INSTITUTE FOR
FREE SPEECH

Via Email

April 10, 2025

Judge John V. Acosta
Wayne L. Morse U.S. Courthouse
405 East Eighth Ave.
Eugene, OR 97401

Re: *Bruce Gilley v. Tova Stabin, UO Communication Manager*
Letter Brief Re: Attorneys' Fees

Dear Judge Acosta:

Thank you for helping the parties settle this case and also for determining the outstanding attorneys' fees issue by considering the submissions of the parties. This letter is Gilley's submission on fees.

Gilley's lawsuit served to vindicate First Amendment rights in the digital realm. This case is about protecting civil rights, not monetary damages. Plaintiff's primary goal is to protect and expand First Amendment rights for citizens interacting with UO's social-media accounts, including dissenters or holders of minority viewpoints. To that end, we have negotiated revisions to UO's social-media guidelines (blocking criteria), development of practical implementation guidance, training for the communications managers who make blocking decisions, and an appeal process for blocked users. Within 180 days, the Court will determine whether UO has made the agreed changes.

Gilley successfully obtained a preliminary injunction and leveraged that injunction to obtain a stipulation and settlement that will expand freedom of speech. Because the settlement involves court-supervised mitigation measures that protect persons interacting with UO's social media accounts, it alters the legal relationship between the parties, making Gilley the prevailing party under 42 U.S.C. § 1988 and Ninth Circuit case law. *See, e.g., Richard S. v. Dep't of Developmental Servs.,* 317 F.3d 1080, 1086 (9th Cir. 2003) (finding that a litigant prevailed when he entered into a legally enforceable settlement agreement); *Watson v. Cnty. of Riverside,* 300 F.3d 1092, 1096 (9th Cir. 2002) (holding that a litigant "prevailed" and was entitled to an award of attorneys' fees when he won a preliminary injunction).

The settlement agreement provides for you to determine the total plaintiffs'

attorneys' fees in a range from $95,000 to $382,000. For reasons explicated in detail below, Gilley asks you to award a total amount at the top end of the range, with $297,000 of that amount being paid to the Institute for Free Speech and $85,000 being paid to the Angus Lee Law Firm.

Summary of the case:

We will not belabor the familiar facts of this case. In summary, UO blocked Gilley from interacting with @UOEquity for quoting a statement from the Declaration of Independence that the overwhelming majority of Americans (and Oregonians) would agree with: "All men are created equal." When Gilley asked UO for its blocking criteria, UO told Gilley they did not use written blocking criteria, and kept him blocked. It was only *after* we sued, that they then hastily posted the social-media blocking criteria online. Since this lawsuit was filed on August 11, 2022, UO has aggressively defended the legality of its blocking regime even though its social-media guidelines contain obviously viewpoint-discriminatory blocking criteria (hateful, racist, otherwise offensive) and UO emails show Stabin blocked Gilley for being "obnoxious" and posting "something about the oppression of white men." Contrary to UO's protestations, it is fairly obvious that its employee blocked Gilley because of her perception of his message, which she interpreted through a DEI lens, focusing on race and gender.

Role of fee awards in § 1983 cases:

Attorney's fees awards are a vital component of civil rights litigation, ensuring that plaintiffs can obtain high-quality legal representation regardless of their financial means. Fee-shifting statutes allow plaintiffs to retain counsel without paying upfront costs, as attorneys agree to be compensated only if the case results in a favorable outcome. In doing so, counsel assumes significant risk, investing substantial time and advancing considerable costs without any guarantee of payment.

The risk in a case such as this was exceptionally high, particularly for local counsel, who undertook this representation knowing that even the best-case scenario would simply be recouping payment for the work performed. Unlike many § 1983 cases, where attorneys may have the prospect of recovering a meaningful contingency fee tied to a percentage of a financial award, here there was no opportunity for such a recovery beyond fees earned. Local counsel agreed to take the case purely because of its importance, knowing that success would only mean being paid for time already invested.

In order for important work like this to occur, the risk assumed by plaintiff's counsel must be recognized by the courts when awarding fees. Otherwise, the purpose and goals of 42 U.S.C. §§ 1983 and 1988—ensuring access to justice and vindication of constitutional rights—would be undermined. Plaintiffs' counsel in

civil rights cases take significant professional and financial risks. The possibility of not recovering any fees is a real and frequent occurrence, particularly where the legal issues are complex and exist at the cutting edge of the intersection between law and emerging technologies.[1]

The availability of fee awards for prevailing plaintiffs thus provides an essential incentive for attorneys to undertake these high-risk but socially vital cases.

Legal standard for fee awards:

Calculating a reasonable attorney's fee involves a two-step approach. A court must first calculate a lodestar figure by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. *Blum v. Stenson,* 465 U.S. 886, 888 (1984). This lodestar figure is presumed to represent an appropriate fee. *Jones v. George Fox Univ.*, No. 3:19-cv-0005-JR, 2022 U.S. Dist. LEXIS 162869, at *8-9 (D. Or. Sep. 9, 2022). Having established the lodestar figure, a court may adjust the award upward or downward to account for the *Kerr* factors not subsumed within the initial lodestar calculation. *Cunningham v. County of Los Angeles,* 879 F.2d 481, 487 (9th Cir. 1988).

Those *Kerr* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr v. Screen Guild Extras, Inc.,* 526 F.2d 67, 70 (9th Cir 1975).

While First Amendment cases, and social-media content-moderation cases in particular, present cutting-edge issues of unusual complexity, which would warrant an upward adjustment under the *Kerr* factors, a simple lodestar calculation (set forth below) suffices to resolve the fee amount within the parameters of the settlement agreement. A lodestar calculation yields a number slightly above the top end of the agreed range and thus cuts in favor of awarding total fees at the top end.

Summary of litigation activities:

Tova Stabin blocked Gilley on June 14, 2022. This case was filed on August 11,

[1] Indeed, social-media content moderation issues have featured prominently in more than three different sets of cases considered by SCOTUS during the last several terms.

2022. Gilley initially sought a TRO and MPI,[2] but due to scheduling constraints, the MPI hearing did not take place until Dec. 16, 2022, in Portland. Dkt. 53. In addition to defending the MPI, UO filed a motion to change divisional venue to Eugene (which was initially not ruled upon, but later granted by a different judge who had inherited the case) and a motion to dismiss for lack of jurisdiction based on alleged mootness. Dkt. 16, 23, 35. On Jan. 26, 2023, the district court issued its opinion denying Gilley's MPI and also denying UO's motion to dismiss. Dkt. 57. Gilley appealed the MPI denial on a fast-track basis. Dkt. 58. UO then cross-appealed the denial of its motion to dismiss based on mootness. Dkt. 61.

There were a total of 57 docket entries in this case prior to the filing of Gilley's notice of appeal, indicating a significant amount of early litigation activity. In addition, the district court permitted Gilley to conduct limited early discovery into issues relevant to the MPI, which uncovered the emails where Tova Stabin described Gilley as "obnoxious" and "commenting something about the oppression of white men." That discovery included a Rule 30(b)(6) deposition of UO's designee related to social-media blocking and short depositions of Tova Stabin and the VP of Division of Equity and Inclusion. UO insisted that the depositions of its personnel all take place in Eugene, even though the case was pending in Portland and most counsel were located closer to Portland. UO also required counsel to travel to Eugene separately to depose the VP of DEI because of late-breaking scheduling problems that prevented her deposition when the other witnesses were scheduled.

Including the original complaint and MPI papers, Gilley's attorneys were constrained to file over ten different briefs and pleadings in the district court, prior to noticing the appeal. That does not include numerous supporting declarations and exhibits, which are reflected in the court docket.

UO's litigation tactics:

Since this case's outset, UO has aggressively litigated its defense, expending

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[2] Tova Stabin was served on the same day the case was filed, including with the TRO/MPI packet (Dkt. 9), but plaintiff's counsel did not timely submit information about notice before the TRO was denied (Dkt. 7). Counsel acknowledges that he should have provided that information to the Court sooner, but that is separate from the issue of whether Gilley should have conferred with UO before filing this suit. For Section 1983 civil rights cases, no exhaustion of state administrative remedies is required. Requiring conferral before filing a federal lawsuit seeking equitable relief by way of local rule or practice is tantamount to imposing an administrative exhaustion requirement. *See, e.g., Knick v. Twp. of Scott,* 139 S. Ct. 2162, 2172-73 (2019). Local rules may not be used to amend federal civil rights statutes (indeed, during the Jim Crow era, many former Confederate States would have liked to do so). That issue, however, will have to be litigated another day. As a practical matter, requiring conferral prior to filing suit (or seeking an MPI) on a social-media blocking decision would invite tactical unblocking and make it extremely unlikely that a plaintiff's attorney would invest the time to work-up a case or file it. That would make social-media blocking by government entities effectively unreviewable in the District of Oregon. Faced with the looming lawsuit and MPI, the entity will just unblock the person and claim mootness.

hundreds of thousands of dollars to mostly lose, when it could have probably settled the case early for a modest payment attorneys' fees, an apology, and some of the mitigation measures discussed above. That UO chose to litigate this case for so long, at such great cost suggests that UO's decisionmakers were overly concerned about defending DEI's role in UO's operations, including in making social-media blocking decisions. That approach amounted to a serious misallocation of public resources.

Throughout the case, defense counsel has focused on Gilley's political views and suggested that he is a gadfly or an extremist out of step with Oregon values, who is unworthy of the Court's protection. Of course, people who express majoritarian views rarely get censored—unless those views are disfavored by officials with the power to censor. UO's decision to post social-media guidelines on their public-facing website *after* this lawsuit commenced, while giving the appearance that such guidelines had been previously available, warrants careful scrutiny in evaluating UO's litigation conduct.

Similarly, mailing Gilley's attorneys a $20 bill in a misguided attempt to moot the case sent a message that Gilley's nominal damages claim for past blocking was not being taken seriously. What mattered, of course, was a judgment, legally acknowledging wrongdoing. Instead, UO engaged in a maneuver that was too-clever-by-half, failing to address the core issue—the need for a formal judgment recognizing the violation of Gilley's constitutional rights.

UO's aggressive tactics were perhaps best illustrated by its actions after Gilley appealed the denial of his MPI: UO filed a cross-appeal of the denial of its motion to dismiss based on mootness, even though that amounted to an appeal of a non-final order. The practical effect of that cross-appeal was to slow down Gilley's fast-track MPI appeal, extend the briefing schedule, and increase the amount of briefing submitted by all parties. As a result of UO's improper cross-appeal, Gilley filed a motion to dismiss, but the Ninth Circuit's motions panel deferred that matter to the merits panel. Thus, Gilley's attorneys were forced to respond to UO's improper cross-appeal on its merits.

In the end, the Ninth Circuit agreed with Gilley and dismissed UO's cross-appeal for lack of jurisdiction ("We dismiss stabin's cross-appeal . . . for lack of a final judgment"). Dkt. 67 at 3. The Ninth Circuit also vacated and remanded "the district court's denial of the preliminary injunction." *Id.*

But UO also took other actions on appeal that increased the amount of work for both sides. On August 25, 2023, UO filed a motion to supplement the record based on a publicly reported proposal to eliminate the blocking function on the X platform.[3] This necessitated additional briefing from Plaintiff's counsel. In the end, the blocking function on X was not eliminated and remains extant.

[3] That motion was later re-filed due to UO's counsel's failure to comply with the circuit rules.

At the appellate oral argument, in response to questioning by the panel, the undersigned counsel informed the court that the $20 bill had been returned to UO's counsel. The panel then asked Mr. Isaak whether the bill was returned, but rather than admitting what everyone knew to be true, he would only state that this fact was not in the record on appeal.[4] Mr. Isaak's unwillingness to admit that the $20 had been returned defendants, necessitated Gilley filing a post-hearing motion to supplement the record with the evidence concerning the return of the $20 via UPS, which was filed on September 15, 2023. This was necessary because—at that time—Gilley did not have the benefit of the panel's opinion regarding the lack of jurisdiction on UO's cross-appeal—and could not take any chances.[5]

Later, on Oct. 6, 2023, UO submitted a FRAP 28(j) letter informing the court that the government's petition for cert had been granted in *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022), *cert. granted*, 2023 WL 6319658 (U.S. Sept. 29, 2023). Inexplicably, UO's counsel also attached the government's entire cert petition, resulting in a Rule 28(j) filing that was 207 pages in length—far in excess of the rule's 350 word limit. Such a use of Rule 28(j) procedure—stuffing legal arguments developed in a cert petition into a 350-word limit letter—is highly unusual and openly inconsistent with the purpose of that rule.

This also necessitated a response from Gilley's attorneys. In that case, SCOTUS eventually issued a merits opinion against the government, and *FBI v. Fikre*, 601 U.S. 234 (2024), actually supports many of the arguments Gilley had successfully made regarding mootness.

Even after the denial of Gilley's MPI was vacated and remanded to the district court, UO still would not agree to the entry of a preliminary injunction. This, in turn, necessitated further briefing by both sides, which eventually resulted in the district court entering a PI in Gilley's favor. Dkt. 80. On July 23, 2024—nearly two years after he first filed suit—Gilley finally obtained the preliminary injunction he had initially sought. To obtain this positive result, Gilley was required to navigate a lawsuit that generated over 148 separate docket entries (combining the 68 Ninth Circuit docket entries with the 80 district court docket entries leading up to the PI).

The amount of litigation activity in this case was almost entirely due to the aggressive way that UO opted to defend its right to block Gilley for quoting the

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[4] Ninth Circuit Oral Argument Video at timestamp 23:30 to 30:15, https://youtu.be/Cujdm67EGg0?si=YA58Sx4x6k_goewz. The panel repeatedly chided UO's counsel for this ploy with the cash. Even Judge Fletcher (who ultimately dissented for other reasons), told Mr. Isaak that he read the cases differently than him and that "this is all too clever by half." This exchange is emblematic of UO's approach to this case. The reason this case generated so much work is that UO took this misguided approach.

[5] Gilley's motion to supplement was later denied as moot since the court decided it did not need to determine whether the $20 was returned. Dkt. 67 at 3, fn 2.

Declaration of Independence. Having chosen this path, UO should not now be heard to complain about having to pay Gilley's attorneys a reasonable fee for their work. The amount of work was proportionate to the demands of the case.

Hourly rate:

During the mediation, the Court informed counsel that, because the case was pending in the Eugene Division, Your Honor would apply the Eugene-market rate for attorneys with equivalent experience—$425 per hour, based on the most recent Oregon State Bar salary survey—in determining Plaintiff's reasonable attorneys' fees.

Gilley accepts your judgment on that issue, but would note that this case was initially filed into the Portland Division, where Gilley experienced the effects of the blocking; and was pending there for most of the life of this case, until transferred to the Eugene Division late in 2024. The MPI hearing took place in Portland and all of the substantive rulings going to the merits of this case were issued there as well.

It is also notable that UO opted to retain Portland-based counsel to defend this case. Given the complexity of the issues, the location of the proceedings, and the higher prevailing rates in the forum where most of the litigation occurred, the artificially low lodestar rate weighs strongly in favor of awarding fees at the top end of the range permitted under the settlement agreement.

Attorneys' fees generated by UO:

UO initially retained Perkins Coie to defend this case, staffing it with two partners and one primary associate. After Mr. Isaak moved to Stoel Rives, that firm assumed the defense. Plaintiff obtained UO's aggregate attorney-fee invoices through Public Records Requests. As of November 30, 2024, UO had already paid its outside counsel $533,078, covering only a portion of the litigation. Although UO withheld its counsels' hourly rates on the basis of "trade secret" claims, it is reasonable to infer that the rates charged—particularly for Mr. Isaak, a Portland-based partner—substantially exceeded $425 per hour.

The magnitude of UO's defense expenditures, even for an incomplete segment of the litigation, confirms that this case demanded substantial and high-quality legal work on both sides. By comparison, the top end of Plaintiffs' fee-award range is $382,000—only 72% of the amount UO paid to its own counsel for just a portion of the litigation. Plaintiff's counsel were required to match the intensity and complexity of the work performed by defense counsel, yet now seek a significantly lower total fee. In light of these circumstances, awarding fees at the top end of the agreed range is both reasonable and just.

Plaintiff's counsels' experience:

IFS and Angus Lee are representing Gilley on a pro bono basis, but our retention agreement allows all fees recovered under § 1988 to go directly to plaintiff's counsel. As of the date Gilley's mediation letter was submitted to you, I had logged 700 hours of work on this case, not including the time of other IFS lawyers who have assisted in some way.[6]

I have been practicing for 30 years, with most of that time spent as a civil litigator. At a rate of $500/hour that would be $350,000. At a rate of $425/hour that would be $297,500. I have personally done most of the legal work in this matter, including drafting the briefs (including on appeal) and taking the depositions on this case. Other attorneys at IFS have also contributed by doing research on specific issues, although we are not asking for that work to be compensated.

Our briefs have also been reviewed and lightly edited by Alan Gura, IFS's VP of Litigation. Mr. Gura has been practicing an equivalent length of time and has successfully argued two seminal civil rights cases before SCOTUS. We also do not seek fees for any of Mr. Gura's work on this case, but would have been entitled to do so if this matter had gone to a disputed fee motion absent this settlement.

Our local counsel, Angus Lee has logged 200 hours on this case. Under the local rules, Mr. Lee's participation was essential, as no one at IFS is a member of the Oregon Bar. Mr. Lee has actively participated in the case, reviewing and contributing to all briefing, attending all depositions and hearings, and providing valuable strategic advice.

Due to the time demands of this case, Mr. Lee had to decline numerous prospective clients and high-value criminal defense cases. He referred these cases to other attorneys to ensure that he would have the time and focus necessary to prosecute this case effectively. This lost opportunity further underscores the significance of the risk undertaken and supports a full and fair award of attorneys' fees.

Mr. Lee has been practicing for 20 years. His usual rate for civil cases is $500/hour. That would total an additional $100,000. At a reduced rate of $425/hour, that equals $85,000.

Taking the reduced rate of $425/hour that you indicated you would apply, the

[6] Your honor requested letter briefs on attorneys' fees, not timesheets, so we have summarized our work, rather than supplying the granular detail reflected in timesheets. We would be happy to supplement the timesheets if you determine those would be helpful. We would submit, however, that the dispute about fees has to date not involved disputes about timesheets or specific entries. This is more of a big-picture dispute.

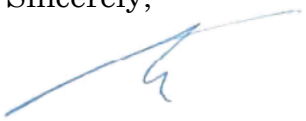
total plaintiff's attorneys' fees would amount to $382,500, slightly over the top end of the range. Gilley submits that the top end of the range is warranted.

Conclusion:

In closing, we would note that the settlement agreement allows for separate fees checks for both of plaintiff's law firms, so we ask that your order on fees break out those amounts for easier implementation by UO's insurer, who will be issuing two checks. We respectfully request that you determine that the total fees awarded to plaintiff's counsel be at the high end of the range, for a total of $382,000; with $297,000 of that amount being paid to IFS and $85,000 being paid to the Angus Lee Law Firm.

If you have any questions about the content of this letter, we would be more than happy to answer those. Thank you again for agreeing to resolve this fees issue.

Sincerely,



Endel Kolde
Counsel for Bruce Gilley

cc: Misha Isaak
Alexander Bish
Bruce Gilley
D. Angus Lee