Nos. 23-35097, 23-35130

In the United States Court of Appeals for the Ninth Circuit

BRUCE GILLEY,

Plaintiff-Appellant/Cross-Appellee,

v.

TOVA STABIN, ET AL.,

Defendants-Appellees/Cross-Appellant.

Appeal from an Order of the United States District Court for the District of Oregon, The Hon. Marco A. Hernandez (Dist. Ct. No. 3:22-cv-01181-HZ)

CORRECTED PLAINTIFF-APPELLANT/CROSS-APPELLEE'S THIRD BRIEF ON CROSS-APPEAL

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INTRODUCTION

UO's story keeps changing.

The evidence shows that Tova Stabin blocked Bruce Gilley because she thought he was "being obnoxious" and commenting about the "oppression of white men" when he retweeted "all men are created equal." It also shows that UO declined to unblock Gilley when he asked about its blocking criteria, initially told him no criteria existed, and later tried to create the impression that its criteria had always been publicly posted. Per UO's officials, it was all a mistake and a retweet about equality was "off-topic" and "disruptive" in a discussion about racism.

Now UO claims that its criteria don't even restrict speech and "are not directed at the public." It also asks this Court to find Gilley's claims moot because UO cannot fine or arrest Gilley and its lawyers mailed his lawyer a $20 bill.

A more blatant example of viewpoint discrimination will rarely come before this Court. This Court should reverse the district court and direct it to grant Gilley's motion for a preliminary injunction. It should also dismiss UO's cross-appeal for lack of jurisdiction or, in the alternative, find that Gilley's claims are not moot.

STATEMENT OF JURISDICTION

This Court has jurisdiction over Gilley's appeal pursuant to 28 U.S.C. § 1292(a)(1). Further jurisdictional details are set forth in Gilley's Opening Brief. 9th Cir. Dkt. #12 at 12.

This Court lacks jurisdiction to hear UO's cross-appeal under 28 U.S.C. § 1292, and under the pendant appellate jurisdiction doctrine.

STATEMENT OF ISSUES

Issues on the cross-appeal are:

1. Whether this Court has jurisdiction to consider UO's cross-appeal of a non-final order denying a motion to dismiss.

2. Whether, assuming this Court has jurisdiction over the cross-appeal, Gilley's claims for prospective relief are not moot under the voluntary cessation doctrine because UO maintains malleable blocking guidelines that explicitly authorize UO officials to block or ban users they deem "offensive."

3. Whether, assuming this Court has jurisdiction over the cross-appeal, Stabin may moot a nominal damages claim arising from her unconstitutional censorship by mailing Gilley's counsel $20 in cash without accepting an entry of judgment.

STATEMENT OF THE CASE

Gilley need not repeat in full his earlier statement of the case, which differs markedly from UO's statement. *See* 9th Cir. Dkt. #12 at 13–36. A review of the following undisputed facts, however, would aid this brief's consideration.

1. UO's communication manager blocked Gilley

On June 14, 2022, Tova Stabin, acting as UO's employee, blocked Gilley from the official @UOEquity Twitter account after he retweeted UO's Racism Interrupter tweet with the comment "all men are created equal." 3-ER-349; 3-ER-411–412.

2. Gilley asked for UO's blocking criteria

Twelve days later, Gilley made a public records request to UO, asking how many users it blocked from @UOEquity and their Twitter handles, as well as any written blocking criteria. 3-ER-348.

The next day, UO's Office of Public Records emailed two UO managers, VP for Equity and Inclusion Yvette Alex-Assensoh and her Chief of Staff, Kelly Pembleton, about Gilley's request. 2-ER-252.

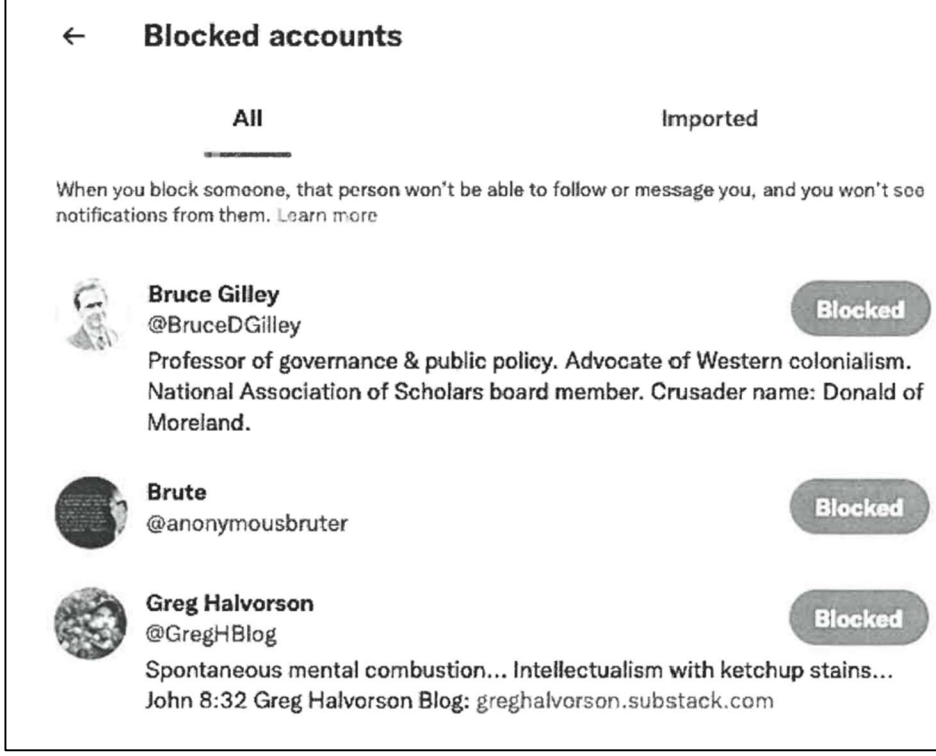
Pembleton responded 12 minutes later, indicating that she would check with "our communications manager" and "circle back to you." *Id.*

3. Stabin described Gilley as "being obnoxious" and commenting "something about the oppression of white men" thirteen days after blocking him

A few minutes later, Tova Stabin responded by email to Pembleton about the request, listing three blocked users and stating that Bruce Gilley was "being obnoxious." 2-ER-251:

From: tova stabin
To: Kelly Pembleton
Subject: Re: Office of Public Records 2022-PRR-400
Date: Monday, June 27, 2022 12:39:35 PM
Attachments: image001.png
image002.png

Doesn't take real long. I've only ever blocked three people. Here is the list. I'm assuming the issue is this guy Bruce Gilley. He was not just being obnoxious, but bringing obnoxious people to the site some. We don't have much following and it's the social I pay least attention to. Here's a screenshot of everyone I've ever blocked. I hardly do it (and barely know how to).



About two minutes later, Stabin emailed Pembleton again stating that she was not surprised it was "Bruce who brought it" and accusing him of posting "about the oppression of white men" and being there to trip her up and "make trouble." "Ugh."

2-ER-169:

From: Kelly Pembleton
To: tova stabin
Subject: RE: Office of Public Records 2022-PRR-400
Date: Monday, June 27, 2022 12:44:00 PM
Attachments: image001.png

Thanks. No need to contact central comms. Let me know when you're finished with lunch and we can check in quickly about our response to public records... thanks!

From: tova stabin <tstabin@uoregon.edu>
Sent: Monday, June 27, 2022 12:41 PM
To: Kelly Pembleton <kpemblet@uoregon.edu>
Subject: Re: Office of Public Records 2022-PRR-400

Oh, I see. It is Bruce who brought it. Not surprising. He was commenting on one of the "interrupt racism" posts, as I recall talking something about the oppression of white men, if I recall. Really, they are there to just trip you up and make trouble. Ugh. I'm around at home for a quick zoom about it. I'm going to eat lunch but that can be at any time, so let me know.

I can also ask central what they do as they block way more people than me.

tova

Later that afternoon, Pembleton emailed UO's Public Records Office back about Gilley's records request, copying Alex-Assensoh. Pembleton advised that she had "connected with our communications manager, tova stabin, on this request." She wrote, "we are certain there are no

written records that are responsive to the request," and added that Stabin "has the autonomy to manage the accounts on her own as per her professional judgment." 2-ER-250.

4. UO first told Gilley there were no blocking criteria

On July 5, 2022, UO's Public Records Office emailed Gilley, informing him that there were no records responsive to his request for blocking criteria and providing him the screen shot of the blocked users. UO also told Gilley that the staff member "that administers the VPEI Twitter account and social media has the autonomy to manage the accounts and uses professional judgment when deciding to block users." 3-ER-346–347. The response did not mention UO's social media guidelines. *Id.*

As of July 5, 2022, Gilley remained blocked from @UOEquity and Stabin, Pembleton, and Alex-Assensoh took no steps to unblock Gilley despite receiving his public records request. 2-ER-118–119; 3-ER-414. UO did not unblock Gilley until after he filed this lawsuit on August 11, 2022. 2-ER-119.

At the time Gilley initiated this lawsuit, UO had not posted its social media blocking guidelines on any public-facing website. 2-ER-221 (170:14–19); 2-ER-268.

5. UO first posted its blocking criteria shortly after Gilley filed this lawsuit

Sometime between August 11 and August 31, 2022, UO first posted its blocking guidelines on its public website. 2-ER-299–300 (¶ 15: "the section of the University's website labeled and referred to as the 'social media guidelines' was recently updated to more fully reflect language in the internal 'social media guidelines' . . . .").

On August 31, 2022, UO records employee Chris Widdop informed Gilley's counsel that the July 5 public records response was "inaccurate" and that UO maintained social media guidelines published at a public URL. 3-ER-336 (¶ 6); SER-123.

UO's Director of Content Strategy, Leslie Larson, discussed the blocking criteria in her first declaration, dated September 7, 2022. 3-ER-341–342. She also authenticated the public-facing guidelines as "Exhibit 1" (3-ER-342 (¶ 6); 3-ER-339 (Exhibit 1)), declaring further that they "have not changed since the present controversy with Plaintiff arose on June 14, 2022." 3-ER-342 (¶ 6).

UO does not contest Gilley's assertion that it failed to post its blocking guidelines before he filed this lawsuit. Nor does UO contest that ¶ 6 of Larson's first declaration inaccurately created the impression that the guidelines had been publicly posted at the time Stabin blocked Gilley.

6. UO's guidelines are not an official university policy

On August 16, 2022, five days after Gilley filed this lawsuit, Larson emailed other UO employees with the subject line "UO Communications social media policy on blocking users[.]" SER-118. In that email, copied to UO legal counsel Kevin Reed and Douglas Park, she claimed to "re-affirm our long-standing policy related to blocking users on social media." *Id.* Larson listed the blocking criteria and noted that for egregious or repeat behavior, "we reserve the right to ban the user." *Id.* She also stated that UO "reserve[s] the right" to "restrict access to users who violate these guidelines[.]" *Id.*

Although she sometimes referred to blocking criteria as "guidelines," Larson also referred to them as either a "policy" or "polices" multiple times. *Id.*

UO's blocking guidelines do not qualify as an official university policy, which must undergo a more rigorous approval process. 2-ER-243–244; 2-ER-217 (106:12–18).

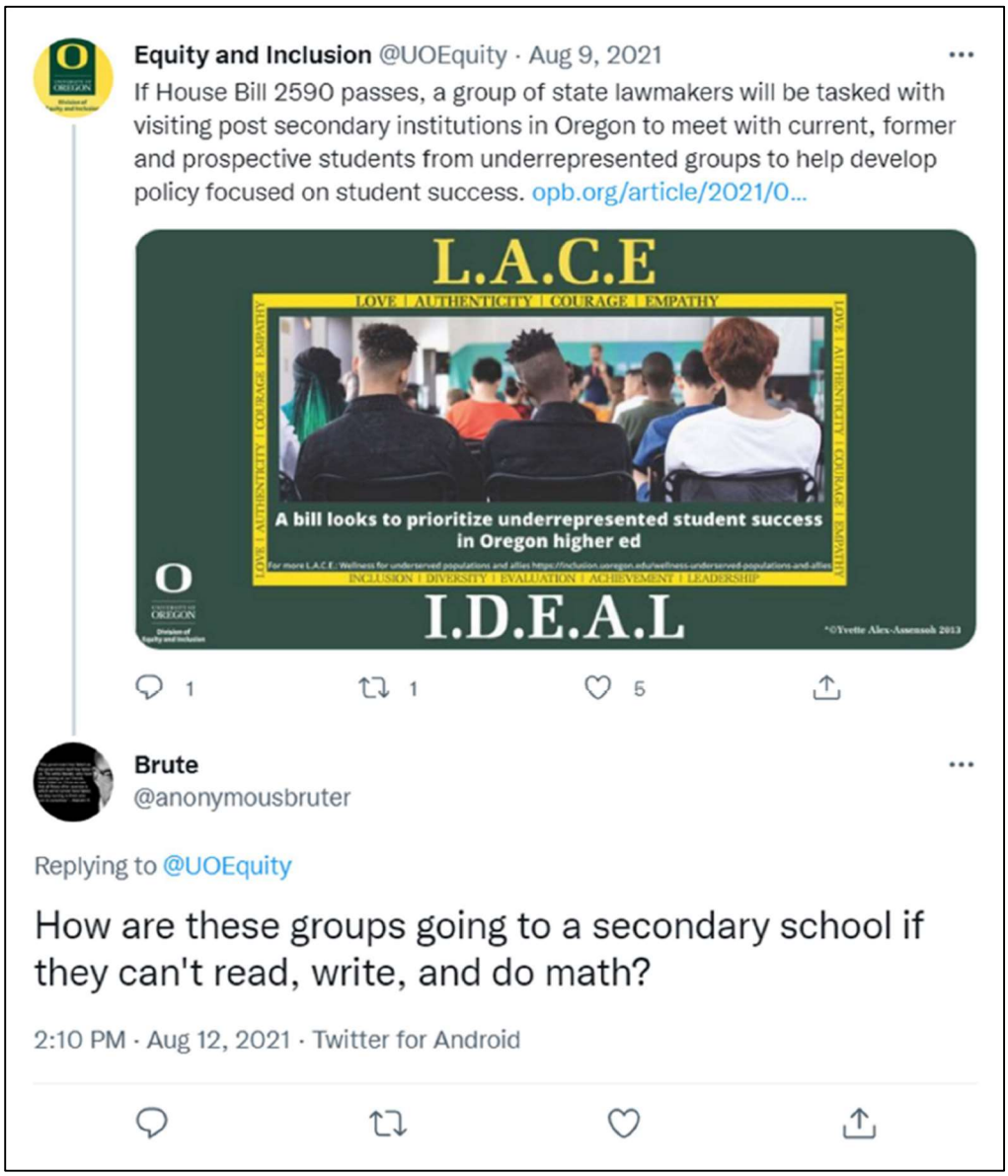
7. Stabin testified she does not know why she wrote that Gilley was "being obnoxious" or said "something about the oppression of white men"

In both her deposition and courtroom testimony, Tova Stabin admitted sending the emails about Gilley in late June 2022, but claimed

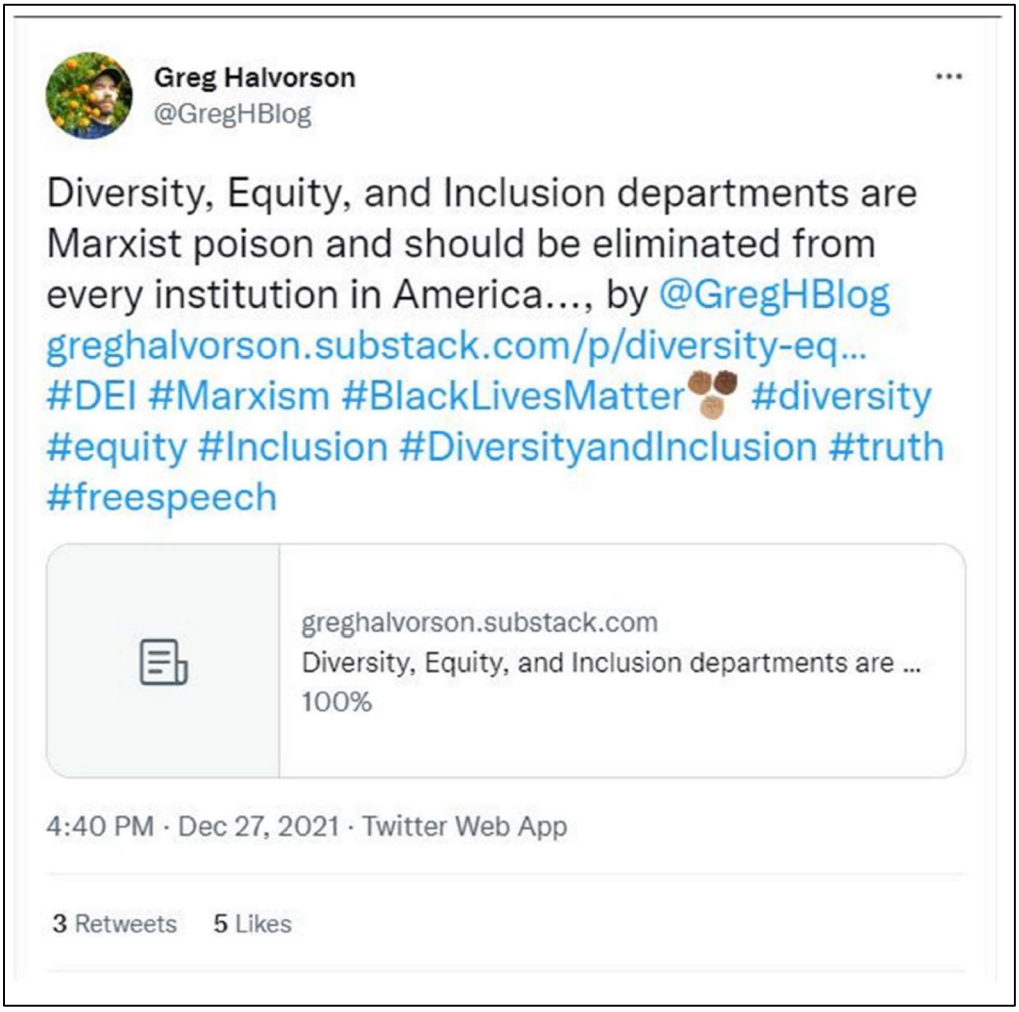
not to remember why she wrote that he was "being obnoxious" or discussed the "oppression of white men." 2-ER-207 (63:21–64:14); 2-ER-208 (67:14–68:3). Although she would have preferred to edit Gilley's quote that "all men are created equal" to remove gendered language, Stabin later claimed to agree with the quote, and denied that it related to the oppression of white men. 2-ER-72–73; 2-ER-89. Stabin didn't know why she had equated Gilley's comment about equality with the "oppression of white men" in her June 27 email. 2-ER-90–91 (49:25–50:4). Stabin did admit that she viewed Gilley as "making trouble" and "disrupting the site." 2-ER-92 (51:22-24).

8. Stabin testified she did not know why she blocked the other two users

Stabin also claimed she did not know why she blocked the other two users—@anonymousbruter and @GregHBlog—from @UOEquity. 2-ER-94–97. When shown DEI-related content posted by those accounts, Stabin claimed not to be able to tell if the posters were DEI critics. 2-ER-95–96 ("it's not really clear if they're being sarcastic, because of the tags they use, so I don't really know."). The relevant posts:


Equity and Inclusion @UOEquity · Aug 9, 2021
If House Bill 2590 passes, a group of state lawmakers will be tasked with visiting post secondary institutions in Oregon to meet with current, former and prospective students from underrepresented groups to help develop policy focused on student success. opb.org/article/2021/0...
L.A.C.E
LOVE | AUTHENTICITY | COURAGE | EMPATHY
A bill looks to prioritize underrepresented student success in Oregon higher ed
INCLUSION | DIVERSITY | EVALUATION | ACHIEVEMENT | LEADERSHIP
I.D.E.A.L
1
1
5
Brute
@anonymousbruter
Replying to @UOEquity
How are these groups going to a secondary school if they can't read, write, and do math?
2:10 PM · Aug 12, 2021 · Twitter for Android

3-ER-344.


Greg Halvorson
@GregHBlog
Diversity, Equity, and Inclusion departments are Marxist poison and should be eliminated from every institution in America..., by @GregHBlog
greghalvorson.substack.com/p/diversity-eq...
#DEI #Marxism #BlackLivesMatter #diversity #equity #Inclusion #DiversityandInclusion #truth #freespeech
greghalvorson.substack.com
Diversity, Equity, and Inclusion departments are ...
100%
4:40 PM · Dec 27, 2021 · Twitter Web App
3 Retweets
5 Likes

3-ER-345.

9. UO's other witnesses testified that they do not know what the other blocked users were posting about either

UO's other witnesses similarly claimed an inability to tell whether this content was critical of DEI. 2-ER-195 (Alex-Assensoh: "I don't know"); 2-ER-215 (Richie Hunter: "I'm not categorizing this as critical or supportive. I think it's just a statement."). Indeed, Hunter testified that Halvorson's tweet might "be seen as supporting DEI, supporting Marxism, supporting Black Lives Matter…." SER-39–41.

Like UO's witnesses, the district court also concluded that it does not know why the other two users were blocked. 1-ER-25.

10. Procedural history of cross-appeal

The district court denied UO's motion to dismiss. The court found that UO had not met its burden of showing that Gilley's claims for injunctive and declaratory relief were moot, particularly because UO's blocking guidelines did not constitute a formal policy. 1-ER-15–18. It also held that UO could not moot Gilley's retrospective nominal damages claim by paying the demanded damages unless it also agreed to accept entry of judgment. 1-ER-18–20.

UO filed its cross-appeal on February 16, 2023, challenging the denial of its motion to dismiss. SER-6–7. On February 21, 2023, Gilley filed a motion to dismiss the cross-appeal for lack of jurisdiction. 9th

Cir. Dkt. #4-1. On March 29, 2023, the motions panel denied Gilley's motion to dismiss without prejudice to renewing the arguments in the third brief on cross-appeal. 9th Cir. Dkt. #18. Gilley now renews those arguments.

STANDARD OF REVIEW

Although this Court ordinarily reviews denial of a preliminary injunction for abuse of discretion and factual findings for clear error, underlying legal conclusions are always reviewed de novo. *TGP Commc'ns, LLC v. Sellers*, No. 22-16826, 2022 U.S. App. LEXIS 33641, at *6 (9th Cir. Dec. 5, 2022) (citation omitted). Reliance on an erroneous legal premise amounts to abuse of discretion. *Id.* (citation omitted).

In addition, this Court reviews constitutional facts de novo in First Amendment cases. *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1177 n.12 (9th Cir. 2022), *cert. granted*, 91 U.S.L.W. 3268 (U.S. Apr. 24, 2023) (No. 22-324) (citations omitted). That includes the application of law to facts on free speech issues. *Lair v. Motl*, 873 F.3d 1170, 1178 (9th Cir. 2017) (citation omitted). Mootness and standing are to be reviewed de novo. *Atwood v. Shinn*, 36 F.4th 901, 903 (9th Cir. 2022) (citation omitted); *McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015) (citations omitted).

SUMMARY OF ARGUMENT

The district court erred in denying Gilley's preliminary injunction motion because (1) he presented smoking-gun evidence of UO's viewpoint discrimination; (2) the district court's cramped theory of standing would insulate virtually all government blocking criteria from judicial review; (3) there is no presumption in favor of a limited public forum in the social media context; (4) UO has conceded that its content-based restrictions cannot survive the strict scrutiny required by a designated public forum; (5) this court lacks jurisdiction to hear UO's cross-appeal of a non-final order on a motion to dismiss; (6) UO has not met its heavy burden of showing that Gilley's claims are moot; and (7) mailing a $20 bill to counsel does not moot a nominal damages claim in a civil rights case.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE DISTRICT COURT BECAUSE GILLEY DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF BOTH HIS AS-APPLIED BLOCKING AND FACIAL PRE-ENFORCEMENT CLAIMS

A. UO discriminated against Gilley's viewpoint

"Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citation omitted); *see also Pleasant Grove City v. Summum,* 555 U.S. 460, 469 (2009).

Thus, even assuming that @UOEquity's interactive portions are a limited public forum (and there is good reason to conclude they are a designated public forum), UO is still not permitted to discriminate against DEI critics. "Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set." *Rosenberger,* 515 U.S. at 829.

As a matter of law, to exclude Gilley's comment about equality is both unreasonable in a discussion about racism and constitutes viewpoint discrimination. Moreover, UO's smoking-gun internal emails and its witnesses' feigned ignorance about why two other DEI critics

were blocked amply demonstrate viewpoint-discriminatory animus. The district court clearly erred in holding otherwise.

Stabin's claim that Gilley's comment about equality was off-topic in a discussion about racism defies is per se unreasonable. But even UO's own evidence shows that it has selectively enforced the off-topic rule, a practice amounting to viewpoint discrimination.

1. UO's internal emails demonstrate that Stabin blocked Gilley because she was offended by his retweet

The best evidence of what Tova Stabin thought about Gilley's retweet are the emails she sent to Kelly Pembleton on June 27, 2022, a mere 13 days after she blocked Gilley. She said she wasn't surprised it was "Bruce." 2-ER-169. She referred to Gilley as "talking something about the oppression of white men" and accused him of being there to trip her up and "make trouble." *Id.* In another email sent a few minutes earlier she said he was "being obnoxious." 2-ER-251.

Stabin doesn't deny sending these emails and she doesn't have a good explanation for sending them—because she knows they look horrible. It is also telling that UO does not discuss these emails *at all* in its stage-two brief—the university would rather not draw any attention to them. Her emails show that Stabin was offended by Gilley's views because she

saw him as an obnoxious troublemaker, who thinks white men are oppressed.[1]

Presented with far less obvious evidence of viewpoint discrimination, this Court held "that it is a close question whether the Trustees' decisions to block the Garniers were viewpoint discriminatory." *Garnier*, 41 F.4th at 1179. Given the minimal impact of the Garniers' repetitive comments, this Court found "reason to doubt" the Trustees' explanation that they were silencing spammers, not critics. *Id.* at 1179-80.[2]

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[1] Stabin's offense is also consistent with an antiracist worldview, which requires that only certain groups qualify as oppressed. *See* 2-ER-230 (Anti-Racist Continuum defining underrepresented as "Indigenous, Black, Latino, Asian, Desi, Pacific Islander, LGBTQ+, multiracial, women, low-income, first generation, international, or disabled"). This would explain why Stabin would be offended by Gilley's retweet if she thought it was about white men.

[2] The Supreme Court granted certiorari in *Garnier* to consider the question of whether the Trustees engaged in state action. *See* United States Supreme Court, Docket for Case No. 22-324, Pet. for Cert., https://perma.cc/VCA9-ZJ9L. While state action questions may arise in cases concerning social-media accounts that are both personal and official, no one disputes that Stabin blocked Gilley on an official UO Twitter account, or that she did so while acting in the course and scope of her job duties as DEI's communication manager. 1-ER-22

Similarly, in *TGP Communications,* this Court found credible evidence of viewpoint discrimination when a county defendant denied a press pass to a reporter because he participated in partisan events. 2022 U.S. App. LEXIS 33641, at *10-11. "The evidence supports, at least at this preliminary stage of the review, the conclusion that a predominant reason for the County denying Conradson a press pass was the viewpoint expressed in his writings." *Id.* at *14.

If UO's internal emails don't prove viewpoint discrimination, it is hard to imagine what would suffice. Even so, additional evidence corroborates the intent revealed by those emails.

2. UO doubled down even after Gilley asked for the blocking criteria

UO would have this Court believe that Stabin's actions were an isolated mistake, the actions of a now-retired "lone wolf" who acted alone; and also that Gilley sat on his rights, both by delaying his lawsuit and by failing to ask UO to unblock him before filing suit. But that is not a reasonable interpretation of the evidence.

("Defendants do not dispute that Defendant stabin acted under color of state law").

Gilley exercised his right under state law to request the blocking criteria only twelve days after Stabin blocked him. 3-ER-348. The email trail shows that Stabin provided information for UO's response and that Pembleton, Alex-Assensoh's Chief of Staff, was involved in gathering information for the response. 2-ER-169–170; 2-ER-249–252. Moreover, Alex-Assensoh was copied on many of the emails. 2-ER-249–250; 2-ER-252.

Pembleton was obviously aware that Gilley was blocked as of June 27, 2022 (2-ER-250–251) and yet no one–not Pembleton, not Stabin, not Alex-Assensoh—took any steps to unblock Gilley. A reasonable person—especially a highly-educated individual working in upper management at a flagship state university—would understand Gilley's request for the blocking criteria as questioning whether he was appropriately blocked. The most reasonable and obvious explanation[3] for why UO did not unblock Gilley after he sent his request is that the people involved thought the blocking was justified. That would be consistent with

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[3] Circumstantial evidence can be just as probative as direct evidence. *United States v. Knight*, No. 21-10197, 2023 U.S. App. LEXIS 95, at *6-7 (9th Cir. Jan. 4, 2023); *see also* Ninth Cir. Jury Instructions Comm., Manual of Model Civil Jury Instructions 1.12 (2017).

Stabin's emails describing Gilley as an obnoxious troublemaker who was commenting about the oppression of white men.

It would also be consistent with Pembleton's membership in UO's "Deconstructing Whiteness Working Group," a group of faculty and staff who work to "foster long-term commitment to anti-racist thought and action." *Compare* 2-ER-223–224 (work-group photo showing Kimberly Pembleton in back row, fourth from left) *with* 2-ER-238 (online profile for Kelly Pembleton, Assistant Vice President and Chief of Staff).

It would be reasonable to infer that Pembleton, a UO manager, committed antiracist, and member of a racialist working group would be fine with keeping Gilley blocked for his views. Afterall, the work of an antiracist is never done.[4] And she is the Chief of Staff to the author of UO's "Continuum of Becoming a Thriving, Anti-Racist and Fully-Inclusive Institution." 2-ER-228 ("Individuals are recognizing oppression…and intervening in it"); 2-ER-196 (61:2–13).

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[4] "Like fighting an addiction, being an antiracist requires persistent self-awareness, constant self-criticism, and regular self-examination…. To be an antiracist is a radical choice in the face of this [racist] history, requiring a radical reorientation of our consciousness." IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 29 (2023).

3. *UO's feigned ignorance of why it blocked the other two Twitter users is a red flag for viewpoint discrimination*

The discriminatory animus revealed by Stabin's emails is also corroborated by her fortuitous memory loss as to why she blocked two other users, @anonymousbruter and @GregHBlog. 2-ER-209–210 (72:23–73:24). Gilley, a Professor of Political Science, examined the other blocked users' feeds and determined that they expressed politically conservative viewpoints. 3-ER-413.

@anonymousbruter's reply to @UOEquity about "underrepresented groups" was "How are these groups going to a secondary school if they can't read, write, and do math?" 3-ER-344. The most reasonable reading of that post is that @anonymousbruter questioned the qualifications of students from underrepresented groups to be successful at the college level, if they lacked adequate preparation.

Similarly, @GregHBlog's post equated Diversity, Equity, and Inclusion departments (like UO's DEI Division) with "Marxist poison" and called for their elimination "from every institution in America." 3-ER-345. The post links to a paywalled Substack article that begins:

> Okay, this is obvious to the rational, thinking person, a no-brainer, but also obvious is that Diversity, Equity, and Inclusion **(**Big Diversity/Big Racism**)** is **detached** from logic and preys on DE-lusion.

Greg Halvorson Blog, *Diversity, Equity, and Inclusion departments are Marxist poison and should be eliminated from every institution in America...* (last visited May 31, 2022), https://perma.cc/FWG8-6DDM. Halvorson's post is obviously critical of DEI departments, yet Stabin suggested that perhaps he was being "sarcastic." 2-ER-96.

Richie Hunter, speaking for UO as its Rule 30(b)(6) witness, also displayed the exact same epistemic flexibility, noting that the tweet "could be sarcasm." SER-41. Hunter even had the audacity to suggest that Halvorson might be a DEI supporter. SER-40.

The proposition, jointly advanced by Stabin and UO, that Greg Halvorson is not a critic of DEI, but possibly a sarcastic supporter of DEI, is unreasonable and illustrates why Bruce Gilley is correct to distrust UO's representations. If UO's VP of Communications is unwilling to even acknowledge that the other blocked users were blocked for criticizing DEI, there is no reason to believe UO will interpret and apply its guidelines in good faith in the future. On a more probable than not basis, any objective observer knows why Stabin blocked these users. The district court clearly erred in failing to see that.

4. UO's selective enforcement of its off-topic rule is a pretext for viewpoint discrimination

Even assuming that UO blocked Gilley for being off-topic, it still discriminated against his viewpoint by selectively enforcing the off-topic rule. While both direct and circumstantial evidence supports the conclusion that Stabin blocked Gilley because she deemed his comment "offensive," her pretense of deeming his content "off-topic" instead does not remove the taint of viewpoint discrimination. Even viewpoint-neutral rules become viewpoint discriminatory if they are selectively enforced against disfavored speakers. *See Waln v. Dysart Sch. Dist.,* 54 F.4th 1152, 1162-63 (9th Cir. 2022) (school district prohibited plaintiff from displaying religious message on graduation cap while allowing other messages).

UO and Stabin would have everyone believe that it is just bad luck that of the 2,558 replies and retweets directed at @UOEquity since 2017, the less-than-0.12% who were blocked all just happened to express conservative, anti-DEI viewpoints. *See* 2-ER-184. Their outlier status underscores the targeted nature of UO's blocking.

5. UO has gone out of its way to paint Gilley as a provocateur unworthy of legal protection

UO's approach to litigating this case betrays its institutional hostility to Gilley and his views. During opening arguments, defense counsel went out of his way to argue that Bruce Gilley was "famous for being a provocateur. That is, in fact the main thing he's known for[,]" and listed several non-consensus opinions allegedly espoused by Gilley. 2-ER-56. *"Bruce Gilley says outrageous things, invites people's ire,* and then having invited a backlash, he then promotes himself as having been a victim of cancel culture . . . . And at bottom, that is what this case is about . . . . That is why we are here." 2-ER-57 (emphasis added); *see also* 9th Cir. Dkt. #26 at 47 (describing Gilley as a "professional provocateur" and highlighting a curated selection of his opinions about George Floyd and colonialism). But this line of argument admits a little too much. If that is "why we are here," then Gilley was blocked for being someone who says "outrageous things" and not due to a mistake.

Defense counsel, acting on UO's behalf, also chose to highlight some of Gilley's non-consensus writings in other fora, including counsel's personal opinions about those writings. SER-103–105. For example, counsel criticized Gilley for his "boast" about drawing a parallel between DEI and cancer. SER-105 (¶ 8). Yet this same metaphor was utilized by Ibram X. Kendi, the prominent antiracist, in his seminal

work on the topic. "Our world is suffering from metastatic cancer. Stage 4. Racism has spread to nearly every part of the body politic…" KENDI, at 255, *supra.* If one side of a debate can avail itself of a cancer metaphor, the other side may surely do so too. *See R. A. V. v. St. Paul*, 505 U.S. 377, 391-92 (1992) ("St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules").

Defense counsel similarly used up valuable time during the hearing to cross-examine Gilley about his views on contested political and historical issues (2-ER-125–130). If Gilley's viewpoints don't matter, why did UO's agent spend so much time focusing on them?

An outside observer could view this tactic as a signal (others might call it a "dog whistle") to the district court that Gilley is an outlier who does not represent majoritarian "Oregon values" and should therefore not receive the court's protection—a curious approach for an institution that claims to be open to dissent. It is precisely those speakers who espouse non-consensus views who need legal protection. An essential feature of our First Amendment is that its protections are not subject to a majority vote.

Further, UO has also advanced the proposition that Gilley is asking the Court "to penalize Dr. Alex-Assensoh and the University for Dr.

Alex-Assensoh holding views that are different than his own." 9th Cir. Dkt. #26 at 45. But here an important distinction must be made between Alex-Assensoh's role as an academic and her role as the VP of Equity and Inclusion, a position that allows her to wield government power and supervise her division's communication manager. Academics at public universities do receive special protection for their scholarship and teaching in the classroom. *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014). But this benefit does not apply to university administrators acting outside the contours of the classroom or research paper. *See Adams v. Trs. of the Univ. of N.C.-Wilmington,* 640 F.3d 550, 563-64 (4th Cir. 2011). Functionally, Alex-Assensoh may well wear two hats: that of an academic and that of administrator. But her part-time status as an academic does not give her (or her subordinates) carte blance to discriminate when she exercises state authority.

Similarly, as a government entity, UO does not have First Amendment rights. *Contra* 9th Cir. Dkt. #26 at 43 (accusing Gilley of "villainizing" the University for engaging in its own "protected speech"). To claim otherwise is to fundamentally misunderstand our Constitution and the role of the Bill of Rights.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove,* 555

U.S. at 467 (citation omitted). To be sure, a "government entity has the right to speak for itself." *Id.* (cleaned up). UO and its officials may legally craft @UOEquity's outbound tweets to reflect UO's institutional priorities. But those tweets are government speech, not subject to the First Amendment. UO officials have no right to censor the public's replies or retweets when they don't fit with the university's preferred message. The district court's theory of standing would insulate virtually all government blocking criteria from judicial review.

6. Social media fora invite capricious blocking and unblocking by government officials

The district court held that Gilley lacked standing to bring a pre-enforcement challenge to UO's social media guidelines because Gilley "faces no risk of prosecution, professional discipline, or harm to his reputation or employment," and also because he had "not shown a reasonable likelihood that he will be blocked again." 1-ER-31–32. The district court's reasoning would effectively insulate UO's guidelines from ever being reviewed by a court.

Unless the blocked user is a student or employee, entities such as UO will never be able to prosecute or fine users because they lack statewide police powers. UO might only block or permanently ban critics such as Gilley, but that is enough of a constitutional injury to provide standing.

See Garnier, 41 F.4th at 1167-69 (analyzing and rejecting mootness where officials deployed word filters on Facebook). "As state actors, the Trustees violated the First Amendment when they blocked the Garniers from their social media pages." *Id.* at 1177.

Similarly, just this last December, this Court found irreparable injury when county officials used viewpoint discriminatory criteria to exclude a reporter from in-person press conferences, relegating him to watching a live stream. *TGP Commc'ns,* 2022 U.S. App. LEXIS 33641, at *15. "The constitutional harm of viewpoint discrimination, expressed here by the County's exclusion of Plaintiffs from its limited forum, cannot be rendered de minimis or otherwise mitigated by requiring Plaintiffs to avail themselves of a less desirable, even if somewhat effective, alternative." *Id.* This analysis is no less applicable to the forum of the interactive portions of @UOEquity. *See Davison v. Randall,* 912 F.3d 666, 675-76 (4th Cir. 2019) (finding standing where official unblocked plaintiff but reserved right to block him again). Under binding Circuit precedent, the threat of blocking (already demonstrated) is legally sufficient to provide standing.

Indeed, were the district court correct, state actors could cut-off civil rights litigation by tactically unblocking individuals whenever they face suit, claiming the blocks were "mistakes." Under the district court's

rule, few plaintiffs, or attorneys, would bother bringing such cases, effectively authorizing censorship on state-run social-media channels.

7. UO's arguments that its blocking criteria do not restrict speech are directly contradicted by the text of its criteria

UO asserts that its social-media guidelines "do not restrict speech and have never been used to restrict speech." 9th Cir. Dkt. #26 at 60–66. But this is obviously incorrect.

First, the plain text of UO's guidelines permits its communication managers to block users and content. 3-ER-342; 3-ER-339 ("But *you may remove comments, messages and other communications* and restrict access to users who violate the following guidelines . . . . If a user engages in particularly egregious behavior, or continues to post comments in violation of our standards . . . *you have the right to ban or hide the user")* (emphasis added).

Second, shortly after this lawsuit was filed, Larson sent an email re-affirming UO's blocking criteria. SER-118.

Third, Richie Stevens, testifying on behalf of UO, stated under oath that the guidelines were used to make blocking decisions. *See, e.g.,* SER-60 (202:8-17) ("The only reason that someone would be blocked by

University of Oregon – a post or a person blocked on our social media platforms is if it violates our social media guidelines").

Fourth, setting aside whether Stabin blocked Gilley for being offensive or off-topic, UO has itself repeatedly asserted that Stabin blocked Gilley for being off-topic, which is one of the guidelines' blocking criteria. *See, e.g.,* 2-ER-52–53 (Defense counsel's opening argument: "What she knew is this guy is being disruptive by responding to the division's post with something off topic . . . . And to prevent the conversation she wanted to facilitate from being derailed by more off-topic comments, she blocked him."); 2-ER-204–205 (52:18–54:3) (Stabin testimony). Thus, UO has *itself* argued that its guidelines were used to restrict speech. The record directly contradicts its new arguments.

UO's reliance on *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) is also misplaced. That case involved government grant-making for the arts, not speech restrictions for ordinary citizens in the modern public square. The Court noted the presence of a "competitive process" and the government's role as a patron, not sovereign. *Id.* at 586, 589.

Unlike an NEA grant process that must necessarily allocate limited resources to only some artists, UO is not doling out subsidies through the interactive portions of @UOEquity. Nor does it incur any monetary cost as a result of public interaction with any given tweet.

Plaintiffs "may demonstrate that an injury is likely to recur by showing that the defendants had a written policy and that the injury stems from that policy." *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 642 (9th Cir. 2008) (cleaned up). Where the harm alleged is traceable to a written policy, there is an "implicit likelihood of its repetition in the immediate future." *Id.* (citations omitted); *see also Kaahumanu v. Hawaii,* 682 F.3d 789, 807 (9th Cir. 2012) (Even though never exercised, the discretionary power to deny permits was inconsistent with First Amendment because "potential for the exercise of such power exists").

It is undisputed that UO maintains blocking guidelines, that it claims to have applied those guidelines to Gilley (and others) in the past, and that it reserves the right to apply the guidelines to Gilley (and other users) in the future. Consequently, there is an implicit likelihood of its misconduct's future repetition and the district court erred when it held that Gilley had not shown that he is likely to be blocked again.

8. Gilley's plans are sufficiently concrete to convey standing

The district court concluded that Gilley lacked standing because he "provided minimal detail about his plans to interact with @UOEquity" and "without explaining the types of posts he intended to make." 1-ER-

30 (footnote 4). But that conclusion is both inaccurate and takes an unnecessarily cramped view of standing in the First Amendment context. Gilley declared that:

> If I can receive some legal protection . . . then it would be my intent to interact with @UOEquity and criticize some of their DEI-related posts in the future. I would intend some of my posts to be provocative in order to stimulate a conversation or introspection about DEI. That is because I believe all ideas should be open to challenge, discussion, and refutation.

3-ER-307 (¶ 21).

This statement wholly suffices to establish standing and plaintiffs should not be required to script responses to tweets that do not yet exist. *See Wolfson v. Brammer,* 616 F.3d 1045, 1059 (9th Cir. 2010) ("Wolfson has expressed an intention to run for office in the future, and a desire to engage in two kinds of campaign-related conduct that is likely to be prohibited by the Code"); *Davison,* 912 F.3d at 678 ("Accordingly, the evidence establishes that Davison continues to engage in a course of conduct—namely, posting about alleged municipal corruption on the Chair's Facebook Page—likely to be impacted by Randall's allegedly unconstitutional approach to managing the page").

9. UO has not contested that it plans to hire an antiracist communications manager

UO seeks to mitigate Stabin's blocking decisions by arguing that she is retired, that the position remains unfilled, and that her replacement will report directly to DEI instead of UO Communications. But UO's decision to leave the position unfilled is as tactical as its decision to unblock Gilley.

And UO does not dispute that it plans to hire an antiracist to fill Stabin's position. UO's position description indicates that the new manager will report directly to the "Vice President for Equity and Inclusion [Dr. Alex-Assensoh]" (2-ER-254) and must have a "passion for the values of social justice and anti-racism[.]" *Id.* The new reporting relationship, and the position's mandatory ideology, will exacerbate the risk of viewpoint discriminatory blocking.

Antiracism ideology calls for censorship of its critics. *See* 2-ER-116–117 (testimony of Prof. Bruce Gilley). Gilley further detailed his knowledge of antiracism and DEI ideology and explained why he fears that an antiracist communication manager would use UO's blocking criteria to block a conservative-white-male speaker who was advocating a colorblind viewpoint. 3-ER-304–307 ("DEI adherents also believe that most people are racist unless they are explicitly 'anti-racist'"). If UO can block "racist" comments, an antiracist communication manager will

block colorblind comments. To an antiracist, colorblindness is automatically "racist."[5]

That Stabin's replacement will need to be an antiracist who will report to another antiracist, the author of UO's Ideal Roadmap (3-ER-371–395) and Continuum of Becoming a Thriving, Anti-Racist and Fully Inclusive Institution (2-ER-228–230), does not point to increased tolerance for dissent.

It is reasonable for Gilley to infer that an antiracist communication manager would interpret UO's blocking criteria for offensive, racist, hateful, or otherwise inappropriate content broadly and with an "equity lens" and that there is therefore a reasonable risk he or she would block him again or ban him completely. It was clear error for the district court to ignore this evidence, which it did not discuss anywhere in its opinion.

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[5] "The language of color blindness—like the language of 'not racist'—is a mask to hide when someone is being racist." KENDI, at 11, *supra*. *See also* 3-ER-395 (Alex-Assensoh: "Colorblindness is the idea that race-based differences don't matter. It ignores the realities of systemic racism").

10. The Furgatch factors favor standing in light of UO's insincere behavior

As recently as 2020, this Court reaffirmed that a "chilling of First Amendment rights can constitute a cognizable injury, so long as the chilling effect is not based on a fear of future injury that itself is too speculative to confer standing." *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020) (cleaned up). In that case the plaintiffs alleged that the federal government's crowd-control measures were chilling their First Amendment rights, and that the injury was ongoing. *Id.* This Court made a point of distinguishing *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983), a case relied on heavily by UO, because the due-process injury in *Lyons* "differs sharply" from the chilling of First Amendment rights. *Index Newspapers,* 977 F.3d at 826.

This Court also cited with approval the district court's application of the *Furgatch* factors in assessing whether the federal government's crowd-control conduct was likely to re-occur. *Id.* at 826-27. These factors include (1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of his or her conduct; (4) the extent to which the defendant's professional and personal characteristics might enable or tempt him to commit future violations; and (5) the sincerity of any assurances against

future violations. *Fed. Election Com. v. Furgatch*, 869 F.2d 1256, 1263 n.5 (9th Cir. 1989).

The *Furgatch* factors cut strongly in favor of Gilley facing a substantial risk that he will blocked or banned again. First, UO has demonstrated scienter in numerous ways, including:

- Attempting to ignore Stabin's smoking-gun emails about Gilley's retweet;
- Claiming not to know why Stabin blocked the other two DEI critics, or even admitting that they were DEI critics;
- Glossing over the fact that UO kept Gilley blocked after he requested the blocking criteria;
- Initially telling Gilley that there were no blocking criteria;
- Later telling Gilley that they had publicly posted blocking criteria and not initially revealing that those were first posted in response to this litigation;
- Claiming that a comment about equality is off-topic in a discussion about racism; and
- Claiming incorrectly that UO's guidelines prohibit viewpoint discrimination when it is self-evident that they contain viewpoint discriminatory criteria.

Second, both Stabin and UO sought to avoid the conclusion that she had engaged in a pattern of viewpoint discriminatory blocking by disputing that the blocked users were DEI critics and claiming not to know why they were blocked. Third, neither Stabin nor UO has ever admitted that Stabin blocked Gilley for viewpoint discriminatory reasons. UO, being jointly represented in this matter, has fully backed Stabin's farfetched claims. *See, e.g.,* 2-ER-160 (Defense counsel's oral argument: "I wouldn't call my position awkward as much as the university takes Ms. Stabin at her word . . . that what she is testifying to is true and that she did not block him for viewpoint reasons"). Third, UO maintains the right to block or ban users who post content that violates UO's guidelines, and intends to fill the communication manager position with an antiracist who will be reporting to another antiracist. That person will be ideologically inclined to apply the blocking guidelines with an equity lens because antiracism requires proactive measures. Fifth, Gilley rightly views UO's assurances as insincere in light of its pattern of conduct detailed above.

As a result, under the *Furgatch* factors, it was error for the district court to conclude that Gilley did not face a significant risked of being blocked again in the future and that he lacked standing to challenge the blocking guidelines.

B. There is no presumption in favor of a limited public forum in the social-media context

1. UO bears the burden of proving that its forum has clear access rules that are consistently enforced

As explicated in Gilley's opening brief, the district court erred as a matter of law when it created a presumption in favor of a limited public forum, glossed over the lack of ex post screening, and placed the burden on Gilley to prove the existence of a designated public forum. 9th Cir. Dkt. #12 at 43–48. UO's brief offers no meaningful analysis of these issues. Nor does UO even cite this Circuit's seminal public-forum and viewpoint cases such as *Hopper v. Pasco,* 241 F.3d 1067 (9th Cir. 2001), *Seattle Mideast Awareness Campaign v. King County,* 781 F.3d 489 (9th Cir. 2015) (*"SeaMAC"*), or *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1131-32 (9th Cir. 2018) *("AFDI II").* UO's avoidance of these binding precedents is a tacit admission that they contradict many of its key arguments.

If UO wants the benefit of a designated public forum, it should bear the burden of proving that it established such a forum, with unambiguous access rules that are consistently enforced, whether through ex ante or ex post screening.

2. Binding circuit precedent prevents UO from relying on secret internal blocking criteria

As further detailed *infra,* at 19, sometime between the filing of this lawsuit on August 11, 2022, and when UO changed its public records response to Gilley on August 31, 2022, the university first posted its blocking guidelines on its public website. Nowhere in its brief does UO contest this fact. Instead, it argues that the guidelines are not meant for the public, because they bind only UO employees. 9th Cir. Dkt #26 at 74. This response is insufficient.

First, UO completely ignores the fact that the district court based its forum determination in part on the proposition that the "pertinent part of the guidelines *was posted online for anyone to view,* and was also part of a larger internal document." 1-ER-23 (emphasis added). Second, binding circuit precedent requires officials who seek to establish limited public fora to publish "clear rules of etiquette for public comments[.]" *Garnier,* 41 F.4th at 1182. "Had the Trustees established such rules, it is possible that the Garniers would not have continued to post the same messages repeatedly, knowing that such comments could lead to their being blocked from the page." *Id.*

The district court was correctly concerned with whether UO had published its rules ex ante, but it incorrectly concluded that UO had done so. On the contrary, UO maintained secret blocking criteria, first

telling Gilley that no criteria existed, and then reversed course and attempted to create the impression that its criteria had been public all along. It is curious that UO went to the trouble of quickly publicly posting its blocking criteria after this lawsuit was filed. UO's actions indicate that it too thought it was important to post its rules.

If it is true, as UO now claims, that the criteria are only "internal guidelines and they are not directed to the public…" (SER-29), then UO is departing from *Garnier* and is not entitled to claim that it created a limited public forum. Such a forum is achievable only with unambiguous and known access rules.

3. The First Amendment precludes UO from creating an interactive social-media forum only for viewpoints it agrees with

UO also newly claims that the interactive portions of @UOEquity are a forum "limited to dialogue and information about diversity, equity, and inclusion." 9th Cir. Dkt. #26 at 76. UO points to no policy establishing[6] the claimed boundaries of the relevant forum, but even

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[6] UO's reliance on *Koala v. Khosla*, 931 F.3d 887, 901-02 (9th Cir. 2019) is misplaced because that case stands for the proposition that "where an

assuming that such boundaries are extant, it is axiomatic that UO may not limit comments to pro-DEI, antiracist content or exclude colorblind viewpoints. "Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set." *Rosenberger,* 515 U.S. at 829. "If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one." *Id.* at 831.

Similarly, in *AFDI II,* this Court held that once a state actor opens a forum to certain topics, it may not discriminate against select, hot-button, viewpoints.

> We cannot conclude that the appropriate limitation on subject matter is "offensive speech" any more than we could conclude that an appropriate limitation on subject matter is "pro-life speech" or "pro-choice speech." All of those limitations exclude speech solely on the basis of viewpoint—an impermissible restriction in a nonpublic forum (as in other contexts).

904 F.3d at 1132.

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express policy creates a metaphysical forum, the policy itself defines the forum's scope." UO has provided no policy defining the scope of @UOEquity. Even UO's blocking guidelines do not contain the words diversity, equity, or inclusion.

UO proposes that it has the right to create an interactive forum where only pro-DEI speech is allowed, or at least only certain kinds of "constructive" disagreement, perhaps by certain speakers. That is plainly impermissible under both Supreme Court and circuit precedent.

But the district court went even a step further into impermissible territory—effectively holding that Stabin, as the author of the "Racism Interrupter" post, had authority to *subjectively* determine the "purpose" of her post and thus also the permissible scope of replies or re-tweets. 1-ER-27. Stabin testified that "the purpose of the prompt was to give people tools to use to respond to discriminatory comments they might hear in their daily lives." *Id.* The district court went on to hold that Gilley's comment, "could reasonably be said to appear *inconsistent with the purpose of the prompt* and off topic." *Id.* (emphasis added).

This holding is incompatible with binding precedent because it allows an individual communication manager to determine the scope of responsive commentary with reference to her own perception of her post's purpose. *See, e.g., Minn. Voters All. v. Mansky,* 138 S. Ct. 1876, 1891 (2018) (officials' discretion must be guided by objective, workable standards); *AFDI II,* 904 F.3d at 1130 (reasonableness of exclusion from forum is assessed by looking at forum's purpose, asking whether

standards are sufficiently objective and definite, and independently reviewing the record); *SeaMAC,* 781 F.3d at 499-500 (same).

Under the district court's exotic holding, the scope of the forum could change with the vicissitudes of each tweet. An official's "intent" could be used to adjust the boundaries of the forum on-the-fly, or ex post, to exclude speakers and views found to be disagreeable. Motivated arguments will almost always be available that some comment did not "fit" with the purpose of a post, especially once a lawsuit is underway. That is why this Court has consistently held that standards for inclusion and exclusion must be objective and definite, not subjective and malleable.

Imagine, for example, an elected official who says that his tweet's purpose on his official account is to promote a positive image of his leadership abilities, and his critics' mocking replies undermine that purpose. The district court's holding would permit such blocking on official social-media accounts. It amounts to reversible error.

4. UO has failed to respond to Gilley's argument that its blocking criteria are vague and allow for excessive enforcement discretion

Gilley devoted a significant portion of his opening brief to the argument that UO's blocking criteria are vague and allow for excessive

enforcement discretion. 9th Cir. Dkt. #12 at 59–62. UO's brief fails to offer any response to those arguments, amounting to a concession that UO's guidelines are indeed vague and subjective.

Here even UO's designated witness agreed that its guidelines were vague, and drew from dictionary definitions that are no more definite. 2-ER-220; *see also* 2-ER-185–191. UO has not offered any additional guidance that would assist its officials in guiding their discretion. *See Marshall v. Amuso*, 571 F. Supp. 3d 412, 424 (E.D. Pa. 2021) ("In parsing out these subjective terms, the School Board has presented no examples of guidance or other interpretive tools to assist in properly applying Policies 903 and 922 to public comments").

5. UO's own evidence demonstrates haphazard monitoring of the relevant forum

The standards for inclusion in a limited public forum "must be unambiguous and definite." *Garnier,* 41 F.4th at 1178 (quoting *Hopper*, 241 F.3d at 1077). "A policy purporting to keep a forum closed (or open to expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it is not enforced or if exceptions are haphazardly permitted." *Hopper,* 241 F.3d at 1076 (citation omitted).

Gilley's opening brief presents detailed arguments about UO's inconsistent application of the off-topic rule and Stabin's admission that she hardly monitored the @UOEquity account. 9th Cir. Dkt. #12 at 44–48. UO fails to engage with the holdings of the *Hopper* opinion and instead criticizes Gilley for not offering "evidence of the proportion of off-topic comments." 9th Cir. Dkt. #26 at 77. But there is no "proportionality test" for determining the existence of a public forum. "What matters is what the government actually does -- specifically, whether it consistently enforces the restrictions on use of the forum that it adopted." *Hopper,* 241 F.3d at 1075.

The evidence confirms that @UOEquity rarely blocked anyone (except Gilley and the other two DEI critics); and that Stabin said she paid the least attention to @UOEquity and barely knew how to block someone. 2-ER-184; 2-ER-251. That is practically the definition of "no policy at all," which in practice is not enforced or to which exceptions are "haphazardly permitted." *See Hopper,* 241 F.3d at 1076. And in the absence of consistently enforced access rules, a designated public forum is allowed to take root. *See Garnier,* 41 F.4th at 1179; *Hopper,* 241 F.3d at 1078 ("Prior to the exclusion of the works at issue here, the city neither pre-screened submitted works, nor exercised its asserted right to exclude works").

6. The plain text of UO's guidelines authorizes viewpoint discriminatory blocking and banning

Jarring and offensive speech communicates constitutionally protected viewpoints. *Iancu v. Brunetti,* 139 S. Ct. 2294, 2299–2302 (2019); *AFDI II,* 904 F.3d at 1131 ("Giving offense is a viewpoint, so Metro's disparagement clause discriminates, *on its face,* on the basis of viewpoint") (emphasis added); *see also* 9th Cir. Dkt. #12 at 56–59 (discussing racist and vulgar speech).

In *AFDI II,* this Court invalidated King County Metro Transit's non-disparagement provisions, holding that:

> *Matal* applies with full force to the disparagement clause here. No material textual difference distinguishes Metro's disparagement clause from the trademark provision at issue in *Matal*. Metro's disparagement clause, like the Lanham Act's disparagement clause, requires the rejection of an ad solely because it offends.

904 F.3d at 1131 (citing *Matal v. Tam,* 137 S. Ct. 1744 (2017)).

Metro's policy called for the rejection of any transit ad that "contains material that demeans or disparages any individual, group of individuals or entity." *AFDI II,* 904 F.3d at 1130-31. The standard further called for a "reasonably prudent person," apply community standards to determine whether the ad "contains material that ridicules

or mocks, is abusive or hostile to, or debases the dignity or stature of any individual, group of individual or entity." *Id.* at 1131.

UO's guidelines similarly authorize its officials to "remove comments, messages and other communications and restrict access to users who… [p]ost violent, obscene, profane, hateful, or racist comments or otherwise uses offensive or inappropriate language." 3-ER-339. UO's blocking guideline is no less viewpoint discriminatory than the disparagement clause this Court invalidated as facially viewpoint discriminatory in *AFDI II*. *See* 904 F.3d at 1131. Moreover, UO's guidelines lack Metro's "reasonably prudent person" filter, which would allow a communication manager steeped in antiracism to bring her biases to the determination of what is hateful, racist, offensive, or otherwise inappropriate.

UO has not offered any persuasive argument to the contrary. It repeats the assertion that UO's guidelines contain an "overarching directive" and "prohibit viewpoint discrimination." 9th Cir. Dkt. #26 at 17–18, 75. The district court similarly claimed that the "social media guidelines themselves do not permit viewpoint discrimination." 1-ER-32–33.

But these assertions are obviously incorrect. The plain text of UO's guidelines authorize the restriction of users who post "hateful or racist

comments or otherwise uses offensive or inappropriate language." 3-ER-339. UO re-affirmed the right to remove such comments or ban users after this lawsuit was filed. SER-118.

At best, UO's guidelines protect *some* viewpoints from blocking, but they do not protect a class of viewpoints that UO has singled out for special treatment: hateful, racist, offensive or otherwise inappropriate views—as UO sees it. Nor has UO provided further guidance on which views qualify, which invites officials to insert their subjective determinations, or respond to their most sensitive listeners, who are quick to proclaim offense.

UO clearly wants to be able to block such content or it would have already agreed to remove that part of its guidelines or stipulated to an injunction. The university asserts a strong interest in managing its "internal affairs" (9th Cir. Dkt. #26 at 78–80). But on Twitter, UO interacts with the wider world and may not retreat into the safety of its campus bubble.

In making this interference assertion, UO also tells this Court something. These blocking criteria matter to UO. Enjoining the criteria would only "interfere" with UO's affairs if it intends to apply them.

There is no avoiding that UO's guidelines discriminate against certain viewpoints. The district court erred when it concluded that they did not.

7. UO has failed to present evidence of disruption

Ms. Stabin testified that she blocked Gilley because his comment was disruptive. 2-ER-92; *see also* 2-ER-52–53 (opening argument). But neither Ms. Stabin, nor UO, offered any evidence of actual disruption. As this Court has repeatedly made clear, actual disruption requires actual disruption, not imaginary disruption. *Garnier,* 41 F.4th at 1181-82 (citations omitted); *see also SeaMAC,* 781 F.3d at 501 (threat of disruption was real where Metro showed risk of vandalism, violence, lost ridership, and diversion of resources). In the absence of any evidence of actual disruption, it should have been apparent to the district court that Stabin's claim was a fig leaf for viewpoint discrimination. *See AFDI II,* 904 F.3d at 1133-34 (Metro's rejection of proposed faces-of-global-terrorism ad was unreasonable given lack of evidence of disruption to transit system).

C. UO has conceded that its content-based restrictions do not meet strict scrutiny in a designated public forum

As Gilley argued in his opening brief (9th Cir. Dkt. #12 at 48–50), if the interactive portions of @UOEquity are a designated public forum, then any categorical, content-based restrictions must meet strict scrutiny. *See Hopper,* 241 F.3d at 1075; *see also City of Austin v. Reagan Nat'l Advert. of Austin, LLC,* 142 S. Ct. 1464, 1474 (2022) (law is content based if it requires authorities to examine the contents of the message to see if a violation has occurred). That would, by definition, include UO's restriction on off-topic comments because a communication manager would need to examine a reply or retweet to determine if it was off-topic or disruptive.

UO has offered no argument that its off-topic rule would survive strict scrutiny, so this proposition should be considered established. Thus, if this Court concludes, as it should, that the relevant forum is a designated public forum, rather than a limited public forum, UO's off-topic rule is plainly unconstitutional, regardless of whether it was enforced selectively or was a pretext for viewpoint discrimination.

II. THIS COURT LACKS JURISDICTION OVER UO'S CROSS-APPEAL BECAUSE GILLEY'S RETROSPECTIVE CLAIM FOR NOMINAL DAMAGES AGAINST STABIN IS DISTINCT FROM HIS CLAIMS FOR PROSPECTIVE RELIEF

A. Denials of motions to dismiss based on mootness are presumptively not subject to interlocutory review

Appellate courts are courts of limited jurisdiction, and the default rule is that only final judgments are subject to review. 28 U.S.C. § 1291. Only a limited subset of district court orders are subject to interlocutory review, including orders denying an injunction. *Id.* § 1292(a)(1). The only appeal properly before this Court is Bruce Gilley's appeal from the denial of his preliminary injunction motion.

A "final decision" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233 (1945) (citation omitted). An order that adjudicates fewer than all claims is not final. *M.M. v. Lafayette School Dist.,* 681 F.3d 1082, 1089 (9th Cir. 2012).

"[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." *Catlin,* 324 U.S. at 236; *Batzel v. Smith*, 333 F.3d 1018, 1023 (9th Cir. 2003), *superseded by statute on other grounds,* 878 F.3d 759, 766-67 (9th Cir. 2017) ("It is understandable that Cremers did not promptly appeal the denial of his

motion to dismiss for lack of personal jurisdiction, because the denial was not an appealable order").

UO based its motion to dismiss on mootness claims. 1-ER-3; 1-ER-10–20. UO (or its former employee) did not itself request injunctive relief or assert an immunity defense. 1-ER-10–20. The district court denied UO's motion to dismiss, finding that Gilley's claims for injunctive and declaratory relief and nominal damages are not moot. *Id*.

UO will have an opportunity to appeal the rejection of its mootness arguments after the district court enters a final judgment disposing of all claims. Until then, UO's cross-appeal is presumptively improper.

B. The issues presented by Gilley's preliminary injunction appeal are not inextricably intertwined with his retrospective claim for nominal damages

UO seeks to avoid the presumptive bar on appealing non-final orders by arguing for pendent appellate jurisdiction. 9th Cir. Dkt. #26 at 64. "Pendent appellate jurisdiction refers to the exercise of jurisdiction over issues that ordinarily may not be reviewed on interlocutory appeal, but may be reviewed on interlocutory appeal if raised in conjunction with other issues properly before the court." *Cunningham v. Gates*, 229 F.3d 1271, 1284 (9th Cir. 2000). Pendent jurisdiction must be narrowly construed and should be extended only where the rulings were

inextricably intertwined or if review of the pendent issue was necessary to ensure meaningful review of the independently reviewable issue. *Id.* Two issues are not inextricably intertwined if they apply different legal standards. *Id.* at 1294*; see also Norbert v. City & Cty. of S.F.,* 10 F.4th 918, 936-37 (9th Cir. 2021) (qualified immunity is legally distinct from entitlement to preliminary injunction).

Neither prong of this exception applies here. First, as discussed further *infra,* the issue of prospective injunctive relief against UO (raised by Gilley's appeal) and retrospective nominal damages against Stabin are analytically distinct. This is self-evident: prospective relief is by definition different than retrospective relief. And Gilley's claim for damages against Stabin for past harm is not dependent on the validity of his injunctive and declaratory relief claims against UO.

So too with the issue of injunctive and declaratory relief. While the district court's opinion is not a model of clarity, some of that is a function of the shifting legal burdens. While Gilley bears the burden of showing standing, UO bears the burden of showing mootness.

Standing and mootness are two distinct jurisdictional doctrines. Article III standing is evaluated by considering the facts as they existed at the time of the action's commencement. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *Skaff v.*

Meridien N. Am. Beverly Hills, LLC, 506 F.3d 832, 838-39 (9th Cir. 2007). At the case's outset, the burden rests on the plaintiff, as the party invoking federal jurisdiction, to show standing: injury in fact, causation, and redressability. *Friends of the Earth,* 528 U.S. at 180-81; *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 305-06 (3d Cir. 2020).

While a plaintiff must show standing at the outset of the case, he need not keep doing so throughout the litigation. *Hartnett,* 963 F.3d at 305-06. The heavy burden of persuading the court that a case is moot lies with the party asserting mootness. *Friends of the Earth,* 528 U.S. at 189; *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018). Thus, the difference in legal standards can lead to some incongruity.

Mootness doctrine is discussed in further detail below, but for purposes of evaluating the availability of pendent jurisdiction, it bears noting that the district court's opinion recognizing Gilley's claims for prospective relief against the guidelines as live is reconcilable with its conclusion that he "lacks standing to challenge the guidelines *as a whole* on behalf of others." 1-ER-35 (emphasis added). While this analysis is ultimately incorrect for the reasons stated in this brief, the opinion can plausibly be read as holding that Gilley may challenge the off-topic rule prospectively, but may not challenge any other aspects of UO's guidelines. *See also* 1-ER-32 ("He lacks standing to bring a pre-

enforcement challenge to the social media guidelines as a whole"). This reading would also be consistent with the nature of preliminary relief, because full discovery might reveal new evidence or UO might take some other action before final judgment is entered, such as blocking Gilley again.

Regardless, these issues are not inextricably intertwined with Gilley's preliminary injunction appeal. To the extent UO wants to contest Gilley's standing to bring a pre-enforcement challenge (which is legally distinct from mootness), it may do so without necessitating a cross appeal.

Moreover, the cases that UO relies on are distinguishable. To date, the parties have not litigated any issues of immunity, qualified or otherwise;[7] nor does this case involve settling and non-settling parties or a complex class action.[8] As a result, this is not one of those rare

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[7] *See Kwai Fun Wong v. United States INS*, 373 F.3d 952, 961 (9th Cir. 2004) (appeal of a qualified-immunity order where motion to dismiss was inextricably intertwined with the existence of a clearly established legal right).

[8] *See Smith v. Arthur Andersen LLP*, 421 F.3d 989, 998 (9th Cir. 2005) (class action).

situations where this Court should exercise pendent appellate jurisdiction.

III. GILLEY'S CLAIMS ARE NOT MOOT BY OPERATION OF THE VOLUNTARY CESSATION DOCTRINE AND HIS UNRESOLVED CLAIM FOR NOMINAL DAMAGES

A. The voluntary cessation doctrine applies because UO could easily resume blocking Gilley in the future

1. UO only unblocked Gilley after he sued

In this circuit, a voluntary change in official behavior only moots a lawsuit when it is absolutely clear that sufficient procedural safeguards ensure that the wrongful government activity will not re-occur. *Fikre*, 904 F.3d at 1039. A statutory change will usually render a case moot because the rigors of the legislative process make such changes harder to reverse. *Id.* at 1038. "On the other hand, an executive action that is not governed by any clear or codified procedures cannot moot a claim." *Id.* (cleaned up). In cases that fall between these extremes, courts ask whether the government's new position could be easily abandoned or altered in the future. *Id.* (citation omitted).

There is no bright-line test for mootness. But in the event of mere policy changes, mootness is more likely if (1) the policy change is evidenced by language that is broad and unequivocal; (2) the changes

fully address all of the wrongful government conduct; (3) the lawsuit was a catalyst for the change; (4) the policy has been in place a long time; and (5) since implementation of the change officials have not reverted to wrongful conduct. *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (citations omitted). The ultimate question always remains whether the government defendant asserting mootness meets its heavy burden of proving that the challenged misconduct cannot reasonably be expected to re-occur. *Id.*

Thus, in *Fikre,* this Court held that the plaintiff's claims were not moot because the FBI's decision to remove Fikre from the no-fly list was an individualized determination, untethered to any explanation or abiding change in policy. *Fikre,* 904 F.3d at 1039-40. The FBI's decision was discretionary, rather than entrenched and permanent, and there was no assurance he would not be placed on the no-fly list again in the future, or a verification of procedural safeguards that would prevent a re-occurrence of the FBI's wrongful conduct. *Id.*

Tellingly, in *Garnier*, this Court noted the risk that defendants will cease the offending conduct to moot the case and then simply resume it after the litigation has passed. 41 F.4th at 1167-69. This Court went on to hold that the plaintiffs' claims were not moot, even though the school-trustee defendants had mostly closed their social media accounts to

public comments after the filing of the lawsuit. No assurance guaranteed that the trustees would not in the future re-open their social-media pages "for verbal comments from the public." *Id.*

Defendants rely on *Rosebrock* for the proposition that policy changes (or re-affirmation of an existing policy) can sometimes moot a claim. But their reliance is misplaced. In that case, a practice had developed where the plaintiff, a veteran, had sometimes hung a flag on a fence at a large Veteran's Administration (VA) complex, which was allowed by VA officials. *Rosebrock,* 745 F.3d at 967-70. The plaintiff was advocating for the field at the complex to be put to a different use to help veterans, and when VA officials did not agree, he began hanging the US flag on the fence with the union side down, as a form of protest. *Id.* This caused VA officials to cite plaintiff and eventually take down one of his protest flags, because hanging the flag that way offended some. *Id.* at 968-69. In response to his First Amendment lawsuit alleging viewpoint discrimination, the VA re-affirmed its long-standing federal regulation—38 C.F.R. 1.218—which disallowed any distribution or posting of any outside materials on VA property. *Id.* at 969-70. The re-affirmation also included a ban on posting the U.S. flag in any position on the VA fence. *Id.*

It is not hard to see why this Court concluded that a re-occurrence of viewpoint-discrimination was unlikely because the VA had closed the forum altogether—no flags could be posted on the fence. Conversely, UO has not closed the interactive portions of @UOEquity to user replies or retweets. In fact, UO still maintains the authority to block and permanently ban users for promoting offensive viewpoints or violating other criteria. 3-ER-339; SER-118.

While UO General Counsel Kevin Reed's letter purports to have "reinforced" to UO communications managers that they may not block based on viewpoint, his claim is directly contradicted by the guidelines' text. 3-ER-339; SER-131. Moreover, unlike a legislative change, his advice can easily be reversed, and there is no evidence of procedural safeguards to prevent viewpoint-discriminatory blocking in the future. *See Fikre*, 904 F.3d at 1039-40; *McCormack*, 788 F.3d at 1025 (suspiciously timed offer of transactional immunity did not moot case); *compare Brach v. Newsom,* 38 F.4th 6, 13 (9th Cir. 2022) (school re-opening entrenched where state legislature included sunset and self-repeal provisions in emergency statute).

Under the *Rosebrock* factors, UO's post-filing mitigation efforts are insufficient to moot the case and appear rather as an attempt to manipulate this Court's jurisdiction. First, Mr. Reed's affirmation is not

unequivocal because it is contradicted by UO's guidelines. Second, the claimed "re-affirmation" does not address Gilley's concerns about the blocking of "offensive," "racist," "hateful," or "otherwise inappropriate" user commentary. Third, no one from UO has expressly acknowledged that Stabin discriminated against Gilley's viewpoint.

Indeed, UO has joined Stabin in advancing the unpersuasive claim that Gilley was blocked for being off-topic, not because he was offensive. 2-ER-53 ("[T]o prevent the conversation she wanted to facilitate from being derailed by more off-topic comments, she blocked him"). Further, UO continues to defend the legality of its blocking criteria. 2-ER-156–157; 9th Cir. Dkt. #26 at 78 ("The Guidelines otherwise prohibit viewpoint discrimination and have never been used to restrict speech"). UO's decision to defend the legality of its discriminatory blocking criteria itself strongly cuts against mootness. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (Seattle schools had ceased to apply racial tie-breaker but the district continued to vigorously defend its race-based program); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 770 (6th Cir. 2019) (university's arguments against preliminary injunction amounted to defense of speech-restricting definition's constitutionality); *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 161-62 (3d Cir. 2019)

(declaratory relief claim not moot where government continued to defend its prior rule).

Based on the evidence developed through early discovery, this case is much more like *Fikre* (and *McCormack*) than *Rosebrock*. No procedural safeguards prevent wrongful blocking in the future, and UO's guidelines allow blocking offensive and other content. UO maintains no appeal process for blocked users and won't even admit that what happened here was viewpoint discrimination.

Moreover, UO's behavior throughout this case has been opaque and tactical. Unblocking Gilley serves UO's short-term goal of manipulating this Court's jurisdiction and insulating its guidelines from judicial review, especially on unfavorable facts. UO has not made any legally binding commitment to Gilley, or other DEI critics. *Compare Already, LLC v. Nike, Inc.*, 568 U.S. 85, 93 (2013) (covenant not to sue for trademark infringement was sufficient to moot case where covenant was unconditional and irrevocable).

2. UO's previously secret guidelines are malleable and do not rise to the level of legislation or even official policy

The focus in voluntary-succession doctrine "is on whether the defendant made that change unilaterally and so may return to its old

ways later on." *Hartnett,* 963 F.3d at 307. UO has voluntarily unblocked Gilley hoping to obtain a litigation advantage. Nothing prevents UO from reversing course and blocking Gilley again after this case is concluded.

In this litigation's early stages, much like UO sought to create the inaccurate impression that it had previously posted its blocking criteria, UO attempted to camouflage its guidelines as tantamount to official "policy."

But UO blocking guidelines do not rise to the level of a university policy, which, as noted *supra,* must undergo a more rigorous approval process. 2-ER-243–244 (defining policy, distinguishing policy from procedure, and describing policy approval process); 2-ER-217 (106:12–18). Importantly, a policy "establishes rights, requirements or responsibilities" and must typically be approved by UO's president or board of trustees. 2-ER-243–244.

And even during this litigation, at least some evidence arose that UO was quietly moving to modify its blocking guidelines. *Compare* 3-ER-339 (public blocking guidelines including banning provision) *with* 2-ER-272, 2-ER-279–280 (Oct. 19, 2022, update of internal social media guidelines that do not contain banning provision).

Whatever UO's current rule on banning users is (and the external and internal guidelines conflict on this point) the university's blocking guidelines are easily changed, fundamentally differentiating this case from *Rosebrock,* 745 F.3d at 972-73 — where the VA closed the forum and re-affirmed a long-standing CFR provision that been poorly enforced—or *Brach,* 38 F.4th at 13-15 — where the emergency legislation had a built-in sunset provision. *See also Bd. of Trs. of the Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (repeal, amendment, or expiration of legislation will render an action challenging the legislation moot absent expectation of re-enactment). UO is not constrained by legislative process and can change its guidelines on a whim, just like it can block critics and quickly unblock them when that proves useful.

If this Court allows UO to manufacture mootness here, virtually no government defendant in this circuit will be subject to legal accountability for blocking a citizen from an official social-media account; so long as those officials are willing to tactically unblock the citizen and claim it was a mistake. The voluntary cessation doctrine exists precisely to prevent such a dynamic. "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case

declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already,* 568 U.S. at 91.

Moreover, this case bears similarities to cases in other circuits where courts declined to find free-speech claims moot. *Speech First, Inc.,* 939 F.3d at 761, 769 (timing of policy change was suspicious); *Blackwell v. City of Inkster*, 596 F. Supp. 3d 906, 915 (E.D. Mich. 2022) (unblocking was "ad hoc rather than legislative"); *see also Davison*, 912 F.3d at 675-78 (jurisdiction for declaratory relief found by Fourth Circuit where public official reserved right to again block commenters). As a result, the district court correctly concluded that UO had not met its burden to show that Gilley's claims were moot.

B. Mailing a $20 bill to plaintiff's counsel is insufficient to moot a civil rights claim for nominal damages

UO also claims to have mooted Gilley's claim for nominal damages by mailing his lawyer a $20 bill, but such a performative gesture is not legally significant without, at a minimum, an entry of judgment against UO or Stabin; and even that would appear to be questionable under Supreme Court precedent.

1. *Binding authority holds that a live nominal damages claim precludes mootness*

An "award of nominal damages *by itself* can redress a past injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021) (emphasis added). In that case, college officials first vigorously defended their speech policies, but later jettisoned the policies and then mooted the request for injunctive relief. *Id.* at 797. The district court later found that nominal relief was insufficient to convey standing, and the Eleventh Circuit agreed, but the Supreme Court reversed. *Id.* The court reasoned that it was undisputed that Uzuegbunam experienced a completed violation of his rights when the college enforced its speech policies against him. *Id.* at 802. "Because every violation of a right imports damage, nominal damages can redress Uzuegbunam's injury even if he cannot *or chooses not* to quantify that harm in economic terms." *Id.* (cleaned up, emphasis added).

This makes sense, because otherwise it would be too easy for government actors to avoid accountability for violating citizen's rights if the prospect of easily quantifiable damages was low. The practical import of *Uzuegbunam* is that a clear Supreme Court majority does not want government officials engaging in gamesmanship to avoid judicial review.

In a concurring opinion, Justice Kavanaugh did note: "I write separately simply to note that I agree with THE CHIEF JUSTICE and the Solicitor General that a defendant should be able to accept the entry of a judgment for nominal damages against it and thereby end the litigation without a resolution of the merits." *Id.* at 802. While this minority view seems to allow for tendering the nominal damages along with entry of a judgment, nothing in *Uzuegbunam* stands for the proposition that a defendant can simply end litigation of constitutional issues by mailing a $20 bill to plaintiff's counsel. *See also Campbell-Ewald Co. v. Gomez,* 577 U.S. 153, 165-66 (2016) ("[A]n unaccepted settlement offer or offer of judgment does not moot a plaintiff's case . . . . We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, *and the court then enters judgment for the plaintiff in that amount*") (emphasis added); *Polk v. DelGatto, Inc.,* No. 21-Civ.-129, 2021 U.S. Dist. LEXIS 137764, at *9 (S.D.N.Y. July 23, 2021) ("defendant must first request that the court enter judgment for the full amount potentially owed to the plaintiff"). To the extent it is still an open issue whether a state actor may moot a nominal damages claim by paying those damages *and*

accepting an adverse entry of judgment, that factual constellation is not presented by this case. *See* 1-ER-19–20.

UO has not offered any authority that squarely supports the proposition that government officials can moot an otherwise plausible civil rights claim by tendering $20 cash to the plaintiff while avoiding an adverse entry of judgment. Cases involving compensatory damages are simply not analogous, especially in light of *Uzuegbunam*. Nor are dissenting opinions, which by their very nature, do not reflect the currently prevailing legal analysis.

2. If UO is correct then all government censors could moot nominal damages claims by mailing petty cash to their targets

Gilley of course doesn't want UO to accept an adverse entry of judgment without taking responsibility for its past behavior and putting in place actual safeguards to prevent (or at least seriously mitigate the risk of) viewpoint discriminatory blocking in the future. That view is also consistent with *Uzuegbunam*'s central theme.

But there is a practical reason why UO is unwilling to accept an entry of judgment here: doing so would make Gilley a prevailing party entitled to reasonable attorneys' fees under 42 U.S.C. § 1988. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) ("We therefore hold that a plaintiff who

wins nominal damages is a prevailing party under § 1988. When a court awards nominal damages, it neither enters judgment for defendant on the merits nor declares the defendant's legal immunity to suit."); *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 872 (9th Cir. 2017) (nominal damages serve to clarify the identity of the prevailing party)

If this Court finds that UO's actions here moot Gilley's claim for nominal damages without an entry of judgment against UO or Stabin, then there is no reason for any government official in this circuit to behave any differently. Such a holding would shield officials from appropriate judicial scrutiny and would make a mockery of *Uzuegbunam*.

3. There is no nominal damages claim against the unfilled position of the DEI division's communication manager

When Stabin retired from UO effective the day after this lawsuit was filed, Fed. R. Civ. P. 25(d) provided that the official capacity claim (for injunctive and declaratory relief) against her was inherited by the vacant position of the DEI communication manager. "If an official is sued in both an individual and official capacity and leaves office, the successor is automatically substituted with respect to the official capacity claims, but the predecessor remains in the suit with respect to

the individual capacity claims." *6 Moore's Federal Practice - Civil § 25.41* (2022); *see also Developmental Servs. Network v. Douglas*, 666 F.3d 540 n.* (9th Cir. 2011) (applying Rule 25(d) to substitute successor director of agency); "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citation omitted).

Gilley agrees that he may only seek nominal damages from Stabin, as the only party sued in her individual capacity. *See* 9th Cir. Dkt. #26 at 63 ("[Gilley] cannot seek damages from the communications manager"). But defense counsel already knows this. 2-ER-158 (defense counsel's closing argument: "And the reason for that is, *there are only damages claims against Ms. Stabin"*) (emphasis added); *see also* 3-ER-310–311 (Amended Complaint ¶¶ 5 and 10). As a result, there is no actual dispute before the Court about this issue.

CONCLUSION

This Court should reverse the district court's order denying Bruce Gilley's motion for a preliminary injunction and dismiss UO's cross-appeal for lack of jurisdiction. In the alternative, this Court should find that Gilley's claims are not moot.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s): 23-35097, 23-35130

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