Case No. 18-15712

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PRAGER UNIVERSITY

Plaintiff and Appellant,

vs.

GOOGLE LLC and YOUTUBE, LLC

Defendants and Respondents.

APPELLANT'S OPENING BRIEF

Appeal From The United States District Court, Northern District of California, Case No. 5:17-cv-06064-LHK
The Honorable Lucy H. Koh

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, appellant Prager University ("PragerU") states as follows: PragerU is an educational 501(c)(3) nonprofit company with its principal place of business in the Los Angeles County, California.

DATED: August 23, 2018

Respectfully submitted,

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I. INTRODUCTORY STATEMENT

This case presents two issues of law concerning the regulation of protected speech on the global social media video platform YouTube:

First, whether Defendants/Appellees, Google LLC's and YouTube, LLC's ("Google/YouTube" or "Appellees") regulation of speech on the YouTube platform is "State action" subject to judicial scrutiny under the First Amendment because Google/YouTube expressly designate and invite the public to use YouTube as a public forum for "freedom of expression." *See Lee v. Katz*, 276 F.3d 550, 554-57 (9th Cir. 2002) (private party's regulation of speech on property designated as a public forum is State action under the First Amendment).

Second, whether Google/YouTube's misrepresentations to the public that YouTube is a viewpoint neutral, public forum for "freedom of expression" constitute false and deceptive advertising and anticompetitive business practices under the Lanham Act.

Whatever the answer to these questions, one thing is clear: Google/YouTube cannot have it both ways. They cannot both promise and induce the public to use YouTube as a public forum for "freedom of expression" and "viewpoint neutrality" to profit from and monetize free speech and then proceed to regulate and restrict

that speech in ways that violate the fundamental rules and principles that define "freedom of expression" and "viewpoint neutrality" under federal law.

II. JURISDICTIONAL STATEMENT

A. Basis For District Court's Subject-Matter Jurisdiction

PragerU appeals the Order dated March 26, 2018 ("Order") and Final Judgment dated April 18, 2018 ("Judgment") of U.S. District Court for the Northern District of California (San Jose Division) (Koh, J.) dismissing all federal claims asserted in its Complaint against Defendants/Appellees Google LLC, and its subsidiary, YouTube, LLC under Federal Rule of Civil Procedure 12(b)(6): (i) under 42 U.S.C. § 1983 for violations of the First Amendment of the Constitution of the United States (First Amendment"); (ii) under the Lanham Act, 15 U.S.C. § 1125, *et seq.*, (the "Lanham Act"); and (iii) for declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.[1] The district court, therefore, had subject matter jurisdiction over the claims in this case pursuant to 28

[1] PragerU does not appeal the dismissal without prejudice the claims for relief asserted under California law below because, in dismissing those claims under Federal Rule of Civil Procedure 12(b)(1) for lack of federal subject matter jurisdiction after the court declined to exercise supplemental jurisdiction, the district court invited PragerU to assert those claims in a state court action. ER44-45; 89-90. PragerU intends to file that state court action within the next 30 days.

U.S.C. §§ 1331, 1338, 1343, 1367, and 2201-02; and 42 U.S.C. §§ 1983, 1985 and 1988.

B. Basis For Court Of Appeal's Jurisdiction

On April 18, 2018, the district court entered judgment against Plaintiff and in favor of Defendants, dismissing the federal law claims on the merits under Federal Rule of Civil Procedure 12(b)(6) and the state law claims for lack of subject matter jurisdiction under Federal Rule Civil Procedure 12(b)(1). ER44-45. No post-judgment motions were filed. Accordingly, this Court has appellate jurisdiction to review the judgment under 28 U.S.C. § 1291.

C. Timeliness Of Appeal

This appeal is timely under Federal Rule of Appellate Procedure 4(a)(4)(A). After the district court entered Judgment on April 18, 2018, Plaintiff filed its Notice of Appeal on April 23, 2018. ER1-2.

D. Finality Of Judgment

The judgment entered by the district court is final and disposes of all claims and defenses asserted in the proceedings below. ER44-45.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is Google/YouTube's regulation and restraint of free speech on YouTube "State action" subject to judicial scrutiny under the First Amendment because YouTube invites the public to use the site as a forum for "freedom of expression"?

2. Are Google/YouTube's misrepresentations, deceptive solicitations, and false promises that YouTube is a viewpoint-neutral forum for "freedom of expression" actionable under the Lanham Act?

IV. STATEMENT OF THE CASE

Appellant is a 501(c)(3) tax exempt, nonprofit educational organization that produces and uploads short educational videos on YouTube that discuss historical, religious and current events. It filed this lawsuit to redress Google/YouTube's unlawful use of subjective content-based restrictions on speech to block viewer access to and monetization of more than 30 educational videos[2] that PragerU uploads to YouTube. Google/YouTube cannot have it both ways: induce the public to post and view video content on YouTube with promises and express

[2] Since the district court issued its Judgment, YouTube has restricted an additional 40 PragerU videos bringing the total number of PragerU's videos that YouTube restricts to approximately 80.

representations to users that the site is a viewpoint-neutral, public space for "freedom of expression" and then turn around and restrict viewer access to and demonetize video content in their sole discretion for any reason, or no reason at all. ER913-26.

In dismissing the lawsuit, the district court relied on two legal grounds: (i) the regulation of speech by a private party in a public forum is not State action subject to scrutiny under First Amendment (ER73-81); and (ii) Google/YouTube's false representations to the public that YouTube is a viewpoint-neutral place for "freedom of expression" and viewpoint neutral regulation of speech are not actionable under the Lanham Act. ER81-89.

A. STATEMENT OF FACTS

For convenience and brevity, PragerU sets forth the core facts that form the basis for its appeal. With respect to any facts, background context, or legal claims not discussed below or omitted because of word count considerations, PragerU respectfully refers the Court to the Complaint (ER901-43), the memoranda of points and authorities, declarations, and evidentiary exhibits submitted by the parties in support of and in opposition to the parties' respective "cross-motions"

for a Preliminary Injunction (ER855-900; 186-291; 140-162) and to Dismiss (ER505-576; 292-504; 166-185), all of which are included in the record on appeal.

1. The Parties

PragerU is "an educational 501(c)(3) nonprofit company" founded by Dennis Prager whose mission is to "provide conservative viewpoints and perspectives on public issues that it believes are often overlooked or ignored." ER912. PragerU fulfills its mission by, among other things, producing and posting short educational videos that "espouse[] viewpoints and perspectives based on conservative values." ER912. Although PragerU "is not an academic institution and does not offer certifications or diplomas," its educational videos are aimed at engaging with high school, college, and graduate school-age audiences on historical, cultural, religious, and political issues that are often ignored by other media, news, or educational organizations. ER591.

YouTube, LLC is wholly owned by Google LLC. ER908. Google/YouTube own and operate YouTube, the largest public video sharing social media platform in the history of the world. *Id.* Both companies are organized for profit under Delaware limited liability company laws and both have their principal places of business in Mountain View, California. *Id.* Together,

Appellees own, operate, regulate, and control YouTube, including the regulation of video content that appears on the site. *Id.*

2. Defendants' Business Model Is To Monetize Free Speech For Profit By Designating YouTube As A Public Forum For Freedom Of Expression

With a market value that is larger than the Gross Domestic Products of all but the very largest economies of the world, Google/YouTube profit handsomely from YouTube's status as the paradigmatic public square of the twenty-first century. YouTube has indisputably become the most comprehensive forum for individual and collective expression in the history of the world. As alleged in the proceedings below:

- More than 1.3 billion people – both paid subscribers and otherwise – currently use YouTube. ER902.

- More than 30 million members of the general public visit the platform every day. *Id.*

- 400 hours of videos are uploaded to the service every hour, much of which includes paid advertising. *Id.*

- More video content has been uploaded to Google/YouTube than that created by the U.S. television networks during the last 30 years. *Id.*

- The total number of hours spent watching video content on YouTube has been estimated as 3.25 billion. *Id.*

- One report estimated that 10,113 YouTube videos generated over 1 billion views. *Id.*

- The average number of mobile YouTube views is estimated to be about 1 billion per day. *Id.*

- YouTube videos can be navigated in at least 76 different languages. *Id.*

YouTube is also a social media platform, "allow[ing] users to upload, view, rate, share, add to favorites, report, [and] comment on videos" in a place where both viewers and content creators can interact and communicate with each other. ER912-13.

In operating YouTube, Google/YouTube monetize and commercially profit from free speech by running YouTube as a public forum where the public is

invited to engage in "freedom of expression" by submitting, commenting on, rating and viewing video content. ER187; 908-10; 913-14. YouTube's business model is based entirely on Google/YouTube's public invitation to use the platform to engage in "freedom of expression," inducing the public to provide it with historically massive amounts of video content, which it then turns around and monetizes for Google/YouTube through advertising and paid subscriptions. *Id.*

Specifically, Google/YouTube invite the public to use the platform as a forum for "freedom of expression" where users enjoy "four essential freedoms" that serve to "define" the YouTube experience:

> "1. **Freedom of Expression**: We believe people should be able to speak freely, share opinions, foster open dialogue, and that creative freedom leads to new voices, formats and possibilities.
>
> "2. **Freedom of Information**: We believe everyone should have easy, open access to information and that video is a powerful force for education, building understanding, and documenting world events, big and small.
>
> "3. **Freedom of Opportunity**: We believe everyone should have a chance to be discovered, build a business and succeed on their own terms, and that people—not gatekeepers—decide what's popular.
>
> "4. **Freedom to Belong**: We believe everyone should be able to find communities of support, break down barriers, transcend borders and come together around shared interests and passions."

ER625; 868.

Google/YouTube tell the public that YouTube provides "one of the largest and most diverse collections of self-expression in history" and that, over the preceding ten years, the platform has "given people opportunities to share their voice and talent no matter where they are from or what their age or point of view." ER910; *see also* ER82. According to Google/YouTube, the goal is to "create a world where everyone can be heard," and to give people the tools to "us[e] your voice and videos to help make the kind of social change you believe in." ER650; 910. Google/YouTube also hold YouTube out to the public as "a community where everyone's voice can be heard" and "a place to express yourself and show the world what you love." ER650; 659; 910.

To convince users that YouTube will protect and ensure the exercise of the "four essential freedoms" by members of the public who visit or use the platform, Google/YouTube warrant that YouTube uses "neutral" content-based filtering to regulate videos under which the "same standards apply to all" and no one's content will be restricted because of a user's viewpoint, perspective, or identity. ER197.

In addition to representations to the general public, Google/YouTube specifically declared in testimony before Congress that YouTube is a "public

forum," in which the regulation of speech is subject only to viewpoint neutral content-based regulations. ER110-12.

3. YouTube's Use Of Restricted Mode And Monetization To Unlawfully Restrain Speech

Google/YouTube engage in content-based regulation of video content on YouTube that is fundamentally incompatible with and in direct violation of its promise of "freedom expression," as defined under federal law. They admit, for example, that the use of content-based regulations and filters on speech is subject to "pressure" to restrict content from special interest groups, governments, and YouTube advertisers. ER190; 193.

Google/YouTube use a multitude of different and potentially unlawful content-based restrictions, filtering tools and regulations on speech and expression. The two at issue in this case are dubbed "Restricted Mode" and "Video Monetization." ER193-95; 913-18. Both are content-based restrictions that use vague, broad, ambiguous, subjective, and purely discretionary criteria. Google/YouTube use these regulations and filters to censor or restrict protected speech for any reason they see fit, including animus or profit, or for no reason at all. ER913-26.

a. Restricted Mode

YouTube's Restricted Mode is a "setting that gives users the option to automatically filter out videos that ***YouTube has determined may contain mature content.***" ER191 (emphasis added). Once enabled, the user will not see, know of the existence of, or have any autonomy to access videos that are blocked in Restricted Mode. Google/YouTube, not the user, unilaterally and in their sole and unfettered discretion determine what videos are blocked in Restricted Mode because they are "likely to be inappropriate for the more sensitive members of its audience." ER192.

To ensure that Google/YouTube have absolute and unfettered discretion to restrict whatever they deem "inappropriate," Restricted Mode is embedded with criteria that are so vague, broad, ambiguous, subjective, and rife with unbounded discretion that the Mode amounts to nothing more than a pretext for Google/YouTube to restrain access to any video content for any or no reason at all, including viewpoint and identity bias (and pure profit). For example, at the core of this filtering regulation is classic "catch-all" language that is the hallmark of an unconstitutional restraint on free speech under the First Amendment: "**Mature subjects:** Videos that cover specific details about events related to terrorism, war,

crime, and political conflicts that resulted in death or serious injury, ***even if no graphic imagery is shown***." ER193-94 (emphasis added). Moreover, Google/YouTube also use undisclosed "internal guidelines," entirely unknown to their users, that "permit" "YouTube's reviewers [to] categorize content" based purely on Google/YouTube's subjective determination of "context" – resulting in some videos being tagged with the "Restricted Mode" while other videos with similar content remain untouched. *Id.* And if that is not enough, Google/YouTube admit that they will restrict access to video content, as in the case of PragerU, even when the content in the video does not violate any of YouTube's "internal" or public criteria, including Restricted Mode, Community Guidelines, and separate "Age-based Restrictions," because Google/YouTube contend they are free to block or restrain speech on YouTube for any reason (fair or not), for profit, or for no reason at all. ER191; 262. All of this results in Restricted Mode blocking access to and otherwise censoring all videos that Google/YouTube deem "inappropriate" for "sensitive" audiences amounting to anywhere between 1.5 and 2 percent of more than one billion YouTube users. ER914.

Many users do not enable Restricted Mode by choice: it is often the case that network administrators at businesses, libraries, and educational institutions, not the

actual user, control when Restricted Mode is enabled. In such circumstances, individual users like students or employees cannot disable Restricted Mode or de-restrict particular videos or channels absent action by network administrators or managers. ER631. Restricted Mode thus disproportionately impacts users on network computers they do not control, including high school, college and graduate students who comprise PragerU's target audience. ER629; 634; 694; 819.

b. Demonetization

Google/YouTube use similar criteria to demonetize PragerU videos, a process whereby third parties are prevented from purchasing advertising in PragerU's videos. This is particularly nefarious, because Google/YouTube engage in this practice while simultaneously producing and posting their own content on YouTube that they monetize through third-party advertising in direct competition with other content creators like PragerU. As such, Google/YouTube use their demonetization filtering and restriction tools as a pretext to gain an unfair advantage over other third-party content creators. ER839-40; 912-14; 921-24; 940.

4. Google/YouTube Restrain Speech Based On Speaker Viewpoint Or Identity And Silence Speakers Based On Discriminatory Animus

Google/YouTube contend that Restricted Mode and Demonetization regulation and filtering are intended to limit what they deem in their sole discretion to be "inappropriate." Whatever "inappropriate" means to Google/YouTube, they concede that Restricted Mode or Demonetization content-based restrictions are not applied neutrally, consistently, or equally to all speakers. Google/YouTube even admit that their filtering tools and protocol can result in restraints on content when the content is not considered "inappropriate" but because Google/YouTube otherwise object to the political viewpoint, identity, topic or context of the video, or the commercial status of the content creator. *See* ER189-92. By way of example only, in August 2017, Google/YouTube admitted that they were improperly and discriminatorily restricting video content posted by users who identified as LGBTQ; they purportedly agreed to change the filtering tools and protocol to remedy that viewpoint and identity discrimination. ER632.[3]

[3] Furthermore, internal company emails describe a dysfunctional workplace, dominated by a culture of political animus towards perspectives that Google/YouTube deem "incorrect," including the use of blacklists, public shaming, and adverse employment sanctions, which are imposed on employees

In the case of PragerU, Google/YouTube similarly restrain videos not because the videos contain "inappropriate" content (they do not), but because, as the private owners of YouTube, Google/YouTube believe they have an absolute right to restrain speech on YouTube for any reason they see fit, whether for profit, viewpoint bias or identity animus. ER270-71. Furthermore, the video content analytics asserted in the Complaint demonstrate that Google/YouTube restrict *PragerU*'s videos, but allow other, *preferred* users to air videos containing profanity, graphic violence, or other offensive material with no viewer access restrictions. ER128-31; 823-24; 849-52; 926-32.

Since the filing of the underlying action, Google/YouTube have continued to restrict approximately 30 PragerU videos. ER823-24; 848-52. As described above, Google/YouTube's discriminatory use of Restricted Mode is especially damaging to PragerU because PragerU is unlawfully restrained from reaching its target audience of persons between the ages of 13 and 34, many of whom access the site on computer networks at high school, college, graduate school, or

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whose personal viewpoints on politics, religion, gender, and race do not comport with Google/YouTube's "correct" views and beliefs. ER110-12; 458-60.

businesses that do not allow an individual user to turn Restricted Mode off. *Id.* Most of PragerU's viewership is under the age of 35. ER823.

5. Defendants Continue To Restrict PragerU's Videos

For more than a year now, PragerU has communicated with and requested that Defendants remove Restricted Mode from PragerU's videos. In making a good faith effort to resolve the continued restriction of its videos, PragerU has repeatedly sought clear and specific guidance as to why the content is not eligible to be viewed other than in Restricted Mode. And despite multiple communications between PragerU and Defendants, Defendants continue to restrict PragerU videos and have provided no reasonable explanation for, or guidance about, the restrictions other than to sometimes say that the videos mention events that involve genocide, war, or terrorism. ER821-22; 829-48.

As any person can see, these and other PragerU videos do ***not*** contain profanity, graphic violence or nudity, do ***not*** advocate violence, and do ***not*** contain hate speech that seeks to incite violence. They ***fully*** comply with the letter and spirit of all of Defendants' Terms of Service, Community Guidelines, and statements of policy. ER904, 906, 919. There is no explanation for their continued restriction, particularly as videos on similar subject matter posted by

other speakers — including videos containing profanity, graphic violence, or other content that plainly violate Defendants' Terms of Service, Guidelines, and policies — continue to be available, even in Restricted Mode. ER128-31; 823-24; 848-52; 926-32. Defendants' bias and animus toward PragerU is so pronounced that identical video content posted by unauthorized users who ***copied that content from PragerU videos*** is ***not*** restricted.[4] ER925-26. YouTube even goes so far as to restrict a PragerU interview with Professor Alan Dershowitz about the same-sex marriage wedding cake case recently decided by the Supreme Court. (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, Supreme Court Case No. 16-111). ER824; 854.

B. THE PROCEEDINGS BELOW

On October 23, 2017, Plaintiff Prager University ("Plaintiff") filed this Action against Defendants YouTube, LLC ("YouTube") and Google LLC ("Google") (collectively, "Defendants") to redress Defendants' arbitrary and capricious restraints and viewer access restrictions on certain educational videos

[4] *See* ER925-26. Two of the previously unrestricted copycat videos are now restricted. Strangely, one of PragerU's original and previously restricted videos is now "unrestricted" while the previously unrestricted "copycat" video is now "restricted."

produced and uploaded to the YouTube video platform. In its Complaint, Plaintiff asserted claims under federal law for violations of the First Amendment (42 U.S.C. § 1983 and 28 U.S.C. § 2201) and Lanham Act (15 U.S.C. § 1125, *et seq.*), as well as state law claims under Article I, Section 2 of the California Constitution (the "Liberty of Speech Clause"), the Unruh Civil Rights Act, Cal. Civ. Code § 51, *et seq.*, the Unfair Competition Law, § 17200, *et seq.*, and contractual breach of the implied covenant of good faith and fair dealing, contractual obligations, and anticompetitive and unfair business practices. Plaintiff sought equitable and legal relief, including an injunction and declaratory judgment. ER69; 932-42.

On December 29, 2017, pursuant to stipulation and order negotiated by the parties, Plaintiff filed a motion for preliminary injunction. ER855-900. Defendants also filed a Motion to Dismiss all claims under Federal Rule of Civil Procedure 12(b)(6) ER545-76. On March 26, 2018, the district court issued an order dismissing the federal claims on the merits under Federal Rule of Civil Procedure Rule 12(b)(6) and declining to exercise supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(a) and Federal Rule of Civil Procedure 12(b)(1). ER65-91.

On April 4, 2018, the district court convened a case management conference (CMC) to discuss, among other things, whether any amendments to the federal claims would be futile in light of the court's Order dismissing the two federal claims on the merits and its refusal to exercise supplemental jurisdiction over the state law claims. ER46-64. At the CMC hearing, PragerU sought clarification of the district court's ruling, including the court's belief that PragerU must plead that YouTube is a "company town" that provides ***all*** of the functions and services traditionally and exclusively reserved for government to state claims under the First Amendment. ER51, 54-55. In so doing, PragerU unsuccessfully sought to raise the Ninth Circuit's decision in *Lee* that private regulation of protected speech in a designated public forum is an exclusive government function that is "State action" subject to First Amendment scrutiny. But the court was not interested. *See* ER52-53 (attempting to cite *Lee v. Katz*, 276 F.3d at 554-56 (the regulation of speech by a private party on property designated as a public forum is "quintessentially an exclusive and traditional public function" sufficient to establish that a private party is a "State actor[]")).

After reviewing the court's Order, and its statements regarding "State action" and "puffery" during the case management hearing, Plaintiff notified the

district court that the addition of new factual allegations in the complaint could not overcome the rigid legal basis and reasoning for district court's dismissal of the First Amendment and Lanham Act claims. ER58-60; 92-96. Accordingly, on April 18, 2018, the district court entered final judgment dismissing the First Amendment and Lanham Act claims with prejudice, and the state law claims without prejudice, in order to allow the Plaintiff to appeal the dismissal of the federal claims in this Court and to file and prosecute the claims under California Law in a state court. ER44-45.

On April 23, 2018, Plaintiff filed a timely Notice of Appeal and commenced this appeal. ER1.

C. DISTRICT COURT'S ORDER AND FINAL JUDGMENT

In its Order dated March 26, 2018, the district court dismissed Plaintiff's First Amendment and Lanham Act Claims on the merits under Federal Rule of Civil Procedure 12(b)(6) and then dismissed the remaining state law claims for lack of subject matter jurisdiction by declining to exercise its discretion to assert supplemental jurisdiction over those claims under 28 U.S.C. § 1367(a). ER65-91. Consequently, the district court dismissed the two federal claims for failure to state

claims for relief, but "declined to address Defendants' other arguments for dismissal." *Id.*[5]

1. Dismissal Of The First Amendment (Section 1983 And Declaratory Judgment) Claims

With respect to the First Amendment claim, the district court found that Plaintiff could not establish that Defendants were state actors under the "'public function' test" as a matter of law. ER80-81. Noting that state action can only be

[5] Among the issues the District Court declined to consider involved another important, but different, First Amendment issue: whether Defendants' affirmative claim of immunity from suit under section 230(c)(2) of the Communications Decency Act (CDA) requires the Court to enforce a federal immunity statute in a manner that would result in an unlawful prior restraint of speech. A court order granting CDA immunity with respect to claims involving otherwise protected speech constitutes a government law or action that restrains speech prior to the adjudication of whether that speech would otherwise be constitutionally protected. The criteria for immunity under section 230(c), and especially subdivisions (c)(2)(A) and (B) are overly broad, vague, and are triggered by the type of subjective ambiguous language that grants the decision maker with unfettered discretion to subjectively determine only what is and is not "offensive" content. *See* 47 U.S.C. § 230(c)(2); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (holding criminal enforcement portions of CDA unconstitutional under the First Amendment); *Reed v. Town of Gilbert, Ariz*, 135 S.Ct. 2218, 2226 (2015); *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992) (statutes that contain language that is overbroad or ambiguous so as to give the decision make unfettered subjective discretion to restrain speech without objective criteria are per se unconstitutional); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991) (same); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151–55 (1969) (same); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (same).

established in cases where a private party acts in a manner that is "traditionally the exclusive prerogative of the State," the district court reasoned that the regulation of speech by a private party on property designated "as a public forum for freedom of expression" is ***not*** one of the "very few" public functions that were traditionally and "exclusively reserved to the State." ER74; 78.

In reaching that conclusion, the district court accepted as true, as it must, Google/YouTube's express and affirmative designations of YouTube as a forum where members of the public are invited to engage in "freedom of expression" for all, regardless of the speaker's viewpoint or identity: "Plaintiff emphasizes that Defendants hold YouTube out 'as a public forum dedicated to freedom of expression to all' and argues that 'a private property owner who operates its property as a public forum for speech is subject to judicial scrutiny under the First Amendment.'" ER74. Even so, according to the district court, a private party's regulation of speech in a designated "public forum" is insufficient to establish State action: "Plaintiff points to no persuasive authority to support the notion that a private party's regulation of speech and restriction of access "to certain videos that are uploaded" onto a "video-sharing website" expressly designated as a public forum for freedom of expression has "somehow engaged in one of the "very few"

functions that were traditionally "exclusively reserved to the State." *Id.* (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978)); *but see* ER52-53 (attempting to cite to *Lee v. Katz*, 276 F.3d at 554-56). Consequently, the court dismissed PragerU's First Amendment claims on the sole ground that the designation of private property as a "public forum" does not mean that a private party who regulates protected speech in that forum is engaged in a function that is traditionally and exclusively reserved for the government. ER52-53.

To support its conclusion, the district court construed the United States Supreme Court's seminal public function test decision in *Marsh v. Alabama* as "plainly . . . not go[ing] so far as to hold that any private property owner 'who operates its property as a public forum for speech' automatically becomes a state actor who must comply with the First Amendment." ER75. "To be sure," the court wrote, "*Marsh* does contain some broader language that could be construed to support Plaintiff's position that because Defendants hold out and operate their private property (YouTube) as a forum dedicated to allowing its users to express diverse points of view" the regulation of speech was subject to First Amendment scrutiny. But based on the conflicting views expressed in subsequent Supreme Court cases, including Justice Black's dissent in *Logan Valley*, the district court

found that broader rule in *Marsh* "was never intended to apply" outside "the very special situation of a company-owned town." ER77. According to the district court, while "many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Id.* And such exclusive government functions do not include the regulation of speech that occurs on and within property designated as "a public forum for freedom of expression." *See* ER78 (quoting *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 330 (1968) (Black, J., dissenting) and citing *Flagg Bros.*, 436 U.S. at 158). Accordingly, the Court ruled that *Marsh* cannot "be extended to support Plaintiff's contention that Defendants should be treated as state actors subject to First Amendment scrutiny merely because they hold out and operate their private property as a forum for expression of diverse points of view." ER78-79.

2. Lanham Act

With respect to the Lanham Act, the district court found that Google/YouTube's false promises of "free expression" and "viewpoint neutral" filtering were insufficient to state a claim for relief. In so doing, the district court found the representations to be "puffery" and not subject to relief under the Lanham Act for four reasons.

First, the district court reasoned that YouTube's application of its "Restricted Mode" to PragerU's videos is a mere implication and thus cannot constitute a public representation – let alone a misrepresentation for a promotional purpose – about the content of such material. And even if such an implication could be deemed to be a public statement for purposes of the Lanham Act, the district court reasoned that there were purportedly no alleged facts "that remotely suggest Defendants restricted access to some of PragerU's videos 'as part of an organized campaign to penetrate the relevant market,' which [is] 'the touchstone of whether a defendant's actions may be considered 'commercial advertising or promotion under the Lanham Act.'" ER83-84.

Second, the district court reasoned that YouTube's various representations about providing a forum for everyone to be heard in a diverse environment amount to nothing more than "mere puffery": "None of the statements about YouTube's viewpoint neutrality identified by [PragerU] resembles the kinds of 'quantifiable' statements about the 'specific or absolute characteristics of a product' that are actionable under the Lanham Act." ER86.

Third, the district court also rejected the notion that allegedly false statements contained in YouTube's policies and procedures for regulating video

content may form the basis of a Lanham Act claim, reasoning that there purportedly are not "sufficient facts to plausibly suggest that these policies and guidelines amounted to or were contained in 'commercial advertising or promotion' within the meaning of [the Lanham Act]." ER88. In addition, the district court stated that there is "nothing" in the complaint that suggests that the harm alleged flowed from the Defendants' publication of their policies and guidelines. ER88-89.

And ***fourth***, the district court rejected the claim that false misrepresentations in the terms of the Agreements between PragerU and Defendants may form the basis of a valid Lanham Act claim. Again, the Court noted that these statements amount to "puffery." ER88. And the district court reasoned that PragerU purportedly lacks standing to assert a Lanham Act claim based on these alleged misrepresentations because PragerU purportedly did not suffer cognizable injury under the Lanham Act to its reputation and business standing as a result of the alleged misrepresentations in the terms of the relevant Agreements. ER89.

3. Supplemental Jurisdiction Over State Law Claims

Finally, because of the purported substantive legal defects in the two federal law claims identified above, the district court "decline[d]" to exercise supplemental

jurisdiction over the four claims for relief alleged under California state law and dismissed those claims without prejudice to conserve judicial resources and "promote[] comity." ER89-90. Specifically, the district court believed that dismissal of the state law claims on grounds of comity was "an especially important consideration . . . because [PragerU] asserts a claim that demands an analysis of the reach of Article I, section 2 of the California Constitution in the age of social media and the Internet." ER90. Consequently, the court declined to keep jurisdiction over the state law claims so that PragerU could pursue those claims in state court. ER44-45; 89-90.

V. SUMMARY OF ARGUMENT

Google/YouTube cannot lawfully market and monetize public speech for profit by inviting the public to upload and view video content on a global public platform expressly dedicated to and designated for "freedom of expression" and "viewpoint neutrality," and then regulate and restrain the public's speech without any regard to the legal rules and principles that give rise to, define, protect, and govern "freedom of expression" and "viewpoint neutrality" under the law. By arbitrarily and capriciously regulating, restraining, and censoring public speech on YouTube as they see fit, whether because of profit, bias, animus, or any other

reason (or no reason), Google/YouTube's conduct violates federal law in two distinct, but related ways.

First, Google/YouTube's regulation and filtering of video content on YouTube is "State action" subject to scrutiny under the First Amendment. The regulation of speech by a private party in a designated public forum is "quintessentially an exclusive and traditional public function" sufficient to establish that a private party is a "State actor[]" under the First Amendment. *Lee*, 276 F.3d at 556-57 (citing and quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982)). In this case, Google/YouTube designate, invite the public to use, and operate YouTube as a forum for the public to engage in "freedom of expression," expressly "defined by the four essential freedoms" — "**Freedom of Expression**," "**Freedom of Information**," "**Freedom of Opportunity**," and "**Freedom to Belong**." ER187; 625.

Further, in sworn testimony before Congress, YouTube representatives confirmed that YouTube is a "public forum" where the public may engage in free speech subject only to viewpoint and source neutral content-based regulations and rules. ER110-12. Because it failed to follow the established law in the Ninth Circuit that the regulation of speech by a private party in a public forum is "State

action," the district court erroneously concluded that despite the designation of YouTube as a public forum for speech, the regulation of speech within that public forum is "not one of the very few public functions that constitutes 'State action' subject to scrutiny under the First Amendment." ER74; 78. Thus, with respect to the First Amendment claims, the sole issue on appeal is one this Court has already decided: whether the regulation of speech by a private party on property expressly designated as a public forum for "freedom of expression" is "State action" under the First Amendment. *Lee,* 276 F.3d at 556-57 (private party administration of rules governing speech in a public forum is State action under the First Amendment).

Second, Google/YouTube's representations that YouTube is a public place for "freedom of expression," operated and defined by the "four essential freedoms," along with the plethora of other misrepresentations about the "neutrality" of their algorithms and other speech filtering tools, are sufficient to state a claim for relief under the Lanham Act. Google/YouTube's representations to the public that YouTube operates under "core values" of "Freedom of Expression," viewpoint neutrality, and equal treatment for all are not mere "puffery" but are ***the*** fundamental representations to the public as to how

Google/YouTube operate YouTube. **They are the very model for Google/YouTube's business of monetizing and profiting from "freedom of expression."** Google/YouTube cannot publicly solicit billions of people to use YouTube as a platform for "freedom of expression" subject only to "neutral" content-based restrictions, and then tell the Court that such false solicitations are just "puffery" with no legal consequences. In essence, Google/YouTube's operation of and profit from YouTube are based on multiple misrepresentations to the public about the core values and qualities of the "goods, services, or commercial activities" YouTube purports to offer its users. And, because Google/YouTube engage in this false advertising to promote their own content (and that of their preferred content partners) over the content of smaller users, Google/YouTube are engaged in anticompetitive conduct intended to crush smaller, independent content providers like PragerU by interfering with their ability to reach audiences. That conduct is more than sufficient to state a claim for relief under the Lanham Act. 15 U.S.C. § 1125(a)(1); *see also PhotoMedix, Inc. v. Irwin*, 601 F.3d 919, 931 (9th Cir. 2010) (false advertising defendants liable under Lanham Act if they make a representation of fact without a good faith belief in the truth of the statement).

VI. STANDARD OF REVIEW

In general, a lower court's dismissal on the ground that the asserting party has failed to plead a claim for relief under Rule 12(b)(6) is reviewed de novo. *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1063 (9th Cir. 2004). "A motion under Rule 12(b)(6) should be granted only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The complaint must be construed in the light most favorable to the plaintiff. *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003).

The Court "review[s] de novo the district court's conclusion that a defendant is not a State actor and review[s] for clear error its findings of fact. *Lee*, 276 F.3d at 553-54 (citing *Neal v. Shimoda*, 131 F.3d 818, 823 (9th Cir. 1997) (mixed questions of law and fact implicating constitutional rights reviewed de novo). In conducting that review, however, the "State action doctrine has not been a model of consistency, perhaps because it is so fact dependent." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295, (2001); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632, (1991). "What is fairly attributable [as State action] is a matter of normative judgment, and the criteria lack rigid

simplicity.... [No] one fact can function as a necessary condition across the board ... nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason...." *Lee*, 276 F.3d at 554 (quoting and citing *Brentwood*, 531 U.S. at 295-96).

VII. ARGUMENT: DEFENDANTS CANNOT HAVE IT BOTH WAYS: HOLD YOUTUBE OUT AS PUBLIC FORUM AND THEN RESTRICT SPEECH IN VIOLATION OF THE FEDERAL LAW GOVERNING FREEDOM OF EXPRESSION

PragerU's First Amendment and Lanham Act claims arise from unique circumstances not present in any of the cases or legal authority cited or relied upon by the district court in the proceedings below: the admission of private property owners that they are engaged in regulating protected speech on property they invite the public to use as a place "for freedom of expression." ER187; 908-10; 913-14. Thus, unlike any of the cases relied on by the district court, there is no dispute at this stage of the proceedings that Google/YouTube "hold YouTube out to the public as a forum for 'freedom of expression,' where everyone's speech is treated equally and regulated without regard to the speaker's viewpoint or identity." *Id.* The district court's belief that the allegations and facts adduced in the record

before it are insufficient to allow PragerU's First Amendment and Lanham Act claims to go forward is wrong as a matter of law. The Court should reverse the lower court's dismissal of the federal claims and remand for further proceedings.

A. The Regulation Of Speech By A Private Party In A Designated Public Forum Constitutes State Action

Although federal law provides a number of different tests in conducting the State action inquiry, no one single or specific test exists for determining "State action" in all circumstances, particularly when the dispute involves the First Amendment. Ronald B. Rotunda & John E. Nowak, 2 TREATISE ON CONST. L., § 16.4 n. 1 (3d ed.). And "because of the fact-intensive nature of the inquiry, courts have developed a variety of approaches to the State actor issue." *Lee*, 276 F.3d at 554 & n. 4. (listing seven approaches to the issue including the coercion test, the joint action test, the public function test, and the entwinement test).

The satisfaction of any one test is sufficient to establish State action, so long as no countervailing factors exist. *Lee*, 276 F.3d at 554 (citing *Brentwood*, 531 U.S. at 304 ("When ... the relevant facts show pervasive entwinement ..., the implication of state action is not affected by pointing out that the facts might not

loom large under a different test."). Consequently, "[a]n entity may be a State actor for some purposes but not for others." *Id.* at 555 and n. 5.

In general, a Plaintiff "bear[s] the burden of establishing by a preponderance of the evidence that the defendant is a State actor under any test. *Lee*, 276 F.3d at 553-54 (citing *Flagg Bros.*, 436 U.S. at 156). However, as with any dispute at the pleading stage under Rule 12(b)(6), if the Plaintiff alleges facts, that, taken as true, are sufficient to meet that burden, the plaintiff is entitled to have a full and fair opportunity to prove its case. *Balderas v. Countrywide Bank, N.A.*, 664 F.3d 787, 791 (9th Cir. 2011).

In this case, the district court identified four tests: (1) the "public function test"; (2) the "joint action test"; (3) the "state compulsion test"; and (4) the "governmental nexus test." ER73-74 ("'[t]he Supreme Court has articulated four tests for determining whether a private party's actions amount to state action'") (citing *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012); *see also Lee*, 276 F.3d at 554-55. PragerU, however, argued below only that Google/YouTube are engaged in state action under the "public function" test because they regulate public speech in a public forum for freedom of expression in the United States.

"To satisfy the public function test, the function at issue must be both traditionally and exclusively governmental." *Lee*, 276 F.3d at 555. The "functionally exclusive regulation of free speech within . . . a public forum, is a traditional and exclusive function of the State." *Id* at 556. "It is the function of the [private party's] administration of the [public forum] that guides and informs [the] inquiry, not the precise legal arrangement under which the" private party administers the forum. In the First Amendment context, "the 'function' is the administration of free speech rules within a public forum," a "quintessentially exclusive and traditional public function." *Id.* at 556-57. Thus, when a private party regulates speech in a public forum, the party becomes a State actor for purposes of the First Amendment. *Id*.

1. The Regulation Of Speech By A Private Party In A Designated Public Forum Is A "Quintessential" Exclusive Government Function That Is Subject To First Amendment Scrutiny

In dismissing PragerU's claims that Google/YouTube's regulation of speech on YouTube constitutes "State action," the district court stated that it was unable to find "any persuasive authority" to support the notion that restricting access to speech in a designated "public forum" is one of the "very few" functions that were

traditionally "exclusively reserved to the State." ER74 (citing and quoting *Flagg Bros.*, 436 U.S. at 158). The district court is mistaken. The regulation of speech by a private party on property designated as a public forum "i***s quintessentially an exclusive and traditional public function***" sufficient to establish that a private party is a 'State actor[],' and its regulation of speech is subject to judicial scrutiny under the First Amendment, regardless of title to the domain, ownership, or operation of the property. *Lee*, 276 F.3d at 554-56 (emphasis added) (citing and quoting *Lugar*, 457 U.S. at 935).

In *Lee*, a private party leased municipal park property along with some of the structures adjacent to the private party's property from the City of Portland to further its business. "In connection with its administration of the leased area, [the private party] promulgated policies regulating speech," that, among other things, "regulated the areas on the [the property] where public speaking could occur, the conduct of the speaker, and the volume of the speech." When the private party excluded a number of street preachers from that property for limited periods of time because of alleged violations of the private party's public speech policy, persons who had been excluded for violating that policy sued, alleging violations of the First Amendment. After a bench trial, the district court granted judgment in

favor of the private party, finding – much like the district court did here – that the private party was not a State actor and thus any abridgment of the plaintiffs' constitutional rights was not State action within the meaning of 42 U.S.C. § 1983. *Lee*, 276 F.3d at 551-52.

This Court reversed, finding that the regulation of speech on property that is designated as a public forum "is quintessentially an exclusive and traditional public function" sufficient to establish that a private party is a "State actor[]" whose regulation of speech is subject to judicial scrutiny under the First Amendment. *Lee*, 276 F.3d at 557. In so doing, this Court emphasized that there, as here, the property owner did not contest that the property in question was a designated "public forum" for free speech. *Id.* at 552. Thus, because the private party's regulation of speech was taking place on property that was designated as a public forum, the Court held "that in regulating free speech within the [designated public forum] the [private defendant] ***performs an exclusively and traditionally public function***," implicating the First Amendment. *Id.* at 554 (emphasis added).

In reaching that conclusion, the Court limited its State action inquiry to "public function" analysis only, and then declined to reach the plaintiffs' alternative theory that the private defendant was a State actor "under what they label the

'nexus' test.'" Consequently, *Lee* considered and found "State action" by a private party based on the same test and issue used by the district court here: whether the act of regulating speech in designated public forum was a function exclusively and traditionally reserved for the government. *Lee*, 276 F.3d at 554. In reaching the opposite conclusion, however, the Court was unequivocal that for purposes of the "public function" analysis, when property is ***indisputably designated as a public forum*** for free speech, the title to or property interest in the property, by itself, is irrelevant. *See Lee*, 276 F.3d at 555. The State action inquiry turns ***only*** on whether the act of regulating speech in a public forum is a public function, traditionally and exclusively reserved for the government:

> The OAC argues it is not a State actor because, unlike in *Faneuil Hall*, 745 F.Supp. at 71, no public easement exists through the Commons. The absence of such an easement, however, does not control our analysis, ***given the reality that the Commons is a public forum.*** *See Marsh*, 326 U.S. at 505 n.2, 66 S.Ct 276 (determination of State court that company town was not "dedicated" under law to public use "does not decide the question under the Federal Constitution" whether company town is a State actor); *Brentwood*, 531 U.S. at 301 n. 4 (noting that the State actor determination often emphasizes practical reality over legal formalities). It is the function of the OAC's administration of the Commons that guides and informs our inquiry, not the precise legal arrangement under which the OAC leases the area. That "function" is the administration of free speech rules within a public forum.

Id. at 556 (emphasis added).

Thus, at least with respect to the First Amendment, a private party's claims of private title, ownership, or dominion or control over private property are irrelevant. *Id.* Even when the government "retain[s] little, if any, power over the [private party's] free speech policies governing [a designated public forum]," it is the "functionally exclusive regulation of free speech within" a designated public forum, and only that function, which makes the private party's conduct a traditional and exclusive function of the State under the First Amendment. *Id.*

The regulation of speech by Google/YouTube on YouTube, a global video sharing platform that Google/YouTube have designated a public forum for "freedom of expression" is no exception. Google/YouTube's regulation of speech on YouTube "is quintessentially an exclusive and traditional public function" sufficient to establish that when regulating speech, Google/YouTube is a "State actor[]" under the First Amendment. *Id.* at 557. And, just like *Lee*, Google/YouTube's public designations of YouTube as a forum for "freedom of expression" establish the public forum character of the property at the pleading stage. ER74-75; 110-12; *see Lee*, 276 F.3d at 552. According to Google/YouTube, "YouTube is a place defined by the "four essential freedoms" – "**Freedom of Expression**," "**Freedom of Information**," "**Freedom of Opportunity**," and

"**Freedom to Belong**," ER110-12 (YouTube is public forum); *see also, e.g.*, ER910 (YouTube provides "one of the largest and most diverse collections of self-expression in history" that, over the preceding ten years, the platform has "given people opportunities to share their voice and talent no matter where they are from or what their age or point of view."); ER659 (Google/YouTube also hold YouTube out to the public as "a community where everyone's voice can be heard" and "a place to express yourself and show the world what you love."). Google/YouTube affirmatively contend that it is they, and they alone, who have unfettered and absolute authority to regulate and restrain speech on YouTube as they see fit. ER270-71. Thus, as in *Lee*, at least when Google/YouTube exercise their authority to regulate and restrain speech in its self-designated public forum, they are engaging in "State action" and are subject to First Amendment scrutiny. *See Lee*, 276 F.3d at 554-57.

2. The First Amendment's Regulation Of Speech Is Not Limited To "Company Town" But Applies To All Property Designated As A Public Forum

In addition to ignoring this Court's holding in *Lee*, the district court erred by reducing the Supreme Court's "public function" test to a legal anachronism limited to "company towns" of the early 20th Century. According to the district court, the

Supreme Court in *Hudgens v. NLRB* – a pre-Internet and pre-Google/YouTube decision – limited State action by a private party under the "public function test" exclusively to situations involving "***company towns***" where the private property owner provides "***all*** of the essential services traditionally and exclusively reserved for the government." ER78; 54-57 (emphasis added). In misinterpreting *Hudgens*, the district court effectively overruled *Marsh* and terminated its long-established rule that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *See Marsh v. Alabama*, 326 U.S. 501, 502-503, 506 (1946); *Logan Valley*, 391 U.S. at 324 (citations omitted), abrogated by *Hudgens v. N. L. R. B.*, 424 U.S. 507 (1976); *Denver Area Educ. Tele. Communications Consort, Inc. v. FCC*, 518 U.S. 727, 749-50 (1996) (public forums may include "private property dedicated to public use") (quoting and citing *Cornelius*, 473 U.S. at 801)); *see also Lloyd Corp. v. Tanner*, 407 U.S. 551, 567-570 (1972) (when private interests are "substituting for and performing customary functions of government, First Amendment freedoms [cannot] be denied where exercised in the customary manner . . . ."). In short, the district court effectively

overruled *Marsh* and put the entire "public function" concept of State action "to rest without proper burial." *See Hudgens*, 424 U.S. at 534 (White, J. dissenting).

Hudgens does not compel the conclusion reached by the district court. In *Hudgens*, a divided Supreme Court sought to resolve a series of conflicting decisions that involved the public character of ***private shopping centers***, private property never designated by the property owner as a public place for free speech. The *Hudgens* Court considered ***only*** whether the First Amendment was a defense to criminal trespass charges leveled against disgruntled union workers who picketed a private business on adjacent streets, owned and operated by the private shopping center, which had invited members of the public to shop for retail goods.[6] The sole question to be decided by the *Hudgens* Court was "whether the respective rights and liabilities of the parties are to be decided under the criteria of the National Labor Relations Act alone, under a First Amendment standard, or under some combination of the two." *Id*.

[6] In considering the issue, the Court also noted that the "history of this litigation has been a history of shifting positions on the part of the litigants," and had caused "considerable confusion, engendered at least in part by decisions of this Court that intervened during the course of the litigation." *Hudgens*, 424 U.S. at 512.

In answering that question, the Supreme Court held only that the First Amendment did not apply because the private party's invitation to the public to use the shopping center did not involve or mention the right of picketing union workers to engage in free speech. Rather, the invitation was simply to purchase retail goods and engage related commercial transactions with merchants doing business at the brick-and-mortar shopping center. *Hudgens*, 424 U.S. at 520-21 (picketers "did not have a First Amendment right" to "enter this shopping center for the purpose of advertising their strike against" a private employer). To support that common sense conclusion, the Court believed it needed to clarify ambiguous language in *Marsh*. Because merely inviting the public to enter private property was too "attenuated" to construe the invitation to also use the property as a public forum for freedom of speech, the Court stated only that "the Constitution by no means requires such an attenuated doctrine of dedication of private property to public use," and, unlike the company town in *Marsh*, "there is no comparable assumption or exercise of municipal functions or power" at a private brick-and-mortar shopping center where the public is invited ***only*** to shop for retail goods. *Hudgens*, 424 U.S. at 519.

In its *Hudgens* analysis, the Supreme Court limited the reach of *Marsh* in shopping center cases by simply formally adopting the reasoning of an

immediately preceding decision in *Lloyd*, 407 U.S. at 570, a case decided while *Hudgens* was pending: "'[w]e hold that there has been no such dedication of [defendant's] privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights . . .'" *Hudgens*, 424 U.S. at 520-21 (quoting *Lloyd* at 570). Because the brick-and-mortar shopping center was not designated by its owners as a place for free speech in which disgruntled workers were entitled "to enter this shopping center for the purpose of advertising their strike against" a private merchant, the "constitutional guarantee of free expression ha[d] no part to play[.]" *Id.* at 520-21. Nothing in the pre-Internet *Hudgens* or *Lloyd* decisions suggests that the *Marsh* doctrine was limited to "company towns" or that *Marsh* would have no application to online designated public forums like that operated by Google/YouTube.

Also misplaced is the district court's reliance on dicta in another pre-Internet case, *Flagg Bros.*, to support both its belief that *Marsh* no longer has any application to the State action determination and that the "public function" test is no longer viable. In *Flagg Bros.*, the Supreme Court considered whether a statute that delegated the authority to a private party to resolve commercial disputes was an improper delegation of an exclusive public function. *See Flagg Bros.*, 436 U.S. at

151. *Flagg Bros.*, however, did not consider or involve allegations or claims arising from the regulation of protected speech in a designated public forum. In holding that the statute's delegation to private parties of dispute resolution authority in connection with commercial disputes did not violate the Constitution, the Court found only that the public function of resolving commercial disputes was not an exclusive government function that could not be delegated or undertaken by a private party in its private capacity. The district court's reliance on *Flagg Bros.* as to whether dispute resolution under the UCC is a public function exclusively reserved for the government, therefore, has no relevance to whether the regulation of speech in a designated public forum is a "quintessential" exclusive public function that constitutes State action under the First Amendment. *See, e.g.*, *Lee*, 276 F.3d at 557 (the regulation of speech in a public forum is a ***quintessential*** public function reserved exclusively for the government and the exercise of that function by a private party is State action that is subject to judicial scrutiny under the First Amendment).

To be sure, the Supreme Court has narrowed *Marsh*. But it did so in a context and under circumstances that predated and has little applicability to social media sites in the age of the internet, and then only to make clear that simply

inviting the public to use a brick-and-mortar commercial establishment for commercial non-speech purposes does not transform such a private property owner into a State actor. Neither *Hudgens, Flagg Bros.*, nor any other Supreme Court case has ever held, in the Internet era or before, that there can be no First Amendment scrutiny of a private party's regulation of speech in a designated public forum, much less that *Marsh* applies only to non-existent "company towns." Indeed, the district court's "company town" rule is not only in direct conflict with this Court's decision in *Lee*, but purports to end, with no legal support, the longstanding rule that "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *See Lee*, 276 F.3d at 556-57; *Marsh*, 326 U.S. at 506. The district court's rigid and anachronistic "company town" requirement ignores the crucial distinction in First Amendment jurisprudence between private shopping centers designated for shopping and public social media sites in which the property owner expressly invites the public to use the site to engage in free speech.

In contrast to *Marsh*, *Logan Valley*, *Hudgens*, *Flagg Bros.*, or any of the other cases relied upon by the district court, Google/YouTube ***expressly*** designate

and dedicate YouTube as place for free speech. YouTube is not a brick-and-mortar retail shopping center, but a business that invites the public to engage in "freedom of expression," and then monetizes that protected speech for profit and commercial gain. The regulation of protected speech in such a designated public forum is, and has always been, one of the few "quintessential" public functions reserved for government and is subject to First Amendment scrutiny, even (and perhaps especially) when the party doing the regulating is a private social media conglomerate like Google/YouTube. *Lee*, 276 F.3d at 557; *see also Lloyd*, 407 U.S. at 567-570 (when private interests are "substituting for and performing customary functions of government, First Amendment freedoms [cannot] be denied where exercised in the customary manner . . . ."); *Amalgamated Food* 391 U.S. at 324 (citations omitted), (*abrogated by Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976)); *Denver Area Educ. Tele. Communications Consort*, 518 U.S. at 749-50 ("assuming public forums may include 'private property dedicated to public use'" (quoting and citing *Cornelius*, 473 U.S. at 801)). Had the run-of-the-mill brick-and-mortar shopping centers in *Lloyd* or *Hudgens* instead been Internet-based social media giants that, like Google/YouTube, invited members of the public to engage in free speech by telling them that the forum was a designated place for

"freedom of expression" and viewpoint neutrality, the outcome of those cases would have been much different.

3. The Supreme Court Has Warned That Restricting Access To Internet Sites Designated As A Place For Freedom Of Expression Implicates First Amendment Rights.

Several more modern decisions by the Supreme Court provide further reason to reject the district court's "company town" requirement in free speech cases involving the Internet. Specifically, in *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017) and *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Court pointed out that the prevalence of global social media sites that serve as public forums for free expression implicates important concerns under the First Amendment. In both *Reno* and *Packingham*, the Court struck down laws restricting access to social media sites under the First Amendment. While it is true that both of those cases involved publicly enacted laws, both the *Reno* and *Packingham* Courts went to substantial effort to point out that private social media "websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard" and "allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" As Justice Kennedy put it in *Packingham*, "social media

users employ websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Packingham*, 137 S.Ct. at 1736 (quoting *Reno*, 521 U.S. at 868). And "while, in the past, there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear[,] [i]t is cyberspace—the 'vast democratic forums of the Internet' in general" and "social media in particular." *Id*. Thus, because global Internet social media sites bear all of the characteristics of a traditional public forum for freedom of expression, the Supreme Court has admonished that courts should "***exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.***" *Packingham*, 137 S.Ct. at 1736 (emphasis added).

That admonishment, which was not heeded by the district court, certainly applies with full force to YouTube. Google/YouTube operate a business that monetizes free speech in a public forum and, as a result, have made billions of dollars in profits. ER110-12 (YouTube is public forum); *see also, e.g.*, ER910 (YouTube provides "one of the largest and most diverse collections of self-expression in history" and that, over the preceding ten years, the platform has "given people opportunities to share their voice and talent no matter where they are

from or what their age or point of view."); ER659 (Google/YouTube also hold YouTube out to the public as "a community where everyone's voice can be heard" and "a place to express yourself and show the world what you love."). There is nothing inconsistent with or novel about the notion that Google/YouTube should act in accordance with its promise of "freedom of expression," and free speech in video and viewer interaction, as defined under federal law. And, the established law in this Circuit demands nothing less. *See Lee*, 276 F.3d at 557.

4. Subjecting A Designated Public Forum To First Amendment Scrutiny Provides A Clear Set Of Rules By Which Google/YouTube May Continue To Regulate Speech On YouTube.

In the proceedings below, Google/YouTube advanced several "policy" arguments that the sky will fall if they are forced to operate YouTube in compliance with their promises of freedom of expression and viewpoint-neutral regulation of speech. Each is a straw man with no legal merit that is intended only to scare the court into abandoning fundamental free speech protections on the internet.

First, Google/YouTube's contention that the harm caused by its viewer access and monetization restrictions to PragerU is so *de minimis* that First

Amendment relief is unwarranted contravenes 200 years of free speech jurisprudence. Unlawful restraints on free speech, even for minimal periods of time, or in minimal ways, are not only injuries that may be redressed under the First Amendment, but constitute irreparable and immediate harm as a matter of law. *E.g., Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011) (long line of precedent establishes that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Second, Google/YouTube's contention below that the First Amendment provides it with a right "not to speak" and that right can ***only*** be vindicated by censoring speech with which it does not agree has been tried and rejected. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the U.S. Supreme Court considered and rejected a private party's attempt to use the First Amendment as both a "sword and shield" to justify unlawful censorship and false advertising.

In *Pruneyard*, the Supreme Court rejected Google/YouTube's argument that "First Amendment right not to be forced by the State to use [its] property as a forum for the speech of others," or to compel "recitation of a message containing an affirmation of belief" provides Google/YouTube with a First Amendment right to censor speech in a designated public forum on private property. The Court

stated that a property owner's "First Amendment right not to be forced by the State to use his property as a forum for the speech of others," or to compel "recitation of a message containing an affirmation of belief," was not the same as "being compelled to affirm [its] belief in any governmentally prescribed position or view." Private parties like Google/YouTube that wish to vindicate their purported constitutional right not to speak (or not to endorse speech with which they disagree) may vindicate that right "by publicly dissociating [themselves] from the views of the speakers." *Id.* at 88. As such, if Google/YouTube want to vindicate their "right" not to speak or endorse speech, they can easily do so by publicly dissociating themselves from the views of speakers or the content itself. But they may not silence or censor protected speech. *Id.* [7]

[7] Google/YouTube's reliance below on a non-controlling district court case involving Internet search engines is also misplaced and provides no legal or rational basis to ignore or abrogate the U.S. Supreme Court's decision in *Pruneyard*. In *Zhang v. Baidu.Com., Inc.*, 10 F.Supp.3d 433 (S.D.N.Y. 2014) (and cases cited therein), a district court from an out-of-circuit jurisdiction considered the "circumstances" under which the results of a search engine constituted protected speech. *Zhang*, 10 F.Supp.3d at 433, 436. In considering that issue, the district court in *Zhang* drew the astute but crucial distinction between the rights of a traditional publisher that are implicated by the posting of search engine results on the one hand, and a neutral infrastructure tool designed to regulate the speech of third parties on the other. With respect to the former, the communications and content of the search engine's results are protected by the First Amendment

Third, Google/YouTube's assertion below that the First Amendment's application to public forum social media sites like YouTube is "unworkable" and will lead to a "lawless no-man's land" where anything goes reflects an irrational and profound misunderstanding of how (and the extent to which) the First Amendment does and does not protect speech. The use of a content-based regulation of speech that Google/YouTube insist is necessary to operate YouTube is not precluded under the First Amendment. The Constitution has ***always*** permitted viewpoint-neutral content restrictions on speech, provided the regulation on which the restraint is based meets three criteria: (i) furthers a compelling state interest (*e.g.*, national security, public health and safety, defamatory content, exploitation of minors, or mitigating the risk of violence); (ii) is as narrowly drawn as possible to further that compelling state interest; and (iii) is not overbroad,

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because they "inherently incorporate the search engine company engineers' judgments about what material users are most likely to find responsive to their queries." *Zhang* at 438-39 (quoting Eugene Volokh & Donald M. Falk, *Google* FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS, 8 J.L. ECON. & POL'Y 883, 884 (2012). Thus, a private party's operation of a search engine can, under certain circumstances, implicate the free speech rights of its provider; operating "an infrastructure or platform that delivers content in a neutral way" does not. *See Zhang*, 10 F.Supp.3d at 440 (quoting Oren Bracha & Frank Pasquale, FEDERAL SEARCH COMMISSION? ACCESS, FAIRNESS, AND ACCOUNTABILITY IN THE LAW OF SEARCH, 93 CORNELL L.REV. 1149, 1192-97 (2008)).

vague, ambiguous, or so subjective as to provide the regulator of speech with unfettered discretion that may be used as a pretext to silence a speaker based on its identity, viewpoint, or other reason that has no bearing on or nexus to the compelling interest and/or the actual content of the speech. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1063-64 (9th Cir. 2010). Consequently, by asking that Google/YouTube simply be required to comply with the First Amendment principles to which they have claimed allegiance and from which they are profiting, PragerU does not — nor could it — seek to prohibit Google/YouTube from regulating, filtering, or restraining content or speech on YouTube. A ruling requiring Google/YouTube to use constitutionally adequate content-based speech regulations in a designated public forum does not mean that YouTube is powerless to regulate non-compliant speech and does not push the platform toward a "lawless no man's land where anything goes."

What Google/YouTube cannot do under the First Amendment is effectuate or utilize regulations, criteria or filtering tools that are (a) based on or embedded with overly broad, vague, subjective or animus-based restrictions that serve no compelling interest; (b) pervasively infected with viewpoint bias; (c) discriminate based on the identity of the speaker; (d) improperly privilege Google/YouTube's

financial interest over that of its content creator competitors; or (e) otherwise impermissibly regulate speech. If Google/YouTube truly believe that they must utilize unconstitutional restraints, Google/YouTube may do so, but only by de-designating and disavowing that YouTube is a public place for "freedom of expression." In other words, Google/YouTube need to tell the public the truth: YouTube is ***not*** a place for freedom of expression and Google/YouTube, and only Google/YouTube, decide who may speak and what they can say. Until such time, however, Google/YouTube must comply with the law, including the First Amendment. *Cf. generally* ER270-71.

B. PragerU Has Stated A Viable Claim For Relief Under The Lanham Act.

By summarily dismissing Plaintiff's Lanham Act claims at the pleading stage, the district court failed to recognize that the Lanham Act ***also*** forbids Google/YouTube from playing fast and loose with their professed commitment to free speech. Google/YouTube may not wrap themselves in the First Amendment for some purposes and then quickly jettison their commitment to free debate when they believe that doing so advantages their litigation position.

More specifically, PragerU has pleaded multiple examples of a "(1) false statement of fact by [Google/YouTube] in a commercial advertisement about its own or another's product; (2) [which] actually deceived or has the tendency to deceive a substantial segment of its audience; (3) [which] is material, in that it is likely to influence the purchasing decision; (4) the defendant caused [] to enter interstate commerce; and [that] (5) [PragerU] has been or is likely to be injured as a result of the false statement." *Wells Fargo & Co. v. ABD Ins. & Financial Services, Inc.*, 758 F.3d 1069, 1071 (9th Cir. 2014); *see* ER914-15; 916-18; 918-32; 940-41. The district court's summary rejection of Plaintiff's Lanham Act claims should be reversed.

1. YouTube's Improper Application Of "Restricted Mode" To PragerU's Educational Videos Constitutes False Implications Of Fact About PragerU's Content That Have Caused Injury To PragerU

PragerU has sufficiently alleged a claim for relief under the Lanham Act based on Google/YouTube's arbitrary designation of its videos with the "Restricted Mode" stamp of disapproval. More specifically, PragerU alleged that (1) Google/YouTube have tagged some of PragerU's content with a "Restricted Mode" designation that effectively limits access to those videos; (2) Google/YouTube represent to the public that videos subject to the "Restricted

Mode" designation contain (i) ***discussions about drug use or abuse or drinking alcohol***; (ii) overly detailed conversations about or depictions of ***sexual activity***; (iii) ***graphic depictions*** of violence, violent acts, natural disasters or tragedies or violence in the news; (iv) videos that cover ***specific details*** about events related to terrorism, war, crime, and political conflicts that resulted in ***death or serious injury***, even if no graphic imagery is shown; (v) ***inappropriate language, including profanity***; and (vi) video content that is ***gratuitously*** incendiary, inflammatory, or demeaning toward an individual or group; (3) Google/YouTube's implicit representations are false; (4) Google/YouTube made these representations for the purpose of growing their business and inviting the public to view their video content; and (5) PragerU has suffered damages as a proximate result of the false implication Google/YouTube have made to the public. ER914-15; 916-18; 918-32; 940-41 (emphasis added).

The district court, however, summarily rejected this portion of PragerU's claim, reasoning that YouTube's baseless application of its "Restricted Mode" to Plaintiff's content is a mere "implication" about PragerU's content and thus cannot constitute a public representation – let alone a misrepresentation for a promotional purpose – about the content of Plaintiff's videos. ER83-84. But it is well-

established that "[a] false advertising cause of action under the Act is not limited to literal falsehoods; ***it extends to false representations made by implication or innuendo***." *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service Inc.*, 911 F.2d 242, 245 (9th Cir. 1990) (emphasis added); *see also William H. Morris Co. v. Group W., Inc.*, 66 F.3d 255-257-58 (9th Cir. 1995) (Lanham Act false advertising "embraces innuendo, indirect intimations, and ambiguous suggestions[.]"). As such, even if "Restricted Mode" *is* a "mere implication," this is more than sufficient for PragerU to plausibly allege a claim for relief at the pleading stage. *See also, e.g., Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1254-56 (10th Cir. 1999) (*implication* in advertising materials that EPA approval or clearance had been obtained sufficient to state Lanham Act claim for false advertising); *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 165, (2d Cir. 1978) ("That Section 43(a) of the Lanham Act encompasses more than literal falsehoods cannot be questioned. Were it otherwise, clever use of innuendo, indirect intimations and ambiguous suggestions could shield the advertisement from scrutiny precisely when protection against such sophisticated deception is most needed.").

Google/YouTube's "Restricted Mode" representations about PragerU's content constitute false representations of fact that have caused damage to PragerU. PragerU is entitled to its day in court on this portion of its claim.

2. YouTube's False Professions Of Fealty To First Amendment Principles Also Entitle PragerU To Lanham Act Relief

Google/YouTube's multiple false representations of fealty to First Amendment principles provide an additional basis for PragerU's Lanham Act false advertising claims. As described above, Google/YouTube expressly "hold YouTube out to the public as a forum intended to defend and protect free speech where members of the general public may speak, express, and exchange their ideas." ER902-03. They make multiple representations that "voices matter" and that YouTube is "committed to fostering a community where everyone's voice can be heard." *Id.* They further claim (1) YouTube's "mission" is to "give people a voice" in a "place to express yourself" and in a "community where everyone's voice can be heard"; and (2) YouTube is "one of the largest and most diverse collections of self-expression in history," giving "people opportunities to share their voice and talent no matter where they are from or what their age or point of

view." ER910. PragerU alleges cognizable damages as a proximate result of all of these false representations. ER914-15; 916-18; 918-32; 940-41.

The district court reasoned that these various misrepresentations were not actionable, as they amount to nothing more than "mere puffery." ER86. This determination is wrong and should also be reversed. Any broad-brush dismissal of PragerU's alleged misrepresentations as purported "puffery" at the pleading stage violates well-established law holding that it is only a "rare situation" where granting a motion to dismiss on "puffery grounds" is ever appropriate. *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008). This is because the underlying question as to whether a particular statement, when viewed in context, is or is not "puffery" is inherently factual: "the distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific detailed factual assertions." *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994) (citing *Cook*, 911 F.2d at 246). Their inherently factual nature makes them particularly unsuited for resolution at the pleading stage. *See also World Wrestling Fed'n Entm't, Inc. v. Bozell*, 142 F. Supp. 2d 514, 529 (S.D.N.Y. 2001) (declining to resolve question of falsity on Lanham Act false advertising motion to dismiss).

While *any* consideration of "puffery" at the pleading stage is inappropriate, it bears mentioning that the statements in question do ***not*** meet the "puffery" definition and that the district court was wrong to have concluded otherwise. PragerU does not base its Lanham Act claim on any facially vague and subjective statements by YouTube, but, rather, alleges multiple specific false representations of fact about YouTube's status as a viewpoint-neutral public forum "where everyone's voice can be heard" "no matter where they are from or what their age or point of view." ER914-15; 916-18; 918-32; 940-41. These representations are "not 'blustering' or 'boasting'" and thus cannot properly be characterized as "puffery" – particularly at the pleading stage. *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1368 (Fed. Cir. 2013). Put differently, either it is true that "everyone's voice can be heard" "no matter where they are from or what their age or point of view" or it is not: PragerU has alleged that it is not, and in any event, the answer to this question is plainly one that is capable of being answered in discovery and at trial. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997) ("misdescriptions of specific or absolute characteristics of a product are actionable.").

3. YouTube's False Statements In Its Terms Of Agreement And Policies And Procedures For Regulating Video Content Also Provide A Basis For Lanham Act Relief

The district court similarly erred when it accepted Google/YouTube's view that the false statements of fact in their terms of service and policies and procedures for regulating video content were "puffery" immunized from Lanham Act scrutiny and that Plaintiff's factual allegations fail to connect these statements to the harm it has suffered for standing purposes. ER84, 88. ***First***, no matter the label Google/YouTube attach to their misrepresentations, it is well-established under the Lanham Act that actionable misrepresentations "need not be made in a 'classic advertising campaign' but may consist instead of more informal types of 'promotion.'" *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999). Accordingly, whether Google/YouTube chooses to label their false representations of fact under the heading of "terms and conditions," "policies and procedures" or in an "agreement" is immaterial. PragerU has plausibly alleged the existence of false statements in YouTube's policies and guidelines for regulating video content and in Google/YouTube's terms of service: first, that "Restricted Mode" is applied to videos containing "[g]raphic depictions of violence," "inappropriate language," and "[o]verly detailed conversations about

or depictions of sex or sexual activity," (ER914-15), and second, that Google/YouTube applies its policies and guidelines in a way that will "help [one] grow," "discover what works best" and "giv[e][s] you tools, insights and best practices" for using YouTube's products. ER939-40. The label applied to these statements by Google/YouTube does not shield them from liability. *See also Collegenet, Inc. v. XAP Corp.*, 442 F. Supp. 2d 1070, 1078 (D. Or. 2006) (denying defense motion for summary judgment and holding that privacy policy statements can form basis of Lanham Act false advertising claim); *cf. Doe 1 v. AOL LLC*, 719 F. Supp. 2d 1102, 1113 (N.D. Cal. 2010) (misrepresentations in privacy policy sufficient to state claim under state unfair business practices law).

Second, as discussed above, even if the question of "puffery" were appropriately considered and resolved on a motion to dismiss (it is not, *see Williams*, 552 F.3d at 939), the statements alleged by PragerU are factual descriptions regarding its dealings with customers. They are not the sort of "generalized" and "vague" statements falling within the "puffery" exception to Lanham Act liability. *Cf. Southland Sod*, 108 F.3d at 1145.

And ***finally***, PragerU competes with YouTube as a producer of video content on the YouTube platform and elsewhere. *E.g.*, ER904-06; 941. PragerU

has suffered cognizable economic and reputational injury stemming from Google/YouTube's misrepresentations about how YouTube governs its land of the "Four Freedoms" in a viewpoint-neutral manner. *See* ER934, 937-38; 941. As such – unlike the plaintiff in *Lexmark* – PragerU does not lack statutory standing to complain of YouTube's various representations.[8]

Nothing about Google/YouTube's voluntary choice to insert misrepresentations in its terms and conditions or policies and guidelines immunizes Google/YouTube from liability for false advertising. They are failures that have caused PragerU harm and for which PragerU is entitled to relief. It was error for the district court to have concluded otherwise at the pleading stage.

VIII. CONCLUSION

PragerU respectfully requests that this Court reverse the judgment of the district court dismissing the federal claims under Federal Rule of Civil Procedure

[8] Although amending at the district court would have been futile in light of the terms of the district court's order and comments at the case management conference, PragerU is prepared and respectfully requests leave to amend its complaint on remand in the event the Court finds defects on standing or any other point. *E.g.*, *United Union of Roofers, Waterproofers, and Allied Trades No. 40 v. Ins. Corp. of America*, 919 F.2d 1398, 1402 (9th Cir. 1990) (amendment required for standing deficiencies; denial of amendment proper only where amendment "would be clearly frivolous, unduly prejudicial, cause undue delay or a finding of bad faith is made.").

12(b)(6) and remand this action for further proceedings consistent with this Court's Order.

DATED: August 23, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a) AND NINTH CIRCUIT RULE 32-1

I hereby certify that the foregoing brief complies with the type-volume limitation of Rule 32(a)(7)(B), Fed.R.App.P., because it contains 13,625 words, excluding the parties of the brief exempted by Rule 32(A)(7)(B)(iii), Fed.R.App.P. This brief complies with the typeface requirements of Rule 32(A)(5), Fed.R.App.P., and the type style requirements of Rule 32(A)(6), Fed.R.App.P., because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman style.

s/ Peter Obstler
Peter Obstler

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2018, I electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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STATEMENT OF RELATED CASES

Appellant is currently aware of no related cases required to be disclosed pursuant to Ninth Circuit Rule 28-2.6. Appellant will update this statement if and to the extent required when the state court action referred to in footnote 1 of its opening brief is filed.

DATED: August 24, 2018

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