



September 12, 2023

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Molly Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Gilley v. Stabin, Nos. 23-35097 and 23-35130

Re: Defendants-Appellees/Cross-Appellants' Response to Second FRAP 28(j)
Letter Filed by Plaintiff-Appellant/Cross-Appellee Bruce Gilley

Dear Ms. Dwyer:

Bruce Gilley cites an out-of-circuit decision, *Missouri v. Biden*, No. 23-30445, 2023 WL 5821788 (5th Cir. Sept. 8, 2023), for the proposition that a single instance of past blocking necessarily gives rise to an ongoing injury because it will always be reasonable for a plaintiff to self-censor in response.

There are three problems with this argument.

First, Gilley again ignores the district court's factual findings. Unlike here, the *Missouri* district court did not "doubt" that the plaintiffs were "self-censoring out of a genuine fear of consequences," and it did not find that plaintiffs faced no "collateral consequences if [they] were to engage in speech on [social media] platforms." (1-ER-31–32.) The district court here did make such findings, and this Court must defer to those findings absent clear error.

Second, the self-censorship holding in *Missouri* is limited. The court looked to the particular "fears motivating the Individual Plaintiffs' self-censorship" and the particular "injuries they previously suffered" to determine whether their self-censorship was based on a non-speculative fear of future harm. *Id.* at *7–8.

It did *not* hold that *any* prior adverse action on social media—no matter the nature, frequency, perpetrator, or subsequent remedy—would yield the same result. *Id.* It did not, in other words, defy the Supreme Court's admonition that "past exposure

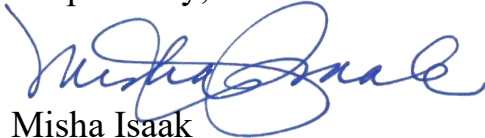
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to illegal conduct does not in itself” give rise to an ongoing injury, as Gilley invites this Court to do. *O’Shea v. Littleton*, 414 U.S. 488, 495 (1974).

Third, the *Missouri* plaintiffs reasonably feared future harm because they were targets of an established, widespread, and ongoing course of government conduct that resulted in repeated platform-wide restrictions, account suspensions, and bans. 2023 WL 5821788, at *2–7. The perpetrators were also high-ranking federal officials, agencies, and the platforms themselves. *Id.*

Gilley, by contrast, was blocked once by a now-retired, low-level employee operating a subaccount with no history of unconstitutional blocking. He was promptly unblocked and promised he would not be blocked again. The University also reaffirmed its decade-long practice of not blocking based on viewpoint, and it has not blocked Gilley or anyone else since then.

Respectfully,



Misha Isaak
Counsel for Defendants-Appellees/Cross-Appellants

In compliance with FRAP 28(j), counsel certifies that the body of this letter contains 350 words.