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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

BRUCE GILLEY,

Plaintiff,

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.

Case No. 3:22-cv-01181-HZ

PLAINTIFF'S POST-APPEAL BRIEF RE: SCOPE OF PRELIMINARY INJUNCTION

Having established standing, serious questions going to the merits of some his First Amendment claims, and irreparable harm (Dkt. 67), Gilley respectfully requests that this court enter a preliminary injunction, limited in scope, that will preserve his right to interact with @UOEquity without fear of further blocking or banning during the pendency of this litigation.

1. Gilley has standing to bring a pre-enforcement challenge to UO's blocking guidelines

Pre-enforcement challenges are a well-established feature of First Amendment litigation. *See, e.g., Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 158 (2014); *Steffel* v. *Thompson*, 415 U. S. 452, 459, (1974). That is especially true where the harm is tied to the existence of a written policy.[1] *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 680-81 (9th Cir. 2023) (citation omitted) (standing existed where at least one student "intended to apply for ASB recognition but was discouraged by the District's policies"). Similarly, where a plaintiff has already been subjected to some enforcement and expresses an intent to engage in similar future actions, he "easily satisfies" this Circuit's standing requirements. *Meinecke v. City of Seattle*, 99 F.4th 514, 520 (9th Cir. 2024) (evangelizing at well-attended public events). Moreover, where such a Plaintiff proposes speech that is "typically impromptu, in response to unpredictable political events," he need not provide an exact, predictive description. *Id.*

So too here. UO has already blocked Gilley for several months and reserves the right to block or ban him again. Moreover, the loss of the right to speak via blocking is itself a harm sufficient to provide standing. Dkt. 67 at 5 (holding that Gilley had

[1] UO's guidelines do not meet the university's own definition of an official policy (Dkt. 42-6 at 2), but for purposes of this lawsuit, they embody a written custom, policy, or practice that Gilley challenges. *See* Dkt. 29 at 2-3, 16-17, 22-23 (alleging that the guidelines codify viewpoint discrimination).

sufficient alleged a risk of irreparable injury); *see also Lindke v. Freed,* 601 U.S. 187, 204 (2024) (discussing blocking function); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1167-69 (9th Cir. 2022), *vacated on other grounds,* 601 U.S. 205, 208 (2024) (rejecting mootness claim where lawsuit could restore right to give feedback on social media). While *Lindke* involved a mixed-use account, inherent in the Supreme Court's analysis is the proposition that state action in the form of social-media blocking presents a viable § 1983 claim. "[I]f Freed acted in his private capacity when he blocked Lindke and deleted his comments, he did not violate Lindke's First Amendment rights[.]" *Lindke,* 601 U.S. at 197.

Similarly, in *Murthy v. Missouri*, No. 23-411, 2024 U.S. LEXIS 2842, at *10-11 (June 26, 2024), the Supreme Court held that plaintiffs can establish standing to enjoin social-media content-moderation via jawboning if they can "demonstrate a substantial risk that, in the near future, they will suffer an injury that is traceable to a Government defendant and redressable by the injunction they seek." Specifically, they must show "that a particular defendant pressured a particular platform to censor a particular topic *before* that platform suppressed a particular plaintiff 's speech on that topic." *Id.* at 27. The *Murthy* plaintiffs, however, lacked standing because they could not (1) trace any particular content-moderation decision to a state actor (*Id.* at 21-22, 25); (2) show an ongoing government pressure campaign to suppress certain speech (*Id.* at 36-37); and (3) show that their proposed injunction would prevent non-party social-media platforms from censoring their speech (*Id.* at 44).

Here no one disputes that UO's communication manager possesses the power to block or ban Gilley from interacting with @UOEquity; or that the manager has already used that power against him. *Cf. id.* at 24 ("If a plaintiff demonstrates that a particular Government defendant was behind her past social-media restriction, it

will be easier for her to prove that she faces a continued risk of future restriction . . .”). Thus, unlike the *Murthy* plaintiffs, Gilley’s standing is based on decisions directly traceable to a government official—the same state actor he seeks to enjoin going forward. And it is based on written blocking guidelines that remain in force.

2. Offensive speech is legally protected speech

To a lay person, it might seem perfectly reasonable that UO’s guidelines would authorize blocking “hateful,” “racist,” or “otherwise offensive” speech. But under the First Amendment, offensive speech is still protected speech; and for good reason—people are often offended by ideas they disagree with. Short of criminal threats, fighting words, or other limited categories of unprotected speech, state actors are not free to censor offensive speech. *See, e.g., Snyder v. Phelps,* 562 U.S. 443, 454 (2011) (holding that the First Amendment protects the right to picket outside funerals with signs stating “Thank God for Dead Soldiers”); *Cohen v. California*, 403 U.S. 15, 25 (1971) (jacket bearing words “Fuck the Draft” was protected speech, even in courthouse); *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1131 (9th Cir. 2018) (citing *Matal v. Tam*, 582 U.S. 218 (2017) (non-disparagement clause discriminates based on viewpoint because “[g]iving offense is a viewpoint”).

3. UO’s blocking guidelines fail to cabin subjective discretion

Both the Supreme Court and the Ninth Circuit have evinced an appropriate concern with regimes that give officials too much discretion to regulate speech. *See, e.g., Minn. Voters All. v. Mansky,* 138 S. Ct. 1876, 1891 (2018) (official discretion must be guided by objective, workable standards); *Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 757 (1988) (“. . . the mere existence of the licensor’s unfettered discretion . . . intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.”); *Spirit of Aloha Temple v. Cnty. of*

Maui, 49 F.4th 1180, 1189 (2022) (upholding facial challenge); *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012) (". . . because the potential for the exercise of such power exists, we hold that this discretionary power is inconsistent with the First Amendment"). And this problem is exacerbated by UO's lack of implementation guidance. *See Marshall v. Amuso,* 571 F. Supp. 3d 412, 424 (E.D. Pa. 2021) ("In parsing out these subjective terms, the School Board has presented no examples of guidance or other interpretive tools to assist in properly applying [its speech policies] to public comment"). What is offensive or hateful is often in the eye of the beholder. For example, to an "antiracist" communication manager, the concept of colorblindness can plausibly be viewed as unacceptable code for "white supremacy," "racism," or "hate."[2] Vague terminology invites biased enforcement.

4. Gilley is entitled to a preliminary injunction based on his actual blocking and the threat of future blocking

Given the Ninth Circuit's opinion, Gilley plainly has standing to seek "prospective relief for his as-applied challenge after he was blocked for his 'all men are created equal' tweet." Dkt. 67 at 4. Gilley has also raised serious questions on the merits of some his claims (*Id.* at 5), past irreparable harm for blocking and a cognizable danger of a recurrent violation. *Id.* These are now legal verities. *Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016) (citation omitted).

These verities entitle Gilley to a preliminary injunction because the remaining factors necessarily cut his way. Raising "serious First Amendment questions

[2] "The common idea of claiming 'color blindness' is akin to the notion of being 'not racist' . . . the colorblind individual, by ostensibly failing to see how people are racialized . . . . The language of color blindness—like the language of 'not racist'—is a mask to hide when someone is being racist." IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 11 (2023). *See also,* Dkt. 5-2 at 25 (fn viii) (Dr. Alex-Assensoh: "Colorblindness is the idea that race-based differences don't matter. It ignores the realities of systemic racism").

compels a finding that . . . the balance of hardships tips sharply in [the plaintiff's] favor.'" *Masonry Bldg. Owners of Or. v. Wheeler*, 394 F. Supp. 3d 1279, 1310 (D. Or. 2019) (citing *Am. Bev. Ass'n v. City & Cty. of S.F.*, 916 F.3d 749, 757-58 (9th Cir. 2019)). Likewise, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (citation omitted).

At this point, the only remaining issue is one of scope. When Gilley sued, UO quickly unblocked him, implicitly admitting that the blocking was wrongful. But UO continued to defend the blocking. Despite almost contemporaneous emails showing that Stabin wrote that Gilley was "being obnoxious" (Dkt. 42-4) or "talking something about the oppression of white men" (Dkt. 51 at 2), UO claimed Gilley's tweet about equality was "off-topic" in a discussion about racism. Thus, while both parties apparently now agree that Stabin wrongfully blocked Gilley, there remains disagreement about why she did so. While Gilley claims she disliked his views—because she deemed them "racist," "hateful" or "otherwise offensive"—Stabin claims it was not quite that bad. This dispute is relevant to the scope of interim relief.

a. UO's guidelines on their face discriminate against speech that the Communication Manager could deem hateful, racist or otherwise offensive

Gilley challenges UO guidelines banning "hateful," "racist," and "otherwise offensive speech" facially, because they are inherently viewpoint discriminatory (for example, both racism and giving offense are viewpoints) and because those terms are too subjective. In so doing, Gilley also challenges them on behalf of third parties who have been blocked, or might be blocked in the future. Accordingly, Gilley has alleged overbreadth (Dkt. 29 at 22, ¶ 105), which entitles him to vindicate the speech rights of others. *See, e.g., Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57, 104 S. Ct. 2839, 2847 (1984) (citing *Broadrick* v. *Oklahoma*, 413 U.S.

601, 612 (1973)); *Spirit of Aloha Temp.,* 49 F.4th at 1189 (". . . laws 'directed narrowly and specifically' at regulating expression . . . may be challenged facially"); *Dream Palace v. Cty. of Maricopa,* 384 F.3d 990, 999 (9th Cir. 2004) ("Under the overbreadth doctrine, a plaintiff may challenge government action by showing that it may inhibit the First Amendment rights of parties not before the court"). While Gilley reserves the right to press his overbreadth claim, for purposes of the preliminary injunction, Gilley requests more modest relief, tailored only to him and his claims in this case.

b. Defining what is on-topic at too great a specificity invites shifting, subjective determinations of topicality

This Court should similarly enjoin application of UO's off-topic provision to Gilley's interactions with @UOEquity, so long as Gilley's reply or re-post broadly relates to the topics of equality, colorblindness, race, racism, equity, diversity, or inclusion. *See* Prop. P.I. Otherwise, the off-topic provision can be used as a proxy for the viewpoint-specific provisions banning offensive, racist, or hateful speech. Indeed, UO's arguments illustrate that Stabin applied the off-topic provision in this way. If Stabin blocked Gilley because his re-tweet about equality did not fit with Stabin's intended purpose for tweeting the racism interrupter tool, that is viewpoint discrimination, because only posts matching her subjective purpose would be on topic. Moreover, any topicality standard that allows the communication manager to personally determine the scope of permissible replies based on her own intentions is a recipe for viewpoint discrimination. Government officials will almost always be able to come up with a post hoc rationalization for why some reply did not fit with

the official's intended purpose.[3] *See Marshall,* 571 F. Supp. 3d at 422-23 ("Mr. Amuso applied his own (or perhaps the Board's) subjective interpretation of relevance, deeming Mr. Abrams's and Mr. Marshall's comments 'irrelevant to diversity in education.'"). The only workable standard is to define relevance at a high level and err on the side of allowing more speech.

5. Gilley's proposed injunction is targeted in scope

Under Fed. R. Civ. P. 65(d), an injunction must state why it was issued, reasonably describe the acts restrained, and who is bound. That said, district courts have considerable discretion in fashioning preliminary injunctions. *Meinecke,* 99 F.4th at 526 (citations omitted). Thus, in another First Amendment case, the Ninth Circuit recently held that an injunction enjoining the city and its police officers for enforcing a municipal code provision against a street preacher "in public parks and streets based on the anticipated hostile reaction of an audience" would provide "fair and precisely drawn notice" as required by Rule 65. *Id.*

To be sure, the Supreme Court has recently reminded subordinate courts that in the preliminary injunction context, universal injunctions are disfavored. *Labrador v. Poe*, 144 S. Ct. 921, 923 (2024). Thus, such injunctions should provide interim relief to the parties and not extend to non-parties or to legal provisions that are not in play. *Id.* at 921, 923; *see also Sierra Club v. City of Boise,* No. 1:24-cv-00169-DCN, 2024 U.S. Dist. LEXIS 79719, at *5 (D. Idaho Apr. 29, 2024) (emergency injunctions should be tailored to the parties who seek them); *cf. WallBuilder Presentations v.*

[3] Imagine, for an example, an apex elected official who posted content on X with the intent of promoting his own image or leadership skills. If the poster's subjective intent determines topicality, that official could then legally block anyone who replied by mocking him, because he did not intend to invite mockery. We would all recognize that for what it is: viewpoint discrimination. The reasoning is no different just because the topic is a proposed tool for dealing with racism.

Clarke, Civil Action No. 23-3695 (BAH), 2024 U.S. Dist. LEXIS 90553, at *51 (D.D.C. May 21, 2024) ("WallBuilders appropriately seeks preliminary to enjoin the enforcement of Guideline 9 only to itself"). Accordingly, Gilley's proposed injunction is limited in scope. It provides UO officials with notice and is tied to the allegations in his Amended Complaint. And whatever may be the scope of final relief, Gilley now only seeks to preserve the status quo by allowing him to freely interact with @UOEquity without fear of blocking or banning.

6. This Court should reject any belated attempt to reverse engineer mootness

One of the challenges of civil-rights litigation is that government parties will sometimes attempt to manipulate the Court's jurisdiction via post-lawsuit actions. Thus, in the wake of the Ninth Circuit's holding that Stabin's actions show that UO "lacks sufficient policies to prevent such departures from policy by a rogue employee," UO now suggests that perhaps it has implemented new and improved training for the incoming communications manager. But this suggestion has not been tested through discovery and should not factor into granting interim relief. As the Supreme Court recently held: "The Constitution deals with substance, not strategies." *FBI v. Fikre*, No. 22-1178, 2024 U.S. LEXIS 1379, at *12 (Mar. 19, 2024) (cleaned up) (no-fly list claims not moot). And government defendants do not enjoy any favored status when it comes to establishing mootness. *Id.* at *12-13. Gilley's claims are not moot because UO maintains written guidelines that authorize him to be blocked or banned from interacting with @UOEquity.

7. No bond is necessary

Under Fed. R. Civ. P. 65(c), federal courts have discretion to forego the security requirement altogether. *Masonry*, 394 F. Supp. 3d at 1312. That is warranted here because Gilley's proposed injunction will not financially burden UO.

Respectfully submitted,

Dated: June 26, 2024

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