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Attorneys for Defendant tova stabin

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

BRUCE GILLEY,

Plaintiff,

v.

TOVA STABIN, Communications Manager, University of Oregon Division of Equity and Inclusion, in her official and individual capacities,

Defendant.

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

DEFENDANT'S RULE 12(B)(1) MOTION TO DISMISS FOR LACK OF JURISDICTION

REQUEST FOR ORAL ARGUMENT

LOCAL RULE 7-1 CERTIFICATION

Counsel for Defendant tova stabin ("stabin" or "Defendant"),[1] Misha Isaak, conferred in good faith about this Motion with counsel for Plaintiff Bruce Gilley ("Gilley" or "Plaintiff"), Del Kolde, by telephone on September 7, 2022. Mr. Kolde indicated that the Motion is opposed.

MOTION

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant moves the Court to dismiss Plaintiff's claims for lack of subject-matter jurisdiction. This Motion is supported by the following Memorandum of Law, the Declaration of Chris Widdop in Support of Defendant's Rule 12(b)(1) Motion to Dismiss ("Widdop Decl."), the Declaration of Lesli Larson in Support of Defendant's Rule 12(b)(1) Motion to Dismiss ("Larson Decl."), and the Declaration of Douglas Park in Support of Defendant's Response in Opposition to Motion to Expedite Preliminary Injunction Hearing and Early Discovery, ECF No. 19 ("Park Decl.").

Defendant requests oral argument on this Motion.

MEMORANDUM OF LAW

I. INTRODUCTION

A federal court is a forum of last resort. It is not a vehicle for publicity, score settling, or even general legal oversight. A federal court may exercise its authority only "as a necessity in the determination of real, earnest, and vital controversy between individuals." *Chi. & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892). Despite this fact, Plaintiff asks this Court to accept jurisdiction over a case that is no longer embedded in any actual controversy between the parties. Within days of filing this action, Plaintiff received all the relief from Defendant that he requested in his Complaint. Defendant paid Plaintiff $17.91 for his alleged damages, unblocked his Twitter account, and confirmed that it would not block him again for expressing a point of view. Defendant also informed Plaintiff that it has social media guidelines—like the ones sought by Plaintiff—which prohibit viewpoint discrimination, and that Defendant had counseled its staff on abiding by

[1] Defendant stabin spells her name using all lowercase letters.

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these guidelines. Together, these corrective actions by Defendant provide all the relief sought from the Court by Plaintiff. Because there is no longer any ongoing or likely threat of future injury for which the Court may provide relief, Plaintiff's claims are moot.

II. FACTUAL BACKGROUND

Plaintiff filed this action on August 11, 2022. In his Complaint, Plaintiff names toba stabin in her individual and official capacities as the lone defendant.[2] (Compl. ¶ 5.) Defendant stabin previously worked as the Communications Manager for the Division of Equity and Inclusion (the "Division") at the University of Oregon (the "University"). (*Id.*) Plaintiff alleges that, on June 14, 2022, stabin blocked Plaintiff from the Division's Twitter account (@UOEquity) after Plaintiff used his Twitter account (@BruceDGilley) to "re-tweet" and comment on a post by the Division's account. (*Id.* ¶¶ 55–58.) Plaintiff contends that he was blocked by Defendant stabin based on the views that he expressed in his re-tweet and comment on the Division's post. (*Id.* ¶ 62.) He asserts a facial and as-applied challenge to Defendant's alleged "pattern and practice of blocking Twitter users" who express viewpoints with which Defendant disagrees. (*Id.* ¶ 77.)

In his prayer for relief, Plaintiff asks the Court to order that Defendant unblock him from the Division's Twitter account. (Compl. at 17.) He also requests that the Court enjoin Defendant from discriminating based on viewpoint and "[a]pplying overly broad content-discriminatory criteria"—such as the unbounded exercise of "professional judgment"—when blocking users from the Division's Twitter account in the future. (*Id.* at 17–18.) Plaintiff further requests nominal damages in an amount less than $20,[3] attorney's fees, and a declaration that Defendant's decision to block him from the Division's Twitter account and apply "professional judgment" when making all blocking decisions violate the First Amendment. (*Id.* at 18.)

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[2] Insofar as Defendant stabin is named in her official capacity, her former employer, the University of Oregon, is the real party in interest to this case. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("[T]he real party in interest in an official-capacity suit is the governmental entity and not the named official . . . ."); *see also Moore v. Hosemann*, 591 F.3d 741, 747 (5th Cir. 2009) (collecting cases and stating that service of officials must be on the government entity).

[3] In fact, Plaintiff seeks nominal damages in the amount of $17.91 in his Complaint, which one can assume is intended as a taunting allusion to the year the Bill of Rights was ratified.

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Plaintiff did not confer with Defendant before filing his lawsuit, so the first time University counsel had a chance to review Plaintiff's claims and blocking allegations was after press inquiries and reports the day after the Complaint was filed. (Park Decl. ¶¶ 3–4.) That same day, the University unblocked Plaintiff. (*Id.* ¶ 4.) Within days, and before the University was even served a copy of the Complaint, the University's General Counsel, Kevin S. Reed, drafted a letter to Plaintiff's counsel stating that (1) Plaintiff had been unblocked, (2) neither Plaintiff nor anyone else would be blocked based on viewpoint in the future, and (3) the University had reminded employees of its prohibition against viewpoint discrimination:

> Prof. Gilley (@BruceDGilley) was unblocked from the Twitter account at issue (@UOEquity) last Friday, August 12, 2022, and the Division of Equity and Inclusion does not intend to block him or anyone else in the future based on their exercise of protected speech. My office has reinforced to our colleagues who control the University's multiple social media channels that, if they open such channels to comments, they may not block commentary on the basis of the viewpoints expressed. I have further confirmed that those social media channels controlled by UO's central communications unit have no blocked users.

(*Id.* ¶ 5 & Ex. 2.) Plaintiff's counsel, Del Kolde, responded by characterizing the University's decision to unblock Plaintiff's Twitter account as "temporary" and asserting that the "voluntary cessation" exception to mootness applies in this case. (*Id.* ¶ 6 & Ex. 3.)

As Plaintiff describes in his Complaint, before filing this action, Plaintiff lodged a public records request with the University. (Compl. ¶¶ 64–65; Widdop Decl. ¶ 3 & Ex. 1.) He requested, among other things, "the policy utilized by [Defendant stabin] to block Twitter users." (Compl. ¶ 64; Widdop Decl. ¶ 3 & Ex. 1.) The University's Public Records Office (the "Office") responded to Plaintiff by informing him that the Division has no written policy governing when it may block a Twitter user and that the "staff member [who] administers the [Division's] Twitter account and social media has the autonomy to manage the accounts and uses professional judgment when deciding to block users." (Compl. ¶ 64; Widdop Decl. ¶ 4 & Ex. 2.)

The information contained in the Office's response to that public records request was

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incorrect. (*See* Widdop Decl. ¶¶ 4, 6 & Ex. 4; Larson Decl. ¶¶ 3–5 & Ex. 1.) Specifically, the University *does* maintain written guidelines that govern when Twitter users may be blocked from University-affiliated accounts. (Widdop Decl. ¶¶ 4, 6 & Ex. 4; Larson Decl. ¶¶ 3–5 & Ex. 1.) Thus, in a letter sent shortly after Plaintiff initiated this lawsuit, the Office revised its prior response and informed Plaintiff that the University's divisions are subject to written social media guidelines promulgated by the University. (Widdop Decl. ¶ 6 & Ex. 4.) It provided a link to the guidelines and clarified that the Office's prior response was "inaccurate." (*Id.* ¶ 6 & Ex. 4)

Under the University's social media guidelines, employees are prohibited from "delet[ing] comments or block[ing] users because they are critical or because [employees] disagree with the sentiment or viewpoint." (Larson Decl. ¶ 4 & Ex. 1.) In addition, the guidelines provide that, "[a]s a public university that values freedom of speech and a robust exchange of ideas, [employees] should err on the side of letting people have their say when commenting on our social media properties." (*Id.* ¶ 4 & Ex. 1.) An employee may hide material created by a user or restrict access for a user *only* if the user engages in the following defined conduct:

- Post violent, obscene, profane, hateful or racist comments or otherwise uses offensive or inappropriate language
- Threaten or defame
- Post comments that are out of context, off topic or not relevant to the topic at hand
- Disclose personally identifiable information, such as addresses or phone numbers
- Include copyrighted materials
- Fall under the category of spam
- Suggest or encourage illegal activity
- Solicit, advertise or endorse a third-party business or service
- Are multiple successive posts by a single user
- Are disruptively repetitive posts copied and pasted by multiple users

(*Id.* ¶ 5 & Ex. 1.) It is these viewpoint-neutral criteria that define when Defendant may restrict Twitters users—not an employee's "professional judgment." (*See id.* ¶ 5 & Ex. 1.)

III. LEGAL STANDARDS

"Federal courts are courts of limited jurisdiction, possessing only that power authorized by

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Constitution and statute." *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quotation omitted). Federal Rule of Civil Procedure 12(b)(1) authorizes parties to seek dismissal when federal subject-matter jurisdiction is lacking.

Under Rule 12(b)(1), a defendant may bring a "factual" attack on a plaintiff's jurisdictional allegations. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). A factual attack contests the truth of the plaintiff's factual allegations based upon evidence outside of the pleadings. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "It is presumed that a cause lies outside [of a court's] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co*., 511 U.S. 375, 377 (1994). In turn, when a defendant raises a factual attack, the plaintiff must support her jurisdictional allegations with "competent proof." *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010). "The plaintiff bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met." *Leite*, 749 F.3d at 1121. A district court may resolve disputed jurisdictional facts. *Meyer*, 373 F.3d at 1039–40.

IV. ARGUMENT

The Court should dismiss Plaintiff's claims for lack of subject-matter jurisdiction because the case is moot—that is, Plaintiff already has received all of the relief from Defendant that he requests in this action, and he has no reasonable expectation that Defendant will injure him again.[4] *First*, the case is moot because there is no longer any "effectual relief" for the Court to award. Plaintiff has received each item of relief that he requested from Defendant, and the only remaining issue is the abstract and non-justiciable question of whether Defendant's past actions were lawful. *Second*, the voluntary cessation exception to the mootness doctrine does not apply here because there is no "reasonable probability" that Defendant will block Plaintiff based on his viewpoint in the future. To the contrary, the University has unblocked Plaintiff, confirmed it will not block him again based on an expressed viewpoint, and informed Plaintiff that the original blocking violated

[4] Mootness and lack of standing are appropriate bases to seek dismissal under Rule 12(b)(1). *See, e.g.*, *Little Coyote v. U.S. Dep't of the Interior*, 371 F. App'x 716, 717 (9th Cir. 2009).

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Defendant's existing prohibition against viewpoint discrimination on social media. Because there is no longer any ongoing or likely threat of future injury for which the Court may provide relief, it must dismiss Plaintiff's action for lack of subject-matter jurisdiction.

A. This case is moot because Plaintiff already received all his requested relief and there is no longer a live controversy between the parties.

Plaintiff's claims are moot because Plaintiff has received all of the relief he requested from Defendant and there is no active "case" or "controversy" between the parties. "Article III of the Constitution limits federal-court jurisdiction to 'cases' and 'controversies.'" *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016) (quoting U.S. Const., Art. III, § 2). "For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case . . . ." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). The parties' requisite "personal stake" in an action requires, among other things, an injury to the plaintiff that is (1) "concrete and particularized," (2) "actual or imminent," and (3) "likely to be redressed by the requested relief." *Id.* The "case" or "controversy" requirement "subsists through all stages of federal judicial proceedings," meaning that the parties must *always* "have a personal stake in the outcome" of an existing case. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477–78 (1990).

"If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Campbell-Ewald*, 577 U.S. at 160–61 (quotations omitted). The mootness doctrine has often been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (quotation omitted). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quotation omitted). "Speculative contingencies afford no basis for finding the existence of a continuing controversy between the litigants as required by article III," *Lee v.*

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Schmidt-Wenzel, 766 F.2d 1387, 1390 (9th Cir. 1987), and "[a]llegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm," *Clapper v. Amnesty Int'l*, 568 U.S. 398, 418 (2013) (quotations omitted).

The rules around the justiciability of claims for prospective relief are particularly stringent. "A request for injunctive relief remains live only so long as there is some present harm left to enjoin." *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 864 (9th Cir. 2017) (quotation omitted). Once the harm-producing act stops, the plaintiff may only pursue injunctive relief if she can show a "real and immediate threat of repeated injury." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (quotation omitted). Although "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury" for the purpose of prospective injunctive relief, *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974), "past wrongs do not in themselves amount to [a] real and immediate threat of injury necessary to make out a case or controversy," *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). "In sum, under Article III, a federal court may resolve only 'a real controversy with real impact on real persons.'" *TransUnion*, 141 S. Ct. at 2203 (quoting *Am. Legion* v. *Am. Humanist Assoc.*, 139 S. Ct. 2067, 2103 (2019)).

An abstract dispute over the lawfulness of past actions is not a "case" or "controversy." In *Alvarez v. Smith*, 558 U.S. 87 (2009), for example, the Supreme Court dismissed as moot an action seeking the return of cash and cars seized by a city after the city had returned the contested property while the action was pending. 558 U.S. at 92–93. The plaintiffs in *Alvarez* challenged the process by which their property had been seized and requested both a declaration that the process was unconstitutional and an injunction against its future use.[5] *Id.* at 90–91. According to the Supreme Court, however, the return of their property mooted the case because the plaintiffs were no longer suffering a present injury from the challenged conduct and there was thus "no longer any actual controversy between the parties." *Id.* at 92. It was not enough, the Court reasoned, that the plaintiffs "continue[d] to dispute the lawfulness" of the manner of the original seizure—the dispute was "no

[5] The plaintiffs did not seek damages for their past injuries. *Id.* at 92.

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longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Id.* at 93. Instead, the case was now "an abstract dispute about the law, unlikely to affect these plaintiffs any more than it affects" other members of the public. *Id.* And "a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm," cannot support jurisdiction. *Id.*

Likewise, a single instance of past exposure to alleged misconduct cannot alone create a "real and immediate" threat of future exposure to the same misconduct. In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), for instance, a single unconstitutional chokehold by the police was insufficient to establish that the plaintiff *personally* faced a "real and immediate" threat of future injury from the same or similar misconduct. 461 U.S. at 105. "[P]ast exposure to illegal conduct," the Supreme Court explained, "does not in itself show a present case or controversy regarding injunctive relief." *Id.* at 102 (quotation omitted). It was immaterial, the Court reasoned, that sixteen other people had died within the past eight years from the city police department's use of similar chokeholds because it did not "establish a case or controversy between *these parties*." *Id.* at 105 (emphasis added); *see also id.* at 115–16 (Marshall, J., dissenting) (stating statistic). The plaintiff was, to that end, "no more entitled to an injunction than any other citizen" of the city because "a federal court may not entertain a claim by any or all citizens who no more than assert that certain [government] practices . . . are unconstitutional." *Id.* at 111; *see also O'Neal v. City of Seattle*, 66 F.3d 1064, 1066 (9th Cir. 1995) (holding that a landlord's failure to pay the water bill on one occasion could not support prospective relief once the landlord paid the outstanding bill).

Similarly, refraining from constitutionally protected activities based on a subjective fear of a future injury that is itself too speculative to support jurisdiction does not give rise to a "case" or "controversy." In *Clapper v. Amnesty International*, 568 U.S. 398 (2013), for example, the plaintiffs alleged that their subjective fear of future First and Fourth Amendment violations by the government deterred them from certain activities in the present. 568 U.S. at 417–18. In rejecting the sufficiency of this apprehension as a basis for jurisdiction over claims for prospective relief, the Supreme Court explained that any self-censorship or other behavioral changes were "incurred in response to a speculative threat." *Id.* at 416. The Court declined to "water[] down the

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fundamental requirements of Article III" by allowing plaintiffs to "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* at 402. In other words, the Supreme Court "drew the line at situations in which [a] chilling effect [is] based on a plaintiff's fear of future injury that itself [is] too speculative to confer standing." *Munns v. Kerry*, 782 F.3d 402, 410 (9th Cir. 2015).

Here, Plaintiff's claims are moot for lack of a live "case" or "controversy" because there is no longer any relief for the Court to award and no "certainly impending" future injury to enjoin. Plaintiff already has received everything from Defendant that he requested in his Complaint. (*See* Compl. at 17–18.) Not only did Defendant pay Plaintiff the $17.91 in nominal damages and unblock his Twitter account, Defendant confirmed it would not discriminate against him (or anyone else) based on viewpoint. (Park Decl. ¶¶ 4–6 & Ex. 2.) More than that, Defendant informed Plaintiff that it maintains written guidelines forbidding viewpoint discrimination and containing objective and reasonable standards for policing users who interact with its social media accounts—just like the policy Plaintiff sought via court order. (Widdop Decl. ¶ 6 & Ex. 4; Larson Decl. ¶¶ 3–5 & Ex. 1.) In other words, like in *Alvarez*, Plaintiff has received all the relief he requested, and a favorable decision by the Court would have no more effect on the parties' "particular legal rights" than it would a member of the public. 558 U.S. at 93. Although Plaintiff may argue that judicial intervention is still needed because he believes that Defendant's past acts or current policy are unlawful, the only question relevant to the mootness inquiry is whether he is *presently* suffering an injury based on Defendant's past acts or an extant application of its policies.[6] "Federal courts do not possess a roving commission to publicly opine on every legal question," *TransUnion*, 141 S. Ct. at 2203, and they may not weigh in on abstract disputes, *Alvarez*, 558 U.S. at 93.

[6] To that end, neither a request for a declaratory judgment stating that the offending conduct is unconstitutional nor a request for attorneys' fees and costs can, standing alone, provide the requisite adversity for maintaining an Article III "case" or "controversy." *See California v. Texas*, 141 S. Ct. 2104, 2115 (2021) ("The Declaratory Judgment Act, 28 U.S.C. § 2201, alone does not provide a court with jurisdiction."); *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 866–67 (9th Cir. 2017) (holding that an "interest in attorney fees and legal costs associated with [the] action . . . standing alone are insufficient to confer Article III jurisdiction").

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There is also no evidence that Plaintiff faces an imminent threat of future harm. Plaintiff alleges a single past instance of Defendant blocking him. But at present, there is no evidence that Defendant intends to block Plaintiff again. To the contrary, Defendant already confirmed that it will not block Plaintiff for expressing his point of view, and Defendant promptly rectified the offending conduct by unblocking Plaintiff as soon as the University became aware. (Park Decl. ¶¶ 4–6.) Defendant has also issued a written reminder to staff about its nondiscrimination policy. (*Id.* ¶ 5.) But even if Defendant were less conciliatory, any predicted future injury to Plaintiff relies on a speculative chain of causation. Before a future injury could arise, Plaintiff would need to (1) comment on a post by Defendant, (2) have his post noticed by Defendant, (3) be subject to an application of Defendant's social medial policy, (4) be found to have violated Defendant's social media policy, and (5) be blocked by Defendant because of his viewpoint—despite the prohibition in Defendant's social media guidelines (i.e., be subject to another erroneous departure from the guidelines). This "chain of contingencies" cannot support jurisdiction, *Clapper*, 568 U.S. at 411, especially since Plaintiff admits that he has no "concrete plans" to interact with the @UOEquity account.[7] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). (*See* Compl. ¶ 68.)

Although Plaintiff may point to Defendant's past blocking of two other Twitter users as evidence that Defendant is likely to block him again, this small number of past incidents involving non-parties cannot "establish a case or controversy between *these parties*." *Lyons*, 461 U.S. at 105 (emphasis added). Both the Ninth Circuit and this Court have found that more robust patterns of misconduct were insufficient to demonstrate a likely threat of future harm. *See, e.g.*, *Rosebrock v. Mathis*, 745 F.3d 963, 966 (9th Cir. 2014) (holding that repeated instances of viewpoint discrimination over a "period of at least 8 months" did not make the offending conduct "reasonably likely" to recur); *Wise v. City of Portland*, 539 F. Supp. 3d 1132, 1140–42 (D. Or. 2021) (holding that five instances of past misconduct targeted at the plaintiffs did not show a "substantial risk" of

[7] The named Defendant, tova stabin, also retired from the University at the end of July 2022. Thus, there is not even a possibility that she, personally, could block Plaintiff from the Division's Twitter account again in the future.

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future injury). Further, it is pure speculation that these other users were blocked based on their viewpoints rather than for permissible reasons. *Cf. generally Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983) (holding that "[r]easonable time, place and manner regulations are permissible" in traditional public forums); *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 797 (9th Cir. 2011) ("In a limited public forum, the government may impose restrictions that are "reasonable in light of the purpose served by the forum").

Plaintiff may also argue that he is presently injured because he is choosing to "self-censor" out of fear that Defendant may block him again. (Compl. ¶ 68.) As in *Clapper*, however, Plaintiff's "subjective fear" of future injury and corresponding change in extant behavior cannot be used to manufacture federal jurisdiction. 568 U.S. at 417–18. For the reasons already described, Plaintiff cannot show that he personally faces a "real and immediate" threat of future injury from the same or similar conduct—Defendant promptly unblocked him when the issue was brought to its attention, confirmed for Plaintiff that he would not be blocked again, and informed Plaintiff that it has written guidelines prohibiting viewpoint discrimination that it does and will enforce. *Lyons*, 461 U.S. at 105. Plaintiff cannot do an end-run around the "case" or "controversy" requirement based on his subjective belief that Defendant might ignore its own written guidelines and the First Amendment by improperly blocking him in the future. This would allow any plaintiff in the world to generate federal jurisdiction where none otherwise exists. Accordingly, because Plaintiff has received all the relief he requested from Defendant and there is no "real and immediate" threat of future injury, this case is moot and must be dismissed for lack of subject-matter jurisdiction.

B. The voluntary cessation exception does not apply because there is not a "reasonable probability" Plaintiff will be blocked again based on viewpoint.

Plaintiff's claims cannot be saved by the voluntary cessation exception to the mootness doctrine. Under the voluntary cessation exception, a claim for prospective relief is not always mooted by "a defendant ending its unlawful conduct once sued." *Already*, 568 U.S. at 91. The exception provides that a "case" or "controversy" still exists if the defendant's offending conduct could "reasonably be expected to recur." *Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S.

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167, 190 (2000). The exception is intended to prevent a defendant from pursuing a stop-start cycle of "temporarily altering its questionable behavior" when a lawsuit is filed and then reverting to its old ways once the case is dismissed. *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). But a plaintiff without an otherwise cognizable injury cannot escape mootness if the defendant demonstrates that her change in behavior "is not a temporary move to sidestep the litigation."[8] *Brach v. Newsom*, 38 F.4th 6, 13 (9th Cir. 2022) (en banc). And the "reasonable expectation" standard "means something more than 'a mere . . . theoretical possibility'" that the conduct could be repeated. *Id.* at 14 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)).

An unconditional representation made in court is often enough to satisfy this standard. In *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013), for example, the Supreme Court held that a broad covenant not to sue, unilaterally executed by the defendant, was sufficient to ensure that it would not resume its efforts to enforce a trademark against the plaintiff. 568 U.S. at 93–96. As the Court explained, "[h]aving taken the position in court that there is no prospect [of a future enforcement action], [the defendant] would be hard pressed to assert the contrary down the road." *Id.* at 94; *see also New Hampshire v. Maine,* 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." (quotation omitted)). Likewise, in *Brach*, the Ninth Circuit was satisfied that the offending conduct was not "likely" to recur because the state defendant had "unequivocally renounced" its past conduct and "reaffirmed" its commitment to the policy sought by the plaintiffs. 38 F.4th at 13 (cleaned up). "The test," the court emphasized, "is 'reasonable expectation,' not ironclad assurance." *Id.* at 15.

[8] Unlike the initial showing of subject-matter jurisdiction, which the plaintiff bears the burden of establishing, *Leite*, 749 F.3d at 1121, a defendant bears the burden of showing that it "could not reasonably be expected" to resume its challenged conduct, *Laidlaw*, 528 U.S. at 190. Nevertheless, as discussed further below, this burden shifting is likely nullified by the presumption of good faith that a plaintiff must overcome when the defendant is a government actor. *Cf. Cocina v. Cultura LLC v. Oregon*, No. 20-cv-01866, 2021 WL 3836840, at *6 (D. Or. Aug. 21, 2021) ("[T]he plaintiff must overcome the presumption of good faith afforded to the state legislature and demonstrate that a reasonable expectation of recurrence exists.").

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It is also well established that, when a government defendant changes its behavior, it is entitled to presumption of good faith. *See Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("[W]e presume the government is acting in good faith."). "For this reason, the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal." *Bd. of Trs. of Glazing Health and Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (en banc). The same is true of a change in policy. *Am. Cargo Transp.*, 625 F.3d at 1180. This does not mean that government defendants receive a free pass, but it does mean that courts must "treat the voluntary cessation of challenged conduct by government officials with more solicitude." *Brach*, 38 F.4th at 12 (quotation omitted). Thus, in *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), the Ninth Circuit deemed a standalone memorandum issued by a federal agency sufficient to moot a case. 227 F.3d at 1242–44. Although there had been no intervening statutory or regulatory change, the court reasoned that the case was nevertheless moot because the memorandum "addresse[d] all of the objectionable measures [agency] officials took against the plaintiffs" and was "unequivocal in tone." *Id.* at 1243; *cf. also Fikre v. FBI*, 904 F.3d 1033, 1039 (9th Cir. 2018) ("[T]he government's unambiguous renunciation of its past actions can compensate for the ease with which it may relapse into them.").

Importantly, the presumption of good faith and permanence carries the most weight when, as here, the government's changed behavior is based on its reaffirmation of an *existing* policy. In *Rosebrock v. Mathis*, 745 F.3d 963 (9th Cir. 2014), for example, the plaintiffs alleged that the defendant agency had inconsistently applied a facially neutral prohibition against posting materials outside the agency's offices. 745 F.3d at 966. They alleged that the agency had allowed them to hang an American flag on an exterior fence when the flag was properly oriented but not when it was placed upside down. *Id.* The agency's "inconsistent" enforcement of its prohibition on posted materials continued for "at least eight months." *Id.* After the lawsuit was filed, however, the agency circulated an email to its staff "reemphasizing" its existing policy against the posting of materials outside its offices and making clear that staff were to apply the policy in a non-discriminatory manner. *Id.* at 969. The court held that enforcement of the policy based on the plaintiffs' viewpoint

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could not "reasonably be expected to recur." *Id.* at 973. In doing so, it explained that "confidence in the Government's voluntary cessation is at an apex" when the government promises to be "more vigilant in following a previously existing policy." *Id.* In such circumstances, it reasoned, the government's "voluntary cessation" is more "aptly described as reemphasizing, or recommitting to, an existing policy of consistent enforcement of a longstanding regulation," and it "increases our confidence that the challenged conduct cannot reasonably be expected to recur." *Id.*

In general, a case involving a government defendant will only fall within the voluntary cessation exception to the mootness doctrine if the government announces an intent to revert to past behavior once a case is over or it changes its behavior based on an unexplained "exercise of discretion." Thus, in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), the Supreme Court applied the voluntary cessation exception where a city had revised a challenged ordinance but was "reasonably expected" to reenact offending provisions because it had announced "just such an intention." 455 U.S. at 289 & n.11. And, in *Fikre v. FBI*, 904 F.3d 1033 (9th Cir. 2018), the Ninth Circuit refused to dismiss as moot a case challenging the plaintiff's five-year inclusion on the "No Fly List" even after the plaintiff had been removed from the list. 904 F.3d at 1039. As the court explained, the plaintiff's removal was "an exercise of discretion" based on "an individualized determination untethered to any explanation or change in policy," and the government had not "assured [the plaintiff] that he [would] not be banned for the same reasons that [had] prompted the government to add him to the list in the first place." *Id.* at 1040.

Here, there is not a "reasonable probability" that Defendant will block Plaintiff again based on his viewpoint. Like in *Already* and *Brach*, Defendant has "unequivocally renounced" blocking Twitter users based on their viewpoints, and it has confirmed for Plaintiff that it will not block him based on viewpoint. *Brach*, 38 F.4th at 13. (Park Decl. ¶¶ 4–6.) That confirmation carries special weight because, as a government actor, Defendant is entitled to a "presumption of good faith." *Brach*, 38 F.4th at 12–13. Moreover, because it is not the product of a new or amended policy but rather a "reaffirmation" and "recommitment" to existing guidelines, the Court's "confidence" in the durability of this relief must be "at an apex." *Rosebrock*, 745 F.3d at 973. But even without

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that presumption, there is no evidence that Defendant acted to strategically moot this litigation; to the contrary, the record shows that Defendant simply acted to effectuate and reaffirm existing expectations, based on its existing written guidelines, as soon as it was alerted to a deviation from those guidelines.[9] (*See id.* & Ex. 2; Larson Decl. ¶ 3 & Ex. 1.) This is not a case like *Fikre* where Plaintiff's relief is based on a discretionary decision taken independent of a controlling policy; rather, this is a case where Defendant "is not free to return to [its] old ways," 904 F.3d at 1039, because there has been a "clear" and "unequivocal" promise to both refrain from blocking Plaintiff and recommit to an existing policy of nondiscrimination, *Rosebrock*, 745 F.3d at 973.

Indeed, the University has existed since 1876. In that time, it has endeavored to honor First Amendment rights. That is why there are few, if any, occasions when the University has been sued for First Amendment violations. In light of this history of endeavoring to protect free speech, Plaintiff cannot show there is a "reasonable probability" that Defendant will block him (or anyone else) again, and Plaintiff's claims must be dismissed as moot.

V. CONCLUSION

Posting comments on public entities' social media accounts is an emerging area of free speech and First Amendment jurisprudence. Sometimes, an individual employee may make an isolated mistake in blocking a person's posts on a public entity's social media page. An isolated mistake like this, especially when immediately corrected, cannot be sufficient to establish that a public institution that is committed to free speech—like the University—is likely to suppress free speech in the future. Accordingly, based on the foregoing, Defendant respectfully requests that the Court grant this Motion and dismiss Plaintiff's claims for lack of subject-matter jurisdiction.

[9] Far from evidencing a "reasonable probability" that Plaintiff will be blocked again, Defendant's response to learning about Plaintiff's allegations demonstrates Defendant's commitment to enforcing a policy like the one prayed for by Plaintiff. (*See* Compl. at 18.)

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