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, in her individual capacity,
and the COMMUNICATION MANAGER of the University of Oregon's Division of Equity and Inclusion, in his or her official capacity,

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the District of Oregon
Hon. Marco A. Hernandez
Case No. 3:22-cv-01181-HZ

DEFENDANTS-APPELLEES/CROSS-APPELLANTS' FOURTH BRIEF ON CROSS-APPEAL

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INTRODUCTION

Gilley asks the Court to imagine a different case than the one currently before it. One in which the University has a history of viewpoint-based blocking. One in which the decision to block Gilley was made collectively by employees who still work at the University. One in which the decision to unblock Gilley and assure him that he will not be blocked in the future was arbitrary and ephemeral rather than the reaffirmation of a written, longstanding, and long-followed prohibition on viewpoint discrimination. One in which the provisions of the Social Media Guidelines targeted by Gilley's pre-enforcement challenge had been used to block even one person. And one in which Gilley had not published and spoken widely on the evils of diversity and inclusion programs while simultaneously claiming self-censorship.

But Gilley cannot change the facts of *this* case. The University has no history of viewpoint-based blocking. The decision to block Gilley was made by a single employee who is now retired and did not consult with any other employee before blocking Gilley. The position previously held by that employee remains vacant. The University did unblock Gilley based on the reaffirmation of a written, longstanding, and long-followed prohibition on viewpoint discrimination rather than an ad hoc or strategic decision. The provisions of the Social Media Guidelines that Gilley targets in his pre-enforcement challenge have never been used to block him or anyone else.

And Gilley admits that he has "no need" to interact with the @UOEquity subaccount and instead views this as a "made-in-heaven" case.

Gilley asks the Court to imagine a different case because the facts of this one show, as the district court found, that he faces no more than a "low likelihood" of being wrongfully blocked in the future. And he asks the Court to imagine a different case because the facts of this one show that Defendants have already redressed any alleged past injury by paying Gilley's nominal damages request in full. Together, these facts dictate that Gilley's claims no longer present a live case or controversy, and that the Court must dismiss his case for lack of jurisdiction.

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS OF FACT COMPEL THE CONCLUSION THAT THE COURT LACKS JURISDICTION OVER GILLEY'S CLAIMS FOR PROSPECTIVE RELIEF.

The task before the Court is a narrow one. The district court made a series of factual findings, including the overarching findings that "Plaintiff has not shown a reasonable likelihood that he will be blocked again" and that the University had shown "a low likelihood that [Gilley] will be blocked again." (1-ER-32, 34.) In the absence of "clear error," the Court's only task is to apply the mootness and standing doctrines to the facts as found by the district court. As described below, the district court's findings of fact are amply supported by the record. Because both the standing and mootness doctrines require at least a "reasonable likelihood" of future injury,

the district court's contrary findings compel the conclusion that it lacked jurisdiction over Gilley's claims for prospective relief. The district court committed reversible legal error by retaining jurisdiction despite its factual findings.

A. The district court's findings of fact are not clearly erroneous and are thus entitled to deference by the Court.

After four months of expedited discovery, multiple rounds of briefing, and a half-day evidentiary hearing, the district court made the following findings of fact:

- The University's "actions point to a low likelihood that Plaintiff will be blocked again." (1-ER-34.)
- Gilley failed to show "a reasonable likelihood that he will be blocked again," that "enforcement (i.e., blocking) is reasonably likely to occur," or that the University "is likely to block him on Twitter in the future for the exercise of protected speech." (1-ER-32, 34.)
- "Plaintiff has not shown more than a possibility that he will be blocked from interacting with @UOEquity in the future." (1-ER-36.)
- "The Court rejects Plaintiff's contention that the University's unblocking of his Twitter account is temporary or that the University is not acting in good faith." (1-ER-17.)
- "[I]t would be speculative to conclude that [tova stabin's] unknown successor is likely to block Plaintiff on Twitter again." (1-ER-35.)
- "Defendant stabin testified that she acted alone in blocking Plaintiff and did not consult any other University staff after she blocked him. There is no evidence indicating otherwise." (*Id.*)

- "Plaintiff has failed to establish a pattern of viewpoint-based blocking by the University," and "Defendant stabin's blocking of Plaintiff was an anomaly." (1-ER-32, 34.)

- "The Court doubts that Plaintiff is self-censoring out of a genuine fear of consequences. His testimony provides no basis for the Court to conclude that he fears any collateral consequences if he were to engage in speech on these platforms. . . . Instead, he has alleged a subjective chill." (1-ER-31–32.)

These factual findings are entitled to deference on appeal unless they are clearly erroneous. *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 949 (9th Cir. 2019) (mootness); *In re Palmdale Hills Prop., LLC*, 654 F.3d 868, 873 (9th Cir. 2011) (standing). "In practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 400 (1990). As this Court has explained, "[t]o be clearly erroneous, a decision must strike [us] as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012) (quotations omitted). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

Here, there is ample evidence to support the district court's findings that the University never engaged in a pattern of viewpoint-based Twitter blocking, that the

University is acting in good faith, that any risk of future blocking by the as-yet-to-be-hired Communications Manager is speculative, and that Gilley faces no more than a low likelihood that he will be blocked in the future.

No pattern of blocking. Gilley was blocked on a single occasion. (3-ER-349–52.) The employee who blocked him, tova stabin, retired before Gilley filed this lawsuit. (SER-69–70.) It is uncontroverted that stabin acted alone and without the knowledge, input, or approval of anyone else. (2-ER-105; SER-78–79.) Critically, over the past decade, just three out of the 2,558 retweets and replies directed at the @UOEquity subaccount have been blocked. (2-ER-184.) The record is devoid of evidence as to why the two other Twitter users were blocked, including which posts (if any) resulted in their blocking or even when they were blocked, and many of the thousands of retweets and replies directed at @UOEquity have expressed dissenting viewpoints. (2-ER-94, 97; SER-22, 79.) Moreover, with respect to Gilley's pre-enforcement challenge to the Guidelines, there is no evidence that the Guidelines provisions targeted by Gilley have *ever* been used to block *anyone*—not just Gilley.

No bad faith. Gilley did not ask to be unblocked or make any effort to confer with the University before suing. (SER-131; 2-ER-122; 3-ER-420–21.) After first learning about Gilley's allegations through the media, the University immediately unblocked him and unequivocally assured him that he would not be blocked based on viewpoint in the future. (SER-131, 136.) It also reinforced to staff that it prohibits

viewpoint discrimination and counseled stabin that, insofar as she blocked Gilley because she did not understand his comment, doing so contravened the Guidelines' directive to "err on the side of not blocking." (SER-31, 56–57, 87–88, 118, 131.) The University's express prohibition on viewpoint discrimination pre-dated Gilley's lawsuit and has remained substantively unchanged since it was reduced to writing in 2019. (*Compare* 2-ER-279 (2022 Guidelines) *with* SER-116–17 (2019 Guidelines); SER-27–28, 42–43.) Further, in the 10 months since Gilley was unblocked, no one has threatened to block him or any other person, and there are no other users blocked from the University's social media accounts. (SER-20–21.)

No likelihood of blocking. In addition to the absence of any pattern or practice of blocking by the University, the position previously held by stabin remains vacant. (SER-16–17.) There is no evidence that the future Communications Manager will risk disciplinary action by violating the University's prohibition on viewpoint discrimination or—with respect to Gilley's pre-enforcement challenge—rely on the targeted provisions of the Guidelines to block a social media user *for the first time ever*. In addition, once hired, the Communications Manager will no longer report to the Communications Department, where stabin worked, and will instead be housed in the Division of Equity and Inclusion (the "Division"). (SER-15–16.) There is no evidence that the Division's leader, Yvette Alex-Assensoh, PhD, has ever silenced social media users, and she testified unequivocally that the University "should not

block users on social media based on their viewpoints" and that to do so would be antithetical to "the work that we do at the university in the Division." (SER-100.)

No self-censorship. In the time since filing his lawsuit, Gilley has engaged in unreserved and very public criticism of diversity, equity, and inclusion viewpoints, including by way of an article in *The Wall Street Journal* and a live appearance on *The Charlie Kirk Show*. (SER-103–09.) Gilley admits that he does not fear arrest, prosecution, or professional consequences if he were to interact with @UOEquity again, (D. Ct. ECF No. 37 at 9), and there is no evidence that Gilley would face any collateral consequences for doing so. To the contrary, Gilley has told the Court why he is not interacting with @UOEquity: He views this lawsuit as a "made-in-heaven" case that he is committed to pursuing despite having no "need to read the University of Oregon's Twitter account." (2-ER-129.) And even though there are hundreds of posts, retweets, and comments visible on the @UOEquity page, Gilley's self-serving declaration fails to specify *a single post, retweet, or comment* he would interact with were it not for his alleged fear of being blocked.[1] (2-ER-184; 3-ER-307.)

[1] Gilley criticizes the University and its counsel for highlighting his unpopular views, and he suggests that this proves their intolerance of free speech. (Pl.'s Third Br. at 36–37.) He once again uses his provocations as both sword and shield. Gilley's outspokenness belies his assertions of self-censorship, and his penchant for inviting backlash and then complaining of being a cancel-culture victim undercuts his claim to be suffering an ongoing injury. At the hearing, counsel for the University told the district court the purpose for which he was offering the evidence: "I mention these things not to condemn Professor Gilley for saying them or to suggest he had no right

In sum, whatever facts this Court might find if it were "sitting as a trial court," there was ample evidence from which the district court could and did "reasonabl[y]" find the facts described above. *United States v. W. T. Grant Co.*, 345 U.S. 629, 634 (1953). The Court must therefore accept those facts on appeal and assess mootness and standing based on an application of the governing legal principles to those facts.

B. Gilley's claims for prospective relief are nonjusticiable as a matter of law based on the district court's findings of fact.

Based on the facts as found by the district court, a straightforward application of the mootness and standing doctrines compels the conclusion that Gilley's claims for prospective relief are nonjusticiable because Gilley cannot "reasonably expect" to be blocked by @UOEquity in the future.

"Plaintiffs in the federal courts must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974). For standing to seek prospective relief, a plaintiff must demonstrate a "real and immediate threat of repeated injury." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (quotations omitted). Similarly, for mootness, a claim for prospective relief

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to say them. Of course he has every right to say them. I mention them to explain his modus operandi. Bruce Gilley says outrageous things, invites people's ire, and then having invited a backlash, . . . promotes himself as having been a victim of cancel culture." (2-ER-56–57.) Gilley is not entitled to protection from having his views used to undermine his legal positions just because they are unpopular.

loses its character as a justiciable dispute if a defendant voluntarily ceases its injury-producing conduct and the offending conduct cannot "reasonably be expected to recur." *Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167, 190 (2000). Although self-censorship can be a cognizable injury sufficient to confer standing and forestall mootness when a plaintiff is otherwise suffering no ongoing injury, the decision to self-censor must be objectively reasonable and not "based on a fear of future injury that itself [is] too speculative" for jurisdiction. *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020) (quotations omitted).

Here, the district court found no "reasonable likelihood" that Gilley would be blocked again; to the contrary, the evidence showed a "low likelihood" that he would be blocked again. (1-ER-32, 34.) Similarly, the district court found that Gilley was not self-censoring based on a reasonable or even "genuine" fear of being blocked in the future. (1-ER-31–32.) Gilley does not dispute that, in the absence of any ongoing injury, jurisdiction over his claims for prospective relief requires at least a reasonable probability that he will be blocked again. But that standard cannot be squared with the district court's findings of fact. Because the mootness and standing doctrines require *at least* a reasonable probability that Gilley will be blocked in the future, the district court's contrary findings compel the conclusion that both this Court and the district court lack jurisdiction over Gilley's claims for prospective relief.

II. GILLEY INVITES THE COURT TO MAKE ITS OWN FINDINGS OF FACT BASED ON STRAINED READINGS OF THE RECORD THAT WERE REJECTED BY THE DISTRICT COURT.

Gilley makes virtually no effort to argue that any of the above factual findings are clearly erroneous. In fact, Gilley never so much as defines the clear error standard in his more than 150 pages of briefing—to say nothing of any argument as to why specific findings of fact would meet that standard. Gilley instead uses the bulk of his briefing on cross-appeal to insinuate that this Court should simply find facts different than those found by the district court. As discussed above, the clear error standard requires more than a difference of opinion between the trial and appellate courts. But even if a simple disagreement were adequate, much of the evidence Gilley relies on is taken out of context, mischaracterized, or both, and none of it is sufficient to find a reasonable probability that he will be blocked in the future.[2]

A. The evidence cited by Gilley is presented without necessary context, mischaracterized, or both.

The evidence cited by Gilley falls into three categories: (1) evidence of the alleged predisposition of antiracists to censor critics, (2) evidence of the University's

[2] To be clear, even if the Court were to find the evidence cited by Gilley persuasive on *de novo* review, it would not render the district court's findings of fact clearly erroneous because there is ample evidence from which the district court could have made the findings that it did. *See Anderson,* 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

alleged pattern of blocking Twitter users with dissenting views, and (3) evidence of the Division's alleged refusal to unblock Gilley.[3]

Alleged predisposition to censor. Gilley argues that the district court should have found a likelihood of wrongful future blocking because "[a]ntiracism ideology calls for censorship of its critics." (Pl.'s Third Br. on Cross-Appeal ("Third Br.") at 45; Pl.'s Opening Br. at 31, 51, 54–55.) The only evidence that Gilley cites for this sweeping proposition is *his own self-serving opinion*. (Pl.'s Third Br. at 45; Pl.'s Opening Br. at 14, 31, 55.) None of the antiracism literature Gilley cites throughout

[3] Gilley also suggests that the University lacks credibility because it promptly (1) corrected a declaration in which an employee mistakenly stated that the complete text of the Guidelines—not just the prohibition on viewpoint discrimination—had appeared as an employee resource on the University's website before this lawsuit, and (2) corrected an initial public records response in which it mistakenly stated that there were no written rules for managing social media accounts. (2-ER-297–300 (updated declaration); (SER-123 (updated public records response); Pl.'s Opening Br. at 28–30; Pl.'s Third Br. at 13, 18–19, 48, 51, 74.) Gilley effectively asks the Court to find that, by timely correcting these inadvertent errors, the University acted in bad faith and engaged in misconduct as part of the expedited discovery process.

But forthrightly correcting errors in a timely manner shows good faith, not bad faith. The district court, which presided closely over the expedited discovery process, was quick to reject Gilley's allegations of bad faith, and Gilley does not allege that the district court had incomplete or incorrect information about the Guidelines or their history when it decided the parties' motions. (1-ER-17.) If Gilley believed that the University intentionally withheld a document or knowingly made a false statement, he could have moved for sanctions and certified that he had a nonfrivolous basis for doing so. Fed. R. Civ. P. 11 & 37. He did not. And he had no basis to do so. Indeed, there is no reason why the University would want to intentionally hide the fact that it maintains a written prohibition on viewpoint discrimination.

his briefs—both scholarly and published by the University—promotes, encourages, or even mentions the silencing of critics, let alone in a professional capacity or on social media managed by a state entity bound by the Constitution. (Pl.'s Opening Br. at 14–16, 54–55; Pl.'s Third Br. at 46.) Gilley asks the Court to find a likelihood of future blocking by Division leaders and a future employee—none of whom have a history of viewpoint discrimination—based on a stereotype of his own creation.[4]

Alleged refusal to unblock. Gilley argues that the district court should have found a likelihood of wrongful future blocking because the leaders of the Division—who will supervise the future Communications Manager for the first time—condone viewpoint discrimination. (Pl.'s Third Br. at 31–32; Pl.'s Opening Br. at 63–64.) Specifically, he alleges that the Division's leaders condone viewpoint discrimination because they did not immediately cause stabin to unblock him after he filed a public records request. (*Id.*) Gilley's argument does not stand up to scrutiny.

First, by his own admission, a reasonable person would not have interpreted Gilley's public records request as a request to be unblocked. (2-ER-122.) Not only

[4] Indeed, Gilley was not offered as an expert witness at any point in the case, and the district court sustained Defendants' objection to his attempt to offer expert testimony on the topics of "antiracism" and "DEI ideology." (2-ER-111–13, 116, 118.) Gilley testified on these topics only as to his view "as the plaintiff in this case," (2-ER-116–17), and to explain "why he's self-censoring," (2-ER-112.) Gilley made no attempt to persuade the district court that he was qualified to offer expert testimony or that he should be allowed to do so. He cannot now, on appeal, cite precisely the same testimony as anything more than evidence of his own opinion.

did he not ask to be unblocked, he did not share that he was blocked. (3-ER-348.) Indeed, Gilley did not even state that he had interacted with @UOEquity or describe his tweet at all. As Gilley has noted several times, he holds advanced degrees from Princeton and Oxford—if Gilley wished to be unblocked, he was capable of plainly stating that request. He cannot fault administrative staff in the Public Records Office and Division for failing to guess his true intentions when neither unit was responsible for managing any of the University's social media accounts. (2-ER-105–07; SER-15–16, 71.) The inability of the Public Records Office and Division to intuit Gilley's undisclosed objectives is hardly an endorsement of viewpoint discrimination.

Second, because stabin was neither employed by the Division nor supervised by its leaders, it is unremarkable that they did not engage in independent factfinding or second guess a past decision by stabin. (2-ER-93–94, 105–07; SER-15–16, 71, 95–96, 98.) Kelly Pembleton, Chief of Staff to the Division, was involved in the public records response solely as a go-between for the Public Records Office and stabin. (2-ER-250, 252; SER-95–96.) Dr. Alex-Assensoh played no role in the public records process and offered unrebutted testimony that she did not even see the emails between Pembleton and the Public Records Office because she was traveling with a student group in Ghana and lacked access to email. (FER-4–6.) In fact, there is no evidence that Pembleton or Dr. Alex-Assensoh ever saw Gilley's comment or even had authority to control the University's social media accounts. (2-ER-93–94, 105–

07, 249–52; SER-95–96.) It is undisputed that neither played any part in blocking Gilley or any other user, and there is no basis to suggest that they condoned it.

Finally, senior University officials were unaware of Gilley's records request and the fact that he had been blocked by stabin. Gilley faults the University for not unblocking him after he submitted an opaque records request, but his request was submitted to the Public Records Office, and he never sent it to senior officials like the Director of Communications, General Counsel, Deputy General Counsel, or any other member of the administration who could have taken action to unblock him. (2-ER-124–25; 3-ER-348.) As a tenured professor at a peer public university in Oregon, Gilley or his counsel could have easily reached out to institutional decisionmakers to request that he be unblocked. (2-ER-124–25.) And it is reasonable to infer that he knew a routine public records request would not be shared with more senior officials. Of course, there is no administrative exhaustion requirement for First Amendment claims, but Gilley asks the Court to infer that the University condoned his blocking without any evidence that its decisionmakers were even aware of the same.[5]

[5] There is another inference to be drawn from the fact that Gilley never reached out to University officials before suing, despite the fact that notice was required by Rule 65(b)(1)(B). (*See* D. Ct. ECF No. 7.) Expecting that the University would promptly unblock him (as it did), Gilley manipulated the court's jurisdiction by ensuring that he was still blocked at the time his suit was filed. (*See* ER-161 ("[T]he difference in this case between mootness and standing is one day.").)

Alleged pattern of blocking. Gilley argues that the district court should have found a likelihood of wrongful future blocking because the two other users blocked by @UOEquity over the past decade previously posted dissenting viewpoints. (Pl.'s Third Br. at 33–35; Pl.'s Opening Br. at 64.) In doing so, he strongly implies that the University and stabin lied to the district court when they testified that they had no recollection or record of the reason(s) for blocking the users. (Pl.'s Third Br. at 33–35.) There are several problems with this argument.

First, the insinuation that the University or stabin lied to the district court is baseless. The district court rejected this suggestion after an opportunity to evaluate stabin's credibility at the in-person evidentiary hearing and after its own review of the record. (1-ER-29.) A district court's decision to believe "coherent and facially plausible" testimony "can virtually never be clear error." *Anderson*, 470 U.S. at 575.

Second, despite asserting that stabin and the University lied, Gilley offers no proof whatsoever that the two users were blocked for the cited posts. In fact, there is no evidence as to *when* or *why* the other users were blocked, let alone evidence that they were blocked for impermissible reasons based on these specific posts.

Finally, the inference that these isolated instances of blocking are predictive of how a not-yet-hired Communications Manager will act in the future ignores the fact that (1) thousands of posts—many critical of the Division and its mission—have been directed at @UOEquity over the past decade without incident, and (2) there is

no evidence that anyone other than the now-retired stabin caused, approved, or knew about the two other instances of blocking. (2-ER-105, 171–84; SER-79.) Simply put, it was not clear error for the district court to find that the 0.11% blocking rate of a now-retired employee over the past decade does not show a reasonable likelihood of a not-yet-hired employee blocking Gilley in the future.

B. Gilley proposes a new legal standard for the first time—requiring different findings of fact—to determine whether he has standing to bring his pre-enforcement challenge.

Gilley argues for the first time that the district court should have applied a different legal standard when it considered his standing to bring a pre-enforcement challenge to provisions of the Guidelines that have never been used to block him or any other person.[6] (Pl.'s Third Br. at 47–49.) Specifically, Gilley now argues that the district court should have measured the likelihood of future prosecution or civil sanction pursuant to these provisions based on the five factors listed in a footnote from *Federal Election Commission v. Furgatch*, 869 F.2d 1256 (9th Cir. 1989), a case in which this Court considered the adequacy of a district court's factual findings in support of a permanent injunction. (*Id.*) The factors are:

1. "[T]he degree of scienter involved,"
2. "[T]he isolated or recurrent nature of the infraction,"

[6] Gilley does not argue that the district court should have applied this standard to the mootness inquiry.

3. "[T]he defendant's recognition of the wrongful nature of his conduct,"
4. "[T]he extent to which . . . professional and personal characteristics might enable or tempt [a defendant] to commit future violations," and
5. "[T]he sincerity of any assurances against future violations."

Furgatch, 869 F.2d at 1263 n.5.

Gilley cites no authority for the proposition that the *Furgatch* footnote factors govern whether someone has standing to bring a pre-enforcement challenge. They do not.[7] *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (holding that pre-enforcement standing depends on whether (1) the plaintiff has a "concrete plan" to violate the law, (2) the enforcement authorities have "communicated a specific warning or threat to initiate proceedings," and (3) there is a "history of past prosecution or enforcement"). Gilley cites no case in which this Court has relied on the *Furgatch* factors when considering standing to bring a pre-enforcement challenge. That is unsurprising: whereas standing to bring a pre-enforcement challenge depends on the likelihood that a law or policy will be applied to the plaintiff *for the first time ever*, the *Furgatch* factors are backward looking and concern whether a defendant's conduct is "likely to *continue*." *Index Newspapers, LLC*, 977 F.3d at 826 (emphasis added).

[7] Indeed, until now, Gilley had argued that the factors from *Thomas* govern pre-enforcement standing. (D. Ct. ECF No. 32 at 8; Pl.'s Opening Br. at 50–51.)

But even if *Furgatch* supplied the governing standard, Gilley would still lack standing to bring his pre-enforcement challenge. The first three factors each concern the *past* frequency or nature of the same enforcement conduct. Here, however, the University has never applied the provisions of the Guidelines targeted by Gilley in his pre-enforcement challenge, so the factors have no relevance to whether Gilley is likely to be blocked pursuant to those provisions in the future. The fourth factor also weighs against standing because, as discussed in Part II.A, there is no evidence that antiracists are predisposed to censorship, let alone that an antiracist employed by the government would risk discipline and possible termination by violating internal rules and the Constitution. And as to the fifth factor, the district court rejected Gilley's "contention that the University's unblocking of his Twitter account is temporary or that the University is not acting in good faith." (1-ER-17.) Gilley has neither argued nor shown that this finding was clearly erroneous.

III. THE LABEL APPLIED TO THE UNIVERSITY'S PROHIBITION ON VIEWPOINT DISCRIMINATION IS IRRELEVANT BECAUSE THE PROHIBITION IS BINDING AND STRICTLY FOLLOWED.

Gilley's primary legal argument is that the alacrity with which the University moved to unblock him and reaffirm its longstanding and long-followed prohibition on viewpoint discrimination is irrelevant because the prohibition does not carry a formal "policy" label. (Pl.'s Third Br. at 68–76.) He urges the Court to find the policy label more probative of how the University and its not-yet-hired Communications

Manager will act in the future than how the University has acted over the past decade and its unequivocal and presumed good-faith assurances that it will not block Gilley. Indeed, Gilley contends that the University's tolerance for dissenting viewpoints is ephemeral and that, in the absence of a formal "policy" label, its prohibition on viewpoint discrimination is unenforceable and easily changed. (*Id.*)

This argument once again runs up against the facts. The record is clear, and the district court agreed, that the University did not *change* any policy or practice when it unblocked Gilley. (1-ER-32; 2-ER-184, 279; SER-116–17.) To the contrary, the University's *existing* policy and practice—the one which it reaffirmed when it unblocked Gilley—was and is to prohibit viewpoint discrimination. (*Compare* 2-ER-279 (2022 Guidelines) *with* SER-116–117 (2019 Guidelines); SER-42–43.) This prohibition has remained unchanged and closely followed since @UOEquity was established in 2013. (2-ER-184.) There is no evidence of any other policy, pattern, or practice to which the University could *revert* in this case—the only evidence is that "stabin's blocking of [Gilley] was an anomaly" and that the University has never engaged in "a pattern of viewpoint-based blocking." (1-ER-32.)

In addition, as the University testified, anyone who violates its prohibition on viewpoint discrimination is subject to discipline—up to and including termination. (SER-54–56.) The trivial number of retweets and replies blocked since @UOEquity was created—just three out of 2,558—corroborates that this prohibition is followed.

(2-ER-184.) Indeed, despite her imminent retirement, the University even counseled stabin that, insofar as she had blocked Gilley because she did not understand Gilley's comment, she should have followed the Guidelines' directive to always "err on the side of letting people have their say." (2-ER-279; SER-18, 88.) There is no evidence that the University—and, more specifically, the not-yet-hired employee who will replace stabin—can be expected to depart from this decade of past practice.[8]

Gilley argues that the University's reaffirmation of its existing prohibition on viewpoint discrimination is not entitled to the "apex" deference and presumed good faith that this Court mandated in *Rosebrock v. Mathis*, 745 F.3d 963 (9th Cir. 2014). He contends that *Rosebrock* is distinguishable because, unlike the University and its future Communications Manager, the government defendant in that case "closed the forum altogether" and did not retain "discretion[]" to regulate speech therein. (Pl.'s Third Br. at 69, 71.) But Gilley misstates the facts of *Rosebrock*.

The forum in *Rosebrock* was *not* closed "altogether," and the plaintiff made precisely the same argument as Gilley in response to that fact: "Rosebrock contends that the [ongoing] discretion allowed to the 'head of the facility or designee' under

[8] A label is merely a signifier or shorthand—it does not determine the substance or effect of the thing labeled. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1744 (2020) (holding, in the context of Title VII, that a defendant's conduct, not the "label" applied thereto, is what governs liability). Thus, if the only evidence is that a rule is binding, enforceable, and strictly followed, the label applied is irrelevant.

[existing law] to authorize displays on VA property prevents the [government's] e-mail from mooting his request for permanent injunctive relief." *Id.* at 973 n.11. The court rejected that argument because there was "no evidence in the record suggesting that the [government] . . . will use this discretion to commit viewpoint discrimination now that [it] has recommitted to strict enforcement" of its existing policy of non-discrimination. *Id*. This was true, the court reasoned, because the absence of prior "inconsistent enforcement" and the "faith we place in the Government" made future misconduct speculative. *Id.* That is, it did not matter to this Court that the same challenged conduct was still *possible*; rather, what mattered was that the government had no prior history of viewpoint discrimination in the relevant forum and that its reaffirmation of this past practice was presumed to be in good faith. *Id.* at 974.

The same is true here: there is no "evidence in the record" suggesting that the University will "commit viewpoint discrimination now that [it] has recommitted to strict enforcement" of its existing prohibition on viewpoint discrimination. *Id.* at 973 n.11. And even more so than in *Rosebrock*, where the government defendant had *repeatedly* engaged in viewpoint discrimination over the course of "at least eight months," *id.* at 966, the University and its future Communications Manager have no history of viewpoint discrimination, and Gilley was blocked on a single occasion by a now-retired employee, *id.* at 973 n.11. Although Gilley speculates that they could "revers[e] course" and block him again because there is a lack of "procedural

safeguards," (Pl.'s Third Br. at 73–74), the *Rosebrock* court dismissed these same concerns, noting that "we have previously found the heavy burden of demonstrating mootness to be satisfied in 'policy change' cases without even discussing procedural safeguards or the ease of changing course," 745 F.3d at 974.

The absence of any past pattern of the challenged conduct, as well as the maintenance of an existing prohibition against the challenged conduct, distinguishes the present case from the authorities cited by Gilley. (Pl.'s Third Br. at 69–70, 73.)

In *Fikre v. FBI*, 904 F.3d 1033 (9th Cir. 2018), for example, the challenged conduct—placing individuals on the No Fly List for impermissible reasons—had endured for decades, continued with respect to the plaintiff until late in the litigation, and ceased only after "an individualized determination untethered to any explanation or change in policy." *Id.* at 1035–36, 1039–40. Here, by contrast, the University has no history of blocking users based on viewpoint, has a longstanding prohibition on viewpoint discrimination, and returned to its *existing* practice of not blocking users when it unblocked Gilley. Similarly, in *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022), the defendants initially refused to unblock the plaintiffs, waited until late in the litigation to unblock them, offered no reason for unblocking them, and did not unequivocally represent that they would not be blocked in the future. *Id.* at 1165–66, 1168 & n.7. None of those facts are present in this case, and, unlike both *Fikre* and *Garnier*, the only person involved in blocking Gilley, stabin, has retired.

At base, Gilley asks the Court to exercise jurisdiction based on a "theoretical possibility" that he could be blocked in the future. *Brach v. Newsom*, 38 F.4th 6, 14 (9th Cir. 2022). That is not the standard for exercising jurisdiction. *See Laidlaw*, 528 U.S. at 190 (holding that a case is moot unless the offending conduct can "reasonably be expected to recur"); *Sacks v. Off. of Foreign Assets Control*, 466 F.3d 764,772–73 (9th Cir. 2006) (holding standing to bring a pre-enforcement challenge requires a "genuine" and "imminent" threat of civil or criminal sanction). Because the record shows, and the district court found, that Gilley faces no "reasonable likelihood" of being blocked in the future, his claims for prospective relief are nonjusticiable and must be dismissed for lack of jurisdiction. (1-ER-32.)

IV. GILLEY URGES THE COURT TO CREATE AN EXCEPTION TO THE REDRESSIBILITY REQUIREMENT OF ARTICLE III FOR HIS NOMINAL DAMAGES CLAIM.

Gilley argues that paying his request for nominal damages does not moot his backward-looking claim against stabin because the district court has not entered an adverse judgment against stabin. (Pl.'s Third Br. at 78–80.) In essence, he contends that, even if there is no redress for a federal court to provide, the court is *compelled* to maintain jurisdiction over a claim for nominal damages unless or until it enters a judgment. Gilley cites no binding authority for this proposition and relies exclusively on passing dicta from a case that did not address whether actual payment of damages extinguishes a claim for damages (*id.* at 78 (citing *Campbell-Ewald Co. v. Gomez*,

577 U.S. 153 (2016))); an out-of-circuit case that never even cites *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), the seminal case on nominal damages (*id.* (citing *Polk v. Del Gatto, Inc.*, No. 21-cv-129, 2021 WL 3146291 (S.D.N.Y. July 23, 2021))); and a two-sentence concurrence by Justice Kavanaugh—joined by no other Justice—in *Uzuegbunam* (*id.* (citing 141 S. Ct. at 802 (Kavanaugh, J., concurring)).)

The Court will note that Gilley carefully avoids discussing the reasoning of *Uzuegbunam*. And for good reason. As the majority in that case held, "no federal court has jurisdiction to *enter a judgment* unless it provides a remedy that can redress the plaintiff's injury." 141 S. Ct. at 801 (emphasis added). A court's ability to award nominal damages "*at the judgment stage*" is what satisfies the "redressability" prong of the case or controversy requirement. *Id.* (emphasis added). And "a plaintiff must maintain a personal interest in the dispute at every stage of litigation, *including when judgment is entered*." *Id.* (emphasis added). Gilley never explains how—in the wake of stabin providing the remedy upon which the redressability of his alleged past constitutional injury depends—the district court could enter a judgment that would provide no "remedy [to] . . . redress [his] injury." *Id.*

Gilley also asserts that "[c]ases involving compensatory damages are simply not analogous." (Pl.'s Third Br. at 79.) But he offers no explanation for *why* they are not analogous. Indeed, the reasoning of *Uzuegbunam* suggests that cases involving compensatory damages are highly analogous. As explained there, nominal damages

satisfy the redressability prong of federal jurisdiction because "nominal damages *are in fact damages* paid to the plaintiff." *Uzuegbunam*, 141 S. Ct. at 801 (emphasis added). The availability of nominal damages, the Supreme Court emphasized, is not "purely symbolic." *Id.* Instead, nominal damages provide redress because they are "concrete" and of "actual benefit" to plaintiffs. *Id.* Accordingly, Gilley's suggestion that payment of nominal damages cannot moot a claim for nominal damages because the way in which nominal damages redress past injury is inherently different than compensatory damages is plainly at odds with the logic of *Uzuegbunam*.

Gilley lastly speculates that stabin will not accept entry of judgment as a precondition to mooting his nominal damages claim because she is concerned about prevailing party fees. (Pl.'s Third Br. at 79–80.) He also warns that respecting the limits of federal jurisdiction could "shield [government] officials from appropriate judicial scrutiny." (*Id.*) But Gilley offers no explanation of why these considerations, even if true, save his claim from becoming moot. An "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990). And the Supreme Court has "long rejected" concerns about insulating government conduct from judicial scrutiny as a valid basis for exercising federal jurisdiction. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1621 (2020); *see Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("The assumption

that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."). As such, because entering a judgment in favor of Gilley would not redress any past injury, his claim for nominal damages is moot.

V. THE COURT HAS JURISDICTION TO DECIDE JURISDICTION.

Gilley does not respond in substance to the Supreme Court's command that federal courts of appeals must always satisfy themselves of their own and the trial court's subject-matter jurisdiction. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review . . . .'" (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934))). Indeed, just this week, the Supreme Court reaffirmed that appellate courts "must" decide questions of mootness before considering the merits of an appeal. *Moore v. Harper*, 600 U.S. __, slip op. at 6 (June 27, 2023). But rather than responding to this mandate, Gilley merely recites the unremarkable proposition that the denial of a Rule 12(b)(1) motion is not itself appealable—a proposition that Defendants do not contest. But Defendants did not file an original appeal in this case, and precedents holding that they could not have filed an original appeal are therefore inapposite.

It is the law of the Ninth Circuit that pendent appellate jurisdiction is always present over questions of subject-matter jurisdiction. *See Smith v. Arthur Andersen LLP*, 421 F.3d 989, 998 (9th Cir. 2005) (holding that this Court has pendent appellate

jurisdiction over questions of subject-matter jurisdiction when an underlying appeal properly seeks review of another interlocutory matter); *Wong v. United States*, 373 F.3d 952, 960 (9th Cir. 2004) (same). And even if that were not true—which it is—this Court would still have jurisdiction to decide subject-matter jurisdiction. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 267 & n.5 (4th Cir. 2012) (Niemeyer, J., dissenting) ("The result is the same under either approach.").

CONCLUSION

Defendants respectfully request that the Court dismiss Gilley's claims for lack of subject-matter jurisdiction.

DATED: June 30, 2023.

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CERTIFICATE OF COMPLIANCE

This brief contains 6,983 words, excluding the items exempted by Fed. R. App. P. 32(f). I certify that the type size and typeface comply with Fed. R. App. P. 32(a)(5). I further certify that this brief complies with the word limit of Circuit Rule 28.1-1(d).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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