Nos. 23-35097 & 23-35130

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE GILLEY,

Plaintiff-Appellant/Cross-Appellee,

v.

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

Defendants-Appellees/Cross-Appellants.

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

DEFENDANTS-APPELLEES/CROSS-APPELLANTS' OPPOSITION TO MOTION TO SUPPLEMENT THE RECORD

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INTRODUCTION

Plaintiff Bruce Gilley moves to supplement the record with new evidence—not previously presented to this Court or the district court—in support of an issue he raised for the first time at oral argument. Defendants tova stabin and the Communications Manager of the University of Oregon's Division of Equity and Inclusion oppose Gilley's motion for the following reasons.

ARGUMENT

1. Gilley has forfeited his new argument against the mootness of his nominal damages claim.

For the first time at oral argument, Gilley presented a new argument—and new facts—in support of his position that his claims for nominal damages are not moot. He now seeks to supplement the record with additional evidence supporting that argument, despite offering no explanation for his failure to raise these issues in multiple rounds of briefing at the district court, the evidentiary hearing at the district court, or even in his briefs to this Court. His argument is now forfeited. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1111 n.11 (10th Cir. 2010). As the Sixth Circuit has explained: "True, whether a party lacks 'Article III standing is jurisdictional and not subject to waiver.' But a party can forfeit its argument for why it *has* standing to sue." *Glennborough Homeowners Ass'n v. United States Postal Serv.*, 21 F.4th 410, 414 (6th Cir. 2021) (internal citations

omitted); *see also Idaho Conservation League v. United States Forest Serv.*, No. 20-35033, 2021 WL 3758320, at *3 (9th Cir. Aug. 25, 2021) ("[A]rguments, even arguments for standing, are generally forfeited or waived when presented this late in the proceedings.") (Bea, J., dissenting).

2. The new evidence Gilley wishes to present on appeal does not change whether his claim for nominal damages is moot.

Even if Gilley had not forfeited his new argument and ability to introduce new evidence, his claim for nominal damages would still be moot, and, accordingly, his motion to supplement the record is futile.

As an initial matter, a defendant moots a claim for **compensatory** damages by unilaterally paying the plaintiff's prayer for relief in full. *See Sands v. Nat'l Lab. Rels. Bd.*, 825 F.3d 778, 782 (D.C. Cir. 2016) (finding mootness where the defendant unilaterally sent the plaintiff a check for $350); *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011) (holding that a compensatory damages claim was moot because, "[a]fter [the plaintiff] filed her complaint and before the [defendant] moved for dismissal, the [defendant] paid [plaintiff] the benefits she requested in her complaint"); *Silk v. Metro. Life Ins. Co.*, 310 F. App'x 138, 139–40 (9th Cir. 2009) (same); *see also Chen v. Allstate Ins. Co.*, 819 F.3d. 1136, 1145–46 (9th Cir. 2016) (stating that the operative test is whether a defendant has "unconditionally

relinquished" its interest in the requested damages). There is no need for a settlement agreement or an act of "acceptance" by the plaintiff.

This case presents the question of whether the same is true when the damages are nominal rather than compensatory. Here, Defendants did not make an offer to pay Gilley's damages, try to settle the case (unilaterally or otherwise), or seek to elicit from Gilley an acceptance of any kind. Defendants simply paid the entire amount Gilley prayed for in full, without any conditions; and, it is not disputed, Gilley received that payment. (SER-120, 132; DC ECF No. 45-3 (delivery receipt).) In essence, Gilley told Defendants they owed him $17.91 in damages and prayed for that in his lawsuit. Defendants acceded to that demand and paid him the full amount.[1] (Again, if the prayer were for compensatory damages, Defendants' unilateral conduct clearly would have mooted the claim.)

While this precise question was not before the Supreme Court in *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), the premises stated in the Court's opinion allow only one answer. The Court said: "[N]ominal damages are [not] purely symbolic, a mere judicial token that provides no actual benefit to the plaintiff." *Id.* at 801. Rather, "nominal damages are in fact damages paid to the plaintiff, they 'affec[t] the

[1] Defendants disclaim that there was any "settlement" here. But to the extent there was any offer and acceptance, Gilley is the one who made the offer by demanding $17.91, and Defendants accepted the offer by paying the full amount.

behavior of the defendant towards the plaintiff' and thus independently provide redress." *Id.* (citation omitted). On that basis, the Court concluded that a request for nominal damages satisfies the redressability element of standing. *Id.* at 801–02.

Defendants' position applies this reasoning: If nominal damages supply the jurisdictional element of redressability because they "they 'affec[t] the behavior of the defendant towards the plaintiff' and thus independently provide redress," *id.*, then jurisdiction is lacking where nominal damages have already been paid and there are no remaining damages—or redress—for a court to provide. In this sense, nominal damages provide redressability to the same extent that compensatory damages do, and, thus, a defendant's unilateral payment of nominal damages deprives jurisdiction to the same extent as unilateral payment of compensatory damages.

Gilley argues that entry of judgment is what is necessary to moot a case when a prayer for nominal damages has already been paid by the defendant. But that cannot be right. The element of redressability is a prerequisite to the Court's subject-matter jurisdiction to enter judgment. It cannot be the law that a court's jurisdiction to enter judgment is independent of any redress that its judgment could provide. It cannot be, in other words, that a court's jurisdiction to enter judgment turns on whether the court has already entered a judgment.

Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016), is not to the contrary. In fact, the Court expressly said in *Campbell-Ewald* that it was **not** deciding the issue

presented here. *See id.* at 166 ("We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff . . . ."). That is because *Campbell-Ewald* is about an unaccepted settlement offer and this case is not. Even more, Justice Thomas, who later authored the majority opinion in *Uzuegbunam*, penned a concurrence in *Campbell-Ewald* saying that a defendant's "offer to pay the entire claim," when "accompanied by 'actually producing' the sum 'at the time of tender' in an 'unconditional' manner," would itself moot a claim. *Id.* at 170 (internal citations omitted) (cleaned up). Justice Thomas's majority opinion for the Court in *Uzuegbunam* is in accord.

In sum, whether the money was returned (or donated to charity or used for another purpose) is legally irrelevant. The nominal damages prayer was paid and received—Defendants "unconditionally relinquished" and "'bid[] [the] money an eternal farewell,'" as this Court put it in *Chen*. 819 F.3d. at 1145–46 (citation omitted). The claim for nominal damages is therefore moot; Gilley cannot keep it alive to obtain a judgment that orders Defendants to pay what they have already paid.

3. Defendants' payment of the nominal damages prayer was not gamesmanship.

There was a suggestion at oral argument that Defendants were engaged in gamesmanship by mailing a $20 bill to pay the nominal damages prayer. Defendants respectfully disagree with this suggestion and remind the Court of the context.

Gilley was blocked from interacting with @UOEquity by a single employee who acted alone. He could have contacted the head of the Division of Equity and Inclusion, the Director of Communications, the General Counsel or Deputy General Counsel, or any number of other University officials to ask to be unblocked. In short, he could have resolved the matter with a single phone call.[2] He did not. Instead, he wanted to showcase his grievances with a lawsuit that he has described as a "made in Heaven case." (ER-129.) Indeed, immediately after filing suit, Gilley even admitted to a reporter that he has no "need to read the University of Oregon's twitter account," an admission that grievously undermines his claim of self-censorship and alleged intent to interact with @UOEquity in the future. (ER-129.)

Rule 65 required Gilley to notify the University before filing his Complaint and moving for a TRO. But Gilley did not, presumably because he expected that the University might unblock him and did not want to be deprived of standing. If there

[2] It is not disputed that if Gilley had contacted University officials sooner, he would have been unblocked then. (SER-57.)

was gamesmanship afoot, it was in Gilley's violation of Rule 65 apparently to manipulate subject-matter jurisdiction.

When University officials learned that Gilley had been blocked, they unblocked him immediately and assured that he would not be blocked again. How, then, could the University—in good faith—disentangle itself from an unnecessary lawsuit? Perhaps the panel's position will be that it could not have, without Gilley's agreement. But the Defendants' decision to cut off gratuitous litigation by paying the nominal damages prayer was not an act of gamesmanship; it was a good-faith effort to avoid an expensive and unnecessary fight about an academic question of law where there was no conflict between the parties' actual legal interests.

4. Gilley has no continuing interest in this case.

The district court cannot redress Gilley's claims for nominal damages because Defendants have already sent him the money that he wants Defendants ordered to provide. What's more, Gilley has no continuing concrete interest in challenging the blocking practices of @UOEquity because, as the district court found, Gilley's blocking was a one-off "anomaly" that is not likely to recur—an indispensable prerequisite to jurisdiction, even in voluntary cessation cases. These findings are incompatible with the continuing justiciability of this case.

Indeed, as the Supreme Court has explained, "the question the voluntary cessation doctrine poses [is]: Could the allegedly wrongful behavior reasonably be

expected to recur?" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 92 (2013). The trial court's findings of fact are inconsistent with a reasonable expectation that Gilley will be blocked again, and those findings are not clearly erroneous. Continuing subject-matter jurisdiction in this case would also be at odds with this Court's decision in *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014), which found mootness under substantially similar circumstances.[3]

With respect to Gilley's pre-enforcement claims challenging the University's Social Media Guidelines, a case was referenced in oral argument that was not mentioned in either party's briefs: *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). In that case, unlike here, the plaintiffs "pleaded *specific statements* they intend[ed] to make in future election cycles." *Id.* at 161 (emphasis added). Importantly, the Ohio Elections Commission had already found probable cause that plaintiffs had violated the operative statute for making the same "specific statements," and plaintiffs were under threat of criminal penalties for making these statements again in the future. On that basis, the Supreme Court "conclude[d] that the combination of those two threats"—i.e., administrative proceedings and criminal prosecution—"suffices to create an Article III injury under the circumstances of this

[3] Gilley has sought to distinguish *Rosebrock* on the ground that University officials have discretion to continue unconstitutional blocking under the University's social media guidelines. In fact, the same was true in *Rosebrock*. 745 F.3d at 973 n.11.

case." *Id.* at 166. Gilley, by contrast, has not pleaded any "specific statements" he intends to direct to @UOEquity—nor does he offer any in his declaration at ER-307—despite years of content available for his commentary (to the contrary, he has admitted he has no "need to read" the subaccount (ER-129)); the University has never found him to be in violation of its Social Media Guidelines; and he is not under threat of either administrative proceedings or criminal prosecution. In short, his circumstances fall far short of the bar set by *Susan B. Anthony List*.

CONCLUSION

There was a revealing moment in oral argument that Defendants hope was noticed by the Court. Gilley's counsel concluded his initial argument with an explanation of why this litigation has continued despite the University's unblocking of his client and payment of the damages prayer. He said: "We want to challenge those guidelines. That's our mission at the Institute for Free Speech and our client supports that."

At bottom, that is what this case is about. It is not about whether the individual plaintiff, Gilley, can interact with @UOEquity. (Indeed, Gilley has said he has no need to interact with @UOEquity. (ER-129.)) Rather, this case is about abstract legal principles, divorced from any person's actual, concrete legal interests. For that reason, it is precisely the kind of case that justiciability doctrines foreclose. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973) ("[U]nder our constitutional

system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court.").

DATED: September 21, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because this motion contains 2,253 words excluding the parts of the motion exempted under Rule 32(f).

This motion complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this motion has been prepared in proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

DATED: September 21, 2023.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing document on September 21, 2023, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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DATED: September 21, 2023.

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