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' SECOND BRIEF ON CROSS-APPEAL

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INTRODUCTION

This is a case in search of a controversy. Plaintiff Bruce Gilley was blocked on a single occasion by a low-traffic Twitter subaccount operated by the University of Oregon. The employee who blocked Gilley acted alone and without the approval, input, or even knowledge of any other person. That employee is now retired, and her former position remains vacant. When the University learned of Gilley's allegations, it immediately unblocked him, assured him that he would not be blocked in the future, and paid his nominal damages request ($17.91) in full. It also reinforced to its staff that viewpoint discrimination is prohibited by the University's binding Social Media Guidelines. This prohibition on viewpoint discrimination has been followed for the past decade: just three out of the 2,558 retweets and replies directed at the relevant subaccount have been blocked since it was created in 2013.

A federal court is a forum of last resort. It is not a vehicle for publicity, score settling, or general legal oversight. Instead, a federal court may exercise authority only "as a necessity in the determination of real, earnest, and vital controversy between individuals." *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). Despite this fact, Gilley asks this Court to accept jurisdiction over a case that is no longer embedded in an actual controversy between the parties, and which could have been resolved with a simple phone call or email. Gilley is not suffering any

ongoing injury, does not face a reasonable probability that he will be blocked in the future, and has had any past injury redressed by Defendants' payment of his nominal damages request. Gilley, "of course, continue[s] to dispute the lawfulness" of the University's past acts and current policies because he disagrees with them. *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). But "a dispute solely about" the legality of a policy or past act, "abstracted from any concrete actual or threatened harm," is not a "case" or "controversy" giving rise to jurisdiction. *Id*.

Because there is no longer any ongoing "case" or "controversy" between the parties, Gilley's claims are moot and must be dismissed for lack of jurisdiction. In the alternative, if the Court finds that it has jurisdiction, it should affirm the district court's denial of Gilley's motion for a preliminary injunction.

STATEMENT OF THE CASE

A. The Division of Equity and Inclusion at the University of Oregon and the @UOEquity Twitter subaccount.

The University of Oregon (the "University") is Oregon's flagship public research institution. One of its core missions is to promote academic freedom and create a diverse, equitable, and inclusive educational environment that fosters free expression and intellectual discourse.[1] In recognition that this mission is advanced

[1] University of Oregon, *Mission Statement*, https://www.uoregon.edu/our-mission (visited May 9, 2023).

by tolerance and inclusion of diverse ideas, scholars, and students, the University houses a Division of Equity and Inclusion (the "Division") that works to promote the school's values of inclusion and tolerance. (2-ER-253; 3-ER-396–98; SER-100.)

One aspect of the Division's work is community engagement, (2-ER-253–54, 397), which is performed in part through maintenance of a Twitter subaccount, @UOEquity, affiliated with the Division. (3-ER-365.) That subaccount historically has been administered by one University employee, the Communications Manager, who reported directly to the University's central Communications Department. (SER-15–16, 71, 77, 95–98.) This case centers on an isolated decision by the now-retired Communications Manager, tova stabin,[2] to block Plaintiff Bruce Gilley on Twitter because she thought his post was off topic.

B. Stabin blocks Gilley for posting a comment she reads as off topic.

It is undisputed that, on June 14, 2022, stabin blocked Gilley from interacting with the @UOEquity subaccount after he used his Twitter account to "retweet" and comment on a post by @UOEquity. (2-ER-64–65.) Stabin had posted a "Racism Interrupter" resource to the @UOEquity subaccount's Twitter page. (3-ER-352.) That post included the text, "It sounded like you just said _____. Is that really what

[2] Defendant tova stabin styles her name with all lowercase letters. This brief capitalizes her name only where it begins a sentence.

you meant?" (*Id.*) It was prefaced by the statement "You can interrupt racism." (*Id.*) In response, Gilley retweeted the @UOEquity post with the statement "My entry: …you just said 'all men are created equal.'" (3-ER-351.) Gilley offered no further commentary or explanation of his statement. (*Id.*)

Stabin testified that she blocked Gilley because she did not understand what he was trying to say and believed that his post was "off topic" and unrelated to the original prompt. (SER-72–76, 80–82, 87.) Whereas the original prompt was meant to be a tool for starting a productive dialogue in response to a perceived racist or offensive comment, stabin did not perceive Gilley's statement—"all men are created equal"—as racist or offensive at all. (SER-72–73, 80–82, 87.) She testified that it would make little sense if a person responded to the statement "all men are created equal" with "is that what you really meant?" because the statement "all men are created equal" is not itself a racist or offensive remark. (SER-72–73, 87.)

C. Stabin acts alone and, in doing so, departs from a decade of past practice by the @UOEquity subaccount.

Regardless of stabin's reasoning, no other University employee was involved in her decision to block Gilley. (2-ER-105; SER-78–79.) In fact, stabin did not consult with or inform any other person before blocking Gilley, and no one working for the Division, Communications Department, or University administration directed, approved, or even knew about her decision. (*Id.*) Stabin stopped working

at the University before Gilley filed this lawsuit and is now retired. (SER-69.) And the position she held remains unfilled. (SER-16–17.) Once filled, the position will move from the central Communications Department, where stabin worked, to the Division, where it will, for the first time, be directly supervised by the Division's leaders. (2-ER-105–107; SER-15–16, 71, 95–98.)

Stabin's decision to block Gilley also departed from years of past practice by the @UOEquity subaccount. Since 2013, more than 2,555 retweets and replies have been directed at the @UOEquity subaccount, of which only three have ever been blocked.[3] (2-ER-183–84.) That number represents just one-tenth of one percent of all the Twitter activity directed at the subaccount. Critically, these 2,555+ retweets and replies have not been uniformly supportive of the University, the Division, or its social media content; to the contrary, these posts are often taunting or critical of @UOEquity, the University, or the Division. (2-ER-171–84.)

D. The University maintains binding Social Media Guidelines that prohibit viewpoint discrimination.

The vanishingly small number of posts removed by @UOEquity reflects the

[3] This includes Gilley. As the district court found, there is no evidence that the other two users were blocked for impermissible reasons. (1-ER-29.) That finding is not clearly erroneous because the record contains no evidence as to why or even when those users were blocked. (2-ER-94, 97; SER-22, 79.) Gilley's insinuation that they were blocked for prohibited reasons is rank speculation.

University's longstanding support of open, robust dialogue and its prohibition on viewpoint discrimination. (SER-23–24, 27–28, 42–43.) Since 2019, the University has maintained written Social Media Guidelines (the "Guidelines") that are binding and govern how its employees administer social media accounts. (SER-54–56, 114–17 (2019 Guidelines).) The overarching directive in the Guidelines is that employees may not "delete comments or block users because they are critical or because they disagree with the sentiment or viewpoint." (2-ER-279; SER-23–24, 42–43.) An employee must always "err on the side of letting people have their say when commenting" on social media. (2-ER-279; SER-18, 23, 25–26, 42–43.) The substance of these provisions has remained unchanged since the they were first promulgated in 2019. (*Compare* 2-ER-279 (2022 Guidelines) *with* SER-116 (2019 Guidelines); SER-27–28, 42–43.)

The Guidelines are not directed at the public. (2-ER-279; SER-29–30.) They do not dictate what a member of the public may post on social media pages, and they do not create civil or criminal sanctions.[4] (*Id.*) Instead, the Guidelines describe a

[4] The University's website also contains the portion of the Guidelines describing an administrator's authority over social media accounts. (2-ER-263–67.) The website has reflected the University's prohibition on viewpoint discrimination since at least 2020, which is the earliest version available. (2-ER-268.) The University more recently updated its website to reflect the Guidelines' complete text. (2-ER-263–67.) The portion of the website containing the Guidelines is a resource for employees

range of permissible conduct for University employees. An employee who violates the Guidelines is subject to discipline, up to and including termination. (SER-54–56.) Thus, when University administrators and stabin's supervisors learned that she had blocked Gilley, they counseled her that, insofar as she had acted because she did not understand his comment, doing so contravened the Guidelines' directive to "err on the side of not blocking." (SER-87–88, 18, 56–57.)

E. Gilley fails to confer with the University before filing his "made-in-heaven-case" so that he can remain blocked.

Gilley did not confer with the University before filing this lawsuit, so the first time the University's counsel and administration reviewed his claims and allegations was after press reports the day after Gilley filed the Complaint. (SER-127, 131.) That same day, the University unblocked Gilley. (*Id.*) If the University had known earlier that stabin had blocked Gilley, it would have unblocked him then. (SER-57–58, 131–32.) But Gilley made no efforts to seek relief or escalate the matter before suing. (2-ER-122–25; SER-131.)

Within days, and before the University was even served with the Complaint, its General Counsel sent a letter to Gilley's counsel stating that (1) Gilley had been

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interested in starting social media subaccounts—it is not addressed to the public and does not set forth rules or resources for the public. (*Id.*)

unblocked, (2) the University had reminded employees of its prohibition on viewpoint discrimination, and (3) neither Gilley nor anyone else would be blocked based on viewpoint in the future:

> Prof. Gilley (@BruceDGilley) was unblocked from the Twitter account at issue (@UOEquity) last Friday, August 12, 2022, and the Division of Equity and Inclusion does not intend to block him or anyone else in the future based on their exercise of protected speech. My office has reinforced to our colleagues who control the University's multiple social media channels that, if they open such channels to comments, they may not block commentary on the basis of the viewpoints expressed. I have further confirmed that those social media channels controlled by UO's central communications unit have no blocked users.

(SER-131–32.) He also enclosed a $20 bill in satisfaction of Gilley's demand for nominal damages of $17.91. (*Id.*)

But Gilley refused to dismiss his lawsuit. (SER-135–37.) It did not matter to him that he already received what he sought in federal court. Nor did it matter to him that the only person involved in blocking him no longer worked at the University. As Gilley explained to one media outlet, he views this case as a "made-in-heaven" opportunity to further his self-image as a "defender of academic freedom in higher education." (2-ER-129.) In fact, Gilley admitted to the same publication that he has "no need to read the University of Oregon's Twitter account," and, true to that representation, he has not interacted with @UOEquity since he was unblocked. (*Id.*)

Indeed, even after learning through discovery of the Guidelines and their prohibition on viewpoint discrimination, Gilley still sought to salvage his case by amending his Complaint to challenge provisions of the Guidelines that he personally views as objectionable, but which have never been applied to him or anyone else.[5] (3-ER-323–32.) Specifically, Gilley seeks to enjoin provisions of the Guidelines that allow—but do not require—subaccount administrators to block posts that are "hateful," "racist," "inappropriate," or "otherwise offensive" if doing so would not be based on the "sentiment or viewpoint" expressed in the post. (2-ER-279–80; SER-24, 42–43, 62–63.) Stabin did not use these provisions to block Gilley, and there is no evidence that they have ever been used to block anyone. (SER-74–76.)

[5] Gilley filed a public records request several weeks after being blocked. (3-ER-348.) In his request, he asked for any documents reflecting "the criteria used to determine whether a [social media] user should be blocked." (*Id.*) He did not state that he was blocked; alert stabin's supervisors, University administrators, or legal counsel that he had been blocked; or request that he be unblocked. (*Id.*) In response to the request, the public records office mistakenly informed Gilley that it had no responsive documents and that "[t]he staff member that administers the [relevant] Twitter account and social media has the autonomy to manage the accounts and uses professional judgment when deciding to block users." (3-ER-346.) Although that was a regrettable error in the public records process, the University promptly corrected its response upon realizing the mistake. (SER-123.) It is unrebutted that the University *does* maintain binding Guidelines, that they have been in writing since 2019, and that both the Guidelines and the University's website have always informed employees that viewpoint discrimination is prohibited.

F. Gilley claims self-censorship while speaking and publishing widely on the same topics covered by his lawsuit.

Since initiating this lawsuit, Gilley has claimed that he is "self-censoring" for fear of expressing viewpoints that he believes are contrary to those held by the University. (2-ER-48; 3-ER-323–25.) Notably, Gilley's self-censorship has thus far included multiple media appearances and high-profile articles that are critical of academic institutions that support diversity and inclusion efforts. (SER-103–10.)

For example, in an essay he recently published in *The Wall Street Journal* (one of the world's largest newspapers by circulation), Gilley criticized another school for its alleged efforts to "get woke with equity teams, affinity groups, Black Lives Matter movements, Native American land acknowledgments, transgender affirmations, climate-change hysteria and all the rest." (SER-109.) Similarly, in a live media appearance, Gilley crowed that "colonialism was the greatest antiracism program in world history." (SER-104–05.) And in an online article, Gilley argued that "DEI's degradations of the search for truth and the vigorous contestation of ideas are akin to the way that cancer spreads from one part of the body to another and eventually kills it." (SER-106–07.) These statements are consistent with the kinds of provocative comments upon which Gilley has built his career. (2-ER-125–29.) He promotes himself as a crusader against "cancel culture" by inflaming others and provoking backlash. (*Id.*)

G. The district court finds that Gilley cannot reasonably expect to be blocked again and denies his request for preliminary relief.

On August 11, 2022, Gilley filed this lawsuit and simultaneously moved for a temporary restraining order ("TRO") and preliminary injunction. (3-ER-421.) The district court denied Gilley's request for a TRO because he failed to confer with Defendants, as required by FRCP 65. (3-ER-420.) After observing that there was no exigency in the case, the district court set a hearing for the preliminary injunction on November 14, a date that was later moved to December 16. (SER-142–43; 3-ER-417, 419.) Defendants moved to dismiss the Complaint for lack of jurisdiction on September 7, and the court ordered the parties to concurrently brief and argue both pending motions. (3-ER-419.)

During expedited discovery, Gilley amended his Complaint to add facial and as-applied challenges to the Guidelines on top of his existing facial and as-applied challenges to Defendants' alleged "pattern and practice of blocking Twitter users" who express viewpoints with which they disagree. (3-ER-325–32.) He named stabin as a defendant in her individual capacity and the as-yet-to-be-hired Communications Manager as a defendant in his or her official capacity. (3-ER-310–11.) Defendants renewed their motion to dismiss on September 27. (3-ER-419.)

In his First Amended Complaint, Gilley seeks three types of relief. First, he prays for $17.91 in nominal damages. (3-ER-334.) Second, he prays for an

injunction that, among other things, requires the University to "permanently unblock" his Twitter account and prohibits it from blocking him or any other user pursuant to the challenged provisions of the Guidelines, based on their viewpoint, or based on other "overly broad content-discriminatory criteria" in the future. (3-ER-333.) Finally, Gilley prays for a declaration that Defendants' decision to block him and apply "professional judgment" and/or the Guidelines when making blocking decisions violates the First Amendment. (3-ER-334.)

After voluminous expedited discovery—including depositions of stabin, Vice President of Equity and Inclusion Yvette Alex-Assensoh, PhD, and the University's corporate designee Richie Hunter—the parties presented evidence and arguments at a hearing on December 16. (3-ER-417.) The next month, on January 26, 2023, the district court issued an order denying Gilley's motion for a preliminary injunction and Defendants' motion to dismiss. (1-ER-2–37.)

In denying Gilley's motion, the district court held that Gilley lacked standing to bring a pre-enforcement challenge to the Guidelines and did not face a likelihood of irreparable harm. (1-ER-29–36.) It found that @UOEquity had no past "pattern of viewpoint-based blocking," that nothing in the record suggested Gilley would be blocked again, and that Gilley's claims of self-censorship were neither objectively

reasonable nor supported by the record.[6] (*Id.*)

The court made similar findings in its review of Gilley's motion to dismiss, but it nevertheless held that his claims for prospective relief were not moot because he was challenging the Guidelines, which still existed, and which were not labeled as a "formal policy." (1-ER-15–18.) The court also found that, despite having received all the damages he requested, Gilley's claim for nominal damages was not moot because Defendants had not agreed to entry of a judgment. (1-ER-18–20.)

Gilley filed his notice of appeal on February 3. (2-ER-39–41.) Defendants filed their notice of cross-appeal on February 16. (SER-6–8.)

ISSUES PRESENTED

The issues presented by Defendants' cross-appeal are:

1. Are Gilley's claims for prospective relief moot because, as the district court found, he cannot "reasonably expect" to be blocked in the future by the now-retired tova stabin or her not-yet-hired replacement?

2. Does Gilley lack standing to bring a pre-enforcement challenge to provisions of the Guidelines that have never been used to block him or any other social media user because, as the district court found, Gilley does not face a

[6] Despite finding that Gilley lacks standing to bring the claims, the district court did not dismiss his pre-enforcement challenge to the Guidelines.

"genuine" threat of "imminent" prosecution under those provisions?

3. Is Gilley's claim for nominal damages moot because Defendants paid his damages request in full and redressed his alleged past injury?

The issues presented by Gilley's appeal are:

1. Is Gilley likely to suffer irreparable harm absent a preliminary injunction when, as the district court found, he does not face a "real and immediate" threat of being blocked in the future by the retired stabin or her yet-to-be hired replacement?

2. Is Gilley likely to prevail on the merits of his claim for injunctive relief when the Guidelines do not restrict the speech of social media users and have no history of being used to restrict the speech of social media users?

3. Do the balance of equities and public interest weigh in favor of denying a preliminary injunction because Gilley is experiencing no ongoing injury and state entities have a strong interest in managing their own internal affairs?

SUMMARY OF THE ARGUMENT

This Court should dismiss Gilley's lawsuit because it lacks jurisdiction over his claims for prospective relief and nominal damages. In the alternative, if the Court finds that it has jurisdiction, it should affirm the district court's denial of Gilley's request for a preliminary injunction.

Jurisdiction. This Court should dismiss Gilley's case for lack of jurisdiction because (1) his claims for prospective relief are moot, (2) he lacks standing to bring a pre-enforcement challenge, and (3) his claim for nominal damages is moot.

1. Gilley's claims for prospective relief are moot because Defendants cannot reasonably be expected to block him in the future. When a defendant voluntarily ceases its injury-producing conduct after the plaintiff files his lawsuit, any claim for prospective relief is moot unless the offending conduct can "reasonably be expected to recur." *Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167, 190 (2000). This requires more than a "theoretical possibility" that the defendant could someday repeat the disputed conduct. *Brach v. Newsom*, 38 F.4th 6, 14 (9th Cir. 2022) (en banc). Critically, a government defendant is entitled to a presumption of "good faith" when it ceases offending behavior. *Rosebrock v. Mathis*, 745 F.3d 963, 973 (9th Cir. 2014). This presumption is "at an apex" when the government "recommit[s]" to "an existing policy of consistent enforcement of a longstanding regulation." *Id.*

Here, Gilley cannot reasonably expect to be blocked in the future. Gilley was blocked on a single occasion by a single employee. That employee, stabin, is now retired. It is undisputed that stabin acted alone and without the knowledge, input, or approval of any other University employee. When the University learned about Gilley's allegations, it immediately unblocked him and assured him that he would

not be blocked in the future for expressing his viewpoint. The position previously held by stabin remains unfilled. Once filled, the position will be housed in a different department with different supervisors.

Stabin's unilateral decision to block Gilley was an anomaly. In the past decade, just three out of the more than 2,555 retweets and replies directed at the @UOEquity subaccount have been blocked. These numbers reflect longstanding adherence to the University's prohibition on viewpoint discrimination. Since 2019, the University has maintained binding Social Media Guidelines that prohibit viewpoint discrimination and require staff always to "err on the side of letting people have their say." The relevant portions of the Guidelines have remained unchanged throughout that time, and employees are subject to discipline if they fail to follow the Guidelines. After learning about Gilley's allegations, the University reinforced to its employees that viewpoint discrimination is prohibited. Gilley's claims for prospective relief are therefore moot and must be dismissed.

2. Gilley also lacks standing to bring a pre-enforcement challenge against provisions of the Guidelines that have never been used to block him or any other person. Specifically, Gilley lacks standing to challenge the provisions that allow—but do not require—subaccount administrators to block posts that are "hateful," "racist," "inappropriate," or "otherwise offensive" if doing so would not be based

on the "sentiment or viewpoint" expressed in the post.

Typically, a plaintiff lacks standing to challenge a law or policy to which he has never been subject. A narrow exception exists for plaintiffs who face a "genuine threat of imminent prosecution." *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 772–73 (9th Cir. 2006). To determine whether an alleged threat of future prosecution is, in fact, "genuine" and "imminent," courts consider three factors: (1) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," (2) "the history of past prosecution or enforcement under the challenged statute," and (3) whether the plaintiff has "articulated a 'concrete plan' to violate the law in question." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000).

Gilley fails to satisfy each of these factors. *First*, no one has "communicated a specific warning or threat" that they will block Gilley in the future, let alone under the specific provisions of the Guidelines he wishes to challenge. To the contrary, the University has assured Gilley that he will *not* be blocked for sharing his viewpoint and that viewpoint discrimination is expressly prohibited by the Guidelines. *Second*, Gilley is unable to cite a single past application of the Guidelines provisions he now allegedly fears, and there is no evidence that the @UOEquity subaccount has ever relied on those provisions to block anyone. The only evidence is that the University

interprets and applies its Guidelines to prohibit viewpoint discrimination. *Finally*, Gilley has no concrete plan to interact with @UOEquity in the future. Indeed, in an interview given the day that he filed this lawsuit, Gilley confessed that he "ha[s] no need to read" the @UOEquity subaccount.

3. Gilley's nominal damages claim is moot because the University paid his damages request in full and there is no longer any redress for a court to provide. An "irreducible" element of federal jurisdiction is "redressability." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021). "[N]o federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury." *Id.* Although the Supreme Court recently held that an award of nominal damages is a remedy that can, on its own, redress a past legal wrong, it warned that a court must be able to offer this redress "at every stage of litigation." *Id.* Indeed, the "Court has long held that when a defendant unilaterally remedies the injuries of the plaintiff, the case is moot—even if the plaintiff disagrees and refuses to settle the dispute, and even if the defendant continues to deny liability." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 180 (2016) (Roberts, C.J., dissenting) (collecting cases).

Here, Gilley's claim for nominal damages is moot because Defendants paid his damages request in full. Once Defendants provided the remedy upon which the redressability of Gilley's past injury depended, Gilley's alleged injury was no longer

redressable by a favorable ruling from the district court. At most, the entry of a judgment by the district court would be an advisory opinion—placing the court's stamp of approval on Gilley's view of the law without offering any redress. Gilley's nominal damages claim is therefore moot.

Preliminary Injunction. If this Court finds that it has jurisdiction, it should affirm the district court's denial of Gilley's motion for a preliminary injunction because (1) Gilley fails to show a likelihood of irreparable harm, (2) Gilley is not likely to prevail on the merits of his claim for injunctive relief, and (3) both the balance of equities and public interest weigh in Defendants' favor.

1. Gilley fails to show that he is likely to suffer irreparable harm absent a preliminary injunction because he is not being blocked by @UOEquity and is not at "imminent" risk of being blocked in the future. To obtain preliminary relief, a plaintiff "must establish that irreparable harm is *likely*, not just *possible*." *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th Cir. 2011) (second emphasis added). "The equitable remedy is unavailable absent a showing of . . . real or immediate threat that the plaintiff will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). "[A] possibility of irreparable harm is inconsistent with [the frequent] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such

relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008).

Here, Gilley fails to show that he is likely to suffer irreparable harm. Within hours of learning about Gilley's allegations, the University unblocked him and confirmed that he would not be blocked in the future for expressing his viewpoint. This occurred before Defendants were even served with the Complaint. The University also prohibits viewpoint discrimination and reinforced this prohibition to its staff. Stabin's unilateral decision to block Gilley was itself an anomaly in the history of the @UOEquity subaccount. Indeed, since the subaccount was created in 2013, just three out of the more than 2,555 retweets and replies directed at the subaccount have been blocked. For these reasons, the district court found that "it would be speculative to conclude that [stabin's] unknown successor is likely to block Plaintiff on Twitter again." That finding is entitled to deference.

2. Gilley is unlikely to prevail on the merits of his claim for injunctive relief because the Guidelines do not restrict speech and have no history of being used to restrict speech. The Guidelines are not directed at the public. They do not regulate who may comment on @UOEquity posts, when they may post, or what they may say. There is no screening, licensing, or sanctions regime created by the Guidelines, and they do not create civil or criminal penalties. Instead, the Guidelines govern *only* the conduct of University employees. And the only thing they prohibit is viewpoint

discrimination. That is also how the Guidelines have been implemented in practice.

In turn, Gilley cannot "demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). Gilley asks the Court to ignore both the text and implementation of the Guidelines in favor of his own speculative fears. But when a law operates only on government employees and does not "preclud[e] speech" or "silence speakers by expressly threatening censorship," a plaintiff bringing a facial challenge "confront[s] a heavy burden." *Id*. at 580, 583. And courts confronting such a law must not "invalidate [it] on the basis of its hypothetical application to situations not before" the court. *Id.* at 584 (quotations omitted). That admonition carries extra weight, no doubt, when the hypothetical situation calls for application of the law as imagined by a plaintiff rather than as written and implemented by a defendant.

3. The balance of equities and public interest factors also weigh in favor of Defendants. Although enjoining an ongoing violation of a fundamental right is "always in the public interest," *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002), there is no ongoing violation to be enjoined. Moreover, it is pure speculation that the Guidelines will, in the future, be applied to Gilley or any other person in a discriminatory manner, and any subjective fear that Gilley has of being blocked again is not objectively reasonable based on the record.

By contrast, an injunction will have a concrete and immediate impact on the University's ability to manage its own internal affairs. As a government entity, it is a "well-established rule" that the University has a strong interest in managing "its own internal affairs." *Rizzo v. Goode*, 423 U.S. 362, 378–79 (1976) (quotations omitted). "[A] federal court must exercise restraint when a plaintiff seeks to enjoin any non-federal government agency, be it local or state." *Midgett v. TriMet*, 254 F.3d 846, 851 (9th Cir. 2001). The fact that the University is a state actor "with procedures already in place" for preventing viewpoint discrimination "militates against a federal court's mandating substitute procedures of its own design to address the same issues." *Id.* at 850. These factors weigh in favor of Defendants.

JURISDICTIONAL STATEMENT

Neither the district court nor this Court possess subject-matter jurisdiction. The basis for appellate jurisdiction is 28 U.S.C. § 1292 and the doctrine of pendent appellate jurisdiction. *See Wong v. United States*, 373 F.3d 952, 960 (9th Cir. 2004).

STANDARDS OF REVIEW

Jurisdiction. Legal conclusions about mootness and standing are reviewed de novo, and factual findings are reviewed for clear error. *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).

Preliminary Injunction. Denial of a preliminary injunction is reviewed for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). The review is "limited and deferential." *Id.*

ARGUMENT

This Court should dismiss Gilley's lawsuit because it lacks jurisdiction over his claims for prospective relief and nominal damages. In the alternative, if the Court finds that it has jurisdiction, it should affirm the district court's denial of Gilley's request for a preliminary injunction. Because this Court must assure itself of its own jurisdiction before reaching other issues, *Negrete v. City of Oakland*, 46 F.4th 811, 813–14 (9th Cir. 2022), Defendants first address the jurisdictional issues presented by their cross-appeal and then the district court's denial of preliminary relief.

I. THIS COURT LACKS JURISDICTION OVER GILLEY'S CLAIMS FOR PROSPECTIVE RELIEF AND NOMINAL DAMAGES.

This Court lacks jurisdiction over Gilley's claims for prospective relief and nominal damages. *First*, Gilley's claims for prospective relief are moot because, as the district court found, Gilley faces only a "theoretical possibility" of being blocked in the future. *Second*, as the district court found, Gilley lacks standing to bring a pre-enforcement challenge to provisions of the Guidelines that have never been used to block him because he cannot show a "genuine threat of imminent prosecution."

Finally, Gilley's nominal damages claim is moot because Defendants have paid his damages in full and there is no longer any redress for a court to provide.

A. Gilley's claims for prospective relief are moot because Defendants cannot "reasonably be expected" to block him in the future.

Gilley's claims for prospective relief are moot because he does not face a reasonable probability of being blocked again by the now-retired stabin or the as-yet-to-be-hired Communications Manager. Although Gilley is no longer blocked on Twitter, he seeks to invoke the coercive power of the federal courts to prohibit the new Communications Manager from blocking him or any other Twitter user in the future. He also seeks a preemptive declaration that doing so would violate the First Amendment. But a court may only resolve "real, earnest, and vital controversy between individuals." *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). When, as here, defendants cease their alleged misconduct, claims for prospective relief no longer present live controversies unless the alleged misconduct can "reasonably be expected to recur." *Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016). Because there is no reasonable expectation that Defendants will block Gilley in the future—as the district court found—his claims are moot.

1. *Article III requires a live "case" or "controversy" throughout all stages of the litigation.*

Starting with first principles, "Article III of the Constitution limits federal-

court jurisdiction to 'cases' and 'controversies.'" *Campbell-Ewald Co.*, 577 U.S. at 160 (quoting U.S. Const. art. III, § 2). "For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case . . . ." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). This requirement "subsists through all stages of federal judicial proceedings," meaning that the parties must *always* "have a personal stake in the outcome" of a pending case. *Lewis v. Cont'l Bank Corp*., 494 U.S. 472, 477–78 (1990). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, . . . the action can no longer proceed and must be dismissed as moot." *Campbell-Ewald Co.*, 577 U.S. at 160–61 (quotations omitted).

To that end, "[a] request for injunctive relief remains live only so long as there is some present harm left to enjoin." *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 864 (9th Cir. 2017) (quotations omitted). "Speculative contingencies afford no basis for finding the existence of a continuing controversy between the litigants as required by article III." *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985). Once the harm-producing act stops, a plaintiff generally may pursue prospective relief only if she can show a "real and immediate threat of repeated injury." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018). Although "past wrongs are evidence bearing on whether" there remains "a threat of repeated injury," *O'Shea*

v. Littleton, 414 U.S. 488, 496 (1974), "past wrongs do not in themselves amount to [a] real and immediate threat of injury necessary to make out a case or controversy," *Lyons*, 461 U.S. at 103.

2. *The minimum for maintaining a live case or controversy is that a defendant's injury-producing conduct must "reasonably be expected to recur."*

When a defendant voluntarily ceases injury-producing conduct after a plaintiff files suit, any claim for prospective relief is moot unless the offending conduct can "reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. This standard requires more than "a mere . . . theoretical possibility," or a "remote and speculative" possibility, that the defendant could someday repeat the disputed conduct. *Brach*, 38 F.4th at 14 (first quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), then *Lee*, 766 F.2d at 1390). As the en banc Ninth Circuit has previously emphasized, there need not be an "ironclad assurance" that the conduct will not recur. *Id.* at 15.

An unconditional representation made in court is often enough to satisfy this standard. In *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013), for example, the Supreme Court held that a broad covenant not to sue, unilaterally executed by the defendant, was sufficient to ensure that it would not resume its efforts to enforce a trademark against the plaintiff. *Id.* at 93–96. As the Court explained, "[h]aving taken the position in court that there is no prospect [of a future enforcement action], [the

defendant] would be hard pressed to assert the contrary down the road." *Id.* at 94; *see also New Hampshire v. Maine,* 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." (quotations omitted)). Likewise, in *Brach*, this Court was satisfied that the offending conduct was not "likely" to recur because the state defendant "renounced any intent" to repeat its disputed conduct and "reaffirmed" its commitment to the policy sought by the plaintiffs. 38 F.4th at 13 (cleaned up).

Importantly, government defendants are entitled to a presumption of "good faith" when they cease offending behavior. *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010). As this Court explained in *Brach*, it "treat[s] the voluntary cessation of challenged conduct by government officials with more solicitude." 38 F.4th at 12 (quoting *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (en banc)). "For this reason, the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal." *Glazing Health & Welfare*, 941 F.3d at 1198. The same is true of a government defendant's change in policy. *See Am. Cargo Transp.*, 625 F.3d at 1180 ("The government's change of policy presents a special circumstance in the world of mootness.").

As relevant here, the presumed good faith of a government defendant carries the most weight when a government defendant's changed behavior is based on the reaffirmation of an *existing* policy. In *Rosebrock*, for example, the plaintiffs alleged that an agency had inconsistently applied a facially neutral prohibition against posting materials outside the agency's offices. 745 F.3d at 966. They alleged that the agency had allowed them to hang an American flag on an exterior fence when the flag was properly oriented but not when it was placed upside down. *Id.* The agency's "inconsistent" enforcement of its prohibition on posted materials continued for "at least eight months." *Id.* After the lawsuit was filed, however, the agency circulated an email to its staff "reemphasizing" its existing policy against the posting of materials outside its offices and making clear that staff were to apply the policy in a non-discriminatory manner. *Id.* at 969.

The court held that enforcing the policy based on the plaintiffs' viewpoint could not "reasonably be expected to recur." *Id.* at 973. In doing so, it explained that "confidence in the Government's voluntary cessation is at an apex" when the government promises to be "more vigilant in following a previously existing policy." *Id.* In such a circumstance, it reasoned, the government's "voluntary cessation" is more "aptly described as reemphasizing, or recommitting to, an existing policy of consistent enforcement of a longstanding regulation," and it "increases [the court's]

confidence that the challenged conduct cannot reasonably be expected to recur." *Id.* It did not matter, the court added, that the agency had retained some "discretion" to choose materials that could be posted outside of the agency's office because there was "no evidence in the record suggesting" that the agency would later "use this discretion to commit viewpoint discrimination" or that the agency had previously been "inconsistent [with] enforcement." *Id.* at 973 n.11.

The court also identified a "loose framework" of factors from policy change cases—neither "definitive" nor "exhaustive"—that "make it more likely" that a defendant's voluntary cessation of challenged conduct will render a case moot:

> (1) the policy change is evidenced by language that is broad in scope and unequivocal in tone; (2) the policy change fully addresses all of the objectionable measures that the Government officials took against the plaintiffs in the case; (3) the case in question was the catalyst for the agency's adoption of the new policy; (4) the policy has been in place for a long time when we consider mootness; and (5) since the policy's implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiff.

Id. at 972 (cleaned up).

3. *Gilley cannot "reasonably expect" to be blocked again because stabin is retired, the Communications Manager position is vacant, the Guidelines prohibit viewpoint discrimination, and only three posts have ever been blocked.*

As the district court found, there is no evidence that stabin or the as-yet-to-be-

hired Communications Manager can "reasonably be expected" to block Gilley in the future. (1-ER-15–17, 31–36.) Gilley was blocked on a single occasion by stabin. (2-ER-64–65.) Stabin is now retired and can no longer block Gilley. (SER-69–70.) It is undisputed that stabin acted alone and without the knowledge, input, or approval of any other employee. (2-ER-105; SER-78–79.) Upon learning of Gilley's allegations, the University immediately unblocked Gilley and assured him that he would not be blocked in the future based on viewpoint. (SER-131, 136.) The University also reinforced to staff that it prohibits viewpoint discrimination. (SER-31, 118, 131.) The Communications Manager position previously held by stabin remains vacant. (SER-16–17.) Once filled, moreover, the position will be housed in a different department with different supervisors. (2-ER-105–107; SER-15–16, 71, 95–98.)

Stabin's unilateral decision to block Gilley was itself an anomaly. In the past decade, just three out of the more than 2,555 retweets and replies directed at the @UOEquity subaccount have been blocked.[7] (2-ER-184.) This number reflects adherence to the University's longstanding prohibition on viewpoint discrimination. Since at least 2019, the University has maintained written Social Media Guidelines that expressly prohibit viewpoint discrimination and require staff to "err on the side

[7] Gilley points to the two other users who were blocked. He speculates that they were blocked for being conservative. (Pl.'s Br. at 64.) But as the district court found, and as discussed *supra* note 3, there is no evidence to support that speculation.

of letting people have their say." (SER-18–19, 23–26, 42–43, 116–18; 2-ER-279.) The relevant provisions of the Guidelines have remained substantively unchanged throughout that time. (*Compare* 2-ER-279 (2022 Guidelines) *with* SER-116–17 (2019 Guidelines); SER-27–28, 42–43.) These provisions are not optional or precatory; rather, any employee who fails to follow them is subject to discipline, up to and including termination. (SER-54–56.) Indeed, the University immediately unblocked Gilley as soon as it learned that he had been blocked, and it would have unblocked him earlier had he alerted University officials. (SER-57–59, 131–32.) No one has blocked or threatened to block Gilley (or anyone else) since then.

Together, these facts make the probability of future injury even more remote than in *Already*, *Brach*, and *Rosebrock*. As in *Already* and *Brach*, the University has "unequivocally renounced" blocking Twitter users based on their viewpoints, and it has confirmed for Gilley that it will not block him based on viewpoint. *Brach*, 38 F.4th at 13. And, as in *Rosebrock*, this representation is entitled to a presumption of "good faith" because the University is a state actor. 745 F.3d at 971. Likewise, because the University's representation that it will not block Gilley is based on a "reemphasis" and "recommitment" to its *existing* prohibition on viewpoint discrimination—a prohibition consistently enforced for a decade—the Court's "confidence" in the durability of this relief must be "at an apex." *Id.* at 972–73.

Gilley may argue that this case is different because the Guidelines do not carry a formal "policy" label and thus, in his view, cannot be enforced or are easily subject to change. But neither point is supported by the record.[8]

Regardless of their label, the only evidence is that employees "must abide by" the Guidelines and are subject to discipline if they fail to follow them. (SER-54–55.) The trivial number of retweets and replies that have been blocked since @UOEquity was created—just three out of 2,558—corroborates that the Guidelines are followed. There is likewise no evidence that the University intends to rescind or modify the Guidelines' prohibition on viewpoint discrimination, and there is no past policy or practice of blocking to which the University could revert. To the contrary, the only evidence is that the prohibition on viewpoint discrimination has remained unchanged and strictly enforced for the past decade—even before the Guidelines were put into writing in 2019. This decade-long track record is far more probative of whether the University can "reasonably be expected" to block Gilley in the future than how it labels its rules—whether as policy, guidelines, or practices.

In sum, as the district court expressly found, Gilley's relief is not "temporary," there is no reason to doubt the University's "good faith," and the University is not

[8] As an initial matter, there is no constitutional requirement that public universities adopt social media policies; even if the University maintained no written guidelines or policies, the Constitution would still govern the University.

"reasonably likely" to block him in the future. (1-ER-17, 32.) Because Gilley faces no more than a "theoretical possibility" of being blocked again, his claims for prospective relief necessarily are moot.

4. *Gilley is not self-censoring for fear of being blocked by the now-retired stabin or the future Communications Manager.*

Gilley attempts to sidestep the speculative nature of any potential future injury by alleging that he is presently self-censoring.[9] He contends that he is self-censoring for fear that "I could be blocked again in the future for expressing a viewpoint critical of the ideology of diversity, equity, and inclusion." (3-ER-414.) But it is hard to understand the logic of Gilley's self-censorship position. He seems to say that, although Defendants are not currently censoring him, he is nonetheless censoring himself because he worries that Defendants *might* censor him. He does not say that he fears arrest, prosecution, or even public shaming if he interacts with @UOEquity again; rather, what he fears is, apparently, that Defendants might do to him what he is in fact doing to himself. There are two problems with this argument.

First, as the district court found, Gilley's alleged fear of future blocking is not objectively reasonable. (1-ER-31–32.) Although self-censorship can be a cognizable

[9] Gilley relies on the allegation that he is self-censoring as both an ongoing injury that can save his claims from becoming moot and as a pre-enforcement injury that can provide standing for him to challenge specific provisions of the Guidelines that have never been used to block him. The latter is discussed *infra* at Part I.B.

injury for purposes of the case or controversy requirement, the decision to self-censor must not be "based on a fear of future injury that [is] itself . . . too speculative" to support jurisdiction. *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020). As described above, Gilley cannot "reasonably expect" to be blocked in the future because the University prohibits viewpoint discrimination, the only person involved in blocking Gilley retired, her position is vacant, her future replacement will work in a new department with new supervisors (none of whom were involved in blocking Gilley), the University has promised Gilley he will not be blocked for impermissible reasons, and @UOEquity has blocked just three users in its 10-year history. Any decision to self-censor is therefore based on a fear of future injury that "[is] itself . . . too speculative" to support jurisdiction. *Id.*

Second, Gilley's self-censorship allegation is contradicted by his unreserved and very public criticism of diversity, equity, and inclusion viewpoints since filing this lawsuit. (SER-103–109.) For example, Gilley published an opinion essay in *The Wall Street Journal* that attacked his daughter's high school for its efforts to be diverse and inclusive, appeared on *The Charlie Kirk Show* to argue that "colonialism was the greatest antiracism program in world history," and published an article in which he argued that "DEI's degradations of the search for truth and the vigorous contestation of ideas are akin to the way that cancer spreads from one part of the

body to another and eventually kills it." (*Id.*) This is hardly the cowering behavior of someone who is self-censoring.

Indeed, as adduced through his testimony on cross-examination, Gilley is a professional provocateur who delights in antagonizing others. (2-ER-125–29.) He makes inflammatory statements and invites backlash so that he may promote himself as a victim of "cancel culture." (2-ER-127.) It is simply not believable that a person who proudly claims having said that American slaves had it "about as good as it can get" and that George Floyd died of a drug overdose is cowed by the fear that he will be blocked by a university's low-traffic Twitter subaccount, much less a dormant one he knows no one is managing. (2-ER-125.) If Gilley is self-censoring, it is not because he is afraid of consequences he will suffer from a not-yet-hired subaccount manager; it is because he wants to maintain a lawsuit that he could have resolved with a phone call and is using to promote himself (indeed, that he has described as a "made-in-heaven case"). As such, in addition to being legally unavailing, Gilley's self-serving claim to be self-censoring is simply not believable.

5. *The district court agreed that Gilley is unlikely to be blocked again but wrongly concluded that his claims are not moot because Gilley still wishes to challenge the Guidelines.*

Despite making the factual finding that Gilley faces no reasonable probability of being blocked again, the district court concluded that his claims for prospective

relief are nevertheless not moot because he continues to challenge the Guidelines. (1-ER-17.) The court reasoned that, even though Gilley failed to show a likelihood that he will be blocked again or that University is acting in bad faith, Gilley still disagrees with the substance of the Guidelines, and this disagreement is adequate for jurisdiction. (*Id.*) That legal conclusion, however, depends on a misunderstanding of the mootness doctrine.

Once the district court determined that Gilley was suffering no ongoing injury and could not reasonably expect to be injured in the future, it was *required* to dismiss Gilley's claims for prospective relief as moot. That is so because "[p]laintiffs in the federal courts must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *O'Shea*, 414 U.S. at 493 (quotations omitted). In the absence of such an ongoing or threatened injury, there can be no "actual controversy" between the parties and no jurisdiction over claims for prospective relief. *Lyons*, 461 U.S. at 105. Gilley, "of course, continue[s] to dispute the lawfulness of the" Guidelines and stabin's past actions. *Alvarez v. Smith*, 558 U.S. 87, 93 (2016). But "a dispute solely about" the legality of a law or past act, "abstracted from any concrete actual or threatened harm," is not a "case" or "controversy" giving rise to jurisdiction. *Id*. Thus, although the Guidelines still exist and Gilley still disagrees with them, neither fact can support jurisdiction

without an ongoing injury or threat of likely future injury.

In the district court's view, the case is live because the Guidelines' continued existence means that it could still provide Gilley with his desired relief. But the requirement that a federal court be capable of providing a remedy to redress an injury is in addition to, *not an alternative to*, the requirement that a plaintiff suffer a cognizable injury in the first instance. It is irrelevant that the district court could declare the Guidelines unconstitutional or enjoin their use because, absent any ongoing or threatened future injury, this case presents nothing more than "an abstract dispute about the law, unlikely to affect [Gilley] any more than it affects" other members of the public. *Alvarez*, 558 U.S. at 93; *Thomas*, 220 F.3d at 1138 ("Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases."). Accordingly, because Gilley faces no ongoing injury and cannot reasonably expect to be blocked again, his claims for prospective relief are moot.

B. Gilley lacks standing to bring a pre-enforcement challenge because he cannot show a "genuine threat of imminent prosecution" under the challenged provisions of the Guidelines.

Gilley also lacks standing to bring a pre-enforcement challenge to provisions of the Guidelines that have never been used to block him. Gilley seeks to enjoin and declare unconstitutional the provisions of the Guidelines that allow—but do not require—subaccount administrators to block posts that are "hateful," "racist,"

"inappropriate," or "otherwise offensive" if doing so would not be based on the "sentiment or viewpoint" expressed in the post. (2-ER-279–80; SER-24, 42–43, 62–63.) Gilley contends that, even though these provisions have never been used to block him, he has standing to challenge them because of the "chilling effect" they allegedly have on his speech. (Pl.'s Br. at 50.) He notes that the law favors a "hold-your-tongue-and-challenge-now approach, rather than requiring litigants to speak first and take their chances with the consequences." (*Id.*) But as the district court rightly found, Gilley lacks standing because he faces no such choice "between holding his tongue on the one hand and speaking and suffering the consequences on the other." (1-ER-32.)

1. *Pre-enforcement challenges are limited to laws and policies that threaten criminal penalties or civil sanctions.*

As an initial matter, the Guidelines are not the type of law or policy amenable to a pre-enforcement challenge. Typically, a plaintiff cannot challenge the provisions of a law or policy with which he disagrees before those provisions have been used against him. A narrow exception exists for plaintiffs who abstain from "allegedly protected speech in order to avoid civil sanction or criminal penalty." *Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 851 (9th Cir. 2007). A plaintiff seeking to avail himself of this exception must "risk[] civil sanction or criminal penalty" by speaking, *id.*, and "the penalty . . . [must be] high," *Am.-Arab Anti-*

Discrimination Comm. v. Thornburgh, 970 F.2d 501, 508 (9th Cir. 1991).

In such circumstances, a plaintiff is not "required to await and undergo a criminal prosecution as the sole means of seeking relief." *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983) (quotations omitted). Thus, although a plaintiff may suffer a cognizable injury from the deterrent or "chilling" effect of threatened future sanctions, it requires that "the challenged exercise of governmental power" be "regulatory, proscriptive, or compulsory in nature" and that a plaintiff be "presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging." *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

This is not such a case. Most fundamentally, the Guidelines do not operate on members of the public and are not written for the public. (SER-29–30; 2-ER-279.) They are not a licensing scheme for speech activities, do not dictate what a member of the public may post on the University's social media pages, and do not provide the University with authority to impose civil or criminal sanctions on Twitter users. (*Id.*) Instead, the Guidelines describe a range of permissible conduct for University employees. A member of the public cannot "violate" the Guidelines and, even if they could, there is no risk of "civil sanction or criminal penalty" for doing so, *Alaska Right to Life Pol. Action Comm.*, 504 F.3d at 851, let alone a "high" penalty, *Thornburgh*, 970 F.2d at 508. The Guidelines, in short, are not the type of law or

policy for which the pre-enforcement doctrine is intended.

2. *Standing to bring a pre-enforcement challenge requires a "genuine threat of imminent prosecution," but neither Gilley nor anyone else has been subject to the challenged provisions.*

Nevertheless, even if this were an appropriate case in which to mount a pre-enforcement challenge, a plaintiff only has standing to bring such a challenge if they face a "genuine threat of imminent prosecution and not merely an imaginary or speculative fear of [future] prosecution." *Sacks*, 466 F.3d at 772–73. "[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Thomas*, 220 F.3d at 1139. To determine whether an alleged threat of future prosecution or civil sanction is, in fact, "genuine" and "imminent," rather than "imaginary or speculative," courts consider three factors: (1) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," (2) "the history of past prosecution or enforcement under the challenged statute," and (3) whether the plaintiff has "articulated a 'concrete plan' to violate the law in question." *Id.*

Gilley cannot satisfy any of these factors. First, no one has "communicated a specific warning or threat" that they will block him in the future, let alone under the specific provisions of the Guidelines he wishes to challenge. *Id.* To the contrary, the University has advised Gilley that he will *not* be blocked for sharing his viewpoint,

and that viewpoint discrimination is prohibited by the Guidelines. (SER-131, 136, 57–59.) These representations are entitled to a presumption of good faith. *Rosebrock*, 745 F.3d at 971. Indeed, it is hard to imagine how Gilley could face a "specific warning or threat" of enforcement when no one is currently running @UOEquity. *See Wash. Wilderness Coal. v. Walla Walla County*, 74 F.3d 1247 (table), 1996 WL 21668, at *2 (9th Cir. 1996) ("[C]onceivably the ordinances could be enforced against [plaintiff], but a threat of enforcement does not arise simply because the language . . . leaves open this slim possibility."); *Sacks*, 466 F.3d at 774 (holding that even reservation of a right to later prosecute the plaintiff did not demonstrate the "requisite specific warning or threat").

Second, Gilley cannot cite a single past use of the Guidelines provisions he now allegedly fears. Although Gilley maintains that "he has already been blocked once by UO," (Pl.'s Br. at 51), that single instance of past blocking by stabin was not pursuant to the provisions targeted by Gilley's pre-enforcement challenge. (SER-74–76.) In fact, there is no evidence @UOEquity has ever used those provisions of the Guidelines to block *anyone*—not just Gilley—and only three retweets and replies have ever been blocked by @UOEquity for any reason. (2-ER-183–84.) Gilley "cannot leverage [his] injuries under certain, specific provisions [of the Guidelines] to state an injury under the . . . [Guidelines] generally." *Get Outdoors II, LLC, v.*

City of San Diego, 506 F.3d 886, 892 (9th Cir. 2007); *see id.* (holding that a plaintiff "has standing to challenge only those provisions [of a law] that applied to [him]"). And, even if Gilley could do so, a single instance of past blocking—immediately corrected when the University learned about it—is insufficient as a matter of law to demonstrate a "real and immediate threat of injury necessary to make out a case or controversy." *Lyons*, 461 U.S. at 103.

Finally, Gilley has no concrete plan to interact with @UOEquity in the future. Indeed, in an interview given after he filed this lawsuit, Gilley confessed that he has "no need to read the University of Oregon's Twitter account." (2-ER-129.) That admission is dispositive of this factor.

Gilley has since submitted a vague and self-serving declaration, which the district court found wanting for detail and credibility. (1-ER-30 n.4, 31–32.) Gilley declares that he will interact with @UOEquity at an unspecified future date and time, but he fails to identify any specific posts he would engage with, what he would say, when he would do so, or whether he even believes that his posts would violate the offending provisions of the Guidelines. (3-ER-306–07.) Thus, as in *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996), where the plaintiffs merely asserted that they "wish and intend to engage in activities prohibited" by the challenged statute but failed to "specify any particular time or

date" for doing so, Gilley also does not say when, how, or under what circumstances he will allegedly violate these Guidelines provisions. *Id.* at 1126. "A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Thomas*, 220 F.3d at 1139.

3. *Gilley's personal disdain for the views held by the University and Dr. Alex-Assensoh are no substitute for his inability to prove a "genuine threat of imminent prosecution."*

Gilley largely ignores the above factors in favor of villainizing the University and the head of its Division, Dr. Alex-Assensoh, for engaging in their own protected speech. (Pl.'s Br. at 13–18, 31, 54–55.) He argues that the University, Dr. Alex-Assensoh, and even the not-yet-hired Communications Manager hold views that are so antithetical to his own that they will inevitably apply the Guidelines in ways that harm him. (*Id.*) There are several problems with this argument.

First, the challenged provisions relating to racist and hateful comments have existed for years. (SER-116–17 (2019 Guidelines).) And yet, in that time, there is no evidence that anyone has ever been blocked pursuant to those provisions, let alone contrary to the University's express prohibition on viewpoint discrimination. Thus, the same provisions Gilley now claims the University is incapable of maintaining without engaging in viewpoint discrimination have, in fact, been around for years *without being used for viewpoint discrimination*. That is because the University

interprets its Guidelines to prohibit viewpoint discrimination. Full stop. (SER-19, 23–26, 42–43.) Gilley offers no reason—other than rank speculation—as to why he now faces a "genuine and imminent threat" that these same provisions will be used to block him when they have never been used in that way before.

Indeed, for the Court to conclude that Gilley is likely to be blocked pursuant to these provisions in the future, it would be required to find that (1) an unidentified future employee of the University (i.e., the Communications Manager) will notice and interpret an unknown future comment by Gilley as racist, hateful, or offensive, (2) this future employee will, *for the first time ever*, apply the challenged provisions to a post by Gilley, and (3) this future employee will then risk disciplinary action by violating the University's prohibition on viewpoint discrimination and blocking Gilley for that post. Such a "speculative chain of possibilities" cannot support jurisdiction. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013); *cf. also Lyons*, 461 U.S. at 107–08 (holding that standing cannot be based on the assumption that litigants will engage in future misconduct and/or unconstitutional behavior).

Second, although Dr. Alex-Assensoh has expressed views in her scholarship that are different from those held by Gilley, there is no evidence that she is likely to cause a future Communications Manager to block Gilley. Dr. Alex-Assensoh clearly and unequivocally testified that the University "should not block users on social

media based on their viewpoints," and that to do so would be antithetical to "the work that we do at the university in the Division of Equity and Inclusion." (SER-100.) She added: "We value diverse people, ideas, and viewpoints and . . . everyone is invited and welcomed to contribute. . . . [T]hat is what we uphold and that is what we have done." (*Id.*) Her response is consistent with what the University repeated throughout its own testimony. This is the only evidence of how Dr. Alex-Assensoh would—if called upon at some future time—handle an analogous case.

Critically, the fact that Dr. Alex-Assensoh holds views that are different from those held by Gilley is in no way contrary to or inconsistent with the repeated and unrebutted testimony that the University prohibits viewpoint discrimination and encourages diverse viewpoints. This is especially so given the lack of evidence showing that Dr. Alex-Assensoh has ever been involved in silencing any social media user, let alone Gilley. At base, Gilley is asking the Court to penalize Dr. Alex-Assensoh and the University for Dr. Alex-Assensoh holding views that are different than his own. That is an extraordinary proposition in a lawsuit ostensibly intended to protect free speech, and for the Court to endorse it would inflict far greater harm on the speech rights of Dr. Alex-Assensoh and the University than it would serve to protect Gilley's rights. Indeed, if one could show a future likelihood of viewpoint discrimination based solely on his viewpoint differing from that of a public entity or

servant, everyone would have the necessary injury to seek and obtain prospective relief, and the speech of countless public servants would be chilled.

C. Gilley's nominal damages claim is moot because Defendants have paid his requested damages and there is no longer any relief for a court to provide.

The Court should also dismiss Gilley's claim for nominal damages as moot. Immediately after Gilley filed his lawsuit, and before it was even served with the Complaint, the University paid Gilley's nominal damages request in full. (SER-119–20, 131–32.) That payment deprived Gilley of a personal stake in the outcome of his backward-looking claim and left the court without any redress to provide Gilley if he were to prevail on that claim. Because the case or controversy requirement mandates that a plaintiff always have a legally cognizable interest in the outcome of his claim, Gilley's claim for nominal damages is moot.

1. *A claim for nominal damages is moot once the plaintiff receives all the relief he requested.*

One of the "irreducible" components of federal jurisdiction is "redressability." *Uzuegbunam*, 141 S. Ct. at 801. "[N]o federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury." *Id.*; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998). Like the other components of federal jurisdiction, a court's ability to offer redress for a plaintiff's injury must be present "at every stage of litigation." *Uzuegbunam*, 141 S. Ct. at 801.

A plaintiff who ceases to present an injury that may be redressed by a favorable judgment loses his "personal interest" in the litigation. *Id.*; *see Allen v. Wright*, 468 U.S. 737, 754 (1984) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

As the Supreme Court recently held, the payment of nominal damages alone can redress a "completed violation of a legal right." *Uzuegbunam*, 141 S. Ct. at 802. That is, a court's ability to award nominal damages "at the judgment stage" satisfies the "redressability" prong of the case or controversy requirement. *Id.* at 801. A request for nominal damages may, as such, provide a plaintiff with the requisite "personal interest" to prevent a case from becoming moot. *Praise Christ. Ctr. v. City of Huntington Beach*, 352 F. App'x 196, 198 (9th Cir. 2009). In fact, an alleged past constitutional violation will often, as here, result in no compensable or ongoing harms, meaning that jurisdiction rests solely on the ability of a court to redress this past wrong with a nominal damages remedy. *See, e.g.*, *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871–72 (9th Cir. 2002) ("A *live* claim for nominal damages will prevent dismissal for mootness." (emphasis added)).

But when a court's ability to redress a past wrong goes away, so, too, does its jurisdiction. *Uzuegbunam*, 141 S. Ct. at 801–02. This means that the satisfaction of a requested damages award moots the corresponding claim because it deprives the

plaintiff of his "personal stake" in its outcome and leaves the court without any "relief" to award. *See, e.g.*, *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1145 (9th Cir. 2016) ("[A] claim [for damages] becomes moot once the plaintiff *actually receives* all of the relief to which he or she is entitled on the claim."); *S. Cal. Painters & Allied Trades v. Rodin & Co.*, 558 F.3d 1028, 1036 (9th Cir. 2009) (holding that a damages claim was moot where defendant paid all requested damages); *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011) (same).

Indeed, the Supreme Court "has long held that when a defendant unilaterally remedies the injuries of the plaintiff, the case is moot—even if the plaintiff disagrees and refuses to settle the dispute, and even if the defendant continues to deny liability." *Campbell-Ewald Co.*, 577 U.S. at 180–82 (Roberts, C.J., dissenting) (collecting cases). This point is reflected in a trio of Supreme Court cases involving defendants who voluntarily paid back taxes. *See California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308 (1893); *Little v. Bowers*, 134 U.S. 547 (1890); *San Mateo County v. S. Pac. R.R. Co.*, 116 U.S. 138 (1885). In each case, the Court found that, because the damages "for which the suit was brought [had] been unconditionally paid and satisfied," *S. Pac. R.R.*, 116 U.S. at 141, there was no longer any "actual controversy, involving real and substantial rights, between the parties," *Little*, 134 U.S. at 557, and the case was thus non-justiciable because "the cause of action [had]

ceased to exist," *San Pablo*, 149 U.S. at 313.

Although the above cases involved compensatory damages, there is no reason the result should be different when the requested damages are nominal. In holding that nominal damages can satisfy the redressability prong of federal jurisdiction, the Supreme Court emphasized that the actual exchange of money allows nominal damages to qualify as a form of redress for past legal harms. *Uzuegbunam*, 141 S. Ct. at 800–02. "Because nominal damages *are in fact damages paid to the plaintiff*, they affect the behavior of the defendant towards the plaintiff," and they thus provide proper redress. *Id.* at 801 (emphasis added) (cleaned up). "If there is any chance of money changing hands," the Court observed, "[the] suit remains live." *Id.* (alteration in original) (quoting *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019)). And the Court made clear: the availability of nominal damages is not "purely symbolic"—nominal damages provide redress *because* they are "concrete" and of "actual benefit" to the plaintiff. *Id.*

It therefore stands to reason that, if the requested nominal damages are "paid to the plaintiff" before "judgment is entered," then that request "can no longer support jurisdiction for a favorable judgment." *Id.* That is, once a defendant provides the remedy requested by the plaintiff to redress his injury, that injury is no longer redressable by the court. *See id.* at 808 (Roberts, C.J., dissenting) ("Where a plaintiff

asks only for a dollar, the defendant should be able to end the case by giving him a dollar, without the court needing to pass on the merits of the plaintiff's claims."); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1273 (10th Cir. 2004) (Henry, J., concurring) ("A defendant could . . . simply pay the nominal damages, thereby mooting the case . . . ."); *TNS Media Research, LLC v. Tivo Research & Analytics*, 629 F. App'x 916, 927 (2d Cir. 2015) ("Kantar agreed to pay TRA $1 in nominal damages, thereby mooting . . . the case.").

2. *Gilley received all the relief he requested and to which he was entitled, and his claim for nominal damages is therefore moot.*

Here, Gilley's claim for nominal damages is moot because Defendants paid his damages request in full. Although his nominal damages request satisfied the redressability requirement at the outset of this litigation, Gilley was required to maintain his "personal interest . . . at every stage of litigation." *Uzuegbunam*, 141 S. Ct. at 801. Once Defendants provided the remedy upon which the redressability of Gilley's past injury depended, that same injury was no longer redressable by a favorable ruling from the district court. And because a federal court cannot "enter a judgment unless it provides a remedy that can redress the plaintiff's injury," the court was required to dismiss the claim as moot. *Id.*

The district court refused to dismiss the claim unless Defendants accepted entry of an adverse judgment. (1-ER-19–20.) But this misses the point. "[N]o federal

court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury." *Uzuegbunam*, 141 S. Ct. at 801. Gilley has already received the only remedy he requested and to which he is entitled. The entry of a judgment would therefore be nothing more than an advisory opinion, placing the court's stamp of approval on Gilley's view of the law without providing any redress. *See id.* at 808 (Roberts, C.J., dissenting) (noting that "our cases have long suggested" a defendant may moot a claim by paying nominal damages "without the court needing to pass on [its] merits"); *McCauley v. TransUnion, LLC*, 402 F.3d 340, 342 (2d Cir. 2005) (holding that a plaintiff "is not entitled to keep litigating his claim simply because [the defendant] has not admitted liability").

3. *Even if Gilley's nominal damages claim is not moot, he cannot seek damages from the Communications Manager.*

Even if the Court were to find that Gilley's nominal damages claim remains live, he cannot seek nominal damages from the Communications Manager. The Communications Manager is sued "in his or her official capacity." (3-ER-311.) But neither the Eleventh Amendment nor 42 U.S.C. § 1983 allow Gilley to bring a claim for damages against a state official sued in their official capacity. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68–69 (1997); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63–66 (1989). Thus, even if it is live, the Court must dismiss Gilley's damages claim against the Communications Manager.

D. This Court has pendant appellate jurisdiction to consider the jurisdictional arguments raised in Defendants' cross-appeal.

It is hornbook law that "[e]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (quotations omitted). Indeed, even when the parties do not raise jurisdictional issues, including mootness, this Court must raise them *sua sponte*. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002). This Court's pendent appellate jurisdiction over issues of subject-matter jurisdiction is a matter of binding circuit precedent, *see Smith v. Arthur Andersen LLP*, 421 F.3d 989, 998 (9th Cir. 2005); *Wong*, 373 F.3d at 960, and is discussed at length in Defendants' response in opposition to Gilley's motion to dismiss this cross-appeal, which Defendants incorporate by reference. (SER-145–61.) This Court has jurisdiction to consider (and, indeed, must consider) the arguments raised in Defendants' cross-appeal.

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DENIAL OF A PRELIMINARY INJUNCTION.

If the Court finds that it has jurisdiction, it should affirm the district court's denial of a preliminary injunction. *First*, as the district court found, Gilley fails to show that he is likely to suffer irreparable harm absent preliminary relief because he is not at "imminent" risk of being blocked in the future. *Second*, as the district court

found, Gilley fails to show that he is likely to prevail on the merits of his claims for prospective relief because the Guidelines do not restrict speech and have no history of being used to restrict speech. *Finally*, as the district court found, the balance of equities and public interest favor Defendants because Gilley is suffering no ongoing injury and the University have a strong interest in managing its own internal affairs.

A. A preliminary injunction is an "extraordinary and drastic remedy" meant to prevent an "irreparable loss of rights."

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quotations omitted). "[T]he basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). A preliminary injunction "is not a preliminary adjudication on the merits but rather a device for preserving the status quo." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). "Preliminary relief," as such, "is properly sought only to avert irreparable harm to the moving party." *Chi. United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 944 (7th Cir. 2006).

A plaintiff is entitled to such relief only if she "meets all four of the elements of the preliminary injunction test established in *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008): [1] that an injunction would be in the public interest, [2] that

without an injunction irreparable harm is likely, [3] that the balance of equities tips in its favor, and [4] that it is likely to succeed on the merits." *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir. 2011). A plaintiff must satisfy all four elements—the test does not "collapse into the merits of [a] First Amendment claim." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011). Moreover, "mandatory preliminary relief"—i.e., relief that changes the status quo as it existed before the conflict giving rise to the case—"is subject to heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party." *Dahl v. HEM Pharms. Corp*., 7 F.3d 1399, 1403 (9th Cir. 1993).

B. Gilley is not likely to suffer irreparable harm because he is not at imminent risk of being blocked.

As the district court found, Gilley fails to show that he is likely to suffer irreparable harm absent a preliminary injunction because he has not been blocked by @UOEquity for 10 months and is not at "imminent" risk of being blocked in the future. (1-ER-33–36.) The district court's findings are not clearly erroneous and are amply supported by the record. Accordingly, this Court should affirm the denial of Gilley's request for a preliminary injunction.

1. *A threat of future harm cannot satisfy the irreparable harm requirement unless the threat is "real and immediate."*

Showing a likelihood of irreparable harm is an "indispensable" requirement

for obtaining a preliminary injunction. *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019). "[E]ven the strongest showing" on the other required elements for injunctive relief cannot justify granting such relief if there is no "imminent and irreparable injury." *Id.* at 326–27. In *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011), for instance, this Court refused to even consider the likelihood of success on the merits once it determined that the plaintiff was not likely to suffer irreparable harm. *Id.* at 982 n.3. And, in *Klein v. City of San Clemente,* 584 F.3d 1196 (9th Cir. 2009), this Court held that, even though the plaintiff was likely to succeed on the merits of his First Amendment claim, preliminary relief was only available if he also "demonstrate[d] that he [was] likely to suffer irreparable injury in the absence of a preliminary injunction." *Id.* at 1207.

Critically, a plaintiff "must establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction." *Vilsack*, 636 F.3d at 1172. "The equitable remedy is unavailable absent a showing of . . . real or immediate threat that the plaintiff will be wronged again . . . ." *Lyons*, 461 U.S. at 111. Thus, an alleged future harm cannot be "speculative," *id.*, and instead must be "imminent," *Vilsack*, 636 F.3d at 1173. The alleged injury, in other words, "must be both certain and immediate," not "theoretical." *Memphis A. Philip Roth Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) (quotations omitted).

A plaintiff cannot show "imminent" harm based solely on "occasional" past instances of alleged misconduct by government employees. In *Lyons*, for example, the Supreme Court held that the plaintiff's past exposure to a single unconstitutional chokehold could not support an injunction against the use of future chokeholds because the isolated past incident involving the plaintiff failed to show that he faced an "immediate threat" of being choked again.[10] 461 U.S. at 111. This was true even though 16 other people had died within the past eight years from similar chokeholds performed by the same police department. *Id.* at 105; *see id.* at 115–16 (Marshall, J., dissenting) (stating statistic). Similarly, in *Midgett*, this Court affirmed the denial of a permanent injunction that would have required a transit agency to comply with the ADA based on several past violations. It was not enough, the panel reasoned, that the plaintiff had been subject to four alleged violations over the past year. 254 F.3d at 848, 850. These "isolated" and "occasional" violations, it held, could not "support an inference that [the plaintiff] face[d] a real and immediate threat of *continued*,

[10] *Lyons* is best known for its holding on justiciability, but the Supreme Court also considered, in the alternative, whether the plaintiff would have qualified for injunctive relief if the Court did have jurisdiction over his claim for a permanent injunction. It is from this portion of the *Lyons* opinion that the above-quoted language and reasoning come. The Court ultimately concluded that the plaintiff would not be entitled to injunctive relief for many of the same reasons it concluded his claims for injunctive relief were non-justiciable.

future violations of the ADA in the absence of injunctive relief." *Id.* at 850.

A plaintiff likewise cannot show "imminent" harm when the government represents that it does not intend to enforce the contested portion of a law or policy. In *Swisher International, Inc. v. FDA*, No. 21-13088, 2022 WL 320889 (11th Cir. Feb. 3, 2022), for instance, the plaintiff challenged an FDA regulation requiring pre-market review of products it was selling without the required FDA approval. *Id.* at *1. According to the Eleventh Circuit, the plaintiff could not "clearly establish" an "actual or imminent" risk of an enforcement action against it because the FDA had sent the plaintiff a letter stating that it had "no intention of initiating an enforcement action" based on the contested provision. *Id.* at *5. This representation, the court explained, showed that future enforcement of the regulation was neither "likely" nor "actual or imminent," and the plaintiff presented no evidence calling this promise into doubt. *Id.* at *4–5. The court acknowledged that there "remain[ed] at least a possibility" that the agency would enforce the contested provision against the plaintiff, but it emphasized that "a possibility of irreparable harm" is simply not enough. *Id.* at *5 (quoting *Winter*, 555 U.S. at 21–22).

In addition, any delay in seeking preliminary relief is compelling evidence that the plaintiff does not face an imminent threat of irreparable harm. Thus, in *Funds for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1975), the D.C. Circuit held that a

44-day delay in seeking injunctive relief was "inexcusable" and "bolstered" the "conclusion that an injunction should not issue." *Id.* at 987. Likewise, in *Mylan Pharmaceuticals v. Shalala*, 81 F. Supp. 2d 30 (D.D.C. 2000), the court found that a two-month delay in bringing an action for injunctive relief "militate[d] against a finding of irreparable harm." *Id.* at 44. And, in *Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121 (7th Cir. 1983), the Seventh Circuit held that a two-month delay in seeking injunctive relief was "inconsistent with a claim of irreparable injury." *Id.* at 1123.

2. *Gilley cannot show a "real and immediate" threat of future blocking because stabin retired, her position remains unfilled, the Guidelines prohibit viewpoint discrimination, and only three posts have ever been blocked.*

Here, Gilley cannot show a "real and immediate" threat of the now-retired stabin or the as-yet-to-be-hired Communications Manager blocking him while his lawsuit is pending. Gilley is not currently being blocked and has been unblocked for 10 months and counting. (SER-131–32.) Stabin, who blocked Gilley one time, no longer works at the University. (SER-69–70.) It is unrebutted that stabin acted alone in blocking Gilley. (2-ER-105; SER-78–79.) Her replacement has yet to be hired, and @UOEquity is dormant. (SER-16–17.) Once hired, stabin's replacement will be supervised by an entirely different University department. (2-ER-105–107; SER-15–16, 71, 95–98.)

Within hours of learning about Gilley's allegations, the University unblocked

him and confirmed that he would not be blocked for expressing his viewpoint in the future. (SER-131–32.) This occurred before Defendants were even served with the Complaint. (SER-126–28.) The University prohibits viewpoint discrimination and has reinforced this prohibition to staff. (2-ER-279; SER-31, 42–43, 118, 131.) Stabin's unilateral decision to block Gilley was also "an anomaly" in the history of the @UOEquity subaccount. (1-ER-34; 2-ER-184.) For these reasons, the district court found that "it would be speculative to conclude that [stabin's] unknown successor is likely to block Plaintiff on Twitter again." (1-ER-35.)

That finding is entitled to deference. As *Lyons* and *Midgett* make clear, the fact that Gilley was previously blocked by stabin on a single, isolated occasion cannot support the inference that he faces a "real and immediate threat" of being blocked in the future. Although Gilley may argue that portions of the Guidelines *might* be applied in a discriminatory manner—even though there is no evidence they have ever been applied like that—such a speculative "possibility" is both insufficient for obtaining preliminary injunctive relief, *Winter*, 555 U.S. at 21, and irrelevant in this case because the University has represented that it has no "intent" of doing so, *Swisher*, 2022 WL 320889, at *3. And, insofar as Gilley now claims that being blocked will cause irreparable harm, that argument—as in *Mylan*, *Shaffer*, and *Funds for Animals*—is belied by the 58 days he waited to seek a preliminary injunction.

Gilley argues that the University—by unblocking him and recommitting to its decade-long practice of not blocking Twitter users based on viewpoint—is engaged in "gamesmanship." (Pl.'s Br. at 67–68.) He contends that no state actor will ever be subject to a preliminary injunction if it can just unblock someone when asked. (*Id.*) But that argument misses the point. The reason a preliminary injunction would be inappropriate here is not simply because the University unblocked him—that is important but not dipositive. Instead, the reason is that Gilley cannot show that he is *likely to be blocked again*. If a defendant engaged in the type of "gamesmanship" described by Gilley—repeatedly blocking users only to unblock them when sued—then that past practice would, absolutely, be strong evidence that a plaintiff is likely to be blocked again. But the whole point is that the record *in this case* does not reflect such a pattern or practice. The record shows the opposite: it shows, as the district court found, that blocking Gilley was "an anomaly." (1-ER-34.) Thus, whatever merit Gilley's argument might have in another case, it does not describe the facts or implications of the only case that matters: this one.

C. Gilley is unlikely to prevail on the merits of his claim for injunctive relief because the Guidelines do not restrict speech and have never been used to restrict speech.

Gilley likewise cannot show that he is likely to succeed on the merits of his claim for injunctive relief. *First*, the Guidelines do not restrict or punish the speech

of Twitter users; rather, they restrict only the conduct of University employees and, even then, only to prohibit viewpoint discrimination. *Second*, even if the Guidelines indirectly burden the speech of Twitter users, the interactive portions of @UOEquity constitute a limited public forum and the ability to moderate off-topic comments is reasonable in light of the forum's purpose. This Court should affirm the denial of Gilley's motion for a preliminary injunction.

1. *The likelihood that Gilley will prevail on the merits of his damages claim is irrelevant to the likelihood that he will prevail on the merits of his claim for injunctive relief.*

At the outset, one must distinguish between Gilley's backward-looking claim for damages, on the one hand, and his prospective claim for injunctive relief, on the other. Gilley's motion for a preliminary injunction was against only one of two Defendants—the Communications Manager in his or her official capacity—because only the Communications Manager (standing in for the University), not stabin, can provide him prospective relief. And, as previously discussed, Gilley can seek only prospective relief against the Communications Manager, not damages, because state entities have sovereign immunity from damages claims. Whatever the merits of Gilley's damages claim against stabin for her original act of blocking him in the past, it does not inform the separate question of whether Gilley is likely to prevail on the merits of his claim for injunctive relief. Thus, the strength or weakness of Gilley's

damages claim against stabin is irrelevant to his motion for preliminary relief.[11]

2. *The Guidelines do not regulate the speech of Twitter users and do not have a history of being used to restrict speech.*

Gilley is unlikely to prevail on the merits of his claim for injunctive relief because the Guidelines do not restrict the speech of Twitter users and have no history of being used in that way. The Guidelines are not directed at the public. (2-ER-279; SER-29–30.) They do not regulate who may comment on @UOEquity posts, when they may comment, or what they may say. (*Id.*) There is no screening, licensing, or sanctions regime created by the Guidelines, and they do not create civil or criminal penalties. (*Id.*) Instead, the Guidelines govern *only* the conduct of University employees. (*Id.*) And the only thing they prohibit is viewpoint discrimination.

That is also how the Guidelines have been implemented in practice. Over the past decade, just three out of the more than 2,555 retweets and comments directed at @UOEquity have been blocked. Moreover, no user has ever been blocked for posting content that was deemed racist, hateful, or offensive, nor has any user ever

[11] Even if the merits of Gilley's damages claim were relevant to the preliminary injunction analysis—and they are not—Gilley is not likely to succeed on that claim because, among other things, stabin has qualified immunity. At the time stabin blocked Gilley, no Ninth Circuit precedent existed to guide her decision. This Court subsequently decided *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022), which granted qualified immunity on that basis, and the Supreme Court has now granted certiorari, No. 22-324, 2023 WL 3046119 (U.S. Apr. 24, 2023).

been threatened or told that they may not post such material. That is because the Guidelines do what they say: prohibit viewpoint discrimination. In fact, the only documented use of the Guidelines to justify speech moderation on the @UOEquity subaccount is stabin's unilateral decision to block Gilley for what she perceived as an off-topic comment. But even then, when University administrators and stabin's supervisors learned that she had blocked Gilley, they counseled her that, insofar as she blocked Gilley because she did not understand his comment, doing so contravened the Guidelines' directive to "err on the side of not blocking."

In turn, Gilley is unlikely to prevail on the merits of his claim for injunctive relief because he cannot "demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *Nat'l Endowment for the Arts*, 524 U.S. at 580. Gilley asks the Court to ignore both the text and implementation of the Guidelines in favor of his own speculative fears about them. But when a law operates only on government employees and does not "preclud[e] speech" or "silence speakers by expressly threatening censorship," plaintiffs bringing a facial challenge "confront a heavy burden." *Id*. at 580, 583. And as the Supreme Court has warned, courts confronting such a law must not "invalidate [it] on the basis of its hypothetical application to situations not before" them. *Id.* at 584. That admonition carries extra weight, no doubt, when the hypothetical situation calls for application of the law as

imagined by the plaintiff rather than as written and implemented by the defendant. Because the Guidelines do not regulate the speech of Twitter users and have only ever been interpreted and applied to prohibit viewpoint discrimination, there is no "substantial risk" that "application of the [Guidelines] will lead to the suppression of speech." *Id.* at 580.

3. *Even if the Guidelines restrict speech, the @UOEquity page is a limited public forum and moderating off-topic comments is reasonable considering the forum's purpose.*

Nevertheless, even if the Court finds that the Guidelines limit the speech of Twitter users—which they do not—those restrictions are constitutional.

First, as the district court found, @UOEquity is a limited public forum. (1-ER-22–26.) It is limited to dialogue and information about diversity, equity, and inclusion. *See Koala v. Khosla*, 931 F.3d 887, 902 (9th Cir. 2019) ("[L]imited public fora are by definition created by the state for particular purposes . . . ."). The handle ("@UOEquity"), description ("Celebrating Diversity" and "Facilitating Equity and Inclusiveness"), and banner ("Division of Equity and Inclusion"), each prominently displayed at the top of the subaccount's main page, immediately and unambiguously inform users of the forum's scope, and the subaccount's posts are consistently limited to the topics of diversity, equity, and inclusion. *See, e.g.*, *Garnier v. Poway United Sch. Dist.*, No. 17-cv-2215-W, 2019 WL 4736208, at *10 (S.D. Cal. Sept.

26, 2019) ("Government intent is critical in [creating a limited public forum], which in turn is evaluated by looking at the government's policy and practice.").

Although Gilley argues that the University does not consistently police off-topic comments, he offers no evidence of the proportion of off-topic comments, if any, posted and allowed to remain on the subaccount.[12] (Pl.'s Br. at 45–46.) He simply points to the narrow sample of dissenting comments submitted into the record by the University. (*Id.*) Not only has Gilley made no attempt to demonstrate that this sample is representative, but each of the sampled comments pre-dating his blocking on June 14, 2022, are responsive to, and critical of, some aspect of a post by @UOEquity. (2-ER-171–73.) That is, they are not comments which should have been removed as being off topic. The sample thus offers insufficient evidence for Gilley to carry his burden of showing that the University failed to limit activity in the forum to the clear and unambiguous purposes for which it was created. The district court's finding that the "University did not affirmatively open @UOEquity as a designated public forum" is not clearly erroneous. (1-ER-26.)

Finally, because the interactive portions of @UOEquity qualify as a limited public forum, "restrictions on speech and speakers are permissible so long as they

[12] There is no small irony in Gilley's argument that the University has been *too good* at allowing people to voice dissenting viewpoints without being blocked.

are viewpoint neutral and reasonable in light of the purpose served by the forum." *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1178 (9th Cir. 2022). Here, the only evidence of purposeful content moderation—whether pursuant to the Guidelines or otherwise—is stabin's decision to block Gilley for what she testified was an off-topic comment. The Guidelines otherwise prohibit viewpoint discrimination and have never been used to restrict speech. The moderation of off-topic comments is viewpoint neutral and reasonable in light of the forum's narrow purpose to provide information and resources about diversity, equity, and inclusion. Accordingly, because Gilley is unlikely to prevail on the merits of his claim for injunctive relief, this Court should affirm the denial of his request for preliminary relief.

D. The balance of equities and public interest favor Defendants because there is no ongoing constitutional injury and state entities have a strong interest in managing their internal affairs.

The district court also correctly found that the balance of equities and public interest weigh in favor of Defendants because Gilley is not suffering any ongoing constitutional injury and state entities like the University have a strong interest in managing their own internal affairs.

When a party seeks preliminary relief against the government, the balance of the equities and public interest factors "merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Although enjoining an ongoing violation of a

fundamental right is "always in the public interest," *Sammartano*, 303 F.3d at 974, there is no such violation here. Further, it is pure speculation that the Guidelines will, in the future, be applied to any person in a discriminatory manner, and any subjective fear of Gilley being blocked is not objectively reasonable based on the record. *See, e.g.*, *Sierra Club v. Trump*, 929 F.3d 670, 706 (9th Cir. 2019) (holding that the balance of hardships should not account for a plaintiff's "self-inflicted wounds").

By contrast, an injunction will concretely impact the University's ability to manage its internal affairs. Gilley seeks a "mandatory" injunction that would require the University to do more than restore the status quo as it existed before he interacted with @UOEquity, namely by making changes to its Guidelines, including provisions never applied to Gilley or anyone else. (2-ER-148; 3-ER-332–34.) This type of "mandatory" relief is "subject to heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party." *Dahl*, 7 F.3d at 1403.

Moreover, as a public entity, it is a "well-established rule" that the University has a strong interest in managing "its own internal affairs." *Rizzo*, 423 U.S. at 378–79 (quotations omitted). As a recipient of federal funds, control over internal affairs includes ensuring that the University complies with Titles VI and IX—which together prohibit the University from fostering a hostile educational environment based on race, color, national origin, or sex—as well as its educational mission. As

this Court has warned, "a federal court must exercise restraint when a plaintiff seeks to enjoin any non-federal government agency, be it local or state." *Midgett*, 254 F.3d at 851. The fact that the University is a state actor "with procedures already in place" for preventing viewpoint discrimination "militates against a federal court's mandating substitute procedures of its own design to address the same issues." *Id.* at 850. Accordingly, because these factors weigh against Gilley, this Court should affirm the district court's denial of a preliminary injunction.

CONCLUSION

Defendants respectfully request that this Court dismiss the case for lack of jurisdiction, or in the alternative, affirm the denial of preliminary relief.

DATED: May 10, 2023.

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CERTIFICATE OF COMPLIANCE

This brief contains 16,457 words, excluding the items exempted by Fed. R. App. P. 32(f). I certify that the type size and typeface comply with Fed. R. App. P. 32(a)(5). I further certify that this brief complies with the word limit of Circuit Rule 28.1-1(d).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document 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.

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