18-15712

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PRAGER UNIVERSITY,
Plaintiff and Appellant,

—v.—

GOOGLE LLC and YOUTUBE, LLC,
Defendants and Appellees.

On Appeal from the United States District Court for
the 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 Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Defendants-Appellees states that YouTube, LLC is a wholly owned subsidiary of Google LLC, which is a wholly owned subsidiary of XXVI Holdings Inc., which is a wholly owned subsidiary of Alphabet Inc., a publicly traded company, and that no publicly traded company holds more than 10% of Alphabet Inc.'s stock.

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INTRODUCTION

In this case, Appellant seeks to overturn bedrock principles of law in an effort to subject YouTube's editorial judgments to First Amendment scrutiny. But YouTube is not a state actor. When it makes decisions about which videos should be available in the special "Restricted Mode" feature it offers to protect its most sensitive users, YouTube is not standing in the shoes of the government or performing a "public function." To the contrary, YouTube is exercising its own rights under the First Amendment. Nor does YouTube violate the Lanham Act by excluding some of PragerU's videos from being displayed in Restricted Mode or by expressing a general commitment to free expression that sits alongside YouTube's established rules for user-submitted content.

YouTube has nothing against PragerU, and it strives to apply its content policies in a consistent manner, without regard to political considerations. There was no viewpoint discrimination here. But even taking Appellant's allegations as true, its claims fail as a matter of law and were properly rejected by the district court. That ruling should be affirmed in all respects.

JURISDICTIONAL STATEMENT

YouTube agrees that the district court had jurisdiction over Appellant's federal claims under 28 U.S.C. § 1331 and that this Court has appellate jurisdiction

under 28 U.S.C. § 1291 to review the district court's final judgment dismissing those claims.

COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. Whether YouTube is a "state actor" constrained by the First Amendment when it limits access to user-submitted videos on its private online platform.

2. Whether YouTube's editorial judgments about when user-submitted videos should be made available in its "Restricted Mode" feature are protected by the First Amendment.

3. Whether Appellant has stated a claim for false advertising under the Lanham Act, 15 U.S.C. § 1125(a).

COUNTERSTATEMENT OF THE CASE

A. YouTube and Its Video-Hosting Service

Appellee YouTube, LLC ("YouTube")—a subsidiary of Appellee Google LLC ("Google")—is a popular online service for sharing videos and related content. Excerpts of Record ("ER") 6. YouTube users around the world upload and view billions of hours of video content on a nearly limitless range of topics. ER 591-92. While YouTube is committed to providing a platform for speech, creativity, and self-expression, it is not a free-for-all. YouTube has extensive rules governing use of its service that allow it to remove or restrict access to user-

submitted content that may be unlawful, harmful, or undesirable. These rules and policies are reflected in various public documents, including YouTube's Terms of Service and the "Community Guidelines," which are incorporated into those Terms. ER 508-28.

In order to post videos or other content to YouTube, YouTube users agree to the Terms of Service and Community Guidelines. ER 508-13. Under these terms, YouTube expressly reserves the right "to remove Content" and "to decide whether Content violates [its] Terms of Service." ER 510-11. The Community Guidelines set out what users can and cannot do when using YouTube. The Guidelines generally prohibit users from posting videos and other content that falls into any one of 12 categories, including nudity or sexual content, harmful or dangerous content, harassment and cyberbullying, threats, violent or graphic content, and material that infringes copyright. ER 514-19. YouTube also recognizes that some videos, while permitted on the service, may not be appropriate for everyone, including families, students, or other more sensitive users. YouTube has therefore created tools to allow users to control what they see and to choose to limit their exposure to potentially mature content. ER 521-22. One of those tools is a feature called "Restricted Mode."

B. YouTube's Restricted Mode Tool

Restricted Mode allows users to select a more limited YouTube experience, one that does not include videos that may be objectionable to younger or more sensitive users. ER 521-22. As YouTube explains to users: "Restricted Mode hides videos that may contain inappropriate content flagged by users and other signals." ER 529-32. Restricted Mode is entirely optional. It is turned off by default, and it must be affirmatively enabled by users who wish to limit their YouTube experience. Those users may include individuals, families, or institutions that provide internet access to the public, such as schools, libraries, and businesses. ER 521-22. Only approximately 1.5% of YouTube's users have Restricted Mode activated on an average day. ER 914.

Videos that are not visible when a user chooses to employ Restricted Mode are *not* removed from YouTube. Such videos, unless they otherwise violate YouTube's Community Guidelines, remain visible on YouTube's general service, where they are readily available to the hundreds of millions of users who have not opted into Restricted Mode. ER 521-31. With Restricted Mode, YouTube is effectively able to provide its users with two different viewing experiences within a single platform: one for all users, which includes any uploaded videos that comply with YouTube's Community Guidelines; and a more limited experience for a small subset of users who wish to avoid potentially mature content. *Id.*

To help determine what content will and will not be available in Restricted Mode, YouTube identifies videos as containing potentially mature content. ER 521. This includes material that falls into six general categories, such as "drugs and alcohol," "sexual situations," "violence" (including "natural disasters and tragedies, or even violence in the news"), and "mature subjects," such as "videos that cover specific details about events related to terrorism, war, crime, and political conflicts." ER 521-22. YouTube implements these classifications in two ways. First, YouTube uses an "automated system" that examines certain signals like "the video's metadata, title, and the language used in the video" to determine if the video should be categorized as mature or age-restricted. ER 521. Second, human reviewers manually review the designations of videos when users appeal the designations from the automated filtering system, and videos that are flagged by users may in some circumstances undergo manual review that can result in the assignment of a different rating. *Id.*

YouTube informs users when videos they have uploaded have been age-restricted or otherwise made unavailable in Restricted Mode. ER 516-17; ER 521-28. Users who believe that their videos have been incorrectly classified or excluded from Restricted Mode can appeal that determination. ER 521-22; ER 534. That process may lead YouTube to change whether a video is available in Restricted

Mode. *Id.* Such changes also may happen when YouTube manually reviews videos flagged by users that have only been classified by its automated system. ER 521-22.

C. PragerU and YouTube's Classification of its Videos

Appellant PragerU is a media organization that seeks to "provide conservative viewpoints and perspectives on public issues." ER 912. PragerU has created, uploaded, and shared on YouTube hundreds of videos covering a range of political and social issues, including racism, police violence, campus rape, genocide, political conflicts, and historical events. ER 557.

PragerU has not been banned from YouTube or prohibited from posting content on the service. Nor have any of its videos ever been excluded from YouTube or made unavailable on the general YouTube service. ***This case is not a challenge to YouTube's removal of content.*** Instead, PragerU's allegations are limited to how YouTube has selected videos for inclusion in Restricted Mode.

PragerU claims that approximately 30 of its videos are currently unavailable in Restricted Mode. Appellant's Opening Brief ("Br.") 16. Those videos represent only a handful (approximately 12%, as of December 2017) of the total number of videos PragerU has posted to YouTube. ER 192, 196; Br. 16. And even the PragerU videos that have been designated as unavailable in Restricted Mode remain fully accessible to virtually all YouTube users—all those who have not chosen to use Restricted Mode. ER 192. Moreover, Appellant makes no allegation

that YouTube (outside of this litigation) has ever made any public statement about the content of PragerU's videos or why certain of them were classified such that they would not appear in Restricted Mode. To the contrary, all of the communications about this issue were conducted privately between YouTube and PragerU. ER 918-25.

D. Proceedings Below

PragerU filed this lawsuit against Google and YouTube on October 23, 2017. ER 901. The Complaint asserted two federal claims—for an alleged violation of the First Amendment and for false advertising under the Lanham Act (15 U.S.C. § 1125(a)(1)(B))—and various claims under state law—for an alleged violation of the California Constitution Liberty of Speech Clause (Cal. Const., art. I, § 2), the Unruh Civil Rights Act (Cal. Civ. Code § 51 *et seq.*), the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*), and for breach of the implied covenant of good faith and fair dealing. ER 901-43.

The parties filed and briefed two simultaneous motions in the District Court. Appellant moved for a preliminary injunction seeking to compel YouTube to make all of its videos available in Restricted Mode, while YouTube moved to dismiss all of PragerU's claims under Fed. R. Civ. P. 12(b)(6) and as barred by the First Amendment and Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230. ER 897; ER 545. After briefing was completed, Appellant submitted

supplemental evidence in the form of congressional testimony by YouTube's Head of Public Policy and Government Relations, Juniper Downs. ER 104-25.

On March 26, 2018, the district court issued a comprehensive Order: (1) granting YouTube's motion to dismiss Appellant's federal claims; (2) denying Appellant's motion for a preliminary injunction; and (3) declining to exercise supplemental jurisdiction over Appellant's state law claims. ER 5-31. Judge Koh's ruling focused on Appellant's First Amendment and Lanham Act claims. The court began by rejecting PragerU's argument that YouTube is a state actor under the "public function" test. ER 14-21. As Judge Koh observed, PragerU "[did] not point to any persuasive authority to support the notion that [YouTube] by creating a 'video-sharing website' and subsequently restricting access to certain videos that are uploaded on that website have somehow engaged in one of the 'very few' functions that were traditionally 'exclusively reserved to the State.'" ER 14 (internal citations omitted). Because state action is a prerequisite for any invocation of the First Amendment, Appellant's claim failed. ER 13-14.

The district court then rejected Appellant's Lanham Act claims on multiple grounds. Judge Koh first explained that YouTube's classification of PragerU's videos as ineligible for Restricted Mode did not make or imply any factual statement about those videos—let alone a statement that constituted "commercial advertising or promotion" as required by the statute. ER 23. The district court

further held that PragerU did not "allege that [YouTube's] policies and guidelines constitute 'commercial advertising or promotion,'" or that any injury Appellant allegedly suffered "flowed directly from [YouTube's] publication of their policies and guidelines." ER 25. Finally, Judge Koh concluded that YouTube's general expressions of support for free expression were not actionable under the Lanham Act because they constituted "mere 'puffery'" that simply could not amount to a "false or misleading representation of fact." ER 26-27.

Having rejected the federal claims, Judge Koh declined to exercise supplemental jurisdiction over Appellant's state law claims. ER 29-30. The court further found that because Appellant had no likelihood of success on the merits of any of its claims, it was not entitled to a preliminary injunction. ER 31.

The district court did not immediately dismiss the case with prejudice. Initially, PragerU stated that it would file an amended complaint containing "additional factual allegations," even though it acknowledged that those allegations were unlikely to alter the court's ruling on the dispositive legal issues in the case. ER 98. Accordingly, Appellant announced that it wanted to simultaneously file an amended complaint while appealing the order dismissing the original complaint.

At the case management conference, Judge Koh noted that this would create "a really odd posture" and suggested that if PragerU wanted to amend its complaint, it should do so and await a second round of briefing before taking an appeal.

ER 47-49. After initially agreeing to do so, PragerU changed its mind and declined to file an Amended Complaint. Instead, it filed this appeal. ER 44-45; ER 1.

SUMMARY OF ARGUMENT

The district court correctly granted YouTube's motion to dismiss Appellant's claims under the First Amendment and the Lanham Act. That ruling should be affirmed in its entirety.

First Amendment. Appellant's First Amendment claim fails because YouTube is not a state actor; it is a private company operating a private service without any involvement or connection with the government. This Court and others have consistently rejected similar constitutional claims against private online service providers. *See, e.g.*, *Howard v. Am. Online, Inc.*, 208 F.3d 741, 746 (9th Cir. 2000); *Green v. Am. Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003).

Appellant tries to get around this obvious result by arguing that YouTube is engaged in a "public function." This argument misunderstands the law. As this Court's decision in *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002), makes clear, the public function test for state action requires (1) a clear delegation of authority from the government (2) to perform a role that otherwise would be the exclusive responsibility of the state. Neither of those requirements is met here: YouTube has not been delegated any authority by the government, and regulating user content on a private online platform is not a traditional, much less an *exclusive*, state function.

Nor is YouTube a "public forum" under the First Amendment. A public forum must be owned or controlled by the government, but YouTube is wholly private. Generic public statements expressing YouTube's general commitment to the values of free expression do not change that reality. Appellant relies on dicta from *Marsh v. Alabama*, 326 U.S. 501 (1946), to argue that even private parties can be subjected to regulation under the First Amendment. But the Supreme Court has expressly limited *Marsh* to the unique context of "company towns" and repudiated any suggestion that private businesses become state actors merely because their premises are generally open to the public. Appellant's misguided effort to revive *Marsh* for the Internet defies decades of precedent.

Beyond its legal infirmities, Appellant's argument would have disastrous practical consequences. The First Amendment appropriately limits the government's ability to censor speech, but applying those limitations to private online platforms would undermine important content regulation. If they are bound by the same First Amendment rules that apply to the government, YouTube and other service providers would lose much of their ability to protect their users against offensive or objectionable content—including pornography, hate speech, personal attacks, and terrorist propaganda. Appellant's blithe assertion that applying the First Amendment here would not meaningfully limit regulation of such material ignores the entire sweep of modern First Amendment law.

Perhaps even worse is Appellant's suggestion that YouTube could avoid the First Amendment by disclaiming any commitment to allowing user self-expression on its service. Not only is this argument disconnected from any actual constitutional principle, it would have entirely perverse incentives. It would reward service providers that embrace heavy-handed censorship at the expense of those, like YouTube, that strive to maintain open platforms while still enforcing rules for what content is acceptable. In this way, Appellant's approach would undermine the very values it purports to serve.

If all that were not enough to reject it, Appellant's claim would also invert the relevant First Amendment rights. When it regulates content on its platform, YouTube is not *bound* by the First Amendment, it is *protected* by it. The First Amendment gives broad freedom to both traditional publishers and online services to exercise "editorial control and judgment." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). In this case, Appellant seeks to force YouTube to display all of PragerU's videos to users who have opted into Restricted Mode—notwithstanding YouTube's determination that some of those videos are not appropriate for that audience. The First Amendment does not allow Appellant to override YouTube's editorial judgments in this way.

Lanham Act. Appellant's invocation of the Lanham Act is equally infirm. This claim is premised, first, on statements YouTube supposedly made about why

PragerU's videos were excluded from Restricted Mode, and, second, on statements YouTube made about its own service, including its general commitment to free expression and its policies for operating Restricted Mode. None of these statements gives rise to a viable claim for false advertising under the Lanham Act.

As for the first theory, YouTube did not make any public statement about PragerU's videos—and certainly not any "false or misleading representation of fact" or any statement "in commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B). Even if such a statement existed, however, it was not the cause of Appellant's purported injuries. On Appellant's own account, it was supposedly harmed by the fact that PragerU's videos were not displayed to users of Restricted Mode, not from any *statement* YouTube might have made about *why* those videos were unavailable. But the decision to exclude the videos is not the basis for Appellant's Lanham Act claim—and it could not be in light of Section 230 of the CDA, which provides broad immunity to YouTube for the actions it takes to restrict access to content on its platform. 47 U.S.C. § 230(c)(1), (2)(B).

Appellant's second theory simply is not cognizable under the Lanham Act. That theory is one of consumer injury: Appellant claims that it was induced to use YouTube's service as a platform for its videos by the public statements YouTube made about its operations and its commitment to free expression. But it is black-letter law that a consumer who relies on allegedly misleading statements about a

company's goods or services "cannot invoke the protection of the Lanham Act." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014).

Beyond that, YouTube's general statements about its commitments to free speech (for example, that YouTube is a place "where all voices can be heard") are not capable of giving rise to a false advertising claim. These statements are, as the district court called them, "puffery," and they are not sufficiently concrete or quantifiable for anyone to have reasonably relied on them. Finally, Appellant does not identify, and certainly not with the particularity required by Rule 9(b), any statements about YouTube's service or its content policies that were actually false or misleading. Appellant's belief that YouTube erroneously deemed a limited subset of PragerU's videos ineligible to appear in Restricted Mode does not turn YouTube's general public statements into false advertising.

ARGUMENT

I. APPELLANT'S FIRST AMENDMENT CLAIM FAILS BECAUSE YOUTUBE IS NOT A STATE ACTOR

Appellant's primary argument on appeal is that YouTube violated PragerU's First Amendment rights by classifying certain of its videos in a way that made them ineligible to be displayed to users of Restricted Mode. This claim is meritless. The First Amendment requires state action, but YouTube is not the government, and its efforts to regulate content posted to its private online service are not limited by the First Amendment.

A. YouTube Is A Private Service Provider, Not A State Actor Subject To The First Amendment

"A fundamental tenet of our Constitution is that the government is subject to constraints which private persons are not." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring). That is certainly true of the First Amendment, which binds only state actors. *See Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."); *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972) ("The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.").

Applying this state action requirement, this Court has squarely held that the First Amendment does not regulate private online service providers. In *Howard v. AOL*, the Court affirmed the dismissal of First Amendment claims against America Online (AOL), a private company that provided "Internet access, electronic mail ..., online conferencing and information directories, entertainment, software, electronic publications and original programming." 208 F.3d at 746. The Court explained that the allegations 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." *Id.* at 754.

Other courts have consistently rejected similar efforts to subject online services to the requirements of the First Amendment. *See, e.g.*, *Green*, 318 F.3d at 472 ("AOL is a private, for profit company and is not subject to constitutional free speech guarantees."); *Nyabwa v. FaceBook*, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018) (holding that Facebook is not a state actor); *Shulman v. Facebook.com*, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (same); *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 441-45 (E.D. Pa. 1996) ("[S]ince AOL is not a state actor and there has been no state action by AOL's activities … [plaintiff] has no right under the First Amendment to the United States Constitution to send unsolicited e-mail to AOL's members."). Indeed, Appellant cannot cite a single case holding—or even hinting—that a private online service provider is a state actor bound by First Amendment restrictions that constrain the government.

This case is no different. There is no dispute that YouTube is a private party operating a private service. The Supreme Court has made clear that the actions of a private party can be treated as state action "if, *though only if*, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 532 U.S. 288, 295 (2001) (emphasis added) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)); *accord Lee*, 276 F.3d at 554 n.4 (explaining that a "nexus" between private action and state

action is a necessary "status that is found in all cases where private action is attributable to the State"). No such connection exists here. Appellant does not allege that YouTube has *any* relevant relationship with the state, much less such a "close nexus" that YouTube's classification of PragerU's videos can be "fairly treated" as a decision made by the government itself. This Court need go no further to reject Appellant's First Amendment claim.

B. Appellant Cannot Use The Public Function Test To Transform YouTube Into A State Actor

While saying almost nothing about this body of law, Appellant relies on this Court's decision in *Lee v. Katz*, to argue that YouTube should nevertheless be treated as a state actor because it supposedly was performing a "public function": the regulation of speech in a "public forum." Br. 36. Appellant is wrong. As *Lee* makes clear, 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. That is not the case here, and Appellant does not meaningfully argue otherwise. Nor is YouTube a "public forum" under the First Amendment. It is a private service that is not operated on public property or controlled in any way by the government.

1. The Public Function Test Is Limited To Delegations of Exclusively Public Functions

The Supreme Court has articulated several tests for when the required nexus between the state and a private entity is so close that the actions of the private party can be attributable to the state. *See Brentwood*, 531 U.S. at 296 (describing coercion test, joint action test, public function test, and entwinement test); *Lee*, 276 F.3d at 554 (same). Here, Appellant solely relies on the so-called "public function" test. Br. 36-49. But it does not come close to establishing that YouTube is performing such a function when it determines what videos will be available to users of Restricted Mode.

"Under the public function test, 'when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.'" *Lee*, 276 F.3d at 554-55 (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)); *see also Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 924-25 (9th Cir. 2011) (same). There are two essential requirements that must be satisfied for a private party's conduct to become state action under this test.

First, the function at issue must have been *delegated* by the government to the private party. *Brentwood*, 531 U.S. at 296 ("We have treated a nominally private entity as a state actor … when it has been *delegated a public function* by the State …." (internal citations omitted) (emphasis added)). This ensures that

constitutional standards are applied to private parties only "when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Id.* at 295 (citation omitted); *e.g.*, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627 (1991) (jury selection is state action because it "represents a unique governmental function delegated to private litigants by the government"). Accordingly, the question is not whether a private party does something similar to actions a government might take. It is whether the government has actually assigned that role to the private party. *See, e.g.*, *West v. Atkins*, 487 U.S. 42, 55-56 (1988) ("The State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins ....").

Second, to "satisfy the public function test, the function at issue must be both traditionally and exclusively governmental." *Lee*, 276 F.3d at 555; *see also Brunette v. Humane Soc'y of Ventura Cty.*, 294 F.3d 1205, 1210 (9th Cir. 2002) (same). Thus, "the relevant question is not simply whether a private group is serving a 'public function.'… [T]he question is whether the function performed has been 'traditionally the *exclusive prerogative of the State.*'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (emphasis added) (citation omitted); *see also, e.g.*, *Jackson*, 419 U.S. at 352-53 (limiting public function test to functions that were "traditionally the exclusive prerogative of the State"); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 545-46 (1987) (U.S. Olympic Committee not

a state actor because "the coordination of amateur sports has [not] been a traditional governmental function").

Lee is fully consistent with this understanding. The plaintiffs there were street preachers who sued to enjoin alleged violations of their First Amendment rights in the Rose Quarter Commons, an outdoor area in Portland, Oregon. *Lee*, 276 F.3d at 551. While the Commons were operated by a private entity (OAC), it sat on land owned by the city of Portland, which leased it to OAC. The lease expressly "required the OAC to 'permit access to and free speech on the [Commons] as may be required by laws.'" *Id.* at 552, 556 & n.6. Indeed, the defendant conceded that the Commons was a public forum. *Id.* at 555-56. On these facts, this Court held that when OAC promulgated rules for expressive activity in the Commons, the First Amendment applied. Both requirements of the public function test described above were met: (1) OAC was exercising authority pursuant to an express delegation from the state (*id.* at 556); and (2) it was engaged in a function—regulating speech on public property—that otherwise would have been provided exclusively by the government (*id.* at 556-57).

2. YouTube Was Not Delegated A "Public Function" That Was Traditionally The Exclusive Province of The State

This case is very different from *Lee*. YouTube was not performing a public function when it excluded Appellant's videos from Restricted Mode. YouTube was

neither acting pursuant to a delegation from the government nor carrying out a function that otherwise would be the exclusive prerogative of the state.

No Delegation. Appellant does not even try to argue that YouTube was exercising authority endowed upon it by the government. Nor could it. YouTube is not operated on public property or pursuant to some kind of arrangement with the government. There was no connection whatsoever between YouTube's decisions about how to classify PragerU's videos and the power of the state. That is in clear contrast to *Lee*, where OAC was operating on public property and was required by the terms of its lease with the city to "permit access to and free speech on the [Commons] as may be required by laws." 276 F.3d at 552. When OAC prohibited the plaintiffs from preaching in the Commons, it was standing in the shoes of the city. But that is not the case here. YouTube's judgments about whether to make certain videos available in Restricted Mode are entirely its own. They are a function of how YouTube chooses to manage a private service on private property. Because there was no delegation here, YouTube cannot be classified as a state actor under the public function test.

No Exclusive State Function. While the analysis could stop there, Appellant's argument also fails at the second step. Regulating content on a private online platform simply is not a function traditionally and exclusively governmental. There is no tradition in this country of the government operating online services

that host user-submitted content. But even if this kind of content regulation was something *ever* performed by the government, it certainly was not an *exclusive* state function. *Accord Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) ("While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'"). To the contrary, like the newsgathering addressed in *Brunette*, the operation of an online service like YouTube is a "quintessential private activity, jealously guarded from impermissible government influence." 294 F.3d at 1214; *accord* 47 U.S.C. § 230(b)(2) (declaring that it is "the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." (emphasis added)); *Island Online, Inc. v. Network Solutions, Inc.*, 119 F. Supp. 2d 289, 306 (E.D.N.Y. 2000) ("[T]he Internet is, by no stretch of the imagination, a traditional and exclusive public function. For most of its history, its growth and development have been nurtured by and realized through private action.").

Appellant argues that YouTube's editorial decisions affect public discourse, but that is irrelevant under established law. "That a private entity performs a function which serves the public does not make its acts state action." *Rendell-Baker*, 457 U.S. at 842; *see also Jackson*, 419 U.S. at 353 (rejecting argument that public function test should extend to "all businesses 'affected with the public

interest'"). So too here. Whether YouTube's service benefits broad swaths of the public makes no difference to whether it is engaged in a public function. What matters is that the regulation of content posted on its online platform is not one of the very few functions that have traditionally been reserved exclusively for the government. Because YouTube is not performing such function, it is not a state actor. *See, e.g.*, *Kinderstart.com LLC v. Google, Inc.*, 2006 WL 3246596, at *5 (N.D. Cal. July 13, 2006) (Google not a state actor under public function test because providing online services is "neither traditionally nor exclusively governmental" (citing *Lee*, 276 F.3d at 555)); *Cyber Promotions*, 948 F. Supp. at 441-42 ("AOL exercises absolutely no powers which are in any way the prerogative, let alone the *exclusive* prerogative, of the State.").

3. YouTube Is A Private Business, Not A "Public Forum"

Ignoring all of this, Appellant points to this Court's observation in *Lee* that the regulation of speech in a "public forum" is a traditional and exclusive public function. Br. 36 (citing *Lee*, 276 F.3d at 555). While that is an accurate statement of the law, it has no application to this case. YouTube simply is not a "public forum" under the First Amendment.

When used in the First Amendment context, the term "public forum" refers to public property. "[T]o potentially qualify as a forum, the space in question must be owned or controlled by the government." *Knight First Amendment Inst. at*

Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018), *appeal docketed*, No. 18-1691 (2d Cir. June 5, 2018).[1] A public forum, that is, is limited to "government property" or "certain other government programs that share essential attributes of a traditional public forum." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009); *accord Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 679 (2010) ("[T]his Court has employed forum analysis to determine when a governmental entity, *in regulating property in its charge*, may place limitations on speech." (emphasis added)). As in *Lee*, and as discussed above, the property at issue was on land owned by the city and leased under the condition that the developer comply with laws limiting the regulation of expressive activity. *Lee*, 276 F.3d at 552. The Commons thus was a quintessential state-owned public forum, and the defendant in *Lee* conceded as much. *Id.* at 556 & n.6.[2]

There is nothing like that here. Appellant does not suggest that YouTube is located on public property, that it is controlled by the government, or that it operates based on any agreement with the government. Instead, Appellant argues

[1] In *Knight*, the court held that certain portions of the Twitter feed directly controlled by President Trump were a public forum, but went out of its way to make clear that other parts of Twitter's service, including those not under the control of the President or other government officials, were not a public forum. 302 F. Supp. 3d at 566-70.

[2] Even then, however, the Court explained that it was *not* holding "that everyone who leases or obtains a permit to use a state-owned public forum will necessarily become a State actor." *Lee*, 276 F.3d at 556.

that YouTube has somehow *designated itself* as a public forum by being generally open for use by the public and by publicly describing its platform as "a community where everyone's voice can be heard." Br. 40-41. This argument rests on a false premise. While YouTube values its role as a platform for creativity and self-expression, it has never suggested that anyone is free to post whatever they want. To the contrary, YouTube has always had detailed rules regarding the content that users can post and what they are permitted to say and do on the service. *See supra* at 2-3; ER 508-28. Appellant cannot turn YouTube into a public forum by ignoring the important limits it places on its users.[3]

Appellant also disregards the law. A private business does not become a public forum under the First Amendment merely because it is open to the public. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) ("Nor does property lose its private character merely because the public is generally invited to use it for designated purposes."); *Central Hardware*, 407 U.S. at 547 ("Before an owner of private property can be subjected to the commands of the First and Fourteenth

[3] Appellant points to congressional testimony in which a YouTube witness answered affirmatively when asked whether she "consider[ed] YouTube to be a neutral public forum." Br. 10-11. But, as the district court explained, she did not state that YouTube was a public forum "in the context of a constitutional challenge." ER 50 at 8-15 ("[S]aying something is a public forum … that's a colloquial term. I don't think she was using it in terms of the Constitution."). Appellant's effort to play "gotcha" with this testimony is no basis for overriding established law governing what constitutes a public forum.

Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use."); *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1255 (10th Cir. 2005) ("Certainly, property does not become a public forum simply because a private owner generally opens his property to the public."). Appellant cannot cite a single case suggesting that a private business—simply because it expresses a commitment to fostering speech by others—becomes a public forum. The case law uniformly holds otherwise: that online service providers are not public forums, no matter how many people use their platforms or for what purpose. *See, e.g.*, *Green*, 318 F.3d at 472 (AOL's online service not "devoted to public use"); *Nyabwa*, 2018 WL 585467, at *1 (Facebook not a public forum for speech); *Cyber Promotions*, 948 F. Supp. at 446 ("AOL's e-mail servers are certainly not a traditional public forum").[4]

Appellant (Br. 48) relies on to dictum in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) that "public forums may include 'private property dedicated to public use.'" *Id.* at 749 (plurality op.) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985)). But, as Justice Thomas explained, this "statement

[4] The unprecedented result that Appellant seeks would also be contrary to the rule, discussed above, that a "close nexus" with the state is needed in all cases where nominally private behavior is to be treated as state action. *Lee*, 276 F.3d at 554 & n.4 (citing *Brentwood*, 531 U.S at 295).

properly refers to the common practice of formally dedicating land for streets and parks when subdividing real estate for developments.… To the extent that those easements create a property interest in the underlying land, it is that government-owned property interest that may be designated as a public forum." *Id.* at 827-28 (Thomas, J., concurring in part and dissenting in part). This statement has no bearing on a case like this one.

In any event, *Denver Area* certainly did not hold that private property can be transformed into a public forum when it is used by the public for expression. To the contrary, the Supreme Court *rejected* a First Amendment challenge to a federal statute that allowed cable operators to restrict programs transmitted over "leased channels" on their systems, and did so without deciding whether those channels qualified as "public forums." *Id.* at 749-50. *Denver Area* thus reaffirmed the basic principle that "the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so *ordinarily* even where those decisions take place within the framework of a regulatory regime such as broadcasting." *Id.* at 737 (plurality op.).

That principle applies even more powerfully here. Online platforms like YouTube are not enmeshed in a comprehensive regulatory regime that subjects their editorial judgments to pervasive control by the government. To the contrary,

such platforms are, as a matter of congressional policy, "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). They are, in short, not public forums, and there is no basis for treating YouTube's operation of Restricted Mode as the First Amendment equivalent of government censorship.

4. YouTube Is Not The Equivalent of A Company Town

Appellant's reliance on *Marsh v. Alabama* is equally misplaced. *Marsh* involved a "company town" that—while owned and operated by a private corporation—had "all the characteristics of any other American town." 326 U.S. at 502. It had the same layout, buildings, and services, and its policeman was a county sheriff, paid by the company. *Id.* at 502-03. The Supreme Court held that the First Amendment did not allow the conviction of a Jehovah's Witness arrested within the town for distributing literature. *Id.* at 509.

Marsh stands for the proposition that a private company that "perform[s] all the necessary municipal functions" in a town is engaged in a public function that can trigger application of the First Amendment. *Flagg Bros.*, 436 U.S. at 158-59. That does not help Appellant here. YouTube is nothing like a company town, and the operation of its private online platform involves "no comparable assumption or exercise of municipal functions or power." *Lloyd*, 407 U.S. at 569.

Appellant does not claim otherwise. Instead, it points to a single sentence from *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." Br. 47 (quoting *Marsh*, 326 U.S. at 506). But, as the district court recognized, this dicta is not good law, and it cannot be used to transform YouTube into a state actor. ER 15-16.

In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Supreme Court relied on *Marsh*'s dicta to hold that a shopping mall was "the functional equivalent of a 'business block' and for First Amendment purposes must be treated in substantially the same manner." *Id.* at 325. The Court did so over the strong objection of Justice Black, the author of *Marsh*. Justice Black explained that *Marsh* "dealt with the very special situation of a company-owned town" and "was never intended to apply" in other contexts. *Id.* at 330 (Black, J. dissenting); *see also id.* at 332 (Black, J., dissenting) ("Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on all the attributes of a town.").

As the district court explained, "[i]t took the United States Supreme Court all of eight years to explicitly overturn its holding in *Logan Valley* and adopt Justice Black's dissent." ER 17. First, in *Lloyd v. Tanner*, the Court held that the First Amendment did not apply to a privately owned shopping center. *Lloyd* significantly limited *Logan Valley*, effectively confining it to its facts. 407 U.S. at 562-63. It also specifically rejected the argument, based on *Marsh*, that private

property becomes public merely because it is "open to the public," explaining that the "Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." *Id.* at 568-69.

Indeed, in a case decided the same day as *Lloyd*, the Supreme Court went even further and explained that, in order to be subject to the First Amendment, "privately owned property must assume to some significant degree the functional attributes of public property devoted to public use." *Central Hardware*, 407 U.S. at 547. Squarely rejecting the idea that private property takes on a public character merely because it is "open to the public," the Court explained that this theory would "constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." *Id.*

Four years later, in *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Supreme Court formally overruled *Logan Valley*, holding that a privately owned shopping center was not a state actor and that picketers "did not have a First Amendment right" to protest there. *Id.* at 520-21. The Court made clear that "the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case." *Id.* at 518. It also fully embraced Justice Black's dissent from *Logan Valley*, including its conclusion that "*Marsh* was never intended to apply to this kind of situation." *Id.* at 516; *accord Flagg Bros.*, 436 U.S. at 159 (*Hudgens* "adopted Mr. Justice Black's interpretation of the limited reach of *Marsh*").

As the district court explained, this line of cases leaves no doubt that *Marsh*'s dicta about private property open to public use has no continuing application as a First Amendment principle (at least outside the unusual context of company towns). ER 15-19. In response, Appellant offers only hand waving. It describes *Hudgens* and *Lloyd* as "pre-internet" cases that only addressed "the public character of *private shopping centers*." Br. 42-43. That ignores the entire rationale of those decisions. The Supreme Court's holding that private shopping centers were not public forums was not based on the brick-and-mortar characteristics of such property. It was instead based on a recognition that that the First Amendment requires "*state* action" and that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd*, 407 U.S. at 567, 569. That principle extends well beyond shopping centers.

Nor is there any basis for using *Marsh*'s dictum to transform private online service providers into state actors insofar they "invite[] members of the public to engage in free speech" on their sites. Br. 48. No such language appears in *Hudgens* or *Lloyd*—or any subsequent case. Appellant's argument would require the conclusion that while the Supreme Court decisively shut down the effort to extend *Marsh* from company towns to other forms of private property, it nevertheless meant to allow it to be applied (decades later) to private online services that have

no physical location and are engaged in none of the functions that *Marsh* recognized as traditionally governmental.. That makes no sense, and it is not the law. To the contrary, *Hudgens*, *Lloyd*, *Central Hardware*, and *Flagg Brothers* make clear that no further extension of *Marsh*'s dicta is permissible.[5]

That is why courts have consistently rejected efforts to apply *Marsh*'s dictum to online service providers. *See Green*, 318 F.3d at 472 (invoking *Lloyd* to reject argument that AOL is transformed into a state actor because it "opens its network to the public"); *Cyber Promotions*, 948 F. Supp. at 442 (rejecting analogy between AOL and the company town in *Marsh*: "AOL has not opened its property to the public by performing any municipal power or essential public service and, therefore, does not stand in the shoes of the State."). There is no basis for a different result in this case.

5. Recent Cases Involving Government Regulation of Online Activity Do Not Turn YouTube Into A State Actor

Finally, Appellant claims that two cases involving First Amendment challenges to statutes regulating the Internet support treating YouTube as a state

[5] Appellant's suggestion that "nothing in the pre-Internet *Hudgens* or *Lloyd* decisions suggests that the *Marsh* doctrine was limited to 'company towns'" (Br. 45) is demonstrably wrong. That is *precisely* the limitation articulated in *Logan Valley* by Justice Black (the author of *Marsh*), and the one expressly written into Supreme Court doctrine by the subsequent majority opinions in *Lloyd*, 407 U.S. at 551-53, *Hudgens*, 424 U.S. at 516-17, and *Flagg Brothers*, 436 U.S. at 159.

actor. Br. 49-51. But neither *Reno v. ACLU*, 521 U.S. 844 (1997), nor *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), supports Appellant's argument.

Those cases involve clear-cut examples of state action. In *Reno*, the Supreme Court invalidated a federal criminal statute that prohibited using the Internet to display or transmit sexually explicit material to minors. 521 U.S. at 884-85. Similarly, *Packingham* struck down a state law making it unlawful for registered sex offenders to access social media websites. 137 S. Ct. at 1738. The analysis in both cases was straightforward: the Court held that the First Amendment limits the power of *the government* to restrict the speech of online service providers and their users. This case is totally different. Appellant challenges not a government speech restriction, but YouTube's actions, as a private party, regulating its platform without any state connection. Nothing in *Reno* or *Packingham* supports applying the First Amendment to restrict the rights of private online service providers to regulate speech on private property.

More broadly, the fact that the First Amendment bars the government from imposing speech restrictions on the Internet does not mean that the private online platforms operate under similar constitutional restrictions. The purpose of the First Amendment, after all, is to limit *government* censorship. *Lloyd*, 407 U.S. at 567. In that regard, *Packingham*'s observation that courts "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to

vast networks in that medium" (137 S. Ct. at 1736) was aimed at the issue before the Court—a statute that made it a felony to use particular websites. In striking down that onerous speech restriction, the Court was not silently effectuating a revolution in the law of state action when it comes to the Internet.

Unsurprisingly, therefore, a recent effort to take *Packingham* out of context to support a similar First Amendment claim against a private website was squarely rejected. *Nyabwa*, 2018 WL 585467, at *1 ("Although the Court recognized in [*Packingham*] that social media sites like FaceBook and Twitter have become the equivalent of a public forum for sharing ideas and commentary, the Court did not declare a cause of action against a private entity such as FaceBook for a violation of the free speech rights protected by the First Amendment."). This Court should do likewise.

C. Appellant's Effort To Subject YouTube To The First Amendment Would Have Pernicious and Perverse Consequences

Beyond all of its legal and doctrinal infirmities, Appellant's effort to impose First Amendment restrictions on YouTube would have pernicious and far-reaching consequences—including undermining the efforts of online platforms to protect their users from hateful and abusive speech.

Appellant's goal is to have the courts impose on YouTube—and similar online services—the same constitutional limitations that apply to the government in regulating speech in public parks or other public forums. Those limits are

stringent. "[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (alteration in original) (citation omitted). Subjecting online platforms to these rules would significantly limit their ability to respond to offensive or objectionable content.

Under that regime, much of the content regulation routinely done by YouTube and other online services would be constitutionally suspect. That would include efforts to remove or restrict sexually explicit content, obnoxious personal attacks, racist language, graphic depictions of violence, terrorist propaganda, and many other forms of objectionable material.[6] It would also include efforts to limit access to such material by minors, as such restrictions are often invalidated on First Amendment grounds when imposed by the government. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011) (striking down law limiting minor's access to violent video games); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 826-27 (2000) (striking down law limiting minor's access to sexually

[6] *See, e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-12 (1975) (striking down ban on drive-in theaters showing films with nudity); *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (striking down prohibition on disparaging trademarks as barred by "bedrock" First Amendment principle that "[s]peech may not be banned on the ground that it expresses ideas that offend"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-394 (1992) (striking down law banning hate crimes); *United States v. Stevens*, 559 U.S. 460, 482 (2010) (striking down ban on violent videos).

oriented television programming). While these restrictions are essential to limiting the *government's* power to censor, applying them to private service providers would undermine widely supported policies aimed at making online platforms safer, more enjoyable, and more welcoming to a wide range of users.

Appellant seems to recognize the radical implications of its constitutional theory, which is why it is quick to tell the Court that the relief it is seeking would not prohibit "Google/YouTube from regulating, filtering, or restraining content or speech." Br. 55. But that simply is not so. Appellant admits that virtually any speech regulations that YouTube tried to enforce would be "content-based" and thus subject to rigorous First Amendment scrutiny. Br. 54-55; *accord Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). Despite Appellant's effort to pretend otherwise, however, this test—strict scrutiny—"is a demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'" *Brown*, 564 U.S. at 799 (citation omitted).

Consider what YouTube would have to do to survive strict scrutiny every time it wanted to enforce one of its content rules. While YouTube carefully crafts its rules to protect its users, Appellant would impose on YouTube the burden of

proving that those rules, and every individual application of them, are both justified by a "compelling" interest and "narrowly drawn to serve that interest." *Id.* YouTube would further have to identify an "actual problem" in need of solving, and "the curtailment of free speech must be actually necessary to the solution." *Id.* If it could not do so, YouTube would be powerless to remove—or even to use Restricted Mode to limit access to—what may be highly offensive or objectionable user content.

In short, the novel application of the First Amendment that Appellant now seeks would seriously deter meaningful content regulation of the sort that online services have long provided and that the public—including governments, civil society groups, and parents—now expects. Beyond harming the quality of online services, Appellant's result would also directly conflict with the "policy" set by Congress to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4).

Appellant suggests that there is no need to worry because YouTube can avoid application of the First Amendment simply by "de-designating and disavowing that YouTube is a public place for 'freedom of expression.'" Br. 56. Appellant cites no authority for the idea that YouTube could treat the First Amendment as a switch that can be flicked on or off based solely upon how it

describes its service.[7] That is not surprising. Whether a private entity is engaged in state action turns not on what it says but on its relationship to the state and the nature of its actions. In *Lee*, for example, the Commons was a public forum because it was on public land, and OAC was a state actor because it was regulating speech pursuant to a delegation from the government. *Lee*, 276 F.3d at 552. OAC could not have avoided that result merely by disavowing any interest to respect the speech rights of those using the Commons.

But even if this were a plausible conception of how the First Amendment might work, it would hardly mitigate the consequences of Appellant's position. On Appellant's theory, private online services that describe their platforms as open would be required to comply with every First Amendment limitation that previously applied only to the state—potentially disabling them from regulating sexually explicit, violent, or hateful content on their systems. At the same time, platforms that renounce any belief in free expression and instead overtly embrace censorship would be free to do whatever they please. The perverse incentives that this rule would create are obvious. Service providers would have powerful reasons

[7] Even if such a rule existed, it would not help Appellant here. YouTube has made clear that users are *not* free to say whatever they want; instead, they must abide by YouTube's Community Guidelines, which impose limits on the kind of content that may be posted on YouTube. *See* ER 509-12; ER 515-19; ER 527. Thus, insofar as YouTube's status under the First Amendment is somehow to be derived from its public statements about its speech policies, YouTube has repeatedly stated that it does not allow unfettered user speech.

to cast their platforms not as places for creativity and self-expression but as closed, tightly regulated systems. Rather than making the Internet more free and open for speech, Appellant's approach would have exactly the opposite effect.

D. YouTube's Decisions About How To Apply Restricted Mode Are Protected By The First Amendment

Imposing First Amendment obligations on YouTube would not merely depart from existing law. It also would invert the relevant First Amendment rights in this case. Rather than being *bound by* the First Amendment when it regulates user content on its platform, YouTube's editorial decisions are *protected by* the First Amendment. And Appellant's effort to hold YouTube liable for those decisions would violate YouTube's own First Amendment rights.

It is settled law that the First Amendment protects "the exercise of editorial control and judgment" by publishers and others who arrange and distribute speech by others. *Tornillo*, 418 U.S. at 258. This broad protection for editorial judgments encompasses the choice of how to present, or even whether to present, particular content. *Id.*; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636-37 (1994) (by "'exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats'" (alteration in original) (quoting *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986))).

These principles readily apply to online service providers like YouTube, which are called upon to decide how best to select, classify, and display third-party content on their services. That is why, for example, search engines have been consistently immunized from liability for their decisions not to include certain websites in their search results. *See, e.g.*, *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 441 (S.D.N.Y. 2014); *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017).

The same First Amendment protections bar Appellant's effort to hold YouTube liable for its determination that certain videos are sufficiently "mature" and should not be displayed to users who have opted into Restricted Mode. YouTube's determinations in that regard are classic instances of editorial judgments. They are akin to issuing an "R" rating to a film, to cable operators deciding whether and when certain programming should air, and to newspapers deciding how ads should appear in their pages. The First Amendment reserves to YouTube the right to make those judgments. *See, e.g.*, *Med. Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806, 825 (9th Cir. 2002) ("The decision not to include information about the true range of error in the industry was an editorial decision protected by the First Amendment."). And that is so regardless of whether its judgments "are fair or unfair, or motivated by profit or altruism." *e-ventures*, 2017 WL 2210029, at *4.

Appellant (Br. 52-53) relies on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), but that case is totally different. There, the Supreme Court held that a shopping mall's First Amendment rights were not violated by a state court ruling requiring it to allow expressive speech on its property. *Id.* at 87-88. The mall was not a publisher of other people's content, however, and it was neither holding itself out as a platform for speech nor making editorial judgments about what kind of speech to allow. *Id.* at 85-86 (explaining that the mall had adopted a rule that barred *all* expressive activity on its property). The mall was a purely commercial enterprise devoted to retail shopping. *PruneYard* thus stands in clear contrast to cases like *Tornillo,* which held that forcing a newspaper to print messages from political candidates impinged the newspaper's First Amendment right to exercise editorial control. *See id.* at 88 (observing that, given the nature of the shopping center's business, the concerns reflected in *Tornillo* about "intrusion into the function of editors" "obviously are not present" in *PruneYard*).

Those concerns are front and center here. YouTube operates a service dedicated to expressive activity. It enables users to publish videos and other kinds of speech, and to that end engages in a wide array of decisions regarding the kind of content that it permits, and whether and under what circumstances it will display videos to a more restricted segment of YouTube users. Appellant seeks to override those decisions and to compel YouTube to publish speech in ways it has

determined would be contrary to the preferences of users who have opted for Restricted Mode. That is exactly the kind of "intrusion into the function of editors" that the First Amendment forbids. *Tornillo*, 418 U.S. at 258.

Finally, Appellant argues that YouTube is different from the search engine in *Zhang*, and somehow outside the First Amendment, because it supposedly holds itself out as an "infrastructure or platform that delivers content in a neutral way." Br. 53-54 n.8. Appellant cites no authority for the idea that, by holding itself out as "neutral," a publishing platform thereby loses its right to make editorial judgments. The slogan "All The News That's Fit To Print," does not deprive the New York Times of the protection that *Tornillo* affords.

In any event, YouTube simply does not describe itself as Appellant claims. As discussed above, YouTube has numerous content-based policies for restricting user exposure to material on its service—policies that Appellant understood and accepted when it started using YouTube. ER 912-15; ER 508-28. By its nature, Restricted Mode reflects determinations by YouTube about whether videos fit within various categories. And those determinations, in turn, require evaluation of the content of user speech. In short, the fact that YouTube has a general commitment to promoting robust expression does not make Restricted Mode anything other than a mode of editorial decision-making, and it cannot strip YouTube of its First Amendment right to make those judgments.

II. THE DISTRICT COURT CORRECTLY REJECTED APPELLANT'S LANHAM ACT CLAIM

Appellant's remaining federal claim—for false advertising under the Lanham Act—was also correctly dismissed. The Lanham Act requires a "false or misleading representation of fact" made "in commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B). There is nothing like that here. On appeal, PragerU offers different theories based on three sets of allegedly false statements: (1) YouTube's designation of certain PragerU videos as sufficiently mature so as not to be visible within Restricted Mode; (2) YouTube's general statements about its commitments to speech and expression; and (3) the general information YouTube provides, including in its terms of service and Community Guidelines, about its content-regulation practices. None of these theories can support a viable claim.

A. YouTube Did Not Make Any False Statement About The Exclusion Of Appellant's Videos From Restricted Mode

Appellant's initial theory is that YouTube violated the Lanham Act by rendering certain of PragerU's videos unavailable to users who opted into Restricted Mode. Br. 57-60. Appellant's claim seems to be that by classifying those videos as it did, YouTube made false representations to the public about the content of those videos. This argument does not work.

No Public Statement. First, Appellant cannot identify the most basic prerequisite for any false advertising claim under the Lanham Act: an actual

statement—that is, a "false or misleading description of fact" or "false or misleading representation of fact"—that was likely to mislead the public. 15 U.S.C. § 1125(a)(1). Because such a claim sounds in fraud, Rule 9(b) requires Appellant to plead "the who, what, when, where, and how" of the misrepresentation. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1008 (9th Cir. 2018); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-04 (9th Cir. 2003) (Rule 9(b) applies to claims that "sound in fraud"); *Bobbleheads.com, LLC v. Wright Bros., Inc.*, 259 F. Supp. 3d 1087, 1095 (S.D. Cal. 2017) (applying Rule 9(b) to Lanham Act false advertising claim); *Seoul Laser Dieboard Sys. Co., Ltd. v. Serviform, S.r.l.*, 957 F. Supp. 2d 1189, 1200 (S.D. Cal. 2013) (same). But Appellant fails to identify any actual statement, much less to do so with particularity.

Appellant's theory is that by preventing certain of PragerU's videos from displaying in Restricted Mode, YouTube communicated to the public that those videos contained some highly offensive or objectionable content. But that is not something that YouTube ever said. Indeed, neither in its Complaint nor its opening brief does Appellant point to any public announcement by YouTube as to the reasons that some of PragerU's videos were excluded from Restricted Mode. That is not surprising. Restricted Mode is simply a filter which users can enable at their discretion. The decisions that YouTube makes that cause certain videos to be unavailable in Restricted Mode are not public record. YouTube does not publish

lists of the videos that are excluded from Restricted Mode, and it certainly does not tell the public why it classified any given video in the way it did.[8]

Appellant does not say otherwise. Instead, it argues that YouTube made such a statement by implication. Appellant's reliance on the principle that implication and innuendo can sometimes be used to support a false advertising claim (Br. 58-59) is misplaced. That principle has never been used—and does not allow—a plaintiff to use innuendo to create a false statement from whole cloth. To the contrary, each of Appellant's cases involved *actual advertisements or promotions* whose falsity was assessed, in part, based on what they reasonably implied. *See, e.g.*, *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 243 (9th Cir. 1990); *William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 257 (9th Cir. 1995); *Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1250 (10th Cir. 1999); *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 162 (2d Cir. 1978).

[8] A user who actually navigated to the specific URL for an excluded video while using Restricted Mode would see a notice that said, simply, that the video "is not available in Restricted Mode." ER 854. For obvious reasons, however, Appellant does not claim that this notice was false advertising. The notice is not in any way misleading. It only says that the video cannot be viewed within Restricted Mode—a fact that was undeniably true. Nor does this notice make any statement about the content of the video or what may have caused it be unavailable. *Cf. Darnaa, LLC v. Google, Inc.*, 2015 WL 7753406, at *1 (N.D. Cal. Dec. 2, 2015) (rejecting Lanham Act claim based on "YouTube's posting of a notice that [a] video had been removed because it violated YouTube's Terms of Service"); *Bartholomew v. YouTube, LLC*, 17 Cal. App. 5th 1217, 1229-30 (2016) (holding that YouTube's removal notice was not defamatory as a matter of law).

This case is very different. Appellant cannot rely on implications to put in YouTube's mouth a public statement about the content of PragerU's videos that YouTube never made.

Appellant also points to YouTube's general policies that describe the wide variety of content that may be deemed ineligible for Restricted Mode. Br. 63-64; ER 521-22. But these policies do not purport to make any statement about PragerU's videos, and they say nothing whatsoever about why those videos were deemed ineligible for Restricted Mode. But even if Appellant could conjure up a statement in this way, it would not be a "false or misleading representation of fact." Appellant's argument, at bottom, is that YouTube was wrong in classifying PragerU's videos as including content that would exclude them from being shown in Restricted Mode. That is a far cry from false advertising. Appellant's disagreement with YouTube's opinion about how to apply its general policies to these specific videos does not give rise to a viable Lanham Act claim. *Cf. Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999) "Statements of opinion are not generally actionable under the Lanham Act.").

No Advertisement or Promotion. Even if YouTube somehow made an implied public statement about the specific content of PragerU's videos, there is no plausible allegation that YouTube made such a statement as part of "commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B); *accord Coastal Abstract*,

173 F.3d at 735 (false advertising claim requires "commercial speech" made "by a defendant who is in commercial competition with plaintiff" for "the purpose of influencing consumers to buy defendant's goods or services").

As the district court held, "[Appellant] alleges no facts that remotely suggest that Defendants restricted access to [Appellant's] videos for any promotional purpose." ER 23. Nothing in the complaint plausibly suggested that YouTube's classification of Appellant's videos was "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." ER 23-24 (internal quotation marks omitted). Appellant offers no basis for disturbing that ruling. It contends—pointing to no supporting factual allegations—that YouTube restricted PragerU's videos to benefit YouTube's own content. Br. 64-65. This makes no sense. Appellant does not (and cannot) explain why stopping some of PragerU's videos from being displayed in Restricted Mode would offer any promotional advantage to YouTube's own videos.

No Causation. Even if there was a false promotional statement here, Appellant has no plausible theory of how such a statement could possibly have been responsible for the injuries it claims to have suffered. To plead a claim under the Lanham Act, the plaintiff must allege that it "has been or is likely to be injured as the result of the [false *statement*]." *Cook, Perkiss & Liehe*, 911 F.2d at 244. To

meet that requirement, Appellant would have to show "economic or reputational injury *flowing directly from the deception* wrought by [YouTube's] advertising." *Lexmark*, 527 U.S. at 133-34 (emphasis added). There is nothing like that here.

Appellant has alleged that it "suffered lower viewership" and "decreased ad revenue" because its videos were unavailable in Restricted Mode. But even if that were true, it would not establish an injury caused by the allegedly false statements at issue. What is missing is any allegation that the supposed deception caused by YouTube's (implied) statements about the content of the excluded videos directly generated economic or reputational harm for PragerU. What Appellant claims instead is that it was injured by the actual *exclusion* of its videos. But the exclusion itself does not implicate the Lanham Act. Nor could it, as any effort to premise a claim on YouTube's decision not to make PragerU's videos available to users of Restricted Mode would be barred by the broad immunity afforded by Section 230 of the CDA.[9] In light of that immunity, the only way that Appellant could even

[9] Section 230(c)(1) immunizes online service providers like YouTube against any claim that would treat them as the "publisher or speaker" of information provided by another information content provider." 47 U.S.C. § 230(c)(1). Because "publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content," this Court has made clear that "[a]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008)). That would include any claim based on YouTube's decision to

possibly proceed under the Lanham Act is to challenge YouTube's (implied) statements. But Appellant offers no plausible allegation that those statements, even if they existed, brought about any injury in its reputation or caused a drop in sales.[10] Without such allegations, there can be no claim under the Lanham Act.

B. YouTube's Statements About Its Service Do Not Give Rise to a Lanham Act Claim

Appellant next turns to statements YouTube has made about its own service. These arguments focus on two sets of statements: generalized expressions of YouTube's commitment to free speech (Br. 60-62); and YouTube's "procedures for regulating video content" (Br. 63-65). Neither gives rise to a viable claim.

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exclude PragerU's videos from appearing to users of Restricted Mode. Section(c)(2)(B) of the CDA independently protects YouTube against liability for "any action taken to enable or make available to information content providers or others the technical means to restrict access to material." 47 U.S.C. § 230(c)(2)(B). This section covers a wide range of "software or enabling tools that filter, screen, allow, or disallow content," *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 (9th Cir. 2009), and Restricted Mode is a paradigmatic example of what Congress sought to protect. *See also Enigma Software Grp. USA LLC v. Malwarebytes Inc.*, 2017 WL 5153698, at *1 (N.D. Cal. Nov. 7, 2017), *appeal docketed*, No 17-17351 (9th Cir. Nov. 21, 2017).

[10] Any such claim would also be wildly implausible. YouTube's policies describe a wide variety of content as ineligible to appear in Restricted Mode—including "graphic descriptions of violence, violent acts, natural disasters and tragedies, or even violence in the news," as well as "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." ER 521-22. It would not be credible to assert, without any supporting facts, that a statement that PragerU's videos included such content caused reputational or commercial injury to Appellant.

1. Appellant Lacks Standing Under The Lanham Act to Bring A False Advertising Claim Based on YouTube's Statements About Its Service

First, Appellant lacks standing to sue based on Google's statements about its service. Both the Supreme Court and this Court have squarely held that consumers are not allowed to bring claims under the Lanham Act alleging that false advertising induced them into purchasing or consuming the defendant's goods or services. *See Lexmark*, 572 U.S. at 132; *see also Barrus v. Sylvania*, 55 F.3d 468, 469-70 (9th Cir. 1995) ("in order to satisfy standing the plaintiff must allege commercial injury based upon a misrepresentation about a product, and also that the injury was 'competitive,' *i.e.,* harmful to the plaintiff's ability to compete with the defendant"). That is true even when the consumer is a business. *Lexmark*, 572 U.S. at 132.

Appellant's claim is barred by that rule. Appellant's theory is that YouTube's statements about its commitment to free speech and its operation of Restricted Mode induced PragerU into choosing "YouTube as the host of its videos." ER 939-40. As the district court explained: "Plaintiff is clearly asserting that it was 'hoodwinked' by Defendants' representations 'into [using] a disappointing' video-hosting service (YouTube)." ER 29 (quoting *Lexmark*, 572 U.S. at 132). In advancing that allegation, Appellant is attacking YouTube's statements in the guise of a consumer of YouTube's services. ER 28-29.

Appellant tries to evade this problem by arguing that it "competes with YouTube as a producer of video content." Br. 64-65. But, beyond being unsupported by the Complaint, this is a non-sequitur. Even if PragerU does compete with YouTube in some arenas, that has nothing to do with its false advertising claim. That claim was brought in PragerU's role as a consumer of YouTube's video platform—not as a purported competitor of YouTube's in the production of video content. ER 941. And Appellant's consumer-protection theory falls outside the zone of interests protected by the Lanham Act. *See, e.g.*, *Jack Russell Terrier Network v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1037 (9th Cir. 2005) (dismissing false advertising claim brought by dog breeders who alleged that they were "blacklisted" in a trade publication and explaining that the fact that plaintiffs were the "target" of the allegedly false advertisement does not "make them competitors" who "have suffered competitive injuries").

2. Appellant Cannot Premise A Claim on YouTube's General Statements in Support of Free Speech

Even apart from its lack of standing, Appellant's effort to hold YouTube liable for its supposedly "false representations of fealty to First Amendment principles" fails to state a claim under the Lanham Act for multiple reasons.

First, the statements at issue here are classic examples of non-actionable puffery. "A statement is considered puffery if the claim is extremely unlikely to induce consumer reliance," *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038,

1053 (9th Cir. 2008), or if it is so vague that it is not "capable of being proved false," *Coastal Abstract*, 173 F.3d at 731. That is the situation here. Appellant alleges that YouTube violated the Lanham Act by saying things such as:

- "Voices matter";
- YouTube is "committed to fostering a community where everyone's voice can be heard";
- 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";
- YouTube is "one of the largest and most diverse collections of self-expression in history" and gives "people opportunities to share their voice no matter where they are from or what their age or point of view";
- YouTube's values are based on four essential freedoms of "Freedom of Expression," "Freedom of Information," "Freedom of Opportunity," and "Freedom to Belong."

ER 902-03.

As the district court explained, none of these "resembles the kinds of 'quantifiable' statements about the 'specific or absolute characteristics of a product' that are actionable under the Lanham Act." ER 26. There is no concrete way to measure YouTube's commitment to "fostering a community" or its broad statement that "voices matter." *Coastal Abstract*, 173 F.3d at 731 (explaining that statements that are not "specific and measurable" are non-actionable puffery). These statements are "vague and subjective" and not "capable of being proved

false." *Id.*; *see, e.g.*, *L.A. Taxi Coop., Inc. v. Uber Techs., Inc.*, 114 F. Supp. 3d 852, 860-62 (N.D. Cal. 2015) (dismissing as puffery Uber's slogans "SAFEST RIDES ON THE ROAD" and "GOING THE DISTANCE TO PUT PEOPLE FIRST"); *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1142 (N.D. Cal. 2010) (same, as to claim that defendant's software provided "greater automation, safeguards and control to help you easily stay compliant now").

Appellant contends that "*any* consideration of 'puffery' at the pleading stage is inappropriate" and "violates well-established law." Br. 61-62. That is plainly wrong. Courts often resolve motions to dismiss Lanham Act claims by holding that challenged statements are non-actionable puffery, and this Court has repeatedly affirmed that approach. *See Cook, Perkiss & Liehe*, 911 F.2d at 245 (holding that whether an alleged misrepresentation "is a statement of fact" or "mere puffery" is a legal question that may be resolved on a motion to dismiss); *Newcal*, 513 F.3d at 1052-53 (affirming dismissal of Lanham Act claim because defendant's statement that it would "deliver 'flexibility'" and "lower copying costs" was non-actionable puffery); *see also, e.g.*, *Shank v. Presidio Brands, Inc.*, 2018 WL 510169, at *9 (N.D. Cal. Jan. 23, 2018); *O&R Constr., LLC v. Dun & Bradstreet Credibility Corp.*, 2017 WL 6526585, at *4 (W.D. Wash. Dec. 21, 2017).[11]

[11] The cases cited by Appellant do not hold otherwise. *Williams v. Gerber Products Co.*, 552 F.3d 934, 939 (9th Cir. 2008), did not even involve the Lanham

Second, whether puffery or not, there is no plausible allegation that YouTube's statements are actually false. Appellant's theory is that YouTube's professed commitment to letting voices be heard is belied by what it did to PragerU's videos. But there is no meaningful connection between the statements at issue here and YouTube's decision to classify some of PragerU's videos so they would not appear to the small subset of YouTube users who activated Restricted Mode. None of those statements even mentions Restricted Mode, much less suggests that Restricted Mode is a place where all voices "can be heard." In short, Appellant's allegations about how YouTube used Restricted Mode in this case do nothing to suggest that YouTube misled the public when it made broad policy statements about its general service.

3. Appellant Cannot Premise A Claim on YouTube's Restricted Mode Policies

Appellant's effort to premise a false advertising claim on YouTube's content rules and its more specific policies for operating Restricted Mode (Br. 63-65) fare no better. As discussed, these claims fail right out of the gate because they are

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Act. In *World Wrestling Federation Entertainment, Inc. v. Bozell*, 142 F. Supp. 2d 514 (S.D.N.Y. 2001), the court declined to resolve a question of *falsity* on a motion to dismiss, not a question of puffery. These are different issues: finding a statement to be puffery means that consumers could not reasonably rely on it—even if it is literally false. That is a legal question that courts can, and do, resolve at the pleading stage.

consumer claims outside the Lanham Act's zone of interest. But there are at least two additional reasons that the district court correctly dismissed these claims.

First, Appellant did not identify with particularity any of the actual statements that it claims are false or misleading. That does not satisfy Rule 9(b). *See Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) ("To satisfy Rule 9(b), a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about [the purportedly fraudulent] statement, and why it is false." (internal quotation marks omitted) (citation omitted)); *see also, e.g.*, *EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1085 (C.D. Cal. 2010) (dismissing Lanham Act claim for failure to satisfy Rule 9(b)).

Second, Appellant offers no plausible allegation that YouTube's descriptions of the content that may be excluded from Restricted Mode are actually false or misleading. Nor could it. YouTube expressly tells users that its "automated system isn't perfect and it sometimes makes mistakes when assessing which videos to make available in Restricted Mode." ER 521. This defeats any suggestion that YouTube has made some kind of guarantee that no videos will ever be excluded from Restricted Mode by mistake or where it is debatable whether the video actually falls within YouTube's established criteria. Moreover, there are no facts pleaded in the Complaint to suggest that YouTube misleads the public by

identifying various categories of material that are supposed to be invisible to users of Restricted Mode. Appellant does not allege, for example, that YouTube systematically includes in Restricted Mode videos that are supposed to be excluded (or vice versa). All that Appellant offers is an account of what happened to its own videos. But even if YouTube misclassified a few of those videos, that would not, by itself, make YouTube's general policies for operating Restricted Mode capable of giving rise to a false advertising claim.

CONCLUSION

For these reasons, this Court should affirm the judgment of the district court dismissing Appellant's federal causes of action.

Dated: October 31, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees respectfully state that there are no related cases.

Dated: October 31, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,650 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: October 31, 2018 By: */s/ Brian M. Willen*
Brian M. Willen

CERTIFICATE OF SERVICE

I hereby certify that 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 on October 31, 2018.

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.

Dated: October 31, 2018 By: */s/ Brian M. Willen*
Brian M. Willen