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UNITED STATES DISTRICT COURT

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.: 6:22-cv-01181-AA

MOTION FOR SUMMARY JUDGMENT

BY DEFENDANTS TOVA STABIN AND THE COMMUNICATION MANAGER OF THE UNIVERSITY OF OREGON'S DIVISION OF EQUITY AND INCLUSION

PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56(A)

ORAL ARGUMENT REQUESTED

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LOCAL RULE 7-1 CERTIFICATION

Counsel for defendant tova stabin ("stabin")[1] and the Communication Manager of the University of Oregon's Division of Equity and Inclusion (individually the "Communication Manager" and together with stabin, "Defendants"), Misha Isaak and Alexander Bish, conferred in good faith about this Motion with counsel for Plaintiff Bruce Gilley ("Gilley" or "Plaintiff"), Del Kolde and Angus Lee, by videoconference on January 27, 2025. Mr. Kolde indicated that the Motion is opposed.

MOTION

Pursuant to Federal Rule of Civil Procedure 56(a), Defendants move the Court for summary judgment dismissing Plaintiff's claims with prejudice. This Motion is supported by the following Memorandum of Law and records in the Court's file. Defendants request oral argument on this Motion.

MEMORANDUM OF LAW

I. INTRODUCTION

This case could have been resolved with one phone call or email to University of Oregon ("University") administrators. It is about a single occasion where one University employee, acting alone, blocked one member of the public from interacting with a low-traffic Twitter[2] subaccount belonging to the University's Division of Equity and Inclusion (the "Division"). Shortly thereafter, that employee—tova stabin—retired. Bruce Gilley, the individual who was blocked and a self-labeled critic of "DEI ideology," did not object to being blocked or even ask

[1] Defendant stabin styles her name using all lowercase letters. We follow that convention here unless the name appears at the beginning of a sentence.
[2] Twitter is now X. Defendants use "Twitter" and the terminology associated with it throughout its brief because that was the title of the company at the time the events at issue in this litigation occurred.

any University official to have him unblocked. And as soon as University officials learned that he had been blocked, they immediately directed that Gilley be unblocked. He has not been blocked again. Nor has anyone else.

Based on this isolated event which has never recurred, Gilley has prosecuted this federal civil rights case for two and half years, seeking both nominal damages from stabin and prospective relief against her successor. Specifically, Gilley alleges that the Division blocked him from interacting with its Twitter subaccount because he expressed a viewpoint critical of "DEI ideology," and he seeks $17.91 in nominal damages and an injunction prohibiting the University's new Communication Manager (who was just recently hired) from blocking him in the future or otherwise applying social media guidelines that discriminate based on viewpoint. These claims should be dismissed for two reasons.

First, when stabin blocked Plaintiff, there was no clearly established right to not be blocked from social media accounts managed by public entities and officials. This means that stabin enjoys qualified immunity, and the claims against her must be dismissed.

Second, federal case law is clear that, to obtain an injunction, Plaintiff must demonstrate that he will likely be harmed in the same way again in the future. Plaintiff cannot make that showing here. Not only did stabin retire from the University, but the new Communication Manager has been trained on the University's social media policies, including the prohibition against viewpoint discrimination. Moreover, there have been only three users blocked from the Division's Twitter page since it was created in 2013 (despite thousands of posts during that time), which shows Gilley's blocking was either a viewpoint neutral decision based on stabin's belief that his post was simply non-responsive to her prompt, or at worst a one-off accident. These facts fall woefully short of establishing a likelihood that Plaintiff will be harmed again in

the future, which is the standard Plaintiff must meet to justify a prospective remedy. Accordingly, the Court should dismiss all claims against the Communication Manager and enter a judgment in her favor.

II. FACTUAL BACKGROUND

Defendant stabin was the Communication Manager of the Division on June 14, 2022. (ECF 57 at 2.) On that day, she posted a prompt on the Division's Twitter page (@UOEquity) titled "Racism Interrupter," which looked like this:

(ECF 29 at ¶ 49.) Stabin intended the Division's Twitter audience to use the prompt as a tool in their daily lives when encountering offensive or discriminatory comments; she did not intend the post to promote discourse on the Division's Twitter page. (ECF 57 at 24.)

The same day that stabin posted the Racism Interrupter prompt, Plaintiff responded to it through his Twitter account (@BruceGilley) with the words "My entry: … you just said 'all men are created equal.'" (ECF 29 at ¶ 61.) Thus, when read with the prompt, Plaintiff in effect posted on the Division's page, "It sounded like you just said [all men are created equal]. Is that really what you meant?" (*Id.*) After seeing Plaintiff's response, which would be visible to any user visiting the Division's page, stabin blocked him, which removed the post from the Division's

account. (ECF 57 at 3.) This also prevented Plaintiff from posting, retweeting, or otherwise commenting on the Division's page. (*Id.*) stabin blocked Plaintiff because she did not think his post was discriminatory or offensive, and therefore would not help users think of productive responses to such comments. (ECF 48-2 at 52-53.)

About two weeks after being blocked, Plaintiff filed public records requests with the University's Office of Public Records ("Office") seeking the Division's social media policies and activities. (ECF 57 at 3.) Specifically, Plaintiff wanted to know how many users had been blocked from the Division's Twitter page, the Twitter identity of any such user, and all documents indicating what criteria the Division uses to determine whether a user should be blocked. (ECF 25-1.)

The Office responded to Plaintiff's request on July 5, 2022. (ECF 25-2.) With that response, the Office provided documents showing that two users in addition to Plaintiff had been blocked from the Division's Twitter page. (*See id.*) The Office also incorrectly stated that there were no responsive documents showing the criteria guiding blocking decisions and that the staff member managing the account (stabin) has "the autonomy to manage the accounts and use professional judgment when deciding to block users." (*Id.*; *see* ECF 25-4 (noting error in initial response).) The Office corrected the misstatement a few months later, noting that the Office was "without key staff" when it first responded to Plaintiff's request and, "in an effort to provide a swift response to [Plaintiff], [the Office] erred when [it] described the university's approach to monitoring its social media sites." (ECF 25-4.) The Office then provided Plaintiff with the University's social media guidelines, which had existed since at least 2019. (*Id.*; ECF 46 at ¶ 9.)

Stabin retired from her role as Communication Manager on July 27, 2022.[3] (ECF 57 at 4.) Shortly thereafter, on August 11, 2022, Plaintiff filed this lawsuit alleging that his First Amendment rights were violated when stabin blocked him and that the University's social media guidelines impermissibly permit viewpoint discrimination; he sought a temporary restraining order, and seeks declaratory and injunctive relief, as well as nominal damages in the amount of $17.91.[4] (*Id.*)

Plaintiff failed to confer with the University or otherwise raised the issue of his blocking prior to filing his lawsuit (which was required under Rule 65 to obtain a temporary restraining order).[5] (ECF 19 at ¶ 3-4.) Indeed, University officials first heard of the dispute the day after Plaintiff filed the suit and issued a press release to go with it. (*Id.*) Plaintiff was immediately unblocked from the Division's Twitter page, and, on August 16, 2022, the University sent an internal communication reminding those in charge of University-run social media platforms of the University's social media guidelines and its prohibition on blocking based on viewpoint. (*Id.* at ¶ 4; ECF 57 at 8.) The University's general counsel also sent Plaintiff's counsel a letter stating that Plaintiff had been unblocked, the Division would not block Plaintiff or any other user in the future based on their exercise of protected speech, and officials throughout the University had been reminded that, if they open social media accounts, "they may not block commentary on the basis of the viewpoints expressed." (ECF 57 at 4-5.) The general counsel further explained there were no blocked users on social media accounts controlled by the University, and he enclosed a

[3] Stabin had unused vacation that she used to effectively retire on July 27, 2022. (ECF 57 at 4 n 4.) However, stabin's official retirement date was August 12, 2022. (*Id.*)
[4] 1791 is the year the Bill of Rights was ratified. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 37 (2022).
[5] The Court denied Plaintiff's request for a temporary restraining order for failing to give notice or explain why notice should not be required. (ECF 7.)

$20 bill to pay for the $17.91 in nominal damages that Plaintiff seeks in this case. (*Id.* at 5.) The general counsel noted that Plaintiff's suit was now moot since Plaintiff received the relief he requested and asked that Plaintiff dismiss the case; Plaintiff refused. (*Id.*)

The parties spent the better part of the next two years litigating Plaintiff's claim for a preliminary injunction, which Judge Hernandez ultimately issued in July of last year. (*See* ECF 80 (granting preliminary injunction).) Judge Hernandez originally concluded that Plaintiff had not adequately alleged an irreparable injury sufficient to confer standing to seek a pre-enforcement challenge to the University's social media guidelines. (ECF 57 at 32-34.) Judge Hernandez noted that Plaintiff was promptly unblocked, and the University reinforced its policy to not block users based on the viewpoints they express. (*Id.* at 33.) Judge Hernandez further determined that "Defendant stabin's blocking of Plaintiff was an anomaly": she acted alone and without input from other University staff, there have been a combined 2,558 replies and retweets by other users on the Division's account since 2017, and there have only been three users (one of which is Plaintiff) that have been blocked, all of whom have had their access restored. (*Id.* at 33-34.)

A split panel of the Ninth Circuit reversed in part. *Gilley v. Stabin*, No. 23-35097, 2024 WL 1007480, at *2 (9th Cir. Mar. 8, 2024). Two of the three judges on the panel determined that Plaintiff had adequately alleged a risk of irreparable injury because he had been blocked for two months prior to seeking injunctive relief and the University gave him conflicting information with respect to the criteria used in determining whether to block an individual from the Division's account, suggesting the University could not prevent a rogue employee from straying from the policy. *Id.* The other judge determined that Plaintiff's claims were moot. *Id.* at *3 (Fletcher, J., dissenting).

On remand, Judge Hernandez determined that Plaintiff has standing to bring a pre-enforcement challenge to the University's social media guidelines as applied to him given the Ninth Circuit's determination that Plaintiff had adequately alleged a risk of irreparable injury.[6] (ECF 80 at 9-10.) The Court then issued a preliminary injunction enjoining Defendants from blocking Plaintiff from the Division's Twitter account and from applying the challenged portions of the social media guidelines to any of Plaintiff's future posts to the Division's account. (*Id.* at 12-13.)

Defendants now move for summary judgment on all of Plaintiff's claims. Specifically, the doctrine of qualified immunity precludes Plaintiff from prevailing on his damages claims against stabin. As for Plaintiff's claims against the Communication Manager, there is no likelihood of substantial and immediate irreparable harm to Plaintiff because there is no likelihood that he will be blocked again based on his viewpoints or any other protected speech. Accordingly, he is not entitled to the injunction that he seeks. Defendants are therefore entitled to a judgment as a matter of law.

III. ARGUMENT

Plaintiff's Amended Complaint asserts two types of claims: claims for nominal damages against stabin in her individual capacity and claims for prospective relief against the Communication Manager in her official capacity.[7] (ECF 29 at 25-27.) Plaintiff's prospective claims seek a declaration that the Division's practices and policies violate the First Amendment, as well as an injunction against blocking Gilley in the future and enforcing elements of the

[6] The court did not decide whether Plaintiff had standing to bring a pre-enforcement facial challenge. (ECF 80 at 6 n 4.)

[7] As this Court has previously held, Plaintiff cannot pursue retrospective declaratory and injunctive relief. (ECF 57 at 17 (citing *LaTulippe v. Harder*, 574 F. Supp. 3d 870, 884 (D. Or. 2021).)

University's social media guidelines, among other things. (*Id.*) Defendants are entitled to a judgment as matter of law on both types of claims.

First, with respect to the claims for nominal damages, stabin is entitled to qualified immunity because the law concerning the First Amendment's applicability to government-run social media accounts was not clearly established at the time stabin blocked Plaintiff from the Division's Twitter page. Second, with respect to the claims for prospective relief against the Communication Manager, Plaintiff cannot demonstrate a likelihood of substantial and immediate irreparable injury. This precludes this Court from issuing him the declaratory and injunctive relief that he seeks against the new Communication Manager. Summary judgment is thus appropriate.

A. Legal Standard

Summary judgment should be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is material if it could affect the outcome of the suit under the governing substantive law." *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). "The moving party bears the initial burden of demonstrating the absence of a 'genuine issue of material fact for trial.'" *Id.* (quoting *Anderson*, 477 U.S. at 256). "The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial." *Id.*

B. Plaintiff's Claim for Nominal Damages Against Stabin Must Be Dismissed

Qualified immunity shields government officials from civil liability. *Morales v. Fry*, 873 F.3d 817, 821 (9th Cir. 2017). To pierce that shield, a plaintiff needs to prove that (1) the official

violated a statutory or constitutional right and (2) the right was "clearly established" at the time of the conduct at issue, "such that 'every reasonable official' would have understood that what he is doing violates that right." *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). Whether a right is "clearly established" is question of law reserved for the Court to decide. *Id.*

Here, Plaintiff alleges that stabin violated his First Amendment right to free speech when she blocked him from the Division's Twitter account on June 14, 2022. (ECF 29 at ¶¶ 82-93.) Plaintiff alleges that he was expressing a viewpoint that is critical "of the ideology of diversity, equity, and inclusion," and that stabin blocked him due to this viewpoint. (*Id.* at ¶¶ 90-91.)

As an initial matter, it is unclear whether reasonable people would think Plaintiff's statement that "all men are created equal" is critical of the ideology of diversity equity and inclusion. Indeed, stabin did not think that was the case, and she specifically testified that she agreed with the statement. (ECF 48-2 at 52-53.) Moreover, even if Plaintiff's allegations are true, the application of the First Amendment to social media accounts managed by government actors was not clearly established on June 14, 2022. At best, the right Plaintiff invokes was not clearly established until more than a month later, on July 27, 2022. At that time, the Ninth Circuit affirmed a district court's decision to grant qualified immunity to two public school board officials who blocked parents from the officials' Twitter pages based on viewpoints the parents expressed. *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1183 (9th Cir. 2022), *vacated and remanded*, 601 U.S. 205 (2024). Addressing qualified immunity in the similar circumstances of that case, the Ninth Circuit explained that it "need not dwell" on the issue because, "[u]ntil now, no Ninth Circuit or Supreme Court authority definitively answered the … First Amendment questions at issue in this case." *Id.*

Garnier was overturned by the Supreme Court on other grounds and is again pending before the Ninth Circuit on remand. *See O'Connor-Ratcliff v. Garnier*, 601 U.S. 205, 206 (2024) (vacating and remanding to apply proper state-action test). Unfortunately for Plaintiff, this makes his case for a clearly established right even more difficult. As explained by the Ninth Circuit in *Reynolds v. Preston* from June of last year, the Supreme Court's "vacatur prevents [the] decision in *Garnier* 'from spawning any legal consequences'—including the consequence of clearly establishing the violation of a constitutional right" to not be blocked from state-run social media. No. 23-15504, 2024 WL 2891205, at *1 (9th Cir. June 10, 2024) (internal citation omitted). Thus, even if Plaintiff's nominal damages claims arose from conduct that occurred after the *Garnier* decision (which they do not), qualified immunity would still apply here. *See id.* (reversing district court's decision denying qualified immunity for conduct occurring after *Garnier* decision).

In short, both *Garnier* and *Reynolds* conclusively establish that the law regarding a public employee's decision to block a social media user based on viewpoint was not clearly established on June 14, 2022, when stabin blocked Gilley. Qualified immunity therefore bars Gilley's claim for damages.[8]

Plaintiff will likely argue that basic First Amendment principles clearly establish that stabin could not block him based on his expressed viewpoint. Such an argument, of course, would be contrary to the Ninth Circuit's decisions in *Garnier* and *Reynolds*. But setting that aside, the idea that First Amendment precedent in contexts pre-dating the existence of social

[8] "The doctrine of qualified immunity … applies to nominal damages." *Eaton v. Blewett*, No. 2:20-cv-1641, 2024 WL 1770481, at *6 (D. Or. Apr. 24, 2024) (citation omitted); *see also Boquist v. Courtney*, No. 23-35535, 2024 WL 4211478, at *1 (9th Cir. Sept. 17, 2024) (reversing an award of nominal damages on grounds of qualified immunity).

media would supply clear guidance to an official operating a social media account ignores the complexities posed by the technology; indeed, as Justice Thomas opined in 2021, the "principal legal difficulty that surrounds digital platforms" is that "applying old doctrines to new digital platforms is rarely straightforward." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring). He further added that courts certainly "will soon have no choice but to address" the issue of government officials blocking users from social media like Twitter and determine how "legal doctrines apply to [such a] highly concentrated, privately owned information infrastructure." *Id.*

Justice Thomas's comment on the novelty of social media arose in the context of another case of a government official blocking private users. In that case, which the Supreme Court ultimately dismissed for mootness, President Trump was sued for blocking users from viewing and interacting with his social media posts. Justice Thomas's concurrence in the Court's dismissal order presents an intriguing argument: "Because unbridled control of the [social media] account resided in the hands of a private party, First Amendment doctrine may not have applied to [the users'] complaint of stifled speech." *Id.* at 1222. Justice Thomas analogized a government official's use of social media as akin to "government officials who informally gather with constituents in a hotel bar [and] ask the hotel to remove a pesky patron who elbows into the gathering to loudly voice his views." *Id.* Because social media platforms, like a bar, are privately owned and controlled, Justice Thomas suggested that the First Amendment may not apply to a government official's choice to exclude participants.

Justice Thomas's opinion is significant here not because it might be right (we do not opine on that). Rather, it is significant because it starkly illustrates that the law governing the blocking decisions of public officials and employees was not clearly established on June 14,

2022. Indeed, if stabin had known of Justice Thomas's concurrence and, before she blocked Gilley, had called a lawyer to ask whether the Supreme Court or Ninth Circuit had definitively addressed Justice Thomas's approach (either by accepting or rejecting it), the answer would have been: "No."[9]

At the relevant time in question here, there was no clearly established law in the space that would have guided stabin's decision to block Plaintiff. *Reynolds*, 2024 WL 2891205, at *1. She is therefore entitled to qualified immunity, and Plaintiff's claims for damages against her should be dismissed.

C. Plaintiff's Claim for Declaratory and Injunctive Relief Against the Communication Manager Should Be Dismissed

1. Plaintiff Cannot Establish a Likelihood of Substantial and Immediate Future Injury

While qualified immunity forecloses Plaintiff's damages claims, that doctrine does not apply to claims for prospective relief. Those claims, however, face a separate hurdle that cannot be overcome here.

To succeed on his claims for declaratory and injunctive relief against the Communication Manager, Plaintiff must establish a future "***likelihood*** of substantial and immediate irreparable injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (emphasis added) (citation omitted). That is because, "[t]he requirements for the issuance of a permanent injunction are 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at

[9] Likewise, two Second Circuit judges dissented from the denial of rehearing en banc in the same case—there, captioned *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 953 F.3d 216, 226-27 (2d Cir. 2020) (Park, Cir. J., & Sullivan, Cir. J., dissenting from denial of rehearing en banc) ("Because Twitter is privately owned and controlled, a public official's use of its features involves no exercise of state authority.").

law.'" *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir. 1996) (citation omitted). Plaintiff cannot make that showing here.

The topic of "irreparable injury" has arisen in different doctrinal contexts in this case so Defendants clarify how it is being raised here. "Irreparable injury" is a familiar requirement to obtain a preliminary injunction and, earlier in this case, the Ninth Circuit held that a "risk" of irreparable injury was enough sustain a preliminary injunction. *See Gilley*, 2024 WL 1007480, at *2. Although the Ninth Circuit panel majority nominally reversed Judge Hernandez on this point, its conclusion was only a shade of difference from his. Judge Hernandez had previously concluded that "Plaintiff fails to establish that he is likely to suffer irreparable harm in the future." (ECF 57 at 32.) The Ninth Circuit panel majority did not disagree with that; rather, it held that a mere "risk" of future irreparable harm was sufficient for Plaintiff to "carr[y] his burden of showing 'some cognizable danger' of a recurrent violation[.]" *Gilley*, 2024 WL 1007480, at *2. Importantly, the context of the court's decision was a preliminary injunction.

But it is not in the context of a motion for preliminary injunction that irreparable injury is raised here. Rather, whenever claims for declaratory and injunctive relief are asserted, a substantive element of those claims is future likelihood of substantial and immediate irreparable injury. *Lyons*, 461 U.S. at 111. In this context, the Ninth Circuit has explained: "In order to be entitled to an injunction, Plaintiff must make a showing that he faces a real or immediate threat of substantial or irreparable injury." *Midgett v. Tri-Cnty. Metro. Transp. Dist. of Or.*, 254 F.3d 846, 850 (9th Cir. 2001). This requirement finds its roots in giving "appropriate consideration to the values of federalism" and separation of powers. *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042-43 (9th Cir. 1999). "[A]bsent a threat of immediate and irreparable harm, the federal courts should not enjoin a state to conduct its business in a particular way." *Id.* at 1042; *see also*

Midgett, 254 F.3d at 850 ("This 'well-established rule' bars federal courts form interfering with non-federal government operations in the absence of facts showing an immediate threat of substantial injury."); *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996) (noting role of courts to remedy past and sufficiently imminent actual harm, role of other branches is to shape institutions to comply with laws and the Constitution, and "distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly").

Plaintiff cannot demonstrate a likelihood of future injury sufficient to justify this Court's exercise of power over the University's social media policies and practices. Since 2017, there have been more than 2,500 replies and retweets by other users on the Division's page. (ECF 57 at 32-34.) Only three people (one of whom is Plaintiff) have ever been blocked from the Division's Twitter account since it was created in 2013. (*Id.* at 34.) When she blocked Plaintiff, stabin acted alone and without consulting any University staff in making her decision; and in any event, stabin has retired and no longer has any control over University-run social media accounts. (*Id.*) The Communication Manager also is under new supervision and required to undergo training on free speech on social media; this training reinforces the University's clear and categorical stance against any blocking or censorship on social media based on viewpoint. (ECF 78 at ¶¶ 5-6.)

At best, the only evidence Plaintiff presents to support his request for an injunction is that three users were blocked from the Division's account in the distant past—when First Amendment law in this area was even less developed. (And Plaintiff does not even show that the two other persons who were blocked were blocked based on their viewpoints.) The case law is

clear, however, that past violations alone do not "support an inference that [the] Plaintiff faces a real and immediate threat of *continued, future* violations of the [law] in the absence of injunctive relief." *Midgett*, 254 F.3d at 850.

In *Lyons*, the plaintiff pursued injunctive relief against the City of Los Angeles because the City's police officers applied a chokehold on him during a traffic stop and without provocation, which he alleged was part of a larger chokehold practice that threatened impairment of rights protected by the Constitution. 461 U.S. at 98. The Supreme Court held that the plaintiff could not show a "likelihood of substantial and immediate" irreparable future injury sufficient to warrant the Court ordering an injunction. *Id.* at 111. The Court explained that, though he may "have been illegally choked by the police on October 6, 1979," the plaintiff could not establish there was a real and immediate threat he'd "again be wronged in a similar way." *Id.* at 105, 111. Without such a showing, the plaintiff was "no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional." *Id.* at 111.

The Ninth Circuit reached a similar conclusion in *Hodgers-Durgin*. There, two plaintiffs sued the United States Border Patrol for its alleged practice of stopping drivers who looked Hispanic or were driving late at night through a stretch of highway near the U.S.-Mexico border. *Hodgers-Durgin*, 199 F.3d at 1038-39. The plaintiffs sought a declaratory judgment finding that the Border Patrol's practice violates the Fourth Amendment and an injunction prohibiting the Border Patrol from further ordering or sanctioning the unconstitutional practice. *Id.* at 1039.

In affirming the district court's award of summary judgment in favor of the defendants, the Ninth Circuit noted that both plaintiffs frequently drive through the stretch of highway at

issue and see the Border Patrol patrolling the area; yet, despite this frequent exposure, both plaintiffs were only stopped "once in 10 years." *Id.* at 1044. Based on those facts, the court concluded that it is "not sufficiently likely that [plaintiffs] will again be stopped by the Border Patrol," meaning that there was no "basis for granting injunctive relief that would restructure the operations of the Border Patrol and that would require ongoing judicial supervision of an agency normally, and properly, overseen by the executive branch." *Id.*; *see also Lewis*, 518 U.S. at 359 (noting that two instances of inmates being denied access to the courts is a "patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief").

One last example of past violations not warranting injunctive relief is *Midgett*, where the plaintiff had multiple sclerosis and needed a wheelchair to get around. 254 F.3d at 847. One cold day in 1996, the plaintiff was waiting for the bus when the wheelchair lift would not work on multiple buses operated by the defendant. *Id.* Eventually, a bus came by with a working lift, but the plaintiff's experience caused him to file a complaint with the defendant. *Id.* Unhappy with the defendant's response, the plaintiff initiated an action for violations of the Americans with Disabilities Act ("ADA") and sought a permanent injunction requiring the defendant to develop a range of procedures to ensure compliance with the ADA. *Id.* at 848.

When the defendant moved for summary judgment on the plaintiff's claim for injunctive relief, the plaintiff submitted evidence showing four instances since initiation of his lawsuit in which he had issues with the defendant's wheelchair lifts, along with declarations from five other riders who had similar complaints about the lifts and the defendant's drivers. *Id.* Meanwhile, the defendant submitted a report from the Federal Transit Administration that found the defendant in compliance with the ADA and evidence showing that the defendant had specific programs in place to address ADA issues. *Id.* at 849. The district court granted summary judgment in the

defendant's favor, determining that the plaintiff had standing to pursue injunctive relief but could not establish a "sufficient threat of ongoing ADA violations" such that he was entitled to an injunction. *Id.*

In affirming the district court's decision, the Ninth Circuit recited the plaintiff's burden to demonstrate a "real or immediate threat of substantial or irreparable injury" and noted that, because he sought to enjoin a governmental entity, "his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Id.* at 850 (citation omitted). The court then explained that the plaintiff's "evidence establishes several frustrating, but isolated, instances of malfunctioning lift service" and "[instances of] a few individual Tri-Met operators hav[ing] not treated passengers as they are required and trained to do." *Id.* Yet, these past violations, the court continued, do not "support an inference that Plaintiff faces a real and immediate threat of *continued, future* violations of the ADA in the absence of injunctive relief." *Id.* (emphasis in original). The court determined that the federal report finding the defendant compliant with the ADA and the other evidence showing the defendant having policies and procedures to address ADA issues "militates against a federal court's mandating substitute procedures of its own design to address the same issues." *Id.*

The situation here is no different than in *Lyons*, *Hodgers-Durgin*, and *Midgett*: Plaintiff may have presented evidence of a few "frustrating, but isolated, instances" of a prior individual who occupied the Communication Manager's role not treating users "as [she is] required and trained to do," *Midgett*, 254 F.3d at 850, but he cannot show a sufficient "likelihood of [future] injury to warrant [the] equitable relief" he seeks, *Hodgers-Durgin*, 199 F.3d at 1044. That Plaintiff and two other individuals were blocked in an eleven-year period during which there

have been thousands of posts by users is a "patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." *Lewis*, 518 U.S. at 359. Summary judgment in the Communication Manager's favor is therefore appropriate.

2. The Ninth Circuit Panel Decision in This Case Does Not Address This Ground for Summary Judgment.

Defendants anticipate that Plaintiff will try to leverage the Ninth Circuit panel majority's decision to suggest that it forecloses the argument presented here. It does not. Far from foreclosing the issue, it does not address the issue at all.

Two legal issues were presented to the Ninth Circuit, both of which involved whether Plaintiff will be blocked by the Communication Manager again in the future: Plaintiff's motion for preliminary injunction (which requires a showing of future harm) and the mootness doctrine (which, likewise, typically requires the presence of a risk of future harm). When these questions were initially presented to Judge Hernandez, he found—repeatedly—that future harm was not likely because Plaintiff had been blocked once by a single University employee, acting alone, and the employee had since retired. (ECF 57 at 32-34.) The Ninth Circuit did not disagree with these findings (nor could it, given the deferential standard of review applied to a trial court's factual findings). Instead, the Ninth Circuit held that a mere "risk of irreparable injury" was sufficient to sustain a preliminary injunction. 2024 WL 1007480, at *2. Curiously, the panel majority's discussion of this issue actually conflates the preliminary injunction standard with mootness. In fact, earlier in its memorandum disposition, it resolved the mootness issue not based on whether there was a risk of future harm, but instead based on the "voluntary cessation doctrine," which holds that "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Id.* at *1 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). That is, in paragraph 2 of its decision, the panel majority held that the case is not moot

under the voluntary cessation doctrine regardless of whether future harm is likely. And in paragraph 5 of its decision, the panel majority held that the existence of a mere "risk" of irreparable injury is sufficient for a preliminary injunction.

At this stage, what is required of Plaintiff is more demanding. Though Plaintiff could avoid showing a ***likelihood*** of future harm for purposes of a motion for preliminary injunction and evading dismissal based on voluntary cessation, the rubber now meets the road, so to speak. Plaintiff must now show a future "likelihood of substantial and immediate irreparable injury." *Lyons*, 461 U.S. at 111; *see also Easyriders Freedom F.I.G.H.T.*, 92 F.3d at 1495 ("The requirements for the issuance of a permanent injunction are 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.'" (citation omitted)). The difference in the showings required is even discussed in *Hodgers-Durgin*. There, the Ninth Circuit held that even if the plaintiffs showed a threat of future injury sufficient to establish standing and overcome mootness, that bare showing was not enough to establish entitlement to the equitable remedy of a permanent injunction. *See Hodgers-Durgin*, 199 F.3d at 1042. So too here.

More generally, the Ninth Circuit has cautioned against reading its decisions to stand for propositions broader than they state. *See United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000) ("[B]roadly speaking, [appellate] mandates require respect for what the higher court decided, not for what it did not decide." (citation omitted)). Another judge of this Court recently may have made this mistake in another high-profile First Amendment case. There, Judge McShane was reversed by the Ninth Circuit once, and then—perhaps due to overcorrection to accommodate that appellate ruling—the trial court was later reversed again by the Ninth Circuit in the other direction. *See Boquist v. Courtney*, No. 23-35535, 2024 WL 4211478, at *1 (9th Cir.

Sept. 17, 2024). As relevant here, the point is: just because two Ninth Circuit judges may have had a charitable view of Plaintiff's arguments on interlocutory appeal does not presage anything about answers to the questions presented in this Motion. Though related, the questions presented previously and here are different.

IV. CONCLUSION

There is another issue lurking beneath this Motion, which Defendants must call to the Court's attention. As mentioned previously, Plaintiff—who is himself a professor at Portland State University—could have resolved his grievance by making a single phone call to alert University officials that he had been blocked from interacting with a University-run Twitter subaccount. Indeed, before filing his lawsuit and motion for temporary restraining order, Plaintiff was required to make good-faith efforts to give notice and confer with Defendants. *See* Fed. R. Civ. P. 65(b)(1)(A). He did not comply with that rule, either deliberately or negligently. Instead, he made a proverbial "federal case of it" by filing and then publicizing this lawsuit without giving the University any notice.

This is what Plaintiff does. He has made a name for himself crusading against "cancel culture" by intentionally creating controversy and then casting himself as a victim of cancel culture, which he then uses for publicity and self-promotion. In this case, Plaintiff's effort required him to forego the courtesy of a phone call or email, and even to violate the conferral obligation imposed by the Federal Rules of Civil Procedure.

So far, Plaintiff's tactics have been successful. He has taken a minor mistake by a now-retired, low-level University employee and, rather than make good-faith efforts to correct it, he has aggressively prosecuted federal court litigation for two and a half years.

Plaintiff's gambit should end here. While two sympathetic Ninth Circuit judges relieved him of the requirement to show a likelihood of future injury for purposes of overcoming the mootness of his case and obtaining a preliminary injunction, now, at this stage, in order to win a judgment, he must overcome qualified immunity and he must actually demonstrate a likelihood of future injury. Simply put, there is no likelihood that that Plaintiff will suffer immediate and irreparable injury in the absence of this Court policing the University's social media policies and practices. Plaintiff therefore is not entitled to his request for equitable relief, and his case should be dismissed.

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