

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 RESPONSE TO MOTION TO SUPPLEMENT RECORD AND
CROSS-MOTION FOR ADDITIONAL SUPPLEMENTATION

D. Angus Lee
ANGUS LEE LAW FIRM, PLLC
9105 NE Highway 99, Suite 200
Vancouver, WA 98665-8974
(360) 635-6464
angus@angusleelaw.com

Endel Kolde
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W., Ste. 801
Washington, DC 20036
202-301-3300
dkolde@ifs.org

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Counsel for Plaintiff-Appellant

INTRODUCTION AND RELIEF REQUESTED

Plaintiff-Appellant Bruce Gilley respectfully requests that this Court deny Tova Stabin and the University of Oregon's (collectively "UO's") motion to supplement the record with a single X post¹ from Elon Musk. That post, presented in isolation, creates a misleading impression that the "block" function is about to be removed from X such that users like @UOEquity will no longer be able to prevent other users, like @BruceDGilley, from interacting with their posts.

UO's motion omits important context. The two primary platforms for mobile app distribution—Apple's App Store and Google Play—require all apps hosting user-generated content (also known as user posts) to have a block feature. Eliminating X's existing block feature without replacing it with comparable functionality would thus likely cause the X app to be excluded from the primary distribution channels for mobile apps, which would severely impair X's reach.

Indeed, other posts from Musk and X employees indicate that he envisions migrating some of the current block features to a stronger

¹ Twitter was re-branded X in July 2023, and what were formerly called "tweets" on that social-media platform are now more generically referred to as "posts."

“mute” feature. Whether it is called “block” or “mute” or something else, there is no viable scenario in which government users like @UOEquity would be unable to prevent other users, like @BruceDGilley, from interacting with their posts. And at this point, it is all speculative anyway, because the block feature remains in place.

Bruce Gilley urges this Court to deny UO’s motion, but if this Court is inclined to grant it, Gilley requests that this Court supplement the record more fully, to include the exhibits attached to his counsel’s declaration. UO does not oppose Gilley’s request for alternative relief in the form of such supplementation.

FACTUAL BACKGROUND

On August 28, 2023, X’s owner posted that “Block is going to be deleted as a ‘feature,’ except for DMs [direct messaging].” Ex. A. Sometime after Musk’s post, other X users utilized the platform’s Community Notes feature to append a comment to Musk’s post that read: “Elon Musk cannot do this. The feature to block someone on the site is REQUIRED as a social media app to be allowed on the App Store and the Google Play store.” Kolde Dec. ¶¶ 5-6; Ex. A. That Community

Note was eventually removed from Musk’s post at some point after August 27, 2023, for unknown reasons. Kolde Dec. ¶ 7.

The two dominant mobile app distribution platforms, Apple’s App Store (for iOS-based iPhones) and Google Play (for Android-based mobile phones), both publish requirements for app developers who want to distribute their apps via the App Store or Google Play. Kolde Dec. ¶¶ 8-13; Exs. B, C; APPLE, *App Store Review Guidelines* (last visited September 2, 2023), <https://perma.cc/6JH6-TJCJ>; GOOGLE, *User Generated Content - Play Console Help* (last visited September 2, 2023), <https://perma.cc/MJ5B-UBM9>. Both Apple and Google include requirements specific to apps that allow posting of so-called “user-generated content,” (or UGC); that is, content that a user of an app has created (generated) and then uses the app to distribute. X, like other social-media platforms, depends on user-generated content, generically referred to as “posts.”

Both Apple and Google require that apps that allow user-generated content have a block function. Exs. C, B. Apple requires that “apps with user-generated content or social networking services must include...*The ability to block abusive users from the service[.]*” Ex. B (emphasis

added). Similarly, Google requires that apps “that contain or feature UGC . . . must implement robust, effective, and ongoing UGC moderation that . . . *Provides an in-app system for blocking UGC and users[.]*” Ex. C (emphasis added).

After Elon Musk posted about eliminating the block feature on X, he and other X employees responded to the online backlash by explaining that they intended to migrate some of the features in the current block function to a new-and-improved “mute” function. On the same day as Musk’s original post, August 18, 2023, an X employee named Christopher Stanley re-posted another X employee’s post about “making mutes stronger, like not allow people you mute to reply or quote you” and further commented that people were making incorrect assumptions about what removing the block feature would mean. Kolde Dec. ¶ 15; Ex. D. Musk responded to Stanley’s post with the comment, “Mayhem over nothing[.]” and included a laughing-crying emoji. *Id.*

Two days later, Musk posted that “the obvious move is to strengthen the mute function by making anything posted by the muted account invisible to you.” Kolde Dec. ¶ 17, Ex. E. That same day Musk also

posted “Mute needs to mute properly, including all mentions.” Kolde Dec. ¶ 18; Ex. F.

Currently, some of the features Musk is discussing adding to the mute function are part of the block function. *See* X HELP CENTER, *How to block accounts on Twitter* (last visited Sept. 2, 2023), <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> (“Tweets from blocked accounts will not appear in your timelines”). As of September 4, 2023, the block function on X is still available. Kolde Dec. ¶ 19, Ex. G.

ARGUMENT

Absent extraordinary circumstance, this Court will not allow parties to supplement the record on appeal. *Reynolds v. City & Cty. of S.F.*, 576 F. App'x 698, 702 (9th Cir. 2014); *United States v. Boulware*, 558 F.3d 971, 976 (9th Cir. 2009). UO has not met its burden of showing extraordinary circumstances because as of today, the X platform still has the blocking feature and @UOEquity maintains the ability to block @BruceDGilley and other users who are critical of its ideological posts.

UO also presents Musk’s post in isolation, without necessary context, which creates a misleading impression. At best, one can say that there

is currently a discussion about moving some of the features currently in X's block function over to the related mute function, which would make mute similar to what is currently called block. Kolde Dec. ¶¶ 5-18; Exs. A-F. Doing so would have little, if any, practical effect on the issues in this case.

For example, if @UOEquity can use a stronger mute feature to prevent @BruceDGilley from replying or quoting @UOEquity, then UO can prevent him from interacting with @UOEquity in the same way as the re-tweet that earned him the original block at issue in this case.

Compare 3-ER-349–351 with Ex. D (“We can make mutes stronger, like not allow people you mute to reply or quote you.”). Similarly, if anything posted by Bruce Gilley is “invisible” to @UOEquity, or its followers, it is hard to see how he will be able to interact with UO’s government account or participate in a public conversation about what a state actor is posting. *See Ex. E* (“Yes, the obvious move is to strengthen the mute function by making anything posted by the muted account invisible to you”).

In addition, it is undisputed that both Apple and Google, whose operating systems dominate the US mobile phone market in a near

duopoly, require that apps available on their distribution platforms (Apple App Store and Google Play) have a block function for apps with user-generated content. *See* Exs. A-C; APP STORE REVIEW GUIDELINES, *infra*; USER GENERATED CONTENT – PLAY CONSOLE HELP, *infra*. Violating these guidelines by removing the block feature would likely result in the X app’s removal from the App Store and Google Play, making it much more difficult for users to download the X app. UO has not met its burden to show that Musk would harm the X platform in such a self-destructive manner.

It is, perhaps, plausible that X will satisfy Apple and Google’s requirements by migrating key features of the current block function over to the mute function, but that would have no practical impact on the legal issues in this case. It does not matter whether the function is called “block,” “mute,” “censor,” “silence critics,” or something else. Unless @UEquity loses the functional ability to keep Bruce Gilley from interacting with an official government account, the ongoing controversy about the First Amendment right to speak freely will persist.

And whatever the mercurial Elon Musk and his team may decide to do at some point in the future is speculative. As of today, the block function remains available to X users. Kolde Dec. ¶ 19; Ex. G.

UO has not met its burden of showing extraordinary circumstances to supplement the record; and even if supplementation were allowed, UO has not met its burden of showing mootness, because government accounts like @UOEquity are still able to prevent other users from interacting with their accounts and content. At this time, UO's motion invites this Court to speculate.

CONCLUSION

This Court should deny UO's motion to supplement the record. In the alternative, if this Court is inclined to grant UO's motion, this Court should grant Gilley's cross-motion in order to allow the context to be presented more accurately.

Respectfully submitted,

Dated: September 4, 2023

s/Angus Lee
D. Angus Lee
ANGUS LEE LAW FIRM, PLLC
9105 NE Highway 99, Suite 200
Vancouver, WA 98665-8974
(360) 635-6464
angus@angusleelaw.com

s/Endel Kolde
Endel Kolde
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W., Ste. 801
Washington, DC 20036
202-301-3300
dkolde@ifs.org

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

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DECLARATION OF ENDEL KOLDE

I, Endel Kolde, hereby declare as follows:

1. I am lead counsel for Bruce Gilley in this case. I am competent to testify and make this declaration based on my personal knowledge.
2. Counsel for Stabin and the University of Oregon (UO) initially filed their motion to supplement the record without conferring.
3. On Sunday, August 27, 2023, I emailed counsel about the failure to confer and indicated that we would oppose UO's proposed supplementation and would be requesting alternative relief in the form of more complete supplementation of the record regarding the status of the blocking feature on X (formerly known as Twitter) and plans to migrate some of its features to the mute function.
4. Counsel conferred on August, 28, 2023, and UO's counsel indicated that he would not oppose Gilley's motion for alternative relief.
5. Sometime after Elon Musk posted about deleting the block feature on August 18, 2023, other X users utilized the Community Notes feature to fact-check Musk and posted a response asserting that eliminating the block feature would violate Google's and Apple's app developer requirements and cause the X app to be excluded from Google Play and Apple's App Store.
6. Attached as Exhibit A is a true and correct screenshot of the Musk post with the Community Note that I saw on X as late as August 27, 2023.

7. Sometime after August 27, 2023, the Community Note on Musk's post was removed, for reasons that are unknown to me.

8. On August 27, 2023, I followed the links on the since-deleted Community Note and determined that Apple's requirements for apps with user-generated content "must include . . . The ability to block abusive users from the service[.]"

9. A true and correct copy of Apple's app requirements is located at <https://perma.cc/6JH6-TJCJ>.

10. A true and correct screenshot of Apple's requirements listed under the heading "1.2 User-Generated Content" is attached as Exhibit B.

11. Similarly, Google's requirements provide that apps "that contain or feature UGC [user generated content], must implement robust, effective, and ongoing UGC moderation that . . . Provides an in-app system for blocking UGC and users[.]"

12. A true and correct copy of Google's UGC and incidental sexual content requirements is located at: <https://perma.cc/MJ5B-UBM9>.

13. A true and correct screenshot, listing Google's requirements for UGC moderation, is attached as Exhibit C.

14. On August 27 and September 1, 2023, I used the search feature on the X mobile app to search Musk's posts since August 18, 2023, and located several posts where Musk explains that he and his team are thinking about moving some of the features from blocking to the related "mute" feature, making mute more like what is currently called "block."

15. On August 18, 2023, an X employee named Christopher Stanley re-posted another X employee's post about "making mutes stronger, like not allow people you mute to reply or quote you" and commented that people were making incorrect assumptions about what removing the block feature would mean. Musk responded to Stanley's post with his own post commenting "Mayhem over nothing."

16. True and correct screenshots of Stanley and Musk's posts are attached as Exhibit D.

17. On August 20, 2023, Elon Musk also posted that "the obvious move is to strengthen the mute function by making anything posted by the muted account invisible to you." A true and correct screenshot of that post is attached as Exhibit E.

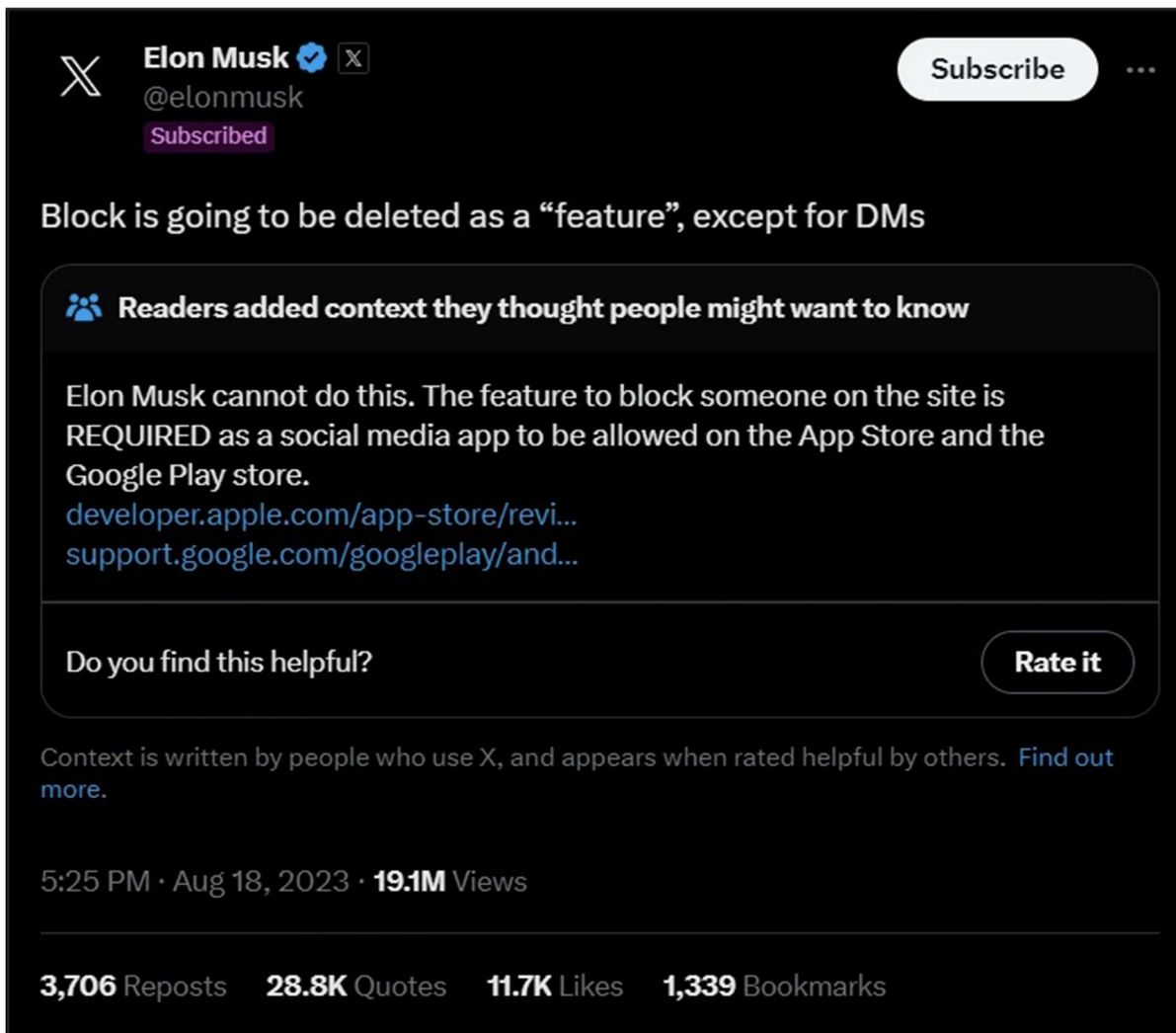
18. On August 20, 2023, Elon Musk also posted "Mute needs to mute properly, including all mentions." A true and correct screenshot of that post is attached as Exhibit F.

19. As of September 4, 2023, the block function on X is still available and functioning. A true and correct screenshot of the menu offering the block function on the X mobile app is attached as Exhibit G.



Executed under penalty of perjury on September 4, 2023.

s/Endel Kolde

Exhibit A




The image is a screenshot of a post on the X social media platform. At the top left is the X logo. To its right is the profile information for 'Elon Musk', including a verified badge, a small X icon, the handle '@elonmusk', and a 'Subscribed' button. Further right is a 'Subscribe' button and a three-dot menu icon. The main text of the post reads: 'Block is going to be deleted as a "feature", except for DMs'. Below this is a context box with a header 'Readers added context they thought people might want to know'. The context text states: 'Elon Musk cannot do this. The feature to block someone on the site is REQUIRED as a social media app to be allowed on the App Store and the Google Play store.' It includes two links: 'developer.apple.com/app-store/revi...' and 'support.google.com/googleplay/and...'. Below the context box is a 'Do you find this helpful?' prompt with a 'Rate it' button. Underneath is a note: 'Context is written by people who use X, and appears when rated helpful by others. Find out more.' The post's timestamp is '5:25 PM · Aug 18, 2023 · 19.1M Views'. At the bottom, engagement statistics are listed: '3,706 Reposts', '28.8K Quotes', '11.7K Likes', and '1,339 Bookmarks'.

Elon Musk  
@elonmusk
Subscribed

Subscribe ...

Block is going to be deleted as a “feature”, except for DMs

 **Readers added context they thought people might want to know**

Elon Musk cannot do this. The feature to block someone on the site is **REQUIRED** as a social media app to be allowed on the App Store and the Google Play store.

[developer.apple.com/app-store/revi...](#)
[support.google.com/googleplay/and...](#)

Do you find this helpful? **Rate it**

Context is written by people who use X, and appears when rated helpful by others. [Find out more.](#)

5:25 PM · Aug 18, 2023 · **19.1M** Views

3,706 Reposts **28.8K** Quotes **11.7K** Likes **1,339** Bookmarks

Exhibit B

1.2 User-Generated Content

Apps with user-generated content present particular challenges, ranging from intellectual property infringement to anonymous bullying. To prevent abuse, apps with user-generated content or social networking services must include:

- A method for filtering objectionable material from being posted to the app
- A mechanism to report offensive content and timely responses to concerns
- The ability to block abusive users from the service
- Published contact information so users can easily reach you

Apps with user-generated content or services that end up being used primarily for pornographic content, Chatroulette-style experiences, objectification of real people (e.g. "hot-or-not" voting), making physical threats, or bullying do not belong on the App Store and may be removed without notice. If your app includes user-generated content from a web-based service, it may display incidental mature "NSFW" content, provided that the content is hidden by default and only displayed when the user turns it on via your website.

Exhibit C

User Generated Content

User-generated content (UGC) is content that users contribute to an app, and which is visible to or accessible by at least a subset of the app's users.

Apps that contain or feature UGC, including apps which are specialized browsers or clients to direct users to a UGC platform, must implement robust, effective, and ongoing UGC moderation that:

- Requires users accept the app's terms of use and/or user policy before users can create or upload UGC;
- Defines objectionable content and behaviors (in a way that complies with Google Play Developer Program Policies), and prohibits them in the app's terms of use or user policies;
- Conducts UGC moderation, as is reasonable and consistent with the type of UGC hosted by the app;
 - In the case of augmented reality (AR) apps, UGC moderation (including the in-app reporting system) must account for both objectionable AR UGC (for example, a sexually explicit AR image) and sensitive AR anchoring location (for example, AR content anchored to a restricted area, such as a military base, or a private property where AR anchoring may cause issues for the property owner).
- Provides an in-app system for reporting objectionable UGC and users, and takes action against that UGC and/or user where appropriate;
- Provides an in-app system for blocking UGC and users;
- Provides safeguards to prevent in-app monetization from encouraging objectionable user behavior.

Exhibit D

← **Post**

 **Christopher Stanley**   
@cstanley

Well said. People are definitely freaking out because what they assume removing blocks means. Most of what they assume is incorrect.

 **Aqueel**   @AqueelMiq · Aug 18

i am seeing a lot of users concerned about removing blocks. We can make mutes stronger, like not allow people you mute to reply or quote you. We can also transfer you block list to mute list.

Preventing an account from seeing your posts does not work in practice. Anyone with any... [Show more](#)

2:02 PM · Aug 18, 2023 · **291.7K** Views

31 Reposts **25** Quotes **566** Likes **22** Bookmarks

← **Post**

 **Elon Musk**   
@elonmusk

Mayhem over nothing 🤪

3:52 PM · Aug 18, 2023 · **151.9K** Views

77 Reposts **49** Quotes **1,268** Likes **16** Bookmarks

Exhibit E



Exhibit F



Exhibit G

