform Snapface—a third party—into a

public actor. Absent corresponding legal authority, even aggressive political tactics do not clear this high bar.

IV. Both of Appellant's claims are jurisdictionally barred by the Eleventh Amendment, which protects state sovereign immunity. While *Ex parte Youn*g creates a narrow exception in order to reconcile state sovereignty with federal supremacy, applying it here would upset that balance. *Ex parte Young* only permits the federal judiciary to hale Governor Nathanson into court if the proposed relief is necessary to stop an ongoing violation of federal law and is prospective in nature. Appellant's case fails both prongs. First, her alleged injuries took place in the past. Second, she asks this Court to retrospectively condemn past conduct and administer indirect remedies that would not effectively resolve her concerns. The Eleventh Amendment stops this Court from granting that relief.

ARGUMENT

De novo review is appropriate for both dismissal for failure to state a claim pursuant to Rule 12(b)(6), *Reznik v. inContact, Inc.*, 18 F.4th 1257, 1260 (10th Cir. 2021), and for dismissal for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), *Republic of Paraguay v. Allen*, 134 F.3d 622, 626 (4th Cir. 1998).

To survive a 12(b)(6) motion to dismiss, the complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While this Court accepts factual allegations as true, it need not "credit a complaint's conclusory statements." *Id.* at 686. Dismissal is also warranted when there is no "cognizable legal theory." *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

I. APPELLANT'S CLAIMS ARE NONJUSTICIABLE.

Under the Constitution's case-or-controversy requirement, federal courts have limited jurisdiction and can only hear suits in which plaintiffs have standing and their claims are not moot. Const. Art. III; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). This Court must consider questions of justiciability, even if they are not raised below. *Steel*, 523 U.S. at 93, 95.

Appellant alleges two counts against Governor Nathanson. Neither is justiciable. Appellant lacks standing to assert both claims because the relief she seeks does not redress her alleged injuries. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Her first claim is also moot because the controversy has been resolved and cannot recur. *See DeFunis*, 416 U.S. at 318–19.

A. Appellant lacks standing because her claims are not redressable.

To meet the "irreducible constitutional minimum" of standing, plaintiffs must plead an injury that is fairly traceable to the challenged action and redressable by a favorable decision, which must lead to "likely" rather than merely "speculative" resolution. *Lujan*, 504 U.S. at 560–61. There is no redressability when the relief sought does not remedy the alleged injury or when a third party necessary for the relief is not legally bound by a court's order. *See id.* at 568–69. A "generalized interest in deterrence" is insufficient. *Steel*, 523 U.S. at 108–09.

For Count I, the relief that Appellant seeks—the undoing of the temporary suspension, JA-2–3—does not remedy her alleged injury. Because that suspension expired months ago and can only be used once, *see* JA-5, Appellant has already obtained what she requests: to "merely . . . [be] un-block[ed]," Appellant Br. 43. To the extent that she

alleges any injury from comments she made while suspended, only Snapface—not Governor Nathanson—can redress that harm by restoring the comments. *See Lujan*, 504 U.S. at 568–69.

The one-time nature of the suspension also forecloses the need to redress any future harm. When seeking an injunction, Appellant must show a "material risk of future harm." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021). But she fails to demonstrate that risk because Governor Nathanson cannot suspend her again. *See* JA-5. Any case that Appellant pursues on behalf of other users or for new accounts would be impermissibly "speculative," because future injuries must be "imminent" and "certainly impending" to be redressable. *Lujan*, 504 U.S. at 561, 564 n.2.

For Count II, Appellant's claim is not redressable because Governor Nathanson lacks legal control over Snapface, a third party necessary to provide relief. *Lujan* held that an injunction against the defendant Secretary of the Interior did not redress alleged harms from third parties because it was an "open question" whether those parties "were bound by the Secretary's regulation" and it was "entirely conjectural" that the alleged conduct would be altered. 504 U.S. at 568, 571.

Here, an injunction compelling Governor Nathanson to "revoke her threats" against Snapface also does not redress the alleged

deplatforming. Appellant Br. 41. As a third party, Snapface is not legally bound to Governor Nathanson. *See Lujan*, 504 U.S. at 568–69. Political pressure is insufficient, because it would be "pure speculation" that enjoining politicians who criticize social media platforms "would affect the behavior of the third-party technology companies." *Ass'n of Am. Physicians & Surgeons v. Schiff*, 518 F. Supp. 3d 505, 516 (D.D.C. 2021), *aff'd*, 23 F.4th 1028 (D.C. Cir. 2022). Appellant must also establish that Governor Nathanson can redress her injury via legal control over changes in Snapface's policies. *See Hart v. Facebook Inc.*, No. 22-cv-00737, 2022 WL 1427507, at *10 (N.D. Cal. May 5, 2022) (declining to find redressability because the Biden Administration could not legally change Facebook's terms of service). Even if Governor Nathanson's political support for Snapface's tax subsidies caused the deplatforming, Appellant Br. 32, *Lujan* explicitly deemed "consultation" to be insufficient for redressability. 504 U.S. at 569.

B. Appellant's first claim is moot.

A case is moot when the issue presented is no longer live. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *see Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1220–21 (2021) (mooting claim against President Trump for blocking Twitter followers because he was no longer President). Voluntary cessation by the defendant does not moot a claim if there is a reasonable

expectation that the wrong will be repeated. *DeFunis*, 416 U.S. at 318 (collecting cases). Otherwise, courts will review moot issues only if the alleged injury is "capable of repetition, yet evading review." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

Appellant's first claim is moot because the alleged violation was a one-time action that has ended and cannot recur. *See* JA-5. When Appellant filed this action, the temporary suspension had been lifted for months. *See* JA-5, 10. The suspension ended automatically after a week without the need for Governor Nathanson's voluntary cessation. *See* JA-5. Additionally, its one-time nature precludes repetition. *See FEC*, 551 U.S. at 462 (noting that the "same complaining party" must reasonably expect to be subject to "the same actions" to sustain a claim). A one-week, unrepeatable suspension is a controversy of the past which this Court cannot adjudicate.

II. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANT'S FIRST COUNT UNDER THE FIRST AMENDMENT.

Count I does not plausibly state a First Amendment claim for three reasons. First, Governor Nathanson's temporary suspension of Appellant's ability to make public comments was a personal act of self-preservation—not an official action enabled by the power of the state. Second, Appellant's comments are not protected speech under the First Amendment. Third, even applying forum analysis, the temporary

suspension appropriately balances the government's interests with First Amendment protections.

A. The temporary suspension was not state action.

The First Amendment only protects against infringement by the government. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). State action doctrine defines the boundary between private and state actors by ensuring that the government is held liable only for its own actions. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Appellant ignores two eponymous requirements of the state action doctrine: (1) the deprivation must flow from "the exercise of some right or privilege created by the *State*," *id.* at 937 (emphasis added), and (2) there must be a "close nexus between the State and the challenged *action*," *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1170 (9th Cir. 2022) (emphasis added).

First, the temporary suspension is not an exercise of state authority because it did not implicate "power . . . made possible only because the wrongdoer [was] clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988). While Governor Nathanson and her staff administered her specific account, every user has the ability to suspend another user from their own page. JA-4–5. And even during the suspension, Appellant could view other users' replies to Governor Nathanson's post and discuss the posts elsewhere on the platform. JA-

6. Appellant's alleged deprivation cannot be linked to any right or privilege created by the state.

Second, Governor Nathanson's action was a personal choice to protect herself from intimidation and violence. An individual employed by the state "gain[s] no authority by presenting [her]self [as a government official]," and her actions retain their fundamentally personal character. *Lindke v. Freed*, 37 F.4th 1199, 1206 (6th Cir. 2022). In *Redding v. St. Eward*, 241 F.3d 530 (6th Cir. 2001), a police officer called 911 to report an armed intruder waiting outside her home. *Id.* at 530. The court rejected arguments that the 911 call was transformed into state action when the caller identified herself as a police officer, reasoning that she was calling only in a personal capacity. *Id.* at 533; *see also McNeal v. Cheruvathor*, No. CV JKB-18-2236, 2018 WL 3740697, at *3 (D. Md. Aug. 6, 2018) (no state action when state employee made "profoundly personal" decision to protect herself against threats).

Governor Nathanson's choice to temporarily suspend a user who was directing "gun-toting 'patriots'" to her home, JA-5—the place she goes when she is *not* working—was "functionally equivalent to that of any private citizen" protecting herself and her family from intimidation and violence, *Redding*, 241 at 533. The First Amendment does not disable government officials from taking the same actions

private individuals would take when their personal liberty is at stake. Indeed, "preserv[ing] . . . *individual* freedom" is the very heart of state action doctrine. *Lugar*, 457 U.S. at 936.

B. Appellant's comments were not protected speech.

Regulation of certain categories of speech "ha[s] never been thought to raise any Constitutional problem," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), because they are "of such slight social value" that any benefit is "clearly outweighed by . . . social interest[s]." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). Appellant's speech receives no First Amendment protection because it is both a true threat and an incitement to lawlessness. Further, because it appeared on Governor Nathanson's page subordinate to Governor Nathanson's name, it should be interpreted as "government speech, the content of which the State is free to control." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

1. Appellant's comments constituted a true threat.

The First Amendment does not protect speech "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." *Virginia v. Black*, 538 U.S. 343, 359 (2003). This carveout protects individuals "from the disruption that fear [of violence] engenders," *R.A.V.*, 505 U.S. at 388 (1992). The true threat analysis is "objective." *United States v. Nishnianidze*, 342

F.3d 6, 15 (1st Cir. 2003); *see also Heller v. Bedford Cent. Sch. Dist.*, 665 F. App'x 49, 51 n.1 (2d Cir. 2016).

Speech is a true threat where a reasonable person would understand it to convey "serious intent" to harm an individual, even when no harm results. *United States v. Turner*, 720 F.3d 411, 423 (2d Cir. 2013). The threat need "not [be] perfectly clear": "[e]ven if a person expresses himself in an . . . illogical manner, his statements can be seriously threatening." *United States v. Dierks*, 978 F.3d 585, 590 (8th Cir. 2020). Courts will almost automatically infer "serious intent" whenever threats are paired with home addresses. *Turner*, 720 F.3d at 416 (judges' and legislators' home addresses); *United States v. Mabie*, 663 F.3d 322, 331 (8th Cir. 2011) (similar); *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007) (true threats because inclusion of target's home address made online posts "significantly more believable").

Appellant's comments qualify as true threats. In *Turner*, an abstract desire for a judge's death represented a true threat when coupled with the judge's address, which demonstrated the "seriousness of the threat." 720 F.3d at 422. Here, Appellant encouraged "outraged" "gun-toting 'patriots'" to "exercise their Second Amendment rights against the Governor," whose address she posted. JA-5. That goes

beyond mere "political hyperbole": it is a true threat. *Turner*, 720 F.3d at 418.

Appellant's responses are unavailing. First, no circuit has ever applied Appellant's suggested subjective test in a civil case.[1] *See* Appellant Br. 11–12. The two circuits to have considered the subjective test have declined to extend it beyond criminal cases. *See Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 747 (9th Cir. 2021); *United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014).

Second, Appellant characterizes her comments as political hyperbole or sarcasm. Appellant Br. 13. But even if they were, Appellant cannot embellish true threats by adding a dash of hyperbole or a sprinkling of sarcasm. *See United States v. Lockhart*, 382 F.3d 447, 452 (4th Cir. 2004) (finding true threat in letter also including political statements); *cf. Higgins v. Ky. Sports Radio, LLC*, 951 F.3d 728, 738 (6th Cir. 2020) (finding intimidation from sarcastic statements).

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[1] *See Nishnianidze*, 342 F.3d at 16; *Heller*, 665 Fd. App'x at 51 n.1 (2d Cir. 2016); *United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013), *rev'd on other grounds*, 575 U.S. 723 (2015); *United States v. White*, 810 F.3d 212, 220 (4th Cir. 2016); *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004); *United States v. Jeffries*, 692 F.3d 473, 477 (6th Cir. 2012); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005); *United States v. Beale*, 620 F.3d 856, 865 (8th Cir. 2010); *United States v. Martinez*, 736 F.3d 981, 988 (11th Cir. 2013), *vacated on other grounds*, 576 U.S. 1001 (2015).

Third, Appellant contends that her statements were premised on a "highly unlikely event." Appellant Br. 13. But "acts of political violence in the United States have skyrocketed in the last five years" and condoning physical attacks on politicians is no longer a fringe belief. Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. Democracy 160, 160 (2021); *see also id.* at 173 ("11 percent of Democrats and 12 percent of Republicans agreed that it was at least 'a little' justified to kill opposing political leaders to advance their own political goals."). Appellant is unquestionably entitled to express her opinions about Governor Nathanson's politics—and the First Amendment protects even "vehement, caustic" attacks. *Watts v. United States*, 394 U.S. 705, 708 (1969). That protection, however, does not extend to threats of violence. *Black*, 538 U.S. at 360.

2. Appellant's comments incited violence.

The First Amendment does not protect incitements to "engage in illegal activity." *United States v. Williams*, 553 U.S. 285, 298–99 (2008). Three factors control the incitement analysis: whether the language "advocate[s] for listeners to take any action," the timing of the called-for action, and the likelihood that the speech will produce it. *Bible Believers v. Wayne County*, 805 F.3d 228, 245 (6th Cir. 2015) (en banc); *see also Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). A speaker need "not explicitly encourage the imminent use of violence"

for her words to be incitement. *Thompson v. Trump*, 590 F. Supp. 3d 46, 115 (D.D.C. 2022) (statement "walk down Pennsylvania Ave" was plausibly incitement).

Where the speaker provides specific enabling details, the first and third factors are both met. That is because, under the first prong, incendiary language is presumed to advocate lawlessness unless it is so "abstract" that it could not lead to a plan. *Compare United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978) (instructions on fraudulently completing tax forms were incitement), *with NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) ("emotionally charged rhetoric" not incitement). Likewise, under the third prong, speech is assumed to produce its intended results where a speaker provides enabling details. *United States v. Fullmer*, 584 F.3d 132, 158 (3d Cir. 2009) (incitement because speaker gave a designated time). The inclusion of sarcasm does not preclude finding incitement. *Higgins*, 951 F.3d at 738. Despite Appellant's attempt to dismiss the incitement here as a "few sarcastic comments on a social media post," Appellant Br. 16, her language includes a concrete activity ("to exercise their Second Amendment rights"), a target ("the Governor"), and a location (Governor Nathanson's home address). JA-5.

The second prong is also met, because incitement is imminent if there is any "rational inference" from the language that the speaker

intends to produce action prior to some "indefinite future time." *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973). *Hess* stressed the defendant's use of "later" in finding that there was no incitement, *id.* at 107, but Appellant used no such qualifying language. JA-5.

Appellant contends that her comments should be read as referring to legal activity, such as letter-writing. Appellant Br. 16. The remarkable suggestion that "gun-toting 'patriots'" "exercis[ing] their Second Amendment rights against the Governor" at her home, JA-5, consists merely of a mail campaign is exactly the kind of implausible inference that this Court need not credit, especially at the motion-to-dismiss stage. *See, e.g.*, *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 998 (9th Cir. 2014).

Appellant finally asserts that her comments cannot be incitement because no violence resulted. Appellant Br. 16. But this logic is circular and belies the fact that Governor Nathanson took swift action to protect herself. *See* JA-5. Further, "the reaction of listeners does not alter the otherwise protected nature of speech." *Nwanguma v. Trump*, 903 F.3d 604, 610 (6th Cir. 2018) (analyzing incitement in social media context). Appellant's argument would require blood to be shed before speech could be deemed incitement.

3. Appellant's comments appeared on a government channel not susceptible to forum analysis.

When the government establishes a medium to communicate its own views, that medium is exempt from the First Amendment. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Governor Nathanson's Snapface page is a classic example of the government's own expression, and thus forum analysis is "misplaced." *Walker*, 576 U.S. at 215.

a. Government speech doctrine applies.

The government's own expressive conduct "is exempt from First Amendment scrutiny." *Summum*, 555 U.S. at 467. When it speaks, the government is free "to say what it wishes," *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995), "exercise[] editorial discretion" in the views it promotes, *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998), and ignore views it disfavors, *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283 (1984).

The government is no less entitled to these freedoms when private parties contribute to its expression. *Walker*, 576 U.S. at 217. Private-party participation "does not . . . transform the government's role into that of a mere forum-provider." *Id.* at 217. Accordingly, courts have found government speech in a wide range of contexts involving

otherwise private expression. *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 331 (1st Cir. 2009) (government website hosting private content); *Walker*, 576 U.S. at 208 (specialty license plates); *Summum*, 555 U.S. at 481 (monuments on government property); *Bryant v. Gates*, 532 F.3d 888, 898–99 (D.C. Cir. 2008) (Kavanaugh, J., concurring) (advertisements in government newspaper); *Mech v. Sch. Bd. of Palm Beach of Cnty.*, 806 F.3d 1070, 1075 (11th Cir. 2015) (local business banners on school fence).

To determine when private speech is subsumed in government speech, courts look "holistic[ally]" at "a case's context rather than the rote application of rigid factors." *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1589 (2022). Though no factor is dispositive, courts consider (1) "the history of the expression," (2) whether the public could associate the speech with the government, and (3) the government's control over the expression. *See id* at 1589-90. Under these factors, Governor Nathanson's page is Governor Nathanson's speech.

First, since the dawn of social media, platforms like Snapface have been used to "convey[] important messages about government." *Id.* at 1590. Appellant instead argues that "the history of the expression" factor should consider all of human history—that the government has "no historical tradition" of speaking via social media comparable to "us[ing] monuments to speak to the public since ancient

times." Appellant Br. 10. But the history of First Amendment doctrine proves otherwise: radio and television were once as novel as social media is today, but courts classified them as mediums of government speech. Put differently, officials have been using these platforms—including ones with the same features at issue here—for nearly the *entire history* of that form of expression. *See, e.g.*, *Mech*, 806 F.3d at 1076 ("[W]e would have little difficulty classifying [government messages on social media] as government speech, even though social media is a relatively new phenomenon"); *cf. CBS v. DNC*, 412 U.S. 94, 95 (1973); The first *Shurtleff* factor decisively favors holding this to be government speech.

Second, based on the page's characteristics—including its structure, presentation, and design—a viewer could reasonably associate content on Governor Nathanson's page with Governor Nathanson. Courts focus not just on the expressive "content" but also "its presence and position." *Shurtleff*, 142 S. Ct. at 1590. Here, the page bears the Governor's name, displays the Governor's posts, and communicates the Governor's chosen messages. JA-4. User replies appear only as appendages to the Governor's posts. JA-4. The second *Shurtleff* factor points to government speech.

Finally, Governor Nathanson maintains control over content on her own page. She can do so in part by temporarily suspending users

who make violent or off-topic comments. Otherwise, viewers might infer an implicit endorsement from her choice to retain certain comments. *See Walker*, 576 U.S. at 213 (holding that permitting private license plate designs would "convey government agreement with the message displayed").

Appellant's "mechanical" application of *Shurtleff* leads to bizarre results. 142 S. Ct. at 1589. By faulting Governor Nathanson for the speculated "absence of previous restrictions," Appellant Br. 10—a fact that Appellant has not even alleged in her complaint—Appellant suggests that Governor Nathanson could only establish that her page is government speech by restricting *more* comments. If, as Appellant contends, such restrictions are unconstitutional censorship, Appellant is effectively seeking more censorship—not less.

b. Forum analysis is inapposite.

Appellant attempts to sidestep the government speech designation by shoehorning social media into the century-old concept of public forums, but her approach upends both doctrines in the process. *See Hague v. CIO*, 307 U.S. 496, 515 (1939). Distilled to their essence, the government speech doctrine controls when the government seeks to communicate its own views, while public forum doctrine controls when it encourages others to exchange views. *See Rosenberger*, 515 U.S. at 833.

Public forums have two critical features: the government must (1) intend to create a public forum and (2) exercise "control" over the platform that hosts the forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800–02 (1985). Neither feature is present here.

First, Governor Nathanson did not intend to create a public forum. This requires the government to "evidence[] a clear intent." *Id.* at 802; *see Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (express policy allowing meetings). Appellant admits that Governor Nathanson's "purpose" in establishing the page was to "post[] news concerning the Governor's *official* actions," Appellant Br. 18 (second excerpt quoting JA-4) (emphasis added)—a far cry from a wholesale invitation for unfettered public discourse.

Appellant's analysis immediately focuses on the *type* of forum, *see* Appellant Br. 22, thus skipping a threshold showing mandated by *Cornelius*: whether the page was a public forum *at all*. 473 U.S. at 800. *Cornelius* requires that the government "intentionally open" a forum, *id.* at 802, with an "affirmative choice." *United States v. Am. Libr. Ass'n*, 539 U.S. 194, 206 (2003). In arguing that Governor Nathanson lacked that clear purpose, Appellant thus inadvertently demonstrates that Governor Nathanson did not clearly intend to create a forum in the first place. Appellant Br. 32; *see Sutliffe*, 584 F.3d at 333 (absence

of "clear standards" was insufficient to show intent to create a public forum).

Second, while Governor Nathanson controls the content on her page, Snapface controls both the page and the platform. Snapface, not the government, operates the platform, decides its terms, writes its algorithms, and defines its features. Individual users like Governor Nathanson, have control over only the limited features that Snapface grants them. Precisely because the government does not control the platform, social media terms of service can prohibit a range of expression that the government could not lawfully censor. *See Matal v. Tam*, 137 S. Ct. 1744, 1749 (2017) (offensive speech); *R.A.V.*, 505 U.S. at 391 (hate speech); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (scandalous or immoral speech); *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (particular speakers' speech).

But if, as Appellant urges, Snapface's control over its platform—and the terms that govern discussion—are attributable to the government, then the government is engaging in viewpoint discrimination merely by participating on the platform. In other words, if the government creates a public forum merely by opening an account on a platform, and if that forum is then defined by terms that the government cannot lawfully enforce, then the government must either change the terms of service, which violates the platform's First

Amendment rights, or exit the platform altogether, which eliminates the public forum entirely.

For these reasons, forum analysis is inappropriate when it would lead "to closing of the forum." *Summum*, 555 U.S. at 480. *Sutliffe* explained that forum analysis did not apply to a government-sponsored website hosting private content because "public forum doctrine could risk flooding the . . . website with private links." 584 F.3d at 334. The court emphasized that if forum analysis applied, the government "might . . . eliminate all external links" rather than be treated as a forum. *Id.* That is Appellant's proposed Sophie's choice: either the government must relinquish its ability "to communicate its own message" by allowing all comments—including threats, spam, harassment, and bots—or prohibit comments altogether. *Id.* "Perversely, application of the forum doctrine in this case could lead to less, not more, speech." *Id.*

C. Even under forum analysis, the temporary suspension was constitutional.

If forum analysis applies, Governor Nathanson's Snapface page is a limited public forum, and the temporary suspension was constitutional because it is both viewpoint-neutral and reasonable. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). Even if this Court finds a designated public forum, the temporary suspension

remains constitutional as narrowly tailored to serve Ames's compelling state interest in safety and privacy. *Summum*, 555 U.S. at 469 (2009).

1. Governor Nathanson's Snapface page would be a limited public forum.

If Governor Nathanson created a public forum, then it was for the limited "purpose [of] convey[ing] information about itself to its citizens and others." *Sutliffe*, 584 F.3d at 334.

A government-created limited public forum exists "for a limited purpose." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983). Courts may infer purpose from unwritten but "consistent polic[ies]" and "practice[s]." *Cornelius*, 473 U.S. at 804, 802. Most courts to have reached the question have found that government officials' social media pages are limited public forums. *Compare Davison v. Plowman*, 247 F. Supp. 3d 767, 776 (E.D. Va. 2017) (limited public forum), *Lloyd v. Doherty*, No. 5:17 CV 2694, 2018 WL 2336808, at *4 (N.D. Ohio May 23, 2018) (same), *aff'd*, No. 18-3552, 2018 WL 6584288 (6th Cir. Nov. 27, 2018), *and Windom v. Harshbarger*, 396 F. Supp. 3d 675, 679, 683 (N.D.W. Va. 2019) (same), *with One Wis. Now v. Kremer*, 354 F. Supp. 3d 940, 955 (W.D. Wis. 2019) (designated public forum).

Governor Nathanson's Snapface page is limited because it has a clear purpose and corresponding policy. First, as in *Plowman*,

Governor Nathanson established the page to "post[] news concerning [her] *official* actions." Appellant Br. 18; *see Plowman*, 247 F. Supp. 3d at 776 (limited public forum because county attorney used Facebook page to "present matters of public interest in [the] county"). Second, Governor Nathanson has established an implied policy of suspending disruptive users who frustrate the news-sharing purpose of her page. The very "fact that the [Governor] screened and rejected" a visitor is "evidence that [she] intended to create a limited public forum[.]" *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 967 (9th Cir. 1999). Here, the fact that Appellant faced removal for making violent posts reflects Governor Nathanson's "practice" of monitoring disruptive comments, *Cornelius*, 473 U.S. at 804—the thing that she "actually d[id]," *Garnier*, 41 F.4th at 1178.

Appellant's argument puts the government in a Catch-22. She admits that courts may infer a limiting policy from the government's practices, but argues that the practice *here* is insufficient because there was no ex ante policy. Appellant Br. 22. That logic places the government in an impossible bind: when the government first seeks to establish a practice early in the life of the forum, Appellant urges the Court to enjoin it because the nascent practice does not yet exist.

2. The temporary suspension was a permissible restriction on speech.

"When the State establishes a limited public forum, the State is not required to . . . allow persons to engage in every type of speech." *Good News*, 533 U.S. at 106. Restrictions on speech in a limited public forum are permissible when they are viewpoint-neutral and reasonable in light of the purpose of the forum. *See Rosenberger*, 515 U.S. at 829. The one-week suspension meets both prongs.

a. <u>The temporary suspension was not viewpoint discriminatory.</u>

Governor Nathanson instituted the temporary suspension not because of Appellant's political ideas but because Appellant's violent outburst contravened the forum's policy of preventing disruptions to its news-sharing purpose. *See Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 876 (8th Cir. 2020) (applying First Amendment analysis to unwritten policy).

Only speech restrictions that suppress certain ideas are viewpoint discriminatory. *Compare Powell v. Noble*, 798 F.3d 690, 698 (8th Cir. 2015) (police removal of an evangelist because he impeded traffic was viewpoint neutral), *with Rosenberger*, 515 U.S. at 831 (university's refusal to fund religious student journal was viewpoint discrimination).

Preventing promotion of violence does not disfavor any particular opinion or idea. In *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489 (9th Cir. 2015), King County simultaneously rejected competing advertisements taking opposite positions on U.S. support for Israel. The *King County* Court held that the decision was viewpoint neutral, rejecting the plaintiff's claim that county officials banned his ads "because they opposed [his] views." *Id.* at 502. Similarly here, Appellant's facts do not support the inference that Appellant was temporarily suspended "because of her criticism." Appellant Br. 24–25. For the duration of her use of Snapface, Appellant was a "vocal opponent of the Governor and her policies, and she expressed those viewpoints frequently." JA-4. Governor Nathanson only issued the temporary suspension after Appellant's comments "promoting violence," JA-8, following a year of routine political criticism from Appellant, JA-4. Because Appellant must provide "evidence [the rules] are applied in a viewpoint-based manner," *Powell*, 798 F.3d at 701, Appellant's call for discovery reveals her failure to state a claim, Appellant Br. 25. Governor Nathanson's decision was decidedly viewpoint-neutral. It was based on safety, not political opinion.

b. The temporary suspension was reasonable.

The reasonableness test sets a low bar, requiring only a permissible state interest and "substantial alternative channels" for the regulated communication. *Perry*, 460 U.S. at 53. The restriction need not be the "most reasonable or the only reasonable" restriction but simply *a* reasonable one. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992) (quoting *United States v. Kokinda*, 497 U.S. 720, 730 (1990)). States like Ames have a permissible, even compelling, state interest in protecting the safety and privacy of those using a government forum. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981); *infra* section II.C.3. The temporary suspension reasonably serves that interest. Furthermore, social media blocking—even when undertaken by the government—"leave[s] adequate alternative channels of communication." *Plowman*, 247 F. Supp. 3d at 779. Here, Appellant could still communicate on her page or other pages, and she could view content on Governor Nathanson's page. JA-5. The restriction was a reasonable one.

3. Even in a designated public forum, the temporary suspension would satisfy strict scrutiny.

Even if this Court finds a designated public forum, the suspension remains constitutional. In a designated public forum, the government may regulate viewpoint-neutral speech—including by removing speakers altogether, *Hopper v. City of Pasco*, 241 F.3d 1067,

1074 (9th Cir. 2001)—as long as its means are narrowly tailored to a compelling interest. *Summum*, 555 U.S. at 469. The unrepeatable, one-week suspension here was narrowly tailored to Ames's compelling interest in ensuring safety and privacy.

a. Ames has a compelling interest in protecting safety and privacy.

Every state has a compelling interest in "protecting the well-being, tranquility, and privacy" of its citizens, which is "of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980); *see also Heffron*, 452 U.S. at 650 (recognizing state interest in protecting the "safety and convenience" of forum users). Contrary to Appellant's claims, a "fact-based inquiry," Appellant Br. 26–27, is unnecessary to identify a well-recognized compelling interest. *See also Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445 (2015) (finding existence of compelling government interest "intuitive"). Ames shares this compelling interest in protecting the safety and privacy of its citizens, including its governor. *See Heffron*, 452 U.S. at 650.

b. The temporary suspension was narrowly tailored.

The First Amendment does not require that restrictions be "perfectly tailored," only "narrowly tailored." *Williams-Yulee*, 575 U.S. at 454, 444 (first excerpt quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)). The suspension here was narrow in multiple ways: It was not

issued until Appellant posted threatening comments, it lasted for only a week, it cannot be repeated, and it only prevented Appellant from commenting publicly.

Appellant suggests two "alternative means" that Governor Nathanson could have employed: deleting specific comments or establishing a clear ex ante policy. Appellant Br. 28. Neither is persuasive. First, comparing the deletion of specific comments against a single-week suspension creates precisely the kind of factual "swamp" that the Supreme Court has "decline[d] to wade into," given that the compelling interests here are "intangible." *Williams-Yulee*, 575 U.S. at 454 (refusing to scrutinize between phone call or text message). Second, if the government must establish "clear rules," Appellant Br. 28, no restriction in a *designated* public forum would ever be permissible. The existence of a clear ex ante policy transforms a designated public forum into a *limited* public forum, where speech restrictions need only be reasonable. *See supra* II.C.1. While not perfect, a suspension that applies only once for a single week on a single Snapface page is narrowly tailored to the compelling interests of protecting the safety and privacy of Ames's citizens.

D. The temporary suspension was not a prior restraint on speech.

Prior restraint analysis—which applies to official constraints on speech in force *prior* to any specific application—is inapposite here. *See*

Alexander v. United States, 509 U.S. 544, 550 (1993). The doctrine only applies to "subject-matter" restrictions such as licensing schemes, not "content-neutral" constraints. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002). *Compare Madsen v. Women's Health Ctr.*, 512 U.S. 753, 766 (1994) (rejecting prior restraint analysis for a content-neutral injunction), *with Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016) (invalidating an order prohibiting dissemination of any information reflecting unfavorably upon the city).

The restriction at issue here is the one-week suspension, which is a content-neutral constraint on the visibility of Appellant's comments to other users. The uniform nature of the visibility restriction and the one-time, one-week timespan do not vary according to the content of the speech. It is irrelevant for the purpose of prior restraint analysis whether the specific application of the one-week suspension to Appellant is viewpoint-neutral, because other First Amendment doctrines handle such issues. The prior restraint doctrine applies to a general, content-based rule, and is not a "self-wielding sword" to be applied indiscriminately. *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 49 (1961). As a content-neutral restriction, the temporary suspension is not barred by the prior restraint doctrine.

For these reasons, this Court must affirm the lower court's dismissal of Appellant's first count for failure to state a First Amendment claim.

III. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANT'S SECOND COUNT UNDER THE STATE ACTION DOCTRINE.

The Constitution "erects no shield against merely private conduct." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). The government becomes liable for the decisions of a private entity only in the rare cases when those "choice[s] must in law be deemed to be th[ose] of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Under this exacting standard, "[n]o social media company has ever been treated as a state actor under § 1983." *O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1179 (N.D. Cal. 2022) (internal quotations omitted).

Following long-standing precedent, the district court correctly dismissed Count II for two reasons. First, Governor Nathanson lacked legal authority to compel Snapface. Under the bright-line rule for distinguishing permissible political pressure from government compulsion, the state actor must have the formal authority to "command[] a particular result" and "remove[] [a] decision from the sphere of private choice." *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963). Second, Appellant's contrary arguments confuse two distinct lines of precedent and apply the wrong law.

A. Governor Nathanson did not exert legal authority over Snapface.

Both binding and persuasive precedent—including near-unanimous agreement among every court to have addressed the question in the social media context—scuttle Appellant's claim.

Though plaintiffs generally may not sue the government for the decisions of private actors, the government can become vicariously liable when a private party's "choice must in law be deemed to be that of the State" because of government coercion." *Blum*, 457 U.S. at 1004. Such coercion hinges on whether the private actor was compelled to harm the plaintiff by a state measure "having the force of law." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 171 (1970). This is a demanding standard: plaintiffs must show "the active intervention of the [government], supported by the full panoply of state power." *Shelley*, 334 U.S. at 19. For this reason, nearly every major case to have considered coercion analyzed a statute or regulation. *See, e.g.*, *Blum*, 457 U.S. at 1005; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 293 (2001); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 43 (1999).

In a handful of cases, courts have also found that threats alone may carry the force of law—but even those cases required an "unequivocal" threat of criminal prosecution from an official exercising direct prosecutorial control. *Lombard v. Louisiana*, 373 U.S. 267, 271

(1963); *see also Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1293 (9th Cir. 1987) (prosecutor threatened private actor with criminal prosecution); *United States v. Stein*, 541 F.3d 130, 151 (2d Cir. 2008) (same).

Governor Nathanson did not exercise legal control over Snapface. *See Abu-Jamal v. Nat'l Pub. Radio*, No. CIV. A. 96-0594, 1997 WL 527349 (D.D.C. Aug. 21, 1997), *aff'd*, 159 F.3d 635 (D.C. Cir. 1998). In *Abu-Jamal*, members of Congress called NPR and "threaten[ed] to restrict [its] funds" if it would not stop "air[ing] [the plaintiff's radio] program." *Id.* at *4–6. Emphasizing that the government did not have "*legal control* over NPR's actions," the court dismissed the case on the ground that NPR's choice to "cancel the broadcast" did not implicate coerced state action. *Id.* at *2, *6 (emphasis added). The court held that political pressure tied to funding "simply d[id] not mean that NPR's 'choice in law' not to air [plaintiff's] broadcast was that of the government." *Id.* at *6.

A spate of social media cases have followed this example. *Informed Consent Action Network v. YouTube* LLC, 582 F. Supp. 3d 712 (N.D. Cal. 2022), dismissed a § 1983 suit after finding that members of Congress did not coerce YouTube into blocking the plaintiff—even by publicly grilling executives, sending menacing letters, and threatening to repeal YouTube's § 230 immunity. *Id.* at

717, 723. And *Rogalinski v. Meta Platforms, Inc.*, No. 22-CV-02482, 2022 WL 3219368 (N.D. Cal. Aug. 9, 2022) dismissed plaintiff's suit because he did not "come close to pleading state action under [the coercion] theory"—despite the fact that the government had threatened Facebook at press conferences and "flagg[ed] problematic posts" for removal. *Id.* at *2, *4; *see O'Handley*, 579 F. Supp. 3d at 1182, 1203 ("flagging O'Handley's tweet" not enough for coercion). These cases emphasized that political pressure, without full "legal control" do not rise to the level of coercion. *Informed Consent*, 582 F. Supp. 3d at 723.

Here, Governor Nathanson can only indirectly *influence* Snapface, not directly exercise *legal control*. *See* JA-6. "[B]usinesses . . . may be *influenced*" by public concerns "without being *coerced* by the government." *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1164 (10th Cir. 2021) (emphasis in original) (citing *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 89 (3d Cir. 1984)). Just as in *Informed Consent*, *Rogalinski*, and *O'Handley*, the mere fact that Governor Nathanson criticized Snapface at a press conference, flagged specific comments, and hinted that she might oppose its tax subsidies does not mean that she coerced it with legally binding force. *See* JA-7–8. Rather, Snapface made an independent decision—enforcing its own terms of service, which it "refer[red to] . . . when it exercised [its disciplinary] authority." *O'Handley*, 579 F. Supp. 3d at 1183.

B. Appellant's alternative framework does not apply.

Appellant cites a series of unrelated cases that concern potential avenues of liability not at issue here. Those cases represent a parallel—but different—line of First Amendment doctrine from the *Blum* theory of state action on which she explicitly bases her suit. *See* JA-8 ("[T]he decision to deplatform Plaintiff was state action . . . under the state action doctrine as outlined in *Blum v. Yaretsky*.").

A plaintiff who believes the state has coerced a third party into violating her First Amendment rights can sue the government under two distinct theories. First, she can seek to attribute the third party's actions to the government. That is the imputed state action theory from *Blum*. *See Blum*, 457 U.S. at 1003 ("Th[is] lawsuit . . . seeks to hold state officials liable for the actions of private parties[.]"). And that is the theory Appellant advances here. *See* JA-8; Appellant Br. 32.

Alternatively—under a parallel, but different, theory—plaintiffs can directly object to the government's own acts, instead of those of a third party (regardless of how the third party responds). Appellant relies almost exclusively on these direct state action cases. For example, Appellant cites *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015), and *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003), where plaintiffs (1) sued an official for direct government conduct without invoking *Blum* or seeking to attribute the third-party actions to the

government, and (2) sought only to enjoin the *government* conduct, not to change the third-parties' behavior. *See, e.g.*, *Backpage.com*, 807 F.3d at 230; *Okwedy*, 333 F.3d at 342.

Here, Appellant complains of a different injury and seeks a different remedy from *direct* state action cases like *Backpage.com* and *Okwedy*. Appellant's injury is based on attributing the decision of a *third party*, Snapface, to Governor Nathanson. And Appellant's relief is to reverse the choice of that *third party* "to deplatform Plaintiff." JA-8. Thus, as Appellant correctly notes, two circuits have found that direct state action doctrine does not require the government to have had "direct regulatory . . . authority." *Okwedy*, 333 F.3d at 343. But under *Blum*'s imputed state action theory, the Supreme Court has explicitly found that *only* legal authority "removes [a] decision from the sphere of private choice." *Peterson*, 373 U.S. at 248. No such authority exists here.

And even if Appellant had brought their suit under the direct state action theory, Appellant has not pleaded facts showing either that Governor Nathanson exercised the coercive force that her framework requires, or that her acts caused Snapface to deplatform her. First, the pressure here falls short of indirect "intimidation and threat of prosecution." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963). For example, *Backpage.com* involved a local sheriff waging a

"campaign" to "kill[]" Backpage with "cease and desist" letters and "refer[rals]" to the FBI. 807 F.3d at 230–31, 236–37. And in *Bantam Books*, another case cited by Appellant, a state commission "investigate[d] and recommend[ed] the prosecution" of booksellers so effectively that it made "criminal regulation . . . largely unnecessary." *Id.* at 60, 68–69.

Second, in direct state action suits, courts do not accept "the false inference that a temporal relationship proves a causal relationship." *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1243 (11th Cir. 2005); *see also Informed Consent*, 582 F. Supp. 3d at 217 (dismissing social media blocking suit because direct state action theory did not apply and, even under it, plaintiff failed to plead causation). Appellant's pleadings here merely state that Governor Nathanson's comments were followed by Snapface's action, JA-8—precisely the temporal link that fails to establish causality. To show causation, "[p]lantiffs must allege more than that [an official] Statement possibly *influenced* a third party's business decision." *VDARE*, 11 F.4th at 1174.

Appellant's rewriting of the law would "eviscerate the state action doctrine's distinction between government and private entities," *Prager Univ. v. Google LLC*, 951 F.3d 991, 997 (9th Cir. 2020), and would expose the State to potential vicarious liability *any time* it

exerted *any degree* of political pressure on a private individual. The law says otherwise: comments from a government official, far from "command[ing] a result by its law," *Adickes*, 398 U.S. at 171, do not transform a "hugely profitable business," JA-6, into the helpless puppet of the state.

IV. THE DISTRICT COURT CORRECTLY DISMISSED BOTH CLAIMS UNDER THE ELEVENTH AMENDMENT.

The district court correctly held that it lacked subject-matter jurisdiction. *See* JA-13–14. This case runs afoul of the Eleventh Amendment's protection of state sovereign immunity, "an explicit limitation on federal judicial power," *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 467 (1945), which is not abrogated here by *Ex parte Young*'s "narrow exception." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996). *Ex parte Young* authorizes federal courts to stop ongoing violations of federal law by administering prospective relief against state officials. *See* 209 U.S. 123, 159–60 (1908). Appellant's injuries, however, are not ongoing, and her proposed remedies are not prospective. And because this issue concerns subject-matter jurisdiction, "[t]he burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Raj v. La. State Univ.*, 714 F.3d 322, 327 (5th Cir. 2013).

A. The *Ex parte Young* exception does not rescue Appellant's claims.

Recognizing the need to carefully calibrate state sovereign immunity with federal supremacy, *Ex parte Young* permits federal courts to abrogate the Eleventh Amendment and issue limited relief when state officers are sued in their official capacities for violating federal law. *See* 209 U.S. at 189. The exception is necessary to uphold "the superior authority of [the] Constitution." *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254 (2011) (quoting *Ex parte Young*, 209 U.S. at 159–60).[2] Nevertheless, this "legal fiction" does not apply here. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 649 (2002) (Kennedy, J., concurring).

Ex parte Young requires a "straightforward inquiry" into whether Appellant (1) alleges an "ongoing violation of federal law," and (2) "seeks relief properly characterized as prospective." *Id.* at 645 (majority opinion). Appellant must satisfy both prongs because only "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Courts must therefore take a "case-by-case approach" because federal supremacy

[2] The outcome of the First Amendment state action inquiry does not impact the Eleventh Amendment state attribution question, and conduct by a state official may satisfy one but not the other. *See Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982).

should be accommodated to "the constitutional immunity of the States," *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280, 278 (1997) (rejecting relief that would deprive a state of its sovereignty over land).

Here, Appellant asks this Court to declare that Governor Nathanson's conduct was unlawful, JA-3, enjoin the alleged government actions in Counts I and II, and restore access to her Snapface account as well as to Governor Nathanson's Snapface page, JA-9. The declaratory and injunctive relief that Appellant seeks for both counts exceeds the scope of *Ex parte Young* because it does not address any ongoing violations of federal law and is not properly prospective.

1. There is no ongoing violation of federal law.

Appellant has not pleaded an ongoing violation of federal law. A violation of federal law is ongoing only if it constitutes a current or future wrong, as opposed to allegations that "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). Appellant "may not use [*Ex parte Young*] to adjudicate the legality of past conduct," *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1337 (11th Cir. 1999), as the ongoing requirement sets a "minimum threshold for abrogating a state's constitutional immunity," *id.* (quoting *Booth v. Maryland*, 112

F.3d 139, 142 (4th Cir. 1997)). Whether a violation is ongoing is judged "at the precise moment when the case was filed." *Paraguay*, 134 F.3d at 628 (refusing to apply *Ex parte Young* to a past treaty violation and rejecting arguments that "the violation is 'ongoing' or 'continuing' in the sense that its 'consequences' persist"); *Green*, 474 U.S. at 65, 73 (explaining that an amended statute at the time of suit meant "[t]here [was] no claimed continuing violation of federal law" nor "any threat of state officials violating the repealed law in the future").

For Count I, Appellant argues that the temporary suspension was "unconstitutional," Appellant Br. 6, but that does not constitute an ongoing or future violation of federal law. First, Appellant's one-week suspension from commenting publicly on Governor Nathanson's page began in June 2021, and had long expired by the time Appellant filed suit in November 2021. JA-4–5, 10. Second, because the feature can be used only once, the alleged violation cannot recur. *See* JA-5.

Appellant contends that her comments during the one-week suspension—which could not be viewed by other users accessing Governor Nathanson's account during that time—"remain censored to this day," thus constituting an ongoing violation of her First Amendment rights. Appellant Br. 40. But that assertion has no basis in the record, and as this issue concerns subject-matter jurisdiction, this Court "do[es] not presume the truth of factual allegations

pertaining to our jurisdiction to hear the case." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1045 (6th Cir. 2015). But even if Appellant had pleaded facts supporting her claim, she confuses the conduct at issue: Governor Nathanson is not *presently* suspending Appellant's comments or *presently* preventing her from accessing Governor Nathanson's account to post the same content again. Because Governor Nathanson is not permitted to suspend Appellant again, she cannot prevent Appellant from exercising her First Amendment right now or in the future.

For Count II, Governor Nathanson's alleged conduct encouraging Snapface to "deplatform" Appellant, JA-7–8, is not ongoing because it was also a past action. Appellant does not allege that Governor Nathanson is currently pressuring Snapface, nor that she will exert pressure in the future. Snapface's refusal to restore access to Appellant's account cannot be continuously imputed to Governor Nathanson. Appellant has done nothing more than plead a "general and threadbare catchall" which suggests "*the possibility* of other" infringements, but that "does not plausibly allege the existence of an ongoing violation of federal law." *Allen v. Cooper*, 895 F.3d 337, 355 (4th Cir. 2018).

To the extent that Appellant contends that Governor Nathanson's "continued refusal to revoke her threats" to Snapface is

itself a constitutional violation, Appellant Br. 41, her use of the direct state action theory is at odds with the imputed state action theory that she relies on for this claim. Moreover, Appellant's sole case supporting that proposition, *NiGen Biotech*, 804 F.3d 389 (5th Cir. 2015), merely establishes that the imminent threat of formal state enforcement can qualify as ongoing under *Ex parte Young*. *Id.* at 392. Here, Governor Nathanson's one-time political pressure against Snapface—which is a third party—bears little similarity. Because Governor Nathanson is not currently imposing any limit on Appellant's speech, there is no ongoing First Amendment violation.

2. Appellant's requested relief is not properly prospective.

Relief sought under *Ex parte Young* must "be declaratory or injunctive in nature and prospective in effect." *Aguilar v. Tex. Dep't of Crim. Just.*, 160 F.3d 1052, 1054 (5th Cir. 1998). For relief to be prospective, it must not only be forward-looking but also "serve[] directly to bring an end to a present violation of federal law." *Papasan*, 478 U.S. at 278. As a result, "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Green*, 474 U.S. at 68.

While Appellant styles her proposal as prospective declaratory and injunctive relief, this Court should "look to the substance rather than to the form of relief sought." *Papasan*, 478 U.S. at 279. At bottom,

Appellant's request is beyond the permissible scope of *Ex parte Young*: the relief she seeks is retrospective for attempting to correct alleged past breaches that are not ongoing, and it is indirect and ineffective for failing to vindicate her constitutional rights.

a. Appellant's proposed relief is retrospective.

Appellant's requests—injunctions to lift an expired one-time suspension and to withdraw past political commentary, as well as accompanying declaratory relief—are retrospective and thus barred by the Eleventh Amendment. JA-3, 8–9. Relief is prospective only if it is "sufficiently forward-looking" and designed to "requir[e] a state official 'to conform his future conduct'" to the Constitution. *Wicomico Nursing Home v. Padilla*, 910 F.3d 739, 748 (4th Cir. 2018) (second excerpt quoting *Edelman v. Jordan*, 415 U.S. 651, 664 (1974)).

Appellant's use of the present tense to describe the injunctions she seeks does not transform her retroactive request into a prospective one. For Count I, Appellant proposes injunctive relief which "requires merely that Governor Nathanson un-block Ms. Lillianfield's account." Appellant Br. 42–43. That fails the forward-looking test: Governor Nathanson is not currently blocking Appellant, and Governor Nathanson cannot block Appellant again. *See* JA-5. For Count II, Appellant asks for an injunction "[r]evoking the threat" that Governor Nathanson made to Snapface. Appellant Br. 43. That likewise targets

past conduct, as Governor Nathanson is not currently threatening Snapface, and Appellant does not allege a future threat. *See* JA-7–8; *Christ the King Manor, Inc. v. Sec'y of U.S. Dep't of Health & Hum. Servs.*, 730 F.3d 291, 319–20 (3d Cir. 2013) (denying an injunction because no "ongoing conduct . . . must be enjoined to ensure the supremacy of law" and the "remedy will not help prevent future violations of federal law"). Contrary to Appellant's suggestion that the proposed remedies are "sufficiently prospective" because they do not "impose financial burdens" on Ames, Appellant Br. 43, a "focus on an injunction's impact on the State's treasury is misdirected," because "the proper focus [is on] whether the injunctive relief sought is prospective or retroactive in nature." *Antrican v. Odom*, 290 F.3d 178, 186 (4th Cir. 2002). Both injunctions only operate to remedy past wrongs and cannot be granted.

The declaratory judgment Appellant seeks is also barred. In *Green*, the Supreme Court ruled that when the Eleventh Amendment prevented a grant of injunctive relief, the only purpose of the corresponding declaratory relief was to adjudicate the past—the textbook definition of impermissible relief under *Ex parte Young*. 474 U.S. at 73. Numerous appellate courts have heeded that direction. *See, e.g.*, *Christ the King*, 730 F.3d at 320 n.30 (Third Circuit holding that the Eleventh Amendment bars relief declaring the prior conduct of

state officials to be unlawful). This Court should do the same and recognize that, "[i]n the absence of a valid claim of a continuing violation of law, both an injunction and a declaratory judgment are rendered unavailable." *United Mexican States v. Woods*, 126 F.3d 1220, 1223 (9th Cir. 1997).

b. Appellant's proposed relief is indirect and ineffective.

Appellant seeks relief that would leave the status quo unchanged. Under *Ex parte Young*, relief is impermissible if it does not "directly end[] the violation of federal law" but instead is "intended indirectly to encourage compliance." *Papasan*, 478 U.S. at 278. As a result, courts must "ensure[] that a federal injunction will be effective with respect to the underlying claim." *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008).

Here, Appellant asks this Court to restore her access to her Snapface account and to Governor Nathanson's Snapface page, but she does not show how injunctions against Governor Nathanson could directly and effectively satisfy her request. JA-9. For Count I, Appellant's proposal for this Court to enjoin the Governor to "un-block" her is unavailing, because the suspension has already ended. Appellant Br. 43; *see* JA-5, 9. There is no evidence in the record that Appellant's comments remain invisible, nor that Governor Nathanson could restore them if they were. In the absence of facts, Appellant has

not carried her burden to demonstrate that there is any active action for this Court to enjoin.

Similarly, for Count II, Appellant's request for this Court to enjoin Governor Nathanson to "[r]evok[e] the threat," Appellant Br. 43, does not remedy Snapface's "permanent ban" that Appellant claims "violated her First Amendment rights," Appellant Br. 32. Because Governor Nathanson has no legal control over Snapface, injunctive relief would neither directly nor effectively lead Snapface to restore Appellant's account. Moreover, the record provides no reason to disbelieve Snapface's statement that it deplatformed Appellant for "violat[ing] Snapface's terms of service by promoting violence," unrelated to Governor Nathanson's alleged "jawboning." JA-8. The tenuous link between the requested injunction and the alleged violation renders the proposed remedy the kind of indirect and ineffective relief that *Papasan* foreclosed. *See* 478 U.S. at 278.

Even if Appellant could show that Governor Nathanson's political influence would persuade Snapface, courts have found that *Ex parte Young* relief premised on persuasion is impermissibly indirect. In *Kobe v. Haley*, 666 F. App'x 281 (4th Cir. 2016), the Fourth Circuit rejected injunctive relief against the South Carolina governor because she lacked legal "authority" to remedy federal law violations at a state agency. *Id.* at 299. Her "direct authority to administer" consisted only

of "reviewing and commenting on proposed plans," which was too indirect. *Id.* at 300. Despite that governor's status as "the single most influential individual in the State" with the power to "establish a budget" for the agency, "political influence over those who are responsible for ongoing violations and have the authority to end them does not . . . make her a proper defendant under *Ex Parte Young*." *Id.* Here, Governor Nathanson's limited authority renders injunctive relief premised on persuasion similarly impermissible. She lacks direct legal control over Snapface, and her authority consists only of a bully pulpit—precisely what *Haley* found insufficient.

Moreover, to the extent that Appellant urges any relief broader than a revocation of the alleged jawboning—such as an affirmative threat to withdraw tax subsidies—that would be the paramount assertion of federal judicial authority over the states which the Supreme Court has feared. If federal courts could command any action with a plausible connection to a violation of federal law, they could obstruct "the lawful discretion of state officials," *Limehouse*, 549 F.3d at 332–33, impermissibly "expend . . . the public treasury or domain," or "interfere with public administration." *Virginia*, 563 U.S. at 255.

B. The history and jurisprudence of the Eleventh Amendment counsel against applying *Ex parte Young*.

The principles animating the Eleventh Amendment establish a presumption against abrogating state sovereign immunity. In constitutional terms, state sovereign immunity represents one of the basic "limits [on] the grant of judicial authority in Art. III." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). Federal courts may pierce that shield only in limited circumstances. This case is not one of them.

State sovereign immunity is a "common-law doctrine that long predates our Constitution," *Employees v. Mo. Pub. Health & Welfare Dep't*, 411 U.S. 279, 288 (1973) (Marshall, J., concurring in result), and the power that Appellant urges this court to embrace was "not contemplated by the Constitution when establishing the judicial power of the United States." *Seminole*, 517 U.S. at 54. When the Supreme Court attempted to limit the doctrine in *Chisholm v. Georgia*, 2 U.S. 419 (1793), Congress passed the Eleventh Amendment to overrule that case and "affirm[] . . . the fundamental principle of sovereign immunity." *Pennhurst*, 465 U.S. at 98.

Today, the Eleventh Amendment continues to protect "background principles of federalism and comity." *Idaho*, 521 U.S. at 277. The "specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent." *Virginia*, 563 U.S. at 256–58. "[T]he dignity and respect afforded a

State," *Idaho*, 521 U.S. at 268, are necessary for the"security [of] the rights of the people," *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (quoting The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)). After all, our "constitutional scheme of dual sovereigns" serves as a principal "check on abuses of government power." *Gregory*, 501 U.S. at 457–58. Moreover, state sovereign immunity helps prevent inappropriate meddling by the federal judiciary. Because the states were designed to serve as "laborator[ies]" of democracy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 387 (1932), they require "freedom . . . from crippling interferences" and thus "a restriction of suability," *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53–54 (1944).

Those principles have guided Supreme Court jurisprudence. A century after its introduction, *Ex parte Young* remains "limited to [the] precise situation" where a federal court can stop state officials from violating federal law. *Virginia*, 563 U.S. at 255. That is because courts have been "willing to police abuses of the doctrine that threaten to evade sovereign immunity." *Virginia*, 563 U.S. at 256–58. Appellant attempts to create an Eleventh Amendment backdoor, one based on "an empty formalism" that undermines constitutional principles while elevating "elementary mechanics of captions and pleading." *Idaho*, 521 U.S. at 270.

This Court should not abrogate Ames's constitutionally protected immunity by haling Governor Nathanson into federal court against her will.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's motion to dismiss on both counts.

February 20, 2023

Respectfully submitted,

The Patsy Takemoto Mink Memorial Team

/s/ Derek K. Choi

/s/ Kunal J. Dixit

/s/ Daniel Q. Flesch

/s/ Phoebe M. Kotlikoff

/s/ Yusuke Tsuzuki

/s/ Monica Y. Wang

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, § 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.

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.