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-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' PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

AND ALTERNATIVE REQUEST FOR PUBLICATION

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Defendants-Appellees/Cross-Appellants tova stabin and the Communication Manager of the Division of Equity and Inclusion at the University of Oregon (collectively, "Defendants") hereby petition for panel rehearing or rehearing en banc, pursuant to Federal Rules of Appellate Procedure 40 and 35(b), and in the alternative, for publication, pursuant to Ninth Circuit Rule 36-4.

INTRODUCTION AND RULE 35 STATEMENT

A case becomes moot when outside events effectively grant the plaintiff the relief he might have won in litigation. Though a defendant's choice to suspend its challenged conduct will sometimes moot a case, mootness is not automatic. That is because the defendant may be dodging accountability by trying to obtain dismissal with a plan of later resuming the offending conduct. Thus, "a defendant's voluntary cessation of a challenged practice will moot a case only if the defendant can show that the practice cannot reasonably be expected to recur." *FBI v. Fikre*, 601 U.S. __, 144 S. Ct. 771, 777 (2024) (cleaned up).

That is the Supreme Court's straightforward clarification of the "voluntary cessation doctrine," in a decision issued last month: "[**A**] **defendant's voluntary cessation of a challenged practice will moot a case only if the defendant can show that the practice cannot reasonably be expected to recur**." *Id.*

In contrast to the Supreme Court's simple statement of the law, this circuit's law on voluntary cessation is inconstant and disarrayed. Panels motivated to let

sympathetic plaintiffs have their day in court focus on the defendant's "heavy burden" of making "absolutely clear" that the challenged conduct won't recur. Panels inclined in the other direction lean on the "presumption" that government-defendants act "in good faith" when they change behavior. One of this court's voluntary cessation cases—*Rosebrock v. Mathis*, 745 F.3d 963 (9th Cir. 2014)—announces a five-factor test to evaluate claims of mootness. But subsequent voluntary cessation cases ignore *Rosebrock*'s factors and veer in other directions. A disproportionate number of voluntary cessation cases in this circuit have dissents (including this one). In this circuit, it is virtually impossible for litigants in voluntary cessation scenarios to know whether their case is moot, even though it is a jurisdictional issue.

This case illustrates the problem. Plaintiff Bruce Gilley sued the University of Oregon for violating his free speech because an employee in the Division of Equity and Inclusion, tova stabin, temporarily blocked him from the Division's Twitter subaccount. She made that decision on her own because Gilley had responded to a post with what stabin thought was an off-topic and disruptive comment. Before the lawsuit was filed, University officials were unaware that stabin blocked Gilley because Gilley made no effort to contest the blocking decision or otherwise inform any University officials. As soon as they learned Gilley was blocked, they immediately ordered that he be unblocked and assured

Gilley in writing that he would not be blocked again. The University's chief legal officer also directed that social media subaccount managers be reminded of the University's free-speech-favoring policy.

The very relief Gilley sought in his Complaint—to be unblocked and assured he would not be blocked again—was ordered by the University hours after he filed his lawsuit. That mooted his claim for prospective relief.

After receiving live testimony and documentary evidence, including undisputed deposition testimony from two University Vice Presidents, the district court made findings of fact that the University's unblocking of Gilley was in good faith, that the blocking incident was an anomaly for the University, that no person other than stabin had been involved in the blocking decision, that stabin was now retired, and that Gilley would not be blocked again—that is, the district court found that the challenged conduct (the blocking of Gilley) is not likely to recur. Those findings were grounded in substantial evidence (including uncontested evidence and credibility determinations) and, thus, are conspicuously unchallenged and unaddressed in the panel majority's decision. If the Supreme Court's recent statement of the law is accepted—*i.e.*, that a case is moot "if the defendant can show that the practice cannot reasonably be expected to recur"—the mootness inquiry would be over. Here, Defendants literally *did* show, and the trial court found, that blocking Gilley was unlikely to recur.

But in the thicket of this court's jumbled doctrine, the panel majority found a path to the conclusion that the case is not moot—despite taking no issue with the district court's findings of fact. Although the district court found that Gilley would not suffer the same injury again, the panel majority said that Defendants had not met their "heavy burden" because preexisting guidelines for managing University social media subaccounts lack formality and thus could be changed.

What do the guidelines have to do with it? If Gilley won't be blocked again, there is no prospective relief left for him to win. The district court certainly cannot award *Gilley* an injunction that benefits only *other people*. Whether a policy that preexisted the litigation lacks formality or can be changed—indeed, whether the policy never existed at all—is irrelevant to mootness in these circumstances. Mootness turns on one thing and only one thing: is the defendant likely to injure the plaintiff again? If it is not, prospective claims are moot. That is what the Supreme Court said just a few weeks ago in *Fikre*.

The disagreement between the panel majority's decision and Judge Fletcher's dissent illustrates the confused state of this circuit's law on voluntary cessation. Because the panel majority's decision is irreconcilable with the Supreme Court's recent decision in *Fikre*, 144 S. Ct. 771, and with this court's decision in *Rosebrock*, 745 F.3d 963, Defendants respectfully request that the panel grant rehearing or that the en banc court take up this case to clarify circuit law.

Not only does the panel majority's decision conflict with decisions of the Supreme Court and of this court, *see* Fed. R. App. P. 35(b)(1)(A); the doctrine at issue—the voluntary cessation exception to mootness—is a matter of exceptional importance, *see* Fed. R. App. P. 35(b)(1)(B). Large government institutions like public universities manage numerous departments and thousands of employees, some of whom sometimes make one-off mistakes. An institution's ability to correct mistakes—swiftly and in good faith—is necessary to avoid imposing on taxpayers and tuition-paying students and parents the exorbitant expenses and burdens of protracted litigation. The panel majority's decision allows plaintiffs who suffer no ongoing injury to pummel government institutions and drain the public fisc on fights over abstract and hypothetical questions.

In the alternative, pursuant to Ninth Circuit Rule 36-4, the panel should issue a published opinion that announces the new legal rule that necessarily underlies its disposition of this appeal: that a case is not moot when a plaintiff challenges a standing policy, even if he will not be injured by the policy in the future, as long as the policy could later be subject to change. That rule is the lynchpin of the panel majority's decision; it is the nub of disagreement with the dissent; and if it controls this case, the court should say so in a published decision.

STATEMENT

I. Summary of Background Facts

Gilley sued the University for allegedly violating his free speech after he was temporarily blocked from interacting with a Twitter subaccount of the University's Division of Equity and Inclusion. ER-308-34. The subaccount was managed by stabin, who made the decision to block Gilley on her own, without consulting or notifying any other University officials. ER-105:5-18. She blocked Gilley because she thought his post was off-topic and therefore disruptive. ER-65:8-25:4. Stabin is now retired and no longer works at the University. ER-107:3-9. Gilley seeks an award of damages against stabin for $17.91 and prospective relief against the University. ER-308-34.

If Gilley had alerted University administrators that stabin had blocked him, they immediately would have directed that he be unblocked. SER-35:23-36:3, SER-58:6-59:8. But Gilley, who has made a name for himself as a provocateur and crusader against "cancel culture," saw the situation as a "made in Heaven" opportunity to promote himself as a victim of cancel culture once again. ER-129:2-12, ER-127:7-128:19. Thus, rather than contact University administrators to restore his access, Gilley sued. ER-123:25-124:13. And to ensure that University officials would not jeopardize his standing by unblocking him, Gilley and his lawyers did not notify the University of their planned lawsuit and motion for temporary

restraining order—in violation of Rule 65(b)(1)(B). ER-420-21 (ECF#7).

As soon as University administrators learned that Gilley had been blocked—when they heard about the suit through media inquiries before the University was even served—they directed that he be unblocked. SER-127, 131. The University's General Counsel used the occasion to remind social media subaccount managers never to block based on viewpoint, and he sent a letter to Gilley's counsel assuring that Gilley would not be blocked again. SER-131. The University also tendered to Gilley the full amount of damages he claimed.

With no ongoing injury to Gilley, the University promptly moved to dismiss the case for lack of subject-matter jurisdiction. ECF#23. Gilley moved for a preliminary injunction. ECF#2, 7. The district court heard both motions together and, in a single order, denied them both. ER-2-37.

Importantly, after receiving live testimony and documentary evidence, the district court made factual findings that:

- The University's "actions point to a low likelihood that Plaintiff will be blocked again." 1-ER-34.
- Gilley failed to show "a reasonable likelihood that he will be blocked again," that "enforcement (i.e., blocking) is reasonably likely to occur," or that the University "is likely to block him on Twitter in the future for the exercise of protected speech." 1-ER-32, 34.
- "The Court rejects Plaintiff's contention that the University's unblocking of his Twitter account is temporary or that the University is not acting in good faith." 1-ER-17.

- "[I]t would be speculative to conclude that [stabin's] unknown successor is likely to block Plaintiff on Twitter again." 1-ER-35.
- stabin "acted alone in blocking Plaintiff and did not consult any other University staff after she blocked him." *Id.*
- "Plaintiff has failed to establish a pattern of viewpoint-based blocking by the University," and "Defendant stabin's blocking of Plaintiff was an anomaly." 1-ER-32, 34.

Gilley appealed the denial of his motion for preliminary injunction and Defendants cross-appealed the denial of their motion to dismiss for lack of subject-matter jurisdiction.

In a split decision, the panel majority concluded that Gilley's claims for prospective relief were not moot, citing the voluntary cessation exception. The panel majority said the University's "policy" prohibiting viewpoint discrimination (*i.e.*, its guidelines for managers of social media channels) lacks formality, could be reversed, and lacks procedural safeguards.

The panel majority made no mention of the district court's factual findings that the University would not block Gilley again—presumably because the findings are entitled to deference unless clearly erroneous. *See Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 949 (9th Cir. 2019) (mootness); *In re Palmdale Hills Prop., LLC*, 654 F.3d 868, 873 (9th Cir. 2011) (standing). Those findings are appropriately within the district court's purview. *See Worth v. Jackson*, 451 F.3d 854, 861 (D.C. Cir. 2006) (relying on *United States v. Concnt'd*

Phosphate Export Ass'n, 393 U.S. 199, 203–04 (1968), for the proposition that whether "the likelihood of further violations is sufficiently remote … is a matter for the trial judge"). Again, they are unchallenged by the panel majority.

Judge Fletcher dissented. Echoing the district court's finding "that stabin's decision to block Gilley was an anomaly," Judge Fletcher concluded: "there has been clear voluntary cessation, with virtually no likelihood of resumption." The panel majority did not engage with Judge Fletcher's well-reasoned dissent.

II. The Panel Majority's Decision Holds The Case Is Not Moot Despite No Likelihood of Recurrence, In Contravention Of *Fikre*

In an appeal from a decision of this court, the Supreme Court this term clarified the voluntary cessation doctrine by reducing it to a simple formulation: "[A] defendant's voluntary cessation of a challenged practice will moot a case only if the defendant can show that the practice cannot reasonably be expected to recur." *Fikre*, 144 S. Ct. at 777 (cleaned up). The Court's meaning was clear that for a case to be justiciable, the challenged conduct must be reasonably likely to recur ***to the plaintiff***. That is apparent, both in *Fikre*'s text and in background principles of justiciability.

Starting with *Fikre*'s text, the plaintiff in that case, Fikre, challenged the FBI's placement of him on the No Fly List. Years into the litigation, the FBI removed him from the No Fly List and said in a declaration that he "will not be placed on the No Fly List in the future based on the currently available

information." *Id.* at 776. But this assurance was not enough to show that the FBI would not someday return Fikre to the No Fly List. That the FBI would not relist him "based on the currently available information," the Court reasoned, did not foreclose relisting him based on ***new*** information. *Id.* at 778. The Court's decision turns on whether the government showed that it would not again relist ***Mr. Fikre***.[1]

In *Fikre*, the Ninth Circuit's decision below had strayed beyond that narrow inquiry. The court deemed it relevant that the FBI adopted no policy change and that it had not "acquiesce[d] to the righteousness of Fikre's contentions" by "repudiat[ing] the decision" to list Fikre in the first place. *Fikre v. FBI*, 904 F.3d 1033, 1040 (9th Cir. 2018). The Supreme Court disapproved these considerations, holding a change of policy or repudiation of past conduct is not necessary to moot a case. "[O]ften a case will become moot even when a defendant 'vehemently' insists on the propriety of 'the conduct that precipitated the lawsuit.'" *Fikre*, 144 S. Ct. at 779 (citation omitted). The Court said: "It is on [one] consideration alone—the potential for a defendant's future conduct—that we rest our judgment." *Id.*

That approach is consistent with justiciability doctrine generally. Mootness

[1] This is consistent with decisions of this court that frame the voluntary cessation inquiry as whether not just the defendant's conduct, but also the plaintiff's injury, is likely to recur. *See, e.g.*, *Students for a Conservative Am. v. Greenwood*, 378 F.3d 1129, 1131 (9th Cir.), *amended*, 391 F.3d 978 (9th Cir. 2004) ("[T]here is no reasonable expectation that the injury the plaintiffs suffered will recur."); *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1511 (9th Cir. 1994) (finding no "reasonable expectation that the same alleged injury will recur.").

arises from Article III's limitation of federal jurisdiction to "cases" and "controversies." The cases-and-controversies limitation restricts federal judicial power "to redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). "This requirement assures that 'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.' Where that need does not exist, allowing courts to oversee legislative or executive action 'would significantly alter the allocation of power ... away from a democratic form of government.'" *Id.* (internal citations omitted). As the Supreme Court has memorably said: "[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[.]" *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973).

For these reasons, in *City of Los Angeles v. Lyons*, 461 U.S. 95, 97 (1983), the Supreme Court famously found non-justiciable a challenge to a city policy authorizing police chokeholds by a plaintiff who had been subjected to one. Although the plaintiff, Lyons, wished to challenge the policy, his claim was not justiciable absent "a real and immediate threat" that he would be stopped by police and subjected to an unwarranted chokehold again. *Id.* at 105. That the challenged

policy was still in force did not create a justiciable controversy.[2]

Mootness is no different. This court's mootness cases have said that an actual, live controversy between the parties must persist throughout the litigation; "the possibility of a future controversy between a complaining party and some other person, not a party to the current lawsuit, does not fulfill the case or controversy requirement of article III." *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985). As in *Lyons* and *Fikre*, the justiciability of Gilley's claims for prospective relief turns on whether he is likely be injured again by recurrence of the University's challenged conduct. Since he is not, his case is moot.

III. The Panel Majority's Decision Is In Conflict With This Court's Decision In *Rosebrock*

The facts of this case are remarkably aligned with those of *Rosebrock*, 745 F.3d 963. That the panel majority reached a different result than that compelled by *Rosebrock* exemplifies the inconstancy of this court's voluntary cessation cases.

In *Rosebrock*—also a free speech case—a Department of Veterans Affairs official had barred the plaintiff from hanging on a fence the American flag "union

[2] Gilley distinguishes *Lyons* as a case about standing, not mootness. But the relevant principles in *Lyons* apply to both doctrines and, in any event, Gilley's challenge to the guidelines does implicate standing. Gilley was unblocked before amending his complaint to challenge the guidelines and he brings a pre-enforcement challenge to portions of the guidelines never applied to him. *See Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1044 (9th Cir. 2015) (standing determined from the circumstances at the time of amendment).

down." The VA official had selectively enforced against the plaintiff a regulation that prohibited the posting of materials on VA property (except when authorized by the head of the VA facility in question or a designee). After the lawsuit was filed, the VA changed course and decided to strictly enforce the regulation by barring the posting of all materials. The VA argued that the change mooted the case because it was no longer perpetrating viewpoint discrimination.

This court agreed. The court's rationale was that the VA action at issue—an isolated deviation from, and then return to, a standing policy—"did not effect a policy change[.]" *Id.* at 972. Rather, the VA's changed course was "more aptly described as reemphasizing, or recommitting to, an existing policy." *Id.* In this context, there is "little concern" that a government defendant "is engaged in gamesmanship[.]" *Id.* at 973. "[R]ecommitment" to a standing policy "makes it particularly unlikely that [the government defendant] will change its policy in the future" and "increases … confidence that 'the challenged conduct cannot reasonably be expected to recur.'" *Id.* at 973.

Remarkably similar circumstances are present here. A low-level University employee unilaterally departed from the University's standing directives to social media subaccount managers. And as soon as University officials learned she had blocked Gilley, they immediately directed that he be unblocked and reminded all subaccount managers of the free-speech-favoring guidelines for social media

managers. It is undisputed that if University officials had learned of Gilley's blocking sooner, before the lawsuit was filed, they would have directed that he be unblocked then.

Gilley emphasizes that he challenges not just stabin's decision to block him, but also the guidelines. He contends that even if he will not be blocked again, his challenge to the guidelines remains a live controversy. But the same argument was rejected in *Rosebrock*.

There, as here, the plaintiff argued the case was not moot because the policy to which the VA had recommitted allowed administrators to retain unconstitutional discretion. 745 F.3d at 973 n.11. *Rosebrock* rejected that argument because the VA had stopped singling out the plaintiff, recommitted itself to consistent enforcement of an existing policy, and was entitled to a presumption of good faith. *Id.* That the VA's challenged conduct was undertaken pursuant to a standing policy, which itself authorized the exercise of potentially unconstitutional discretion, did not undermine the mootness of the plaintiff's claims based on the low probability that he would be targeted again.

This case is the same. Gilley says that a government-defendant's unconstitutional conduct was pursuant to an underlying policy that itself allows unconstitutional discretion. But, though the policy did not save the plaintiff's claims from mootness in *Rosebrock*, the panel majority here says it does. The two

conclusions cannot be reconciled.

The panel majority gets offtrack by confusing a single act that the University voluntarily reversed—blocking Gilley—with an underlying policy against viewpoint discrimination that has ***not*** changed during the litigation. No one contends that the University altered its social media guidelines in response to the litigation, and so whether the guidelines lack formality, can be "reversed" (whatever that means in this context), and lack procedural safeguards is immaterial to the voluntary-cessation inquiry. The guidelines have not changed; it is not at issue whether they can be changed back to something that is unconstitutional. Rather, voluntary cessation asks whether the conduct that ***did*** change—here, blocking (and then unblocking) Gilley—might recur. But, as the district court found (findings with which the panel majority finds no clear error), and as Judge Fletcher says in dissent, there is "virtually no likelihood of resumption" of the blocking of Gilley. 2024 WL 1007480, at *3 (Fletcher, J., dissenting). Because the University showed there is virtually no likelihood of resumption of blocking Gilley, it necessarily showed "that the practice cannot reasonably be expected to recur." *Fikre*, 144 S. Ct. at 777.

Finally, the en banc court should not overlook this case just because the panel majority did not publish an opinion. A published opinion should have been issued because the rule that apparently underlies the decision—*i.e.*, that a case is

not moot when a plaintiff challenges a standing policy, even if it will not injure him in the future, as long as that policy could later be subject to change—is new. Moreover, although this court's practice is not to cite memoranda dispositions, there is no such norm among district courts. *See* 9th Cir. R. 36-3(b). This decision will thus contribute to the voluntary cessation doctrine's confused state in this circuit, leaving district courts to question the continuing authority of *Rosebrock* and searching to reconcile the panel majority's decision with *Fikre*.

CONCLUSION

Taking a step back, it is not a matter of serious dispute that Gilley won't be blocked again. He was blocked once, by one employee, who acted alone, and who is now retired. The record contains no indication that any other University employee has ever blocked another user. Within hours of learning that Gilley was blocked, University officials directed that he be unblocked. It is not disputed that he would have been unblocked sooner if they had known sooner. Upon these facts, the district court found that Gilley's injury is not likely to recur—findings with which the panel majority finds no error.

If Gilley is not at risk that his injury will recur, what are we doing here?

In addition to the panel majority's decision conflicting with *Fikre* and *Rosebrock*, its holding imposes untenable burdens on public institutions like universities. Employees in large government bodies sometimes make mistakes.

Institutional decisionmakers must have the ability to correct course in good faith when they learn of such mistakes without being drawn into protracted, expensive, and disruptive litigation.

For the foregoing reasons, Defendants respectfully petition for panel rehearing or rehearing en banc, and in the alternative, for publication.

DATED: April 22, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Motion's type styles, typeface, and format comply with Fed. R. App. P. 27(d)(1), 32(a)(5), and 32(a)(6). I certify that this Motion complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) and contains 3,884 words.

DATED: April 22, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing/attached document(s) on this date 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: April 22, 2024.

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NOT FOR PUBLICATION

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE GILLEY, Plaintiff-Appellant, v. TOVA STABIN, in her individual capacity; COMMUNICATION MANAGER OF THE UNIVERSITY OF OREGON'S DIVISION OF EQUITY AND INCLUSION, in his or her official capacity, Defendants-Appellees.	No. 23-35097 D.C. No. 3:22-cv-01181-HZ MEMORANDUM*

BRUCE GILLEY, Plaintiff-Appellee, v. TOVA STABIN, in her individual capacity; COMMUNICATION MANAGER OF THE UNIVERSITY OF OREGON'S DIVISION OF EQUITY AND INCLUSION, in his or her official capacity, Defendants-Appellants.	No. 23-35130 D.C. No. 3:22-cv-01181-HZ

Appeal from the United States District Court

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

for the District of Oregon
Marco A. Hernandez, Chief District Judge, Presiding

Argued and Submitted September 13, 2023
Seattle, Washington

Before: W. FLETCHER, R. NELSON, and COLLINS, Circuit Judges.
Dissent by Judge W. FLETCHER.

This dispute arises from Twitter interactions between a University of Oregon employee and Bruce Gilley. Using the University's @UOEquity Twitter account, tova stabin,[1] then Communication Manager for the University's Division of Equity and Inclusion, tweeted a prompt purporting to show ways to respond to racist comments. Gilley quote tweeted the "racism interrupter" tweet by saying that "all men are created equal." In response, stabin blocked him from the University's @UOEquity account. His blocking lasted for two months. During that time, Gilley attempted to learn what policies governed his blocking. The University denied the existence of any such policy.

Gilley sued stabin, in her personal and official capacities, for violating his First Amendment rights. He sought damages, a declaratory judgment, and injunctive relief. In response, the University unblocked him and moved to dismiss the complaint as moot. Gilley moved for a preliminary injunction. The district court denied both motions, and both parties appealed. We have jurisdiction over Gilley's

[1] We follow stabin's convention of not capitalizing her name.

appeal under 28 U.S.C. § 1292. We vacate the district court's denial of the preliminary injunction. We dismiss stabin's appeal for lack of jurisdiction.

1. The denial of a motion to dismiss, "even when the motion is based upon jurisdictional grounds," is not appealable. *Catlin v. United States*, 324 U.S. 229, 236 (1945). We dismiss stabin's cross-appeal, No. 23-35130, for lack of a final judgment. The issues animating the claim for $17.91 in nominal damages are not sufficiently intertwined with Gilley's appeal.[2]

2. Although the University of Oregon no longer blocks Gilley on Twitter, the request for prospective relief is not moot. Mootness turns on whether the voluntary cessation exception applies because "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). As the party asserting that "the challenged conduct cannot reasonably be expected to start up again," the University bears the "heavy" burden of making that showing. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Since the University's decision to unblock Gilley was not due to a statutory or regulatory change, the factors set out in *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014), govern whether the University's challenged conduct may recur. Given the policy's lack of formality and relative

[2] We need not decide whether the $20 payment that was the basis of stabin's mootness argument was returned. We deny the motion to supplement the record with proof that the $20 had been returned as moot.

novelty, how easily the policy can be reversed, and the lack of procedural safeguards to protect from arbitrary action, the University has not met its heavy burden to show that the conduct cannot reasonably be expected to recur.

3. Gilley has standing to seek prospective relief for his as-applied challenge after he was blocked for his "all men are created equal" tweet. Standing is assessed when the complaint is filed. *See Friends of the Earth,* 528 U.S. at 191.[3] There is no dispute that Gilley was blocked from viewing the @UOEquity account when he filed his complaint. Because the voluntary-cessation doctrine applies, Gilley still has standing to seek an injunction preventing future blocking.

4. We remand to the district court to reconsider whether Gilley has standing to seek pre-enforcement facial relief under the proper standard we address above, namely that standing is assessed at the time of the complaint. In deciding this issue in the first instance, the district court should be mindful that the Supreme Court has allowed "pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). "[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). And

[3] Having dismissed stabin's appeal, we do not consider Gilley's standing to seek retrospective relief from his as-applied challenge.

"evidence of past instances of enforcement"—such as the enforcement Gilley experienced when he was blocked from viewing a government account for months—"is important in a standing inquiry." *Id*.

5. We affirm the district court's conclusion that Gilley has raised serious questions on the merits of some of his claims. We reject its conclusion, however, that Gilley failed to adequately allege a risk of irreparable injury. Again, he had been blocked for two months when he first sought injunctive relief. During that time, he sought to learn information on the policy pursuant to which he was blocked without having to petition the courts. The University denied that there was such a policy throughout the period that Gilley remained blocked. The University later disclosed to Gilley its internal social media policy that contained criteria for blocking users and claimed that this policy was operative at the time of Gilley's blocking. In arguing before us that there was a policy, but that stabin violated it, the University shows that it lacks sufficient policies to prevent such departures from policy by a rogue employee. These facts readily demonstrate irreparable harm. When, as here, a constitutional injury is "threatened and occurring at the time of respondents' motion," there is a risk of irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 374 (1976) (plurality). Given the irreparable harm that Gilley actually faced in the months before he filed this action, he has carried his burden of showing "*some* cognizable danger" of a recurrent violation beyond that necessary to avoid mootness.

See United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (emphasis added).

Stabin's appeal is **DISMISSED.**

The order denying the preliminary injunction is **VACATED AND REMANDED.**

FILED

MAR 8 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Gilley v. Stabin, No. 23-35097

W. Fletcher, J., dissenting:

I respectfully disagree with my colleagues' conclusion regarding mootness. When the University learned that Gilley had been blocked, it immediately unblocked him and rejected stabin's decision to block him as inconsistent with its prohibition on viewpoint discrimination. Gilley's request for prospective relief is therefore moot.

stabin blocked Gilley on one occasion. She acted alone and without the knowledge or approval of any other University employee. The University unblocked Gilley the day it learned of his lawsuit. stabin retired the same day.

A few days later, the University sent Gilley a letter stating that it "does not intend to block [Gilley] or anyone else in the future based on their exercise of protected speech." The University also reiterated to its employees that, under its social media guidelines, "[w]e don't delete comments or block users because they are critical or because we disagree with the sentiment or viewpoint." It instructed its employees to "unblock any users you have blocked immediately unless you can make a compelling case that they have violated the guidelines." There is no evidence the University will block Gilley again or modify the guidelines' prohibition on viewpoint discrimination.

The majority holds that the University has not carried its burden to show mootness because its guidelines "lack . . . formality"; are relatively new; and lack "procedural safeguards." But it is undisputed that the record shows that the guidelines are written; that the guidelines have existed since at least 2019; and that employees are subject to discipline if they fail to abide by the guidelines. The record further shows that stabin's decision to block Gilley was an anomaly. There have been the 2,558 retweets and replies directed at the @UOEquity account in the past decade. Only three users (including Gilley) have been blocked during that period.

The University unblocked Gilley immediately upon learning of stabin's action. In unblocking Gilley, the University "did not effect a policy change in the typical sense" because it did not make any modifications to the guidelines. *Rosebrock v. Mathis*, 745 F.3d 963, 973 (9th Cir. 2014). Instead, in reversing stabin's action, the University reiterated that the guidelines prohibit viewpoint discrimination. When, as here, a government defendant "states that it will be more vigilant in following a previously existing policy" in a non-discriminatory manner, "[o]ur confidence in the Government's voluntary cessation . . . is at an apex." *Id.*

On this record, there has been clear voluntary cessation, with virtually no likelihood of resumption. Gilley's request for an injunction is therefore moot.

I respectfully dissent.