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-Appellant.

Appeal from an Order
of the United States District Court
for the District of Oregon, The Hon. Marco A. Hernandez
(Dist. Ct. No. 3:22-cv-01181-HZ)

BRUCE GILLEY'S REPLY RE: MOTION TO SUPPLEMENT RECORD RE: RETURN OF $20 BILL

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REPLY ARGUMENT

I. THE UO DEFENDANTS HAVE EFFECTIVELY CONCEDED THAT GILLEY RETURNED THE $20 BILL

At oral argument, UO's counsel evaded the Court's question about the return of the $20 bill. Now, given another opportunity to contest Gilley's counsel's claim that he returned it, UO has filed a response (Dkt. #57) that is again silent about the $20 bill's status. UO did not contest Susan Bradley's declaration that she shipped it to Misha Isaak in November 2022 and that UPS delivered it.

As a result, UO has now effectively admitted that the $20 bill was returned to its counsel.

II. UO BEARS THE BURDEN OF PROVING MOOTNESS AND MAY NOT RELY ON THE FICTION THAT GILLEY KEPT THE $20 BILL

Rather than engaging with the substance of Gilley's motion, UO has attempted to change the subject and argue that Gilley somehow "forfeited" the argument that he returned the $20 bill. The cases cited by UO do not involve comparable facts or legal arguments and amount to little more than an attempt to distract the Court from the evidence.

Gilley doesn't have to disprove mootness. UO cross-appealed on mootness and must carry its own burden. At the start of litigation, the burden rests on the plaintiff, "as the party invoking federal jurisdiction," to show his standing to sue. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). No one contests that Gilley remained blocked at the time he filed suit. Thus, there is no standing issue before the Court on nominal damages.

But the burden shifts if the defendant (or any party) later claims that some development has mooted the case and that party then bears the heavy burden of persuading the court that there is no longer a live controversy. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citations omitted); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1168 (9th Cir. 2022) (citations omitted).

Thus, as the party asserting mootness by way of "transitioning custody of $20," UO must set forth evidence supporting its assertion. In attempting to meet that burden, UO may not rely on the fiction that Bruce Gilley kept the $20 bill, especially when UO's counsel knows otherwise. At this point, everyone involved in this case knows that Gilley returned it.

Rather than admit the obvious, UO seeks to play a game of gotcha about what was in the record. At best, that record (in its un-supplemented state) establishes that, at one point, UO delivered a $20 bill to Gilley's counsel's DC office—not that Gilley, or his counsel, pocketed the bill. With supplementation, the record shows that Gilley returned the $20 bill—and that UO's attempt to *imply* that he kept it is contradicted by actual events.

It would be a manifest injustice for UO to prevail on a mootness claim under such circumstances.

III. GILLEY ALSO HAS A LIVE CLAIM FOR PRE-ENFORCEMENT STANDING AGAINST UO'S BLOCKING POLICY

In a parting shot, UO's response also argues that "Gilley has no continuing concrete interest in challenging the blocking practices of @UEquity because . . . Gilley's blocking was a one-off 'anomaly' . . . ." Dkt. #57 at 8. But this argument ignores decades of precedent allowing pre-enforcement challenges to speech restrictions.

Although UO originally concealed their existence, UO maintains written blocking guidelines that allow it to block or ban persons who

post "offensive" or other protected speech. 3-ER-339.[1] The record also shows that Gilley intended his original re-tweet about "equality" to be a "criticism of the DEI ideology reflected in the original [racism interrupter] Tweet and [Gilley] hoped that it would cause others to think about [his] viewpoint, and perhaps engender further discussion on Twitter." 3-ER-411–412. That political speech triggered the original block.

Having later learned about UO's internal blocking guidelines, he is now even more concerned about experiencing a future block or long-term ban for irritating UO's officials. 3-ER-307. Like his original re-tweet, Gilley asserted that he intends his future interactions with @UOEquity "to be provocative in order to stimulate a conversation or introspection about DEI." *Id.*

Gilley's declaration of his future intentions is no less concrete than those of the plaintiffs who intended to engage in "substantially similar" future political speech in *Susan B. Anthony List v. Driehaus*, 573 U.S.

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[1] Giving offense is itself a protected viewpoint. *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1131 (9th Cir. 2018).

149, 161 (2014). It is enough that Gilley plans to post provocative comments in the future and in the face of a policy that authorizes UO officials to block him for being offensive (among other things).

Moreover, the existence of UO's blocking guidelines is itself enough to provide Gilley with a justiciable case because those guidelines fail to cabin official discretion. The well-developed body of caselaw allowing facial challenges to speech-licensing schemes is consistent with both pre-enforcement standing doctrine and Gilley's position in this case.

"[O]ur cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 755-56) (1988); *see also Spirit of Aloha Temple v. Cnty. of Maui,* 49 F.4th 1180, 1189 (2022) (citing *Lakewood* and holding that laws that regulate expression or conduct associated with expression may be challenged facially); *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012) ("[T]he record indicates that permits for commercial weddings have been issued as a matter of course, and that the discretionary

power reserved in Paragraphs 18 and 21 *has never been exercised.* However, *because the potential for the exercise of such power exists,* we hold that this discretionary power is inconsistent with the First Amendment.") (emphasis added).

Gilley's opportunity to interact with a government social-media account is worthy of *at least* as much legal protection as the right to obtain a license to speak through a newspaper dispenser on a sidewalk, a church-based bed-and-breakfast and event center, or a tropical-beach wedding venue. A license to speak is but an opportunity to speak and that is what Gilley seeks, without needing to worry about whether he crosses some unseen line. *See also Freedom from Religion Found., Inc. v. Abbott,* 955 F.3d 417, 427 (5th Cir. 2020) (citing *Lakewood* and applying unbridled discretion doctrine in a limited public forum).

If anything, Gilley should be entitled to *more* protection than the license-seekers that this Court has already protected, because UO blocked him for directly engaging in core political speech—and UO's written guidelines provide a basis for it to do so again if he offends UO officials. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, No. 22-15827, 2023 U.S. App. LEXIS 24260, at *34-

35 (9th Cir. Sep. 13, 2023) (en banc) (where harm is traceable to a written policy there is an implicit likelihood of its repetition in the immediate future).

Neither Gilley, nor any other citizen, is required to take the government's word for it when it essentially says "trust us, we won't abuse our power to censor you, but we also reserve the authority to do so under written guidelines." *See Spirit of Aloha Temp.,* 49 F.4th at 25-26 ("We are not bound by officials' promises that they will enforce the guidelines responsibly") (citations omitted).

"When state actors enter [the] virtual world and invoke their government status to create a forum for . . . expression, the First Amendment enters with them." *Garnier,* 41 F.4th at 1185. For better or for worse, social-media platforms like X are increasingly the fora where the intellectual and political leaders of this country, including their younger staff-members, interact and exchange ideas. What happens in those fora matters. And it does not matter that Gilley's is not a high-value, commercially quantifiable claim; or that he is able to express his opinions in other formats or fora.

Gilley seeks to exercise core First Amendment rights without the need to hold back. He should not be excluded from interacting with @UOEquity, or to soften his criticisms in order to avoid the ire of university officials empowered by subjective blocking guidelines.

CONCLUSION

This Court should grant Gilley's motion to supplement the record because doing so will help the Court resolve the mootness claim regarding nominal damages and cure any misperception that Gilley kept the money. Doing so would also promote the interests of justice and the efficient use of judicial resources.

Respectfully submitted,

s/Angus Lee

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CERTIFICATION

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 27(d) and is set in 14-point Century Schoolbook font.

s/Endel Kolde