

Nos. 23-35097, 23-35130
**In the United States Court of Appeals
for the Ninth Circuit**

BRUCE GILLEY,

Plaintiff-Appellant / Cross-Appellee,

v.

TOVA STABIN, ET AL.,

Defendants-Appellees / Cross-Appellant.

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

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

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September 15, 2023

Counsel for Plaintiff-Appellant/Cross-Appellee

INTRODUCTION AND RELIEF REQUESTED

Pursuant to Fed. R. App. P. 10, Plaintiff-Appellant/Cross-Appellee Bruce Gilley respectfully moves to supplement the record with evidence verifying his return of the \$20 bill sent by the University of Oregon's (UO) counsel to Gilley's counsel.

The importance of this additional evidence became apparent during oral argument on September 13, 2023. Gilley's counsel represented during those arguments that the \$20 bill was returned to UO's counsel, but UO's counsel was unwilling to admit on the record that the money had been returned.

The evidence that Gilley now offers into the record consists of the Declaration of Susan Bradley and exhibits that prove that the \$20 was returned to UO's counsel Misha Isaak on November 9, 2022. This evidence bears directly on the issue of mootness raised by UO's cross-appeal and contradicts UO's counsel's implication that Gilley's attorney kept the \$20 bill.

Counsel for both parties conferred via email and UO opposes Gilley's motion to supplement the record.

FACTUAL BACKGROUND

On September 13, 2023, this Court heard oral argument on this cross appeal. Oral Argument Video, <https://bit.ly/3Po2lUf> (last visited Sept. 15, 2023). During oral argument, the panel members asked numerous questions about the disposition of the \$20 bill that UO’s counsel sent to Gilley’s counsel. *Id.* at time stamp 12:00–14:20 (Gilley’s argument); 24:30–30:15 (UO’s argument). Gilley’s counsel informed the Court that he had instructed the Institute for Free Speech’s (IFS) office manager to send back the \$20 bill. *Id.* at time stamp 13:00–14:00.

UO’s counsel argued that Gilley’s nominal damages claim should be moot because UO “transitioned custody of the money to them [Gilley’s counsel].” *Id.* at 24:30–25:00. UO’s counsel also declined to admit that Gilley’s counsel returned the money. *Id.* at 23:30-24:00. Both parties agree that information about the return of the \$20 bill is not currently in the record.

The attached Declaration of Susan Bradley, and Exhibits A-D, conclusively establish that the \$20 bill was returned to UO’s counsel Misha Isaak at the Perkins Coie law firm via UPS Ground Commercial and delivered on November 9, 2022.

ARGUMENT

Fed. R. App. P. 10(e)(3) authorizes a party to seek supplementation of the record directly from the court of appeals. Such supplementation is permitted only in extraordinary circumstances, such as when the information is relevant to a pressing mootness or jurisdictional issue before the court. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, No. 22-15827, 2023 U.S. App. LEXIS 24260, at *36, *39 n.7, *73 n.14 (9th Cir. Sep. 13, 2023) (en banc) (granting motion to supplement record with declarations because testimony raised a mootness issue); *Flores v. Bennett*, No. 22-16762, 2023 U.S. App. LEXIS 20043, at *2 & n.1 (9th Cir. Aug. 3, 2023) (allowing supplementation of record with replacement policy where mootness issue was before court); *Hecox v. Little*, Nos. 20-35813, 20-35815, 2023 U.S. App. LEXIS 2347, at *11 n.1 (9th Cir. Jan. 30, 2023) (allowing supplementation of record where facts in new declaration “bear directly on question of mootness”); *Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003) (discussing standard generally and with regard to mootness); *see also United States v. Karadimos*, 479 F. App’x 144, 144 (9th Cir. 2012) (supplementation of discovery not filed with district

court allowed because remand to the district court “to review it in the first instance would be contrary to the interests of justice and the efficient use of judicial resources”). Accordingly, in some circumstances counsel may even have a duty to bring to the tribunal’s attention facts pertaining to a question of mootness. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997). Such a motion may also be granted to correct a material misstatement in the record. *Mangini v. United States*, 314 F.3d 1158, 1160-61 (9th Cir. 2003).

UO’s cross-appeal argues that “Gilley’s request for nominal damages is moot because Defendants have paid his requested damages[.]” 9th Cir. Dkt. #26 at 58–82. This same argument was reiterated by UO’s counsel at the hearing, where he stated that UO “transferred custody of the money to them” but omitted that such custody was temporary, because Gilley’s counsel returned the money. When asked whether the money was returned, UO’s counsel refused to say and would only state that the information was not in the record. Oral Argument Video, *infra*, at 23:30–24:00.

The information that Gilley seeks to supplement establishes that UO did deliver \$20 cash to the hallway outside of the IFS’s DC office and

that IFS's office manager was instructed to return the \$20 to Mr. Isaak at his then-law firm, Perkins Coie in Portland, Oregon. Susan Bradley Dec. ¶¶ 2–5. On November 3, 2022, Ms. Bradley shipped the cash (along with the original envelope and letter) back to Mr. Isaak via UPS Ground Commercial. *Id.* ¶ 7; Ex. B. That shipment was delivered to Mr. Isaak at Perkins Coie on November 9, 2022, at 9:42 AM. Bradley Dec. ¶¶ 8-9; Exs. C-D.

Gilley's motion is similar to those in *Fellowship of Christian Athletes*, *Flores*, and *Hicox*, where this Court allowed plaintiffs to supplement the record with evidence bearing on an issue of mootness. Indeed, like the present case, *Fellowship of Christian Athletes* and *Flores* both involved speech and other civil-rights claims against government entities, and particularly against policies that the plaintiffs argued burdened their rights. *Fellowship of Christian Athletes*, 2023 U.S. App. LEXIS 24260, at *34-35 (“Plaintiffs may demonstrate that an injury is likely to recur by showing that the defendant had a written policy, and that the injury ‘stems from’ that policy. Where the harm alleged is directly traceable to a written policy, there is an implicit likelihood of its repetition in the

immediate future.”) (cleaned up); *Flores*, 2023 U.S. App. LEXIS 20043, at *6-7 (College’s Flyer Policy was likely unconstitutionally vague).

The fact that the \$20 bill was returned clearly matters to this Court. *See also Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 165-66, 136 S. Ct. 663, 672 (2016) (“In sum, an unaccepted settlement offer or offer of judgment does not moot a plaintiff’s case[.]”).

It is also inaccurate for UO’s counsel to state that UO “transferred custody of the money to them” when the money was returned to UO’s counsel. At best, any “transfer of custody” was temporary and non-consensual. Defendant’s counsel’s statements omitted material information regarding an issue that UO had raised before the Court and left the inaccurate impression that Gilley kept the \$20 bill.

Had counsel simply answered this Court’s questions about the return of the money, that inaccurate impression would have been corrected and this motion would be unnecessary. Counsel is free to argue about the meaning of this evidence—Gilley avers that it supplies conclusive proof that he no longer has the \$20 bill and that whatever Perkins Coie did with the \$20 bill, Gilley rejected UO’s settlement offer or whatever

UO claims it was. But for this motion's purposes, it suffices that this evidence is probative and bears directly on jurisdiction.

Granting this motion to supplement would correct the inaccurate impression left by UO's counsel, provide material information to the Court on the issue of mootness, promote the interests of justice, and the efficient use of judicial resources by foreclosing the need to remand this issue to the district court for further fact-finding. Counsel is unaware of any good faith basis for UO's counsel to dispute the relevance of this evidence, or the fact that Gilley returned the \$20 bill to him.

CONCLUSION

This Court should grant Gilley's motion to supplement the record because doing so will help the Court resolve the mootness claim regarding nominal damages; and also clarify any misconceptions arising out of UO's counsel's statement that UO "transferred custody of the money to them" while omitting that Gilley returned the money. Doing so would also promote the interests of justice and the efficient use of judicial resources.

Respectfully submitted,

Dated: September 15, 2023

s/Angus Lee

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s/Endel Kolde

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Attorneys for Bruce Gilley

CERTIFICATION

I hereby certify that this brief complies with the requirements of Fed.

R. App. P. 27(d) and is set in 14-point Century Schoolbook font.

s/Endel Kolde

No. 23-35097, 23-35130
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BRUCE GILLEY,

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DECLARATION OF SUSAN BRADLEY

I, Susan Bradley, hereby declare as follows:

1. I am office manager for the Institute for Free Speech (IFS), a non-profit corporation that brings free speech cases nationwide on a pro-bono basis. Our physical office is located at 1150 Connecticut Avenue, Suite 801 in Washington DC. Most of our staff and attorneys work remotely, and many are based outside of the DC-metro area.

2. Due to our distributed workforce, our physical office is only intermittently staffed. I am responsible for checking on mail and physical deliveries to our office. On October 18, 2022, I arrived at IFS's DC office and found a FedEx envelope in the hallway outside our office. It was from the University of Oregon (UO) and was addressed to one of our attorneys, Endel Kolde.

3. I opened the FedEx envelope and found that it contained another envelope addressed to Angus Lee, an attorney based in Vancouver, WA who is working with us as local counsel on this lawsuit. That envelope was only partly sealed, allowing me to access the contents, without tearing the envelope.

4. The envelope addressed to Angus Lee contained a letter from UO's general counsel to Mr. Lee and IFS attorney Endel Kolde and a \$20 bill (cash).

5. I contacted Mr. Kolde about this delivery. He instructed me to scan a copy of the letter and email it to him and then return the letter and cash to UO's attorney, Misha Isaak, Perkins Coie, 1120 NW Couch

Street, 10th Floor, Portland, Oregon, 97209-4128. I followed Mr. Kolde's instructions.

6. A true and correct copy of the scanned letter from UO's general counsel is attached as Exhibit A.

7. On November 3, 2022, I shipped the original envelope, original letter, and \$20 bill to UO's counsel of record, Misha Isaak, via UPS Ground Commercial from The UPS Store #0823 in Alexandria, Virginia. A true and correct copy of the physical receipt from The UPS Store is attached as Exhibit B.

8. On November 9, 2022, I received a tracking email from UPS's iShip service, confirming that the shipment was delivered to Misha Isaak at Perkins Coie in Portland, Oregon on November 9, 2022, at 9:42 AM. A true and correct copy of that tracking email is attached as Exhibit C.

9. The shipping address that I used for Mr. Issak was the same one that he listed on his Notice of Appearance filed in this case on August, 24, 2022. A true and correct copy of that notice of appearance is attached as Exhibit D.

Executed under penalty of perjury on September 14, 2023.



SUSAN BRADLEY



Sent via electronic and first class mail

August 16, 2022

D. Angus Lee, Senior Partner
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Re: Gilley v. Stabin - 3:22-cv-01181-HZ

Dear Messrs. Lee and Kolde:

We read about Prof. Gilley's lawsuit in the newspaper. It is customary in Oregon for attorneys to contact each other before filing a lawsuit to determine whether matters can be amicably resolved, without the filing of a lawsuit. Had you contacted my office, we easily could have resolved this matter without the time and expense of your filing a lawsuit.

While you apparently caused a process server to visit our former employee, tova stabin at her home, you have not served the University and my office has received no communication from you about the lawsuit, other than an email sent last Friday to our Deputy General Counsel, who was out of the office till this week.

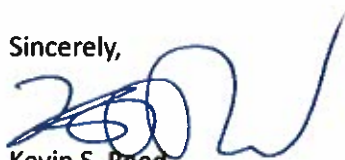
In any event, Prof. Gilley (@BruceDGilley) was unblocked from the Twitter account at issue (@UOEquity) last Friday, August 12, 2022, and the Division of Equity and Inclusion does not intend to block him or anyone else in the future based on their exercise of protected speech. My office has reinforced 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.

Messrs. Lee and Kolde
August 16, 2022
Page 2 of 2

Finally, enclosed with the hard copy of this letter to Mr. Lee is \$20 to cover the nominal damages of \$17.91 alleged in your complaint. Ordinarily the University would issue a check; however, we are enclosing cash to avoid the administrative hassle and delay of issuing a check. Accordingly, your lawsuit is now moot, as there is no longer any effective relief that the federal court can grant, and we ask that you voluntarily dismiss it.

I trust this resolves the complaint and look forward to receiving notice that you have withdrawn your lawsuit.

Sincerely,



Kevin S. Reed
Vice President and General Counsel

Enclosure

Shipment Receipt: Page #1 of 1

THIS IS NOT A SHIPPING LABEL. PLEASE SAVE FOR YOUR RECORDS.

SHIP DATE: THUR 3 NOV 2022	SHIPMENT INFORMATION: UPS GROUND COMMERCIAL 0 lb 0.6 oz actual wt 1.000 lb billable wt
EXPECTED DELIVERY DATE: WED 9 NOV 2022 EOD	DIMS: 10.00X6.00X3.00 IN
SHIP FROM: INSTITUTE FOR FREE SPEECH 1150 CONN AVE NW SUITE 001 WASHINGTON DC 20036 (202) 301-3300	E-MAIL NOTIFICATION: SHIP, DELIVER TRACKING NUMBER: 1Z2F40150334242326 SHIPMENT ID: MM615EAGTK14 SHIP REF 1: - SHIP REF 2: -
SHIP TO: NISHA ISAAK PERKINS COTE 1120 NW COUCH ST FL 10 PORTLAND OR 97209-4128 BUSINESS	DESCRIPTION OF GOODS: DOCS
SHIPPED THROUGH: THE UPS STORE #0823 ALEXANDRIA, VA 22314-2824 (703) 683-8441	SHIPMENT CHARGES: GROUND COMMERCIAL 13.18 SERVICE OPTIONS 0.00 CHS PROCESSING FEE 0.22
	TOTAL \$13.40

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Del Kolde

From: iShip_Services_221@iship.com
Sent: Wednesday, November 9, 2022 10:47
To: Susan Bradley
Subject: Your parcel has been delivered

Your parcel has been delivered



**Your
package is
waiting**

The package sent to MISHA ISAAK has been delivered.



Your shipping information

Who sent it

INSTITUTE FOR FREE SPEECH

(Sender's street address omitted intentionally from this email)

Washington, DC 20036

Who will receive it

MISHA ISAAK

PERKINS COIE

(Recipient's street address omitted intentionally from this email)

PORTLAND, OR 97209-4128 US

Wed 09 Nov 2022 09:42 AM

Shipped from

THE UPS STORE #0823

703-683-8441

Carrier details

UPS Ground

Tracking details

Tracking No.: 1Z2F48150334242326

Shipment ID: MM615EWGWTk14

Order / Item #: --

Reference #: --

Ship date

Thursday, November 3, 2022

Delivery date

Wed 09 Nov 2022 09:42 AM

Tracking your item

Click the link below to view complete tracking information.

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UNITED STATES DISTRICT COURT

for the

District of Oregon



BRUCE GILLEY

Plaintiff

v.

TOVA STABIN, et al.

Defendant

Case No. 3:22-cv-1181-HZ

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Defendant Tova Stabin

Date: 08/24/2022

s/ Misha Isaak

Attorney's signature

Misha Isaak, OSB No. 086430

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