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' AMENDED MOTION TO SUPPLEMENT THE RECORD

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CIRCUIT RULE 27-1 STATEMENT

Due to an inadvertent oversight, Defendants' original motion to supplement the record, filed on August 25 as docket entry 48, did not include the position of opposing counsel, as required by the Circuit Advisory Committee Note to Circuit Rule 27-1. Counsel for Defendants has now conferred with opposing counsel by telephone, and opposing counsel opposes this motion.

RELIEF REQUESTED

Defendants-Appellees/Cross-Appellants tova stabin and the Communications Manager of the University of Oregon's Division of Equity and Inclusion (together, "Defendants") move to supplement the record with the accompanying Declaration of Misha Isaak. The declaration and its supporting exhibit present new facts relevant to the Court's subject-matter jurisdiction over Bruce Gilley's claims for prospective relief.

On August 18, 2023, Elon Musk, owner of the social media platform X, formerly known as Twitter, announced that X will no longer allow its users to block other users. (Declaration of Misha Isaak ¶¶ 2–3.) Specifically, in a post on the social media platform, Musk stated the following: "Block is going to be deleted as a 'feature', except for DMs."[1] (Exhibit A to the Declaration of Misha Isaak.)

[1] The acronym "DM" stands for "Direct Message," a form of communication on the social media platform X that allows users to send other users private chat

These new facts are relevant to resolving—and potentially dispositive of—the current appeal and cross-appeal because the justiciability of Gilley's claims for prospective relief depends on the likelihood that he will be blocked by @UOEquity on X in the future. *See Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167, 190 (2000) (holding that a claim for prospective relief is moot if the offending conduct cannot "reasonably be expected to recur"); *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (holding that a plaintiff lacks standing to seek prospective relief if he cannot demonstrate a "real and immediate threat of repeated injury").

In this case, Gilley argues that his claims for prospective relief present a live case or controversy because he has a reasonable expectation that @UOEquity will block him on X in the future. (*See* Corrected Plaintiff-Appellant/Cross-Appellee's Third Brief on Cross-Appeal at 68–75; Plaintiff-Appellant's Opening Brief at 50–56.) But if X no longer allows its users to block other users, then there is no risk that @UOEquity will block Gilley in the future, and this Court necessarily lacks jurisdiction over Gilley's claims for prospective relief.[2] *See Campbell-Ewald Co. v.*

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messages. *See About Direct Messages*, X (last visited Aug. 22, 2023), https://help.twitter.com/en/using-twitter/direct-messages.

[2] To be clear, this Court lacks jurisdiction over Gilley's claims for prospective relief independent of these new facts for the reasons outlined in Defendants' earlier merits

Gomez, 577 U.S. 153, 160–61 (2016) ("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.").

"[I]t is the duty of counsel to bring to the federal tribunal's attention, '*without delay*,' facts that may raise a question of mootness." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997) (quoting *Bd. of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam)). Indeed, this Court has held that its "[c]onsideration of new facts may even be mandatory . . . when developments render a controversy moot and thus divest us of jurisdiction." *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (citing *Arizonans for Official English*, 520 U.S. at 68 n.23); *see also Khrapunov v. Prosyankin*, 931 F.3d 922, 928 (9th Cir. 2019) (Callahan, J., concurring in the judgment) ("Reviewing courts routinely—and often necessarily—consider in the first instance evidence of events occurring after the district court's decision to determine whether the case has become moot."). It is thus common practice for this Court to exercise its inherent authority to supplement the record with facts relevant to determining its own jurisdiction.[3]

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briefing. Musk's announcement simply offers an additional, stand-alone basis upon which to find that Gilley cannot reasonably expect to be blocked on X in the future.

[3] *See, e.g.*, *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1020 n.3 (9th Cir. 2010) ("Because the new facts that the defendants seek to establish bear on whether the controversy before us is moot, we exercise our discretion to supplement

CONCLUSION

Because Musk's announcement that X will no longer offer a blocking function is relevant to whether this Court has subject-matter jurisdiction over Gilley's claims for prospective relief, Defendants respectfully request that the Court grant their motion to supplement the record.

DATED: August 28, 2023.

Respectfully submitted,

/s/Misha Isaak

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the record on appeal so that we may determine whether we have jurisdiction over the . . . claims for declaratory and injunctive relief."); *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1141 n.3 (9th Cir. 2016) (citing *Johnson* and granting the defendants' motion to supplement the record with new jurisdictional facts); *Khrapunov*, 931 F.3d at 924 n.2 (same); *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F4th 954, 960 n.5 (9th Cir. 2021) (same); *see also Flores v. Bennett*, No. 22-16762, 2023 WL 4946605, at *1 n.1 (9th Cir. Aug. 3, 2023) (unpublished) ("As the existence of the Replacement Policy bears directly on the question of mootness, we GRANT the motion to supplement the record."); *Hecox v. Little*, Nos. 20-35813 & No. 20-35815, 2023 WL 1097255, at *1 n.1 (9th Cir. Jan. 30, 2023) (unpublished) ("As the facts in [plaintiff's] declaration bear directly on the question of mootness, we grant her motion to supplement the record on appeal.").

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 943 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: August 28, 2023

STOEL RIVES LLP

/s/Misha Isaak
Misha Isaak (SB #086430)

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing document on August 28, 2023, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

DATED: August 28, 2023

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