DAVID H. KRAMER, SBN 168452
MAURA L. REES, SBN 191698
LAUREN GALLO WHITE, SBN 309075
PETER C. HOLM, SBN 299233
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 565-5100
dkramer@wsgr.com
mrees@wsgr.com
lwhite@wsgr.com
pholm@wsgr.com

BRIAN M. WILLEN, *admitted pro hac vice*
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
1301 Avenue of the Americas, 40th Floor
New York, NY 10019
Telephone: (212) 999-5800
Facsimile: (212) 999-5899
bwillen@wsgr.com

Attorneys for Defendants
GOOGLE LLC and YOUTUBE, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

PRAGER UNIVERSITY,

Plaintiff,

v.

GOOGLE LLC, a Delaware corporation, YOUTUBE, LLC, a Delaware limited liability company, and DOES 1-25,

Defendant.

CASE NO.: 5:17-cv-06064-LHK

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Date: March 15, 2018
Time: 1:30 PM
Dept.: 8, 4th Floor
Before: Hon. Lucy H. Koh

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

INTRODUCTION & SUMMARY OF ARGUMENT ... 1

FACTUAL AND PROCEDURAL BACKGROUND ... 3

A. YouTube and Its Content Policies ... 3

B. YouTube's Restricted Mode and Age-Restrictions ... 4

C. YouTube's Review Process For Restricted Mode ... 5

D. PragerU and the Classification of Its Videos On YouTube ... 5

E. Proceedings In This Case ... 7

LEGAL STANDARD ... 7

ARGUMENT ... 8

I. PLAINTIFF HAS NO LIKELIHOOD OF SUCCEEDING ON ITS CLAIMS ... 8

A. Plaintiff's Proposed Injunction Is Barred By the First Amendment ... 8

B. Plaintiff Has No Chance of Prevailing On Its Constitutional Claims ... 11

1. YouTube Is Not the "Functional Equivalent" of a State Actor Under the First Amendment ... 11

2. YouTube Is Not Bound By the Liberty of Speech Clause ... 14

3. YouTube's General Commitment to User Self-Expression Is Not a Basis For Treating It As the Equivalent of a State Actor ... 17

4. Plaintiff Cannot Avoid the Disastrous Consequences of Treating YouTube As a State Actor ... 18

C. Plaintiff's Claims Are Barred By Section 230(c)(2)(B) of the CDA ... 21

D. Plaintiff's Claims Are Barred By Section 230(c)(1) of the CDA ... 24

E. Plaintiff Has No Likelihood of Prevailing On Its Non-Constitutional Claims ... 25

II. PLAINTIFF CANNOT SATISFY THE REMAINING *WINTER* FACTORS ... 27

A. Plaintiff Cannot Show Irreparable Harm ... 27

B. An Injunction Would Impose Substantial Hardships on YouTube and Its Users and Would Be Contrary to the Public Interest ... 28

CONCLUSION ... 30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

CASES

Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.,
570 U.S. 205 (2013) 10

Airbnb, Inc. v. City & Cty. of S.F.,
217 F. Supp. 3d 1066 (N.D. Cal. 2016) 25

Albertson's, Inc. v. Young,
107 Cal. App. 4th 106 (2003) 15

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 23

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.,
391 U.S. 308 (1968) 13

Asia Econ. Inst. v. Xcentric Ventures LLC,
2011 U.S. Dist. LEXIS 145380 (C.D. Cal. May 4, 2011) 21

Assocs. & Aldrich Co. v. Times Mirror Co.,
440 F.2d 133 (9th Cir. 1971) 9, 10, 29

Barnes v. Yahoo!, Inc.,
570 F.3d 1096 (9th Cir. 2009) 24

Barrett v. Rosenthal,
40 Cal. 4th 33 (2006) 16

Briggs v. Eden Council for Hope & Opportunity,
19 Cal. 4th 1106 (1999) 16

Brown v. Entm't Merchs. Ass'n,
564 U.S. 786 (2011) 20

Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.,
20 Cal. 4th 163 (1999) 26

Cent. Hardware Co. v. NLRB,
407 U.S. 539 (1972) 11, 14

City of Los Angeles v. Preferred Commc'ns, Inc.,
476 U.S. 488 (1986) 9

Cohen v. California,
403 U.S. 15 (1971) 20

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,
473 U.S. 788 (1985) 11

Cross v. Facebook, Inc.,
14 Cal. App. 5th 190 (2017) 16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cyber Promotions, Inc. v. Am. Online, Inc.,
948 F. Supp. 436 (E.D. Pa. 1996) (AOL) 12

Damabeh v. 7-Eleven, Inc.,
2013 U.S. Dist. LEXIS 66565 (N.D. Cal. May 8, 2013) 27

Darnaa, LLC v. Google, Inc.,
2016 U.S. Dist. LEXIS 152126 (N.D. Cal. Nov. 2, 2016) 24, 27

Denver Area Educ. Telecomms. Consortium, Inc. v. FCC,
518 U.S. 727 (1996) 10, 11, 12

Doe v. Internet Brands, Inc.,
824 F.3d 846 (9th Cir. 2016) 25

Donahue Schriber Realty Grp., Inc. v. Nu Creation Outreach,
232 Cal. App. 4th 1171 (2014) 15

Dowling v. Zimmerman,
85 Cal. App. 4th 1400 (2001) 16

e-ventures Worldwide, LLC v. Google, Inc.,
2017 U.S. Dist. LEXIS 88650 (M.D. Fla. Feb. 8, 2017) 10

e360Insight, LLC v. Comcast Corp.,
546 F. Supp. 2d 605 (N.D. Ill. 2008) 22, 23

Enigma Software Grp. USA LLC v. Malwarebytes Inc.,
2017 U.S. Dist. LEXIS 184658 (N.D. Cal. Nov. 7, 2017) 21

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 19

Fair Hous. Council v. Roommates.com, LLC,
521 F.3d 1157 (9th Cir. 2008) 25

Garcia v. Google, Inc.,
786 F.3d 733 (9th Cir. 2015) 7, 8

Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n,
26 Cal. 4th 1013 (2001) 14, 15

Greater L.A. Agency of Deafness, Inc. v. CNN Inc.,
742 F.3d 414 (9th Cir. 2014) 25

Harrison v. PPG Indus., Inc.,
446 U.S. 578 (1980) 23

Hernandez v. Sessions,
872 F.3d 976 (9th Cir. 2017) 8

Hill v. Colorado,
530 U.S. 703 (2000) 28

hiQ Labs, Inc. v. LinkedIn Corp.,
2017 U.S. Dist. LEXIS 129088 (N.D. Cal. Aug. 14, 2017) ..... *passim*

Holomaxx Techs. Corp. v. Microsoft Corp.,
2011 U.S. Dist. LEXIS 94316 (N.D. Cal. Aug. 23, 2011) 22

Howard v. Am. Online Inc.,
208 F.3d 741 (9th Cir. 2000) 14

Hudgens v. NLRB,
424 U.S. 507 (1976) 11, 13

Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp.,
515 U.S. 557 (1995) 9

Kathleen R. v. City of Livermore,
87 Cal. App. 4th 684 (2001) 21

Kinderstart.com, LLC v. Google, Inc.,
2007 U.S. Dist. LEXIS 22637 (N.D. Cal. Mar. 16, 2007) 12, 15

Lancaster v. Alphabet Inc.,
2016 U.S. Dist. LEXIS 88908 (N.D. Cal. July 8, 2016) 24

Langdon v. Google, Inc.,
474 F. Supp. 2d 622 (D. Del. 2007) 10, 12, 23

Levan v. Capital Cities/ABC, Inc.,
190 F.3d 1230 (11th Cir. 1999) 9

Lloyd Corp. v. Tanner,
407 U.S. 551 (1972) 13, 14

Madsen v. Women's Health Ctr., Inc.,
512 U.S. 753 (1994) 8

Marsh v. Alabama,
326 U.S. 501 (1946) 12, 13

Matal v. Tam,
137 S. Ct. 1744 (2017) 20

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 10

Miami Herald Publ'g Co., Div. of Knight Newspapers, Inc. v. Tornillo,
418 U.S. 241 (1974) 9, 10

Packingham v. North Carolina,
137 S. Ct. 1730 (2017) 12

Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.,
636 F.3d 1150 (9th Cir. 2011) 8

Paul v. Friedman,
95 Cal. App. 4th 853 (2002) 15

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 19

Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8,
55 Cal. 4th 1083 (2012) 14, 15

Ralphs Grocery Co. v. Victory Consultants, Inc.,
17 Cal. App. 5th 245 (2017) 16

Robins v. Pruneyard Shopping Center,
23 Cal. 3d 899 (1979) 14, 15, 16

Rosado v. eBay Inc.,
53 F. Supp. 3d 1256 (N.D. Cal. 2014) 26

Shulman v. Facebook,
2017 U.S. Dist. LEXIS 183110 (D.N.J. Nov. 6, 2017) 12

Sikhs for Justice, Inc. v. Facebook, Inc.,
697 F. App'x 526 (9th Cir. 2017) 24

Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.,
144 F. Supp. 3d 1088 (N.D. 2015) 24, 25

Snyder v. Phelps,
562 U.S. 443 (2011) 8

Song fi Inc. v. Google, Inc.,
108 F. Supp. 3d 876 (N.D. Cal. 2015) 23, 27

Storek & Storek, Inc. v. Citicorp Real Estate, Inc.,
100 Cal. App. 4th 44 (2002) 26

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 9

Twitter, Inc. v. Sessions,
263 F. Supp. 3d 803 (N.D. Cal. 2017) 12

U.S. Telecomm. Ass'n v. FCC,
855 F.3d 381 (D.C. Cir. 2017) 18

United States v. Playboy Entm't Grp.,
529 U.S. 803 (2000) 20

United States v. Stevens,
559 U.S. 460 (2010) 19

Weinberg v. Feisel,
110 Cal. App. 4th 1122 (2003) 15, 17

Winter v. NRDC,
555 U.S. 7 (2008) 7, 27

Zango, Inc. v. Kaspersky Lab, Inc.,
2007 U.S. Dist. LEXIS 97332 (W.D. Wash. Aug. 28, 2007) 22

Zhang v. Baidu.com, Inc.,
10 F. Supp. 3d 433 (S.D.N.Y. 2014) 9, 10, 28

1
STATUTES

2 Cal. Civ. Proc. Code § 425.16 15
3 47 U.S.C. § 230. .... *passim*
4 Cal. Bus. & Prof. Code § 17200 .... *passim*
5 Cal. Civ. Code § 51(b). 2, 7

6
MISCELLANEOUS

7 141 Cong. Rec. H8470 .... 22, 30
8 141 Cong. Rec. H8471 21
9 CAL. CONST. art. I, § 2 .... *passim*
10 U.S. CONST. amend. I .... *passim*
11 U.S. CONST. amend. V 14
12 U.S. CONST. amend. XIV 11, 13, 14

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Defendants Google LLC and YouTube LLC (collectively "YouTube") submit this opposition to Plaintiff Prager University's ("PragerU") motion for a preliminary injunction (ECF No. 25, "PI Mot.").

INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiff seeks an unprecedented injunction that would treat YouTube—a private company—as a state actor required by the federal and state constitutions to display PragerU's videos to users who specifically opted for a more limited YouTube experience. Despite couching its requested injunction as "modest, narrow, and limited," PragerU's motion is a radical attempt to rewrite the rules governing online services, one that would transform nearly every decision that service providers make about how content may be displayed on their platforms into a constitutional case to be arbitrated by the courts. The legal, practical, and social consequences of this result would be profound. Under Plaintiff's approach, online services like YouTube would be deterred—if not altogether prevented—from engaging in all manner of valuable content regulation, from removing material that is hateful, offensive, sexually explicit, or violent, to creating tools that allow sensitive users to avoid categories of videos they have indicated they would rather not see.

Plaintiff's proposed injunction has no basis in law and runs directly afoul of YouTube's own constitutional and statutory rights. Indeed, it is YouTube—not PragerU—that is protected by the First Amendment here. The First Amendment allows YouTube to determine how best to display content on its service, and it bars lawsuits, like this one, based on YouTube's efforts to accommodate the preferences of users who would rather avoid certain types of content. For that reason, and because YouTube is a private actor that does not stand in the shoes of the state, Plaintiff has no likelihood of succeeding on its First Amendment claim or on its similar claim under the California Constitution. PragerU's effort to expand into entirely new terrain narrow cases involving "company towns" and shopping malls is doctrinally unsound, contrary to all applicable law, and would have extremely harmful consequences.

Likewise, PragerU's request for an injunction overriding YouTube's decision to give its users a tool they can use to restrict the kinds of videos they see on the service is directly contrary

to Section 230 of the Communications Decency Act. Congress enacted the immunities codified in Sections 230(c)(2)(B) and 230(c)(1) to encourage online service providers to create such regulatory tools for the benefit of their users and to protect the editorial judgments online service providers make in regard to user-submitted content. While these immunities may not apply to Plaintiff's (meritless) First Amendment claim, they foreclose all the other claims that PragerU asserts in this action—and any request for a preliminary injunction based on those claims.

Even beyond the First Amendment and Section 230, PragerU has no chance of prevailing on its claims under the Unruh Act, California's Unfair Competition Law (UCL), or for breach of the implied covenant of good faith. With respect to the Unruh Act, PragerU does not even attempt to explain how YouTube's conduct amounts to intentional discrimination, and the evidence shows that YouTube acted with no such intent. As to the UCL, Plaintiff fails to make plausible allegations that YouTube's classification of PragerU's videos as ineligible for Restricted Mode was unlawful, unfair, or fraudulent—or caused PragerU to suffer economic injury. Finally, Plaintiff cannot succeed in its claim for breach of the implied covenant because YouTube's terms and policies make clear that YouTube may remove or restrict access to content and may enable its users to do the same. YouTube did not breach its agreement by doing what it specifically advised users, including PragerU, that it had the right to do.

On top of its baseless case on the merits, Plaintiff cannot establish the other factors required for a preliminary injunction. PragerU is not suffering irreparable harm because a handful of its videos are not displayed to the small fraction of users who have asked YouTube to filter out certain categories of content. Plaintiff's cries of "censorship" are just rhetoric: all of PragerU's videos remain available on YouTube, where they can be viewed by anyone who does not have Restricted Mode enabled. As to those users who have opted into Restricted Mode, PragerU ignores their right to avoid more mature types of content—as well as the harm to YouTube's own rights and interests that would be caused by an unprecedented injunction forcing it to include PragerU's videos in Restricted Mode. Finally, such an injunction would be contrary to the public interest. Among other things, it would disregard the significant social value, reflected in Congress's enactment of Section 230, in encouraging online service providers to

self-regulate, including by creating tools that help their users avoid potentially objectionable content. Plaintiff's motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

A. YouTube and Its Content Policies

Google operates YouTube, an online service that enables users around the world to post and share videos and related content. YouTube's mission, "to give everyone a voice and show them the world," is embodied in its "four essential freedoms": freedom of expression, freedom of information, freedom of opportunity, and freedom to belong. Obstler Dec., Ex. A. But while YouTube is committed to providing a platform for speech, creativity, and self-expression, it is not a free-for-all. YouTube has extensive rules governing what kind of content is and is not allowed on the service and informing users of YouTube's broad discretion to manage and restrict content. These rules and policies are reflected in various public documents, including YouTube's Terms of Service and Community Guidelines, and its associated policies regarding its Restricted Mode and age-restriction features. *See* Declaration of Alice Wu ("Wu Decl."), Exs. 1-6.

YouTube's Community Guidelines generally prohibit users from posting content that falls into any one of 12 categories, including nudity or sexual content, harmful or dangerous content, or violent or graphic content. *Id.*, Ex. 2. YouTube's policies also describe similar but separate categories of content that may be "age-restricted" (not shown to users who are logged out or under the age of 18), or made unavailable to users who have chosen to enable YouTube's "Restricted Mode" tool. *Id.*, Exs. 3, 5. These decisions require the exercise of judgment, and the categories are defined in ways that resist bright-line rules that might be insensitive to context and that could be exploited by users looking for perceived loopholes. *Id.* ¶¶ 8, 28.

To enforce these policies, YouTube uses automated review systems and employs a staff of thousands of human content reviewers, which review content on the service 24 hours a day, seven days a week. *Id.* ¶ 10. YouTube also invites its users to report or "flag" content that they consider inappropriate, and these requests come in constantly. *Id.* ¶ 11 & Ex. 7. YouTube's staff reviews user flags to determine whether the flagged content complies with YouTube's Community Guidelines and other content policies. *Id.* ¶¶ 12-13, 15-16.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. YouTube's Restricted Mode and Age-Restrictions

As part of its efforts to create an environment that is enjoyable for everyone, YouTube offers an optional feature called Restricted Mode. This feature allows users to choose a more limited YouTube experience, one that does not include videos that may be objectionable to YouTube's younger or more sensitive users. *Id.* ¶¶ 17-18. Restricted Mode is completely optional: it is turned off by default, but can be enabled by users, including individuals, families, or institutions like schools and libraries that provide online access to members of the public. *Id.* ¶¶ 21-22. While Restricted Mode is an important tool for those who use it, those users represent only a very small fraction of YouTube's overall user base: on an average day, approximately 1.5% of YouTube's users have Restricted Mode enabled. *Id.* ¶ 22.

To help identify videos that will (and will not) be available in Restricted Mode, YouTube classifies videos on its service according to a multi-level rating scale. Content that YouTube determines is safer and more family-friendly is rated "G" or "PG"; content that YouTube deems more appropriate for mature audiences is rated "Teen" or "MA." *Id.* ¶ 25. YouTube's policies identify six general categories of content that may be rated Teen or MA: drugs and alcohol, sexual situations, violence, mature subjects, profane and mature language, and incendiary and demeaning content. *Id.* ¶ 27. Videos rated Teen or MA are not available in Restricted Mode but remain available on YouTube's general service and are fully available to the approximately 98.5% of users on an average day who do not have Restricted Mode turned on. *Id.* ¶¶ 22, 25.[1]

Offering Restricted Mode helps YouTube strike an appropriate balance between user self-expression and the creation of a safe environment that can be enjoyed by users of all sensibilities. This tool enables YouTube users to post videos on a wide range of topics—including politically sensitive, sexual, or violent subjects—while at the same time giving more

---

[1] As noted above, YouTube also sometimes age-restricts videos. Restricted Mode and age-restrictions operate in different ways. Restricted Mode, which excludes all age-restricted videos as well as all videos classified as Teen or higher, must be affirmatively enabled by the user. Age restrictions, which are applied following manual review or at the election of the video's creator, cause videos to be filtered out from view for all logged-out users and from users under 18, regardless of whether those users have enabled Restricted Mode. Wu Decl. ¶¶ 35-37.

sensitive users the ability to limit the range of videos that may be viewed on their accounts. In short, through Restricted Mode, YouTube is able to offer its users two different viewing experiences within a single platform: one for a general audience, which includes any uploaded videos that comply with YouTube's Community Guidelines; and one for a more limited group of users who self-identify as more sensitive and wish to avoid potentially mature content.

C. YouTube's Review Process For Restricted Mode

YouTube classifies videos on its rating scale in two different ways. First, YouTube uses an algorithmic system that automatically evaluates every video on the service based on different "signals," including the title, metadata, and language in the video. Wu Decl. ¶ 29. This mechanism allows YouTube to efficiently review a massive volume of content—over 500,000 hours of new video content uploaded per day—and assign ratings to it. *Id*. ¶ 9.

YouTube's automated system is not perfect, particularly given the significant technical challenges involved with algorithmically understanding, and classifying at scale, the remarkable diversity of video content that is uploaded to the platform. *Id*. ¶¶ 9, 29-31 & Ex. 3. To supplement its automated review tools, human reviewers also sometimes manually review videos and assign ratings based on additional criteria—such as context, tone, and focus—to determine how videos should be rated. *Id*. ¶¶ 28-31.

YouTube manually reviews videos that users flag as "potentially inappropriate," as well as every video submitted via YouTube's Restricted Mode feedback process. *Id*. ¶¶ 13, 30, 32. This feedback process allows uploaders who believe that their videos have been incorrectly classified by the automated system to appeal those classifications. *Id*. ¶ 32 & Exs. 3, 10. In response to such appeals, YouTube manually reviews the video(s) at issue and, if appropriate under YouTube's policies, may change the classification initially made by its system. *Id*. ¶ 33. YouTube's manual-review determinations are also used to train its automated system to make better and more reliable determinations. *Id*. ¶ 34.

D. PragerU and the Classification of Its Videos On YouTube

Plaintiff Prager University ("PragerU") is a media organization that seeks to provide conservative perspectives on current events and issues of public interest by posting short videos

on its own website and on the YouTube service. Strazzeri Decl. ¶ 1. Over 1.2 million users subscribe to PragerU's YouTube channel, which currently has posted 345 public videos. Wu Decl. ¶ 38 & Ex. 11.

Many of PragerU's videos address controversial and mature topics, including, for example, a video entitled "Are 1 in 5 Women Raped at College?," which includes an animated depiction of a nearly naked man lunging at a group of women and discusses college rape culture. *Id.* ¶ 42. Like all of the videos posted on YouTube, YouTube's automated systems reviewed every video uploaded to PragerU's channel. *Id.* ¶ 39. Because of the mature themes they address, and the way the videos address those themes, 41 of those videos are classified as "Teen" or higher by the system, rendering them ineligible for display to users that have turned on Restricted Mode. *Id.* ¶¶ 39-40 & Ex. 12.

While PragerU did not use YouTube's formal feedback form before filing this lawsuit, it had occasionally contacted YouTube to challenge the fact that some of its videos were unavailable in Restricted Mode. *Id.* ¶ 43. In response, YouTube manually reviewed all the PragerU videos classified with a Teen rating. *Id.* ¶¶ 40, 44, 46. Based on that review, YouTube changed the classifications of some of the videos, making them available to users in Restricted Mode, and confirmed the classifications of others, which remain unavailable in Restricted Mode. *Id.* ¶¶ 40, 46. At present, therefore, only 41 of the 345 videos that PragerU has publicly posted on YouTube— less than 12% of the total number of videos on PragerU's channel—are rated Teen or higher, which renders them unavailable in Restricted Mode. *Id.* ¶¶ 39-40 & Ex. 12. None of PragerU's videos are age-gated, however, and all of its videos are available for viewing on YouTube's general service by users not using Restricted Mode. *Id.* ¶ 39.

YouTube's classification of certain PragerU videos as "Teen" or higher was not based on any disagreement with PragerU's politics or the political ideology expressed in the videos. *Id.* ¶¶ 39-41, 50-52 & Ex. 12. To the contrary, those ratings were based on YouTube's careful evaluation and determination—which included individual human review—that those videos are best reserved for a more mature audience because they included discussions of sexual situations, violence, and other mature subjects. *Id.* ¶¶ 39-42. These classifications had nothing to do with

the fact that PragerU created the content; indeed, more than 88 percent of PragerU's videos are rated G or PG and thus are available even to the small percentage of YouTube users who have opted into Restricted Mode. *Id.* ¶ 39. By contrast, a number of channels from varied points across the political spectrum have a lower percentage of their videos available in Restricted Mode—for example, fewer than half of the videos posted by *The Daily Show* are now available in Restricted Mode. *Id.* ¶ 51.

E. Proceedings In This Case

Even though YouTube repeatedly responded to PragerU's requests for additional information about its classification decisions (*id.* ¶¶ 43-48), PragerU filed this lawsuit against YouTube on October 23, 2017. PragerU asserts claims under the U.S. and California Constitutions, the California Unruh Act, California's Unfair Competition Law (UCL), the implied covenant of good faith and fair dealing, and the Lanham Act. ECF No. 1. On December 29, 2017, YouTube moved to dismiss all of Plaintiff's claims as barred by YouTube's First Amendment rights and Section 230, and for failure to state a claim. ECF No. 31 ("MTD"). At the same time, Plaintiff filed this motion for a preliminary injunction, relying on its constitutional and state law claims (not its Lanham Act claim). Both motions are currently pending and noticed for a combined hearing on March 15, 2018.

LEGAL STANDARD

Preliminary injunctions are "an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). Accordingly, a plaintiff seeking preliminary injunctive relief bears a heavy burden to satisfy a stringent, four-factor test. The plaintiff must show that: (1) it is likely to succeed on the merits of its claims; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in the plaintiff's favor; and (4) an injunction is in the public interest. *Id.* "The first factor under *Winter* is the most important"; "when 'a plaintiff has failed to show the likelihood of success on the merits, "we need not consider the remaining three [*Winter* elements]."'" *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). In addition, because PragerU seeks a mandatory injunction that would

1 order YouTube to take action, it "must establish that the law and facts *clearly favor* [its] position,
2 not simply that [it] is likely to succeed." *Id.*
3 Plaintiff misstates the applicable legal standard for obtaining a preliminary injunction,
4 arguing that it need only show "serious questions going to the merits" plus a balance of hardships
5 strongly tipped in its favor. *See* PI Mot. at 7-8. The "serious questions" standard does not apply
6 here. Plaintiff seeks a mandatory injunction, which "are not granted unless extreme or very
7 serious damage will result[,] and are not issued in doubtful cases." *Park Vill. Apartment Tenants*
8 *Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011); *see also Hernandez v.*
9 *Sessions*, 872 F.3d 976, 998-99 (9th Cir. 2017). Regardless, this is not a case where the precise
10 articulation of the governing test changes the result. PragerU is not entitled to a preliminary
11 injunction on any standard.

12 **ARGUMENT**

13 **I. PLAINTIFF HAS NO LIKELIHOOD OF SUCCEEDING ON ITS CLAIMS**

14 PragerU's bid for a preliminary injunction fails for the most basic reason—the claims it
15 asserts against YouTube have no reasonable chance of success. Those claims are barred by the
16 First Amendment and Section 230 of the CDA, and fail on their own terms.

17 **A. Plaintiff's Proposed Injunction Is Barred By the First Amendment**

18 PragerU's claims are based on the First Amendment, but it ignores the First Amendment
19 rights actually at stake. It is YouTube, not PragerU, whose First Amendment rights are
20 threatened here. It is well settled that the First Amendment can serve as a defense against civil
21 liability, immunizing defendants from claims that seek to hold them liable for exercising their
22 First Amendment rights. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011). Likewise,
23 because injunctions "carry greater risks of censorship and discriminatory application than do
24 general ordinances," they require "a somewhat more stringent application of general First
25 Amendment principles." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764-65 (1994).
26 These principles bar any preliminary injunction in this case.
27 As explained in YouTube's pending Motion to Dismiss (MTD at 13-15), the First
28 Amendment protects YouTube's "editorial control and judgment" over third-party content—

1 including YouTube's decision to exclude certain of PragerU's videos from Restricted Mode.
2 *Miami Herald Publ'g Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258
3 (1974). This broad protection covers choices about how to present, or whether to include,
4 particular content on a given platform or service. *Id.*; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S.
5 622, 636 (1994) (cable operators engage in protected "editorial discretion" by selecting
6 television programming); *Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573-
7 74 (1995) (parade organizers engage in protected speech by selecting which marchers may
8 participate in parade); *Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir.
9 1971) ("the acceptance or rejection of articles submitted for publication … necessarily involves
10 the exercise of editorial judgment").

11 "Since all speech inherently involves choices of what to say and what to leave unsaid,
12 one important manifestation of the principle of free speech is that one who chooses to speak may
13 also decide 'what not to say.'" *Hurley*, 515 U.S. at 573; *accord Levan v. Capital Cities/ABC,*
14 *Inc.*, 190 F.3d 1230, 1243 (11th Cir. 1999) ("[t]he decision to air the interview of one person but
15 not another is at heart an editorial decision"). This protection equally applies to editorial choices
16 about video content, *e.g.*, *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494
17 (1986), and by online service providers, *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 441
18 (S.D.N.Y. 2014) (search engine protected by First Amendment for excluding search results on
19 sensitive topics).

20 In this case, PragerU challenges (and now seeks to enjoin) decisions that fall squarely
21 within this protected category: YouTube's decisions about which of the videos posted on its
22 service should be made available to users who have enabled Restricted Mode. In making these
23 decisions, YouTube is deciding how to categorize videos, whether to display those videos at all,
24 and whether those video should be made available to certain segments of the YouTube audience,
25 including users who have specifically opted for a more limited experience. These are exactly the
26 kinds of judgments that the First Amendment protects.

27 They are analogous to decisions made by publishers in selecting the "material to go into a
28 newspaper, and the … limitations on the size and content of the paper, and treatment of public

issues and public officials." *Tornillo*, 418 U.S. at 258; *accord e-ventures Worldwide, LLC v. Google, Inc.*, 2017 U.S. Dist. LEXIS 88650, at *11-12 (M.D. Fla. Feb. 8, 2017) ("determining whether certain websites are contrary to Google's guidelines and thereby subject to removal are the same as decisions by a newspaper editor regarding which content to publish, which article belongs on the front page, and which article is unworthy of publication."). And, just as "the courts … should [not] dictate the contents of a newspaper," *Aldrich*, 440 F.3d at 135, the First Amendment does not allow Plaintiff to use the courts to direct the contents of YouTube's Restricted Mode. *Accord Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737-38 (1996) (plurality opinion) (because "the editorial function itself is an aspect of 'speech,' a court's decision that a private party, say, the station owner, is a 'censor,' could itself interfere with that private 'censor's' freedom to speak as an editor"); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) (First Amendment prohibits order compelling search engines to "'honestly' rank Plaintiff's websites").

PragerU ignores these principles, but they categorically bar its claims and, in particular, any injunction that would force YouTube to display PragerU's videos in a manner that YouTube has determined, based on the exercise of its own judgment, would be contrary to the interest and preferences of its most sensitive users. "The First Amendment protects these decisions, whether they are fair or unfair, or motivated by profit or altruism." *e-ventures*, 2017 U.S. Dist. LEXIS 88650, at *12; *accord Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) ("[F]reedom of speech prohibits the government from telling people what they must say."). Plaintiff's motion should be denied for this reason alone. This Court need go no further to reject a preliminary injunction.[2]

---

[2] As discussed, the record makes clear that YouTube did not take action in regard to PragerU's video because of ideological disagreement (*see generally* Wu Decl. ¶¶ 40-42, 49-52), but even if Plaintiff's allegations on that point had merit, that would only reinforce YouTube's First Amendment rights in this case. For a private party to restrict access to material based on an ideological judgment (which, to repeat, is not what actually happened here) would reflect the kind of "political expression" that is at the core of the First Amendment. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995); *accord Zhang*, 10 F. Supp. 3d at 440 (explaining that to hold a search engine liable for "a conscious decision to design its search-engine

(continued...)

B. Plaintiff Has No Chance Of Prevailing On Its Constitutional Claims

Plaintiff's main argument in support of its request for a preliminary injunction is that YouTube's classification of PragerU's videos violates the First Amendment and the California Constitution. But Plaintiff has no chance of prevailing on these claims, even apart from their interference with YouTube's own First Amendment rights. That is because YouTube simply is not a state actor regulated by the federal or state constitutions.

1. YouTube Is Not the "Functional Equivalent" of a State Actor Under the First Amendment

"It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *see also Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 546-47 (1972) ("The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes."). Here, however, Plaintiff defies this basic rule. YouTube, of course, is a private party, and PragerU does not argue that YouTube acts in coordination with the government. Instead, it asserts that YouTube is the "functional equivalent" of a state actor. PI Mot. at 14. Plaintiff's argument has no basis in law, has consistently been rejected by courts, and would have disastrous consequences.

None of the cases that Plaintiff relies on are on point, and they do not remotely support the idea that YouTube's decisions about Restricted Mode are somehow the equivalent of censorship by the government. *Id.* at 14-16. Plaintiff cites *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), and *Denver Area*, 518 U.S. at 749-50, for the proposition that "public forums may include 'private property dedicated to public use.'" PI Mot. at 15. But Plaintiff ignores that those cases involve speech restrictions *by the government*. In *Cornelius*, the NAACP (unsuccessfully) challenged an Executive Order excluding it from a government charity

---

(...continued from previous page)
algorithms to favor certain expression on core political subjects over other expression on those same political subjects … would plainly 'violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message'").

1 drive, while *Denver Area* addressed a challenge to federal statute (and related FCC regulations)
2 regulating cable broadcasting. These cases involve direct state action, and they do nothing to
3 support the application of the First Amendment to restrict the rights of private parties to regulate
4 speech on their own property.

5 The same is true of *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) and *Twitter,*
6 *Inc. v. Sessions*, 263 F. Supp. 3d 803 (N.D. Cal. 2017). While these cases do say that social
7 media sites can be public forums, that does not help Plaintiff here. The whole point of the forum
8 analysis in those cases was to limit the power of *the government* to restrict the speech of online
9 services or their users. *Packingham* thus struck down a state law making it unlawful for a
10 registered sex offender to access certain social media websites. And *Twitter* addressed a First
11 Amendment challenge *brought by an online service provider itself* to a federal statute prohibiting
12 it from speaking about a matter of public concern. This case is totally different. PragerU
13 challenges not any government speech restriction, but YouTube's private actions. And neither
14 these cases—nor any others—question or limit the rights of service providers to control their
15 own platforms or to make editorial judgments about the content submitted by their users.

16 To the contrary, courts have consistently rejected previous attempts to treat YouTube and
17 other online service providers as state actors. *See Langdon*, 474 F. Supp. 2d at 631-32 (rejecting
18 constitutional claims because Google, Yahoo, and Microsoft are not state actors);
19 *Kinderstart.com, LLC v. Google, Inc.*, 2007 U.S. Dist. LEXIS 22637, at *39-52 (N.D. Cal. Mar.
20 16, 2007) (same for Google); *Shulman v. Facebook*, 2017 U.S. Dist. LEXIS 183110, at *8-10
21 (D.N.J. Nov. 6, 2017) (same for Facebook); *hiQ Labs, Inc. v. LinkedIn Corp.*, 2017 U.S. Dist.
22 LEXIS 129088, at *29-34 (N.D. Cal. Aug. 14, 2017) (LinkedIn); *Cyber Promotions, Inc. v. Am.*
23 *Online, Inc.*, 948 F. Supp. 436, 456 (E.D. Pa. 1996) (AOL).

24 Ignoring these holdings, Plaintiff cites *Marsh v. Alabama*, 326 U.S. 501 (1946), arguing
25 that, because YouTube opens its service to the public and generally tries to allow its users to
26 express themselves, its thereby binds itself by the First Amendment. *Marsh* is inapposite. Like
27 *Packingham*, *Marsh* involved a constitutional challenge to a criminal conviction under a state
28 law. The Court's analysis turned on the peculiar nature of a so-called "company town." Though

privately owned, this town had "all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated," *id.* at 502—in short, "facilities … built and operated primarily to benefit the public" and which serve "essentially a public function," *id.* at 506. Given the essentially public nature of the property, the Supreme Court held that a state's ban on pamphleteering could not be enforced there consistent with the First Amendment.

That *Marsh* is limited to company towns—and cannot be read to support the proposition that the First Amendment applies broadly on private property held open to the public—is confirmed by subsequent cases. While the Supreme Court in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), briefly extended the reasoning in *Marsh* to a privately owned shopping mall, the Court repudiated *Logan Valley* in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), before expressly overruling it in *Hudgens*, 424 U.S. at 518 (explaining that "the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*"). These cases make clear that "*Marsh* was never intended to apply to this kind of situation"—instead, "the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town." *Lloyd*, 407 U.S. at 562-63 (quoting *Logan Valley*, 391 U.S. at 330-31 (Black, J., dissenting)).

It is clear, therefore, that these cases provide no license for Plaintiff's effort to muddy the fundamental constitutional distinction between private and state action. Indeed, *Lloyd* rejected the very argument that PragerU presses in this case: that YouTube is bound by the First Amendment insofar as it holds out its service as a forum for use by the public. The Court held that property does not "lose its private character" merely because it is "open to the public" or because "the public is generally invited to use it for designated purposes." *Id*. at 568-69; *see also id.* at 563 (rejecting "the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks"). Instead, "[b]efore an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must

1 assume to some significant degree *the functional attributes of public property devoted to public*
2 *use*." *Cent. Hardware*, 407 U.S. at 546-47 (emphasis added).
3 There is nothing like that here. YouTube does not resemble a company town: it does not
4 stand "in the shoes of the State," and there "is no comparable assumption or exercise of
5 municipal functions or power." *Lloyd*, 407 U.S. at 569. Nor is it a public utility that happens to
6 be in private hands that is "substituting for and performing the customary functions of
7 government." *Id*. at 562. Plaintiff's rhetoric does not change reality. *Accord Howard v. Am.*
8 *Online Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) (allegation that AOL is a "'quasi-public utility'
9 that 'involves a public trust' … is insufficient to hold that AOL is an 'instrument or agent' of the
10 government"). To expand the First Amendment in the ways PragerU demands here would
11 "constitute an unwarranted infringement of long-settled rights of private property protected by
12 the Fifth and Fourteenth Amendments." *Cent. Hardware*, 407 U.S. at 547.
13 2. YouTube Is Not Bound By the Liberty of Speech Clause
14 Plaintiff's attempt to invoke the California Constitution's Liberty of Speech Clause fares
15 no better. As discussed above, even if PragerU were right about California law, applying such
16 rules to YouTube would violate YouTube's First Amendment rights. But beyond that, Plaintiff's
17 effort to expand the Liberty of Speech clause has no legal basis. PragerU makes two arguments,
18 both of which fail. First, the limited exception established in *Robins v. Pruneyard Shopping*
19 *Center*, 23 Cal. 3d 899 (1979), has essentially been limited to its facts and certainly does not
20 apply to a private online service. Second, cases discussing the "public forum" requirement under
21 California's anti-SLAPP law have nothing to do with whether a private website is the equivalent
22 of a state actor restrained by the Liberty of Speech Clause from regulating its own property.
23 **Pruneyard *does not apply to YouTube.*** Plaintiff's *Pruneyard* argument asks this Court
24 to dramatically expand a state-law doctrine in ways that the California courts have consistently
25 declined to do. Indeed, *Pruneyard* has *never* been applied beyond the context of shopping
26 centers. *See, e.g.*, *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 55
27 Cal. 4th 1083, 1091-92 (2012) (narrowing *Pruneyard* to apply only to the common areas of a
28 shopping center); *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 26 Cal. 4th 1013,

1 1033 (2001) (refusing to apply *Pruneyard* to urban apartment complex); *Donahue Schriber*
2 *Realty Grp., Inc. v. Nu Creation Outreach*, 232 Cal. App. 4th 1171, 1183-84 (2014) (refusing to
3 apply *Pruneyard* to sidewalk areas of a shopping center); *see also* MTD at 16-18. To the
4 contrary, California courts have rejected as "wishful thinking," Plaintiff's radical theory that
5 *Pruneyard* allows a large private business to be judicially transformed into a public forum
6 subject to constitutional limitations "simply because it is 'freely and openly accessible to the
7 public.'" *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106, 117-18 (2003) (quoting *Golden*
8 *Gateway*, 26 Cal. 4th at 1033); *see also, e.g.*, *Ralphs*, 55 Cal. 4th at 1093.

9 But even if there were some support for applying *Pruneyard* outside of shopping malls,
10 there is none whatsoever for stretching the doctrine to entirely "virtual" online spaces, separate
11 from physical real estate. As Judge Chen recently explained, "[n]o court has expressly extended
12 *Pruneyard* to the Internet generally," and "there are a host of potential 'slippery slope' problems
13 that are likely to surface were *Pruneyard* to apply to the Internet." *hiQ*, 2017 U.S. Dist. LEXIS
14 129088, at *31-32; *see also Kinderstart.com*, 2007 U.S. Dist. LEXIS 22637, at *39-52. While
15 taking such a step would be inappropriate generally, it certainly should not be taken by the
16 federal courts without any support from the California Supreme Court. In short, there is no basis
17 for Plaintiff's radical effort to expand *Pruneyard* to YouTube and other online services.

18 ***Plaintiff cannot use the anti-SLAPP law to treat YouTube as a state actor.*** Nor does
19 California's anti-SLAPP law offer PragerU a viable constitutional claim against YouTube. A
20 SLAPP suit is "a meritless lawsuit 'filed primarily to chill the defendant's exercise of First
21 Amendment rights.'" *Paul v. Friedman*, 95 Cal. App. 4th 853, 861 (2002). Plaintiff relies on a
22 so-called "established rule that a 'public forum' under [California's anti-SLAPP law (Cal. Civ.
23 Proc. Code § 425.16)] is by definition a public forum under *Pruneyard* and the California
24 constitution." PI Mot. at 17 n.25. This is not a rule at all, much less an established one, which is
25 why PragerU cites no actual authority to support it. While it may be true that "[t]he concept of a
26 public forum was developed in, and has sole reference to, First Amendment cases," *Weinberg v.*
27 *Feisel*, 110 Cal. App. 4th 1122, 1131 n.4 (2003), that does not support PragerU's contention that
28 the owner of any publicly accessible website is bound by California's Liberty of Speech Clause.

Plaintiff's argument was recently rejected by Judge Chen, who explained that any such holding would lead to "potentially sweeping implications." *hiQ*, 2017 U.S. Dist. LEXIS 129088, at *34 (the "anti-SLAPP statute protects conduct beyond constitutionally protected speech itself"). And not one of the cases that PragerU cites supports its argument. In *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006), for example, the operator of an online forum invoked the anti-SLAPP law—and Section 230 of the CDA—to (successfully) bar a lawsuit seeking to impose liability on the forum for allegedly defamatory messages posted by a user. The court explained that the website was a "public forum" under anti-SLAPP statute—*without regard to whether the operator was a state actor*. *Id.* at 40-41 n.4.[3]

Barrett, and other cases like it, make clear that websites are public forums in the sense that courts should prevent lawsuits like this one, which seek to limit the website operator's protected right to regulate (or refrain from regulating) speech that occurs there. *See, e.g.*, *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 201-02 (2017) (applying anti-SLAPP law to strike claim attacking "Facebook's decision not to remove [content], an act 'in furtherance of [Facebook's] right of petition or free speech'"). But that does not mean that the owners of websites are the equivalent of state actors whose decisions about how to regulate their own forums is subject to constitutional attack.

[3] Plaintiff cites *Ralphs Grocery Co. v. Victory Consultants, Inc.*, 17 Cal. App. 5th 245, 253 (2017), a case in which the Court of Appeal declined to apply the anti-SLAPP law to strike a private property owner's claim for trespass against pamphleteers soliciting on their private property. *Id.* at 249-50. The court concluded that the sidewalks in front of the plaintiff's grocery stores were not public forums and that the pamphleteers were not engaged in constitutionally protected activity. *Id.* at 260. So too here: Plaintiff has no protected right to speak on YouTube's website. While the court may have confusingly blended the public forum analysis with the *Pruneyard* analysis, it certainly did not suggest, much less hold, that any place deemed a public forum for purpose of the anti-SLAPP law would therefore be a place where the property owner was treated as the equivalent of the state under the Liberty of Speech Clause or the First Amendment. Plaintiff also cites *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106 (1999), and *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400 (2001), but those cases do not appear to have any bearing on this case. Neither has anything to do with websites or online speech, and *Briggs* deals with a provision of the anti-SLAPP statute relating to statements made in connection with "official" government proceedings. *Briggs*, 19 Cal. 4th at 1111-13.

1 Any contrary decision would have breathtaking consequences. It would mean that
2 virtually any publicly accessible website—or any other place "sufficiently open to general public
3 access," *Weinberg*, 110 Cal. App. 4th at 1131 n.4—would suddenly be treated as public property.
4 That result is unsupported by California law, and it would turn the anti-SLAPP law on its head.
5 *See hiQ*, 2017 U.S. Dist. LEXIS 129088, at *34. The anti-SLAPP law protects online services
6 like YouTube against claims like these. Plaintiff cannot use that statute, and the important
7 protections it provides against baseless litigation, to bootstrap an unprecedented constitutional
8 attack on the way those private services regulate themselves.

9 3. YouTube's General Commitment to User Self-Expression Is Not a Basis
10 For Treating It As the Equivalent of a State Actor

11 In pressing its constitutional claims, PragerU tries to use YouTube's general commitment
12 to freedom of expression against YouTube itself. Plaintiff argues that because YouTube has
13 publicly recognized the importance of user self-expression, creativity, and opportunity—
14 including through its embrace of "Four Freedoms" that help guide the service—YouTube is now
15 legally bound by the federal and state constitutions to the same restrictions on content regulation
16 that apply to the government. PI Mot. 18-20. As discussed above, Plaintiff's argument is based
17 on a flawed premise—that a private online service becomes the equivalent of a state actor
18 because it is open to the public as a place for speech. But even if this premise were sound, it
19 would not support the claims that PragerU advances here.

20 Plaintiff's reliance on YouTube's statements in support of online expression omits a
21 crucial part of the story: while those freedoms are important, they coexist, and have always
22 coexisted, with strict rules about the kind of content that is acceptable on YouTube, and with
23 policies allowing YouTube to restrict certain videos for the benefit of its users. These rules are
24 reflected in YouTube's Terms of Service and Community Guidelines, which prohibit certain
25 kinds of material, as well as YouTube's extensive public statements regarding its policies for
26 restricting access to material in order to protect its younger or more sensitive users. *See* Wu Decl.
27 ¶¶ 5-7 & Exs. 1-6. These policies are integral to YouTube's operation and to the enjoyment of its
28 service by more than a billion people. YouTube enforces them on a constant basis. *Id.* ¶ 13.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

In short, it simply is not the case that YouTube holds itself out to the world as a place for unfettered or unregulated expression. PragerU cannot focus on one narrow set of YouTube's public statements while ignoring the rest. And it certainly cannot use that selective and distorted picture to transform YouTube into the equivalent of a state actor. It would make no sense to penalize an online service—depriving it of much of its right to self-regulate and subjecting it to potentially liability—simply because it generally prefers more speech to less. Such a holding would create perverse incentives for service providers to clamp down on user speech. It does not serve the values protected by the First Amendment—the values that PragerU claims to support—to suggest that the only way for private online platforms to avoid being treated as state actors is to disclaim their public commitments to user self-expression. And it would be particularly absurd to adopt that rule here, given that PragerU's videos were not even removed from YouTube. Instead, they were simply made unavailable to the tiny fraction of users who have chosen to use Restricted Mode—a feature YouTube offers precisely because it allows a nuanced balance between free expression and the protection of sensitive users from potentially unwanted content.[4]

4. Plaintiff Cannot Avoid the Disastrous Consequences of Treating YouTube As a State Actor

Putting aside the total lack of doctrinal support for Plaintiff's effort to subject YouTube—and virtually the entire Internet—to the standards of the First Amendment and the Liberty of Speech clause, the result that Plaintiff seeks would have profound social consequences.

[4] Plaintiff also argues that the recent repeal of the FCC Open Internet regulations should lead the Court to treat YouTube as a public utility. PI Mot. at 19. This argument makes no sense. Even when these regulations were in force, they never applied to YouTube (or services like it). As the D.C. Circuit explained in responding to concerns about exactly the result that PragerU requests—government regulation of "the editorial decisions" of Google and YouTube—"widely used web platforms such as Facebook, Google, Twitter, and YouTube … are not considered common carriers that hold themselves out as affording neutral, indiscriminate access to their platform without any editorial filtering." *U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 392 (D.C. Cir. 2017); *accord id.* at 434 (Kavanaugh, J. dissenting).

If the First Amendment actually bound private online service providers as it binds the government, those providers would be significantly constrained in their ability to act even against highly offensive or objectionable content. In such a world, YouTube and other online services would be unable to do the kind of content regulation that the public, including governments, civil society groups, parents, and other Internet users, clearly expects, such as removing nudity, personal attacks, racist language, depictions of violence, terrorist propaganda, and many other forms of objectionable content. While First Amendment restrictions are essential to limiting the government's power to interfere with speech, subjecting private service providers to the same limitations would undermine widely supported policies promoting safe and family-friendly content restrictions on the Internet.

PragerU seems to recognize the radical implications of its constitutional theory, which is why Plaintiff is quick to tell the Court that the relief it is seeking is "modest" and "narrow." According to PragerU, YouTube may continue to restrict access to content where it has "clear and objective evidence that the content contains obscenity, graphic nudity, or violence, hate speech, or is objectively offensive regardless of the political viewpoint or identity of the speaker." PI Mot. at 30. (PragerU offers a slightly different version of this formula elsewhere in its brief, which includes a carve-out for videos that contain "profanity." *Id.* at 1.) Far from solving the problem, however, PragerU's regulatory standard actually makes it worse.

The most obvious difficulty with Plaintiff's formulation is that it has been invented from whole cloth. This made-for-litigation standard simply is not the standard that would actually apply under the First Amendment. PragerU's assertion that YouTube would be able to keep restricting videos containing nudity, violence, hate speech, and profanity defies black-letter law, under which all of those categories are protected speech. *See, e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-12 (1975) (striking down ban on drive-in theaters showing films with nudity); *United States v. Stevens*, 559 U.S. 460, 482 (2010) (striking down ban on violent videos); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down law banning hate crimes);

Cohen v. California, 403 U.S. 15, 18 (1971) (profanity protected by the First Amendment).[5] Likewise, Plaintiff's suggestion that "objectively offensive" videos could be restricted ignores "a bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017). In short, there is no basis for Plaintiff's assurances that applying the First Amendment to YouTube would be modest or limited. The fact that PragerU needs to ignore established law to offer such assurances only underscores that it does not take seriously its own argument that YouTube is—or should be—treated like a state actor.

But even if Plaintiff's made-up standard were imposed, it would be unworkable. PragerU says that YouTube should be allowed to restrict content so long as it is "objectively offensive." But PragerU does not even try to explain what this means or how YouTube possibly could be expected to know what qualifies. Presumably, a court would have to construe this standard in every instance where a party challenged the removal or restriction of content. This approach would be a practical and jurisprudential disaster. The volume of removal requests YouTube receives (and the amount of content it has to deal with) is massive. Wu Decl. ¶¶ 9, 12. If every decision to remove or restrict content could be judicially challenged by reference to some supposedly objective criteria, litigation would be endless and the results of such cases would likely be unpredictable and inconsistent. And there would be significant consequences to each ruling: if a court found that certain content was not "objectively" offensive (as measured by some non-existent standard), YouTube would be powerless to remove it. In short, Plaintiff's requested relief would seriously deter meaningful content regulation in ways that would undermine the quality of YouTube's service and undermine the clear expectations of Congress and YouTube users that YouTube will remove or restrict access to material that it considers to be

[5] These First Amendment rules apply not just to prohibitions on such speech, but also to regulations restricting its availability to minors. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011) (striking down law limiting minor's access to violent video games); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 826-27 (2000) (striking down law limiting minor's access to sexually oriented television programming).

impermissible or mature. *E.g.*, 47 U.S.C. § 230(b)(3)-(4); Wu Decl. ¶¶ 4-7, 11, 23. For these reasons as well, PragerU has no chance of prevailing on its unprecedented constitutional claims.

C. Plaintiff's Claims Are Barred By Section 230(c)(2)(B) of the CDA

As YouTube has explained in its motion to dismiss, all of Plaintiff's claims—other than its meritless First Amendment claim—are also barred by Section 230 of the CDA. MTD at 10-12. This federal immunity independently rules out any injunction based on those claims. *See, e.g.*, *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 698 (2001) (Section 230 bars claims for injunctive and declaratory relief); *Asia Econ. Inst. v. Xcentric Ventures LLC*, 2011 U.S. Dist. LEXIS 145380, at *21 (C.D. Cal. May 4, 2011) (same).

In enacting Section 230, Congress sought "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). To that end, the statute seeks to encourage providers of online services to develop tools for restricting access to material that they or their users might deem inappropriate, an approach that both avoided the constitutional problems of direct government speech regulation and that was more flexible. 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden) ("Under our approach … the marketplace is going to give parents the tools they need"). Restricted Mode is precisely the kind of tool that Congress wanted to encourage and protect from civil claims like those made by PragerU.

Aware that Section 230 poses a barrier to its case, Plaintiff tries to preemptively explain why the statute does not apply. PI Mot. at 11-13. This effort fails. First, PragerU ignores the most relevant provision of Section 230. Plaintiff focuses on Section 230(c)(2)(A), spending much time arguing why that provision's "good faith" requirement is not satisfied. *Id.* at 11-12. But YouTube has not relied on Section 230(c)(2)(A). Instead, the subsection at issue is 230(c)(2)(B). That provision is specifically tailored to the situation here: where an online service provider provides a tool that helps its users restrict access to content that the users or the provider considers "lewd … excessively violent … harassing, or otherwise objectionable." MTD at 11. And, critically, Section 230(c)(2)(B) contains no good-faith requirement. *See Enigma Software Grp. USA LLC v.*

1 *Malwarebytes Inc.*, 2017 U.S. Dist. LEXIS 184658, at *7-8 (N.D. Cal. Nov. 7, 2017). Plaintiff's
2 arguments about good faith are simply besides the point.
3 Second, PragerU's argument that its videos do not meet the criteria for "obscene, lewd,
4 lascivious, filthy, excessively violent, harassing, or otherwise objectionable" material ignores the
5 plain text of the statute. *See* 47 U.S.C. § 230(c)(2)(A). Plaintiff contends that YouTube can only
6 restrict access to videos that are "*objectively* 'otherwise objectionable'" (PI Mot. at 13), but the
7 statute, by its terms, imposes a *subjective* standard: whether the service provider or the user
8 "considers" the material to be "objectionable." Congress deliberately adopted a subjective test,
9 not only because what is plausibly deemed objectionable may vary from one service to the next,
10 but also to give broad flexibility to providers and their users to restrict material. *See, e.g.*, 141
11 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox on amendment that
12 introduced the language in 230(c)) ("We can keep away from our children things not only
13 prohibited by law, but prohibited by parents."). And this is exactly how the provision has been
14 applied. *See Holomaxx Techs. Corp. v. Microsoft Corp*., 2011 U.S. Dist. LEXIS 94316, at *6
15 (N.D. Cal. Aug. 23, 2011) (explaining that Section 230(c)(2) "allows an interactive service
16 provider to establish standards of decency"); *Zango, Inc. v. Kaspersky Lab, Inc.*, 2007 U.S. Dist.
17 LEXIS 97332, at *11 (W.D. Wash. Aug. 28, 2007) ("[The CDA] does not require that the
18 material actually be objectionable; rather, it affords protection for blocking material 'that the
19 provider or user considers to be' objectionable."), *aff'd*, 568 F.3d 1169 (9th Cir. 2009);
20 *e360Insight, LLC v. Comcast Corp*., 546 F. Supp. 2d 605, 608 (N.D. Ill. 2008) (Section 230
21 "imposes a subjective element" into whether provider deemed material objectionable). PragerU's
22 effort to rewrite the statute should be rejected.
23 Third, Plaintiff's invocation of *ejusdem generis* to limit the scope of the "otherwise
24 objectionable" language is equally unavailing. The crabbed reading that PragerU proposes
25 disregards Congress's intent to give service providers and their users flexibility in determining
26 what material is objectionable. Plaintiff's approach also drains the term of any independent
27 force. PragerU would restrict "otherwise objectionable" to material that is "similar to material
28 that is found to be obscene, lewd, lascivious, filthy, excessively violent, or harassing" (PI Mot. at

11), but such material is already covered by those more specific terms. Congress expected the immunity to sweep more broadly, to cover decisions to restrict material that providers or users might consider objectionable *in some way other* than those specifically listed in the statue. *See, e.g.*, *Langdon*, 474 F. Supp. 2d at 631; *e360Insight*, 546 F. Supp. 2d at 608. For example, a video praising factory farming might not fit within the specific adjectives of 230(c)(2), but on a website devoted to promoting veganism, it surely would be "otherwise objectionable." Moreover, *ejusdem generis* does not apply where, as here, there is no common attribute linking the specific items in the list. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225-26 (2008). There is no way to give a limiting construction to the phrase "otherwise objectionable" so that it harmonizes with each of the various descriptors that precede it. Given that, the term should be "construed to mean exactly what it says." *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980) (rejecting *ejusdem generis* where the literal meaning of the catch-all term was clear).[6]

In short, the phrase "otherwise objectionable" perfectly captures the videos at issue here, which YouTube determined were among the kind of mature content that would be objectionable to the users who activated Restricted Mode. Wu Decl. ¶¶ 39-41. Indeed, that would be true even on Plaintiff's narrow reading. Many of the PragerU videos that have been excluded from Restricted Mode fall within the specified categories listed in Section 230(c)(2): they could be considered "lewd," "lascivious," (*e.g.*, *id.* ¶ 42 (video entitled "Are 1 in 5 Women Raped at College")), "excessively violent" (*e.g.*, *id*. (video entitled "Why isn't Communism as hated as Nazism?")), or objectionable—especially in light of Restricted Mode's (and Section 230's) purpose of protecting especially sensitive users from sexual, violent, and similarly disturbing content. Section 230(c)(2)(B) squarely applies to Plaintiff's claims and rules out any injunction.

[6] While the court in *Song fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 883-84 (N.D. Cal. 2015) applied the principle of *ejusdem generis* to Section 230(c)(2)(A), YouTube believes that case was wrongly decided and, in any event, the court there held only that "otherwise objectionable" did not cover an "allegedly artificially inflated view count" for a video. *Id*. at 883. This case is different, and even the *Song fi* court specifically acknowledged that a narrowed construction of the statute still would cover videos containing "offensive materials." *Id*.

D. Plaintiff's Claims Are Barred By Section 230(c)(1) of the CDA

Plaintiff's claims (other than its First Amendment claim) are also barred by the separate but reinforcing protection of Section 230(c)(1). *See* MTD at 9-10. PragerU acknowledges Section 230(c)(1), but asserts with little analysis that the provision does not apply to this case. PI Mot. at 10. Established law says otherwise. Multiple decisions in this District (and from this Court) have expressly held that 230(c)(1) immunizes service providers against claims arising from their editorial functions—including blocking or withdrawing user-submitted content from publication on their services. *See Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095 (N.D. 2015) (Koh, J.) (Facebook's blocking of plaintiff's page is "publisher conduct immunized by [Section 230(c)(1) of] the CDA"), *aff'd*, 697 F. App'x 526 (9th Cir. 2017); *Lancaster v. Alphabet Inc.*, 2016 U.S. Dist. LEXIS 88908, at *7-8 (N.D. Cal. July 8, 2016); *Darnaa, LLC v. Google, Inc.*, 2016 U.S. Dist. LEXIS 152126, at *23 (N.D. Cal. Nov. 2, 2016).[7]

Rather than engage with this on-point authority, Plaintiff asserts that subsection (c)(1) could not apply where (c)(2) also applies, because doing so would render "230(c)(2) meaningless surplusage." PI Mot. at 10. The Ninth Circuit has rejected this very argument. In *Barnes*, the Court of Appeals—after confirming that Section 230(c)(1), "by itself" shields from liability "all publication decisions," including the decision to "remove" content—went on to explain that "Subsection (c)(2), for its part, provides *an additional shield from liability*." 570 F.3d at 1105 (emphases added). "Crucially," the Court observed:

> the persons who can take advantage of this [(c)(2) immunity] are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects internet service providers

[7] These decisions are based on clear Ninth Circuit precedent applying Section 230(c)(1). In *Barnes v. Yahoo!, Inc.*, the Court of Appeals explained that removal decisions are among the publisher functions immunized by Section 230(c)(1) as "publication involves reviewing, editing, and deciding whether to publish *or to withdraw from publication* third-party content." 570 F.3d 1096, 1102 (9th Cir. 2009) (emphasis added); *see also id*. at 1105. And the Ninth Circuit recently affirmed this court's decision in *Sikhs for Justice*, confirming that Section 230(c)(1) applies in these circumstances. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017).

> from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.

Id. Applying (c)(1) to bar claims based on the removal of user-submitted content—as this Court has rightly done—does not render (c)(2) superfluous. And while there will be some cases, like this one, where both provisions apply, such overlapping protection is not surprising. Instead, it reflects Congress's powerful intent to encourage self-policing by online service providers and its insistence that providers who exercise discretion to manage content on their platform should be shielded from liability in the strongest terms.[8]

E. Plaintiff Has No Likelihood of Prevailing On Its Non-Constitutional Claims

Even putting aside YouTube's immunities under the First Amendment and Section 230, PragerU has no likelihood of success on its non-constitutional claims. Plaintiff's motion does little more than recite the elements of these claims and summarily assert that it meets them. This is not enough to state a claim (MTD at 18-22), much less show that PragerU will likely prevail.

Unruh Act. Among other deficiencies discussed in YouTube's motion to dismiss (*id.* at 18-19), PragerU ignores the requirement that in a case like this, which is not linked to a claim under the federal Americans with Disabilities Act, it must "plead and prove *intentional* discrimination." *Greater L.A. Agency of Deafness, Inc. v. CNN Inc.*, 742 F.3d 414, 425 (9th Cir. 2014) (emphasis added). Plaintiff offers no evidence of such intentional discrimination. Indeed, the only evidence that PragerU offers are allegations that its videos have been treated differently than other, similar videos. Strazzeri Decl. ¶¶ 6, 11 & Ex. C. This is insufficient. *See Greater L.A.*

[8] Plaintiff's argument that Section 230 does not apply to discrimination claims is not supported even by the cases it cites. PI Mot. at 13. The Ninth Circuit in *Roommates.com* declined to apply Section 230 not because the plaintiff alleged discriminatory conduct, but because the service provider was "'responsible' at least 'in part'" for creating the allegedly discriminatory content at issue. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008). That is not the situation here. Likewise, neither *Airbnb, Inc. v. City & Cty. of S.F.*, 217 F. Supp. 3d 1066, 1076 (N.D. Cal. 2016), nor *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016), remotely suggest that discrimination claims fall outside Section 230's protections. Indeed, neither case even involved such a claim. In contrast, this Court's decision in *Sikhs for Justice* confirms that Section 230 applies even where Plaintiff alleges discrimination in violation of federal and state law. *See Sikhs for Justice*, 144 F. Supp. 3d at 1090.

1 *Agency of Deafness*, 742 F.3d at 425 ("[P]laintiff must therefore allege, and show, more than the
2 disparate impact of a facially neutral policy."). The evidence confirms that YouTube did not
3 discriminate against PragerU when it classified a limited subset of its videos as "Teen" or higher
4 based on the content of those videos. *See* Wu Decl. ¶¶ 39-42, 50-52.

5 ***UCL.*** As an initial matter, PragerU cannot overcome the UCL's "safe harbor," which
6 protects from liability conduct that is expressly encouraged by law (here, Section 230). *Cel-Tech*
7 *Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182, 185 (1999); *see* MTD 19-20. But
8 even on the merits, Plaintiff's UCL claim fails. Plaintiff fails to show, as it must, that it lost
9 "money or property" as a result of the actions it now seeks to enjoin. Cal. Bus. & Prof. Code §
10 17204. Indeed, Plaintiff does not even argue that the unavailability of fewer than 12% of its
11 videos to the tiny fraction of YouTube users using Restricted Mode has caused any tangible
12 economic injury to PragerU.

13 As to the other elements of the UCL, none of Plaintiff's other claims have any merit, so
14 Plaintiff cannot proceed under the statute's "unlawful" prong. Any claim of "fraudulent" conduct
15 fails because PragerU offers no evidence that any of YouTube's public statements about
16 Restricted Mode are false or misleading, much less that PragerU actually relied to its detriment
17 on those statements. *See Rosado v. eBay Inc.*, 53 F. Supp. 3d 1256, 1264-65 (N.D. Cal. 2014).
18 Nor is there any basis for a claim under the statute's "unfair" prong. PragerU fails to show any
19 "actual or threatened impact on competition," as it must in a case like this. *See Cel-Tech*, 20 Cal.
20 4th at 186-87; MTD at 20. Plaintiff's only argument that YouTube's actions were unfair is its
21 conclusory assertion that those actions are motivated by "political and religious animus." PI Mot.
22 at 27. As discussed above, however, Plaintiff cannot carry its burden of showing a likelihood of
23 succeeding on that baseless allegation.

24 ***Breach of the Implied Covenant of Good Faith***. Plaintiff cannot avoid the key problem
25 with its claim—YouTube's agreements with its users specifically permit the actions it took here,
26 so there can be no breach of the implied covenant. *See Storek & Storek, Inc. v. Citicorp Real*
27 *Estate, Inc.*, 100 Cal. App. 4th 44, 56-57 (2002); Wu Decl. Exs. 1-6; MTD at 21-22. Plaintiff
28 simply ignores language in YouTube's Terms of Service that expressly "reserve[] the right to

remove Content," (Wu Decl. Ex. 1), and language in the incorporated Community Guidelines explaining that YouTube may restrict access to videos about mature topics (Wu Decl. Ex. 2). *See* MTD 21-22. A court in this district has found that these provisions give YouTube the right to remove videos from the service altogether or from a given location, and thus defeat an implied covenant claim. *Song fi*, 108 F. Supp. 3d at 885. That authority also includes the more limited step of restricting videos from being displayed in Restricted Mode.[9]

Plaintiff asserts that the contractual provisions that expressly permit YouTube to do what it did here are "vague and subjective" (PI Mot. at 26), but beyond this bald assertion Plaintiff does not show that these provisions fail to give YouTube the authority to restrict its videos. Indeed, Plaintiff acknowledges that YouTube sets forth "criteria" for the restriction of videos, but it fails to explain how YouTube taking action pursuant to those criteria could support a claim. Nor is PragerU's argument about Google's motive and supposed "pretexts" (*id.*) relevant. *See Damabeh v. 7-Eleven, Inc.*, 2013 U.S. Dist. LEXIS 66565, at *15-16 & n.4 (N.D. Cal. May 8, 2013) (Koh, J.) (dismissing implied covenant claim based on allegedly malicious termination of franchise agreement). In any event, the evidence reveals that YouTube did not act with the bad faith or animus that Plaintiff asserts. Wu Decl. ¶¶ 39-42, 50.

II. PLAINTIFF CANNOT SATISFY THE REMAINING *WINTER* FACTORS

Beyond failing to show that it has a likelihood (or even a serious chance) of prevailing on the merits of its claims, PragerU also fails to carry its burden on the remaining *Winter* elements.

A. Plaintiff Cannot Show Irreparable Harm

Plaintiff's sole argument that it has been irreparably harmed is its contention that its speech is being silenced. PI Mot. at 28. But this claim of silenced speech is disconnected from the actual facts of the case. PragerU had not been silenced or "censored": all of its videos are available on YouTube; none of them have been removed from the service or even age-restricted. Wu Decl. ¶ 39. Any YouTube user who wants to see those videos can do so, and the 98 percent

[9] Plaintiff's reliance on *Darnaa, LLC v. Google, Inc.* is misplaced—that case involved allegations that YouTube took action against videos based on view count manipulation. 2015 U.S. Dist. LEXIS 161791, at *16-18 (N.D. Cal. Dec. 2, 2015).

of YouTube users who choose not to use Restricted Mode on an average day would never even know that those videos were not available in Restricted Mode. *Id.* ¶ 22. PragerU has not been irreparably harmed merely because a small percentage of its videos are not available to users who specifically chose to limit their YouTube experience by activating Restricted Mode.

Plaintiff's rhetoric about silenced speech is even more implausible given the nature of the Internet: nothing that YouTube has done has any effect on Plaintiff's ability to put its videos up elsewhere online. *Cf. Zhang*, 10 F. Supp. 3d at 441 ("if a user is dissatisfied with Baidu's search results, he or she 'has access, with just a click of the mouse, to Google, Microsoft's Bing, Yahoo! Search, and other general-purpose search engines'").[10] Thus, while it may be true that a violation of a party's First Amendment rights is often enough to show irreparable harm, this case is different. Here, given the very limited action that YouTube has taken, the ready availability of Plaintiff's videos both on YouTube and elsewhere, and the simple fact that YouTube is not the government, merely invoking the First Amendment is not enough for Prager to establish an injury that cannot be remedied without a preliminary injunction.

B. An Injunction Would Impose Substantial Hardships on YouTube and Its Users and Would Be Contrary to the Public Interest

PragerU also ignores the harms that an injunction would inflict upon YouTube, its users, and the public interest. Plaintiff seeks to override the choices made by YouTube and the users who have enabled Restricted Mode. Those users have made a deliberate decision that they want to see only a limited selection of YouTube videos, ones that do not include material that YouTube has determined is potentially mature. The injunction that PragerU seeks would harm those users' interests by exposing them to exactly the kind of material they have indicated they wish to avoid. *See Hill v. Colorado*, 530 U.S. 703, 716 (2000) ("The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases.").

[10] Indeed, Plaintiff currently hosts these videos directly on its own website, https://www.prageru.com/, in a category entitled "Restricted by YouTube."

At the same time, as discussed in Section I.A, *supra*, Plaintiff's proposed injunction would significantly impair YouTube's own First Amendment rights, by compelling YouTube to display content to particular users in a particular way. A mandatory injunction overriding YouTube's judgment and requiring the publication of content in ways that a private service provider determined to be inappropriate would inflict serious—and indeed irreparable—harm on YouTube. *See, e.g.*, *Aldrich*, 440 F.2d at 133 (affirming denial of injunction that sought to force newspaper to print advertisements). These interests tilt the balance of hardships decisively against the injunction that Plaintiff seeks.

Finally, Plaintiff ignores the broader public interest at stake in this case. PragerU seeks something essentially unprecedented—an injunction forcing an online service provider to display a user's content in the precise way the user demands, and to include that content in a feature designed to protect sensitive users from potentially mature content. That would harm the public's interest. That is especially so given the broader consequences of Plaintiff's legal theory. As discussed above (*supra* at 18-21), an injunction curtailing YouTube's ability to manage content on its service would undermine YouTube's efforts—and those of similar online platforms—to shield the public from a whole range of objectionable material posted to their services. PragerU's effort to treat such providers as the equivalent of the government would substantially limit their ability to take action against pornography or sexually explicit content, material that glorifies terrorism or violent acts, hate speech and other potentially abusive user behavior, and much else.

The self-serving (and legally baseless) limitations that Plaintiff tries to build into its proposed injunction would not solve those problems. Subjecting every content restriction by an online service provider to an undefined "objectively offensive" standard (PI Mot. at 30), invites only uncertainty and confusion. Unsure of what user-submitted content they could actually restrict, providers would be significantly chilled in their effort to self-regulate and act for the benefit of the families, minors, and other sensitive individuals who use their services.

Congress has recognized this powerful public interest in enacting Section 230. In doing so, Congress declared it the "policy of the United States" to "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to

restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). Indeed, to inject the government into service providers' decisions about how to shield their users from potentially problematic content is precisely the outcome that Congress sought to avoid. *See* 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) ("[W]e do not wish to have content regulation by the Federal Government of what is on the Internet."). Plaintiff's proposed injunction is contrary to this important public interest.

CONCLUSION

For these reasons, PragerU's motion for a preliminary injunction should be denied.

February 9, 2018

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: */s/ Brian M. Millen*
Brian M. Willen

Attorneys for Defendants Google LLC and YouTube, LLC.