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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

BRUCE GILLEY,

Plaintiff,

v.

TOVA STABIN and the
COMMUNICATIONS MANAGER,
University of Oregon Division of Equity and
Inclusion,

Defendant.

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

**MEMORANDUM REGARDING
MOTION FOR PRELIMINARY
INJUNCTION**

I. INTRODUCTION

When cases are remanded, the Ninth Circuit instructs that district courts ascertain and adhere to the appellate court’s decision. This principle cuts two ways. It means that district courts must respect and not contravene the appellate ruling. It also means that district courts must not over-read the appellate decision and not course-correct too far.

This doctrine is called the “mandate rule.” “The rule provides that any ‘district court that has received the mandate of an appellate court cannot vary or examine that mandate for any purpose other than executing it.’ The district court may, however, ‘decide anything not foreclosed by the mandate.’” *Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016) (internal citation omitted). “[T]he ultimate task is to distinguish matters that have been decided on appeal ... from matters that have not. ... [B]roadly speaking, mandates require respect for what the higher court decided, ***not for what it did not decide.***” *United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000) (internal citation omitted) (emphasis added).

This case has been remanded by the Ninth Circuit after an appeal from this Court’s decision denying plaintiff Bruce Gilley’s motion for preliminary injunction. Under the mandate rule, this Court’s immediate task is to determine what the Ninth Circuit decided and to apply that ruling. This Court must not assume the Ninth Circuit decided matters it did not decide.

II. WHAT DID THE NINTH CIRCUIT DECIDE?

A. Legal Standard

To ascertain what the Ninth Circuit decided, one starts from the legal standards governing motions for preliminary injunction. The four-part test for preliminary injunctions articulated by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.* is: “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” 555 U.S. 7, 20 (2008). That test has been reformulated by the Ninth Circuit as a “sliding scale.” Under the Ninth Circuit’s approach, preliminary injunction movants may show only “serious questions going to the merits” if they

can also show that the “balance of hardships ... tips sharply” in their favor, as well as “a likelihood of irreparable injury and that the injunction is in the public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).¹ Thus, the elements of the two tests are:

	Supreme Court’s <i>Winter</i> test	Ninth Circuit’s <i>Cottrell</i> test
1.	Likely to succeed on the merits	Serious questions on the merits
2.	Likely to suffer irreparable harm	[same]
3.	Balance of equities tips in favor of movant	Balance of equities tips “sharply” in favor of movant
4.	Injunction is in the public interest	[same]

B. Factual Background and What This Court Decided Previously

Next, to ascertain what the Ninth Circuit decided, one must take account of what this case is about and what this Court decided before the appeal (i.e., what the Ninth Circuit reviewed).

On June 14, 2022, tova stabin, the then-Communications Manager for the University’s Division of Equity and Inclusion (the “Division”), blocked Gilley from interacting with the Division’s Twitter account after he responded to a post. *Gilley v. Stabin*, 652 F. Supp. 3d 1268, 1274-75 (D. Or. 2023), *vacated in part, appeal dismissed in part*, No. 23-35097, 2024 WL 1007480 (9th Cir. Mar. 8, 2024). Two months later, Gilley initiated this litigation, naming as defendants both stabin and the Communications Manager for the Division. *Id.* at 1278. (The long-planned retirement of stabin was effective the day after the suit was filed and so prospective claims are against “the Communication Manager,” a position that has been vacant for nearly two years.) Stabin had acted alone in blocking Gilley and so University officials did not know of the blocking incident until the lawsuit was filed.

When the University learned of the blocking from the lawsuit, it unblocked Gilley

¹ A recent decision by the Supreme Court casts doubt on the continuing viability of the Ninth Circuit’s approach. *See Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1578 (2024) (criticizing a test similar to the Ninth Circuit’s “sliding scale” for being inconsistent with the Supreme Court’s directives in *Winter*). Unfortunately, the Supreme Court decided *Starbucks* after the Ninth Circuit’s mandate had issued in this case. The discussion in *Starbucks* strongly suggests that the high Court does not approve of “watered down” versions of the *Winter* test—including the test at issue in *Starbucks* and the Ninth Circuit’s “sliding scale” approach to preliminary injunctions.

immediately. *Id.* at 1276. It sent Gilley’s counsel a letter noting as much and money to cover the demand for nominal damages. *Id.* Defendants believed the matter was moot. *Id.* Gilley disagreed and pressed on with his case. *Id.*

This Court rejected Defendants’ argument that the case was moot and Gilley’s argument that he was entitled to a preliminary injunction. On the latter issue, this Court decided that Gilley fell short for several reasons. First, it held that Gilley raised serious questions on the merits of his first and fourth claims for relief, which assert as-applied challenges seeking, respectively, damages (the first claim) and an injunction (the fourth claim). *Id.* at 1288, 1291. With respect to Gilley’s third claim—alleging the University’s social media guidelines are facially unconstitutional—the Court said that Gilley was unlikely to succeed on the merits because he lacked standing to assert that claim. *Id.* at 1289-91. And with respect to Gilley’s second claim—challenging an alleged “practice of blocking users on @UOEquity based on unfettered professional judgment”—this Court said that Gilley had not met his burden. *Id.* at 1288-89.

Second, this Court held that Gilley could not establish that he was likely to suffer irreparable harm in the future because stabin had retired, her position was then vacant, her decision to block Gilley was an anomaly, and the new Communication Manager was not likely to block him again. *Id.* at 1291-92. Third and finally, the Court determined that the balance of equities and the public interest favored Defendants. *Id.* at 1293. The Court declined to order a preliminary injunction. Thus, (building on the prior table) this Court ruled:

	Supreme Court’s <i>Winter</i> test	Ninth Circuit’s <i>Cottrell</i> test	District Court Ruling
1.	Likely to succeed on the merits	Serious questions on the merits	On Gilley’s as-applied claims: Gilley raised serious questions on the merits On Gilley’s facial challenge to the social media guidelines: Gilley lacked standing
2.	Likely to suffer irreparable harm	[same]	No likelihood of irreparable harm
3.	Balance of equities tips in favor of movant	Balance of equities tips “sharply” in favor of movant	Balance of equities favors Defendants

4.	Injunction is in the public interest	[same]	Injunction is not in the public interest
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C. The Ninth Circuit’s Decision

Gilley appealed this Court’s decision, and the Ninth Circuit reversed individual conclusions that this Court had made. Significantly, the Ninth Circuit did not say (or imply) that a preliminary injunction should issue on remand. Typically, an appellate opinion would expressly “reverse” the denial of a preliminary injunction and remand with instructions to enter a preliminary injunction.² Here, the Ninth Circuit did not.

Indeed, the Ninth Circuit’s decision expressly contemplates that on remand, this Court must consider some issues in the first instance before deciding whether to issue a preliminary injunction. *See Gilley*, 2024 WL 1007480, at *2 (“We remand to the district court to reconsider whether Gilley has standing to seek pre-enforcement facial relief[.]”). So, while the Ninth Circuit certainly vacated (that is, undid) this Court’s order and reversed certain conclusions, it left open whether a preliminary injunction should issue. This Court must still decide that question.

On the individual issues addressed by the appellate panel, it affirmed this Court’s conclusion that Gilley raised serious questions on the merits of his as-applied claims (claims one and four). With respect to Gilley’s facial challenge to the social media guidelines (claim three), the Ninth Circuit clarified the legal standard and remanded to reconsider standing. The Ninth Circuit did not mention Gilley’s second claim about “unfettered professional judgment.”

On irreparable harm, the appellate court determined that Gilley had adequately shown “a

² *See, e.g., Safari Club Int’l v. Bonta*, No. 23-15199, 2023 WL 6178500, at *1 (9th Cir. Sept. 22, 2023) (“we reverse the denial of preliminary injunction”); *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 918 (9th Cir. 2014) (“We therefore reverse the district court’s denial of plaintiffs’ motion for a preliminary injunction and remand with instructions to issue the requested preliminary injunction.”); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1058 (9th Cir. 2014) (“We therefore reverse the district court’s denial of a preliminary injunction. We remand for entry of a preliminary injunction[.]”); *Associated Press v. Otter*, 682 F.3d 821, 823 (9th Cir. 2012) (“We reverse the district court’s denial of a preliminary injunction and remand for the entry of such an injunction forthwith[.]”); *Khorenian v. Union Oil Co. of California*, 761 F.2d 533, 536 (9th Cir. 1985) (“The order denying an injunction is reversed, and the district court is directed to grant a preliminary injunction.”).

risk” of irreparable injury. *Id.* at *2. It reasoned that a constitutional injury threatened and occurring at the time of the plaintiff’s motion creates a risk of irreparable injury. *Id.* It said that the University did not prevent a “rogue employee” from departing from its social media policy, which is sufficient to demonstrate a risk of irreparable harm. *Id.*

The panel’s decision on irreparable harm is unusual. A preliminary injunction movant must show “likelihood” of irreparable harm. In *Cottrell*, the Ninth Circuit affirmed: “plaintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction. ... [P]laintiffs may not obtain a preliminary injunction unless they can show that irreparable harm is likely to result in the absence of the injunction.” *Id.* at 1131, 1135. And yet, the panel here said that there was a mere “risk of irreparable injury” and that Gilley had shown only “some cognizable danger” of a recurrent violation, quoting a 1953 case about, not the preliminary injunction standard, but mootness. In any event, despite that it found only a “risk” of irreparable harm and not a likelihood, the panel reversed this Court’s conclusion on that prong.

The Ninth Circuit’s decision did not disturb this Court’s conclusions that the balance of equities and public interest factors weighed in favor of Defendants.

Thus, (again, building on the prior table) the Ninth Circuit ruled:

	Supreme Court’s <i>Winter</i> test	Ninth Circuit’s <i>Cottrell</i> test	District Court Ruling	Ninth Circuit Ruling
1.	Likely to succeed on the merits	Serious questions on the merits	On Gilley’s as-applied prospective claims: Gilley raised serious questions on the merits	Affirmed.
			On Gilley’s facial challenge to the social media guidelines: Gilley lacked standing	Vacated for reconsideration in light of clarified legal standard
2.	Likely to suffer irreparable harm	[same]	No likelihood of irreparable harm	Reversed; Risk of irreparable harm established
3.	Balance of equities tips in favor of movant	Balance of equities tips “sharply” in favor of movant	Balance of equities favors Defendants	Not decided

4.	Injunction is in the public interest	[same]	Injunction is not in the public interest	Not decided
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The Ninth Circuit vacated this Court’s order denying a preliminary injunction and remanded for consideration consistent with its opinion. On remand, the question before the Court is whether a preliminary injunction should issue, and, if so, what its scope should be.

III. A PRELIMINARY INJUNCTION SHOULD NOT ISSUE NOW

The first question presented is whether a preliminary injunction should issue at all. Controlling law supplies a straightforward answer: No, it should not.

This Court previously held that the balance of equities and public interest factors weighed in Defendants’ favor. Those determinations remain “law of the case” and are undisturbed by the appellate judgment. *See United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (“[A] district court could not revisit its already final determinations unless the mandate allowed it[.]”).

A preliminary injunction should not issue where the balance of equities and public interest factors do not weigh in favor of the movant. *See Paramount Land Co. LP v. California Pistachio Comm’n*, 491 F.3d 1003, 1012 (9th Cir. 2007) (“But simply raising a serious claim is not enough to tip the hardship scales.”).³ Where, as here, the movant has shown only “serious questions on the merits of some of his claims,” *Gilley*, 2024 WL 1007480, at *2—as both this Court held and the Ninth Circuit affirmed—to obtain a preliminary injunction under the Ninth Circuit’s *Cottrell* standard, *Gilley* would have to show that the balance of equities tips not just in his favor but “sharply” so. 632 F.3d at 1132. He has not made this showing—as this Court already ruled. On this ground alone, a preliminary injunction should not issue at this juncture.

What’s more, the factual underpinnings of the Ninth Circuit’s decision on irreparable harm have changed, as almost two years have elapsed since the record on *Gilley*’s preliminary

³ *Zoom Video Communs. v. RingCentral, Inc.*, No. 21-1727, 2021 WL 1376031 (N.D. Cal. March 29, 2021) (movant established serious questions going to merits but did not demonstrate “balance of hardships tip[ped] sharply” in its favor); *A Woman's Friend Pregnancy Res. Clinic v. Harris*, 153 F. Supp. 3d 1168, 1215-16 (E.D. Cal. 2015) (determining movant had shown serious question as to merits of First Amendment Claim but not that equities tipped sharply in movant’s favor such that preliminary injunction should issue), *aff’d*, 669 F. App’x 495 (9th Cir. 2016).

injunction motion was developed. *See A&M Records v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002) (“A district court has inherent authority to modify a preliminary injunction in consideration of new facts.”); *Language Line Servs. v. Language Servs. Assocs.*, 500 F. Appx. 678, 682 (9th Cir. 2012) (“Should LSA move for modification of the injunction, the district court should consider whether changed circumstances support modifications[.]”).

A new Communications Manager for the Division has been hired but has not yet started. As part of her onboarding, the new Communications Manager will receive training on the University’s social media guidelines and its categorical bar on viewpoint-based blocking or censorship. The new Communications Manager also works within a different department and reports to a different supervisor than her predecessor, stabin, did. Finally, the University has created a new oversight mechanism to ensure users are not blocked for viewpoints they express. This means that the Communications Manager and other University employees who manage social media accounts cannot act alone when determining whether to block users. Instead, University employees who monitor social media accounts are required to receive approval *before* blocking any user. This oversight function eliminates the risk of “a rogue employee”—the very risk that the Ninth Circuit identified in its opinion as a basis for finding Gilley is had demonstrated irreparable harm. *Gilley*, 2024 WL 1007480, at *2 (stating that “University shows that it lacks sufficient policies to prevent such departures from policy by a rogue employee”).

These new developments mean that Gilley is not likely to suffer irreparable harm in the absence of preliminary relief. Thus, on this basis, too, the Court should deny Gilley’s request for a preliminary injunction.

IV. IF THERE SHOULD BE AN INJUNCTION AT ALL, IT SHOULD BE NARROW

In the alternative, if the Court determines that a preliminary injunction should issue, Defendants request that it be narrow and tailored to (1) the actual parties, and (2) remedying the injury Gilley has alleged he will suffer in its absence. *See E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (“An injunction must be “narrowly tailored to remedy the specific harm shown.”); *see also Innovation L. Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1157 (D.

Or. 2018) (preliminary injunction preserves the status quo pending a determination on the merits). Specifically, an appropriate preliminary injunction would order the Communications Manager to not block Gilley from interacting with the @UOEquity subaccount. This will preserve the status quo between the parties as they litigate the merits of Gilley’s claims. *See Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) (noting purpose of preliminary injunction).

Defendants appreciate the efforts of Gilley’s counsel to propose a preliminary injunction that is fairly narrow. Defendants object to Gilley’s proposal on only two grounds. First, it reaches beyond the Communications Manager to “the manager’s agents, servants, employees, and all person in active concert or participation with them who receive actual notice of this injunction[.]” (ECF # 76-1 at ¶ 1.) This formulation is inappropriately broad. A preliminary injunction should reach only the actual parties to the case. *See Zepeda v. U.S. INS*, 753 F.2d 719, 727 (9th Cir. 1983) (stating that a preliminary injunction “may not attempt to determine the rights of persons not before the court”). This case is about a Twitter account and the person who manages it—the Communications Manager. It does not reach everyone she works with, which would include, for example, managers of other social media accounts in unrelated departments.

Second, Gilley’s proposed injunction is needlessly complex and difficult to implement. As the University’s General Counsel communicated to Gilley’s counsel mere days after this suit was filed, the Communications Manager does not intend to block him. Thus, if there must be an injunction at all, it should simply order the Communications Manager not to block Gilley’s account (@BruceDGilley)—that is, to do what she is already doing.

The harm here that Gilley has suffered and is worried about suffering in the future is being blocked by the Communications Manager for interacting with the Division’s social media. An injunction that prohibits that result is all that is needed, and Gilley is entitled to no more.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that no preliminary issue and, in the alternative, that any injunction be drawn narrowly, as described herein.

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