



August 14, 2023

Misha Isaak
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
D. 503.294.9460
misha.isaak@stoel.com

Molly Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Gilley v. Stabin, Nos. 23-35097 and 23-35130

Re: Defendants-Appellees/Cross-Appellants' Response to FRAP 28(j) Letter
Filed by Plaintiff-Appellant/Cross-Appellee Bruce Gilley

Dear Ms. Dwyer:

Bruce Gilley's notice of supplemental authority cites an unpublished decision, *Flores v. Bennett*, No. 22-16762, 2023 WL 4946605 (9th Cir. Aug. 3, 2023), in support of his position on appeal and cross-appeal. *Flores* offers no such support.

First, unpublished dispositions are "not precedent." Cir. R. 36-3(a).

Second, the *Flores* district court made no factual findings because the defendants never raised mootness. Defendants here raised mootness before the district court, and the court found that Defendants had demonstrated "a low likelihood" Gilley would be blocked again. That finding—absent from *Flores*—is dispositive of the mootness issue and may only be disturbed if clearly erroneous.

Third, *Flores* was an appeal from the grant of a preliminary injunction, meaning the defendants could prevail only if they showed that the district court abused its discretion in granting relief. Gilley, by contrast, appeals from the denial of a preliminary injunction, meaning the panel must find for Defendants unless *Gilley* shows that the district court abused its discretion in denying relief.

Finally, the only fact suggesting mootness in *Flores* was the defendants' rescission of their contested policy. But even that rescission came months *after* the case was appealed. There were no other indicia that the relief was durable, such as prompt action by the defendants, a written promise, reaffirmation of an existing prohibition

Molly Dwyer
August 14, 2023
Page 2

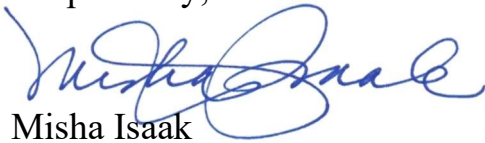
on viewpoint discrimination, retirement of the sole employee involved in the dispute, or evidence that the defendants had no history of discrimination.

Here, by contrast, the University promptly unblocked Gilley, promised he would not be blocked again, and reaffirmed its decade-long practice of not blocking based on viewpoint. The University also maintains a written prohibition on viewpoint discrimination, has no history of discrimination to which it could revert, and has never blocked Gilley or anyone else pursuant to the provisions targeted by Gilley.

Moreover, the now-retired employee who blocked Gilley acted alone and contrary to the directive that employees “err on the side of letting people have their say.”

None of these facts were present in *Flores*, and, unlike *Flores*, the district court reasonably found that Gilley is unlikely to be blocked.

Respectfully,



Misha Isaak

Counsel for Defendants-Appellees/Cross-Appellants

In compliance with FRAP 28(j), counsel certifies that the body of this letter contains 350 words.