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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

BRUCE GILLEY,

Plaintiff,

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.

Case No. 3:22-cv-01181-HZ

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS ON MOOTNESS GROUNDS

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INTRODUCTION

Defendants' claim that they have mooted Bruce Gilley's First Amendment claims for relief because they unblocked him after this lawsuit was filed and mailed him $20. But they also revealed a shifting narrative on blocking criteria, first telling Gilley that blocking is a matter of "professional discretion," but now revealing UO maintains social media guidelines on blocking, which they also claim to have reinforced in the wake of this lawsuit.

Defendants' motion conflates mootness with standing, and incorrectly attempts to shift the burden of proof from Defendants to Plaintiff. Gilley had standing to seek injunctive relief at the timing of filing, when no one disputes that he remained blocked. And since then, he has filed an Amended Complaint which moots the mootness motion and adds additional claims for pre-enforcement relief against UO's social media guidelines. Those guidelines enshrine viewpoint discrimination and provide for excessive discretion; showing that UO still maintains the authority to block and permanently ban users for promoting offensive viewpoints.

These new claims provide an entirely separate basis for injunctive relief, but Gilley's original claims are also not moot because the voluntary cessation doctrine applies. Under that doctrine, UO must show that its unblocking could not easily be abandoned in the future and is protected by procedural safeguards. Moreover, Gilley still has other viable claims for relief, including declaratory relief as to the

current guidelines, and declaratory relief and nominal damages for the past wrongful blocking.

FACTS

The facts of this case, by now well-known to the Court, are set forth in Gilley's Motion for Preliminary Injunction and supporting materials. ECF Nos. 2, 5, 5-1—5-13. Defendants blocked Bruce Gilley from the @UOEquity Twitter account after he re-tweeted a Racism Interrupter prompt with the comment "all men are created equal." ECF No. 5 at 10-13. UO also told him that the responsible official had autonomy to exercise "professional judgment" in making blocking decisions. *Id.* at 12. After the filing of this lawsuit, UO unblocked Gilley, mailed him $20, and asked him to dismiss his lawsuit as moot. ECF No. 19-2. But UO also revealed that it actually did have social media guidelines which provide for blocking criteria, including blocking content that is "offensive." ECF Nos. 24-1, 25-4.

Further necessary facts are discussed in the brief below.

ARGUMENT

I. DEFENDANTS CONFLATE STANDING AND MOOTNESS

A. Standing is determined by taking a snapshot at the time the original complaint is filed

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); *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1139 (D. Or. 2020). 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).

In evaluating standing, this Court looks at the allegations in the plaintiff's complaint, and draws all inferences in his favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009); *Skaff,* 506 F.3d at 838-39; *City of L.A. v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047, 1052 (C.D. Cal. 2014).

Even if this Court were to consider information outside of the Complaint, it is undisputed that at the time the original Complaint was filed, UO's employee had blocked Bruce Gilley from exercising his free speech rights by interacting with the official @UOEquity Twitter account. ECF No. 1 at 8-14; ECF No. 5 at 10-13. The Complaint was filed on August 11, 2022. ECF No. 1. Gilley was not unblocked until at least a day later. ECF No. 19-2 at 1 ("In any event, Prof. Gilley (@BruceDGilley) was unblocked from the Twitter account at issue (@UOEquity) last Friday, August 12, 2022"). As a result, it is undisputed that Bruce Gilley had standing to contest his blocking at the outset of this case.

Defendant relies heavily on *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) for the proposition that Gilley's claims are now moot, but *Clapper* is a standing case (not a mootness case) and is easily distinguishable. In *Clapper,* the plaintiffs challenged a section of the Foreign Intelligence Surveillance Act which

authorized officials to surveil non-U.S. located persons with FISA court approval. *Id.* at 401. Plaintiffs were concerned that their own communications with foreigners for human rights purposes would be surveilled by the government, but the Supreme Court found their claims too speculative to confer standing because there were too many intervening steps to show a risk of actual surveillance. *Id.* at 410.

In contrast, Gilley has already experienced *actual* blocking, lasting for nearly two months, and has shown that the Communication Manager also blocked at least two other DEI critics. Moreover, UO has now revealed that it has a policy enshrining viewpoint discrimination against "offensive" viewpoints. These factors fundamentally differentiate this case from *Clapper*.

B. Mootness tests whether there is ongoing controversy later in the case

Mootness is not limited to testing whether the precise relief sought at the time of application for an injunction is still available, but instead asks whether there can be *any* effective relief. *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988); *Index Newspapers LLC,* 480 F. Supp. 3d at 1140. A case becomes moot only when it becomes impossible for a court to grant a prevailing party any effectual relief. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *Index Newspapers LLC,* 480 F. Supp. 3d at 1140.

This case is not moot because this Court can grant effectual relief by: (1) enjoining viewpoint-discriminatory blocking; (2) protecting Gilley's rights going forward by declaring that Defendants' past blocking was unconstitutional and that

UO's current guidelines are also unconstitutional; and (3) awarding Gilley nominal damages as compensation for past constitutional harms. In addition, this case is not moot because the voluntary cessation doctrine applies. These arguments are explicated in further detail below.

C. Defendants bear the burden of showing mootness

While a plaintiff must show standing at the outset of the case, he must not keep doing so throughout the litigation. *Hartnett,* 963 F.3d at 305-06; *Index Newspapers,* 480 F. Supp. 3d at 1139 ("To the extent the Federal Defendants argue that Plaintiffs must continue to prove standing as this lawsuit continues and the facts evolve, the Federal Defendants misunderstand the doctrines of standing and mootness"). Instead, the burden shifts. *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); *GATX/Airlog Co. v. United States Dist. Court*, 192 F.3d 1304, 1306-07 (9th Cir. 1999). To the extent that Defendants assert that Gilley bears the burden of disproving mootness, they are mistaken. *See* ECF No. 23 at 6. They bear that burden.

II. GILLEY'S AMENDED COMPLAINT RAISES A JUSTICIABLE PRE-ENFORCEMENT CHALLENGE TO UO'S SOCIAL MEDIA GUIDELINES BASED ON SELF-CENSORSHIP

After this lawsuit's initiation, UO disclosed that its pre-litigation representation that the communication manager had autonomy to exercise "professional judgment"

in blocking users was inaccurate. ECF 25-24. Instead, UO disclosed that it maintains social media guidelines. *Id.*; ECF No. 24-1. It is unclear at this time whether UO is alleging that those guidelines were used to make the decision to block Bruce Gilley from @UOEquity on June 14, 2022, or to maintain the blocking thereafter; but now that UO claims to rely on these guidelines, Gilley has the right to challenge them.

On September 13, 2022, Bruce Gilley filed his first Amended Complaint, adding a pre-enforcement challenge to UO's social media guidelines. ECF No. 29 at 16-18, 21-26. Regardless of whether the Amended Complaint is evaluated under either standing or mootness, the Ninth Circuit has long recognized that self-censorship is a cognizable constitutional injury. *Wolfson v. Brammer*, 616 F.3d 1045, 1059-60 (9th Cir. 2010) ("Self-censorship is a constitutionally recognized injury"); *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) (analyzing cases on free speech standing); *Canatella v. California*, 304 F.3d 843, 855 (9th Cir. 2002) ("Canatella alleges harm not only in the form of potential disciplinary measures under the challenged statutes, but in the ongoing harm to the expressive rights of California attorneys to the extent they refrain from what he believes to be constitutionally protected activity"); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1007-08 (E.D. Cal. 2017) (chilling the exercise of First Amendment rights is, itself, a constitutionally sufficient injury); *see also* Gilley Supp. Dec. ¶¶ 16-21 (describing basis of ongoing self-censorship).

To address the chilling effect of speech restrictions, both the Supreme Court and the Ninth Circuit have endorsed a hold-your-tongue-and-challenge-now approach, rather than requiring litigants to speak first and take their chances with the consequences. *Wolfson,* 616 F.3d at 1058-59 (9th Cir. 2010) (citing *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)); *see also Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise"); *Bland v. Fessler*, 88 F.3d 729, 736-37 (9th Cir. 1996) ("That one should not have to risk prosecution to challenge a statute is especially true in First Amendment cases"). That is because the plausible threat of enforcement invites self-censorship. "[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry *tilts dramatically* toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (emphasis added).

In evaluating whether a plaintiff has alleged a credible threat of adverse state action sufficient for Article III purposes, the court looks at whether the plaintiff has a concrete plan that could violate the law or policy at issue. *Lopez,* 630 F.3d at 786; *Wolfson,* 616 F.3d at 1058; *see also Stavrianoudakis v. United States Dep't of Fish & Wildlife,* 435 F. Supp. 3d 1063, 1081-82 (E.D. Cal. 2020) (citing *Lopez* and *Wolfson).* An explicit, direct threat of enforcement against the plaintiff is not required. *Lopez*, 630 F.3d at 786; *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir.

2003). Such a requirement would undo pre-enforcement doctrine, enabling government officials to escape judicial scrutiny.

In evaluating whether a credible threat of enforcement exists, important components of the inquiry are whether the restriction could arguably be applied to the plaintiff and whether the enforcement authority has expressly disavowed enforcement. *Lopez,* 630 F.3d at 788. Here Bruce Gilley has a concrete plan to interact with @UOEquity by promoting his own color-blind viewpoint and other viewpoints critical of DEI ideology by replying or re-tweeting @UOEquity content, so long as he is not blocked or permanently banned. Gilley Supp. Dec. ¶¶ 16-21. Thus, Gilley's situation is analogous to that in *Wolfson,* where the plaintiff established standing by expressing an intention to run for judicial office at some time in the future and to engage in two kinds of campaign-related conduct that might be prohibited. *Wolfson,* 616 F.3d at 1059.

Moreover, there is no dispute that UO and the Communication Manager intend to apply UO's social media guidelines to Gilley's interactions with @UOEquity, as well as to the interactions of similarly situated persons who are critical of DEI. ECF No. 24-1 at 2 ("But you may remove comments, messages and other communications and restrict access to users who violate the following guidelines: …."); ECF No. 23 at 5 (asserting that an employee may restrict social media access based on a list of criteria, including offensive posts). While Kevin Reed has claimed to have advised UO employees that they may not block users based on viewpoint (ECF No. 19-2 at 1), UO simultaneously maintains blocking guidelines that enshrine viewpoint

discrimination against posts that the communication manager determines are "violent," "racist," "profane," "hateful," "otherwise offensive," or "otherwise inappropriate" content. As is explicated further below, such viewpoints are all protected by the First Amendment. As such, Mr. Reed's claim is not credible, because UO's guidelines codify viewpoint discrimination.

Furthermore, Gilley's claim of self-censorship should be evaluated in light of the fact that he has already been censored for expressing a viewpoint in his June 14 re-tweet of the Racism Interrupter prompt with his commentary; and other users who were critical of DEI ideology have been similarly blocked. ECF No. 5 at 11-13; *see also Doe v. Univ. of Mich.,* 721 F. Supp. 852, 863-65 (E.D. Mich. 1989) (striking down Univ. of Michigan's speech code on First Amendment grounds and noting "[A]s applied by the University over the past year, the Policy was consistently applied to reach protected speech").

Gilley's claim of self-censorship is also more credible in light of his opinion that DEI-ideology adherents tend to have an expansive view of the terms "racist," "violent," "hateful," and "offensive." Gilley Supp. Dec. ¶¶ 4-13. To a DEI-adherent, advocating color-blindness is akin to promoting systemic racism. *Id.;* ECF No. 5-2 at 24, 25 n. viii (IDEA report associating colorblindness with segregation and "whiteness" and explaining that colorblindness "ignores the realities of systemic racism"). Moreover, DEI-adherents often equate threatening ideas with violence. Gilley Supp. Dec. ¶¶ 14-16.

This concern is exacerbated by the fact that the former Communication Manager held herself out as an "avid social justice activist" (ECF No. 5-3), while the description for the open Communication Manager position lists hiring criteria such as promoting UO's campus-wide DEI goals, "cultural humility," "nuanced understanding of intersectional diversity, equity, and inclusion issues in higher education," "demonstrated understanding of the intersectional barriers faced by [DEI-favored groups]," and ability to "integrate" DEI-principles into the work. ECF No. 29 at 55-56; Gilley Supp. Dec. ¶ 17. In other words, the position must be filled by an ideologically reliable person. It is not unreasonable for Bruce Gilley, or this Court, to infer that such a person would interpret UO's social media guidelines through a DEI lens, especially in the absence of further procedural safeguards.

III. GILLEY'S FILING OF HIS AMENDED COMPLAINT MOOTS THE MOOTNESS MOTION

The filing of an amended complaint generally moots a motion to dismiss, because the amended complaint supersedes the original complaint. *Ramirez v. Cty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015); *Russell v. Ray Klein, Inc.*, No. 1:19-CV-00001-MC, 2019 U.S. Dist. LEXIS 200300, at *3 (D. Or. Nov. 19, 2019). Thus, this Court could simply dismiss Defendants' Rule 12(b)(1) motion without prejudice, since it challenges the original complaint, not the amended one. ECF No. 23 at 3 (referencing Complaint). ECF No. 23 was also filed on September 7, 2022, six days before the Amended Complaint. But doing so would only invite another

futile motion, because UO cannot meet its burden of establishing either a lack of standing or mootness.

IV. UO CANNOT MEET ITS HEAVY BURDEN OF ESTABLISHING MOOTNESS

A. The voluntary cessation doctrine applies here because UO can easily revert to blocking Gilley in the future

Binding Ninth Circuit precedent requires that 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 v. FBI*, 904 F.3d 1033, 1039 (9th Cir. 2018); *see also Index Newspapers,* 480 F. Supp. 3d at 1141 ("The Federal Defendants' voluntary change in enforcement tactics does not moot Plaintiffs' claims"); *NWDC Resistance v. Immigr. & Customs Enf't*, No. C18-5860JLR, 2022 U.S. Dist. LEXIS 103397, at *13-14 (W.D. Wash. June 9, 2022) (new DHS enforcement guidelines insufficient to moot claims that ICE was targeting outspoken non-citizens for enforcement); *Brandy v. Villanueva*, No. CV 20-02874-AB (SKx), 2020 U.S. Dist. LEXIS 118501, at *8-9 (C.D. Cal. Apr. 6, 2020) (Sheriff's public announcement that COVID restrictions would not be applied to firearms or ammunition retailers was insufficient to moot claims because it could easily be abandoned).

A statutory change will usually render a case moot because the rigors of the legislative process make such changes harder to reverse. *Fikre,* 904 F.3d 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). For cases that lie between these

extremes, courts ask whether the government's new position could be easily abandoned or altered in the future. *Id.*

There is no bright-line test for mootness, but for mere policy changes, mootness is more likely if (1) the policy change is evidence 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). 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,* the Ninth Circuit 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.*

Similarly, in *NWDC Resistance,* the Western District of Washington determined that DHS's promulgation of a new policy stating that a "noncitizen's exercise of First Amendment rights *should* also never be a factor" in enforcement decisions was insufficient to moot the case, because the guidelines still allowed for significant

discretion and were not accompanied by training about First Amendment rights. *NWDC Resistance,* 2022 U.S. Dist. LEXIS 103397, at *13-14 (emphasis in original). The new guidelines also failed to acknowledge the prior targeting of noncitizens for outspoken speech activities. *Id.* at *14-15.

In *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1167-69 (9th Cir. 2022), also a social-media blocking case, the Ninth Circuit noted the risk that defendants will cease the offending conduct to moot the case and then simply resume it after the litigation has passed. The 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. The court noted that there was no assurance that the trustees would not in the future re-open their social-media pages "for verbal comments from the public." *Id.*

Defendants rely heavily on the *Rosebrock* case 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 968-970. 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 was offensive to some. *Id.* In response to

his First Amendment lawsuit alleging viewpoint discrimination, the VA re-affirmed its long-standing regulation—38 CFR 1.218—which disallowed any distribution or posting of any outside materials on VA property. *Id.* at 969-970. 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 the Ninth Circuit would conclude 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 (or its other accounts) to user replies or re-tweets. In fact, UO still maintains the authority to block and permanently ban users for promoting offensive viewpoints. ECF No. 24-1. While Kevin Reed's letter purports to have "reinforced" to UO communications managers that they may not block based on viewpoint (ECF No. 19-2 at 1), his claim is directly contradicted by UO's social media guidelines, which allow for viewpoint-based blocking. We also do not know what Kevin Reed actually advised his clients, but only what he claims in his letter, sent to opposing counsel for litigation purposes. Moreover, Mr. Reed's purported advice could easily change tomorrow or with a change of personnel in the legal counsel's office. Unlike a legislative change, his advice can easily be reversed or ignored, and there is no evidence of procedural safeguards to prevent viewpoint-discriminatory blocking in the future.

Thus, 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" user commentary, especially commentary critical of DEI ideology. Third, although the unblocking is a partial admission that Mr. Gilley's rights were violated, no one from UO has expressly acknowledged violating Gilley's First Amendment rights. Indeed, the record on that is decidedly mixed.

On the one hand, defense counsel has argued that UO "will not block him *again* based on an expressed viewpoint, and informed Plaintiff that the original blocking *violated* Defendant's existing prohibition against viewpoint discrimination on social media," (ECF No. 23 at 6-7) (emphasis added). On the other hand, during the scheduling conference, defense counsel claimed "[Gilley's] Tweet was not about his substantive disagreement with the university's color blindedness or what he's described as the university's diversity and equity and inclusion viewpoints." Kolde Dec. ¶¶ 3-5, Ex. N at 23:3-9. This sounds like UO is both admitting and disclaiming viewpoint discrimination. If UO continues to defend its past discrimination against Gilley, then that cuts against mootness. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007).

Based on the current factual landscape, this case is much more like *Fikre* and *NWDC Resistance* than *Rosebrock*. There are no procedural safeguards to prevent wrongful blocking in the future and in fact, UO's guidelines allow blocking offensive content. There is no evidence, beyond a hasty letter, sent off to opposing counsel

after the filing of this lawsuit, to indicate that UO is serious about respecting dissent, especially against its prevailing DEI ideology.

Moreover, this case bears similarities to cases in other circuits where courts declined to find free speech claims moot based on easily reversible policy changes. Thus, in *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 761, 769 (6th Cir. 2019), the Sixth Circuit held that plaintiffs' claims that the "University of Michigan has stifled student speech through its policy prohibiting bullying and harassing behavior and its Bias Response Team initiative" was not mooted when senior university officials changed some of the offending definitions after initiation of the lawsuit. The court found the timing suspicious and noted that nothing prevented the university from re-implementing the challenged definitions in the future. *Id.*

Similarly, in *Blackwell v. City of Inkster*, No. 2:21-CV-10628-TGB-EAS, 2022 U.S. Dist. LEXIS 61206, at *15 (E.D. Mich. Mar. 31, 2022), the district court held that claims of wrongful social-media blocking against a municipality were not moot because the unblocking was "ad hoc rather than legislative" and there were no formal processes associated with a quasi-legislative change.

Given the present posture of this case, Defendants have not met their heavy burden of showing that this case is moot. Moreover, UO continues to maintain viewpoint-discriminatory guidelines and there are several additional forms of relief that this Court could grant to Gilley.

B. UO is relying on social media guidelines that codify viewpoint discrimination against offensive opinions

Jarring or offensive speech is a constitutionally protected viewpoint. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299–300 (2019) (striking down regime that allowed "registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety"). "[A]s the Court made clear in *Tam*, a law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment." *Id.* at 2300–01 (citing *Matal v. Tam,* 137 S. Ct. 1744 (2017)). Similarly, Defendants "may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring).

Similarly, in *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1131-32 (9th Cir. 2018), the Ninth Circuit, citing *Matal,* struck down King County Metro's non-disparagement restriction on transit advertising because it discriminated against all viewpoints causing offense.

> 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[.]

Id. at 1132.

Similarly, it is clear that racist and hateful speech, however distasteful, is protected by the First Amendment, so long as it does not rise to a direct threat or fighting words. *See Brandenburg v. Ohio,* 395 U.S. 444 (1969) (per curiam) (racist

advocacy by Ku Klux Klan); *Collin v. Smith*, 578 F.2d 1197, 1205-06 (7th Cir. 1978), *cert. denied,* 439 U.S. 916 (1978) (allowing Nazis to march in Skokie, IL and display uniforms and swastikas in the presence of holocaust survivors).

Likewise, the profane and vulgar expression of political ideas has long been protected in this country. *Cohen v. California*, 403 U.S. 15, 25 (1971) (overturning conviction for wearing "fuck the draft" jacket in county courthouse). "How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Id.; see also Gooding v. Wilson,* 405 U.S. 518, 518-20 (1972) (noting that vulgar and offensive speech is protected by the First and Fourteenth Amendments and striking down Georgia statute that criminalized "opprobrious words or abusive language"); *Doe,* 721 F. Supp. at 863-64 (invalidating university speech code and noting that even gravely offensive speech is protected by the First Amendment).

In allowing communication managers to block "racist," "hateful," "offensive" or "otherwise inappropriate" language, UO's guidelines invite its officials to engage in viewpoint discrimination. And although Kevin Reed's letter to opposing counsel (ECF No. 19-2) makes no mention of the guidelines, Defendants are now claiming that the guidelines provide "viewpoint-neutral criteria" for blocking decisions. ECF No. 23 at 4.

This claim runs counter to binding Supreme Court precedent. Offensive, racist, and hateful opinions are viewpoints subject to First Amendment protection, with

only very narrow exceptions. Thus, even if many DEI adherents and UO officials would deem Gilley's provocative Tweets about colorblindness or merit in education or employment to be "hateful," "colonial-genocidal," or "white supremacist," his views are protected speech.

Common sense also dictates that if an official must examine the content of the user's message to determine if it is racist, hateful, offensive, or inappropriate, that official is, by definition, making judgments based on content. "[R]egulations that discriminate based on 'the topic discussed or the idea or message expressed' … are content based." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015)).

In addition, UO has provided no evidence that its officials' discretion is limited by any objective, workable standards. *See, e.g. Minn. Voters All. v. Mansky,* 138 S. Ct. 1876, 1891 (2018) ("But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as 'political.'"); *see also Butcher v. Knudsen,* 38 F.4th 1163, 1175 (9th Cir. 2022) (lack of fair notice and risk of arbitrary enforcement existed where Montana law did not give the retirees fair notice whether their conduct would convert them into a "political committee").

Here UO has not provided any evidence that it has provided training or other guidance to its officials when they administer the social-media guidelines. That invites viewpoint-discriminatory enforcement, as occurred with Bruce Gilley and the other DEI-critics. As a result, Gilley has a viable pre-enforcement claim to

enjoin enforcement of UO's social media guidelines and his claim for injunctive relief is not moot.

C. Gilley's claim for declaratory relief is not moot because he was blocked before and could be blocked again for voicing an offensive opinion

This Court can also grant Gilley declaratory relief, regardless of whether his claim for injunctive relief is moot. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174-75 (9th Cir. 2002); *Skysign Int'l v. City & Cty. of Honolulu*, 276 F.3d 1109, 1114-15 (9th Cir. 2002); *see also Super Tire Eng'g Co. v. McCorkle,* 416 U.S. 115, 123-24 (1974) (claim for declaratory relief not moot even though strike had ended because NJ benefits statute could affect future collective bargaining).

"When a plaintiff seeks declaratory relief, a defendant arguing mootness must show that there is no reasonable likelihood that a declaratory judgment would affect the parties' future conduct." *Hartnett*, 963 F.3d at 306; *see also Fikre,* 904 F.3d at 1040 (no mootness where plaintiff could benefit from declaration that he was mistakenly put on no-fly list).

Here Gilley was already blocked once for expressing his viewpoint, and he is aware that other DEI critics were also blocked. Moreover, UO's social media guidelines still cast a pall over free-and-open interaction with @UOEquity because they allow for viewpoint-discriminatory blocking, and even permanent banning. Thus, Gilley would benefit from a declaration by this Court that defendants' past blocking was unconstitutional and that the current guidelines are also unconstitutional. Such a declaration would send a powerful message to UO's

officials that they must respect the rights of dissenters, including DEI critics who might offend some UO personnel, faculty, students, or other Twitter users.

D. Gilley's claim for nominal damages is not moot in the absence of a judgment in his favor

Defendants' also claim to have mooted Gilley's claim for nominal damages by sending him $20 in the mail,[1] but such a gesture is not legally significant without at least a legal judgment adjudicating his rights; and even that would appear to be questionable under Supreme Court precedent.

In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021), the Supreme Court held that an "award of nominal damages *by itself* can redress a past injury." In that case, college officials first vigorously defended their speech policies, but later jettisoned the policies and then mooted the request for injunctive relief (a strategy that seems somewhat familiar). *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

[1] Despite claiming to have sent the cash, to-date, Defendants have not provided proof that it was delivered.

and emphasis added). This makes sense, because otherwise it would be a lot easier for government actors to avoid accountability for violating citizen's rights if the prospect of easily quantifiable damages was low.

In a concurring opinion, Justice Kavenaugh noted "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 into constitutional issues by mailing a $20 bill to plaintiff's counsel. *See also Polk v. DelGatto, Inc,* 2021 U.S. Dist. LEXIS 137764, at *9 (S.D.N.Y. July 23, 2021) ("[F]or a rejected settlement offer to moot a claim, the defendant must first request that the court enter *judgment* for the full amount potentially owed to the plaintiff") and *Cocina Cultura Ltd. Liab. Co. v. Or. Dep't of Admin. Servs.*, No. 3:20-cv-01866-IM, 2021 U.S. Dist. LEXIS 162629, at *28-30 (D. Or. Aug. 27, 2021); *but see Hassan v. Lyons Logistics,* 2021 U.S. Dist. LEXIS 244578, at *3-4 (E.D. Va. Nov. 9, 2021) (tender of damages did not moot case where plaintiff was entitled to attorneys' fees under FLSA).

It seems unlikely that the either the Supreme Court or the Ninth Circuit would approve of mooting a free speech case simply by mailing the nominal damages amount to plaintiff's counsel because if that were so, almost every government defendant would do that to avoid scrutiny of their misbehavior. Perhaps if such an

act was at least accompanied by an entry of judgment, that would provide some redress because it would make the plaintiff the prevailing party, entitled to fees under 42 U.S.C § 1988. *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 874 (9th Cir. 2017) (nominal damages serve to identify the prevailing party for the purposes of attorneys' fees and costs in appropriate cases). Still, this seems like a ticky-tacky way of avoiding judicial scrutiny of unconstitutional behavior.

The underlying theme of *Uzuegbunam,* is that officials should not be allowed to game the system by violating rights, changing policies on-the-fly, and mooting nominal damages. 141 S. Ct. at 800 ("By permitting plaintiffs to pursue nominal damages whenever they suffered a personal legal injury, the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights" and "Nominal damages are not a consolation prize…."). That would invite more speech suppression.

Here, Defendants have simply mailed Plaintiff's counsel a $20 bill, which is of no legal significance whatsoever. Moreover, even if Defendants somehow managed to moot the claim for nominal damages for the past violation against Gilley, his lawsuit is still not moot, because he has a viable claim for declaratory and injunctive relief. Outspoken Twitter users such as Bruce Gilley should not have to run to Court every time they are blocked by an ideologically biased university official. This case presents an excellent opportunity for the Court and the parties to provide for more meaningful, lasting relief.

CONCLUSION

This Court should deny Defendants' motion to dismiss this case on mootness grounds.

Respectfully submitted,

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