



## INSTITUTE FOR FREE SPEECH

October 13, 2023

Molly Dwyer, Clerk of Court  
Office of the Clerk  
U.S. Court of Appeals for the Ninth Circuit  
P.O. Box 193939  
San Francisco, CA 94119-3939

Re: Rule 28(j) Letter in *Bruce Gilley v. Tova Stabin, et al.*,  
Nos. 23-35097, 23-35130  
Submitted after oral argument on September 13, 2023 at 09:00  
A.M. in SE 7th Floor, Courtroom 2, in Seattle.

Dear Ms. Dwyer:

UO's latest Rule 28(j) letter attaching a cert petition as supplemental legal authority is inappropriate. A brief is argument, not authority. UO has already exhausted its word count.

UO also exaggerates the significance of the cert grant in *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022).

First, a cert grant is not definitive. It remains to be seen how the Supreme Court will rule. Second, Gilley cited to *Fikre v. FBI*, 904 F.3d 1033 (9th Cir. 2018) (*Fikre I*), not *Fikre II*, which garnered the cert grant. Dkt. #34 at 68-76. Third, *Fikre II* raises national-security concerns regarding placement on the federal government's no-fly list that are different from the social-media speech issues presented in Gilley. See Dkt. #59 at 33 (watchlist decisions implicate sensitive state and military secrets).


Fourth, Gilley relied on numerous other cases for the proposition that his case is not moot. Dkt. #34 at 68-76. Chief among them is *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014), which stands for the proposition that among the non-exclusive factors for evaluating mootness in a non-legislative context is whether the government's

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policy change was catalyzed by the plaintiff and fully addresses the objectionable measures. Here those factors cut strongly against mootness because UO doesn't even have a policy that it has changed—it has only written guidelines that enshrine viewpoint discrimination against “offensive” posts and contain subjective blocking criteria that fail to cabin official discretion.

UO also hasn't come clean. Initially, it told Gilley it didn't have any written blocking criteria and kept him blocked. Then it tried to pretend that its criteria had always been public. Then it asserted that it blocked Gilley for being off-topic, not because UO disagreed with his views, despite emails that show the opposite. Moreover, UO still defends its guidelines, which authorize viewpoint discrimination going forward. *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (Seattle school district continued to defend its race-based program). UO's gamesmanship will continue unless this Court puts a stop to it.

Sincerely,



Endel Kolde  
Counsel for Bruce Gilley  
Plaintiff-Appellant/Cross-Appellee

In compliance with Circuit Rule 28–6, the body of this letter contains 344 words, as counted by Microsoft Word.