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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

The Mary Tape Memorial Team

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Oral Argument

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ARGUMENT

I. Federal courts have the power to adjudicate the Governor's violations of Ms. Lillianfield's constitutional rights in order to protect the rule of law.

Governor Nathanson mischaracterizes Ms. Lillianfield's injuries. *See* Appellee Br. Parts I, IV. Ms. Lillianfield is suffering from two ongoing First Amendment violations because of the Governor's censorship of her speech. Opening Br. 40–41. The first injury began when the Governor blocked her. JA-5–6, 8. It continues because all of Ms. Lillianfield's shadow-banned comments remain censored from the @AmesGov page. Opening Br. 40. The second injury began when the Governor's office reacted to Ms. Lillianfield's comments by threatening the CEO of Snapface regarding government subsidies worth millions of dollars. JA-7–9. It continues because the Governor has not revoked that coercive threat. Opening Br. 41. Nothing bars federal courts from adjudicating these ongoing constitutional violations.

A. Ms. Lillianfield satisfies the three requirements for Article III standing.

To establish Article III standing to bring a suit in federal court, the plaintiff must establish three elements: (1) the plaintiff has an injury in fact; (2) the defendant is a cause of that injury; and (3) the injury is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). At the pleading stage, the Court will

"presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561 (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). The burden of establishing standing is "relatively modest" at this stage. *Bennett v. Spear*, 520 U.S. 154, 171 (1997).

Although the Governor contests only redressability, Appellee Br. 10–12, we address all three elements in order.

1. Ms. Lillianfield suffers injuries in fact.

Injury in fact requires an invasion of a legally protected interest that is concrete and particularized, and actual or imminent. *Lujan*, 504 U.S. at 560.

Ms. Lillianfield has a legally protected—indeed, a constitutionally protected—interest in her right to free speech. Opening Br. Section I.A. The Governor's invasions of that right are "concrete and particularized" to Ms. Lillianfield because the Governor shadow banned one week's worth of *her* comments and pressured Snapface to remove *her* from the platform. JA-6–8. The invasions are actual because the week's comments are still shadow banned and the threat still stands. Opening Br. 40–41.

2. Ms. Lillianfield's injuries are fairly traceable to the Governor's actions.

Causation requires that "the injury is fairly traceable to the challenged action of the defendant." *Lujan*, 504 U.S. at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rts. Org.*, 426 U.S. 26, 41 (1976)) (cleaned up). The fairly traceable prong "does not exclude injury produced by determinative or *coercive effect* upon the action of someone else." *Bennett*, 520 U.S. at 169 (emphasis added).

The ongoing censorship of one week's worth of Ms. Lillianfield's comments from @AmesGov is fairly traceable to the Governor's decision to block Ms. Lillianfield. *See* JA-5. Ms. Lillianfield's removal from Snapface is fairly traceable to the Governor's threat against Snapface's CEO because of that threat's coercive effect. Opening Br. 33–36.

3. Ms. Lillianfield's injuries are redressable.

Redressability requires that it "be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43). The Governor challenges exclusively this prong of standing. Appellee Br. 10–12.

a. Ms. Lillianfield would be redressed for Count I when the Governor stops censoring one week's worth of her comments.

The Governor asserts, without citing the record, that "only Snapface—not Governor Nathanson—can redress [the Count I] harm

by restoring the comments." Appellee Br. 11. But at the motion to dismiss stage, courts make the opposite presumption. *See Lujan*, 504 U.S. at 561. In *Bennett*, the government defendants asserted that the plaintiffs had failed to plead how removing restrictions on lake levels would personally affect them absent evidence about how the government allocates water for irrigation. 520 U.S. at 167–68. The Court rejected the government's argument because "it is easy to presume specific facts" necessary to support the alleged claim, like the government distributing the restriction pro-rata to the plaintiff. *Id.* at 168–69 (discussing *Lujan*, 504 U.S. at 561). Similarly, the Governor asserts that Ms. Lillianfield failed to plead specific facts about what steps the Governor will need to take to restore the censored comments. Appellee Br. 52–54. But because the Governor is the one who imposed the shadow ban, the Court can presume specific facts—like Snapface's platform providing a mechanism for the Governor to reveal the comments—that are necessary to support the alleged claim.

b. Ms. Lillianfield would be redressed for Count II when the Governor revokes her threat against the CEO of Snapface.

The Governor speculates, without citing the record, about her legal control over Snapface to argue she cannot redress Ms. Lillianfield's Count II injury. Appellee Br. 11–12. But that speculation is unnecessary because the root of Count II's constitutional violation is

the coercive pressure that the Governor's office applied by threatening Snapface's CEO. Opening Br. 33–36. Therefore, merely revoking the unconstitutional threat will provide redress to Ms. Lillianfield. *See infra* Part IV.[1]

Because Ms. Lillianfield's allegations satisfy all three standing prongs, she successfully carries her "relatively modest" burden to proceed to discovery. *See Bennett*, 520 U.S. at 171.

B. Count I is not moot because Ms. Lillianfield has a concrete interest in revealing her censored comments.

"As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)).

The Governor claims that Count I is moot because the initial block has expired. Appellee Br. 13. But the Governor again misunderstands the relevant injury. Ms. Lillianfield has a concrete interest in the ongoing censorship of one week's worth of her comments arising from the initial block. *See* Opening Br. 40.

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[1] The same argument applies to the Governor's congruent *Ex parte Young* claim, Appellee Br. 53–54, which is based on an unpublished case, *Kobe v. Haley*, that is not even binding in its own circuit, *see* 666 F. App'x 281, 283 (4th Cir. 2016) ("Unpublished opinions are not binding precedent in this circuit.").

Ultimately, the Governor's various attempts to insulate her conduct from the rule of law fail; federal courts are empowered to adjudicate her violations of Ms. Lillianfield's constitutional right.

II. The First Amendment protects Ms. Lillianfield's speech.

A. Ms. Lillianfield's comments do not meet the high bar for incitement to violence.

The Governor has not demonstrated the three required elements for incitement to violence: specific intent, imminence, and advocacy for action. *See Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

First, the Governor asserts that any "enabling detail" can support a finding of intent. Appellee Br. 20 (citing *United States v. Fullmer*, 584 F.3d 132, 158 (3d Cir. 2009)). But the Governor's sole case holds only that a speaker's intent to incite *imminent* violence turns on details about *timing*. *Id.* Ms. Lillianfield's comments contained no such details. *See* JA-5.

Second, the Governor faults Ms. Lillianfield for not including "qualifying language," like "later." *See* Appellee Br. 21. But incitement cases do not demand such disclaimers. *See, e.g.*, *Brandenburg*, 395 U.S. at 446–47. The Governor does not identify any language in Ms. Lillianfield's comments that would satisfy the "imminence" prong. *See* Appellee Br. 20–21.

Third, the Governor claims that "incendiary language is presumed to advocate lawlessness unless it is so 'abstract' that it could not lead to a plan." Appellee Br. 20. The presumption is in fact the opposite. Absent proof that it actually advocated for action, speech is presumed to be protected even if it has a "tendency to lead to violence." *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973).

B. In context, Ms. Lillianfield's comments are not true threats.

Tellingly, the Governor never presents Ms. Lillianfield's comments in their entirety, and rarely in their original sequence. *See, e.g.*, Appellee Br. 4, 21; *United States v. Cook*, 472 F. Supp. 3d 326, 330 & n.4 (N.D. Miss. 2020) (criticizing the government for "present[ing] statements out of context" in a true threat claim because "context is the critical issue in play"). Read in context, Ms. Lillianfield's comments were not true threats.[2]

The Governor relies on *United States v. Lockhart* to suggest that political hyperbole is irrelevant. *See* Appellee Br. 18. But *Lockhart* holds that the statement "I will personally put a bullet in his head"

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[2] The Governor asserts that true threat analysis is "objective," not subjective. Appellee Br. 16–17. But the Supreme Court recently granted certiorari on that very question. *Counterman v. Colorado*, 497 P.3d 1039 (Colo. App. 2021), *cert. granted,* 143 S.Ct. 644 (2023). Regardless, Ms. Lillianfield prevails. Opening Br. 12–13.

was a true threat because three contextual factors were missing: intent to engage in political discourse, joking, and conditionality. *See* 382 F.3d 447, 449 (4th Cir. 2004). All three are present here. Ms. Lillianfield's comments opened with political critique, included sarcastic quotation marks and laughter, *see* JA-5 ("Ha!"), and were expressly conditional upon the highly unlikely event that anyone described as "gun-toting" would be "as outraged as" she was about the Governor's veto of a gun *control* law. Opening Br. 12–13.[3]

The Governor also claims that courts "almost automatically" find true threats when statements include home addresses. *See* Appellee Br. 17. But none of her three citations substantiate that claim. Two involve extensive personal information combined with detailed discussions of crime. *See United States v. Turner*, 720 F.3d 411, 423 (2d Cir. 2013); *United States v. Sutcliffe*, 505 F.3d 944, 950–51 (9th Cir. 2007). The third mentions the non-public nature of an *unlisted* address as one part of a thorough contextual analysis, which the Governor fails to provide here. *See United States v. Mabie*, 663 F.3d 322, 331 (8th Cir. 2011).

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[3] The Governor misidentifies the highly unlikely event as "political violence," but the Opening Brief makes no such argument. *See* Appellee Br. 19.

C. Ms. Lillianfield's comments are not government speech.

The Governor overlooks the crucial distinction between a Snapface page's posts and its comments. *See* Opening Br. 9–11; *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009). The Governor's own posts are government speech. But comments made by private citizens are not. Opening Br. 10–11. Because the Governor openly "permitted Snapface users to publish comments," JA-4, she cannot claim a First Amendment exception that covers only speech that the state "actively control[s]," *see Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1592 (2022).

III. The Governor's shadow ban violates the First Amendment.

A. The shadow ban is state action.

The Governor misunderstands *West v. Atkins*, 487 U.S. 42 (1988). *See* Appellee Br. 14. *West* clarified that a state official "acting in [her] official capacity" is state action. *Id.* at 49–50. Per the reasoning of every circuit to address blocking on a government official's social media page, Ms. Lillianfield's shadow ban from the *official* @AmesGov page is state action. Opening Br. 17–18. The Governor's reliance on *Redding v. St. Eward* is therefore misplaced—the policewoman's 911 call was personal only because she "was off duty [and] out of uniform." 241 F.3d 530, 533 (6th Cir. 2001).

B. @AmesGov is a public forum.

The Governor alleges that the Opening Brief omitted the threshold public forum analysis, Appellee Br. 26, but courts regularly conduct that threshold inquiry as they taxonomize the forum. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802–06 (1985). First, the Governor asserts that she subjectively "did not intend" to create a public forum. Appellee Br. 26. But *Cornelius* does not recognize post hoc justifications. *See* 473 U.S. at 802–04. The Governor's *actions* indicate that she intentionally opened her page for public discourse. Opening Br. 20–22. Second, the Governor mischaracterizes the "government control" test as requiring the state to have *exclusive* control over *Snapface*. *See* Appellee Br. 27. However, the state needs only *substantial* control over the @AmesGov *page*. *See, e.g.*, *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1175 (9th Cir. 2022). The Governor does not cite to a single case finding that a government actor's official social media page was not any type of public forum.

C. @AmesGov is a designated public forum, not a limited public forum.

The Governor contends that @AmesGov is a limited public forum, arguing that her page "has a clear purpose and corresponding policy" of "monitoring disruptive comments." Appellee Br. 29–30. But the Governor's "implied policy" is based exclusively on a single block

(Ms. Lillianfield's). *Id.* at 30. A single block is not the "consistent policy" *Cornelius* requires. 473 U.S. at 804. It is not even the "unspoken" practice that the *Garnier* court rejected. 41 F.4th at 1178. Instead, @AmesGov is a designated public forum. Opening Br. Section I.C.

Furthermore, while the Governor argues that requiring an ex ante policy would "place[] the government in an impossible bind," Appellee Br. 30, our legal system strongly disfavors ex post facto laws, and courts have no trouble protecting a citizen's right to be put on notice, *see, e.g.*, U.S. CONST. art. I, §§ 9–10; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

D. The shadow ban fails strict scrutiny.

"'[I]t is the rare case' when a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015) (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion)). The Governor's shadow ban is not one of those rare cases. It is underinclusive because it failed to ban her June 15th comments.[4] *See* JA-4–5. It is also

[4] The fact that the Governor's shadow ban did not even hide the June 15th comments, *see* JA-5, also calls into question her alleged compelling interest in safety, *see* Appellee Br. 34.

overinclusive because it banned even unrelated comments made throughout the following week. *Id.* It is therefore far from narrowly tailored. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799–804 (2011).

E. The shadow ban is a prior restraint.

Misreading precedent, the Governor argues that the shadow ban cannot be a prior restraint because it covered *all* of Ms. Lillianfield's speech on @AmesGov for a week instead of assessing each comment individually based on its subject matter. *See* Appellee Br. 36. These are not necessary conditions for prior restraint doctrine; the relevant question is instead whether expression is restrained prior to dissemination. *See, e.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233, 251 (1936) (voiding tax on *all* high-circulation newspapers regardless of subject matter as an unconstitutional prior restraint); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720 (1931); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53 (1984) (explaining that prior restraint analysis turns "exclusively on the nature and form" of the regulation and not on subject matter).

IV. The Governor's coercive threat against Snapface renders the permanent ban of Ms. Lillianfield state action.

The Governor's bifurcation of "direct" and "imputed" state action, Appellee Br. 41–43, is inappropriate because the former implies the latter in this case. When private conduct conforms to coercion by a state official, that conduct is imputed to the state. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 303 (2001) ("'Coercion' . . . can justify characterizing an ostensibly private action as public."); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (similar). And when a state official's threat is so coercive as to directly violate the First Amendment, that threat necessarily constitutes the coercion required to impute conforming private conduct to the state. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66–67 (1963).[5]

The Governor downplays the pressure she exerted against Snapface by highlighting her press conference and arguing that indirect pressure is insufficient for state action under either line of cases. Appellee Br. 39–40. We agree. Our argument focuses on the Governor's direct communication with Snapface's CEO. Opening Br.

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[5] This is why what the Governor cites as "imputed" cases regularly invoke "direct" cases like *Bantam Books* in their analysis of state responsibility for private conduct. *See, e.g.*, *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1295–96 (9th Cir. 1987).

33–35. There is far more than a "temporal relationship," Appellee Br. 43, between that direct communication and Ms. Lillianfield's permanent ban, *see* Opening Br. 33–35. Because it is reasonable to infer that the Governor's direct threat coerced Snapface and thereby violated the First Amendment, *see id.* at 33–36, it is likewise reasonable to hold the Governor constitutionally responsible for the consequent ban, *see Lombard v. Louisiana*, 373 U.S. 267, 272–74 (1963).

The Governor also claims that she lacks "direct prosecutorial control" over Snapface, mischaracterizing cases like *Lombard* as requiring such authority for state action. *See* Appellee Br. 38–39. *Lombard* expressly disclaims any requirement of actual prosecutorial authority behind the coercive statements of officials. 373 U.S. at 272–74. Moreover, the Governor's factual inference that she, as the state's chief executive, lacks legal authority to punish Snapface, Appellee Br. 39–40, is impermissible at this stage.

"Responsive government is built on communication." Appellee Br. 1. We agree. Instead of being responsive to Ms. Lillianfield's communication, the Governor chose to silence her, and thus executed the "coercive elimination of dissent." *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

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. art. I § 9

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

U.S. CONST. art. I § 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.