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 Appellees.

APPELLANT'S REPLY BRIEF

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

BROWNE GEORGE ROSS LLP
Pete Wilson (State Bar No. 35742)
pwilson@bgrfirm.com
Eric M. George (State Bar No. 166403)
egeorge@bgrfirm.com
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

BROWNE GEORGE ROSS LLP
Peter Obstler (State Bar No. 171623)
pobstler@bgrfirm.com
101 California Street, Suite 1225
San Francisco, California 94111
Telephone: (415) 391-7100
Facsimile: (415) 391-7198

Attorneys for Appellant Prager University

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, plaintiff-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: December 21, 2018

Respectfully submitted,

BROWNE GEORGE ROSS LLP
Eric M. George
Peter Obstler

By: /s/Peter Obstler
Peter Obstler
Attorneys for Appellant Prager University

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

Statutes

I. INTRODUCTION

The crux of Appellees' defense is that their affirmative representations and admissions that YouTube is a "public forum" where the public is invited to engage in "freedom of expression" do not matter because they are private property owners who are too big to be subjected to the First Amendment. The idea that Appellees' own words and admissions, including sworn testimony before Congress about YouTube's public character, do not matter is an extreme, dangerous, and constitutionally indefensible position. That is particularly true in this case where the operators of the world's largest public space for free expression insist on an unfettered right to regulate free speech as they see fit in what they admit is a "public forum."

On Wednesday, January 17, 2018, Ms. Juniper Downs, Global Head of Public Policy and Government Relations for YouTube, and a member of the California Bar who graduated from New York University School of Law, provided sworn testimony before the U.S. Senate Committee on Commerce, Science, and Transportation on behalf of Appellees-Defendants Google LLC and YouTube, LLC ("Appellees") admitting that Appellees operate YouTube as a "public forum":

> **Senator Cruz**: Thank you Mr. Chairman. Welcome to each of the witnesses. I'd like to start by asking each of the company representatives a simple question, which is: do you consider your companies to be neutral public fora?

* * * *

Senator Cruz: I'm just looking for a yes or no whether you consider yourself to be a neutral public forum.

Senator Cruz: Ms. Downs?

Ms. Downs: Yes, our goal is to design products for everyone, subject to our policies and the limitations they impose on the types of content that people may share on our products.

Senator Cruz: So, you're saying you do consider YouTube to be a neutral public forum?

Ms. Downs: ***Correct.*** We enforce our policies in a politically neutral way. Certain things are prohibited by our Community Guidelines, which are spelled out and provided publicly to all of our users.

[ER110-12, 0:00:00 – 01:06 of the excerpted video recording or 02:28:30 – 02:29:36 of the full hearing recording.]

* * * *

Senator Cruz: What is YouTube's policy with respect to Prager University and the allegations that the content Prager University is putting out are being restricted and censored by YouTube?

Ms. Downs: ***As I mentioned, we enforce our policies in a politically neutral way.*** In terms of the specifics of Prager University, it's a subject of ongoing litigation so I'm not free to comment on the specifics of that case.

ER110-12, 05:56 – 06:57 of the excerpted video recording or 02:34:28 – 02:35:29 of the full hearing recording (emphasis added).

Appellees' explanation that their testimony to Congress is nothing more than a "colloquial" or "gotcha" moment that has no bearing on the allegations in this case is unpersuasive. Appellees, like everyone else, are not above the law, especially when it comes to telling the truth to Congress.[1] And, given YouTube's Mission Statement, numerous public disclosures to YouTube users, and the sworn declaration provided to the district court below in this case, Appellees have a long and well-documented history of saying one thing to the public and Congress, and another to this Court. *See, e.g.,* ER110-12, 493, 625, 640, 867-869, 879, 909-910. Appellees' and *Amici's* argument that, despite their unequivocal representations to the public, Congress, and the district court that pervade this unique record, Appellant "does nothing to demonstrate that YouTube is a public forum" is so misleading that it would not even pass muster under YouTube's Community Guidelines prohibiting the posting of "clickbait" and "Fake News." *See* Brief of *Amicus Curiae* Computer & Communications Industry Association (filed 11/7/18) ("CCIA Brf."), p. 8; *see also* Brief of *Amicus Curiae* Electronic Frontier Foundation (filed 11/7/18) ("EFF Brf."), p.3 n.3.

[1] Appellant is not aware, and Appellees do not represent, that Ms. Downs has formally corrected, clarified, or withdrawn her testimony to Congress that YouTube is a "neutral public forum."

At least in the Ninth Circuit, sworn statements and representations matter when it comes to evaluating the legal sufficiency of free speech and false advertising claims at the pleading stage. *See, e.g.*, *Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 966 (9th Cir. 2011) (in considering a mixed question of law and fact involving assertion of First Amendment violation by a public employee, "two inquiries are needed," first, a factual inquiry as to the scope and content of the employee's job responsibilities, and second, applying those factual findings to the law); *Venetian Casino Resort v. Local Joint Exec. Bd. Of Las Vegas*, 257 F.3d 937, 947 (9th Cir. 2001) (forum analysis as to whether a private forum qualifies as a public forum requires the court to evaluate multiple factors, including the forum's historical use, its physical location, and its dedication to public use); *Colacurcio v. City of Kent*, 163 F.3d 545, 549 (9th Cir. 1998) ("When a mixed question of fact and law involves *undisputed* underlying facts, *summary judgment* may be appropriate.") (emphasis added); *Trenouth v. U.S.*, 764 F.2d 1305, 1307 (9th Cir. 1985) (characterization of property alleged to be a public forum "mixed question of law and fact"); *see also Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1052 (9th Cir. 2008) (inappropriate to dismiss Lanham Act claim based on questions of fact).

Thus, putting aside all of the contradictory statements and emotional rhetoric that pervade Appellees' answering brief ("AAB") and those of the three special

interest industry groups who filed *amicus* briefs (*Amicus Curiae* Computer & Communications Industry Association (filed 11/7/18) ("CCIA"), *Amicus Curiae* Electronic Frontier Foundation (filed 11/7/18) ("EFF"), and *Amicus Curiae* Chamber of Commerce of the United States of America (filed 11/7/18) ("COC"), collectively the "Three *Amici*"), the unique record in this case establishes that Appellees have affirmatively represented and admitted that YouTube is a public forum where the public is invited to engage in "freedom of expression." ER110-12, 493, 625, 640, 867-869, 879, 909-910. Consequently, the sole, but dispositive issue in this case, at least at the pleading stage, is the legal effect of those admissions: whether Appellees' repeated admissions, as well as YouTube's character, operation, and invitation to the public are sufficient to plead that Appellees are engaged in "state action" when they regulate speech on property designated as a "public forum." Appellant has sufficiently alleged that Appellees' conduct is subject to some level of judicial scrutiny under the First Amendment in addition to the Lanham Act.

II. ARGUMENT: APPELLANT HAS PLEADED VIABLE CLAIMS UNDER THE FIRST AMENDMENT AND LANHAM ACT

Unless Appellees can convince this Court to be the first federal appellate court to hold as a matter of pure law that a private property owner can never, under any circumstances, dedicate its property to the public as a forum for "freedom of expression," Appellant has, at a bare minimum, sufficiently alleged that Appellees

are engaged in "state action" under the "public function" test. A private party's regulation of public speech in a public forum is one of the few "quintessential exclusive public functions" reserved for the government. *See Lee v. Katz*, 276 F.3d 550, 554-57 & n.4 (9th Cir. 2002). As the district court recognized, Appellees have alleged that YouTube dedicated and operated YouTube as a "public forum" where the public is invited to use the site as a place for "freedom of expression." ER74; Appellant's Opening Brief ("AOB") 23. Thus, absent an absolute, categorical prohibition on a private property owner's dedication of private property as a public forum, a bright line rule that no federal appellate court has drawn to date, Appellant has pleaded viable claims for relief under both the First Amendment and Lanham Act that are sufficient to survive a motion to dismiss under Rule 12(b)(6).

In more than 200 pages of briefing, Appellees and the Three *Amici* fail to cite a single case that would support the bright line rule that they request the Court to draw in this case. No court has made such a holding, and for good reason. The creation of such a bright line rule will have extreme and dangerous consequences far beyond the narrow issues and relief sought in his case. It will eviscerate the fundamental free speech liberties of the more than two billion people who use and depend on public forums like YouTube as their primary form of public communication.

Such a holding would also require this Court to effectively overrule *Marsh v. Alabama*, 326 U.S. 501 (1946) and the many recent decisions of the Supreme Court and this Court that are based on the longstanding First Amendment axiom in *Marsh*: "[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." *Venetian*, 257 F.3d at 945-46 (*quoting Marsh*, 326 U.S. at 506); *see also Lee*, 276 F.3d at 555 (9th Cir. 2002) ("Ownership does not always mean absolute dominion.... [Where] facilities are built and operated primarily to benefit the public ... their operation is essentially a public function ... subject to state regulation") (*quoting Marsh*, 326 U.S. at 506); *see also Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 792 (1996) (Kennedy, J., concurring) (internal citations omitted) ("Public fora do not have to be physical gathering places, nor are they limited to property owned by the government"); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801, 105 (1985) (when a speaker seeks "access to . . . private property dedicated to public use," it may "evoke First Amendment concerns"); *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland*, 383 F.3d 449 (6th Cir. 2004) (holding privately owned sidewalk that encircled sports complex was a "traditional public forum"); *McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012) (finding privately owned sidewalks on university

campus public fora); *Brindley v. City of Memphis, Tennessee*, No. 17-cv-2849 (SHM), 2018 WL 3420819, at *4 (W.D. Tenn. July 13, 2018) ("When property is privately owned, it is subject to the First Amendment in proportion with the owner's authorization of public use") (*citing and quoting Marsh* and progeny).

Based on the record in this case, therefore, Appellant has alleged facts demonstrating that Appellees operate YouTube by engaging in a quintessential and exclusive public function: the regulation of protected speech in a designated public forum. *Lee*, 276 F.3d 557 & n.4.

Appellant has also alleged facts that Appellees are engaged in false advertising by inducing the public audience to use YouTube based on false promises of content neutrality and by falsely branding Appellant's speech as offensive and inappropriate. Appellees unlawfully restrict and falsely brand Appellant's speech based on animus and discriminatory reasons and for the purely anti-competitive purpose of boosting the audience reach and profitability of Appellees' own content on YouTube at the expense of Appellant. That is particularly important in this case, because Appellees have spent enormous sums to create, host and promote both their own video content and that of particularly lucrative preferred partners and directly competing for audience with Appellant and other members of the public. ER940.

A. A Private Party That Regulates Speech In A Public Forum Performs An Exclusive Public Function That Constitutes State Action Subject To Judicial Scrutiny Under The First Amendment

Appellees' central defense to the First Amendment claim is that their sworn representations and admissions about the public character of YouTube and dedication to "politically neutral" content filtering practices simply do not matter because YouTube is both privately owned and too big to be held accountable under the First Amendment. *See*, *e.g.*, AAB 15-16. The idea that "private online service providers" are too powerful and be subjected to the public function doctrine poses an extreme, dangerous and autocratic threat to liberty and the rule of law in the age of the Internet. Fortunately, the contention finds no support in the law, including the decisions of the Supreme Court and this Court that govern the disposition of this appeal.

As discussed above, the U.S. Supreme Court and the Ninth Circuit have continually reaffirmed the concept 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 supra*, at pp. 6-7. None of the cases cited by Appellees holds to the contrary. Appellees' assertion that *Howard v. Am. Online Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) supports the creation of such a bright line rule on this record is unavailing. *In Howard*, the Ninth Circuit held only that conclusory allegations

averring that AOL was "a 'quasi-public utility' that 'involv[es] a public trust'" were "insufficient to hold that AOL is an 'instrument or agent' of the government." *Howard*, 208 F.3d at 754. That is hardly legal precedent for rejecting the public function test in this case. As *Howard* makes clear, there was simply "nothing in the record that supports the contention that AOL should be considered a state actor." *Id.*

That is not this case. Here, the record is replete with Appellees' admissions, including sworn testimony to Congress, that they operate YouTube as a "public forum" where the public is invited to engage in "freedom of expression." Those words matter under the public function test because they establish that Appellees are engaged in the quintessential and exclusive government function of regulating free speech in the paradigmatic public square of the twenty-first century: the world's largest designated public forum. *Cf. Lee*, 276 F.3d at 554–57 & n.4. Appellees affirmatively claim to operate YouTube to serve a unique public function: a public space for freedom of expression dedicated to the four core values of Freedom of Expression, Freedom of Information, Freedom of Opportunity, and Freedom to Belong. ER625, 640, 868-869. Having used these inducements to build YouTube into the largest visual communication monopoly in the world by operating it as a "public forum" where the public is expressly invited to engage in "freedom of expression," Appellees are engaged in the regulation of free speech in

a designated public forum, "quintessentially an exclusive and traditional public function" constituting state action. *Lee*, 276 F.3d at 556–57.

Appellees' reliance on *Green v. Am. Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003) fares no better. In *Green*, the allegations were only that "AOL is transformed into a state actor because AOL provides a connection to the Internet on which government and taxpayer-funded websites are found, and because AOL opens its network to the public whenever an AOL member accesses the Internet and receives email or other messages from non-members of AOL." Like *Howard*, the plaintiff in *Green* failed to allege any facts to establish that AOL's service was "sufficiently 'devoted to public use' under" similar factors considered by the Ninth Circuit. *Id.* at 472. Again, that is not the case here. Appellees do not hold out YouTube as an online service provider that simply offers general Internet access to its customers, including ***private*** emails or other messaging services. Rather, YouTube is the largest video hosting platform in the world that monetizes free speech by expressly inviting individuals to engage in freedom of expression by posting content for the rest of the world to see. *Cf. also Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 444 (E.D. Pa. 1996) (ruling on a fully developed factual record that prohibiting unsolicited emails to AOL customers is not state action because protecting private customers from unsolicited contact is not an exclusive government function).

The Ninth Circuit has considered and rejected Appellees' related contention that "[t]his Court need go no further to reject Appellant's First Amendment claim under the public function test," because "the actions of a private party can only be treated as state action if there is a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Compare* AAB 16-17 (*citing and quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 532 U.S. 288, 295 (2001)) *with Lee*, 276 F.3d at 554 & n.4 (stating that *Brentwood* was a pervasive entanglement, not public function, case and that the exercise of power over a function exclusively reserved for the government is sufficient to establish "state action" under the public function test).

Appellees' related contention that *Lee*'s public function analysis should be limited to cases where "the government has delegated a function to [the private party] that otherwise would be exclusively provided by the state" has been made to and rejected by the Ninth Circuit. AAB 16-17. As set forth in Appellant's Opening Brief, ***no*** direct agency or nexus relationship with the government is required to meet the public function test when the conduct at issue involves the quintessentially exclusive public function of regulating speech in a dedicated public forum because "***the required nexus may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State***.'"

Lee, 276 F.3d at 554 & n.4 (*citing and quoting Blum v. Yaretsky*, 457 U.S. 991, 1005, (1982) (*quoting Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)) (emphasis added)). Thus, to the extent that "nexus" status is "found in all cases where private action is attributable to the State," the required "nexus" is satisfied when the private party engages in conduct that is traditionally performed by and reserved for the government. *Id.*

As *Lee* also demonstrates, inserting a direct government nexus or entanglement element into the public function test eliminates the fundamental distinction between the public function and entanglement tests. Appellees' attempt to insert a direct entanglement requirement into "public function" test would render the entire public function doctrine superfluous and meaningless. *See* AAB 16-17; *but see Lee*, 276 F.3d at 554, n.4. As set forth above, this Court has already held that a direct nexus to government is unnecessary, at least in this unique case, because the regulation of speech in a designated public forum satisfies the public function test for state action without any need to "reach the [alternative] argument that the private party is a State actor under what they label the 'nexus' test.'" *Id*.

Appellees' reliance on *Brentwood* for the proposition that "a private party performs a 'public function' *only* when the government has delegated a function to it that otherwise would be exclusively provided by the state" suffers from the same defect. *See* AAB 16-18. As noted above, *Brentwood* is inapposite to the state

action allegations in this case, if for no other reason than the obvious fact as pointed out by this Court in *Lee*, *Brentwood* was decided under the "pervasive entwinement" test, not the "public function test." *See Lee*, 276 F.3d at 554, n. 4 (quoting and discussing *Brentwood*, 532 U.S. 288, 295).

Appellees' attempt to distinguish *Packingham v. North Carolina*, 582 U.S. ___, 137 S.Ct. 1730 (2017) and *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) from this case because they both "involve[d] clear-cut examples of state action," continues to miss the point when it comes to the public function test. AAB 32-34; *but see Lee*, 276 F.3d at 554-557, & n.4. Because the government "nexus" requirement is satisfied in those rare and unique cases when the private party exercises one of the very few powers that are the "exclusive prerogative" of the government, federal courts analyze public function claims by scrutinizing those factors that relate to and determine the character and purpose of the property at issue, including its history, use, and the specific invitation to public regarding its use. Consequently, naked title to the property, without more, is never dispositive, if not entirely irrelevant. *See*, *e.g.*, *Venetian*, 257 F.3d at 943, 946 (*citing Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000)); *see also Lee*, 276 F.3d at 555-56.

The Supreme Court's repeated characterization of global Internet social media sites like YouTube in *Packingham* and *Reno* as bearing all of the character

attributes of a traditional public forum is important, if not dispositive, to the public function characterization of the property in this case. Accordingly, the Supreme Court's admonishment in *Packingham* and *Reno* that federal courts should "***exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks"*** on the internet applies with equal force to YouTube and the claims against Appellees in this case. *Packingham*, 137 S.Ct. at 1736 (emphasis added). Given the record of how Appellees operate and hold YouTube out to the public and Congress, *Packingham* and *Reno*, therefore, provide further support for the claim that Appellees are engaged in regulation of speech on property they hold out to the public as an open forum dedicated to freedom of expression.

Finally, Appellees' attempt to scare the Court into creating a categorical bar to subjecting a private property owner who regulates speech on an internet site to First Amendment scrutiny on this narrow and unique record is based on emotional rhetoric, not persuasive legal reasoning. Indeed, Appellees' claim that permitting Appellant to prosecute a First Amendment claim on this narrow record would result in an unlimited expansion of the public function doctrine to all private internet providers is disingenuous. *See, e.g.,* AAB 10, 34-39; EFF Brf. 13 (falsely ascribing to Appellant "that the only way for users to truly benefit from online platforms is to deem those platforms public forums/state actors, thereby holding

them to First Amendment content standards like government entities"). There is no risk of such an expansion. The allegations in this case are based on the affirmative statements and representations of Appellees about the public character and function of its property, the largest and most comprehensive "public square" in the history of the world dedicated to "freedom of expression." Consequently, Appellees as the owners and operators of YouTube have total and absolute control as to that characterization, including their representations to the public, Congress, and the courts.

To that end, Appellant does not argue for a broad implied designation theory that all internet sites are "public fora" merely because the public is invited to use the property for communication or speech. Rather, Appellant takes issue with the brazen manner in which Appellees hold out YouTube as a "neutral public forum" and place where the general public is expressly invited to engage in "freedom of expression." And, it is Appellees' business decision, something that is entirely in their control, to invite the public to use YouTube as a "public forum" dedicated to the core value of freedom of expression that implicates the First Amendment. Accordingly, there is absolutely no practical need, let alone any legal justification, for this Court to overrule established First Amendment jurisprudence and create a categorical rule that, as a matter of law, a private property owner cannot dedicate his or her private property for the expression of free speech, and thereby engage

the "exclusive and traditional public function" of "regulat[ing] . . . free speech within a public forum." *Lee*, 276 F.3d at 557.

B. Appellees' Claim That YouTube Is A Publisher Is An Issue Of Fact That Is Refuted By The Record In This Case, Including By Appellees' Own Admissions.

Appellees' assertion that YouTube is a "private publisher" that is merely exercising a traditional editorial right to deem what videos are and are not "fit to print" is disingenuous given this record. AAB 39-42. Appellees' claim that YouTube is a "private publisher" is, at most, a factual dispute that has no bearing on the sufficiency of the allegations at the pleading stage.

It is also not true. Among other things, Appellees provided a sworn declaration admitting to the district court the opposite of what they now argue to this Court. That declaration admits that YouTube is a "service that enables more than a billion users around the world to upload" videos, where users are urged to "Broadcast Yourself," "promote yourself" or "do the broadcasting yourself." ER187; *see also* ER230 and 235. Furthermore, Section 10 of YouTube's Terms of Service ("TOS") state that it is not legally or otherwise responsible for any third party content. ER766. Nor is YouTube "responsible for the accuracy, usefulness, safety, or intellectual property rights of or relating to such Content"; responsibility for the "FOREGOING RESTS ENTIRELY WITH YOU [THE USER]." ER763 (TOS, Section 5.D); ER 766 (emphasis original)). Those are not the statements of

a publisher who tells the public they only print news "fit to print." Indeed, Appellees do not merely sell edited news content to users; they monetize third party public speech inviting "everyone" to "express themselves" on a "nearly limitless range of topics." ER187-190; *see also* ER494-95.

As such, Appellees' related "free press defense" that YouTube is effectively a private "publisher" that retains unfettered editorial authority under the First Amendment to decide what to print like that exercised by New York Times or the Miami Herald Tribune is entirely unavailing. AAB 39-42 (*discussing Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241(1974) at length). Applying the free press concepts at issue in *Tornillo* to allegations that Appellees regulate speech in a public forum fails because it obscures the crucial distinction between a party that operates and regulates a public forum for free speech and a newspaper publisher that exercises editorial control over the content ***it*** decides to publish or not. Consequently, Appellees' factual claim that YouTube is a "publisher" and not a "forum" for free speech puts the "cart" of whether YouTube is a publisher under the law before the "horse" of whether factual allegations, including their contrary representations to the public and Congress, can support the self-serving and questionable claim that YouTube is a traditional newspaper publisher and not an operator of a global internet platform where the public is invited to engage in freedom of expression.

In this case, Appellant has also alleged that YouTube 's business plan is to reap the financial benefits of unedited, third party content published by more than one billion members of the public. In furtherance of that objective, Appellees hold YouTube out to the public as a platform dedicated to "four core values" intended to ensure "freedom of expression" for "all" its users. And all of those disclosures, including its Community Guidelines and promises of "neutral" content filtering "***are also incorporated . . . by reference***" into its Terms of Service. ER760 (Section 1.A) (emphasis added). Unless the Court is prepared to hold as a matter of law that Appellees' representations, including its Mission Statement, Community Guidelines, Terms of Service, and sworn testimony to Congress and the courts do not matter, Appellant has alleged facts sufficient to establish that YouTube is a hosting platform for the public to edit and post third party content, not a newspaper publisher. *See Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9494 AHM (SHx), 2008 WL 4217837 (C.D. Cal. Jul. 16, 2008) (issue of whether Google is content provider fact-intensive and improper for Court to resolve on the pleadings).

C. The First Amendment Does Not Protect Appellees From Unlawfully Regulating Speech In A Public Forum

Appellees' more general contention that a party that regulates speech in a public forum retains an unfettered and unilateral First Amendment right to arbitrarily censor and restrain speech on private property dedicated to the public as

a place for free speech has been made and expressly rejected by the U. S. Supreme Court. *Pruneyard Shopping Center v Robins*, 447 U.S. 74 (1980) (discussed at length in AOB 52-53). As set forth in Appellant's Opening Brief, when a private property owner is involved in the regulation of protected speech in a forum designated for public speech, the operator and regulator of that forum may not engage in unilateral censorship because it does not agree with the viewpoint expressed by the speech. Instead, the regulator has a First Amendment right to affirmatively speak out to dissociate itself from the speech or the viewpoint expressed therein. *See id*. at 85–88; AOB 52-53.

To the extent Appellees are arguing that the First Amendment rights of "private publishers" are somehow reciprocal or co-extensive as a matter of law with that of a party that performs the public function of regulating speech in a public forum, Appellees advance a circular and dangerous autocratic view of the First Amendment. Indeed, if these Appellees get their way, they will wipe out 75 years of First Amendment jurisprudence governing the limited subjective discretion of parties, be they public or private, which engage in regulating protected speech. *See, e.g.*, *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 130–33 (1992); *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 760 (1988); *Shuttlesworth v. City of Birmingham, Ala.,* 394 U.S. 147, 150–51 (1969); *Marsh*, 326 U.S. at 501. Even with respect to non-public forums, although

"the Supreme Court has not yet had occasion to apply the unbridled discretion doctrine outside the context of a traditional public forum," it is assumed that the regulator of speech does not possess unfettered discretion to censor speech based on the identity or viewpoint of the public speaker. *See Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*, 716 F. Supp. 2d 773, 798 (W.D. Wis. 2010), *aff'd on other grounds,* 658 F.3d 614 (7th Cir. 2011) (citations omitted; internal quotation marks omitted).

Finally, Appellees' claim that Restricted Mode is "analogous to decisions made by publishers in selecting the 'material to go into a newspaper, and the limitation on the size and content of the paper, and treatment of public and public officials'" finds no support in the law, especially the law cited by Appellees. *Cf.*, *e.g.*, *Shulman v. Facebook.com*, No. 17-cv-764 (JMV), 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (no allegation of state action); *Langdon v. Google, Inc.*, 474 F.Supp.2d 622, 632 (D. Del. 2007) (merely opening to public does not transform into public forum); *Kinderstart.com LLC v. Google, Inc.*, 2007 No. 06-cv-2057(JF) WL 831806 (N.D. Cal. Mar. 16, 2007) (no allegations that search engine was opened to public for speech); *Cyber Promotions,* 948 F.Supp. 436 (merely providing email service did not transform AOL into public forum). Had any of those courts been confronted with multiple allegations of affirmative representations and party admissions under oath delegating the internet property at

issue as a "public forum" for "freedom of expression," the outcomes of those decisions may have been very different.

Zhang v. Baidu.Com., Inc., 10 F.Supp.3d 433 (S.D.N.Y. 2014) (and cases cited therein) is no exception. In *Zhang*, a district court in another circuit considered the "circumstances" under which the results produced by a search engine involve the publishing of protected speech. *Id*. at 433, 436. In considering that issue, the district court in *Zhang* drew an astute and crucial distinction between the rights of a traditional publisher that are implicated by search engine results on the one hand, and neutral infrastructure and filtering tools designed solely to regulate the speech of third parties on a hosting platform, on the other. With respect to the former, *Zhang* stated that communications and content of the search engine's results are protected by the First Amendment because they "inherently incorporate the search engine company engineers' judgments about what material users are most likely to find responsive to their queries." *Id.* at 438–39 (citations omitted). With respect to the latter, however, *Zhang* expressly limited that ruling by finding that a private party's operation of a search engine can, under certain circumstances, also implicate the free speech rights when the claims are based on the failure to live up to promises that the "infrastructure" or "platform" "delivers content in a neutral way." *Id.* at 440 (citations omitted).

D. The First Amendment's Public Forum Doctrine Is Not Limited To "Company Towns" Of The Early 20th Century

Appellees' next contention that Appellant's public forum allegations are insufficient as a matter of law because YouTube is not a "company town" is incorrect. Appellees have designated YouTube as a "public forum" for free speech and hold YouTube out as a place where the public is invited to engage in "freedom of expression." ER110-12, 493, 625, 640, 867-869, 879, 909-910.

Appellees do not cite any cases (and Appellant is not aware of any) holding that a private party who regulates speech in a designated public forum can only engage in "state action" if, and only if, the property is a "company town." *See generally* AOB 28-32. As stated above and reiterated here: "ownership does not always mean absolute dominion.... [Where] facilities are built and operated primarily to benefit the public ... their operation is essentially a public function ... subject to state regulation"). *Lee*, 276 F.3d at 555 (*quoting Marsh*, 326 U.S. at 506)). And, "[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." *Venetian Casino*, 257 F.3d at 945–46 (*quoting Marsh*, 326 U.S. at 506)).

In response to these clear statements of law, Appellees are left to argue that the Supreme Court's words relied upon by this Court have no legal force because they are "dicta that is not good law" when applied to anything other than a

"company town" of the early 20th century. AAB 1; 39, 41 42. That is simply not true. *See*, *e.g.*, *Denver Area Educ.* 518 U.S. at 792 (Kennedy, J., concurring) (citations omitted) ("Public fora do not have to be physical gathering places, nor are they limited to property owned by the government"); *Cornelius*, 473 U.S. at 801 (when a speaker seeks "access to . . . private property dedicated to public use," it may "evoke First Amendment concerns"); *Venetian Casino*, 257 F.3d at 945–46 (*quoting Marsh*, 326 U.S. at 506)); *Brindley*, 2018 WL 3420819, at *4 ("When property is privately owned, it is subject to the First Amendment in proportion with the owner's authorization of public use") (*citing and quoting Marsh* and progeny); *United Church of Christ,*, 383 F.3d at 452-53 (holding privately owned sidewalk that encircled sports complex was a "traditional public forum"); *McGlone*, 681 F.3d at 733 (finding privately owned sidewalks on university campus public fora). And, the fact that a "company town" is now a meaningless legal anachronism is certainly not a proper legal basis to throw out the underlying legal principle of *Marsh*, affirmed in decades of First Amendment jurisprudence, that a private property owner can, under certain circumstances, be subject to First Amendment scrutiny when it regulates speech on property it expressly designates as a public forum.

E. Appellees' Contention That They Are Too Private And Big To Be Subjected To The First Amendment Should Be Rejected

Appellees and the Three *Amici* also contend that the sky will fall if Appellees are required to regulate speech in a manner that complies with the Constitution because of the size, nature volume and diversity of the speech they attract. Appellant respectfully disagrees with this characterization of how social media sites operate and monetize speech, on the internet, as well as how the First Amendment would apply to such speech. Appellees' argument is based on the dangerous concept that they are too big to comply with the First Amendment. *See generally* CCIA Brf. 4-5; EFF Brf. 17-21; and COC Brf. 9-16.

First, to the extent that Appellees believe their own propaganda that a global internet platform is too big and complex for the First Amendment, then Appellees, as YouTube's rightful owners, have an easy and quick out: de-designate the platform as a public forum, withdraw their false representations, and tell the public and Congress the truth. Appellees should not be permitted to market YouTube to the public, Congress, and the courts as a "public forum" that induces the public to engage in "freedom of expression," monetize that free expression, and then restrict that free expression in reckless disregard for the constitutional values, norms, and rules that breathe life into the fundamental liberties and protections accorded to free speech by the Constitution.

Second, it is wrong for *Amici* EFF to claim that Appellees' restrictions on Appellant's video "content was faulty on many accounts," but insist that such faulty conduct is best "scrutinized in the court of public opinion," not the courts. EFF Brf. 2-3. As a matter of basic constitutional law, the Supreme Court held more than 200 years ago that "where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). EFF's "court of public opinion" argument is so ridiculous from a practical policy standpoint that it requires no further response beyond pointing out the obvious: Appellees hold monopoly power over the very "court of public opinion" that EFF believes is sufficient to remedy Appellees' arbitrary, capricious, and discriminatory viewpoint censorship, because they exercise unfettered control over the speech of the more than one billion people who use YouTube every day.

Third, the suggestion by Appellees and the Three *Amici* that Congress and not the courts should regulate content on YouTube, reflects a profound misunderstanding of the supremacy of the Constitution over the legislature's enactment of general laws. *See*, *e.g.*, EEF Brf. 2-3, 13. A federal statute like the Communications Decency Act, 47 U.S.C. § 230 ("CDA") must be consistent with the First Amendment scrutiny sought in this, or any other case. The use of any statute or law, such as the CDA, to regulate speech on the Internet is indisputably

"state action" that is always subject to judicial scrutiny under the First Amendment. Indeed, the Supreme Court has already struck down substantial portions of the CDA as unconstitutional. *Reno*, 521 U.S. at 864–68. It is only a matter of time before the immunity provisions cited by Appellees and the Three *Amici* face similar First Amendment scrutiny.

Fourth, the Three *Amici*'s rhetorical assertion that a public forum designation means that "everything goes" on the internet under the First Amendment reflects a basic misunderstanding of how speech is, ***and is not***, protected by the Constitution. Indeed, hate speech, pornography, health and safety, and national security have historically been, and continue to be, examples of issues that are successfully regulated by and adjudicated under the First Amendment. *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1991) ("From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (citation omitted; internal quotation marks omitted)). Such scrutiny takes context into account, including where the speech takes place, the interest in regulating the speech, the content of the speech and the requirement that the regulation must be objective and viewpoint neutral. *See id*. at 385–86. As long as Appellees maintain

viewpoint neutrality, Appellees can create "safe places" by designating the entire platform or portions thereof as limited public forums, or even non-public forums. But any meaningful debate over the regulation of types of speech and appropriate time, manner, place restrictions, is premature, if not irrelevant at this juncture of the case because it requires a court to adjudicate what speech is and is not protected, and what level of protection, if any, should be afforded to that speech. There is plenty of opportunity to debate that issue in this, and other cases, but it doesn't justify throwing out the entire First Amendment when it comes to global internet service providers.

To that end, it bears repeating that Appellant's speech in this case does not implicate any of those issues. Appellant's restricted videos involve purely political speech of the type and nature that is unquestionably protected by the First Amendment. ER926-32. Indeed, a review of any of those videos demonstrates they are not only protected by the First Amendment, but also fully comply with YouTube's purportedly "politically neutral" content filtering rules and Advertising Policy. *Id.* To the extent Appellees disagree that any of Appellant's videos are protected speech, they are free to argue that to the district court on remand below. But, that is a very different argument than the one Appellees now advance by asking this Court to throw the baby out with the bath water when it comes to free speech on the Internet because they are too big and too important to abide by the

provisions of the First Amendment. Appellant respectfully requests that the Court decline Appellees' invitation to create such a bright-line rule.

F. Appellant Has Alleged Facts Sufficient To State A Claim For Relief Under The Lanham Act

Words also matter when it comes to false advertising claims under the Lanham Act. Appellees do not contest that Appellant has correctly stated the elements of a Lanham Act false advertising claim. *Wells Fargo & Co. v. ABD Ins. & Financial Servs., Inc.*, 758 F.3d 1069, 1071 (9th Cir. 2014)); 15 U.S.C. § 1125(a)(1)(B); *see also* AOB 57. Rather, Appellees seek to mischaracterize and insert fabricated nuances into those allegations in an effort to distort Appellant's core claim and preserve the district court's erroneous decision to dismiss the claim. This effort fails.

1. Appellant Has Alleged That Appellees Have Made False Implications of Fact About The Content Of Appellant's Videos

Appellees initially contend that a Lanham Act false advertising claim can never be premised on "implication" (ER83-84) and that Appellant "fail[ed] to identify any actual statement" made by Appellees. AAB 44-46. Not so. Appellant has alleged that Appellees slapped a capitalized "Restricted Mode" stamp of disapproval on Appellant's educational videos by branding each such video with an oversized red square face bearing a forebodingly disapproving expression and ***explicit*** statement to Appellant's intended audience that "this video is unavailable

with Restricted Mode enabled. To view this video, you will need to disable Restricted Mode." ER818. Appellees ***explicitly*** represent to Appellant's intended audience that this "Restricted Mode" branding means that its videos 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***." AOB 58 (*citing* ER914-15; 916-18; 918-32; 940-41 (emphasis added)).

Appellees vacillate between attempting to re-characterize their statements as "statements of opinion" (AAB 46) and claiming that Appellant must ***also*** "point to [a] ***public announcement*** by YouTube as to the reasons that some of PragerU's videos were excluded from Restricted Mode" at the pleading stage. But Appellant alleges that the statements at issue are false and misleading representations of ***fact***, not opinion. Indeed, the Lanham Act provides that a false advertising claim is not limited to spoken or written words but applies to ***any*** deceptive "word, term name, symbol, or device." 15 U.S.C. 1125(a). Appellees' attempt to manufacture a

"press conference" pleading requirement eviscerates the well-established law in this Circuit and elsewhere that a Lanham Act false advertising claim may be premised on deceptive ***implications*** of fact. *See* AOB 59 (citing *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service, Inc.*, 911 F.2d 242, 245 (9th Cir. 1990); *William H. Morris Co. v. Group W., Inc.*, 66 F.3d 255, 257–58 (9th Cir. 1995)); *see also, e.g.*, *Sussman-Automatic Corp. v. Spa World Corp*., 15 F. Supp. 3d 258, 270 (E.D.N.Y. 2014). Their denial of the existence of any actionable representation is not credible.

2. Appellees' False Representations Were Made For An Allegedly Unlawful Purpose

Appellees next argue that their false representations were not made as part of any "commercial advertising or promotion" prohibited by the Lanham Act. AAB 46. Appellees are incorrect. Appellees' misrepresentations are numerous and littered throughout their website, mobile applications, and elsewhere. *See, e.g.*, ER806-810; 818–19; 914–15; 916–18; 918–32; 940–41. Whatever self-serving label Appellees choose to attach to their audience-diverting misrepresentations is irrelevant: actionable misrepresentations "need not be made in a 'classic advertising campaign' but may consist instead of more informal types of 'promotion.'" *See Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999). This is why statements that violate the Lanham Act can be found in: a privacy policy (*Collegenet, Inc. v. XAP Corp.*, 442 F. Supp. 2d 1070,

1078 (D. Or. 2006)); sales presentations (*Seven-Up Co. v. Coca-Cola Co.*, 83 F.3d 1379, 1386 (5th Cir. 1996)); and proposals for services (*Larkin Group, Inc. v. Aquatic Design Consultants, Inc.*, 323 F. Supp. 2d 1121, 1128–29 (D. Kan. 2004)). Appellant's claim is no different.

3. Appellant Has Alleged Injury Under The Lanham Act

Appellees' next assertion that Appellant has not alleged a "plausible theory" of how any of the representations "could possibly been responsible for the injuries Appellant claims to have suffered" is also wrong. AAB 47. So too is Appellees' contention that sole allegation of harm is "lower viewership" and "decreased ad revenue" for Appellant "because its videos were unavailable in Restricted Mode." AAB 48.

"When a defendant harms a plaintiff's reputation by casting aspersions on its business, the plaintiff's injury flows directly from the audience's belief in the disparaging statements." *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 137 (2014)). Here, Appellant alleges that "as a direct and proximate result of" the "***false representations***" that "deceptively misrepresent the nature, characteristics and qualities of YouTube's services and commercial activities as an equal and diverse public forum," Appellees "unfairly enhance the image and goodwill of [YouTube]'s content" while also "degrading [Appellants] videos" by suggesting that the content of [Appellant's] videos [is] offensive,

hateful, or inappropriate." ER940–41, ¶¶ 117–18 (emphasis added). As a result, Appellant has suffered an "immediate and irreparable injury in fact," ***including*** "lower viewership, decreased ad revenue, a reduction in advertisers willing to purchase advertisements shown on [Appellant's] videos, diverted viewership, and damage to its brand, reputation and goodwill." ER940–41, ¶¶ 117–18. By way of their false representations, Appellees demean PragerU as a peddler of hateful and offensive content unprotected by the First Amendment principles to which YouTube falsely claims corporate devotion. *Id.*; *see also* AOB 58. That is precisely the kind of injury for which the false advertising prohibitions of the Lanham Act provide a remedy.

4. Appellant's Lanham Act Claims Are Not Premised On A "Hoodwinked Consumer" Theory

Appellees also argue that this Court should affirm the district court's erroneous conclusion that PragerU's Lanham Act claims are premised on a non-cognizable "assert[ion] that it was 'hoodwinked' by [Appellees'] representations 'into [using] a disappointing' video-hosting service" (ER29; AAB 50-51). That is not true. Appellees wave away PragerU's allegations of competitive harm as a "non-sequitur" (AAB 51), but what PragerU actually pleads that it competes with YouTube as a producer and distributor of video content (*id.*) and, as discussed above, has suffered actionable injury because of YouTube's misrepresentations. The core of the Lanham Act claim is that YouTube has sought to gain competitive

advantage in the video content marketplace both by falsely branding itself as a free speech-centric marketplace of ideas and by falsely branding PragerU to its target audience as trafficking in hateful and offensive content containing specific elements YouTube deems unworthy of free speech protections. AOB 58; ER940-41. The requisite standing exists.

5. Appellees' Misrepresentations Are Not "Puffery"

Appellees' contention that the district court's dismissal of their falsehoods as mere "puffery" because "none" of the challenged representations is "capable of being proved false" is itself false. AAB 53. Appellees do not and cannot challenge the fact that Appellees' false representations about the ***content*** of Appellant's videos are not mere "puffing." And, while courts can, under certain circumstances, resolve questions of "puffery" at the pleading stage, that is not this case. *Cf.*, *e.g.*, *Cook, Perkiss & Liehe*, 911 F.2d at 245. Appellees are here alleged to have made multiple false representations 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" and where all filtering of content is "politically neutral." (ER914–15; 916–18; 918–32; 940–41). That is not mere "bluster," but lies that implicate "measurable" and "quantifiable" issues of fact going to the core of how YouTube operates. And while Appellees are correct that this Court's *Williams* admonishment that district courts exercise caution before

granting "puffery" motions to dismiss was handed down in the context of the UCL, there is no principled reason why this would not apply with equal force in the Lanham Act context: it is well-established in this Circuit that UCL false advertising claims are "substantially congruent to claims made under the Lanham Act." *L.A. Taxi Cooperative v. Uber*, 114 F. Supp. 3d 852, 860 and n. 1 (N.D. Cal. 2015); *see also Cytosport v. Vital Pharm., Inc.*, 894 F.Supp. 2d 1285, 1295 (E.D. Cal. 2012) (similar). This case is simply not the "rare situation in which granting a motion to dismiss" on puffery grounds "is appropriate." *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008); *see also Blue Buffalo Co. Ltd. v. Nestle Purina Petcare Co.*, No.15-cv-384 (RWS), 2016 WL 3227676 (E.D. Mo. Jun. 13, 2016); *Ackerman v. Coca-Cola Co.*, No. 09-cv-395 (DLI), 2010 WL 2925955, at *17 (E.D.N.Y. Jul. 21, 2010).

III. CONCLUSION

Appellant respectfully requests that the Court reverse the district court's order dismissing Appellant's First Amendment and Lanham Act Claims under Fed. R. Civ. P. 12(b)(6) and issue an order remanding those claims for further proceedings to the district court.

STATEMENT REGARDING ORAL ARGUMENT

Appellant hereby requests oral argument before a panel of the Ninth Circuit Court of Appeals. Oral argument should be permitted because this case raises

important issues regarding the extent to which the First Amendment and the Lanham Act apply to global social media companies who monetize speech by inviting the public to use their platforms as "public fora" for "freedom of expression."

DATED: December 21, 2018

Respectfully submitted,

BROWNE GEORGE ROSS LLP
Pete Wilson
Eric M. George
Peter Obstler

By: /s/ Peter Obstler
Peter Obstler
Attorneys for Appellant Prager University

CERTIFICATE OF COMPLIANCE

This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is 8,393 words, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

DATED: December 21, 2018

By: /s/ Peter Obstler
Peter Obstler

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Peter Obstler
Peter Obstler

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-15712

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☒ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [8,393] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant [/s/ Peter Obstler] Date [12/21/2018]

("s/" plus typed name is acceptable for electronically-filed documents)