6th Civil No. H047714

# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

PRAGER UNIVERSITY

*Plaintiff and Appellant,*

vs.

GOOGLE LLC, a Delaware limited liability company, YOUTUBE, LLC, a Delaware limited liability company

*Defendants and Respondents.*

Appeal from the Superior Court
of the County of Santa Clara,
Case No. 19CV340667
The Honorable Brian C. Walsh

**APPELLANT'S ANSWERING BRIEF TO BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION**

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**CERTIFICATE OF INTERESTED ENTITIES OR PARTIES**

**(Cal. Rules of Court, Rule 8.208)**

There are no interested entities or persons to list in this certificate. (Cal. Rules of Court, Rule 8.208(E)(3).)

DATE: May 18, 2022

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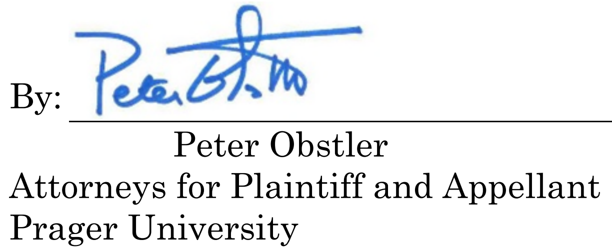
By: 
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## I. INTRODUCTION

In its Amicus Brief, Electronic Frontier Foundation ("EFF") asserts Respondents Google LLC and YouTube, LLC (collectively "Respondents" or "Google/YouTube") and other global internet service providers ("ISPs") have a First Amendment right to discriminate against internet consumers based on the consumer's race, sex, religious, political or other protected identity in ***violation of and under a consumer contract.*** *See, e.g.*¸ Amicus Brief filed on April 27, 2022 by EFF ("Amicus Brief") at pp. 1, 8, 10, 18-24. That is a shocking, dangerous, and repugnant assertion from anyone, let alone from an entity that represents itself to this Court as "a non-profit civil liberties organization working to protect and promote fundamental liberties in the digital world." Amicus Brief, p.1.

According to EFF, granting ISPs a First Amendment right to avoid their legal obligations under contract, "ensure[s] that companies can moderate their platforms free from legal mandates, resulting in a diverse array of forums for users, with varied editorial views and community norms." Amicus Brief, p. 8. EFF argues that the First Amendment protects ISPs



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"regardless of how selective" or discriminatory they are, and "there is no dichotomy of selective and non-selective intermediary services," even where, as here, the discriminatory "selections" violate the express terms of service and contractual obligations between the ISP and the consumer. Amicus Brief, pp. 8, 18, 20, 21, 23, 28.

EFF's position reflects a profound and dangerous ignorance of First Amendment law. As the Supreme Court made clear thirty years ago in *Cohen v. Cowles Media Co.,* 501 U.S. 663, 665 (1991), "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Id.*((quoting *Associated Press v. NLRB*, 301 U.S.103, 132–133 (1937). Nor does the First Amendment immunize publishers from liability for breach of contractual promises or promissory estoppel. *Id.* at 669-670; *see also Zacchini v. Scripps–Howard Broad. Co.*, 433 U.S. 562, 576–579 (1977) (the press, just like the general public, must obey copyright laws); *Pruneyard Shopping Ctr. v. Robins*, 447 US. 74, 88 (1980) (First and Fifth Amendments are not a defense to unlawful censorship or



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otherwise immunize the property owner's unlawful conduct from scrutiny under California's Liberty of Speech Clause); *Associated Press v. U. S.,* 326 U.S. 1, 20 (1945) (First Amendment does not immunize publishers for antitrust law violations); *Associated Press,* 301 U.S. 103 (First Amendment does not immunize publishers for labor law violations); *Dietemann v. Time, Inc.,* 449 F.2d 245 (9th Cir.1971) (First Amendment does not immunize publishers for torts under state law); *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 953 (2002) (First Amendment does not immunize business for UCL violations); *Millennium Dental Techs. Inc. v. Terry*, No. SA CV 180348-DOC (KESx), 2018 WL 5094965, at *13–14 (C.D. Cal. July 16, 2018) (quoting *TrafficSchool.com, Inc. v. Edriver, Inc.*, 653 F.3d 920, 928 (9th Cir. 2011).

Furthermore, immunity for the lawful exercise of editorial discretion by ISPs is codified by section 230(c) of the Communications Decency Act, 47 U.S.C. § 230(c) ("§ 230(c)"). As the Ninth Circuit holds, that immunity prohibits content moderation based on the identity of the consumer, or conduct that reaches a contract or promise by the ISP. *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d. 1040, 1047 (9th



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Cir. 2019) (§230(c)(2) does not immunize anti-competitive, identity based filtering and blocking) ("*Enigma*"); *Barnes v. Yahoo!, Inc.*, 570 F.3d. 1096, 1108-1109 (9th Cir. 2009); (ISP who promises identity neutral content moderation contractually waives publishing immunity under §230(c)(1)) ("*Barnes*").

In addition to its gross mischaracterization of First Amendment jurisprudence, EFF makes no attempt to square its flawed and extreme position on editorial discretion with the specific factual record in this case, including allegations that: (i) Respondents use computer driven digital content filtering tools and practices to profile, filter, and block consumers based on the user's legally protected identity status, not the material that appears online in the video; and (ii) do so in a manner that discriminates based on the consumers protected identity under and in violation of express contractual obligations and promises to moderate, filter, restrict, or block a user's content and access on YouTube only if the user violates Respondents specific, identity "neutral" content based rules that apply "equally to all" members of the public who use YouTube. *See* CT 5:8-6:9; 8:28-17:26, 34:13-37:12; 46:28-47:25; *see also* CT 6:10-24, 18:5-13,



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25:14-19, 33:6-24:3, 34:8-37:12, 37:22-38:2, 38:13-39:5, 39:7¬16, 39:24-40:4, 42:19-49:2; 72-91.

Consequently, whether intentional or in advertent, EFF's silence on how the First Amendment's limited protections of editorial discretion apply to the Respondents' unlawful discrimination against consumers under and in violation of a consumer contract is deafening and dooms each of its arguments. *See* Amicus Brief, pp. 20-24 (failing to apply *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-55 (1974) ("*Tornillo*") and progeny to the specific and narrow facts of unlawful digital redlining under and in violation of contract).

## II. SUMMARY OF ARGUMENT

***First***, the First Amendment does not protect companies who engage in unlawful conduct, whether they do so in their business capacity as a publisher or as a consumer service provider. *Cohen v. Cowles Media Co.*, 501 U.S. at 669- 670 (publishers have no First Amendment immunity from the application of general laws) (citing *Zacchini v. Scripps–Howard Broad. Co.*, 433 U.S. 562, 576–579 (1977) (publishers must comply with copyright laws); *Associated Press*, 301 U.S. at132-



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133  (publishers must comply with the National Labor Relations Act); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192–193 (1946) (publishers must comply with the Fair Labor Standards Act);  *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (publishers must comply with antitrust laws); *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969) (publishers must comply with antitrust laws); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 581–583 (1983) (publishers must pay nondiscriminatory taxes)); *Nike*, 27 Cal. 4th at 954-955 (First Amendment does not immunize business for UCL violations); *Dietemann*, 449 F.2dat 247  (First Amendment does not immunize publishers for torts under state law); *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 828 (9th Cir. 2011) (First Amendment does not immunize business for violations of the Lanham Act); *Am. Bankers Mgmt. Co., Inc. v. Heryford*, 190 F. Supp. 3d 947, 957 (E.D. Cal. 2016), *aff'd*, 885 F.3d 629 (9th Cir. 2018) (First Amendment is not a defense for UCL violations).

Violating and discriminating under a consumer contract is not unique to the publishing business.  *Barnes*, 570 F.3d. at



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1106, 1108-1109 (contract liability does not flow from publishing conduct, "but from [their] manifest intention to be legally obligated to do something"); *see also Cohen*, 501 U.S. at 665; *Pruneyard*, 447 US. at 88; *Nike,* 27 Cal. 4th at 953*Heryford,* 190 F. Supp. 3d at 957 ((First Amendment is not a defense for UCL violations); *Terry*, slip op. at 2018 WL 5094965, at *13–14. This includes violations of legal obligations codified in consumer contracts, antidiscrimination laws dating back to the civil war, consumer fraud and unfair business practice protections, and the prohibitions on identity based speech discrimination under California's constitutional protection of liberty of speech. *Id.9*

***Second***, EFF's attempt to extend the First Amendment right of ISPs to that enjoyed by newspapers and magazine publishers, is not at issue in this appeal. Appellant does not challenge Respondents' "right" to moderate content. *Compare generally* Appellants Brief, pp. 10-45; 58-69; 75-79; Respondents' Brief, pp. 10-16, *with* Amicus Brief, p. 20 ("private entities that operate online platforms for user speech have a First Amendment right to curate that speech"). The ISP in this case expressly contracted and promised consumers that it would not



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discriminate or exercise its editorial judgment or discretion in any way that is based on or otherwise considers the protected identity of the consumer. CT 1803:16-1804:3 (emphasis original) (citing CT 4:22-6:10; *see also* CT 6:10-24, 18:5-13, 25:14-19, 33:6-24:3, 34:8-37:12, 37:22-38:2, 38:13-39:5, 39:7¬16, 39:24-40:4, 42:19-49:2; 72-91. Not only did Respondents violate their contractual obligations to filter based on content, not identity, but on at least 10 different occasions, Respondents restricted and demonetized Appellant's videos with no explanation while allowing other users to repost the identical videos on other YouTube channels unrestricted and fully monetized. CT 46:28-49:2. Thus, whatever the scope of editorial discretion afforded publishers under the First Amendment, EFF knows better than to assert that the right to lawfully curate content includes the "right" to discriminate against consumers in violation of contract, to misappropriate and steal intellectual property rights, and to defraud millions of consumers.

***Third***, EFF next asserts that because the First Amendment provides ISPs with a right to lawfully moderate content, it also shields ISPs who discriminate against the



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protected identity of consumers from California's Liberty of Speech Clause. That is equally dangerous and flawed. *See* Amicus Brief, pp. 17-18.

Indeed, in *Pruneyard*, the United States Supreme Court considered and rejected an identical argument: "We conclude that neither appellants' federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state-protected rights of expression and petition on appellants' property." *Pruneyard*, 447 U.S. at 88.

EFF's assertion that *Pruneyard* is distinguishable because it involved a brick and mortar retail business, rather than an internet business and, consequently, and did not implicate discretionary editorial functions, is both wrong and disingenuous. EFF knows that Appellant is not challenging Respondents' right to moderate content on YouTube. Indeed the very opposite is true. Appellant seeks only to require Respondents comply with their identity neutral content moderation promises, policies, and rules. This includes express promises that YouTube is a forum open to the public for free



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expression, subject only YouTube's own identity and viewpoint neutral moderation rules that "apply equally to all." CT 9:5-18:4, 72-91.

In sum, Respondents have chosen to moderate content by holding YouTube out to the public, and operating it for profit, as the most "ubiquitous," place for free expression in the world, subject, of course, only to specific, contractual time manner place content moderation rules and restrictions. *Id.* Respondents' functional operation of YouTube as a for profit public space for speech and expression, triggers some level of scrutiny under the Liberty of Speech Clause with respect to Google/YouTube's failure to comply with promises that the site is a public place for free speech subject only to neutral content based rules. "[T]he government's power to regulate property when the interests of the individual owner come in conflict with the interests of society is not static; property rights can and should be redefined to accommodate the conditions of modern life." *Park Mgmt. Corp. v. In Defense of Animals*, 36 Cal. App. 5th 649, 663-664 (Cal. Ct. App. 2019) (quoting and discussing *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 73 Cal. App. 4th 425, 431–432



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(1999) ("*Trader Joe's*"); *Pruneyard*, 23 Cal. 3d at 906)); *see also Fashion Valley Mall LLC v. NLRB*, 42 Cal. 4th, 850, 854-55 (2007).

And to the extent EFF believes that, as a policy matter, consumers are "better served" if global ISPs are not subject to constitutional scrutiny under *Pruneyard*, any ISP can do so by (i) designating its site as NOT open to the public for free expression, (ii) clearly and publicly disclosing that it intends to moderate content with respect to specific rules that take into account and exclude specified viewpoints, and/or (iii) amending their electronic contracts of adhesion to afford them discretion to discriminate and deny services based on non-protected classifications. *See Pruneyard*, 447 U.S. at 88; *Snatchko v. Westfield LLC*, 187 Cal. App. 4th 469, 491–492 (2010); CT 1235 ¶6.F; 1230, ¶6.F. But until Respondents decide to operate YouTube in manner that complies with what they promise, EFF's argument that the First Amendment bars constitutional scrutiny under *Pruneyard* solely because Respondents operate on the internet, is both bad law and bad policy.[1]

[1] EFF refers to itself as a defender of civil liberties and consumers on the internet, and complains in weekly podcasts



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## III. PROCEDURAL HISTORY AND BACKGROUND: EFF MISREPRESENTS THE UNIQUE FACTS, CLAIMS, AND POSTURE OF THIS CASE

In addition to its misrepresentations of law, EFF mischaracterizes the record in this case and ignores the core conduct, theory, and claims from which this appeal arises. This includes the specific claims that the Ninth Circuit instructed Appellant to plead under California law. *Prager Uni. v. Google LLC*, No. 18-15712 (9th Cir. 2019).

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about the chaos that pervades the internet. In 2017, EFF advised counsel for Appellant that *Pruneyard*, unlike the narrower First Amendment, was a legally viable means for consumers to hold global internet companies accountable. What changed? As the media has reported, EFF has become a "shill" for Silicon Valley tech cartels, and has received millions of dollars from Respondents and other corporate interests. *See* "Google and Facebook's New Tactic in the Tech Wars," https://fortune.com/2012/07/30/google-and-facebooks-new-tactic-in-the-tech-wars/; *see also* "And You Will Know Them by the Trail of the Lobbyists: Google Shill Listers @eff Promoting IRFA," https://musictechpolicy.com/2012/11/08/and-you-will-know-them-by-the-trail-of-the-lobbyists-google-shill-listers-eff-promoting-irfa-no-mention-of-sherman-act-or-court-packing/amp/; "New Reports says Engine, EFF are Shills for Google on patent Reform," https://www.ipwatchdog.com/2018/06/04/report-engine-eff-shills-google-patent-reform/id=98007/.



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EFF should know better. It was as an Amicus Curiae in *Prager*. It knows that the Ninth Circuit dismissed Appellant's case, ***without prejudice*** to any of the state law claims now before this Court. In so doing, the panel acknowledged that the allegations of identity based discrimination both under and in violation of a consumer contract were "deeply disturbing," and not without remedy or relief. Exhibit A, Reporter's Transcript dated August 27, 2019 in *Prager Uni.*, No. 18-15712 (9th Cir. 2019) at 12:8-20.

On August 27, 2019, the author of the *Prager* decision, the Hon. Margaret McKeown, stated on the record that Appellant should sue for breach of contract in state court:

> HON. M. MARGARET MCKEOWN: Well --but it seems to me that you can puff and say that you're a public forum, but that doesn't define your First Amendment status. I mean, they are a public forum in a colloquial sense. People can go, they host speech by a whole variety of individuals, organizations, companies, and so in that way they become a public forum for discussion. But, does that necessarily mean that they're a First Amendment public forum? And that's, I think, why the -- what you're trying to say, well, by representing the words "public forum" that they're transformed.
>
> MR. OBSTLER: I think it's more than just the words "public forum."



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HON. M. MARGARET MCKEOWN: All right.

MR. OBSTLER: Okay? First of all, they agree to be viewpoint neutral as to all content-based regulations, and that those rules apply equally to all. And listen to what they say in their mission statement. They --

HON. M. MARGARET MCKEOWN: So sue them for contract breach.

MR. OBSTLER: Well, if I didn't have –yeah, and when they come back –

HON. M. MARGARET MCKEOWN: Yes, ***I'm serious***, you -- I'm not recommending that we have more lawsuits -- . . . . -- ***I'm just saying –. . . .***

***That sounds like a contract claim not a constitutional claim.***

*Id*. at 9:13-10:25 (emphasis added).

Another panel member stated:

HON. JAY BYBEE: If your representations are correct, it seems deeply disturbing that they've put your stuff in the restricted area. But that seems to suggest that Google isn't abiding by its word. That Google -- I'm sorry, that YouTube is not doing what they've promised, that they've somehow failed to live up to their promise. I'm not sure that creates a First Amendment issue.

*Id*. at 12:8-20.

Following the Ninth Circuit's admonishment, Appellant refiled its lawsuit asserting only claims under California law that arise from the core allegation that Respondents use filtering tools, including a consumer's personal identity based data, to



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make content curation and user access decisions based on the race, sex, religion, political affiliation, or other legally protected identity of the consumer, not the material in the consumer's online content or conduct, in violation of Respondents' contractual promises.

In dismissing those California claims, the trial court did not find that the First Amendment barred any of the claims, but only held that §230(c) provided categorical and absolute immunity and that Respondents' terms of service contained a "catch-all" provision that effectively operated as an enforceable covenant that authorized Respondents to discriminate under and violation of contract, "for any reason or no reason." CT 1817:16-1820:17.

Appellant appealed that ruling on the grounds that (i) digitally redlining consumers based on a legally protected identity breaches Respondents' specific contractual promises; (ii) any discrimination based on a consumer's protected identity under or in violation of those contracts or promises violates the Unruh Act, the UCL, the Liberty of Speech Clause; and (iii) the enforcement of any covenant to discriminate under and in



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violation of contract based on a legally protected identity is unenforceable and a violation of the Equal Protection Clause under *Shelley v. Kramer*, 334 U.S. 1, 18, 22-23 (1948). *See also Loce v. Time Warner Ent. Advance/Newhouse P'hip*, 191 F.3d 256, 271 (2d Cir. 1999); *United States v. Texas*, No. 1:21-cv-796-RP, slip op. * *23-24, 30 (W. D. Tex. Oct. 6, 2021) (discussing the holding in *Shelly*, that the Equal Protection Clause precludes the enforcement of discriminatory covenants in contracts between private parties). Thus, all of the claims in this case, including the claims for breach of contract and promises, as well as violations of the Unruh Act, UCL, and Liberty of Speech, arise directly from Respondents' use of a consumer's protected identity to discriminate under and in violation of a consumer contract.

On this record, EFF's assertion that ISPs have a First Amendment Right to discriminate against a consumer under and in direct violation of a consumer contract, is legally baseless and dangerous. Moreover, EFF attempts to do so by falsely asserting that the limited protections afforded newspapers and publishers for the lawful exercise of legitimate editorial functions, somehow extends to unlawful conduct. Indeed, according to EFF, the



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editorial function is absolute, and provides First Amendment protection for patently unlawful race, sex, religious, or political discrimination under and in violation of contract. That is not, never was, and never will be the law. *Shelley*, 334 U.S. at 18, 22-23; *Loce v. Time Warner Ent. Advance/Newhouse P'hip*, 191 F.3d 256, 271 (2d Cir. 1999); 42 U.S.C. § 1981(b); Cal. Civ. Code § 51.

## IV. LEGAL ARGUMENT

EFF's Amicus Brief is based on the premise that "the First Amendment shields platforms from being forced to publish any content that they would otherwise choose not to publish." Amicus Brief, p. 18. So what? Appellant is not challenging Respondents' right to choose the rules for content curation on YouTube. The issue on appeal is only whether the law requires that Respondents comply with the specific content moderation and access rules and promises they drafted and contracted for on YouTube. *See generally*, Appellant's Brief, p. 79; Respondents' Brief, pp. 10-16. Consequently, all of Appellant's claims are based on Respondents' failure to comply with their own rules and contractual promises, and to discriminate thereunder. *See* CT 5:8-6:9; 8:28-17:26, 34:13-37:12; 46:28-47:25; *see also* CT 6:10-24,

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18:5-13, 25:14-19, 33:6-24:3, 34:8-37:12, 37:22-38:2, 38:13-39:5, 39:7-16, 39:24-40:4, 42:19-49:2; 72-91.

No cases, including any cited by EFF, suggest that the First Amendment shields a publisher from liability for breaching its contracts and engaging in patently unlawful conduct that violates anti-discrimination, unfair competition, and liberty of speech laws. *Compare, e.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (government mandated public access to cable TV under state law); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (government mandated union membership under state law); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (government mandated publicly posted notices re facility licensure under state law); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1741, 1744-1745 (2018) (government compelled speech under state public accommodation law); *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986) (government limitations on cable access to utility poles under municipal ordinance); *Tornillo*, 418 U.S. at 254-258 (government mandated publication of political speech



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under state law)); *with Cohen*, 501 U.S. at 665; *Pruneyard*, 447 U.S. at 87-88; *Enigma* 946 F.3d. at 1047-1049; *Barnes* 570 F.3d. at 1106, 1108-1109; *Heryford,* 190 F. Supp. 3d at 957; *Terry*, slip op. at 2018 WL 5094965, at *13–14; *Nike,* 27 Cal. 4th at 953.

And to the extent that EFF is seriously arguing that the largest corporation in the world has a First Amendment right to break the law and discriminate against consumers based on their race, sex, religious, political, or other protected identity classification under and in violation of consumer contracts and promises, EFF is wrong as a matter of law. *See Shelley v. Kramer,* 334 U.S. at 18, 22-23; *see also* the authorities cited *infra* at 11-13. Does EFF seriously believe that the First Amendment permits Google/YouTube to violate the Ku Klux Klan Act of 1867, 42 U.S.C. § 1981(b), the Unruh Act, the UCL, federal and state securities fraud statutes, intellectual property laws, or the California Constitution? If not, EFF should stay in its lane and focus on "protect[ing] and promot[ing] fundamental liberties in the digital world," not destroying them.

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### A. **The Issues On Appeal Have Nothing To Do With The Right To Moderate Content On The Internet.**

EFF's premise that this case has something to do with the debate over whether consumers are better served by moderated or unmoderated platforms is mystifying. All of the claims in this case arise from the refusal of Respondents to do what they promise and what the law requires regarding content moderation, not whether they can or should moderate.[2]

Indeed, EFF's argument that because users benefit from content moderation on the internet "every major 'general purpose' social media service . . . enforces its own content moderation policies" demonstrates precisely why Respondents must be held

[2] This portion of EFF's brief appears to be a cut and paste job from a brief it filed in an unrelated case involving a challenge to a Texas statute that prevents large ISPs from filtering and blocking any online content. *Compare* Amicus Brief, pp. 9-24, *with Netchoice LLC v. Comput. & Commc'ns Indus. Assoc.*, Civ. Action No. 1:21-cv-00840-RP (W.D. Texas), Brief of *Amicus Curiae* Electronic Frontier Foundation In Support Of Plaintiffs' Motion For Preliminary Injunction, Document No. 33 (filed Oct. 29, 2021) at 2-16. That case, and EFF's argument set forth therein, have nothing to do with whether Respondents may discriminate against consumers in violation of their own rules and promises and the statutory prohibitions against consumer discrimination and fraud under and violation of contract. *Id.*



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accountable under their **own** content moderation policies. *See* Amicus Brief, pp. 10; 11-14. It may be true that Gettr, Rumble, Pinterest, Roblox, Strava, ProAmericaOnly, Reddit, Discord, and most other internet sites have different content moderation rules and restrictions about who and what is allowed, all of which are disclosed to consumers. *See id.* But Appellant is not challenging the right of any ISP to decide on and implement their own rules. Once the ISP chooses and discloses its own rules to consumers, the ISP does not have a right to ignore or breach them, much less do so based on the consumer's protected identity. *Barnes* 570 F.3d. at 1106, 1108-1109; *Enigma* 946 F.3d. at 1047-49.

Consequently, this appeal has important ramifications not just for Appellant, but for all consumers, and especially consumers who traditionally have been marginalized by social media and society in general. In *Newman v. Google*, No. 3:20-cv-04011-VC, (N.D Cal. 2020) ("*Newman*"), racially protected minority consumers have sued Respondents for using their race or ethnicity to make content moderation decisions under and in violation of the same consumer contracts at issue on this appeal. *Newman*, Third Amended Class Action Complaint, Docket No. 77,



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dated Oct. 5, 2021, pp.2:3-12, 3:6-22, 4:19-26, 5:18-27, 7:3-16, 8:8-17, 9:12-17, 22:16-19, 25:8-12, 29:15-19, 36:17-23, 52:7-27, 54:12-16, 56:18-23, 151:14-20, 166:13-18, 172:23-27, 173:12-20, 187:4-13, 200:25-201:7, 201:18-203:2. And if that is not enough, Respondents pay less for Spanish language content than similar English content involving the same advertisers. *Id*. at 145:17-28.

Similarly, in *Divino v. Google*, No. 19-cv-04749-VKD, (N.D. Cal. 2019) ("*Divino*"), LGBTQ+ content creators have sued Google/YouTube for discrimination under and violation of the same electronic consumer adhesion contracts and similar promises. Indeed, in that case, the plaintiffs were told in a recorded customer service call that Google has a policy of refusing to sell ads to LGBTQ+ channels and creators because "of the gay thing." CT 6:10-24; 33:6-16; 41:3-24. Furthermore, Respondents promote and profit from hate speech directed at LGBTQ+ users by failing to curate and filter content in compliance with their **own** content based rules against hate speech. *Id.* at 10:23-27, 11:6-22, 41:22-42:9; 42:11-22, 79:14-80:4, 82:1-10.

And in *Brown v. Google*, *LLC*, 525 F. Supp. 3d 1049, 1077–1078 (N.D. Cal. 2021) Respondents were caught using the private

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browser data of consumers to create cradle to grave profiles on every internet user in the world. *See also In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 598–599 (9th Cir. 2020). Does EFF think that the First Amendment protects these types of intentional, computer driven profiling and discrimination under and in violation of the consumer contracts?

Respondents and EFF are free to argue that they are not engaged in the types of discriminatory, unlawful digital redlining and wholesale disregard of the consumer rights alleged in these cases. But they cannot do so by arguing that First Amendment deprives consumers of their fundamental right to prove otherwise. If Respondents and EFF believe that YouTube's filtering and blocking tools, practices, and "mistakes" are not discriminating under and in violation of contract and other laws, they must be transparent and prove that during the discovery process.

That is not an issue of First Amendment law, but one of transparency that requires giving the plaintiffs an opportunity to inspect the architecture, design, and computer source code of the filtering tools to determine once and for all whether Respondents



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are profiling and using the race, sex, religion, politics or other protected identity, not actual content, to filter and block content and access on YouTube. Until then, the law is clear: neither the plaintiffs, nor or the courts, are required to take Google/YouTube's summary denials at face value, i.e., that the allegations are innocent "mistakes," especially given the evidence and party admissions which comprise the record in each case.

### B. **The First Amendment Does Not Protect Unlawful Discrimination Under And In Violation Of Contract**

EFF's assertion that "[e]very court that has considered the issue has rightfully found that private entities that operate online platforms for user speech have a First Amendment right to curate that speech" misses the point. Amicus Brief, p.18. No court has ever held that publishers have First Amendment right to breach legal obligations under and in violation of their contract with a consumer. To the contrary, courts have uniformly held that the First Amendment is not a "get out of jail card" for companies who break the law. That includes publishers who enter into contracts with consumers to publish content subject to



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content based rules, not the identity of the author or speaker of the content. *Cohen*, 501 U.S. at 665; *Zacchini*, 433 U.S. at 576–579; *Pruneyard*, 447 US. at 88; *Dietemann*, 449 F.2d at 245, 249-250; *see also Barnes*, 570 F.3d. at 1106, 1108-1109; *Nike,* 27 Cal. 4th at 953; *Terry*, slip op. at 2018 WL 5094965, at *13–14.

*Tornillo* is certainly no exception. The court held in *Tornillo* that a Florida statute requiring newspapers to give political candidates equal access and allow a candidate to respond to a newspaper's endorsement of an opposing candidate, violated the publisher's First Amendment right to publish only what it sees fit. 418 U.S. at 254-55. The Court found that this type of "***government-enforced access***" interfered with the publishers' editorial discretion and function protected by the First Amendment and the broader principles of freedom of the press. *Id.* at 254. In so doing, the court made an important distinction between governmental coercion and consensual access:

> [A]t each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. **If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years**.



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*Id.* at 254 (emphasis added).

Here, the access and content blocking issues are not the result of "governmental coercion," but the consequence of a "consensual" contract between the Respondents and consumers. *See* CT 5:8-6:9; 8:28-17:26, 34:13-37:12; 46:28-47:25; *see also* CT 6:10-24, 18:5-13, 25:14-19, 33:6-24:3, 34:8-37:12, 37:22-38:2, 38:13-39:5, 39:7¬16, 39:24-40:4, 42:19-49:2; 72-91. That contract, not a government statute, sets the rules of access by promising that access to content and services on YouTube will only be denied if the consumer posts or engages in online content that violates the specific, identity neutral content based rules that Respondents promise under contract. Respondents' electronic adhesion contracts contain a self-executing license provision that is triggered every time a person visits or uses YouTube. CT 1232 ¶1.A, 1429 ¶1.A, 1465 ¶1. Under that provision, Appellant and every other user give Respondents an irrevocable and perpetual license to their content, personal data, and the revenue derived from that content, data, viewership, and advertising. CT 1234-35 ¶¶5-6, 1430 ¶¶5-6, 1466-67 ¶¶9-10.



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Thus, the licensing contract and other promises become legally operative and binding. The enforcement of that contract and the longstanding laws prohibiting discrimination, unfair business practices, consumer fraud, and Liberty of Speech under and in violation of that contract are **not** discretionary editorial functions. They are rules of law. *Cohen*, 501 U.S. at 665; *Barnes*, 570 F.3d. 1106, 1108-09; *Nike,* 27 Cal. 4th at 953.

Appellant's challenge to the Respondents' editorial function is based entirely on the contracts, promises, and laws which Respondents have agreed to be bound by and have codified under contract. If the law did not allow consumers to enforce their contractual rights and corresponding consumer rights to obtain the benefits of that contract free from discrimination, fraud, and unlawful censorship the global companies controlling, the ISPs of the world would have unfettered discretion to break the law for "any reason, or no reason." CT 1820:20-1821:21; *see also* CT 5:8-6:9; 6:10-24; 8:28-17:26; 18:5-13, 25:14-19, 33:6-24:3; 34:8-37:12; 38:13-39:5, 39:7-16; 39:24-40:4; 42:19-49:2; 46:28-47:25; 72-91.

The mere fact that Respondents operate their business on the internet has no bearing on whether they must comply with



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their contractual obligations or the longstanding laws governing consumer contracts. Contrary to EFF's suggestion, none of the cases cited in the Amicus Brief issued by the U.S. Supreme Court "since 2018," holds otherwise. Not one of those cases involved the enforcement of consensual access, curation and filtering provisions codified in a contract between the service provider and the consumer. *Cf.*, *e.g.*, *Halleck*, 139 S. Ct. at 1930 (government mandated public access to cable TV under state law); *Janus*, 138 S. Ct. at 2463 (government mandated union membership under state law); *Nat'l Inst. of Fam. & Life Advoc.*, 138 S. Ct. at 2375 (government mandated publicly posted notices re facility licensure under state law); *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1741, 1744-1745 (government compelled speech under state public accommodation law).

If the bigoted baker in *Masterpiece Cakeshop*, had contracted with the customer to make the cake, the First Amendment would not prevent the enforcement of such a contract. Furthermore, had the bigoted baker entered into that contract which included a covenant stating that if he subsequently learned that the customer was black, or had



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another protected identity, he could refuse to make the bargained for cake -- such a covenant would be *per se* unlawful and unenforceable under the Supreme Court's seminal decision in *Shelley,* 334 U.S. at 18, 22-23. *See also Loce*, 191 F.3d at 271; *United States v. Texas*, No. 1:21-cv-796-RP, slip op. * *23-24, 30 (W. D. Tex. Oct. 6, 2021).

The racial covenant argument is precisely the defense that Respondents are making in this case and other cases. They promise identity neutral, content based moderation and access on YouTube. But they also claim the right to discriminate under a catchall provision that permits them to filter and block content and access "for no reason or any reason," including the race, sex, religion, political affiliation or any other identity trait. Respondents' Brief, pp.15, 49; *see also* pp. 20-21, 23, 52-55, 61, 63. That is a discriminatory and unenforceable covenant.

Discriminatory covenants are unlawful, not only under the First Amendment, but under the Equal Protection Clause. *Shelley,* 334 U.S. t 18, 22-23; *see also Loce*, 191 F.3d at 271; *see also Roberts v AT&T Mobility LLC,* 877 F.3d. 833, 841-842 (9th Cir. 2017). Is EFF seriously contending that *Shelley* does not



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apply to internet companies because they alone have a First Amendment right to discriminate against consumers based on a legally protected identity?

EFF's reliance on *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569–570 (1995), is also misplaced. In *Hurley*, the Court held only that a private party who received a permit to hold a parade had a First Amendment right to select its participants, even if the parade was perceived as generally open for public participation. *Hurley*, 515 U.S. at 569–570. In so holding, the Court confirmed a longstanding rule that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* Again, that holding, like every other case cited by EFF, has no relevance here because Respondents specifically contracted with Appellant for a place in YouTube's parade.

### C. The First Amendment Does Not Bar Scrutiny Under The Liberty Of Speech Clause

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EFF's attempt to use the limited First Amendment right to editorial discretion to prevent any judicial scrutiny of Respondents' unlawful discrimination under California's Liberty of Speech Clause is so flawed and intellectually dishonest that Appellant hardly knows where to start.

***First***, EFF's argument that "YouTube and other social media platforms that moderate content are primarily, if not exclusively, expressive venues protected by *Tornillo*" was expressly rejected by the United States Supreme Court in *Pruneyard*:

> Appellants also argue that their First Amendment rights have been infringed in light of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). Barnette is inapposite because it involved the compelled recitation of a message containing an affirmation of belief. This Court held such compulsion unconstitutional because it "require[d] the individual to communicate by word and sign his acceptance" of government-dictated political ideas, whether or not he subscribed to them. 319 U.S., at 633, 63 S.Ct. at 1183. Appellants are not similarly being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views of the speakers or handbillers.
>
> *Pruneyard*, 447 U.S. at 87–88.



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In so doing, the Supreme Court expressly rejected EFF's *Tornillo* argument because, like this case, the concerns of intrusion on any discretionary editorial discretion "obviously are not present here." *Id*. This case is no exception.

The Liberty of Speech claim arises from Respondents' representations and promises codified in a contract between them and the Appellant. CT 5:8-6:9; 6:10-24; 8:28-17:26; 18:5-13, 25:14-19, 33:6-24:3; 34:8-37:12; 38:13-39:5, 39:7-16; 39:24-40:4; 42:19-49:2; 46:28-47:25; 72-91. EFF's attempt to avoid that unambiguous holding by arguing that "[u]nlike YouTube, the PruneYard shopping center had no core editorial function," and was "simply a business establishment that is open to the public to come and go as they please" is disingenuous. Amicus Brief, pp. 25-26. EFF knows that Respondents' editorial functions on YouTube are governed by a consumer contract that promises identity neutral editing that is expressly subject to specific content based rules. CT 5:8-6:9; 6:10-24; 8:28-17:26; 18:5-13, 25:14-19, 33:6-24:3; 34:8-37:12; 38:13-39:5, 39:7-16; 39:24-40:4; 42:19-49:2; 46:28-47:25; 72-91. Respondents expressly promised Appellant and other consumers that YouTube is a public place that anyone can use, and access provided, they comply with the



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sites published content based rules, regardless of the identity or political viewpoint of the consumer. *Id*.

And lest there be any ambiguity, about Respondents' promise, Respondents' testimony under oath to Congress ***about this specific case*** resolved any doubt. On July 17, 2018, in response to direct questioning from members of Congress about Appellant's lawsuit, YouTube's Assistant General Counsel, Juniper Downs, confirmed that Respondents operate and designate YouTube as a "Public Forum" for speech subject to content based rules and regulations that are applied with no regard to the identity or political viewpoint of the user. CT 5:8-6:9.

EFF also knows that all of the claims in this case, like those asserted in *Newman* and *Divino*, and those of other marginalized consumers, arise from allegations that Respondents are using filtering and blocking computers and other tools that use the racial, sexual, religious, political, or other protected identity of the consumer to filter and block access to YouTube, and that consumers who have fully complied with the sites' content based rules, have had their content and access restricted or blocked. CT 5:8-6:9; 6:10-24; 8:28-17:26; 18:5-13,



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25:14-19, 33:6-24:3; 34:8-37:12; 38:13-39:5, 39:7-16; 39:24-40:4; 42:19-49:2; 46:28-47:25; 72-91. That is unlawful discrimination of speech under and in violation of a consumer contract, and it neither implicates nor has anything to do with the type of discretionary editorial functions at issue in *Tornillo*. *Cohen*, 501 U.S. at 665; *Pruneyard*, 23 Cal. 3d at 906; *Barnes*, 570 F.3d. at 1106, 1108-1109; *Nike*, 27 Cal. 4th at 953. Therefore on this record, EFF cannot argue that all Respondents are doing is exercising a "core" editorial function of selecting material for publication and how best to present that material to the public.

EFF's next argument, that global social media platforms "are not functionally public forums," because "they are not 'open to the public to come and go as they please,'" is just more of the same false and dangerous rhetoric. Amicus Brief, pp. 26-27. Ignoring the application of the factual record to the functional elements of the *Pruneyard* test, EFF returns to the "many examples above," where it claims that "internet platforms almost always exercise, and have always exercised, editorial discretion as to which users and what content they allow and what content they feature." Amicus Brief, pp. 26-27. EFF misses the point again.



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All operators of public spaces reserved for speech and expressive activity must engage in editorial decisions about what to allow and not to allow, including spaces owned and operated by the government as well as privately owned internet sites designated by ISPs for public speech. That concept, however, does not preclude constitutional scrutiny under *Pruneyard* where, as here, the owner of the site holds and contracts the space out to consumers for profit as a place for public expression subject to compliance with specific identity neutral time manner place rules. *See Fashion Valley*, 42 Cal. 4th at 854-55; *Pruneyard Shopping Ctr.*, 23 Cal. 3d. at 909-911; *see also* CT 1803:4-1807:5; CT 4:22-8:15.

Respondents made a business decision to open their platform up to the general public and invite the public to use it for free speech and expression under a consumer contract. Consequently, the contract controls.[3] Respondents, like any other regulator of speech, may exercise their right to regulate

[3] That is precisely what the Ninth Circuit told the parties at oral argument when it ruled that the contractual agreement, not the federal First Amendment, governed, including for purposes of a state constitutional claim for Liberty of Speech. *See* Exhibit A, pp.9:13-10:25.



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that speech in a manner that complies with specific editorial rules and promises codified in that contract. But on YouTube, Respondents promise Appellant, and other users, the U.S. Congress, and the public, that YouTube is a public forum for speech subject only to neutral content rules that apply equally to all with regards to "political viewpoint" or identity. CT 5:8-6:9; 6:10-24; 8:28-17:26; 18:5-13, 25:14-19, 33:6-24:3; 34:8-37:12; 38:13-39:5, 39:7-16; 39:24-40:4; 42:19-49:2; 46:28-47:25; 72-91; *see also* CT 1803:4-1807:5; CT 4:22-8:15.

A more direct admission and public invitation to use YouTube as public forum is not possible. *Cf.*, *e.g.*, *Fashion Valley*, 42 Cal. 4th at 854-855; *Pruneyard*, 23 Cal. 3d. at 909-911; *Trader Joe's*, 73 Cal. App. 4th at 436; *Park Mgmt.*, 36 Cal. App. 5th at 663–664; *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106, 114–15 (2003). The fact that Respondents choose to do so for profit only makes the conclusion more compelling. *Id*.

EFF's final argument that "even if YouTube were functionally a public forum such that the balancing test of *Trader Joe's*, 73 Cal. App. 4th at 432, applied, the balance would weigh in favor of YouTube's editorial freedom" is unpersuasive



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for two reasons. First, EFF fails to address the interplay between §230(c) and the Liberty of Speech Clause when it comes to the internet. Unlike the slippery slope concerns that confront non-internet service businesses, particularly small retail stores, the Liberty of Speech clause is preempted and foreclosed by §230(c) with respect to all lawful, content based editorial conduct. §230(c)(1) – (2) (preempting state constitutional rights when conduct comes within 230(c)). Thus, unlike non internet businesses, as long as the ISP is engaged in lawful, content based content curation that does not violate or discriminate under a consumer contract, there is, and can be no civil liability of any type.

This case is different because it involves a breach of contract and express promises regarding editorial decisions and involves the profiling and use of consumer's protected identity, rather than the posting of noncompliant or objectionable content or use of the site. *Barnes* 570 F.3d. at 1106, 1108-1109; *Enigma* 946 F.3d. at 1047-1049. Thus, the only Liberty of Speech claims that Appellant asserts are claims involving the worst and most repugnant form of censorship: the filtering and blocking of the person who speaks, not the content they post. That is not an



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expansion of *Pruneyard*, but a necessary and important limitation that protects of the public's right to be free from race, sex, religious, political, or other forms of identity based discrimination.

As EFF points out, YouTube has become "the 'modern public square,' for expressive activity." Amicus Brief, p. 29 (citing *Packingham v. N. C.*, 137 S.Ct. 1730 (2017)); *see also Reno v. ACLU*, 521 U.S. 844, 852-853 (1997). Thus, without some constitutional protection against identity based speech discrimination under and in violation of a consumer contract, any protection of the public's state constitutional right of Liberty of Speech on the internet will be lost forever.

Finally, EFF's baseless refrain that the sky will fall if the Court scrutinizes Respondents' discriminatory conduct under the Liberty of Speech Clause because such scrutiny "pose[s] a 'significantly greater risk of interfering with normal business operations,'" is rhetorical fear mongering. Amicus Brief, p. 29 (citing *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 55 Cal. 4th 1083, 1092 (2012)). As the California Supreme Court has remarked many times in response to such arguments, if the Respondents want to de-designate



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YouTube as a private place, change the rules, or dissociate itself from the speech or the speaker, they are free to do so, like any other private business. *Pruneyard*, 447 U.S. at 88; *Snatchko*, 187 Cal. App. 4th at 491–492. But what Respondents cannot do is engage in a consumer bait and switch whereby they invite, solicit, and capture consumers' market share, license rights, and revenues by promising neutral content based access in a forum free from discrimination, and then turn around and breach those promises by discriminating against consumers for profit. CT 5:8-6:9; 6:10-24; 8:28-17:26; 18:5-13, 25:14-19, 33:6-24:3; 34:8-37:12; 38:13-39:5, 39:7-16; 39:24-40:4; 42:19-49:2; 46:28-47:25; 72-91; *see also* CT 1803:4-1807:5; CT 4:22-8:15.

## V. <u>CONCLUSION</u>

The First Amendment does not include a right to breach or discriminate under or in violation of a consumer contract. Nor does it bar speech discrimination claims against businesses who open their property up to consumers under that contract as a public forum for profit. EFF's arguments to the contrary are as legally baseless, as they are dangerous, and should be rejected based on the factual record and law that governs this appeal.



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DATE: May 18, 2022

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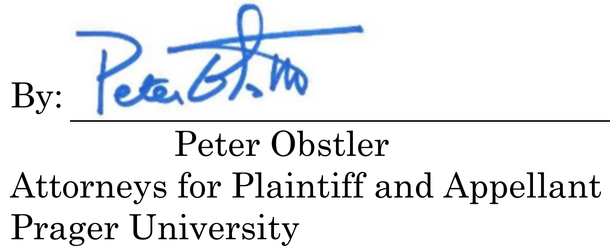
By: 

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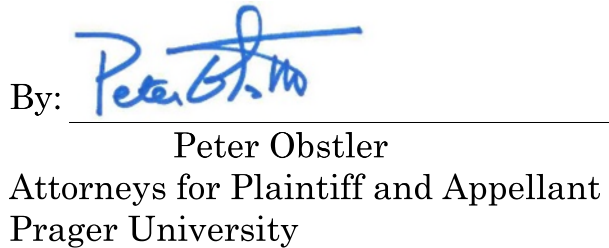
By: 
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## PROOF OF SERVICE

**Prager University v. Google LLC and YouTube, LLC**
**State of California Court of Appeal, Case No. H047714**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 S. Figueroa Street, Suite 2000, Los Angeles, CA 90017.

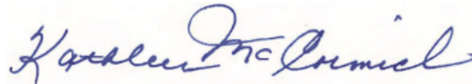
On May 18, 2022, I served true copies of the following document(s) described as **APPELLANT'S ANSWERING BRIEF TO BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY ELECTRONIC SERVICE:** I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to TrueFiling, through the user interface at www.truefiling.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 18, 2022, at Los Angeles, California.



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**SERVICE LIST**
**Prager University v. Google LLC and YouTube, LLC**
**State of California Court of Appeal, Case No. H047714**

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| **VIA FED EX**<br>Hon. Sunil R. Kulkarni<br>Superior Court of California<br>County of Santa Clara<br>191 N. First Street<br>San Jose, CA 95113 | *Trial Court* |

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6th Civil No. H047714

# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

PRAGER UNIVERSITY

*Plaintiff and Appellant,*

vs.

GOOGLE LLC, a Delaware limited liability company, YOUTUBE, LLC, a Delaware limited liability company

*Defendants and Respondents.*

Appeal from the Superior Court
of the County of Santa Clara
Case No. 19CV340667
The Honorable Brian C. Walsh

**EXHIBIT A IN SUPPORT OF APPELLANT'S ANSWERING BRIEF TO BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION**

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**TABLE OF EXHIBITS**

| Exhibit | Document Name | Date | Pages |
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| **A** | Reporter's Transcript dated August 27, 2019 in *Prager University v. Google LLC*, No. 18-15712 (9th Cir.) | 8/27/19 | 3 |

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# EXHIBIT A

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1 US Court of Appeals
2 for the Ninth Circuit
3 ----------------------------
4 18-15712
5 ----------------------------
6 PRAGER UNIVERSITY
7 Plaintiff-Appellant
8 Vs.
9 GOOGLE LLC
10 Defendant-Appellee
11 and
12 YOUTUBE, LLC
13 Defendant-Appellee
14 ----------------------------
15
16 Seattle Washington
17 Oral Argument
18 August 27, 2019
19
20 B E F O R E :
21 HON. M. MARGARET McKEOWN
22 HON. JAY BYBEE
23 HON. FERNANDO J. GAITAN Jr.
24 Circuit Judges
25 PAGES 1 - 47



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11 Attorney for Defendant-Appellees

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14

15 BY: BRIAN WILLEN

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1 HON. M. MARGARET MCKEOWN: Now we may begin.
2 MR. OBSTLER: Thank you, Your Honor.
3 May it please the Court. My name is Peter
4 Obstler, I represent the appellant in this case,
5 Prager University. Also with me at counsel table
6 are two of my colleagues, who have been of
7 tremendous assistance to me in this case, the
8 Honorable Former Governor Pete Wilson, from the
9 great state of California and my friend, Ryan
10 Keech.
11 Your Honors, this is a really, at least
12 to me personally, a very, very important, and
13 profound case and it is on a record before you
14 that I would submit is unique with respect, in
15 particular, to the public function test.
16 And let me stop for one second, I
17 omitted to do this. I'd like to reserve five
18 minutes of my time, if possible, for rebuttal.
19 HON. M. MARGARET MCKEOWN: All right.
20 Try to watch the clock. I'll try to help you as
21 well.
22 MR. OBSTLER: Thank you so much.
23 Any event, there are two issues here
24 and we're here on a motion to dismiss. The two
25 issues are that we did not plead a claim for a





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1 constitutional violation under the Federal First
2 Amendment on the theory that there was no state
3 action because YouTube is privately owned and the
4 ownership of a video hosting platform, according
5 to the Honorable Lucy Koh, is not a function that
6 is an exclusive, traditional government function
7 under the public function test.
8 With respect to that issue, we don't
9 think that that is the function that we are
10 alleging in the complaint is the issue. We think
11 that private parties absolutely have the right to
12 own and operate video platforms, and that they
13 would not be state actors. What makes this case
14 different, is the affirmative designations of the
15 platform as a public forum for freedom of
16 expression, for freedom of information --
17 HON. JAY BYBEE: A public designation
18 by -- an affirmative designation by whom?
19 MR. OBSTLER: By YouTube.
20 HON. JAY BYBEE: And what difference
21 does that make? Why did -- they just declared
22 themselves to be public?
23 MR. OBSTLER: Well --
24 HON. JAY BYBEE: Did they make
25 themselves public by declaring themselves public?



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1 MR. OBSTLER: Yes, Your Honor. And let
2 me explain.
3 HON. JAY BYBEE: Okay.
4 MR. OBSTLER: In Marsh vs. Alabama, the
5 United States Supreme Court said that the more
6 that the property owner opens up his or her
7 property for public use and public function, the
8 more that that property becomes subscribed to
9 constitutional scrutiny. That case was cut back
10 in Hallock and Hudgens, because merely operating
11 a forum that is -- that offers people that
12 opportunity is not a -- the same thing as
13 officially designating private property as a
14 public forum.
15 Now, if what Your Honor is getting at
16 is that there is a bright-line rule that a
17 private property owner can never designate their
18 property as a public forum for freedom of
19 expression, then I have no response to that, if
20 that is the bright-line rule. But I did not see
21 Judge Kavanaugh -- Justice Kavanaugh, and I did
22 not see the courts in --
23 HON. M. MARGARET MCKEOWN: Wait. Well,
24 go ahead.
25 HON. JAY BYBEE: Counsel, your argument







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1 is almost an argument that if YouTube had come
2 forward and said, we've agreed to bind ourselves
3 by the First Amendment, that somehow that would
4 actually have some consequence that this Court
5 would be responsible for enforcing outside of a
6 contract.
7 MR. OBSTLER: Yes. And I've heard the
8 argument that it's a contract, that this is a
9 contract case and a UCL case --
10 HON. JAY BYBEE: And I know
11 (indiscernible).
12 MR. OBSTLER: -- and those are other
13 causes of action.
14 HON. JAY BYBEE: Those are other --
15 MR. OBSTLER: Right. Right.
16 HON. JAY BYBEE: -- (indiscernible)
17 other problems. But this is --
18 MR. OBSTLER: Right. But look, this
19 Court has said that the regulation of speech, by
20 a private party in a public forum, is a
21 quintessential government function. And that --
22 and the case I'm referring to is Lee vs. Katz.
23 And in that case, I understand that the public
24 forum issue was not in place --
25 HON. M. MARGARET MCKEOWN: Well, and so



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1 that's why Lee isn't very instructive here,
2 because everyone agreed it was a public forum.
3 So I don't think you can use Lee to bootstrap
4 that somehow the Google platform becomes a public
5 forum. Do you have a better case than Lee?
6 MR. OBSTLER: I actually would ask the
7 Court to look at Footnote 4 in Lee, because I
8 think Lee tried to deal with that nexus. They
9 said that nexus was not required, in Footnote 4
10 on Lee. I'm only citing Lee for the reason that
11 I lost in the district court, which was that the
12 regulation of speech is not -- in a public forum
13 is not an exclusive government function.
14 I know that what we're dealing with
15 here is a different issue, which is assuming that
16 that is the law, that if it's a public forum, and
17 you're regulating speech in it, whether you're a
18 private party or a public party, that is an
19 exclusive government function. Your point is --
20 HON. M. MARGARET MCKEOWN: And when you
21 were in district court you didn't have the
22 Halleck case, correct?
23 MR. OBSTLER: Correct.
24 HON. M. MARGARET MCKEOWN: And so --
25 MR. OBSTLER: Correct.





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1 HON. M. MARGARET MCKEOWN: -- now
2 you've got some fenceposts out there that the
3 Supreme Court put up for you --
4 MR. OBSTLER: Yeah.
5 HON. M. MARGARET MCKEOWN: -- and the
6 question is, I mean, if you're hosting speech,
7 Halleck says that's not a traditional exclusive
8 public forum. And even if you went to the
9 dissent, say Justice Sotomayor's dissent, she was
10 basically -- that was a case where the state had
11 designated them to be a public access channel.
12 So I think what you're asking, and I
13 want you to frame it, is that you're somewhere
14 between those goalposts.
15 MR. OBSTLER: Well, I mean between
16 Marsh on the one hand, the company town, right,
17 the privately-held company town, and cable access
18 companies, and in Hudgens, a retail company that
19 invites people to come and shop. We need to look
20 at the nature of the invitation, the character of
21 how the platform is operated, and specifically
22 the fact that as a result of these
23 representations, they control 90 to 95 percent of
24 the public video content and engagement in the
25 world. They are not just a company town, they're





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1 arguably a company country and maybe a company
2 world force.
3 And my point is that they did that on
4 the express designation, which they have repeated
5 to Congress, under oath, that they are a public
6 forum. So to Judge Bybee's point, if that's all
7 they do, I guess they get to advertise
8 themselves, and I guess they get to run around
9 there and consistently say, we're a public forum,
10 we're a public forum, we're a public forum, but
11 they don't have to abide by the fundamental
12 principles that are at the heart --
13 HON. M. MARGARET MCKEOWN: Well --
14 MR. OBSTLER: -- of what it is to be a
15 public forum.
16 HON. M. MARGARET MCKEOWN: -- but it
17 seems to me that you can puff and say that you're
18 a public forum, but that doesn't define your
19 First Amendment status. I mean, they are a
20 public forum in a colloquial sense. People can
21 go, they host speech by a whole variety of
22 individuals, organizations, companies, and so in
23 that way they become a public forum for
24 discussion. But, does that necessarily mean that
25 they're a First Amendment public forum? And





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1 that's, I think, why the -- what you're trying to
2 say, well, by representing the words "public
3 forum" that they're transformed.
4 MR. OBSTLER: I think it's more than
5 just the words "public forum."
6 HON. M. MARGARET MCKEOWN: All right.
7 MR. OBSTLER: Okay? First of all, they
8 agree to be viewpoint neutral as to all content-
9 based regulations, and that those rules apply
10 equally to all. And listen to what they say in
11 their mission statement. They --
12 HON. M. MARGARET MCKEOWN: So sue them
13 for contract breach.
14 MR. OBSTLER: Well, if I didn't have --
15 yeah, and when they come back --
16 HON. M. MARGARET MCKEOWN: Yes, I'm
17 serious, you -- I'm not recommending that we have
18 more lawsuits --
19 MR. OBSTLER: Right.
20 HON. M. MARGARET MCKEOWN: -- I'm just
21 saying --
22 MR. OBSTLER: Well -- right.
23 HON. M. MARGARET MCKEOWN: -- that
24 sounds like a contract claim not a constitutional
25 claim.





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1 MR. OBSTLER: And we have sued them for
2 contract, and then we're going to have a CDA
3 fight, and then I'm going to be back in front of
4 this Court as to whether the application of the
5 CDA, to immunize them on an issue of speech, is a
6 prior restraint of speech. So we're going to --
7 I mean, we're not there yet, but that's where
8 we're headed.
9 HON. M. MARGARET MCKEOWN: Okay.
10 MR. OBSTLER: Because it's a hall of
11 mirrors here. On the one hand, you're -- they're
12 out there saying -- I mean, can I just -- I just
13 have to read this.
14 HON. M. MARGARET MCKEOWN: Sure.
15 MR. OBSTLER: "Freedom of expression.
16 We believe people should be able to speak freely,
17 share opinions, foster open dialogue, creative
18 freedom leads to new voices, formats, and
19 possibilities. Freedom of information. We
20 believe everyone," everyone, "should have easy
21 open access to information. Freedom of
22 opportunity. We believe everyone should have the
23 chance to be discovered, build business, succeed
24 on their own. Freedom to belong. We believe
25 everyone should be able to find community



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1 support, break down barriers. These are subject
2 only to content-neutral rules with no viewpoint
3 bias whatsoever, narrow rules."
4 I mean, that sounds a lot like they're
5 taking the exact language of 20 to 50 years of
6 First Amendment jurisprudence and putting it out
7 to the public. And I understand --
8 HON. JAY BYBEE: The list of videos
9 that you put in your complaint is impressive.
10 And I haven't viewed any of those videos or the
11 ones that you contrasted them with. If your
12 representations are correct, it seems deeply
13 disturbing that they've put your stuff in the
14 restricted area.
15 But that seems to suggest that Google
16 isn't abiding by its word. That Google -- I'm
17 sorry, that YouTube is not doing what they've
18 promised, that they've somehow failed to live up
19 to their promise. I'm not sure that creates a
20 First Amendment issue.
21 MR. OBSTLER: Your Honor, I would agree
22 with you in almost 99 percent of the cases. What
23 I'm saying is, I'm on a motion to dismiss, and
24 this is a mixed question of law and fact. And I
25 have alleged that these representations, and





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1 hundreds of other facts, make them a public
2 forum.
3 Now, if we're going to draw the bright-
4 line, and as Justice White said in Hudgens, and
5 he said their beautifully, nobody has accorded
6 Marsh the proper burial that it appears to be
7 deserving. And if that's what we're talking
8 about here, if this Court is prepared to be the
9 first one to draw the line and say, under no
10 circumstances can a property owner, on its own,
11 as a free, willing, knowing property own,
12 designate its property as a public forum, well
13 then, I lose. And I --
14 HON. JAY BYBEE: It's easy enough to
15 limit Marsh to its facts, that is it's a company
16 town.
17 HON. M. MARGARET MCKEOWN: Company
18 town.
19 HON. JAY BYBEE: And what you're asking
20 us to do is to extend Marsh and declare this to
21 be an Internet company town.
22 HON. M. MARGARET MCKEOWN: Yes. And
23 I'm also saying, that if you look at --
24 HON. JAY BYBEE: That's a pretty big
25 step.





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1 HON. M. MARGARET MCKEOWN: Well, no.
2 But let's -- can we just look at Halleck for a
3 second? Because I think Judge Kavanaugh left the
4 door open, because I have to tell you, I really
5 thought about whether I should withdraw the First
6 Amendment claim. I did, after Halleck.
7 And then when I went back and read it,
8 why didn't they just simply, you know, overrule
9 the notion that a private property owner cannot
10 ever use its property? I mean, you can --
11 HON. M. MARGARET MCKEOWN: But they
12 didn't need to. And when they don't need to, you
13 know, to strike a balance, the Supreme Court
14 doesn't necessarily go back and retroactively
15 kind of parse through all its cases. We've seen
16 that time and again.
17 MR. OBSTLER: So if they're a company
18 town, and if I were to allege that they're a
19 company town, they're providing political
20 services, maybe law enforcement's using them,
21 things of that nature --
22 HON. JAY BYBEE: Well, you have an
23 analogy to a company town, you don't have a
24 company town.
25 MR. OBSTLER: Well, and one would argue





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1 that a company town is and of itself an analogy.
2 You know --
3 HON. JAY BYBEE: So what language --
4 MR. OBSTLER: Yes. Yes.
5 HON. JAY BYBEE: -- do you think and
6 what -- tell us what page.
7 MR. OBSTLER: Yes. Okay. So on Page 7
8 of 8 of the slip opinion --
9 HON. JAY BYBEE: Okay. Can you give me
10 a Supreme Court citation?
11 MR. OBSTLER: I don't believe we got --
12 we checked, right, to see if it had come out?
13 HON. JAY BYBEE: Oh, I've got it.
14 MR. OBSTLER: Oh, I apologize. It's
15 Section 2(b).
16 HON. M. MARGARET MCKEOWN: Well, you
17 have a --
18 HON. JAY BYBEE: Okay. All right.
19 2(b), that's helpful.
20 HON. M. MARGARET MCKEOWN: 2(b). Okay.
21 MR. OBSTLER: I apologize, Your Honor.
22 HON. M. MARGARET MCKEOWN: Let me just
23 (indiscernible).
24 HON. JAY BYBEE: Got it. Okay.
25 MR. OBSTLER: I'm sorry.





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1 HON. JAY BYBEE: Which paragraph? How
2 does the paragraph read?
3 MR. OBSTLER: It's the paragraph that
4 begins like this, it says, quote, "By
5 contract --" and this is the argument that -- in
6 fact the first argument and the third argument
7 in, I just want to make this point, were really
8 more of entanglement arguments. This is where
9 Judge Kavanaugh gets to the concept that it's a
10 public forum, by opening the forum up to the
11 speech. Because everybody agrees that if it's a
12 public forum, if you were to find that I've
13 alleged enough for a public forum, then we're
14 okay. But I get -- I take your point, which is
15 can they designate it.
16 And he says, "By contrast, when a
17 private entity provides a forum for speech, the
18 private entity is not ordinarily constrained by
19 the First Amendment, and may exercise
20 editorial...." Then he goes on to say, okay,
21 that, "The Hudgens decision reflects --" and he's
22 relying on Hudgens, "The Hudgens decision
23 reflects a common-sense principle: Providing some
24 kind of forum," some kind of forum for speech,
25 "is not an activity that only governmental







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1 entities have traditionally performed." I agree
2 with that. But that's not what I'm alleging
3 here. They're not just alleging some kind of
4 forum.
5 And look what he relies on. They rely
6 on Hudgens. "The Constitution by no means
7 requires such an attenuated doctrine of
8 dedication of private property to public use."
9 What I'm arguing, Your Honors, and maybe I'm not
10 going to get there, but what I'm arguing is this
11 is not attenuated. This is an express admission
12 that they have doubled down on and tripled down
13 on that they are, as a private owner, they are
14 choosing to use their property. And the slippery
15 slope --
16 HON. M. MARGARET MCKEOWN: Okay. So
17 let me go back and ask you.
18 MR. OBSTLER: Yes.
19 HON. M. MARGARET MCKEOWN: He says
20 here, in the opinion, "Merely hosting speech by
21 others is not a traditional exclusive public
22 function and does not alone transform private
23 entities into state actors subject to the First
24 Amendment." So I guess you would say hosting
25 speech doesn't -- you'd have to agree with that,



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1 because we can't -- you can't disagree with the
2 Supreme Court.
3 MR. OBSTLER: I absolutely agree with
4 that, Your Honor.
5 HON. M. MARGARET MCKEOWN: Okay. Thank
6 you. But you would then say, but if they
7 represent themselves as a public forum, then
8 that's the extra for transformation?
9 MR. OBSTLER: Well, I'm saying there
10 are a number of factors. And again, I come from
11 the State of California where we have a different
12 view of state action, and I understand that
13 that's not governing on this Court, but we do
14 have a test that works in California. We look at
15 factors. We look at the size of the speech
16 that's controlled. We look at the nature of the
17 invitation.
18 HON. M. MARGARET MCKEOWN: But we're
19 not here looking at (indiscernible) law.
20 MR. OBSTLER: Well, I think, but
21 there's no preclusion of that. We have mixed
22 questions of fact and law, this is a mixed
23 question. And --
24 HON. JAY BYBEE: Your argument is
25 interesting, because it depends on being able to



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1 say something that everybody seems to agree,
2 which is that YouTube dominates the area. And if
3 you don't have access to -- full access to
4 YouTube, then you don't have full access to a
5 worldwide forum, in which competing speech does
6 have access to that.
7 MR. OBSTLER: Correct.
8 HON. JAY BYBEE: Of course, you know,
9 Justice Holmes' response might be, well, let's --
10 why don't you just open up your own channel.
11 HON. M. MARGARET MCKEOWN: Right.
12 HON. JAY BYBEE: Let's have a Prager
13 University channel and you can put anything you
14 darn well please there, and everybody will find
15 it.
16 MR. OBSTLER: Absolutely, Your Honor.
17 HON. JAY BYBEE: That would be
18 competing speech. But you want us to say YouTube
19 has been so successful that we're going to impute
20 to it the role of the government.
21 MR. OBSTLER: No. What I -- well,
22 that's a factor, but I want to say, how else --
23 let me ask you this, if this were a government
24 website, and I --
25 HON. JAY BYBEE: That would be a



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1 completely different case.

2 HON. M. MARGARET MCKEOWN: That would

3 be a very --

4 MR. OBSTLER: Right. But why? Because

5 of title, right? Solely because of title.

6 HON. M. MARGARET MCKEOWN: No, not

7 because of title, but because it would then be

8 state action.

9 MR. OBSTLER: Well, but it's state

10 action because of title.

11 HON. JAY BYBEE: Or if the government

12 had given them --

13 HON. M. MARGARET MCKEOWN: Because of

14 reality.

15 HON. JAY BYBEE: If this were a

16 licensed right, that is if there were limited --

17 if there were limited band scope and the FCC were

18 deciding who gets band scope or not, and they

19 gave YouTube, you know, all of this broadband and

20 just let them dominate everything and it becomes

21 the only thing, it might be a very different

22 case.

23 MR. OBSTLER: Yeah.

24 HON. M. MARGARET MCKEOWN: That's

25 closer --





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1 HON. JAY BYBEE: That kind of dominance
2 --
3 HON. M. MARGARET MCKEOWN: -- to the
4 dissent.
5 HON. JAY BYBEE: -- and government
6 licensed.
7 MR. OBSTLER: Right. But again, I
8 think you're drawing a line that says you -- how
9 else can you have -- how else can a property
10 owner, or even the government have a public forum
11 without designating it? You can't do it. Even
12 the government has nonpublic forums. I can't go
13 on the Contra Costa County website and start
14 claiming it's a place for free speech. I look up
15 who the district attorneys are, or who I have a
16 case with. You have to affirmatively designate
17 your property. The only difference here is it's
18 a private property owner.
19 And all I'm saying is don't draw that
20 bright line. Give me an opportunity to go back
21 and let's do the mixed questions of fact and
22 factors on this, because even Judge Kavanaugh,
23 had he been presented with these facts, I don't
24 know he would have come out this way, if I had
25 handed him these representations, that's the





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1 problem. He's worried about property owners
2 everywhere being held to be a public forum.
3 There's simple solution here. My
4 opposing counsel, who, by the way, is a wonderful
5 personal I have a great relationship with. And I
6 love YouTube, and I want to be clear about that,
7 we are not out, as an existential threat here at
8 YouTube. Okay. He could come up here right now
9 and say, you know what, Your Honor, we're de-
10 designating. The problem goes away. He controls
11 this. This is not the concern that Justice
12 Kavanaugh had about a state law forcing a private
13 party to make a cable access station. I mean, I
14 grew up in New York City, I could tell you you
15 can't get 2.3 billion people on cable access.
16 You get Salvador Dali at 3:30 in the morning.
17 Trust me, I've seen those shows.
18 HON. M. MARGARET MCKEOWN: I'm going to
19 leave Salvador Dali where he is and --
20 MR. OBSTLER: Yes, thank you, Your
21 Honor.
22 HON. M. MARGARET MCKEOWN: -- take a
23 break for your rebuttal.
24 MR. OBSTLER: Thank you so much. I
25 really appreciate the opportunity.





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1 MR. WILLEN: Good morning, Your Honor.
2 May it please the Court. Brian Willen for Google
3 and YouTube.
4 So appellant's claims in this case are
5 based on an entirely artificial premise. YouTube
6 is not discriminating against Prager U, it hasn't
7 taken any action based on Prager U's political
8 views. But --
9 HON. JAY BYBEE: Whoa, now. I mean, if
10 that's your opening -- if that's your opening
11 line --
12 HON. M. MARGARET MCKEOWN: Put them
13 back on.
14 MR. OBSTLER: -- you're inviting us --
15 yeah, you're inviting us to make that judgment.
16 And they've issued a nice chart that, at least
17 very superficially, again, I haven't looked at
18 the videos, suggests that YouTube has really over
19 designated some things here and that it ought to
20 undesignate them and put them back on.
21 MR. WILLEN: So, of course we disagree
22 with that. The reason for starting it is just to
23 make clear that the premise of their claims is
24 artificial, but the issues before the Court are
25 strictly legal.







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1 So let me get into it, and I -- at the
2 risk of belaboring a point that I think Your
3 Honors articulated very well, let me start with
4 Halleck, which I think conclusively resolves any
5 doubt about appellant's claims in this case.
6 Now, the First Amendment state action issue was
7 not a difficult issue before Halleck was decided.
8 But Halleck specifically and expressly rejects
9 the fundamental premises on which their claim
10 rests.
11 So first, Halleck makes clear that the
12 public function test, which is the only test for
13 state action that Prager relies on, applies only
14 to a very, very few functions that were
15 traditionally and exclusively performed by the
16 government. And Halleck then goes on to say that
17 providing a forum for speech, hosting speech by
18 others is not one of those traditional and
19 exclusive public functions. So this holding
20 applies directly here.
21 So first of all, with respect to
22 YouTube, what -- the function that YouTube is
23 providing is a platform for speech. It's a video
24 hosting platform. And it's quite clear, there's
25 no dispute, that that is not a function,





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1 traditionally and exclusively, performed by the
2 government. So Halleck's statement that it is
3 not at all a near exclusive function of the state
4 to provide the forums for public expression,
5 politics, information, or entertainment, applies
6 directly to this case.
7 That's especially true when it comes to
8 online services. There is absolutely not
9 tradition in this country of the government
10 providing online services, certainly not
11 exclusively. And you could only look back to
12 this Court's own decision in Howard vs. AOL,
13 which squarely rejected the theory that another
14 large Internet platform, America Online, this is
15 back in 2000 --
16 HON. M. MARGARET MCKEOWN: Right.
17 MR. WILLEN: -- was a state actor, on
18 the theory which was alleged in the complaint
19 there, that it was a quasi-public utility. So
20 the same thing here.
21 So appellant has tried --
22 HON. M. MARGARET MCKEOWN: Do you think
23 that almost 20 years of development of the
24 Internet may have changed that?
25 MR. WILLEN: Well, it hasn't changed,





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1 at all, the rule of state action, which is the
2 rule that we're focused on here. So what the
3 Supreme Court has made clear, over, and over
4 again, particularly in the Brentwood case, is
5 that a nexus between private action and the
6 actions of the government is always required for
7 a finding of state action. That nexus is
8 completely absent in this case.
9 And so that brings me to the second,
10 and crucial point about Halleck, in particular in
11 the passages that my friend on the other side was
12 discussing. So the same argument that they've
13 advanced here, that the service provider is
14 regulating speech in a public forum, this is the
15 argument that they make relying on this Court's
16 decision in Lee vs. Katz, well Halleck expressly
17 rejected that attempt to reframe the question and
18 focus on this term "public forum."
19 So what Halleck said is that the key
20 point in thinking about a public forum, under the
21 First Amendment, is who is providing it. If the
22 government is providing the forum, it's a public
23 forum. If a private entity is providing the
24 forum, in almost all cases, it's not. The
25 exceptions are situations where the private







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1 entity may own the property, but the government
2 has some role that it's playing, whether as a
3 landlord or as a controller of what's happening
4 on the space.
5 There's simply no cases anywhere that
6 they can cite to where pure private action,
7 unconnected to the government and unconnected to
8 a traditional and exclusive government function
9 rises to the level of state action.
10 HON. M. MARGARET MCKEOWN: The
11 difficulty, and I see a lot of sympathy for their
12 argument, is that with the ubiquity of YouTube,
13 and the dominance in terms of a video platform,
14 and the fact that it's operating with no borders,
15 basically, that Google has almost the equivalent
16 of a state power when it decides who can and
17 cannot be hosted on that platform. So what is
18 their remedy?
19 MR. WILLEN: Well, as my friend pointed
20 out, there are other claims that they have
21 advanced in this case. There's a series of state
22 law claims, of course, that they made. The
23 district court here declined to exercise
24 supplemental jurisdiction.
25 HON. M. MARGARET MCKEOWN: Well, they



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1 do have a Federal Section 43(a) Lanham Act claim,
2 but put that over --
3 MR. WILLEN: And I would like to talk
4 about that at some point.
5 The state law claims are proceeding in
6 state court. We think they have no merit, for a
7 whole host of reasons. They fail to state a
8 claim, they're barred by Section 230, they're
9 barred by the First Amendment, there's plenty of
10 arguments that we have as to why they haven't and
11 cannot state a claim based on contract or unfair
12 competition or any of the other theories.
13 HON. M. MARGARET MCKEOWN: So is the
14 answer they have no remedy?
15 MR. WILLEN: Well, in this case they
16 don't, in part because nothing actual untoward
17 has happened to them, in part because the law is
18 very clear with --
19 HON. JAY BYBEE: Isn't the remedy that
20 they just have to go get their own channel?
21 MR. WILLEN: Well, I think that's
22 right. I think that if you look at Justice
23 Kavanaugh's opinion for the Court in Halleck, it
24 makes very clear, and it goes through great pains
25 to say, that the expansion of state action





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1 doctrine is a threat, potentially, to private
2 enterprise and to economic and personal liberty.
3 And so the remedy for this kind of situation is
4 to use the rights that the First Amendment
5 affords private individuals, to go and speak for
6 yourself.
7 Now, it's worth pointing out that in
8 this case not a single one of their videos has
9 actually been removed from YouTube. Every one of
10 those videos, even though some of them are not
11 available in restricted mode --
12 HON. M. MARGARET MCKEOWN: You have to
13 go into the backroom to look.
14 MR. WILLEN: Well, it's actually the
15 opposite, Your Honor.
16 HON. M. MARGARET MCKEOWN: Well,
17 restricted -- in the restricted zone. Right?
18 MR. WILLEN: Well, just to be clear
19 about what restricted mode is, it's a limited
20 opt-in feature --
21 HON. M. MARGARET MCKEOWN: Correct.
22 MR. WILLEN: -- that only about 1.5
23 percent of YouTube users are actually using at
24 any given time. So it's vastly the exception.
25 HON. JAY BYBEE: It turns out to be



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1 schools and libraries.

2 HON. M. MARGARET MCKEOWN: Right.

3 MR. WILLEN: Schools and libraries, for

4 the most part.

5 HON. JAY BYBEE: So that's an important

6 audience for them.

7 MR. WILLEN: I'm not saying that it's

8 not an important audience, but I am saying that

9 anyone who wants to see these videos on YouTube

10 can do so, simply by going to a browser, or going

11 to a computer which is not logged into restricted

12 mode. So the idea that there's some meaningful

13 censorship that's going on, because a small

14 handful of their videos are not available to the

15 small handful of YouTube users using restricted

16 mode, I think is just not accurate.

17 But in any event, let me focus, if I

18 can, on the -- what I think was the fundamental

19 argument that we heard here, which is that

20 YouTube's public statements somehow transform its

21 status.

22 HON. JAY BYBEE: One question on

23 restricted mode. So if I were looking for

24 something, if I had seen a reference to one of

25 Prager University's videos, can I go to YouTube



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1 and look for it? Will YouTube tell me that it's
2 there, but it's behind the wall?
3 MR. WILLEN: So if you have the url
4 where the video appears, you would go to a page,
5 and this is somewhat relevant, I think, to the
6 Lanham Act claim, there's a notice that simply
7 says, this video is not available in restricted
8 mode, to see it you need to turn restricted mode
9 off.
10 HON. JAY BYBEE: Okay. But if I went
11 on a general search. For example, they had a
12 series that was on rape on college campus --
13 MR. WILLEN: Yes.
14 HON. JAY BYBEE: -- and they noted a
15 number of other things that were available,
16 there's was in restricted mode, if I put in, I
17 was interested in seeing videos on the problem of
18 rape on college campuses, would I get Prager
19 University's listed on the right side when I pull
20 -- when I put in the search terms?
21 MR. WILLEN: Yeah. So if you are
22 logged into restricted mode and do a general
23 search, you will not see videos that have been
24 designated as excluded from --
25 HON. JAY BYBEE: Okay. So I will -- so





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1 the answer is, if I went to the public library
2 and they were on restricted mode, then I will
3 never know that Prager University has prepared a
4 video on that?
5 MR. WILLEN: If the library computer
6 was logged into restricted mode.
7 HON. JAY BYBEE: Right.
8 HON. M. MARGARET MCKEOWN: But it's
9 solely a question of, in terms of, like, your
10 privacy, whatever you log in and whatever your
11 restrictions are that you put on your YouTube
12 account?
13 MR. WILLEN: Yes, it is browser
14 specific.
15 HON. M. MARGARET MCKEOWN: Browser
16 specific.
17 MR. WILLEN: And it's -- the default is
18 for restricted mode to be off. So someone has to
19 make the affirmative decision --
20 HON. M. MARGARET MCKEOWN: Has to
21 affirmatively --
22 MR. WILLEN: -- to turn it on.
23 HON. M. MARGARET MCKEOWN: -- to put it
24 on.
25 MR. WILLEN: And as I say, it's about



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1 1.5 percent of YouTube users on any given day,
2 that are logged in as restricted mode users.
3 HON. M. MARGARET MCKEOWN: But nothing
4 would prevent them from taking those videos and
5 putting them on some other platform, correct?
6 MR. WILLEN: Oh, of course, not. Of
7 course, not. And so --
8 HON. M. MARGARET MCKEOWN: And then it
9 would just be a question of search word
10 capability and results as to whether they would
11 show up on rape on college campuses, or academic
12 freedom, or whatever one wants to look at a video
13 about?
14 MR. WILLEN: Yes. And they might well
15 show up in Google search results, which are using
16 a different technology and not connected to what
17 YouTube is restricting or not restricting.
18 So there's any number of ways, if they
19 actually want people to see these videos, for
20 people to see these videos. Whether that's
21 hosting them on a different platform, whether
22 that's hosting them on their own platform, or
23 whether it's just having them be on the general
24 YouTube service, which as I say they are.
25 HON. M. MARGARET MCKEOWN: And what's





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1 the appeal process within YouTube, if I want to
2 take myself out of a restricted mode and make
3 sure I'm not in that?
4 MR. WILLEN: Sure. So YouTube does
5 have an appeal process which Prager has used for
6 most, if not all, of the videos that are at issue
7 in these cases. Based on that appeal some --
8 YouTube looked at the videos and some of them
9 were designated differently than they had been
10 based on the AI that was used as the first cut.
11 So all of the videos at issue have now been
12 reviewed by humans who have made the
13 determination, either that they are eligible or
14 not eligible based on the published guidelines
15 that YouTube has for how it operates restricted
16 mode. So the appeal process exists and Prager's
17 actually used it to its advantage in this case.
18 So if I could talk just about the
19 public statements. So the idea that YouTube has
20 designated itself as a public forum is based on
21 both a fundamental misunderstanding of the law
22 and of the facts. So just as the Court in
23 Halleck made very clear, being a platform for
24 speech doesn't subject a private business to the
25 First Amendment. Simply saying you're a platform







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1 for speech certainly doesn't create state action.
2 And Prager U, despite this being the centerpiece
3 of their argument, has not cited a single case
4 that suggests otherwise.
5 That's not a surprise, the First
6 Amendment isn't a switch that gets turned on or
7 off based on how a private business describes
8 itself. State action is based on substance, not
9 on words. It requires a nexus to the government
10 and it requires, in a case like this, engaging,
11 actually engaging in a set of functions that are
12 traditionally and exclusively performed by the
13 government.
14 Now, they've relied on this sort of
15 stray fragment from the Supreme Court's decision
16 in Cornelius vs. NAACP, about private property
17 being dedicated to public use. But -- and this
18 is, I think, maybe the most important passage in
19 Halleck, in Footnote 3 of the Court's opinion,
20 Halleck expressly repudiated Cornelius' dictum.
21 The Court made clear that the dictum was, quote,
22 "imprecise and overboard," and, quote, "not
23 consistent with this Court's cases."
24 So Halleck expressly rejected any
25 suggestion that private property owners are





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1 subject to the First Amendment constraints
2 whenever they dedicate their private property to
3 public use or otherwise open their property for
4 speech. So I think as a matter of law that rules
5 out any sort of dedication argument.
6 More broadly, the idea that using this
7 dictum in Marsh about opening your property for
8 speech somehow creates a weapon that courts can
9 use to subject private online services to the
10 First Amendment, I think is inconsistent with 40
11 years of Supreme Court cases, including the line
12 of cases from the 1970's, from Central Hardware,
13 to Hudgens, to Lloyd vs. Tanner that have
14 expressly limited Marsh, as the Court recognized,
15 to its unusual facts which have no equivalent
16 here.
17 And just one more point about the
18 dedication argument. The idea that it would
19 actually be a good result for the First Amendment
20 if we, or any other online service, could turn
21 the First Amendment on or off simply by saying
22 we're a public forum or we're not, we're
23 committed to free expression or we're not, is
24 really a scary and unfortunate result. It would
25 create, obviously, very powerful incentives for





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1 online services to renounce any kind of
2 commitment to allowing people to use their
3 platforms for speech, and result in a very
4 different and much more clamped down and closed
5 Internet, which I think is exactly the result
6 that Prager claims not to want. So there's a
7 very perverse result to this idea that we should
8 just be in control of whether we're a state actor
9 by what we say.
10 So, in short, the core First Amendment
11 argument that appellant has advanced in this
12 case, it's bad law, it's not consistent with the
13 facts, and it's even worse policy. Judge Kho was
14 right to reject it and that ruling should be
15 affirmed.
16 I do want to turn, in the five minutes
17 I have left, and talk about the Lanham Act claim,
18 which we haven't really got a chance to speak
19 about much. So the district court was right to
20 reject appellant's effort to transform YouTube's
21 operation of restricted mode into false
22 advertising.
23 The complaint is extremely cryptic
24 about what the Lanham Act claim in this case is
25 supposed to be. There's actually not a single





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1 statement that is identified in the complaint as
2 supposedly being false advertising.  If you look
3 at Paragraph 117 and 118 of the complaint, that's
4 Page 940, 941 of the excerpts of record, you will
5 see no actual statements identified, which we
6 don't think satisfies Rule 9(b) and that would be
7 a basis, in and of itself, for affirming the
8 dismissal of the claim.
9 HON. M. MARGARET MCKEOWN:  Well, why do
10 you need Rule 9(b)?  I mean, isn't it a
11 misrepresentation claim --
12 MR. WILLEN:  It is --
13 HON. M. MARGARET MCKEOWN:  -- not
14 necessarily a fraud claim?
15 MR. WILLEN:  It is -- there are cases
16 that hold that Rule 9(b) applies to false
17 statement -- false advertisement cases under the
18 Lanham Act.
19 HON. M. MARGARET MCKEOWN:  Yes.
20 MR. WILLEN:  Whether or not Rule 9(b)
21 applies, they haven't alleged anything here that
22 would plausibly constitute false advertising.  So
23 let me just talk briefly about --
24 HON. M. MARGARET MCKEOWN:  Well, I
25 guess he can speak for himself, but I think the -





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1 - I guess they would characterize it as
2 derogatory, not necessarily false. It's -- and
3 that is it's -- you've got this big square red
4 face out there and the fact that is sort of an
5 Internet symbol of disapproval.
6 MR. WILLEN: Yeah.
7 HON. M. MARGARET MCKEOWN: And that is
8 Google, YouTube's stamp on their films. And that
9 association is basically putting the imprimatur
10 of YouTube as to the nature of their films. So
11 why wouldn't that be, at least on a motion to
12 dismiss, sufficient to be false designation or
13 derogatory, in general, unfair competition under
14 the Lanham Act?
15 MR. WILLEN: Sure. Let me talk about
16 that. So, first of all, as I said, that
17 statement, which is referred to in their briefs
18 and in this Court is actually not referenced at
19 all in their complaint. It's just, it's not in
20 there. It's certainly not in there in support of
21 their Lanham Act claim. They were actually given
22 leave to amend by the district court and chose
23 not to do it, so I think they're stuck with the
24 complaint that they have.
25 But even if that statement were







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1 actually before the Court, so here's what that
2 statement says, it's a notice that says, simply,
3 "This video is unavailable with restricted mode
4 enabled. To view this video, you will need to
5 disable restricted mode." That's what it says.
6 HON. M. MARGARET MCKEOWN: Right.
7 MR. WILLEN: So, first of all, that
8 statement, as Judge Kho found, is not commercial
9 advertising or promotion under the Lanham Act.
10 It's not commercial speech, it's a purely
11 informational notice. There's no allegation in
12 the complaint that the statement was made for the
13 purpose of influencing consumers to buy
14 defendant's goods or services, which is the test
15 that this Court articulated in the Coastal
16 Abstract case. So that's the first problem.
17 The second problem is that the
18 statement just isn't false or misleading, it is a
19 hundred percent true. The videos are not
20 available in restricted mode, and if you want to
21 see them you have to turn restricted mode off.
22 So the fact that Prager might disagree with
23 YouTube about the reasons that the videos were
24 excluded doesn't make this sort of purely factual
25 statement untrue. It's a background disagreement





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1 that doesn't affect the -- whether the statement
2 is misleading or not.
3 And then the third point is that they
4 have to show proximate cause. They actually have
5 to allege that this statement, by itself, not the
6 underlying exclusion of their videos from
7 restricted mode, but the statement itself, caused
8 them to suffer a commercial injury, that is a
9 harm to reputation or sales. The complaint
10 doesn't do that, and I don't think it could,
11 because the idea that even if someone interpreted
12 that statement to say that YouTube had found the
13 videos satisfy one or more of the criteria that
14 causes videos not to be available in restricted
15 mode, that would harm their reputation, I think
16 is just not plausible.
17 So just to give an example, one of the
18 categories, and in fact the category that is most
19 relevant here, is the category of mature
20 subjects, which are videos that include specific
21 details about events related to terrorism, war,
22 crime, and political conflicts. The idea that
23 even if YouTube had said, hey, Prager, your
24 videos include details about war, your videos
25 include details about political conflicts, that





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1 that statement would somehow have harmed their
2 reputation or cause them to lose sales is just
3 not a plausible allegation, even if they had made
4 it, which they didn't. So I think for that
5 reason, Judge Kho got it exactly right, that
6 these kinds of statements do not, and cannot give
7 rise to a claim under the Lanham Act.
8 My time is about to expire, so I will
9 stop there.
10 HON. M. MARGARET MCKEOWN: Thank you.
11 You have some time for rebuttal.
12 MR. OBSTLER: Thank you, Your Honor.
13 I'd like to show you what comes up when you go to
14 restricted mode.
15 HON. M. MARGARET MCKEOWN: Right.
16 MR. OBSTLER: You've seen that, right,
17 with the red face?
18 HON. M. MARGARET MCKEOWN: Yes.
19 MR. OBSTLER: And then, what they're
20 doing is they're saying my client's content
21 contains nudity, it contains obscenity, it
22 contains graphic violence, that's what they're
23 saying about my client's content. You should
24 look at those videos, they don't contain any of
25 that. And they're doing that because they have





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1 their own content and they're promoting their own
2 content on the site. That is a classic Lanham
3 Act claim.
4 They are -- by making the
5 representation that they are viewpoint neutral,
6 they are making a statement of fact that my
7 client's content contains obscenity, violence,
8 graphic nudity, et cetera. That's why it's in
9 restricted mode.
10 HON. M. MARGARET MCKEOWN: What does --
11 where in the complaint is the proximate cause?
12 MR. OBSTLER: Paragraphs 41 through 44
13 allege the statements. And in the Lanham Act
14 portion of the complaint, we allege the proximate
15 cause of the harm.
16 But, Your Honor, if this is a pleading
17 issue, the reason that I didn't amend the
18 complaint had nothing to do with proximate cause.
19 Judge Kho told me, as a matter of law, at the
20 case management conference, that the statements
21 were puffery. If she's making the statements are
22 puffery, I can't amend the complaint, that's a
23 ruling of law.
24 If you think that I need to go back and
25 allege that, I will allege it. Because, you know



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1 that 1.5 percent he's talking about, that's 28.5
2 million people a day. That is classic Lanham.
3 They are using restricted mode --
4 HON. M. MARGARET MCKEOWN: Do we have
5 any --
6 MR. OBSTLER: -- to stigmatize -- I'm
7 sorry.
8 HON. M. MARGARET MCKEOWN: -- do we
9 have any ruling from Judge Kho that these are
10 puffery?
11 MR. OBSTLER: Yes. That's the --
12 HON. M. MARGARET MCKEOWN: That's in
13 the case management?
14 MR. OBSTLER: No, that's in her order.
15 She dismissed it as a matter of law that their
16 statements were pure puffery and are not
17 actionable because they're not statements of
18 fact.
19 And I'm saying that when you represent
20 to the public that this is a viewpoint neutral
21 applying equally to all, you're making a
22 statement of fact that any judge can see, when
23 they look at those videos, that my client's
24 content contains all this obscenity. And that's
25 what Prager is most upset about, it's the



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1 stigmatization that YouTube is using, and doing
2 it selectively to promote their own content.
3 They're one of the largest content
4 manufacturers and producers in the world now, and
5 they subject certain people's content to their
6 regulations, and they don't subject their own.
7 That's unfair competition, but it's also classic
8 Lanham.
9 And at a minimum, I should be given an
10 opportunity to get discovery and go back and
11 prove it. If I lose on summary judgment, so be
12 it. But I didn't even get out of the gate here,
13 I didn't even get a chance to look at the
14 algorithm. I really would love to see what that
15 code is in that algorithm, and I will get that if
16 you give me the opportunity to do so.
17 I also want to address two other quick
18 issue on Lanham, if I may. I've got 20 seconds
19 here. Implications are enough, and that would be
20 the William Morris case, 911 F.2d 242 - 245, need
21 not be made in a formal advertising campaign,
22 that would be 173 F.3d 725 at 735.
23 HON. M. MARGARET MCKEOWN: So, I mean,
24 obviously on the advertising by implication,
25 under the Lanham Act, you need what is





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1 identification of the advertisement or promotion,
2 and you're saying it's simply that notice. Is
3 that what you're saying?
4 MR. OBSTLER: It's the notice that goes
5 with the rules that every consumer sees, that the
6 reason you're in restricted mode because you
7 contain obscenity, nudity, violence, and all
8 sorts of terms. I mean, read -- if you read our
9 complaint --
10 HON. M. MARGARET MCKEOWN: I think we
11 have your point in mind. Thank you.
12 MR. OBSTLER: Yeah. Okay.
13 HON. M. MARGARET MCKEOWN: I appreciate
14 your argument.
15 MR. OBSTLER: Thank you, Your Honors, I
16 really appreciate the time. Thank you so much.
17 HON. M. MARGARET MCKEOWN:
18 We'd like to thank all counsel for the argument
19 today. The case of Prager University vs. Google,
20 LLC is submitted.
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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certify that the

4 foregoing transcript is a true and accurate

5 record of the proceedings.

6

7

8 Sonya M. Ledanski Hyde

9

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16 Date: August 30, 2019

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***Prager University v. Google LLC and YouTube, LLC***
**State of California Court of Appeal, Case No. H047714**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 S. Figueroa Street, Suite 2000, Los Angeles, CA 90017.

On May 18, 2022, I served true copies of the following document(s) described as **EXHIBIT A IN SUPPORT OF APPELLANT'S ANSWERING BRIEF BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION** on the interested parties in this action as follows:

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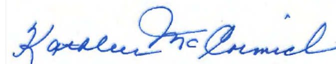

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| **VIA FED EX**<br>Hon. Sunil R. Kulkarni<br>Superior Court of California<br>County of Santa Clara<br>191 N. First Street<br>San Jose, CA 95113 | *Trial Court* |

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