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)

## PLAINTIFF-APPELLANT'S OPENING BRIEF

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## INTRODUCTION

"The protections of the First Amendment apply no less to the vast democratic forums of the Internet than they do to the bulletin boards or town halls of the corporeal world." *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1185 (9th Cir. 2022) (internal quotation marks omitted). "When state actors enter that virtual world and invoke their government status to create a forum for such expression, the First Amendment enters with them." *Id.*

Oregon's flagship state university (UO) maintains a Division of Equity and Inclusion. The division's communication manager posts content on the topics of diversity, equity, and inclusion on Twitter using the division's official account. When she posted a "Racism Interrupter" prompt, Bruce Gilley posted "all men are created equal" in response, and she blocked him. When Gilley asked the university for its blocking criteria, they told him they had none, and kept him blocked. When he sued over the ban, they hastily unblocked him and posted previously secret criteria on their website. Those criteria include provisions that explicitly discriminate based on viewpoint.

Discovery revealed that UO's employee had called Gilley's behavior "obnoxious" and that she had described his comment as being "about the oppression of white men," yet UO and its employee continued to claim that Gilley was blocked for being "off-topic" rather than due to his viewpoint.

The district court denied Gilley's request for a preliminary injunction. It found that although he had presented some colorable claims, Gilley lacked standing to challenge UO's blocking criteria because he had not shown he was likely to be blocked again. The district court also found that UO had created a limited public forum, not a designated public forum. In so doing, the district court committed reversible error.

## STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as the dispute arises under the United States Constitution and 42 U.S.C. § 1983.

(b) Plaintiff Bruce Gilley appeals from the district court's order denying his motion for preliminary injunction. 1-ER-20–37. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1).

(c) The order appealed from was entered on January 26, 2023. 1-ER-37. Plaintiff filed his notice of appeal from that order on February 3, 2023. 2-ER-39–41. The appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

## STATEMENT OF ISSUES

1. Whether the district court erred by placing the burden of proving the existence of a designated public forum on plaintiff Bruce Gilley.

2. Whether the district court abused its discretion by determining that UO had created a limited public forum where UO intentionally

accessed an interactive social-media platform and maintained vague blocking guidelines that were inconsistently applied.

3. Whether the district court erred in holding that Gilley did not have standing to mount a pre-enforcement challenge against UO's social media guidelines, which contain inherently viewpoint discriminatory blocking criteria.

4. Whether the district court clearly erred by finding that a reasonable jury could conclude that Tova Stabin blocked Gilley because he was off-topic, when his comments obviously related to the topic of racism and Stabin had referred to Gilley in derogatory terms.

## STATEMENT OF THE CASE

### *1. The University of Oregon and its Department of Equity and Inclusion*

The University of Oregon (UO) is a public state university, organized pursuant to ORS 352.002. UO is a taxpayer-funded governmental entity performing governmental functions and exercising governmental powers pursuant to ORS 352.033.

The Division of Equity and Inclusion ("Division") is a part of UO. 3-ER-396–398. The Division uses the acronym "DEI," a common acronym for the ideology of diversity, equity, and inclusion. *Id.;* 3-ER-403. The Division's official slogan declares that it "promotes inclusive excellence by working to ensure equitable access to opportunities, benefits, and resources for all faculty, administrators, students, and community

members." 3-ER-396. The Division promotes its concept of "inclusion," which it describes as a "decision-making process in ways that lead to equity." 3-ER-397. The Division also promotes its concept of "equity," which it describes as a "structural concept" that "takes into account where people are and where they need to go." *Id.*

The Division's equity concept includes discriminating in favor of certain races and genders (and therefore discrimination against others) in order to atone for actual and perceived past discrimination. 3-ER-405–406 (¶ 15); 2-ER-109–110 (68:23-69:3) ("[DEI] is a social movement, an ideology that seeks to identify society based on the racial characteristics and other ascriptive characteristics of its members, and to distribute resources, status, and power, including speech rights, based on the alleged degree of victimization or oppression among the different racial groups."); *see also* 3-ER-385–388; 3-ER-394 (UO Road Map emphasizing race-based and gender-based hiring, retention, and promotion goals; "[UO] must stridently and consistently choose a path of anti-oppression in word and as well as deed"); 3-ER-407 (¶¶ 21-23).

The head of the Division, Vice-President for Equity and Inclusion, Yvette Alex-Assensoh, authored an "IDEAL Roadmap" setting forth DEI goals for UO. 3-ER-371–395; 2-ER-197 (68:6-8). She has also authored a continuum for transforming UO into a "Thriving, Anti-Racist and Fully-Inclusive Institution." 2-ER-228–230; 2-ER-196–197

(61:2-68:11). The continuum "is a tool for understanding the university's ongoing equity, inclusion and antiracist evolution." 2-ER-230.

VP Alex-Assensoh, and the division she leads, promote the idea that the United States and the State of Oregon were founded on oppression and remain systemically racist to this day. 3-ER-376–377 ("During this time, it is impossible to turn away from the inculpating evidence of . . . oppression that undergirds American life."); 3-ER-406–407 (¶¶ 19-20). The Division promotes its framework as a "mechanism for refashioning the State and the UO[.]" 3-ER-377.

Alex-Assensoh and her division similarly promote the concept that UO is an oppressive institution, in need of transformation in alignment with DEI ideology. 2-ER-196 (63:19-21); 2-ER-228 (base-case of continuum: "Actions that oppress or deny oppression of underrepresented groups are common"). Alex-Assensoh describes oppression as omnipresent, because it "does not exist only at the University of Oregon. It's part of the higher education landscape. It's indeed embedded in the culture and society of America and international forces." 2-ER-198 (70:14-24).

In her 2020 report, the Division's Vice President criticized a perceived lack of progress in promoting DEI-based education, hiring and promotion at the University of Oregon. 3-ER-394. She similarly criticized the ideology of color-blindness and "whiteness."

> The other side, told by the data about representation, student success and faculty achievement, presents a less flattering story—one of a campus that is mired in incrementalism—as it relates to diversity, equity and inclusion. This incrementalism chains the UO to its racially segregated past on a campus where colorblind ideology and whiteness prevail.

*Id.*

The Division, and Alex-Assensoh, reject the proposition that state universities should aspire to colorblindness in decisionmaking. 3-ER-395 (viii: "Color blindness is the idea that race-based differences don't matter. It ignores the realities of systemic racism"); 2-ER-199–200 (76:22-77:4); *see also* 3-ER-406–407 (¶¶ 17-23; describing Prof. Gilley's opinions and observations about DEI ideology). Alex-Assensoh similarly believes that UO's students, faculty, and staff have "the right to psychological safety." 2-ER-197 (65:7-66:4).

In alignment with DEI's race-based ideology, the Division hosts, and publicizes, a "Deconstructing Whiteness Working Group," of which Kelly Pembleton, Alex-Assensoh's Chief of Staff and Assistant VP, publicly holds herself out as a member. 2-ER-223–224; 2-ER-238 (compare profile photo with working group photo, second row, fourth from left, depicting Chief of Staff Pembleton). Among other things, the group seeks to understand how its members "have been socialized into whiteness and white supremacy" and how they can take responsibility for their actions "that perpetuate oppression." 2-ER-224.

*2. DEI's communication manager and the @UOEquity Twitter account*

Until the day after this lawsuit was filed, defendant Tova Stabin was employed by UO as "Communication Manager for the Division of Equity and Inclusion." 1-ER-3; 3-ER-367–368. Prior to her retirement, she was responsible for the Division's digital communications, external communications, and social media. *Id.* Ms. Stabin is a former diversity consultant and considers herself to be an "avid social justice activist." 3-ER-367.

Prior to her retirement, Ms. Stabin was responsible for administering the Division's @UOEquity Twitter account, which is the Division's official presence on the Twitter platform.[1] *Id.*; 2-ER-63(22:5-8); 3-ER-365–366.

Established in 2013, the @UOEquity Twitter account follows over 400 users and is followed by nearly 1,000 users. 3-ER-365. The @UOEquity account is a public account, and its posts can be read and commented on by any other Twitter user from the user's account who is not blocked by the Division's communication manager. *Id.;* 3-ER-408–409 (¶¶ 29-34). Other users can also reply to posts with their own

[1] Twitter is a social-media platform, which users can utilize to interact with each other by posting content called tweets. *See, generally,* TWITTER, *Using Twitter,* http://bit.ly/3ZjIKIJ (last visited Feb. 26, 2023). Twitter's functionality is described at TWITTER, *How to Tweet,* https://help.twitter.com/en/using-twitter/how-to-tweet (last visited Feb. 26, 2023).

comments or retweet posts to their own followers if they have not been blocked by the communication manager. 3-ER-408 (¶ 31).

The @UOEquity Twitter account bears UO's trademark, trade dress, and school colors, presents its location as "University of Oregon" and links to "inclusion.uoregon.edu," the Division's official webpage. 3-ER-365. The Division's official website also invites the public to "connect with us," including on Twitter @UOEquity. 3-ER-366.

The communication manager uses @UOEquity Twitter to promote the Division's DEI ideology. 3-ER-409 (¶¶ 35-37); 3-ER-358–364. For example, in the recent past, the communication manager used @UOEquity to tweet about various pro-DEI viewpoints, including viewpoints on Asian culture, food justice, the harmful effects of harassment and discrimination against LGBTQ people in schools, the historic significance of Justice Ketanji Brown Jackson's nomination, the transformative journey of Africans to Africans living in America, solidarity discussions centered on social and racial justice, and the International Transgender Day of Visibility. *Id.*

Followers of @UOEquity's Twitter account and other Twitter users who are not blocked by the communication manager are able to interact with her posts by liking, retweeting, or replying to the posts. 3-ER-409–410 (¶ 38). When replying to a post, Twitter users can express their own opinion about a viewpoint expressed in the post. *Id.* That post then becomes visible to other users, who may also reply to it, thus conducting

a public conversation that would continue under the @UOEquity account, unless a specific user affirmatively chooses to exclude that account from a reply. *Id.* Users can also start new conversations about a Tweet by retweeting it and including their own comments, which may elicit further replies. 3-ER-410 (¶ 39).[2]

The communications manager does not block Twitter users who post replies to @UOEquity expressing pro-DEI viewpoints or viewpoints that are uncritical or agnostic toward DEI from interacting with the account. 3-ER-410–411 (¶¶ 40-46); 3-ER-353–357. For example, one Twitter user posted a reply to @UOEquity in July 2022 that he was bullied by the "UO university police" because they knew he was Jewish. 3-ER-353. Another user replied in May 2022 that the user "really enjoyed" Bryant Terry's talk on Black Lives Matter and Food Justice, which had been promoted by @UOEquity. 3-ER-354. Another user replied in May 2022 that "Spirted Away," a film promoted by @UOEquity, was a "Great film." 3-ER-355. Another user replied in April 2022 that she was disappointed that antisemitism was the "sole focus" of a local campaign to combat "propaganda" and that "anti-trans messages" were just a footnote. 3-ER-356. Another user replied in February 2022 that Black

[2] The Twitter functionality of "replying" is described at: TWITTER, *About replies and mentions,* http://bit.ly/3xS12of (last visited Feb. 26, 2023). The Twitter functionality of "retweeting" is described at: TWITTER, *How to Retweet*, http://bit.ly/3Z1KiqD (last visited Feb. 26, 2023).

Studies was her major, accompanied by several heart emojis and an exclamation mark. 3-ER-357.

UO maintains that it allows many users to post replies and retweets to the interactive portions of the @UOEquity that are critical of UO, the Division, or the @UOEquity account without blocking them. 2-ER-184 (¶ 6); 2-ER-171–182. UO further maintains that out of the 2,558 replies and retweets directed at @UOEquity since 2017, it has only ever blocked three users. 2-ER-184 (¶¶ 5-6).

*3. The communication manager blocks Gilley for commenting about equality*

The communication manager has used the @UOEquity Twitter account to post what is referred to as a "Racism Interrupter." 3-ER-411 (¶ 47). The Racism Interrupter consists of a quotation or prompt about racism or DEI-related topics. *Id.* On or about June 14, 2022, Stabin used @UOEquity to post one such Tweet stating "You can interrupt racism" with the prompt "It sounded like you just said _____. Is that really what you meant?" The prompt was presented with the University's and Division's logos and the label "RACISM INTERRUPTER" underneath the prompt. *Id.* (¶ 48); 3-ER-352:


Plaintiff-Appellant Bruce Gilley is a professor at another university in Oregon. 3-ER-403 (¶ 2). He is the chapter president of the Oregon Association of Scholars, the Oregon state affiliate of the National Association of Scholars, which promotes academic freedom and excellence on American college campuses. *Id.* (¶ 4). He is also a member of the Heterodox Academy and supports its mission to encourage viewpoint diversity in higher education. *Id.*

Gilley categorically rejects his employer's claims that his university sits on "stolen land" and resists attempts by his employer to impose the DEI ideology on campus. *Id.* (¶ 5). He has previously declined to sign a

"black lives matter" statement because it amounts to an ideological pledge. 3-ER-403–404 (¶ 5). He also resists what he views as the ideological indoctrination of students. *Id.*

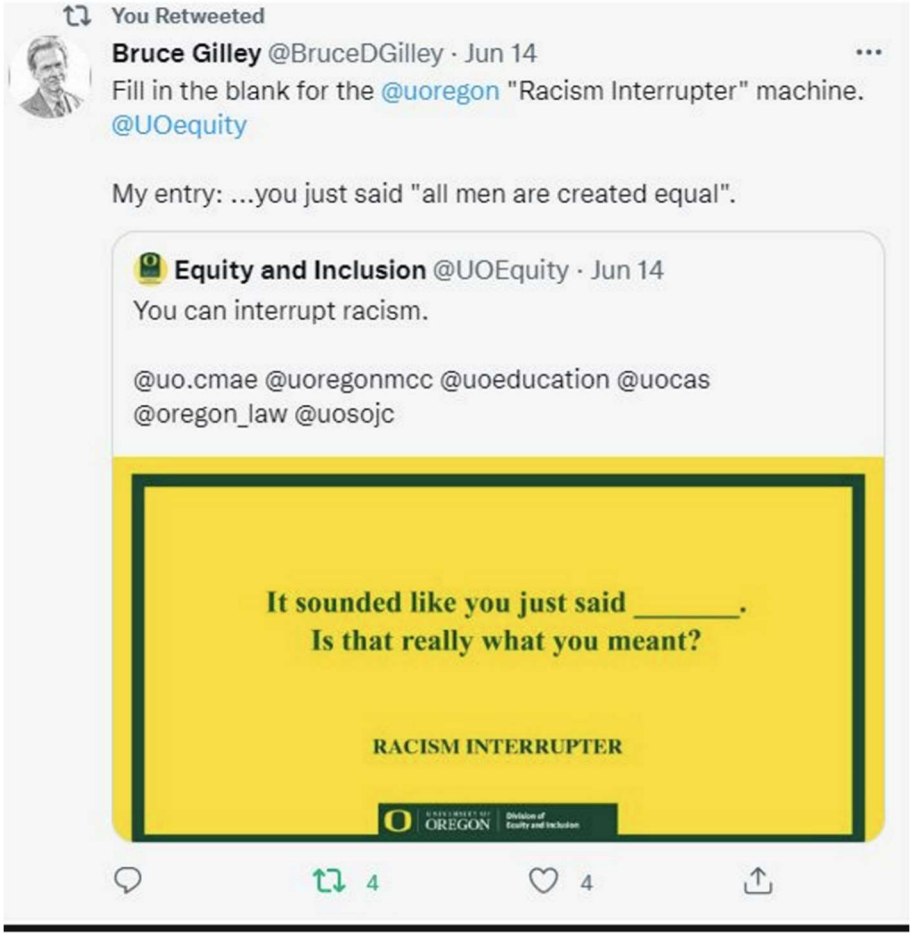
Gilley is a critic of the DEI principles promoted by the Division, Alex-Assensoh, and the Division's communication manager, because he believes that DEI calls for discrimination against university faculty, students, and applicants who are not members of groups favored by the Division, Alex-Assensoh and the communication manager. 3-ER-403–404 (¶¶ 3, 6); 2-ER-230 (Anti-racist continuum defining the term "underrepresented").

Gilley also believes that the principles they promote are based on "critical theory," which threatens freedom of thought at Oregon universities by labeling competing ideas, such as colorblindness, as "racist," "white supremacist," and otherwise "unsafe" to express in public. 3-ER-404 (¶ 7). Professor Gilley is a known critic of DEI ideology as it is practiced at UO and other Oregon public universities. 3-ER-403–404 (¶¶ 3, 8).

Gilley expresses his viewpoints in various forums, including on Twitter, using his account @BruceDGilley. 3-ER-404 (¶ 9). On June 14, 2022, Gilley used Twitter to retweet the @UOEquity's Racism Interrupter prompt with the statement "all men are created equal," quoted from the U.S. Declaration of Independence, which promotes his viewpoint of colorblindness and equality contrary to a DEI-adherent's

view of "equity." 3-ER-404 (¶ 6); 3-ER-407 (¶¶ 21-23); 3-ER-411–412 (¶ 51); 3-ER-351.

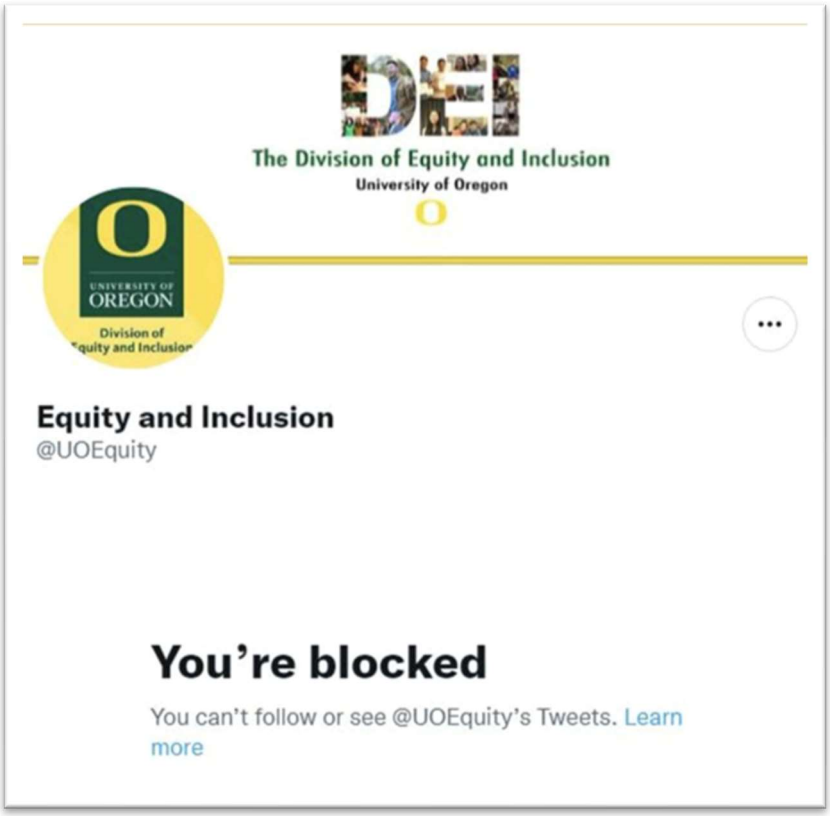
In his retweet of the Racism Interrupter prompt with his own comment, Gilley also tagged @uoregon and @UOEquity, which would cause the retweet to become visible to the communication manager. 3-ER-412 (¶ 52); 3-ER-351:




It is undisputed that on June 14, 2022, defendant Stabin, acting in her official role as the Division's communication manager, blocked

Bruce Gilley from the @UOEquity account due to this retweet. 3-ER-412–413 (¶¶ 54-57); 2-ER-65 (24:4-7). It is also undisputed that Stabin was performing her official duties, and engaging in state action, when she blocked Gilley. 1-ER-22;

3-ER-349:




Blocking @BruceDGilley on Twitter prevented Bruce Gilley from viewing, replying, or retweeting any of @UOEquity's posts, including sharing them with his own Twitter followers. 3-ER-412 (¶ 56). Blocking also removed Bruce Gilley's "all men are created equal" reply from @UOEquity's timeline and prevented other users from viewing it or

interacting with it, and with Gilley, including followers of the @UOEquity account. *Id*.; 3-ER-350.[3]

*4. UO first tells Gilley there are no written blocking criteria*

On June 26, 2022, Gilley filed a public records request in his capacity as chapter president of the Oregon Association of Scholars, pertaining to his being blocked from the @UOEquity account. 3-ER-403 (¶ 4); 3-ER-413 (¶58); 3-ER-348. The request asked for records on:

1. The number of Twitter users that the Division of Equity and Inclusion has blocked from access to its Twitter feed as of June 25, 2022.
2. The Twitter handles (@Name) of all users blocked by the Division of Equity and Inclusion as of June 25, 2022.
3. Any documents, emails, or written communications during the last twelve months by the Division of Equity and Inclusion or other administrative staff pertaining to the criteria used to determine whether a user should be blocked.

3-ER-348.

On July 5, 2022, UO informed Gilley that no such criteria exist, and 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-413 (¶ 60); 3-ER-346–347. In the same public records request response, the

[3] The Twitter functionality of "blocking" is described at: TWITTER, *How to block accounts on Twitter,* https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts (last visited Feb. 26, 2023).

University of Oregon also informed Gilley that two other Twitter users were blocked from the @UOEquity. *Id*.

Both of the other blocked users have expressed politically conservative viewpoints, including criticizing posts of the @UOEquity account. 3-ER-413–414 (¶¶ 62-65). One reply by a blocked user asked "[h]ow are these groups going to a secondary school if they can't read, write, and do math?" *Id.;* 3-ER-344. Another reply by a different blocked user stated "Diversity, Equity, and Inclusion departments are Marxist poison and should be eliminated from every institution in America." 3-ER-345.

When later asked about why these other users were blocked, UO's representatives either stated that they did not know why or that they did not know if the blocked commenters were critical of DEI or the Division. 2-ER-95–97 (54:3-16) (Stabin testimony); 2-ER-195 (57:1-58:2) (Alex-Assensoh testimony); 2-ER-215 (61:10-63:13) (Stevens Rule 30(b)(6) testimony).

Although Gilley did not know it at the time, his public records request triggered a number of internal email communications between UO's public records office, Chief of Staff Kelly Pembleton, and Tova Stabin, about responding to the request; some of these emails were also copied to VP Alex-Assensoh. *See, e.g.,* 2-ER-252; 2-ER-237.

In one email sent on June 27, 2022, at 12:39 PM, Tova Stabin identified "this guy Bruce Gilley" as the likely information requestor. 2-

ER-251. She also stated that "He was not just being obnoxious, but bringing obnoxious people to the site some." *Id.*

In another email sent to Pembleton about two minutes later, Stabin referred to him as "Bruce" and stated it was "not surprising" he brought the request. 2-ER-169. Her email went on to tell Pembleton that he was commenting on one of the Racism Interrupter posts, and "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." *Id.*

None of the contemporaneous emails refer to Gilley's all-men-are-

**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

tova stabin
Communications Manager
Division of Equity and Inclusion
tstabin@uoregon.edu; 541-346-5265

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created-equal retweet as having been off-topic, irrelevant, or confusing;

even though, a few months later, after being sued, Stabin claimed that she blocked him for being off-topic, after looking at the other posts on his Twitter account. 2-ER-204–205 (51:5-56:19); 2-ER-212 (91:15-24); 2-ER-69 (28:9-19). Similarly, a few months later, Stabin did not know why she called him "Bruce," wrote that he was "being obnoxious" and just there to trip her up, or why she had described his retweet as being about the "oppression of white men." 2-ER-90–91 (49;3-50:4); 2-ER-206–208 (57:8-68:19).

Later in the afternoon of June 27, 2022, Pembleton emailed the UO public records office (with a copy to Alex-Assensoh), writing that she had consulted with Tova Stabin and that there were no written blocking criteria and that Stabin had the "autonomy to manage the accounts on her own per her professional judgment." 2-ER-250. She also emailed the list of blocked accounts to the UO public records office, again with a copy to Alex-Assensoh. 2-ER-249.

It is undisputed that no UO official—including Tova Stabin, Chief of Staff Kelly Pembleton, or VP Alex-Assensoh—took any steps to unblock Bruce Gilley as a result of his public records request in late June 2022, and that he remained blocked until the day after the filing of this lawsuit on August 11, 2022. 1-ER-5; 2-ER-211 (77:6-9); 3-ER-421.

*5. UO later reveals its previously secret blocking guidelines*

It is undisputed that UO made no mention of its social media guidelines or blocking criteria in its public records response to Gilley. 3-

ER-346–347. It is also undisputed that, prior to the filing of this lawsuit, UO had not published its social media blocking criteria on its public-facing website. 2-ER-300 (¶ 16: authenticating a copy of the public-facing website as it existed prior to this lawsuit); 2-ER-268–271 (public-facing "Social Media Guidelines" pre-lawsuit; omitting later-disclosed list of blocking criteria).

> Q. Okay. Is it fair to say that prior to the filing of the lawsuit, at least in the year 2022, the blocking criteria from the social media policy was… not on the public-facing part of the UO website?
>
> A. Correct.

2-ER-221 (170:14-19) (Dep. of UO's Rule 30(b)(6) witness Richie Hunter).

It was not until August 31, 2022, after the filing of this lawsuit, that UO revealed its internal blocking criteria to Bruce Gilley, via a public disclosure response to his counsel. 3-ER-336 (¶ 6); 3-ER-338–340. Among other things, those criteria provided for blocking users who posted content that includes "hateful or racist comments or otherwise uses offensive or inappropriate language" or is "off-topic or not relevant." 3-ER-342. It also authorized the banning of users for what it termed egregious behavior. 3-ER-339.

UO's claims about its blocking criteria have also evolved in other ways over the course of this litigation. On September 7, 2022, Leslie Larson, UO's Director of Content Strategy, initially submitted a

declaration that gave the impression that UO's blocking criteria had been posted on its public-facing website for some time. 3-ER-341–342 (¶¶ 1-6) ("The University's social media guidelines… have not changed since the present controversy with Plaintiff arose on June 14, 2022").

But on October 26, 2022, Larson submitted another declaration, explaining for the first time that the section of UO'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…" 2-ER-299 (¶ 15); *compare* 2-ER-268–271 (pre-lawsuit website, not listing blocking criteria) *with* 2-ER-263–267 (post-lawsuit website, listing blocking criteria). She also claimed that she had originally meant that the internal social media guidelines had not changed since the controversy with Gilley arose. 2-ER-298 (¶ 8).

*6. Gilley amends his complaint to challenge UO's social media guidelines*

Two weeks after first learning about UO's secret blocking criteria (also sometimes referred to as "UO's social media guidelines"), Gilley filed an amended complaint challenging the newly disclosed criteria, both facially and as-applied. 3-ER-308–334. Gilley's facial challenge alleged that UO's guidelines enshrined viewpoint discrimination and did not sufficiently define the terms "hateful," "racist," "otherwise offensive," or "inappropriate" to limit official discretion. 3-ER-329–331. Gilley also alleged that the guidelines allow a DEI-adherent to import

their ideological biases and assumptions when applying the guidelines. 3-ER-329. Since UO was sending Gilley contradictory messages about whether it had blocking criteria, Gilley also styled his facial challenge as a pre-enforcement challenge. 3-ER-331. For his as-applied challenge to the guidelines, he alleged that his all-men-are-created-equal retweet was not off-topic, racist, hateful, offensive, or inappropriate. 3-ER-332.

Gilley also declared that he was self-censoring from interacting with @UOEquity account because he did not believe UO's changing explanations about its guidelines and was concerned the guidelines could be used by a DEI-adherent to block or permanently ban him for making DEI-critical comments. 3-ER-304–307.

Gilley also noted that UO's position description for the open communication manager position called for the successful candidate to be a DEI adherent. 3-ER-306 (¶ 17). And in his testimony, he explained that an "anti-racist" DEI-adherent is necessarily opposed to views that are based on the concepts of equality and colorblindness. 2-ER-116–117 (75:11-76:24).

UO's position description for Tova Stabin's replacement states that the Division's communication manager "will be a leader in the division and must have a nuanced understanding of intersectional diversity, equity, and inclusion issues facing higher education." 2-ER-254. The manager must also have "a passion for the values of social justice and anti-racism, and the potential that communications can have to build

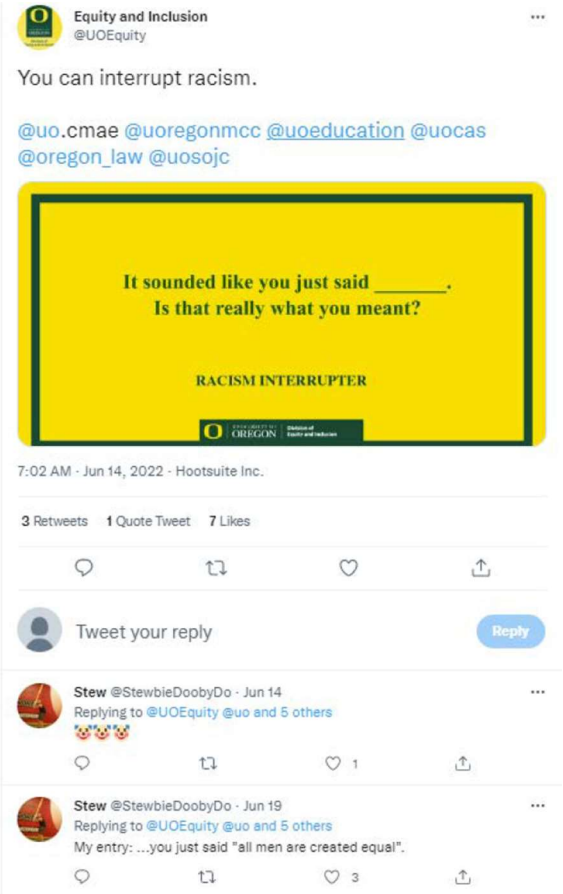
inclusive community and effect positive change." *Id*. And the manager must have a "[d]emonstrated understanding of the intersectional barrier facing historically and persistently underserved communities" and "[c]ultural humility and ability" to integrate DEI principles into communications. 2-ER-255. The Division's as-yet-to-be-hired communication manager will report directly to VP Alex-Assensoh. 2-ER-107 (66:8-17); 3-ER-254.

*7. Evidence about the interpretation and application of UO's social media guidelines*

On October 28, 2022, Gilley's counsel deposed UO's VP for Communications, Richie Hunter, whom UO designated as a Rule 30(b)(6) witness on its behalf. 2-ER-214. Gilley's counsel asked her about the meaning of terms used in UO's social media guidelines, including "violent," "hateful," "racist," "offensive," or "inappropriate." 2-ER-217–220. VP Hunter was unable to give a clear definition of those terms and indicated that UO would turn to Webster's dictionary definitions, if needed. *Id.* She also testified that people often disagree about the term "racist" in application and interpret it differently. 2-ER-219–220 (116:22-117:5). She similarly testified that as to the guidelines' provision "otherwise use offensive language" that "there is a lot of gray here" that the prohibitions on "offensive" and "inappropriate" content were "the most vague" terms in the guidelines; "there's just a level of vagueness." 2-ER-220 (117:14-22; 118:19-119:1). Other than Webster's

dictionary, VP Stevens did not identify any written criteria that would be used to interpret, limit, or otherwise apply UO's social media guidelines.

Leslie Larson, UO's Director of Content Strategy, also authenticated numerous screenshots of replies to @UOEquity posts that were critical of the posted content. 2-ER-171–182. At least seven replies included the same comment that Gilley had made: "all men are created equal." 2-ER-174; 2-ER-177–182. Six of those were replies to various Racism Interrupter posts, one of the six was to the same Racism Interrupter




post that Gilley had retweeted. 2-ER-174; 2-ER-177–182. Unlike Gilley,

none of the other users who had posted all-men-are-created-equal replies were blocked for being off-topic or otherwise violating UO's social media guidelines. 2-ER-184 (¶¶ 6-7).

In an email dated June 27, 2022, Tova Stabin wrote that @UOEquity is the social media platform that she pays the "least attention to" and that she hardly ever blocks anyone (and barely knows how to). 2-ER-251. She confirmed the accuracy of her email during her in-court testimony. 2-ER-81–82 (40:17-41:11).

*8. Procedural history*

On August 11, 2022, Gilley filed this suit against Defendants for nominal damages, injunctive, and declaratory relief in the U.S. District Court for the District of Oregon and moved for a TRO and preliminary injunction. 3-ER-421. The district court summarily dismissed the TRO and asked the parties to contact the court about scheduling the preliminary injunction hearing once defense counsel had appeared. 3-ER-420–421. On September 8, 2022, the district court set oral argument for the motion for preliminary injunction and defendants' motion to dismiss for November 14, 2022, the earliest date available. 3-ER-419. Due to an illness, that hearing was later rescheduled to December 16, 2022. 2-ER-45.

On December 16, 2022, the parties presented evidence, including testimony from Tova Stabin and Bruce Gilley, as well as arguments on both motions. 3-ER-417; 2-ER-42–167. On January 26, 2023, the district

court denied UO's motion to dismiss for lack of jurisdiction and also denied Gilley's motion for a preliminary injunction. 1-ER-37.

In evaluating the likelihood of success on the merits, the district court found that Gilley had presented colorable as-applied claims of unlawful Twitter blocking and application of UO's social media guidelines in the past. But the court found that Gilley had not shown a reasonable likelihood that he would be blocked again. 1-ER-26–35. The district court also found that Gilley lacked standing to mount a pre-enforcement challenge to UO's social media guidelines as a whole, and further held that the relevant forum was a limited public forum and not a designated public forum. 1-ER-32; 1-ER-22–26.

Gilley filed his notice of appeal regarding denial of the preliminary injunction on February 3, 2023. 2-ER-39–41.

## SUMMARY OF ARGUMENT

The district court's order denying Gilley's motion for a preliminary injunction should be reversed because the district court incorrectly determined that: (1) the interactive portions of @UOEquity were a limited public forum, not a designated public forum; (2) Gilley bore the burden of proving the absence of a limited public forum in the absence of evidence of unambiguous access rules and consistent enforcement; (3) UO had provided public notice of its blocking criteria before this lawsuit; (4) Gilley lacked standing to bring a pre-enforcement challenge against UO's blocking criteria which precluded offensive posts and other

viewpoints; (5) Gilley lacked standing to challenge UO's vague blocking criteria; (6) a reasonable fact-finder could determine that Gilley was blocked for being off-topic; and (7) Gilley had not shown irreparable harm where he was self-censoring, but did not face criminal or civil enforcement consequences.

## STANDARD OF REVIEW

This Court reviews the district court's denial of a preliminary injunction for abuse of discretion. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010) (citation omitted). A district court abuses its discretion in denying a request for preliminary injunction if it based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Id.* (citing *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008)). A district court's decision is based on an erroneous legal standard when "the court misapprehended the law with respect to the underlying issues in the litigation." *Clear Channel Outdoor, Inc. v. City of L.A.*, 340 F.3d 810, 813 (9th Cir. 2003) (internal quotation marks omitted).

Legal conclusions are to be reviewed de novo, with factual findings of the underlying decision for clear error. *See Fed. Trade Comm'n v. Consumer Def., LLC*, 926 F.3d 1208, 1212 (9th Cir. 2019). Dismissal of claims for lack of standing are to be reviewed de novo. *Atwood v. Shinn*, 36 F.4th 901, 903 (9th Cir. 2022) (citation omitted).

## ARGUMENT

### I. GILLEY DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF BOTH HIS AS-APPLIED BLOCKING AND FACIAL PRE-ENFORCEMENT CLAIMS

The district court should have granted Gilley's request for a preliminary injunction because (1) strict scrutiny applies in a poorly monitored designated public forum; (2) Gilley has standing to bring a pre-enforcement challenge against UO's inherently viewpoint-discriminatory guidelines; and (3) the evidence conclusively establishes viewpoint discrimination.

#### A. The interactive portions of @UOEquity are a designated public forum where content restrictions must pass strict scrutiny

##### *1. Defining the relevant forum*

The relevant forum is the interactive portions of UO's official @UOEquity Twitter account—that is, the reply and retweet features that allow other Twitter users to interact with content posted by @UOEquity by adding their own comments. The district court inaccurately described the forum as "the @UOEquity Twitter account" (1-ER-22), but the entire account is not at issue.

If it were, Gilley would presumably be claiming the right to post content on behalf of UO, a request he has never made. 3-ER-325–326 (¶¶ 85-87). This Court recently held that the interactive portions of officials' Twitter accounts can constitute either a designated public

forum or a limited public forum. *Garnier,* 41 F.4th at 1177 ("The interactive sections of the Trustees' social media accounts constituted public fora").

*2. How to distinguish between a designated public forum and a limited public forum*

Although they are related fora, important practical differences distinguish a designated public forum from a limited public forum. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074-75 (9th Cir. 2001). Content-based speech restrictions in designated public fora are subject to the same limitations as traditional public fora—they must meet strict scrutiny. *Id.* at 1074 (citing *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964-65 (9th Cir. 1999)). A limited public forum is a sub-category of a designated public forum where content-based restrictions are allowed, so long as they are reasonable and viewpoint-neutral. *Hopper,* 241 F.3d at 1074-75; *see also Garnier,* 41 F.4th at 1178; *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 496 (9th Cir. 2015) ("*SeaMAC")* (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009)).

Government intent is an important factor in establishing the forum's nature, especially where access to government-owned property is concerned. *Hopper,* 241 F.3d at 1075 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797 (1985)); *see also SeaMAC,* 781

F.3d at 496-97 (citation omitted). In divining that intent, this Court looks to (1) the government's policy on access to the forum, including the existence of selective access rules; (2) the implementation of the access policy in practice; (3) the nature of the government property at issue. *SeaMAC,* 781 F.3d at 497 (citing *Cornelius*, 473 U.S. at 802).

This Court has emphasized that the policy and practice inquiries "are intimately linked in that an abstract policy statement" limiting access is insufficient. *Hopper,* 241 F.3d at 1075. "What matters is what the government actually does[.]" *Id.* (emphasis added); *see also Garnier,* 41 F.4th at 1178 (citing *Hopper,* 241 F.3d at 1075).

In addition, the standards for inclusion and exclusion in a limited public forum must be "unambiguous and definite." *Garnier,* 41 F.4th at 1178 (quoting *Hopper*, 241 F.3d at 1077*).* That is because without objective standards, officials may use their discretion as a pretext for censorship. *Hopper,* 241 F.3d at 1077-78.

In *Hopper,* this Court found that the City of Pasco had created a designated public forum in its art displays at city hall because it had not regularly pre-screened so-called controversial artwork or previously excluded any art. *Id.* at 1075-78. Conversely, in *SeaMAC,* 781 F.3d at 497-98, this Court found that King County's Metro Transit had created a limited public forum in its transit advertising program because Metro had a "formal policy" with "fixed guidelines that imposed categorical subject-matter limitations" and the agency consistently pre-screened all

ads that were displayed in its forum. Metro also "consistently rejected proposed ads" that failed to comply with its policy, and this Court noted that the expressive purpose of bus ads was secondary to the purpose of generating ad revenue for the bus system. *Id.* at 498.

Social media forums are obviously different. As this Court recently recognized in *Garnier,* 41 F.4th at 1178, "[s]ocial media websites—Facebook and Twitter in particular—are fora inherently compatible with expressive activity." Indeed, this should be self-evident. @UOEquity holds itself out as "Celebrating Diversity. Facilitating Equity and Inclusiveness. Inspiring Positive Change." 3-ER-365. It is also undisputed that @UOEquity has been used to interact with other Twitter users through outbound tweets as well as third-party replies and retweets. 3-ER-353–357; 3-ER-358–364; 2-ER-171–182.

@UOEquity also isn't government property like a building, art display, or the advertising space on the side of a bus. In fact, the Twitter platform is not government property at all; UO is merely a licensee of its software, just like Bruce Gilley. TWITTER, *Your License to Use the Services,* http://bit.ly/3SzA7H8 (last visited Feb. 27, 2023) ("Twitter gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software provided to you as part of the Services").

When UO availed itself of the Twitter platform it did not open existing government property to the public; it intentionally chose to

access an interactive social-media platform owned by someone else. *See One Wis. Now v. Kremer,* 354 F. Supp. 3d 940, 953-55 (W.D. Wis. 2019) ("If defendants truly had no intention to create a space for public interaction and discourse, they would not have created public Twitter accounts in the first place"). This factor cuts heavily in favor of finding that the interactive portions of @UOEquity are a designated public forum.

In *Garnier,* 41 F.4th at 1182, this Court noted that government officials are free to establish and enforce clear rules for public comments on official accounts. But UO has neither established clear rules nor enforced them consistently.[4] Bound by *Garnier,* 41 F.4th at 1179, the district court should have concluded that the interactive portions of @UOEquity were a designated public forum.

*3. The district court clearly erred when it concluded that UO had publicly posted its blocking criteria before this lawsuit*

One factor in determining whether the government established a limited public forum is whether it had a known, formal policy for access. *SeaMAC,* 781 F.3d at 497-98. After Gilley filed this lawsuit, UO scrambled to create the impression that it had always posted its

[4] A more detailed discussion of the vagueness and excessive enforcement discretion inherent in UO's blocking criteria is found at B.3., *infra.*

blocking criteria on its public-facing website, but that was, in fact, not the case, necessitating the filing of a supplemental declaration by UO's Director of Content, to avoid perpetuating a false impression. *Compare* 3-ER-341–342 (¶¶ 1-6) ("The University's social media guidelines… have not changed since the present controversy with Plaintiff arose on June 14, 2022") *with* 2-ER-299 (¶ 15) (Oct. 26, 2022: "website labeled and referred to as the 'social media guidelines' was recently updated to more fully reflect language in the internal 'social media guidelines….'"); and *compare* 2-ER-268–271 (pre-lawsuit website, not listing blocking criteria) *with* 2-ER-263–267 (post-lawsuit website, listing blocking criteria). Richie Hunter, UO's VP of Communications and Rule 30(b)(6) witness, plainly admitted that the blocking criteria were *not* posted on the public-facing website prior to this lawsuit. 2-ER-221 (170:14-19).

The district court clearly erred in concluding that the "pertinent part of the guidelines was posted online for anyone to view" and that UO "adopted and published guidelines restricting the content that can be posted on the page." 1-ER-23; 1-ER-26. UO's internal guidelines were not published when UO blocked Gilley, or when UO later declined to unblock him and told him that @UOEquity didn't use any blocking criteria. UO's current claims of transparency and viewpoint neutrality should be evaluated in light of this changing story, including its litigation-induced efforts to make it appear that it has always put the

public on notice of its blocking criteria. It had not, and to claim otherwise is simply false.

*4. The district court incorrectly focused its analyses on the feasibility of ex ante screening without adequately considering ex post screening*

*SeaMAC* stands for the proposition that systematic pre-screening of content before granting access to the forum cuts in favor of finding it to be a limited public forum. 781 F.3d at 497-98. Accordingly, another district court recently found that a suburban city near Seattle had created a designated public forum in the interactive portions of its official Facebook page, in part because it did not pre-screen posts. *Kimsey v. City of Sammamish*, 574 F. Supp. 3d 911, 919-20 (W.D. Wash. 2021) (citing *SeaMAC,* 781 F.3d at 496). "[B]y allowing comments on its Facebook posts and City Council meetings without any prior approval, the City made this forum wide open to the public and imposes no requirements to obtain prior approval before making comments." *Kimsey*, 574 F. Supp. 3d at 920.

The district court in this case rejected *SeaMAC*'s binding reasoning and the persuasive reasoning of *Kimsey,* holding instead "[t]he Court doubts that requiring prior approval for every post on @UOEquity is a feasible method of content restriction, and Plaintiff points to no evidence suggesting that it is." 1-ER-24.

The district court's approach breaks with binding precedent and stands the First Amendment on its head. Fundamental constitutional rights do not depend on their "feasibility." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) ("the prime objective of the First Amendment is not efficiency"). When Constitutional rights collide with technological feasibility, those rights aren't discarded because they prove inconvenient to the government.

Moreover, the district court compounded its error by glossing over the availability of timely and consistent ex post review. Given the complete absence of pre-screening, the district court should have required UO to come forward with convincing evidence that it had a credible program for screening replies and retweets.

*5. The district court wrongly created a presumption in favor of a limited public forum*

A limited public forum's standards for inclusion and exclusion "must be unambiguous and definite." *Garnier,* 41 F.4th at 1178. Having rules is not enough: "what matters is what the government actually does—specifically, whether it consistently enforces the restrictions on use of the forum that it adopted." *Id.* at 1178, 1182 ("Alternatively, the Trustees could have established *and enforced* clear rules of etiquette for public comments[.]") (emphasis added). A state actor wishing to claim a limited public forum's advantages over the rules governing a designated

public forum must show it intended to create—and maintain—a limited public forum.

*Kimsey* is instructive. Much like UO now claims, the city in that case also had an off-topic rule that it applied ex post, but the city's own evidence showed that it had inconsistently applied that rule, contributing to the court's conclusion that it had established a designated public forum. *Kimsey,* 574 F. Supp. 3d at 920 (quoting *Hopper,* 241 F.3d at 1076) ("The lack of consistent application of the 'off topic' rule here weighs heavily in favor of finding a designated forum because an unevenly enforced rule 'is no policy at all for purposes of public forum analysis.'").

Similarly, UO's evidence shows that it has inconsistently applied its off-topic rule. On the exact same date that Gilley posted his all-men-are-created-equal retweet, another user, going by the handle @StewbieDoobyDo, replied to the same "Racism Interrupter" tweet with several clown emojis, and was not blocked. 2-ER-174. Five days later, he posted "My entry:…you just said 'all men are created equal" and was again not blocked. *Id.* The same UO exhibit contains six other instances of users posting replies with some variation of "all men are created equal" without getting blocked. 2-ER-174–182.

UO seeks to take credit for allowing these replies to persist without blocking those users (2-ER-184 (¶¶ 6-7)), but in doing so UO contradicts its claim to have established clear and unambiguous access rules that

are consistently enforced, as well as its claim that the posts are off-topic. UO's own evidence shows that it has hardly ever blocked anyone on @UOEquity for any reason. 2-ER-184 (¶¶ 3-4). Out of 2,558 replies and retweets since 2017, only three users have ever been blocked; a blocking rate of less than 0.12%. *See id.* This is hardly a forum with selective access. Instead, the data show that UO created a designated public forum with virtually unfettered access.

UO's data is further corroborated by Tova Stabin's email and testimony confirming that @UOEquity is the social media she paid the least attention to, that she had hardly ever blocked anyone, and barely knew how to do so. 2-ER-81–82 (40:17-23); 2-ER-251. It was Stabin's job to administer @UOEquity on behalf of her employer, including making blocking decisions. 2-ER-62–63 (21:16-22:12). Her admission, combined with UO's blocking data and own examples of inconsistent blocking show that UO's internal guidelines were enforced in a haphazard manner, befitting a designated public forum. "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).

But instead of following this Circuit's precedents, the district court glossed over this evidence and created a presumption in favor of UO as having established a limited public forum. 1-ER-24–25. Such a

presumption ignores longstanding precedent that requires evidence of unambiguous and definite access rules, combined with consistent enforcement in order to establish a limited public forum. *Hopper,* 241 F.3d at 1076-78.

Doing so shifted the burden onto Plaintiff Gilley to prove the absence of a limited public forum. 1-ER-25 ("Plaintiff has not provided enough evidence of users who arguably should have been blocked under the guidelines"). But here the government sought to claim the benefits of a limited public forum, and bears the burden to come forward with convincing evidence supporting its proposition. A limited public forum allows the government to restrict more speech than it can in a designated public forum, and it is axiomatic that the government always bears the burden of justifying its speech restrictions, not the other way around. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *Lone Star Sec. & Video, Inc. v. City of L.A.*, 827 F.3d 1192, 1197 (9th Cir. 2016) (citation omitted) (city bears the burden of proving the constitutionality of its ordinances). Moreover, if there is to be any presumption in the interactive social-media context, it is that absent persuasive evidence of clear access rules that were consistently applied, the default rule is that officials created a designated public forum. *See*

*Garnier,* 41 F.4th at 1179. In holding otherwise, the district court erred as a matter of law.

*6. UO's off-topic rule cannot meet strict scrutiny where there is no evidence of forum disruption*

In a designated public forum, content-based restrictions on speech are subject to strict scrutiny. *Hopper,* 241 F.3d at 1075. That standard is fatal to UO's off-topic rule and that rule's purported application to Bruce Gilley—even if he was "off-topic."

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015) (citations omitted).

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163. "A law may also be content based if it requires authorities to examine the contents of the message to see if a violation has occurred." *Tschida v. Motl,* 924 F.3d 1297, 1303 (9th Cir. 2019) (citation omitted); *see also City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022) (citing *Reed*, 576 U.S. at 171).

UO has not even bothered to put forward evidence of a compelling government interest for blocking Gilley's retweet. Tova Stabin testified

that she was frustrated with Gilley because he was allegedly "disrupting the site." 2-ER-92 (51:24). But she also testified that no other "disrupting" traffic came to the site before she blocked Gilley. 2-ER-80–81.

As this Court re-affirmed in *Garnier,* government claims of disruption must be backed by actual evidence, not "constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption." 41 F.4th at 1181-82 (quoting *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010)). Similarly, in *Kimsey,* the district court held that the avoidance of distraction or dilution of public safety messages by off-topic comments does not constitute a compelling government interest. 574 F.3d at 921.

Here there is no evidence of actual disruption, much less a compelling government interest. And to the extent that UO claims that Gilley's retweet about equality dilutes UO's own message about interrupting racism, its "off-topic" claim is a thinly veiled pretext for viewpoint discrimination.

The district court should have held that the relevant forum was a designated public forum and that Gilley was likely to prevail on his as-applied challenge to UO's blocking criteria.

### B. Gilley has standing to assert a pre-enforcement challenge against UO's inherently viewpoint discriminatory blocking criteria

#### *1. Standing doctrine favors pre-enforcement challenges to speech restrictions*

To address the chilling effect of speech restrictions, the Supreme Court and this Court have both endorsed a hold-your-tongue-and-challenge-now approach, rather than requiring litigants to speak first and take their chances with the consequences. *Wolfson v. Brammer*, 616 F.3d 1045, 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 standing, this Court looks at (1) whether there is a reasonable likelihood the government will enforce

the restriction against the plaintiff; (2) whether the plaintiff has a concrete plan that would violate the restriction; and (3) whether the restriction is inapplicable to the plaintiff by its terms or as interpreted by the government. *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010); *Wolfson*, 616 F.3d at 1058. 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). But past is prologue here.

Gilley has already been blocked once by UO, and he remained blocked for a month-and-a-half after he inquired about the blocking criteria. Moreover, UO has sent conflicting messages about its criteria, and has joined its former employee in advancing far-fetched claims about why it blocked Gilley. Discovery revealed that Stabin interpreted his "obnoxious" retweet as being about the "oppression of white men" and now neither she, nor UO, will take responsibility for her obvious viewpoint discrimination. UO also says it wants an "anti-racist" to fill Stabin's vacant position. Under such circumstances, it is plausible for Gilley to fear being blocked or banned again, especially after the threat of this lawsuit has passed.

"It is well settled that evidence of past instances of enforcement is important in a standing inquiry." *LSO,* 205 F.3d at 1155 (citations omitted). The absence of enforcement is not dispositive, especially in the First Amendment context. *Libertarian Party of L.A. Cty. v. Bowen*, 709

F.3d 867, 872 (9th Cir. 2013) (citation omitted); *Fitzgerald v. Cty. of Orange*, 570 F. App'x 653, 656 n.1 (9th Cir. 2014) (citation omitted); *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 508 (9th Cir. 1992) (history of actual enforcement against plaintiffs). Nor is this factor limited to the criminal-enforcement context. *Fitzgerald,* 570 F. App'x at 655 (finding standing were plaintiff challenged rule and guidelines regarding speech at county board of supervisors' meetings).

While this Court has often found that plaintiffs enjoyed standing when challenging speech restrictions that had never been enforced, Gilley presents a history of *actual* enforcement. UO not only blocked Gilley, but doubled-down after he inquired about their criteria. And like *Fitzgerald,* the evidence plainly shows that UO's employee was targeting Gilley's speech because it was "obnoxious" or about the "oppression of white men." 570 App'x at 655 ("Board Supervisors made comments that specifically targeted the content of Fitzgerald's speech, and either explicitly stated or implied that Fitzgerald's comments had gone beyond the bounds of free speech and acceptable behavior at a board meeting").

Whether the relevant enforcement authorities have disavowed enforcement against the plaintiff is also a factor in evaluating standing. *Lopez,* 630 F.3d at 788 ("we have held that plaintiffs did not demonstrate the necessary injury in fact where the enforcing authority expressly interpreted the challenged law as not applying to the

plaintiffs' activities"); *LSO,* 205 F.3d at 1155 ("Courts have also considered the Government's failure to disavow application of the challenged provision as a factor in favor of a finding of standing").

UO may claim that it, belatedly, did disavow enforcement against Gilley by later unblocking him and sending a letter stating that it does not intend to block him for protected speech in the future. *See* 1-ER-5. But such tactical, self-serving conduct in the face of litigation does not constitute a disavowal sufficient to vitiate standing, especially where UO continues to assert the right to enforce its social media guidelines in the future. *Am.-Arab Anti-Discrimination Comm.,* 970 F.2d at 508 ("Already they have once been charged with the challenged provisions, which charges were dropped, not because they were considered inapplicable, but for tactical reasons."); 3-ER-342 (¶ 5: listing permissible reasons to restrict user access); 2-ER-272, 2-ER-279–280 (post-lawsuit, Oct. 19, 2021 version of guidelines with blocking criteria). Moreover, rather than taking responsibility for their employee's illegal conduct, UO has defended her actions and joined in her attempts to obfuscate her discriminatory motives.

In this case, the threat of enforcement is also inherent in the challenged restrictions. *Wolfson,* 616 F.3d at 1059; *see also Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003). "So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one." *Dombrowski v. Pfister*, 380 U.S. 479, 494

(1965) (finding that Louisiana Subversive Activities and Communist Control Law created danger zone that inhibited protected activity); *see also Libertarian Party of L.A. Cty.*,709 F.3d at 871 (finding standing where plaintiff had posted instructions on her website that burdened speech rights).

As is explicated further below, UO still maintains the right to apply its guidelines to Gilley and other speakers, and those guidelines contain inherently viewpoint discriminatory provisions, in addition to being vague and granting excessive enforcement discretion. *See* B.3., *infra*.

Moreover, Gilley has already been blocked once and UO already gave him the run-around on the reasons for the blocking. While Tova Stabin conveniently retired the day after this lawsuit was filed, UO will place its guidelines into the hands of an anti-racist DEI-adherent, who will report to anti-racist Alex-Assensoh, who also equates Gilley's colorblind viewpoint with racism. *See* 3-ER-395 (viii: "[Colorblindness] ignores the realities of systemic racism"). The district court's analysis failed to engage with Gilley's evidence of how the now-prevalent DEI ideology on university campuses would impact a DEI adherent's view of terms such as "racist," "hateful," "offensive," or "inappropriate." *See* 3-ER-304–306.

Indeed, to a passionate anti-racist, anything that does not support anti-racism is by definition "racist." *See* 2-ER-117 (76:7-19).[5]

Moreover, Gilley has indicated that he would like to interact with @UOEquity in the future, if he had legal protection to do so without getting blocked or permanently banned. 3-ER-307 (¶ 21). "I would intend some of my posts to be provocative in order to stimulate a conversation or introspection about DEI." *Id.* It is plausible to infer that provocative posts by a conservative DEI critic that are directed at @UOEquity could be deemed to be "offensive," "racist," "hateful," "off-topic," or otherwise "inappropriate," especially by a communication manager "with a passion for the values of social justice and anti-racism[.]" *See* 2-ER-254.

And Gilley's plans to interact with @UEquity are no less concrete than those of the plaintiff in *Wolfson,* who expressed an intent to run for office at some unspecified time in the future and engage in speech that

[5] As a tenured professor of political science, with a Ph.D. from Princeton Univ. and an M.Phil. from Oxford, Gilley had more-than-sufficient expertise to offer opinions about how a DEI adherent would understand terms such as "racist." Fed. R. Evid. 702-703; *United States v. Hankey,* 203 F.3d 1160, 1169 (9th Cir. 2000) (officer was allowed to offer background information about gang culture). The district court should not have sustained UO's objection to his in-court testimony on the subject, and should have allowed him to make his record. 2-ER-113 (72:3-11) 2-ER-118 (77:5-20). But Gilley's declarations, which were not stricken, supply alternative supporting evidence of his opinions. 3-ER-303–306; 3-ER-40–408; 3-ER-412-413.

was likely to be prohibited by the challenged restrictions. 616 F.3d at 1059. Moreover, UO's guidelines are patently unconstitutional, and this lawsuit presents a viable means to strike them down and protect Gilley's speech rights and those of other DEI critics.

*2. UO's guidelines enshrine inherently viewpoint discriminatory restrictions on posting offensive and other protected speech*

Jarring or offensive speech is a constitutionally protected viewpoint. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299–3000 (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, 1751 (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), this Court, 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.

Indeed, 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, 447-48 (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 v. Univ. of Mich.,* 721 F. Supp. 852, 863-64 (E.D. Mich. 1989) (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. That UO has maintained the right to implement its viewpoint discriminatory guidelines, even in the face of litigation, is telling of UO's future intent.[6]

The district court also clearly erred in concluding that the "social media guidelines themselves do not permit viewpoint discrimination." 1-ER-32–33. At best, the guidelines suggest that users should not be blocked based on some viewpoints, so long as they aren't offensive, inappropriate, racist, hateful, or other unacceptable viewpoints. 3-ER-339; 2-ER-279–280. Those viewpoints are off-limits. The guidelines are thus contradictory and patently insufficient to meet UO's burden. Guidelines that ban only some viewpoints are still viewpoint discriminatory. It is not legal for UO to engage in just a little bit of viewpoint discrimination.

The district court's conclusion that the guidelines do not permit viewpoint discrimination runs counter to binding Supreme Court and Ninth Circuit precedent. Offensive, racist, and hateful opinions are

[6] UO's blocking criteria are not considered an official UO policy and are much more easily changed. 2-ER-217 (105:5-11, 106:12-18, 107:313); 2-ER-243 (operating guidelines are not policies).

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 DEI to be "offensive," "racist," "hateful," "inappropriate," "off-topic," or just in poor taste, Gilley's views are protected speech. By maintaining its guidelines, UO is explicitly reserving the right to block or ban users based on viewpoint. Moreover, in addition to enshrining viewpoint discrimination, UO's guidelines are vague and allow for excessive enforcement discretion.

*3. UO's guidelines use vague terminology that invites subjective decisionmaking and allows for excessive enforcement discretion*

A government speech regulation may be unconstitutionally vague in two ways. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1084 (9th Cir. 2006). First, the regulation may fail to give persons of ordinary intelligence adequate notice of what conduct is proscribed; second, it may permit or authorize "arbitrary and discriminatory enforcement." *Hill v. Colo.*, 530 U.S. 703, 732 (2000); *Berger v. City of Seattle*, 569 F.3d 1029, 1047-48 (9th Cir. 2009) (en banc) (uncertain enforcement of vague regulation "is likely to have a chilling effect on speech."); *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998) (subjective terms invite discriminatory enforcement). "[T]hese vagueness concerns are more acute when a law implicates First Amendment rights and, therefore,

vagueness scrutiny is more stringent" in such cases." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001); *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"). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

What qualifies as "offensive," "hateful," "racist," "inappropriate," "off-topic" or otherwise prohibited speech under the guidelines is open to interpretation. Even UO VP of Communications, Richie Stevens, who gave binding Rule 30(b)(6) testimony on behalf of UO, admitted that the guidelines' prohibition of offensive content had "a lot of gray" and that the prohibitions on "offensive" and "inappropriate" content were "the most vague" terms in the guidelines, adding (quite accurately): "there's just a level of vagueness." 2-ER-220 (117:14-22; 118:19-119:1).

When the government's designated witness admits to a "level of vagueness" in a speech code, the speech code is vague.

Moreover, Stevens similarly admitted that that people often disagree about the term "racist" in application and interpret the term differently. 2-ER-219–220 (116:22-117:5). When pressed, the best she could do is state that UO's officials would consult Webster's dictionary to interpret the meaning of the blocking criteria. ER-217–220. But those definitions

are no less vague than the guidelines. 2-ER-185–191. As they stand, UO's guidelines, now for the first time available to the public, fail to give fair notice as to what the forums' ground rules are and invite users to hedge or trim their comments, lest they earn a block or permanent ban.

In addition, UO has provided no evidence that its officials' discretion is limited by any objective, workable standards, including training on applying the guidelines or practical implementation guidance. *See e.g., Minn. Voters All. v. Mansky,* 138 S. Ct. 1876, 1891 (2018) (striking down restriction on "political" t-shirts; officials' "discretion must be guided by objective, workable standards"); *Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d at 1150-51 (9th Cir. 2001) (vague statutes "impermissibly delegate basic policy matters to lower level officials for resolution on an ad hoc and subjective basis…"); *People for the Ethical Treatment of Animals, Inc. v. Shore Transit*, 580 F. Supp. 3d 183, 191 (D. Md. 2022) (no additional guidelines to limit discretion in determining what constitutes an advertisement that is "political" or "controversial, offensive, objectionable, or in poor taste."); *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"). The absence of any training or implementation guidance invites UO's communication manager to bring his or her own

biases and subjective interpretations to bear on the contours of the blocking criteria. Indeed, it could allow a social-justice activist to deem a retweet about human equality to be off-topic in a discussion about racism. In this case, the concern about arbitrary enforcement of UO's blocking rules is not just a risk; it has already happened.

### C. The district court glossed over smoking-gun evidence of viewpoint discrimination

#### *1. Stabin's nearly contemporaneous emails and selective memory clearly demonstrate viewpoint discriminatory animus*

While the district court begrudgingly acknowledged that Gilley had presented evidence to support the conclusion that Stabin had blocked him for viewpoint discriminatory reasons, the court bent over backwards to credit Stabin's testimony that she thought Gilley's comment about equality was genuinely off-topic in a discussion about racism. 1-ER-26–27. The most the court was willing to find was that Gilley had made a colorable claim, not that he was likely to succeed on the merits. 1-ER-28. This was clearly erroneous, and it set the table for the court's finding that Gilley did not face a risk of future blocking from UO. If the district court had acknowledged that UO's employee had blocked Gilley for viewpoint discriminatory reasons, and that UO was joining her in defending that blocking, it is much harder for the district court to justify its conclusion on standing. After all, if someone

discriminates and won't take responsibility, and maintains criteria that allow for future discrimination, it is reasonable to conclude that they will try to discriminate again.

It is not plausible for a reasonable fact-finder to interpret Stabin's emails, sent some 13 days after she blocked Gilley, as anything but smoking-gun evidence of viewpoint discrimination. She referred to him as "talking something about the oppression of white men" and accused him of being there to trip her up and "make trouble." 2-ER-169. She also referred to him by his first name, suggesting familiarity with Gilley and his views. *Id.* In another email, she expressed her opinion that Gilley was "being obnoxious." 2-ER-251. It is clear that Stabin was offended by Gilley's comment.

Those emails were both exchanged with the Division's Chief of Staff and Assistant VP, Kelly Pembleton, who is also a member of UO's racialist "Deconstructing Whiteness Working Group." 2-ER-238; 2-ER-223. Neither Stabin nor Pembleton took any steps to unblock Gilley after he inquired about the blocking criteria, indicating that they both believed the blocking was justified and should remain in place. 2-ER-118–119.

A management-level employee of the Division, Pembleton, was obviously aware as of at least June 27, 2022, that Gilley was blocked from her Division's Twitter account, but took no steps to unblock him or investigate further. 2-ER-212. Common sense dictates that if a blocked

user is making a request for the blocking criteria, he is questioning the basis of his blocking. Both Stabin and UO's management-level employee should have revisited Gilley's blocked status at that time; instead it took this lawsuit to get him unblocked. The district court's analysis ignores these inconvenient facts and led it to find a lack of standing.

Moreover, it is hard to credit Stabin's self-serving testimony that she does not recall some 5-6 months later why she wrote those smoking-gun emails 13 days after blocking Gilley, or why she blocked the two other users who happened to express conservative, DEI-critical viewpoints. 2-ER-95–97; 2-ER-90–91; 2-ER-206–208.

In addition, UO's selective enforcement of its off-topic rule is itself evidence of its viewpoint discrimination. *See Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1162 (9th Cir. 2022); *Gerlich v. Leath*, 861 F.3d 697, 704-07 (8th Cir. 2017); *Brooks v. Francis Howell Sch. Dist.*, 599 F. Supp. 3d 795, 803-05 (E.D. Mo. 2022).

UO and Tova Stabin would have everyone believe that it is just an unfortunate coincidence that out 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. If anything, the infrequent blocking underscores the targeted nature of UO's blocking of Gilley and the other two DEI-critics. Out of the thousands of posts, UO singled those out for special treatment.

*2. The absence of evidence of disruption reveals the pretextual nature of UO's claims*

The district court also clearly erred when it credited Stabin's testimony about disruption concerns in the absence of any evidence of actual disruption. 1-ER-27 ("…the Court believes at this point that a jury could reasonably conclude that Defendant [S]tabin did not violate Plaintiff's First Amendment rights"). It was incumbent on UO to bring forward evidence of disruption. *Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 973 (9th Cir. 2002) ("[T]here is insufficient evidence in the current record to support the argument that Appellants' clothing will, in fact, cause such interference or disruption"). And the lack of evidence of actual disruption "strongly suggests that, in implementing the [speech restrictions], Appellees were motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum." *Sammartano,* 303 F.3d at 972.

D. It is per se unreasonable to deem a comment about human equality to be irrelevant to a discussion about racism

Even if this Court affirms the district court's finding that the interactive portions of @UOEquity are a limited public forum, applying UO's off-topic rule to Gilley's retweet was per se unreasonable. "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." *Rosenberger v. Rector and Visitors of the Univ. of Va.,* 515 U.S. 819, 831 (1995).

It is unreasonable for a federal court sitting in equity, and adjudicating fundamental constitutional rights, to conclude that a comment about human equality is off-topic in a discussion about racism. *See* 1-ER-27 ("The phase [sic] 'all men are created equal' could reasonably be said to appear inconsistent with the purpose of the prompt and off topic"). Under the district court's reasoning, any comment on a tweet that diverged from the government's purpose could be deemed off-topic. Thus, if the purpose of a tweet was to promote DEI, any comment not promoting DEI would be "off-topic." Such reasoning defies logic and invites widespread censorship.

## II. THE DISTRICT COURT'S INCORRECT ANALYSIS OF IRREPARABLE HARM IN THE SOCIAL-MEDIA CONTEXT AMOUNTS TO A HOW-TO GUIDE FOR CENSORS

Existence of a colorable First Amendment claim is generally sufficient to establish irreparable harm for purposes of obtaining a preliminary injunction. *Cuviello v. City of Vallejo*, 944 F.3d 816, 832-33 (9th Cir. 2019); *Doe v. Harris*, 772 F.3d 563, 582-83 (9th Cir. 2014); *Sammartano,* 303 F.3d at 973-974. This Court has also recognized that the threat of enforcement of a speech restriction may chill speech rights, creating irreparable harm supporting an injunction even in the absence of actual enforcement. *Cuviello,* 944 F.3d at 832-33. Moreover, this

Court's "cases do not require a strong showing of irreparable harm for constitutional injuries." *Id.* at 833.

In this case, the district court found that Gilley had established colorable First Amendment claims as to his two as-applied challenges, but it sought to avoid issuing an injunction by incorrectly limiting its findings to Gilley's backward-looking claims for past blocking. 1-ER-33; 1-ER-35–36. Despite UO's changing story about its blocking criteria and the risible assertion that Tova Stabin had blocked Gilley for making an off-topic, disruptice comment, the district court found Gilley's claim of self-censorship based on future blocking to be unduly speculative. 1-ER-35.

While it is true that Gilley does not face a criminal or civil enforcement action for violating UO's guidelines (*see* 1-ER-30–31), limiting pre-enforcement standing to such cases in the context of a public social-media forum invites just the sort of gamesmanship exhibited by UO in this case. A provocative poster such as Gilley will only ever face the prospect of temporary blocking or permanent banning by UO, or any other government entity that opens an interactive forum on a social media account.

The district court's holding on irreparable harm is a how-to guide for UO and all would-be censors in the social-media context: (1) create written blocking criteria, even viewpoint-based blocking criteria, but soften them with a general statement about the need to avoid viewpoint

discrimination; (2) allow your personnel to subjectively apply those criteria to block unwanted posts or users; (3) if any of the blocked people bother to sue you, immediately unblock them and claim you will never do it again. For good measure, send the blocked person's attorney $20 in the mail to cover the nominal damages. *See* 1-ER-6.

The district court's reasoning, if allowed to stand by this Court, would effectively prevent *any* plaintiff from *ever* challenging the constitutionality of government blocking criteria; so long as the government was astute enough to quickly unblock the plaintiff after the suit was filed. It cannot be that this Circuit, having recently joined other circuits in recognizing the existence of public social media fora, would allow the government's rules for such fora to be placed beyond judicial review.

That is especially true where UO and its former-employee jointly continue to advance the rather fanciful claim that Bruce Gilley was legitimately blocked for being off-topic, but was also "being obnoxious" and commenting about "the oppression of white men."

## III. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FACTORS FAVOR GILLEY

Gilley has shown that, if fairly evaluated by a trier of fact, he would be almost-certain to succeed on his claims of viewpoint discrimination and in his facial challenge to UO's illegal guidelines. As is the case here, when the government is a party, the balance of hardships and public

interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citation omitted). A case that raises First Amendment concerns, such as Gilley's, compels a finding that, at the very least, the balance of hardships tip sharply in Gilley's favor. *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005) (citing *Sammartano*, 303 F.3d at 973). It is within the public's interest to uphold First Amendment principles. *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (citing *Sammartano*, 303 F.3d at 974). Further, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted).

Moreover, the district court here found that UO "would be unnecessarily burdened by the issuance of an injunction." 1-ER-36. That would only be true if UO intended to use its guidelines to block users, such as Gilley, on @UOEquity.

## CONCLUSION

This Court should reverse the district court's order denying Bruce Gilley's motion for a preliminary injunction.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

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

I am the attorney or self-represented party.

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- ○ complies with the word limit of Cir. R. 32-1.
- ◉ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ☐ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ☐.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature:** s/Endel Kolde **Date:** 03/03/2023