

D. Angus Lee, OSB No. 213139
ANGUS LEE LAW FIRM, PLLC
9105 NE Highway 99, Suite 200
Vancouver, WA 98665-8974
(360) 635-6464
angus@angusleelaw.com

Endel Kolde
(pro hac vice to be sought)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW, Suite 801
Washington, D.C. 20036
(202) 301-1664
dkolde@ifs.org

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

BRUCE GILLEY,

Plaintiff,

v.

TOVA STABIN, Communications
Manager, University of Oregon
Division of Equity and Inclusion, in
her official and individual capacities,

Defendant.

Case No. 3:22-cv-01181

MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

MOTION

In accordance with Fed. R. Civ. P. 65, 42 U.S.C. § 1983, and First and Fourteenth Amendments to the U.S. Constitution, Plaintiff Bruce Gilley hereby moves for a temporary restraining order (“TRO”) and preliminary injunction enjoining Defendant Tova Stabin, her officers, agents, servants, employees, and all

persons in active concert or participation with her who receive actual notice of the injunction:

- 1) To unblock @BruceDGilley from the @UOEquity Twitter account;
- 2) From discriminating on the basis of viewpoint when blocking users from @UOEquity, including other users who express views critical of the ideology of diversity, equity, and inclusion;
- 3) Applying overly broad content-discriminatory criteria when blocking users from @UOEquity; and
- 4) Enforcing Defendant's subjective custom, policy, and practice of applying "professional judgment" when blocking users from @UOEquity.

And any other relief this Court may grant in its discretion.

Plaintiff's memorandum in support of this motion follows.

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MEMORANDUM OF LAW IN SUPPORT OF BRUCE GILLEY'S
MOTION FOR TRO AND PRELIMINARY INJUNCTION

INTRODUCTION

“The protections of the First Amendment apply no less to the ‘vast democratic forums of the Internet’ than they do to the bulletin boards or town halls of the corporeal world.” *Garnier v. O'Connor-Ratcliff*, Nos. 21-55118, 21-55157, 2022 U.S. App. LEXIS 20719, at *62 (9th Cir. July 27, 2022). “When state actors enter that virtual world and invoke their government status to create a forum for such expression, the First Amendment enters with them.” *Id.*

Oregon’s flagship state university maintains a Division of Equity and Inclusion. The Division’s communication manager, Tova Stabin, posts content on the topics of diversity, equity, and inclusion on the social media platform Twitter, using the Division’s official account. She recently posted a “Racism Interrupter” prompt which was open to comments by other Twitter users, thereby making it a designated public forum. But when Bruce Gilley posted “all men are created equal” in response to that prompt, Tova Stabin blocked him from the Equity Division’s Twitter account because he promotes a colorblind viewpoint with which she, and her employer, disagree. Stabin’s blocking constitutes impermissible viewpoint discrimination, and it violates the First Amendment.

FACTS

The University of Oregon is a State Institution

The University of Oregon (“University”) is a public state university, organized pursuant to ORS 352.002. The University is a taxpayer-funded governmental entity performing governmental functions and exercising governmental powers pursuant to ORS 352.033.

The Division of Equity and Inclusion (“Division”) is a part of the University of Oregon. UNIV. OF OREGON, *About DEI*, <https://inclusion.uoregon.edu/about-DEI> (last visited August 8, 2022). The Division uses the acronym “DEI,” *id.*, which is also a common acronym for the ideology of diversity, equity, and inclusion. *Id.*; Declaration of Bruce Gilley ¶ 3.

The Division’s official slogan declares that it “promotes inclusive excellence by working to ensure equitable access to opportunities, benefits, and resources for all faculty, administrators, students, and community members.” U. OF O., *About DEI*, *supra*. The Division promotes its concept of “inclusion,” which it describes as a “decision-making process in ways that lead to equity.” *Id.* The Division also promotes its concept of “equity,” which it describes as a “structural concept” that “takes into account where people are and where they need to go.” *Id.*

The Division’s concept of equity includes discriminating in favor of certain races and genders (and therefore discrimination against others) in order to atone for

actual and perceived past discrimination. *See* Gilley Dec. ¶¶ 13-16; UNIV. OF OREGON, *An IDEAL Framework*, <https://inclusion.uoregon.edu/ideal-framework> (last visited August 2, 2022); UNIV. OF OREGON, *IDEAL: Our Roadmap for a Fully-Inclusive and Resilient Campus*, <https://bit.ly/3BU7EFI>, at 15-18, 24 (December 10, 2020) (emphasizing race-based and gender-based hiring, retention, and promotion goals; “[UO] must stridently and consistently choose a path of anti-oppression in word and as well as deed”); Gilley Dec. ¶25; Ex. B (report).

The Division promotes the idea that the United States and the State of Oregon were founded on oppression and remain systemically racist to this day. Gilley Dec. ¶¶ 19-20; Ex. B at 6-7 (“During this time, it is impossible to turn away from the inculcating evidence of... oppression that undergirds American life.”). The Division claims that “the core of the IDEAL framework is a deep love for the people and the State of Oregon,” a state which it nevertheless describes as built on an “ugly foundation of racial exclusion and oppression” and “atrocities.” *Id.* at 6. The Division promotes its framework as “deeply American, patriotic” and as a “mechanism for refashioning the State and the UO[.]” *Id.* at 7.

The Division similarly promotes the concept that the University of Oregon is a systemically racist institution. In a 2020 report, the Division’s Vice President criticized a perceived lack of progress in promoting DEI-based education, hiring and promotion at the University of Oregon. *Id.* at 24.

The other side, told by the data about representation, student success and faculty achievement, presents a less flattering story—one of a campus that is mired in incrementalism—as it relates to diversity,

equity and inclusion. This incrementalism chains the UO to its racially segregated past on a campus where colorblind ideology and whiteness prevail.

Id.

The Division’s concept of inclusion does not include allowing the expression of viewpoints critical of DEI. Gilley Dec. ¶¶ 17-23. The Division rejects the proposition that state universities should aspire to colorblindness in making educational and employment decisions. Ex. B at 25 n. viii (“Color blindness is the idea that race-based differences don’t matter. It ignores the realities of systemic racism”). The Division is administered by the Office of the Vice President for Equity and Inclusion (VPEI), which is also part of the University of Oregon. U. OF O., *Office of the Vice President for Equity and Inclusion (VPEI)*, <https://inclusion.uoregon.edu/office-vice-president-equity-and-inclusion-vpei> (last visited August 2, 2022).

Tova Stabin is a state actor and agent of the University of Oregon

Defendant Tova Stabin is an employee of the University of Oregon VPEI and Equity Division. U. OF O., *Meet the Office of Vice President for Equity and Inclusion Staff*, <https://bit.ly/3zpVhyw> (last visited August 2, 2022); Gilley Dec. ¶¶ 26-28. Her job title is Communication Manager. U. OF O., *Communication Manager*, <https://bit.ly/3OONiR6> (last visited Aug. 2, 2022); Ex. C (screenshot of job description). She is responsible for all of the Equity Division and VPEI’s digital communications, external communications, and social media. *Id.* Ms. Stabin is a former diversity consultant and considers herself to be an “avid social justice activist.” *Id.*

Ms. Stabin is responsible for administering the Division's @UOEQuity Twitter account, which is the Division's official social media presence on the Twitter platform. *Id.*; Equity and Inclusion (@UOEQuity), TWITTER, <https://twitter.com/UOEQuity> (last visited Aug. 2, 2022). Twitter is an interactive social media platform, which users can utilize to interact with each other by posting content called "Tweets." *See, generally*, TWITTER, *Getting started with Twitter*, <https://bit.ly/3JuJuIn> (last visited Aug. 2, 2022). The Twitter functionality of "tweeting" is described at: TWITTER, *How to Tweet*, <https://help.twitter.com/en/using-twitter/how-to-tweet> (last visited July 29, 2022). Established in 2013, the @UOEQuity Twitter account follows over 400 Twitter users and is followed by nearly 1,000 Twitter users. @UOEQuity, *supra*. The @UOEQuity account is a public account, and its posts can be read and commented on by any other Twitter user who is not blocked by Ms. Stabin. *Id.*; Gilley Dec. ¶¶ 29-31. Other Twitter users can also reply to posts with their own comments or retweet posts to their own followers if they have not been blocked by Ms. Stabin. *Id.*

The @UOEQuity Twitter account bears the trademark, trade dress, and school colors of the University of Oregon, presents its location as "University of Oregon" and links to "inclusion.uoregon.edu," the Division's official webpage. @UOEQuity, *supra*; Gilley Dec. ¶ 33; Ex. E. The Division's official website also invites the public to "connect with us," including on Twitter @UOEQuity. *See, e.g.*, UNIV. OF OREGON, *Division of Equity and Inclusion*, <https://inclusion.uoregon.edu/> (last visited Aug. 8, 2022); Gilley Dec. ¶ 32; Ex. E (screenshot of connect-with-us buttons).

Ms. Stabin uses @UOEQuity Twitter to promote the Division's concepts of diversity, equity, and inclusion or DEI. @UOEQuity, *supra*; Gilley Dec. ¶¶ 35-37. Ms. Stabin uses @UOEQuity to tweet about various pro-DEI viewpoints, including viewpoints on Asian culture, food justice, the harmful effects of harassment and discrimination against LGBTQ people in schools, the historic significance of Justice Ketanji Brown Jackson's nomination, the transformative journey of Africans to Africans living in America, solidarity discussions centered on social and racial justice, and the International Transgender Day of Visibility. *Id.*; Ex. F (screenshots of DEI Tweets); *see also* @UOEQuity, *supra*.

Followers of @UOEQuity's Twitter account and other Twitter users who are not blocked by Stabin are able to interact with her posts by liking, retweeting, or replying to the posts. Gilley Dec. ¶ 38. When replying to a post, Twitter users can express their own opinion about a viewpoint expressed in the post. *Id.* That post then becomes visible to other Twitter users, who may also reply to it, thus conducting a public conversation that would continue under the @UOEQuity account, unless a specific user affirmatively chooses to exclude that account from a reply. *Id.* Users can also start new conversations about a Tweet by re-tweeting it and including their own comments, which may elicit further replies. *Id.* ¶ 39.

The Twitter functionality of "replying" is described at: TWITTER, *Reply to Tweets to add your voice*, <https://help.twitter.com/en/resources/twitter-guide/topics/how-to-join-the-conversation-on-twitter/how-to-reply-to-a-tweet-on-twitter> (last visited July 29, 2022). The Twitter functionality of "re-tweeting" is described at: TWITTER, *How*

to Retweet, <https://help.twitter.com/en/using-twitter/how-to-retweet> (last visited July 29, 2022).

Twitter users who post replies to @UOEquity that express pro-DEI viewpoints, or viewpoints that are uncritical or agnostic toward DEI, are allowed to interact with the account by Stabin without getting blocked. Gilley Dec. ¶¶ 40-46. For example, one Twitter user posted a reply to @UOEquity in July 2022 that he was bullied by the “UO university police” because they knew he was Jewish. Gilley Dec. ¶ 41; Ex. G (screenshots of unblocked replies). Another user replied in May 2022 that the user “really enjoyed” Bryant Terry’s talk on BLM and Food Justice, which had been promoted by @UOEquity. Ex. G. Another user replied in May 2022 that “Spirted Away,” a film promoted by @UOEquity, was a “Great film.” *Id.* Another user replied in April 2022 that she was disappointed that antisemitism was the “sole focus” of a local campaign to combat “propaganda” and that “anti-trans messages” were just a footnote. *Id.* Another user replied in February 2022 that Black Studies was her major, accompanied by several heart emojis and an exclamation mark. *Id.* Two of the heart emojis were green, which is one of the University of Oregon’s school colors. *Id.*; Gilley Dec. ¶ 45.

*The Racism Interrupter prompt and Gilley’s quote from
the Declaration of Independence*

Defendant Stabin has used @UOEquity Twitter to post what she refers to as a “Racism Interrupter.” Gilley Dec. ¶ 47. The Racism Interrupter consists of a quotation or prompt, designed to provoke a discussion about racism or DEI. *Id.* On

or about June 14, 2022, Stabin used @UOEquity to post one such Tweet stating “You can interrupt racism” with the prompt “It sounded like you just said _____. Is that really what you meant?” The prompt was presented on a yellow and green field with the University’s and Division’s logos and the label “RACISM INTERRUPTER” underneath the prompt. *Id.* ¶ 48; Ex. H (Tweet).

Below is a screen shot of the Tweet:



Ex. H.

In tweeting this, Stabin also apparently promoted the Division’s viewpoint that some statements may reflect subconscious or implicit racial bias, even if they were not intended to promote racist views, so long as they are subjectively interpreted as

racist by any listener who is also a member of a DEI-favored group. Gilley Dec. ¶ 50; *see also* U. OF O., *Continuum of Becoming a Thriving, Anti-Racist, and Fully-Inclusive Institution*, <https://bit.ly/3Qefqhx> (last visited Aug. 2, 2022) (discussing “oppression,” “cultural humility,” and “implicit bias;” defining DEI-favored groups); U. OF O., *Implicit Bias in Decision-Making: An Introduction*, <https://bit.ly/3vBsPsi> (last visited Aug. 2, 2022).

Bruce Gilley is a professor at another university in Oregon. Gilley Dec. ¶ 2. He is the chapter president of the Oregon Association of Scholars. *Id.* ¶ 4. He is also a member of the Heterodox Academy and supports its mission to encourage viewpoint diversity in higher education. *Id.*

Bruce Gilley categorically rejects his employer’s claims that his university sits on “stolen land” and resists attempts by his employer to impose the ideology of diversity, equity, and inclusion on campus. *Id.* ¶ 5. He has previously declined to sign a “black lives matter” statement because it amounts to an ideological pledge. He also resists what he views as the ideological indoctrination of students. *Id.*

Bruce Gilley is a critic of the DEI principles promoted by the Division, VPEI and defendant Stabin, because he believes that DEI calls for discrimination against university faculty, students, and applicants who are not members of groups favored by the Division, VPEI and defendant Stabin. *Id.* ¶ 3, 6.

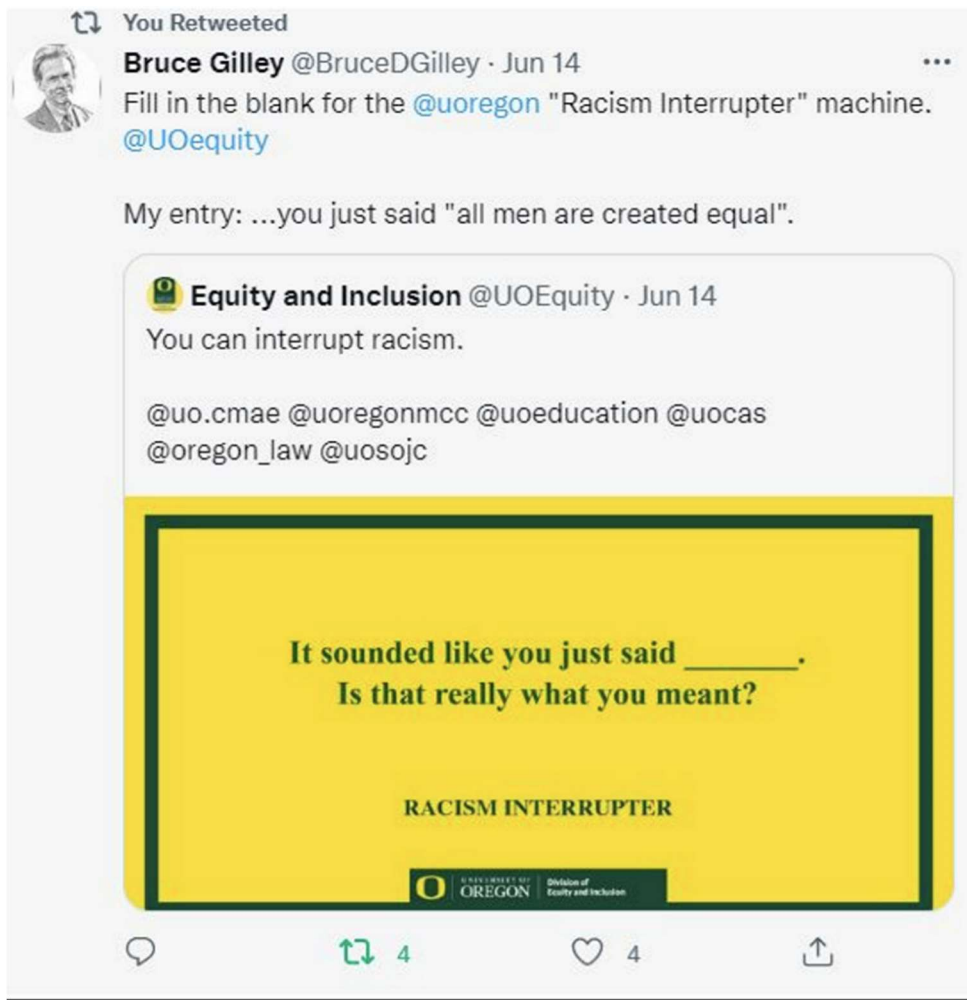
He also believes that the principles they promote are based on what is called “critical theory,” which threatens freedom of thought at Oregon universities; including by labeling competing ideas, such as colorblindness, as “racist,” “white

supremacist,” and otherwise “unsafe” to express in public. *Id.* ¶ 7. Professor Gilley is a known critic of the ideology of DEI as it is practiced at the University of Oregon and at other public universities in Oregon. *Id.* ¶¶ 3, 8.

Bruce Gilley expresses his viewpoints in various forums, including on Twitter, using his account @BruceDGilley. *Id.* ¶ 9. On June 14, 2022, Bruce Gilley used Twitter to re-tweet the @UOEQuity’s Racism Interrupter prompt with the statement “all men are created equal,” quoted from the U.S. Declaration of Independence, which promotes his viewpoint of colorblindness and equality, contrary to Stabin’s view of “equity.” *Id.* ¶¶ 6, 21-23, 51; Ex. I. This colorblindness principle is also reflected in the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and numerous anti-discrimination laws. *See, e.g.*, U.S. CONST. amend. XIV § 1; 42 U.S.C.S. § 2000e-2 (Preferential treatment not to be granted on account of existing number or percentage imbalance).

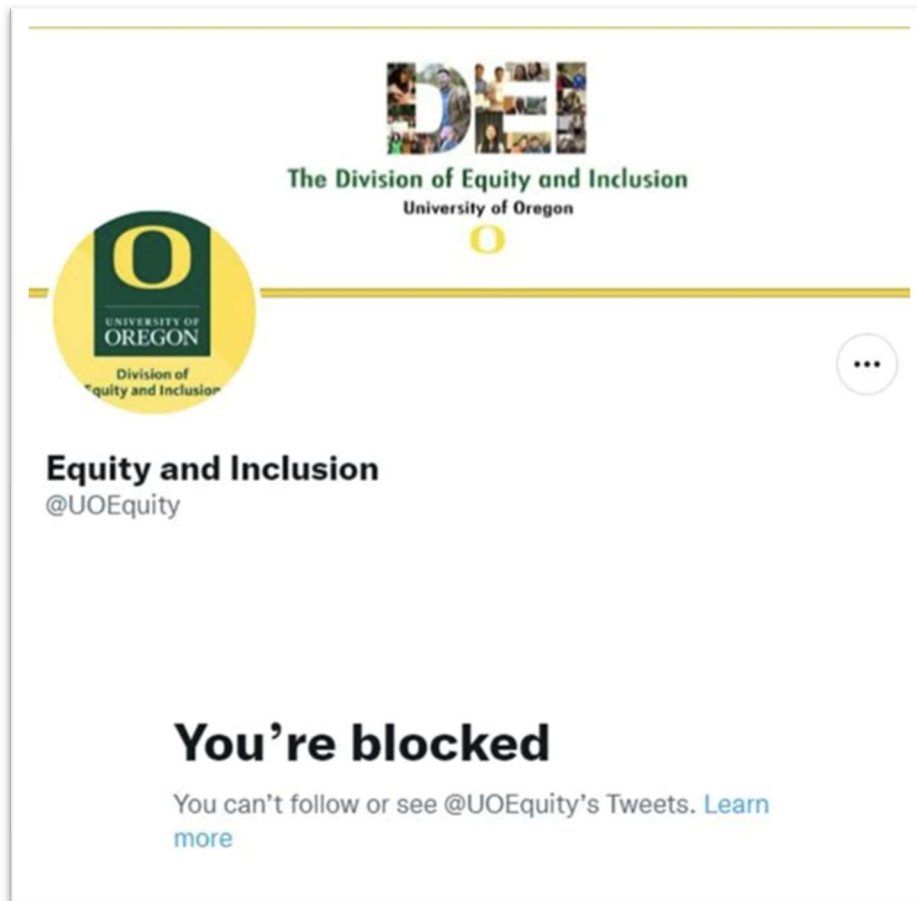
In his re-tweet of the Racism Interrupter prompt with his own comment, Gilley also tagged @uoregon and @UOEQuity, which would cause the re-tweet to become visible to Stabin, the @UOEQuity account administrator. Gilley Dec. ¶ 52, Ex. I.

Below is a screen shot of Gilley’s re-tweet. Ex. I:



On June 14, 2022, defendant Stabin, acting in her official role as VPEI Communications Manager and administrator of the @UOEquity Twitter account, or someone acting in concert with her, blocked Bruce Gilley from the account. Gilley Dec. ¶¶ 54-57; *see also* U. OF O., *Communication Manager, supra*.

Below is a screen shot of the above-referenced block notification.



Ex. J

Blocking @BruceDGilley on Twitter prevents Bruce Gilley from viewing, replying, or retweeting any of @UOEQuity's posts, including sharing them with his own Twitter followers. Gilley Dec. ¶ 56. Blocking also removed Bruce Gilley's "all men are created equal" reply from @UOEQuity's timeline and prevented other users from viewing it or interacting with it, and with Gilley, including followers of the @UOEQuity account. *Id.* The Twitter functionality of "blocking" is described at: TWITTER, *How to block accounts on Twitter*, <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> (last visited July 29, 2022).

On June 27, 2022, Gilley filed a public records request in his capacity as chapter president of the Oregon Association of Scholars, the Oregon state affiliate of the National Association of Scholars, which promotes academic freedom and excellence on American college campuses, pertaining to his being blocked from the @UOEQuity account. Gilley Dec. ¶¶ 4, 58; Ex. K (public records request). The request asked for records on:

1. The number of Twitter users that the Division of Equity and Inclusion has blocked from access to its Twitter feed as of June 25, 2022.
2. The Twitter handles (@Name) of all users blocked by the Division of Equity and Inclusion as of June 25, 2022.
3. Any documents, emails, or written communications during the last twelve months by the Division of Equity and Inclusion or other administrative staff pertaining to the criteria used to determine whether a user should be blocked.

Ex. K.

On July 5, 2022, in response to Gilley's public records request for the written criteria utilized by VPEI to block Twitter users, the University of Oregon informed him that no such criteria exist, and that the "staff member that administers the VPEI Twitter account and social media has the autonomy to manage the accounts and uses professional judgment when deciding to block users." Gilley Dec. ¶ 60; Ex. L (UO public records response). In the same public records request response, the University of Oregon also informed Gilley that two other Twitter users were blocked from the @UOEQuity. Ex. L.

Both of the other blocked users have expressed politically conservative viewpoints, including criticizing posts of the @UOEQuity account. Gilley Dec. ¶¶

62-65. One reply by a blocked user asked “[h]ow are these groups going to a secondary school if they can’t read, write, and do math?” *Id.*; Ex. M (blocked user screenshots). Another reply by a different blocked user stated “Diversity, Equity, and Inclusion departments are Marxist poison and should be eliminated from every institution in America.” Ex. M.

@BruceDGilley remains blocked from the @UOEquity account. Gilley Dec. ¶ 65. Gilley is unable to use his Twitter account to express his views in replies or retweets to @UOEquity. *Id.* Even if he were temporarily unblocked, Bruce Gilley remains concerned that he could be blocked again in the future for expressing a viewpoint critical of Stabin’s DEI ideology. *Id.*

ARGUMENT

I. PRELIMINARY INJUNCTION AND TRO STANDARD

Gilley may obtain a preliminary injunction if he shows that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tip in his favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014); *see also Wise v. City of Portland*, 483 F. Supp. 3d 956, 965-66 (D. Or. 2020).

Alternatively, in the Ninth Circuit, plaintiffs who show that the balance of hardships tips “sharply” in their favor need only raise “serious questions” going to the merits. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011);

Woman's Friend Pregnancy Res. Clinic v. Becerra, 901 F.3d 1166, 1167 (9th Cir. 2018); *see also Wise*, 483 F. Supp. 3d at 966 (Ninth Circuit applies a sliding scale to *Winter* factors); *Don't Shoot Portland v. City of Portland*, 465 F. Supp. 3d 1150, 1154 (D. Or. 2020) (same).

First Amendment cases introduce an additional permutation: once Gilley meets his initial burden of showing that he has a colorable claim that his First Amendment rights have been infringed, the burden shifts to the state actor to justify the restriction. *Doe*, 772 F.3d at 570; *Masonry Bldg. Owners of Or. v. Wheeler*, 394 F. Supp. 3d 1279, 1294 (D. Or. 2019).

The standard for a TRO is essentially the same as for a preliminary injunction. *Don't Shoot Portland*, 465 F. Supp. 3d at 1154; *Woodstock v. City of Portland*, No. 3:20-cv-1035-SI, 2020 U.S. Dist. LEXIS 116612, at *2-3 (D. Or. July 2, 2020). Since the analysis merges, the terms TRO and preliminary injunction are used interchangeably in this memorandum.

Gilley meets both the *Winter* test or the Ninth Circuit's sliding-scale variation of it. And he also easily meets his burden to show that his First Amendment rights were burdened when a state university employee blocked him from an official Twitter account for expressing a colorblind viewpoint. Conversely, Ms. Stabin cannot justify viewpoint discrimination in a designated public forum.

II. GILLEY’S FIRST AMENDMENT CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS

A. Viewpoint discrimination is illegal in a designated public forum such as the interactive features of the @UOEquity Twitter account

In recent years, litigation concerning public officials’ blocking of social media users has increased. *See, e.g., Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019); *Knight First Amendment Institute v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019). Sometimes close calls occur, such as when officials run campaign accounts or only occasionally post about official business on their personal media accounts. *Compare German v. Chloe Eudal Y*, No. 3:17-cv-2028-MO, 2018 U.S. Dist. LEXIS 109151, at *1 (D. Or. June 29, 2018) *with Lewis v. Jones*, 440 F. Supp. 3d 1123, 1134 (E.D. Cal. 2020).

This case does not present a close call, because Tova Stabin was obviously a public employee, responsible for administering an official state-university Twitter account, when she blocked Bruce Gilley because he quoted from one of our nation’s founding documents in response to her employer’s Racism Interrupter prompt. Indeed, this case presents an even stronger First Amendment violation than the one featured in *Garnier*, 2022 U.S. App. LEXIS 20719, at *52, because Stabin blocked Gilley for viewpoint discriminatory reasons.

1. *Stabin is a state actor*

To state a § 1983 claim, Gilley must allege a violation of a federal right by a person “acting under color of state law.” *Garnier*, 2022 U.S. App. LEXIS 20719, at *20-21; *see also* Ninth Circuit Model Civil Jury Instruction 9.3 (“A person acts

‘under color of state law’ when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance or regulation”). A government officer acting within her scope of employment is presumptively acting under color of state law. *See Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835-36 (9th Cir. 1996) (“If a government officer does not act within his scope of employment or under color of state law, then that government officer acts as a private citizen”).

Moreover, the Ninth Circuit recently held that school district trustees were state actors under the close-nexus test, where their use of social media accounts “was directly connected to, although not required by, their official positions.” *Garnier*, 2022 U.S. App. LEXIS 20719, at *23; *see also Lee v. Katz*, 276 F.3d 550, 554-55 (9th Cir. 2002) (private individuals endowed with governmental powers thereby become instrumentalities of the state subject to constitutional limitations).

The proposition that Stabin is a state actor is even stronger than the state action presented in *Garnier*. It is undisputed that Stabin is employed by a state university supported by taxpayer funds, and exercises governmental powers under state law. ORS 352.002, .033. Not only is management of the @UOEquity Twitter account connected to her job; it is an essential function of her position as Communication Manager. Ex. C (“As Communication Manager, she will be working on all digital and print communication, including social media, website content and design, internal and external communication, as well as working on strategic communication planning”).

These circumstances would amount to state action even in circuits with narrower state-action doctrines than the Ninth Circuit's, because of the use of public resources and employee time and the fact that the account belonged to public entity and not an individual. *Lindke v. Freed*, 37 F.4th 1199, 2022 U.S. App. LEXIS 17593, at *7-9, *15-16 (6th Cir. 2022) ("instead of examining a page's appearance or purpose, we focus on the actor's official duties and use of government resources or state employees").

Even were Stabin to allege that she somehow acted for private reasons, she would still be a state actor under either the close-nexus or public-function tests. *See Garnier*, 2022 U.S. App. LEXIS 20719 at *21-22 (describing state action tests, any one of which is sufficient); *see also Davison*, 912 F.3d at 680-81 (county board of supervisors' chair was state actor where she clothed Chair's Facebook Page in the power and prestige of her state office and blocked critic).

The Division invites members of the public to "connect with us" at @UOEQuity. Ex. D. The @UOEQuity account holds itself out as an official account of the University of Oregon's Division of Equity and Inclusion, bears the team colors, trade dress, and logo of the University of Oregon; and links back to Division's official webpage (and vice versa). Ex. E. Further, the account posts material related to DEI viewpoints and official activities of the Division, and is not used to post content about Stabin's personal life experiences, such as, for example, family pictures, vacation photos, or meals. Ex. F.

To any reasonable observer, @UOEQuity presents as an official state university account used to promote content related to the Division. *See Garnier*, 2022 U.S. App. LEXIS 20719, at *32 (courts should look to how the official uses the account, to whom it is made available, and how the public regards the account). Thus, any decision to block a member of the public from interacting with the account constitutes state action.

2. *The University of Oregon created a designated public forum by allowing replies and re-tweets to @UOEQuity*

“A designated public forum exists where ‘the government intentionally opens up a nontraditional forum for public discourse.’” *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (quoting *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999)). The baseline presumption is that strict scrutiny applies to content-based restrictions in designated public fora. *Hopper*, 241 F.3d at 1074-75. There also exists a sub-category of designated public forums, called limited public forums, where restrictions that are viewpoint neutral and reasonable in light of the forum’s purposes are permissible. *Id.*

To qualify as a limited public forum, the state must maintain a consistent policy of keeping a designated public forum closed to off-topic discussion. *Id.* at 1076. “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.” *Id.*

The Ninth Circuit recently re-affirmed that social media platforms such as Twitter “are fora inherently compatible with expressive activity.” *Garnier*, 2022 U.S. App. LEXIS 20719, at *44. Moreover, it held that in the absence of a clearly defined policy regulating content posted to that forum, the state actors (school board trustees) had created a designated public forum (not a limited public forum) in the interactive portions of their social media platforms. *Id.* at *45-56.

Here the University of Oregon told Gilley that it had no criteria regulating blocking decisions and that Stabin had complete “autonomy” to exercise “professional judgment.” Gilley Dec. ¶ 60; Exs. K, L. Thus, the interactive portions of the @UOEquity Twitter account—the reply and re-tweet features—were and are a designated public forum. As a result, any content-based blocking must pass strict scrutiny. *Hopper*, 241 F.3d at 1081. That standard is fatal here.

3. *Viewpoint discrimination is presumptively illegal*

It is axiomatic that the government may not “regulat[e] speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). When governments target not just the subject matter, but a speaker’s views, “the violation of the First Amendment is all the more blatant.” *Id.* “Viewpoint discrimination is thus an egregious form of content discrimination.” *Id.*

Thus, neither the University of Oregon, nor its agent Ms. Stabin, may control the terms of the debate about diversity, equity, and inclusion. “If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as

offensive to the First Amendment as exclusion of only one.” *Id.* at 831. Moreover, the requirement of viewpoint-neutrality applies regardless of whether the interactive portions of @UOEquity is a designated public forum or a limited public forum. *Hopper*, 241 F.3d at 1079; *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1132 (9th Cir. 2018); *see also Garnier*, 2022 U.S. App. LEXIS 20719, at *47-48.

Nor can Stabin rely on the specious argument that quoting from the U.S. Declaration of Independence is “offensive” or “unsafe.” Even if the concept of colorblindness is offensive to some, the First Amendment protects the expression of offensive opinions. “Giving offense is a viewpoint.” *Am. Freedom Def. Initiative*, 904 F.3d at 1131 (citing *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017)). Stabin also may not base her blocking decisions on the reaction of other users to “controversial” content, because doing so “offers a convenient guise for the banning of unpopular views.” *Hopper*, 241 F.3d at 1079-80 (cleaned up; quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)).

The overwhelming evidence here establishes that Stabin’s blocking decision is based on viewpoint. Temporally, she blocked Prof. Gilley after he re-tweeted the Racism Interrupter prompt with his comment that “all men are created equal,” tagging @UOEquity. Gilley Dec. ¶¶ 54, 57; Ex. J; *compare* Exs. I, M (blocked), *with* Exs. F, G (pro-DEI content). The only other two users who have been blocked also expressed views critical of DEI and the Division. Exs. L, M; Gilley Dec. ¶¶ 62-64. Moreover, users who post replies that are pro-DEI, agnostic toward DEI, or who do

not express opinions promoting “colorblindness” are not blocked. Gilley Dec. ¶¶40-46; Ex. G.

On a more probable than not basis, Bruce Gilley easily establishes that Stabin discriminates based on viewpoint when blocking users from interacting with, or even viewing content on, @UOEQuity. As a result, Gilley is likely to succeed on his claim for as-applied relief, both as to himself, and as to the sub-set of other similarly situated (blocked) individuals.

B. The Division’s custom, policy, and practice of granting unfettered discretion to make blocking decisions invites viewpoint discrimination

Gilley is also entitled to facial relief, because the Division’s granting of full “autonomy” and “professional judgment” to Stabin invites viewpoint-discriminatory blocking decisions. One might even say that it systematically embeds oppression and erasure of individuals who hold views disfavored by the powerbrokers at the Division and VPEI.

Policies governing access to limited public forums must contain workable objective and definite criteria to cabin official discretion. *Am. Freedom Def. Initiative*, 904 F.3d at 1130; *Hopper*, 241 F.3d at 1077-78; *see also Garnier*, 2022 U.S. App. LEXIS 20719, at *55-56 (“Alternatively, the Trustees could have established and enforced clear rules of etiquette for public comments on their pages, including rules against lengthy, repetitive, or off-topic comments”). Absent such standards, “government officials may use their discretion to interpret the policy as a pretext for censorship.” *Hopper*, 241 F.3d at 1077-78. “It is self-evident that an

indeterminate prohibition carries with it the opportunity for abuse.” *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (cleaned up). [“D]iscretion must be guided by objective, workable standards” or the official’s own politics may shape the exclusion decision. *Id.*; see also *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992) (county’s application of ordinance regarding police protection charges lacked narrowly drawn, reasonable and definite standards).

The more subjective the standard, the less likely it will pass First Amendment scrutiny. *Hopper*, 241 F.3d at 1078.

Stabin’s blocking practices are entirely subjective and lack any objective or definite standards. She is given complete “autonomy” to exercise her “professional judgment.” In light of the fact that she holds herself out as an “avid social justice activist,” it is no surprise that she exhibits a pattern and practice of exercising her judgment to block users who express views that are critical of the Division’s DEI ideology. As a result, this Court should facially prohibit Stabin from blocking any users from interacting with the @UOEquity Twitter account.

III. GILLEY WILL SUFFER IRREPARABLE HARM WITHOUT THE COURT’S INTERVENTION

“A colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief.” *Doe*, 772 F.3d at 583; *Am. Bev. Ass’n v. City & Cty. of S.F.*, 916 F.3d 749, 757 (9th Cir. 2019); see also *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (violation of constitutional rights unquestionably constitutes irreparable injury); *de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Bruce Gilley is

unable to interact with @UOEquity account by reading, replying, or re-tweeting any of its content, which burdens his right to speak in a designated public forum. Even if he were temporarily unblocked, the existence of unbridled blocking discretion, and an established track record of viewpoint-discriminatory blocking, would invite him to self-censor in future comments about content on @UOEquity. Gilley Dec. ¶ 65.

IV. THE PUBLIC INTERESTS FAVORS PROTECTING GILLEY'S CONSTITUTIONAL RIGHTS

In the Ninth Circuit, it is always in the public interest to prevent the violation of a party's constitutional rights. *Melendres*, 695 F.3d at 1002; *Don't Shoot Portland*, 465 F. Supp. 3d at 1157.

V. THE BALANCE OF THE EQUITIES FAVORS GILLEY

The chilling of free speech rights favors a preliminary injunction and can only be overcome with a record of evidence that a preliminary injunction will seriously hamper significant government interests. *Cuviello v. City of Vallejo*, 944 F.3d 816, 834 (9th Cir. 2019); *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (balance of hardships tips sharply in plaintiffs' favor where they have raised serious First Amendment questions). Stabin advances no legitimate governmental interest in preventing Bruce Gilley from quoting the U.S. Declaration of Independence, expressing his view in favor of colorblindness, or otherwise criticizing the ideology of DEI.

VI. THIS COURT SHOULD WAIVE THE RULE 65 BOND REQUIREMENT

Federal courts have discretion to forego the security requirement altogether. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005); *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009). Gilley has set forth an incredibly strong claim of viewpoint discriminatory speech censorship by a state actor. Even if he were ultimately not to prevail, Stabin will suffer no monetary damages and this Court should therefore waive the bond requirement. *See Masonry Bldg. Owners of Or.*, 394 F. Supp. 3d at 1312.

CONCLUSION

This Court should enjoin Defendant Tova Stabin and all persons in active concert or participation with her who receive actual notice of the TRO and injunction to unblock @BruceDGilley from the @UOEquity Twitter account, from discriminating on the basis of viewpoint when blocking users from @UOEquity, and from enforcing her custom, policy, or practice of subjective blocking based on “professional judgment.”

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), because it contains 5,577 words, as calculated by Microsoft Word, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

Respectfully submitted,

Dated: August 10, 2022

Endel Kolde
(pro hac vice to be sought)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW
Suite 801
Washington, D.C. 20036
(202) 301-1664
dkolde@ifs.org

s/D. Angus Lee
D. Angus Lee
OSB No. 213139
ANGUS LEE LAW FIRM, PLLC
9105 NE Highway 99
Suite 200
Vancouver, WA 98665-8974
(360) 635-6464
angus@angusleelaw.com

Attorneys for Bruce Gilley