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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 REPLY RE MOTION FOR PRELIMINARY INJUNCTION

REPLY

1. UO has failed to explain why Gilley was blocked

Defendants characterize their blocking of Bruce Gilley as the isolated act of an ex-employee, but nowhere in their response (ECF No. 31) do they explain *why* Stabin blocked Gilley. They merely cite to Gilley's allegations in his Amended Complaint; they have not submitted a declaration from Stabin or anyone else with personal knowledge of the blocking decision. *See* ECF No. 31 at 2, n.1 (listing declarations relied upon).

Moreover, defense counsel's arguments, which are not admissible evidence, have been contradictory. On the one hand, counsel has argued that UO "will not block him *again* based on an expressed viewpoint, and informed Plaintiff that the original blocking *violated* Defendant's existing prohibition against viewpoint discrimination on social media," (ECF No. 23 at 6-7) (emphasis added). On the other hand, during the scheduling conference, defense counsel claimed "[Gilley's] Tweet was *not* about his substantive disagreement with the university's color blindedness or what he's described as the university's diversity and equity and inclusion viewpoints." ECF No. 34-1 at 3 (23:3-9) (emphasis added). UO appears to be trying to keep its options open by both admitting *and* disclaiming viewpoint discrimination; and without telling Plaintiff or the Court why Gilley was blocked. These positions are mutually exclusive.

In addition, Defendants have been oddly silent about the other two conservative Twitter users who @UOEquity also blocked. ECF No. 5 at 12-13 (¶¶ 62-64); ECF No.

5-13 (screenshots of conservative-DEI critical posts). If there is an innocent, viewpoint-neutral reason why UO blocked Gilley or the other two DEI critics, we have yet to hear it from the defense.

This Court should interpret UO's tactical ambiguity as a concession that Gilley's allegations are accurate: that the communication manager blocked him (and others) in order to suppress criticism of her employer's DEI ideology. If there was a better explanation, we should have heard it by now.

2. UO has not explained which criteria the communication manager applied to block Gilley and its story keeps changing

UO's story about its social media blocking criteria keeps changing. First, UO told Gilley that there are no criteria, the communication manager uses "professional judgment." ECF No. 5 at 60; ECF No. 5-12. After the lawsuit was filed, Kevin Reed wrote a letter claiming the university does not intend to block users on the basis of viewpoint, but he did not apologize to Gilley or mention UO's social media guidelines. ECF No. 19-2. A bit later, we first learned about UO's social media guidelines. ECF No. 24 at 2; ECF No. 25 at 2; ECF No. 24-1.

Now defense counsel is arguing both that UO's social media guidelines are viewpoint neutral and that everything is fine because Stabin did not apply those guidelines. ECF No. 31 at 7, 9. But counsel's arguments are not evidence. Ninth Cir. Manual of Model Civ. Jury Instr. (updated June 2022) at 12, 1.10 What is Not Evidence ("Arguments and statements by lawyers are not evidence. The lawyers are not witnesses"). UO has not provided admissible evidence about what criteria were

used to block Gilley, or the other DEI critics, because we have not heard from anyone with direct, personal knowledge of the blocking decision. And defendants have access to that information. Their unwillingness to tell us concedes that it would not benefit UO for that evidence to be presented to the Court.

Any number of plausible scenarios are unhelpful to UO's defense: (1) perhaps the key players in the Division of Equity and Inclusion were not aware of UO's social media guidelines or had their own custom and practice; (2) perhaps UO did not adequately disseminate the guidelines or train employees about them or otherwise hold employees accountable; and (3) perhaps the communication manager did know about the guidelines and actually applied them or interpreted them through a DEI lens, deeming Gilley and the other DEI critics to be "offensive," "racist," "hateful," or "otherwise inappropriate." Or perhaps it was some combination of those scenarios. We don't know, because UO hasn't told us about that and their story on the blocking criteria keeps changing. In the absence of a clear explanation, we are entitled to infer the worst.

UO's shifting story about blocking criteria also leads to the inevitable conclusion that the interactive portions of @UOEquity are a designated public forum where all content-based restrictions are subject to strict scrutiny, rather than a limited public forum were reasonable content-based restrictions are allowed, so long as they are viewpoint neutral. *See Garnier v. O'Connor-Ratcliff,* No. 21-55118 21-55157, 2022 U.S. App. LEXIS 20719, at *60 (9th Cir. July 27, 2022) (trustees could have established and enforced clear rules of etiquette for public comments); *Hopper v.*

City of Pasco, 241 F.3d 1067, 1076 (9th Cir. 2001) ("A policy purporting to keep a forum closed (or open to expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it is not enforced or if exceptions are haphazardly permitted"); *compare Seattle Mideast Awareness Campaign v. King County,* 781 F.3d 489, 497-98 (9th Cir. 2015) (county transit advertising program consistently applied detailed screening criteria making it a limited public forum).

On the present record, it is not even clear whether the Division's communication manager knew about UO's social media guidelines, or whether she (or other UO communication managers) applied them consistently. Such haphazard or selective application of screening criteria all but assure that the interactive portions of @UOEquity do not enjoy the status of a limited public forum, but are rather a designated public forum where strict scrutiny applies. UO's guidelines do not pass strict scrutiny.

3. UO's claim of viewpoint neutrality is contradicted by its social media guidelines

Defendants claim that they will not block anyone based on viewpoint is belied by the fact that UO continues to maintain social media guidelines that authorize its communication managers to block, hide, or permanently ban users based on their viewpoints. *See* ECF No. 24 at 2 ("Under the University's social media guidelines, an employee may hide material created by a user or restrict access..."); ECF No. 24-1 ("But you may remove comments, messages, and other communications and restrict access to users who violate the following guidelines…").

Indeed, defendants seek to take credit for the guidelines, inaccurately characterizing them as "guidelines that prohibit viewpoint discrimination." ECF No. 31 at 10. On the contrary, the guidelines enshrine viewpoint discrimination because they allow blocking or banning of users who the communication manager deems, subjectively, to have posted content that is offensive, racist, hateful, or otherwise inappropriate. *See, e.g., Am. Freedom Def. Initiative v. King County,* 904 F.3d 1126, 1132 (9th Cir. 2018); ECF No. 32 at 24-27 (collecting cases on offensive viewpoints). Moreover, the risk of viewpoint discriminatory blocking under UO's guidelines is heightened when they are put into the hands of a DEI-ideology adherent, because such true-believers apply a DEI lens to those terms. *See* ECF No. 33 at 3-5.

UO has also not shown any evidence that it has provided training or interpretive guidance on the meaning of the blocking terms in the social media guidelines. That invites subjective and selective enforcement against disfavored speakers. *People for the Ethical Treatment of Animals, Inc. v. Shore Transit*, 580 F. Supp. 3d 183, 195 (D. Md. 2022) (there are no additional guidelines to limit Defendants' discretion in determining what constitutes a transit advertisement that is "political" or "controversial, offensive, objectionable, or in poor taste"); *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 Policies 903 and 922 to public comments."); *see also Minn. Voters All. v. Mansky,* 138 S. Ct. 1876, 1891 (2018) (cited by both *Marshall* and *People for the Ethical Treatment of Animals* for the proposition that officials'

"discretion must be guided by objective, workable standards"). Accordingly, in *Marshall,* a school-board speech case (limited public forum), the court facially invalidated two speech policies on vagueness grounds: "Allowing little more than the presiding officer's own views to shape 'what counts' as irrelevant, intolerant, abusive, offensive, inappropriate, or otherwise inappropriate under the policies openly invites viewpoint discrimination." *Marshall,* 571 F. Supp. 3d at 424.

If UO has any training, guidance, or other processes in place to protect against viewpoint-discriminatory blocking, they would have told us. But these guidelines invite discrimination rather than guarding against it. This makes UO's stated commitment to viewpoint neutrality simply not credible.

4. Self-censorship is a cognizable constitutional injury

Defendants' response re-hashes many of their mootness arguments from their motion to dismiss, but with a focus on Gilley's request for injunctive relief. Plaintiff has already set forth detailed arguments and authority for the proposition that self-censorship is a cognizable injury, and that Gilley thus has standing to bring a pre-enforcement challenge to UO's social media guidelines even if those guidelines have not yet been applied to him (we don't know). ECF No. 32 at 12-17. This is particularly true because Gilley and other DEI critics have already been blocked by the communication manager.

Gilley's claim of self-censorship is also credible in light of his own first-hand experiences dealing with DEI adherents in the academic setting. ECF No. 33 at 3-5. DEI adherents are particularly biased toward finding the views of conservative

white men (such as Gilley) to be "racist," "hateful," "offensive," or even "violent." *Id.* at 4 (¶¶ 11, 13-16) (detailing Gilley's interactions with DEI adherents, investigation by PSU's diversity office, and PSU faculty senate resolutions equating criticism of critical race theory with "harassment" and "endangerment"). Given such experiences, Gilley's decision to self-censor is believable, especially considering UO's shifting claims, unwillingness to explain why he was blocked, and continued adherence to viewpoint discriminatory guidelines.

Moreover, the cases Defendants have cited in support of their assertion that injunctive relief is moot are non-First Amendment cases. For example, Defendants rely heavily on *Los Angeles v. Lyons,* 461 U.S. 95, 97 (1983), involving an unsuccessful attempt to obtain an injunction against "choke holds," based on a prior police encounter. But *Lyons* has been limited to situations where government action was triggered by illegal conduct, resulting in police contact. *Index Newspapers LLC v. City of Portland*, 474 F. Supp. 3d 1113, 1122 (D. Or. 2020); *Marbet v. City of Portland*, No. CV 02-1448-HA, 2003 U.S. Dist. LEXIS 25685, at *29-31 (D. Or. Sep. 8, 2003) (*Lyons* does not apply to lawful demonstrators).

> Plaintiffs, however, are not breaking any laws—to the contrary, they are *engaging in constitutionally protected First Amendment activity*. It is one thing to ask citizens to obey the law in the future to avoid future alleged harm. But it is quite another for the Federal Defendants to insist that Plaintiffs must forgo constitutionally protected activity if they wish to avoid government force and interference.

Index Newspapers, 474 F. Supp. at 1122 (emphasis added).

The harm at issue in *Index Newspapers,* just like here, is about self-censorship. *Id.* ("This chilling of First Amendment rights is not adequately compensable with money damages"). And the right to be free from the harm of self-censorship is not limited to journalists who wish to cover social-justice protests – it applies just as much to conservative university professors who want to criticize DEI, or to any other dissenter.

It is true that Gilley does not face arrest or termination for his Tweeting, but his constitutional right to express himself in a designated public forum is not a lesser right because of it. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) ("By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square[.]"); *see also Healy v. James*, 408 U.S. 169, 181-82 (1972) (student group's associational interest were circumscribed by denial of the use of campus bulletin boards and school newspaper). Bruce Gilley has a constitutional right to interact with @UOEquity without having to hedge or trim lawful expressions of opinion; and so do other DEI critics.

There is also a practical reason why this Court should issue a preliminary injunction: Bruce Gilley's rights to speak, and those of other DEI dissenters, will not be adequately protected if the UO can simply unblock him, send a letter, and waive around some guidelines that do not appear to be followed consistently. This situation will happen again and Bruce Gilley, and people like him, should not have

to file a federal lawsuit every time it does. Most people will probably just drop it and move on with their lives, leaving the harm uncorrected.

5. UO's professed concern with intrusion into its internal affairs is a red flag

Defendants make a startling admission when they claim that "an injunction will have a *concrete and immediate impact* on the University's ability to manage its own internal affairs." ECF No. 31 at 16 (emphasis added). That would only be true if Defendants intend to engage in viewpoint-discriminatory blocking, as their policy allows them to do. This statement illustrates that UO's claims of viewpoint neutrality are a feint for litigation purposes, designed to allow them to avoid accountability.

Defendants' argument on this is all over the map: we won't discriminate based on viewpoint again, and our guidelines don't call for that, but we didn't apply them when we did discriminate based on viewpoint, and if the Court issues an injunction prohibiting us from discriminating it is interfering in UO's internal affairs. But why would it be an intrusion to require UO to refrain from viewpoint discrimination and allow Twitter users to criticize DEI?

Even the phraseology of protesting the "intrusion into internal affairs" has a stilted, authoritarian ring to it; as if UO exists inside a sovereign bubble where normal civil-rights rules don't apply. *See, e.g.,* AFP, *China hits back at nations' 'wanton interference' in its affairs after 22 countries sign UN letter condemning mass detention of Uighur Muslims,* DAILY MAIL.COM (Oct. 5, 2022),

https://bit.ly/3V4Fdw2 ("It is a public politicisation of human rights issues and wantonly *interferes in China's internal affairs*….") (emphasis added); *see also Healy,* 408 U.S. at 180-81 ("At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment"). Indeed, UO should be inviting a robust debate about the tension between DEI and colorblindness. Having such a debate enriches adherents of both viewpoints. "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas[.]'" *Id.*

So too with the passing invocation of Titles VI and IX. Those statutes do not authorize viewpoint discriminatory blocking of protected speech by non-employees in a designated public forum. That Defendants even hint that they might do so, betrays that they really do want to keep censoring speech.

CONCLUSION

This Court should grant Bruce Gilley's motion for a preliminary injunction.

Respectfully submitted,

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