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12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

14

15 Kimberly Carleste Newman, Lisa Cabrera,  
Catherine Jones, and Denotra Nicole Lewis,

16 Plaintiffs,

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18 vs.

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19 Google LLC, YouTube LLC, Alphabet Inc,  
and DOES 1 through 100, inclusive,

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20 Defendants.

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Case No.

**CLASS ACTION COMPLAINT FOR  
DECLARATORY JUDGMENT,  
RESTITUTION AND DAMAGES**

Trial Date: None Set

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1 Plaintiffs, Kimberly Carleste Newman, Lisa Cabrera, Catherine Jones, and Denotra Nicole  
2 Lewis, bring this lawsuit (the “Lawsuit”), individually and on behalf of a putative class of similarly  
3 situated persons, against Defendant YouTube LLC (“YouTube”), and its parent companies,  
4 Google LLC (“Google”) and Alphabet Inc. (collectively referred to as “Google/YouTube” or  
5 “Defendants,” unless otherwise specified).

6 Substantial overlaps exists between the claims, allegations, putative classes and issues in  
7 this Lawsuit with case pending before this Court captioned *Divino Group, LLC et al., v. Google,*  
8 *LLC, et al*, Case No. 5:19-cv-004749 – VKD (N.D. Cal.) (“*Divino*”). After reviewing Civil L.R. 3-  
9 12 governing related cases, it is unclear whether this Lawsuit technically meets the specific criteria  
10 and elements required for relation under Local Rule 3-12. Specifically, this Lawsuit does not  
11 involve *all* of “the same parties,” or the identical “property” owned by the same parties in *Divino*. It  
12 is also unclear whether the “transactions” are the same within the meaning of Local Rule 3-12 or  
13 whether the “events” consist of the identical unlawful conduct of restricting of access to the  
14 YouTube platform based on the profiling and discriminatory use of a person’s personal identity or  
15 viewpoint in *Divino* that may be different from the racial identity profiling and discrimination  
16 against Plaintiffs and the members of the Class in this Lawsuit. Consequently, while Plaintiffs do  
17 not believe that all of the requirements for designating the Lawsuit “related” come within the  
18 definition of Local Rule 3-12, Plaintiffs are not opposed to having this Lawsuit related to, or  
19 otherwise coordinated with, the pending proceedings in *Divino*.

## 20 **I. INTRODUCTION AND PREFATORY STATEMENT OF THE CASE**

21 1. Plaintiffs are African American content creators, viewers, and consumers who bring  
22 this Lawsuit to redress overt, intentional, and systematic racial discrimination perpetrated by  
23 Google/YouTube to deny them and other members of a protected racial classification under the law  
24 equal access to YouTube, the most “ubiquitous” provider of public video content and internet  
25 access services in the history of the world.

26 2. Defendants are members of the largest business enterprise, private or public, in the  
27 world. Through this enterprise, Defendants exercise complete, absolute, and “unfettered” control  
28 over access to approximately 95% of all video content that is available to the public. This includes

1 absolute control over any and all posting, viewing, engagement, advertising, personal data, and  
2 revenue monetization rights of the 2.3 billion consumers who access and use YouTube.

3 3. Defendants are also the largest creators, promoters, and sponsors of video content on  
4 YouTube. Thus, in addition to hosting and regulating video content and services on YouTube,  
5 Defendants compete directly with Plaintiffs and their content for the same access, audiences,  
6 viewership, advertising, marketing, and revenue based services on YouTube.

7 4. In exercising these unprecedented powers, Defendants contract with Plaintiffs and  
8 all persons similarly situated to provide equal access to YouTube and all of its related services,  
9 subject only to viewpoint neutral content rules and criteria that apply equally to all.

10 5. In reality, however, Defendants' access restrictions and denials imposed on  
11 Plaintiffs and all persons similarly situated are not the result of an identity and viewpoint blind  
12 review and application of the rules to actual video material. Instead, Defendants have an  
13 irreconcilable commercial conflict of interest: on the one hand, Defendants act as content creators  
14 or sponsors of video content, competing directly with Plaintiffs and all persons similarly situated  
15 for the same services, audiences, advertisers, and revenue streams on the YouTube platform; on the  
16 other hand, Defendants act as absolute regulators and monetizers of all YouTube content and  
17 services, and exercise unfettered authority to determine viewer and service access by enforcing  
18 their Community Guidelines and Terms of Service (the "TOS") against their competitors, based on  
19 the identity or viewpoint of Plaintiffs and all other persons similarly situated.

20 6. Under the pretext of honest content and service regulation, Defendants rig the game,  
21 by using their power to restrict and block Plaintiffs and other similarly situated competitors, based  
22 on racial identity or viewpoint discrimination for profit. Defendants also abuse their power by not  
23 subjecting their own videos to the same Community Guidelines and TOS that they apply to all  
24 other YouTube users. As a result, Defendants are not subject to filtering or blocking restrictions,  
25 even where Defendants' videos contain material that violates their own rules.

26 7. Among the many abuses that Defendants have perpetrated against Plaintiffs and all  
27 other persons similarly situated, are Defendants' practices of allowing racist hate speech to go  
28 unregulated on Plaintiffs' channels, resulting in lost subscribers and viewership, and the

1 surreptitious “bugging” of Plaintiffs’ videos by the insertion, attachment, appending, or embedding  
2 of metadata and other signals that allow Defendants’ filtering tools to target Plaintiffs and all other  
3 persons similarly situated, based on race, identity and/or the viewpoint of the creator, her channel  
4 subscribers, and viewers.

5 8. This intentional and systematic racial discrimination violates Defendants’ legal  
6 obligations under the contract(s), and is unlawful under federal and state antidiscrimination laws,  
7 false advertising, unlawful business practices, and free speech laws. It is unlawful whether it is  
8 done for profit, or out of ideological animus.

9 9. Interfering with the contractual and legal rights of Plaintiffs and all persons similarly  
10 situated to access and use YouTube based in any way, part, or degree on their race, identity or  
11 viewpoint, violates YouTube’s TOS and is unlawful under the strict prohibitions against racial  
12 discrimination in contract and business practices enshrined in federal and California law. That is  
13 racism, overt intentional and systematic.

14 10. Defendants knowingly, intentionally, and systematically employ artificial  
15 intelligence (“A.I.”), algorithms, computer and machine based filtering and review tools to “target”  
16 Plaintiffs and all other persons similarly situated, by using information about their racial, identity  
17 and viewpoint to restrict access and drive them off YouTube.

18 11. Under the pretext of finding that videos violate some vague, ambiguous, and non-  
19 specific video content rule, Defendants use computer driven racial, identity and viewpoint profiling  
20 and filtering tools to restrict, censor, and denigrate Plaintiffs and all persons similarly situated on  
21 YouTube, wholly or in part, because they are African American, black, members of a protected  
22 racial classification under the law, or identify as such, or with a related viewpoint.

23 12. Since at least 2017, Defendants’ filtering and review tools and procedures are  
24 embedded with computer code or other machine based “triggers” that profile the personal racial  
25 identity or viewpoint of the user. Defendants admit that their filtering tools use information about  
26 the identity of the YouTube creators, subscribers and viewers to “target” members of protected  
27 racial classifications under the law and impose access restrictions on them that are not racially,  
28 identity or viewpoint neutral; nor are they based on, or supported by actual material in the videos;

1 and Defendants treat such videos as if they violate YouTube’s content based Community  
2 Guidelines and TOS, by denying full YouTube platform access and related services.

3 13. On March 19, 2017, Defendants publicly admitted that they improperly censored  
4 videos using their “Restricted Mode” filtering that were posted or produced by members of the  
5 LGBTQ+ Community, based upon the identity and orientation of the speaker, rather than upon the  
6 content of the video. Defendants also promised to remove all restricted filtering on videos posted  
7 or produced by LGBTQ+ members and groups, and changed their filtering algorithm, and manual  
8 review policies and practices to address the risk that videos posted by LGBTQ+ vloggers were  
9 being censored because of the identity or viewpoint of the speaker.

10 14. On April 27, 2017, Johanna Wright, Vice President of Product Management for  
11 Google/YouTube, took to the airwaves and news media to promise the global “YouTube  
12 Community,” that Defendants would ensure that “Restricted Mode” would not “filter out content  
13 belonging to individuals or groups based on certain attributes like gender, gender identity, political  
14 viewpoints, race, religion or sexual orientation.” While Ms. Wright conceded that “Restricted  
15 Mode will never be perfect, [Google/YouTube] hope to build on [their] progress so far to continue  
16 making [their] systems more accurate and the overall “Restricted Mode” experience better over  
17 time.”

18 15. On September 14, 2017, Defendants invited independent YouTubers and content  
19 creators to address concerns that the platform’s video review algorithm and practices discriminated  
20 against certain minority groups, including LGBTQ+, African American, and other users of color or  
21 vulnerable minorities. At the meeting, Defendants admitted that their content filtering and review  
22 tools were “targeting” African American, LGBTQ+, and other “minority” users. They further  
23 admitted that this resulted in the application of erroneous or unwarranted blocking restrictions and  
24 access denials for users that were based, at least in part, on the user’s racial or sexual identity or  
25 viewpoints, rather than a content violation of YouTube’s rules or Terms of Service.

26 16. Defendants also represented that they were working on a “fix,” and that neither user  
27 identity nor viewpoint has any role in the application of YouTube’s content based access rules and  
28



1 restrictions or should otherwise interfere with a user’s right to access the myriad of services that  
2 Defendants offer to users.<sup>1</sup>

3 17. But things have only gotten worse with respect to Defendants’ racial profiling and  
4 “targeting” of African American and members of other protected racial classifications under the  
5 law who use YouTube.

6 18. In January 2018, Defendants got caught red handed. During a recorded call between  
7 a user and a supervisor, who Defendants now identify as the “Floor Manager” for their customer  
8 service advertising services center in Bangalore, India, Defendants represented to the user that its  
9 “holiday special” video was not eligible for advertising services because the filtering tools had  
10 identified the user as being involved with the “gay thing.” Under what the manager expressly  
11 stated was “company policy,” the filtering algorithm determined that the video contained  
12 “shocking” or “sexually explicit” content, not because of any actual material in the video, but  
13 because the “company” considered video content created by a “gay” user or content that discussed  
14 the “gay thing” as ineligible for advertising or promotion. Defendants considered content created  
15 or viewed by “gay” persons to be “shocking” or “sexually explicit.”

16 19. This pattern and practice or “policy” of denying users equal access to YouTube  
17 based on their racial, sexual, or other individual identities or viewpoints occurred to the same user  
18 after the January 2018 call with Defendants, on at least five other occasions. The pattern and  
19 practice has become so pervasive that many prominent and quality content creators have lost more  
20 than 90% of their viewers, advertisers, revenue, and other access rights in the last 24 months solely

21  
22  
23 <sup>1</sup> One of the persons who attended the meeting is Stephanie Frosch, a prominent and popular  
24 LGBTQ+ content creator on YouTube. Ms. Frosch is a named plaintiff in another class action  
25 lawsuit pending in this District, captioned *Divino Group, et al. v. Google LLC, et al.*, Case No.  
26 5:19-cv-004749-VKD (N.D. Cal.). In that case, Ms. Frosch testified under oath she and the  
27 other attendees were required to execute multiple non-disclosure agreements (the “NDAs”) before  
28 and at the event. The NDAs prevented her, and any anyone else who attended the meeting, from  
disclosing any information about the meeting. On March 23, 2020, after Plaintiffs threatened to  
move to set aside the NDAs as void and unenforceable, Defendants agreed to release her from her  
obligations under the NDAs. *See* Declaration of Stephanie Frosch Submitted in Support of  
Plaintiffs’ Application to File a Sur Reply to Address New Authority. A true and correct copy of  
the Declaration of Stephanie Frosch (Dkt. #40) is attached as Exhibit A.

1 because they are identified as African American, LGBTQ+ or other protected racial classifications  
2 under the law.

3 20. The Plaintiffs in this Lawsuit also face the same sort of overt, intentional, and  
4 systemic identity and viewpoint discrimination, with one important difference: Defendants do not  
5 discriminate against Plaintiffs only because of sex based identity or viewpoint profiling, but  
6 primarily because they identify as African American, or with other protected racial classifications  
7 under the law.

8 21. This is unlawful race discrimination. Unlike any other form of prohibited  
9 discrimination, it has been outlawed in the United States since 1865, when Congress enacted  
10 section 1981 and other civil rights laws intended to wipe out, prohibit, and make any and all racial  
11 discrimination in contracts and business practices unlawful.

12 22. Defendants know and admit that they discriminate, including admissions that since  
13 at least 2017, they use content based filtering and access review tools, systems, and practices that  
14 “target” African Americans and other members of protected racial classifications under the law.

15 23. Nonetheless, Defendants have failed to “fix” the discriminatory defects in their  
16 content and access review systems and stop the “targeting” as promised. Defendants continue to  
17 knowingly, intentionally, and systematically block, demonetize, and deny Plaintiffs and other  
18 persons similarly situated, their contractual and other legal rights to access YouTube based on the  
19 color of their skin or other protected racial traits, rather than the material in their videos.

20 24. Defendants also abuse their dual roles as content reviewers and content creators on  
21 YouTube. Specifically, under the pretext of unfettered “discretion” to serve as sole “censors” of  
22 content on the YouTube platform, Defendants use racial profiling to restrict the reach and access of  
23 Plaintiffs and other third party users who compete directly with Defendants and their sponsored  
24 video content for click per minute (“CPM”), advertising, and other revenue stream and services on  
25 YouTube.

26 25. Instead of “fixing” the digital racism that pervades the filtering, restricting, and  
27 blocking of user content and access on YouTube, Defendants have decided to double down and  
28 continue their racist and identity based practices because they are profitable. By utilizing their

1 unilateral control over 95% of the world’s public video content, Defendants unlawfully  
2 misappropriate viewers, CPM, advertising, and other revenues that belong to, or would otherwise  
3 be available to, Plaintiffs and other third party users, but for the discriminatory restrictions that  
4 unlawfully restrict and block Plaintiffs’ content and access to YouTube services.

5         26. This is race discrimination. It is knowing and intentional. Defendants knowingly  
6 used and continue to use discriminatory content filtering review tools and procedures that “target”  
7 Plaintiffs and other persons similarly situated, for access restrictions because they are African  
8 American, persons of color, or are identified by Defendants as having an ethnicity or other personal  
9 immutable traits and/or viewpoints, not because the actual video content or material violates  
10 YouTube’s purportedly neutral content rules.

11         27. Defendants’ racist profiling and practices are also systematic. By using A.I.,  
12 algorithms and other computerized machine based filtering tools (in lieu of having humans perform  
13 the “ubiquitous” task of reviewing and deciding whether the material or content in billions of hours  
14 of videos uploaded daily to YouTube) to sanction Plaintiffs, Defendants engage in a knowing and  
15 intentional practice that unlawfully discriminates against users based on race or other protected  
16 racial classifications under the law, or viewpoints.

17         28. Defendants’ conduct is knowing, intentional, and systematic, regardless of whether  
18 Defendants are motivated by ideological animus towards black and members of other protected  
19 racial classifications under the law, or they merely use racial and identity profiling to restrict access  
20 for profit, and/or to save costs, resources, labor, and time necessary to lawfully review actual video  
21 content and determine, in a viewpoint neutral manner, whether a rule violation has occurred that  
22 triggers a content based access restriction or sanction on YouTube. In short, Defendants’ use of  
23 racism for profit is every bit unlawful as ideological racism, since, in either case, it discriminates  
24 against Plaintiffs because they are African Americans or members of other protected racial  
25 classifications under the law.

26         29. Defendants do not disagree. Susan Wojcicki, YouTube’s CEO, has taken to the  
27 airwaves over the last three years to repeatedly and unequivocally deny that Defendants  
28 discriminate against anyone when it comes to content or access restrictions to YouTube, while

1 insisting that all decisions, wrong or right, are the product of good faith, viewpoint neutral, and  
2 identity blind content reviews and decisions.

3 30. On or about June 14, 2020, Wojcicki publicly announced that in conjunction with  
4 Alphabet, Defendant YouTube was starting a \$100 million fund "dedicated to amplifying and  
5 developing the voices of Black creators and artists and their stories." In a [blog post](#) Thursday,  
6 Wojcicki said, "At YouTube, we believe Black lives matter and we all need to do more to  
7 dismantle systemic racism." See [https://www.marketwatch.com/story/youtube-is-starting-a-100-](https://www.marketwatch.com/story/youtube-is-starting-a-100-million-fund-for-black-creators-artists-2020-06-11)  
8 [million-fund-for-black-creators-artists-2020-06-11](https://www.marketwatch.com/story/youtube-is-starting-a-100-million-fund-for-black-creators-artists-2020-06-11).

9 31. Given Defendants' stated concerns regarding systemic racism, Defendants have  
10 some serious explaining to do when it comes to the Plaintiffs and the other persons similarly  
11 situated using YouTube. Plaintiffs would prefer that Defendants spend their money to stop the  
12 racist practices that pervade the YouTube platform, including:

13 a. **Abusing Artificial Intelligence Programs, Algorithms and Other**  
14 **Filtering Tools** to digitally profile, redline, and target Plaintiffs and all persons similarly situated  
15 on the YouTube platform, for access restrictions, blocking, demonetization, suspensions and  
16 removals from the platform based on the racial identity or viewpoint of the video creator, her  
17 subscribers, and/or the viewers of her videos by inserting or appending to individual videos race,  
18 identity or viewpoint based metadata, thereby forcing Plaintiffs to self-censor and refrain from  
19 posting videos regarding issues and current events which are important to the African American  
20 community, such as requiring Plaintiffs to avoid or hide references to abbreviations like "BLM,"  
21 "KKK;" terms such as "Black," "White," "Racism," "Boogaloo," "White Supremacy," "Racial  
22 Profiling," "Police Shootings," "Police Brutality," "Black Lives Matter;" names of individuals such  
23 as those killed by law enforcement, "Bill Cosby," "Louis Farrakhan;" names of organizations such  
24 as "Ku Klux Klan," "Nazi," "Neo-Nazi," "Aryan Brotherhood," and/or other euphemisms that are  
25 known and particular to the African American community, despite the fact that the videos involved  
26 do not contain any hate speech, profanity, or nudity, and at most, contain very short references or  
27 quotations from recognized news sources, which are properly attributed.

28

1           b.       **Preventing Full Revenue Generation** for videos of Plaintiffs and all  
2 persons similarly situated who are not afforded full monetization, Channel Membership and  
3 Livestream donations for videos that are otherwise eligible under Defendants’ rules, but have been  
4 demonetized or limited in monetization because of Defendants’ addition of metadata and use of  
5 algorithms and filtering tools that profile creators, subscribers and viewers based on their race or  
6 viewpoint, rather than on the actual content of the video.

7           c.       **Misapplying “Restricted Mode”** to the videos of Plaintiffs and all persons  
8 similarly situated, which address or discuss issues of importance to their communities, merely  
9 because the videos have titles or tags which include “abbreviations like “BLM,” “KKK;” terms  
10 such as “Black,” “White,” “Racism,” “Boogaloo,” “White Supremacy,” “Racial Profiling,” “Police  
11 Shootings,” “Police Brutality,” “Black Lives Matter;” names of individuals such as those killed by  
12 law enforcement, “Bill Cosby,” “Louis Farrakhan;” names of organizations such as “Ku Klux  
13 Klan,” “Nazi,” “Neo-Nazi,” “Aryan Brotherhood,” and/or other euphemisms that are known and  
14 particular to the African American community, despite the fact that the videos do not contain  
15 materials which discuss drug use or the abuse or drinking of alcohol; overly detailed conversations  
16 about or depictions of sexual activity; graphic depictions of violence, violent acts; natural disasters  
17 or tragedies or violence in the news; specific details about events related to terrorism, war, crime  
18 and political conflicts that resulted in death or serious injury, even if no graphic imagery is shown;  
19 inappropriate language, including profanity, or content that is gratuitously incendiary,  
20 inflammatory, or demeaning toward an individual or group.

21           d.       **Shadow Banning Entire Channels And Individual Videos** of Plaintiffs  
22 and all persons similarly situated on the YouTube platform based on the race, identity or viewpoint  
23 of the video creator, her subscribers, and/or the viewers of her videos, so that the channel and/or  
24 individual videos do not appear in searches using the YouTube search application, and viewers  
25 cannot locate new videos which discuss issues and current events that are important to the  
26 communities of African Americans and members of other protected racial classifications under the  
27 law.

28

1 e. **Deputizing Other YouTube Users To Flag Channels And Videos** on the  
2 YouTube platform in order to restrict, block, and/or censor the videos of Plaintiffs and all persons  
3 similarly situated, and then, in acting on false or unconfirmed complaints of purported rule  
4 violations, Defendants remove, restrict, and/or demonetize, individual videos and/or suspend the  
5 channels without first verifying that the flagged video contains material that violates a specific  
6 Community Guideline or Term of Service.

7 f. **Interfering With Livestream Broadcasts** of Plaintiffs and all persons  
8 similarly situated by inserting new voice content and/or visual images into the video stream,  
9 unrelated to the Livestream topic; throttling, interrupting or cutting off the Livestream broadcast  
10 while in progress; deleting positive viewer comments; and promoting, sponsoring, allowing and/or  
11 inserting offensive, misogynistic, racist, or obscene comments or engagement in direct violation of  
12 YouTube’s Community Guidelines based on the race of the creators, channel subscribers and/or  
13 viewers, or their viewpoints.

14 g. **Excluding From “Trending” And “Up Next” YouTube Video**  
15 **Recommendations** the videos of Plaintiffs and all persons similarly situated which, even though  
16 they comply with Defendants’ Community Guidelines and TOS, are excluded from Defendants’  
17 promotional applications based on the race, identities, and viewpoints of the creators, channel  
18 subscribers and/or viewers. Defendants’ practices muffle the voices of Plaintiffs and all persons  
19 similarly situated on the YouTube platform and reduce the racial diversity of the opinions and  
20 information posted on the platform.

21 h. **Freezing Analytic Numbers Of Subscribers And Viewers** for the channels  
22 of Plaintiffs and all persons similarly situated. In suspending the accurate analytic information for  
23 the channels of Plaintiffs and all persons similarly situated, Defendants prevent them from  
24 qualifying for YouTube Partnership benefits such as monetization, mobile Livestreaming, Channel  
25 Membership, and SuperChat; as well as deprive them of the opportunity to grow their channels and  
26 generate revenue.

27 i. **Promoting And Profiting From Hate Speech** by allowing racist and  
28 misogynist hate speech videos that target Plaintiffs and all persons similarly situated on the

1 YouTube platform in direct violation of Defendants’ Community Guidelines and TOS, and  
2 affording such videos monetization, despite the fact that such videos have been flagged by  
3 Plaintiffs and/or their subscribers as violating Defendants’ standards, and despite having received  
4 repeated complaints regarding those videos.

5           j.       **Interfering With, Obstructing, Delaying And Ignoring Appeals** to  
6 prevent Plaintiffs and all persons similarly situated from obtaining a timely manual review of video  
7 content and reversal of Defendants’ erroneous decisions to suspend their channels and to remove,  
8 restrict monetization, or restrict access to videos deprives them of their rights to communicate with  
9 their intended audience and/or to earn revenue, unless and until, Defendants lift the suspension,  
10 removal, and/or restriction, if ever.

11       32.       Regardless of what Defendants’ internal motivations are, Defendants are not above  
12 the law nor are they too big to “self-regulate” by complying with the law, including the long  
13 established prohibition on race discrimination in contract.

14       33.       Until such time as Defendants make good on their promises, representations, and  
15 obligations to “fix” this racism and compensate Plaintiffs and other similarly situated victims of  
16 Defendants’ unlawful and repugnant discriminatory conduct, Defendants will continue to engage in  
17 intentional race discrimination that violates their agreements with Plaintiffs, as well as established  
18 federal and state laws that govern the relationship between the parties.

19       34.       Plaintiffs can no longer wait for Defendants to implement the “fix” they promised  
20 years ago. Nor should they have to. Whether Defendants’ “motive” for refusing to do so is based  
21 on profit, ideology, or “no reason at all,” the knowing use of a person’s, race, skin color or some  
22 other immutable personal trait or viewpoint to filter and review access to YouTube, is digital racial  
23 profiling, redlining, and discrimination. It is illegal.

24       35.       It is time for Ms. Wojcicki, and the other senior officers of Google YouTube, to put  
25 up or shut up. If Defendants truly believe that they are engaged in good faith, viewpoint neutral  
26 content regulation on YouTube, then Defendants should produce the computer code and permit an  
27 expert review of that code to examine the “triggers” for review and restriction of content.  
28 Defendants can then, under oath in deposition and other sworn testimony, and through other

1 discovery, explain to Plaintiffs, the Court, and the public why their prior admissions and other  
2 evidence of “targeting” African Americans and members of other protected racial classifications  
3 under the law, are not true.

4 36. Until that time, Defendants’ unsupported denials, or recent portrayal of the  
5 discriminatory conduct as “mistakes” or the result of a “he said, she said” misunderstanding  
6 between its employees and officers, is not a lawful reason to deny Plaintiffs their day in court.

7 37. Despite a whole lot of “telling,” Defendants have made no attempt to “show” that  
8 their actions do not discriminate based on the race, identity or viewpoint of Plaintiffs or the  
9 hundreds of millions of other users who fall victim to discrimination by Defendants.

10 38. Defendants’ refusal to do so is mystifying, if not damning. The computer code and  
11 information about how Defendants’ A.I., algorithms, and other machine based filtering operate,  
12 developed and have changed since Defendants purchased YouTube in 2007. Such evidence will  
13 resolve the extent to which Defendants use filtering tools to profile and discriminate against  
14 YouTube users based on their race, identity or viewpoints.

15 39. For whatever reason, Defendants do not deny they are engaged in intentional and  
16 systematic racial discrimination on YouTube, but only that they can be held to account under the  
17 law. Despite informal and formal legal requests for the computer code and information about how  
18 content filtering works on YouTube, Defendants claim that section 230(c) of the Communication  
19 Decency Act (47 U.S.C., § 230(c)) (“Section 230(c)”) is both a sword and a shield to hide the  
20 computer code and other evidence that will show, once and for all, whether Ms. Wojcicki’s denials  
21 of unlawful conduct are in fact true, or are just another in a line of false, misleading, and deceptive  
22 statements to the YouTube Community.

23 40. Defendants’ use of Section 230(c) to immunize them from having to account for  
24 intentional discrimination against African Americans and other members of protected racial  
25 classifications under the law, based on the users’ race, sex, or other identity or viewpoint, is itself  
26 unlawful.

27 41. Under the First Amendment, the United States Supreme Court in *Denver Area*  
28 *Educational Telecommuns. Consortium, Inc. v. Federal Communications Comm’n*, 518 U.S. 727,



1 766-67 (1996), confirmed the obvious: a congressional law that permits a private party to regulate  
2 speech is unlawful and unconstitutional unless the law (i) is applied in a viewpoint neutral manner,  
3 (ii) is narrowly tailored so as not to create a risk of an erroneous private veto over speech, **and** (iii)  
4 does not interfere with or otherwise alter or obstruct the parties' existing legal relationship,  
5 obligations, and rights or the enforcement of those rights and obligations in a court of law.

6 42. Defendants' assertion that Section 230(c) permits them to use a person's race,  
7 identity or viewpoint to block access to YouTube is unconstitutional because, at least as applied to  
8 this Lawsuit, the law is neither (i) viewpoint neutral, (ii) narrowly tailored to prevent against an  
9 erroneous veto of speech by Defendants under its rules, and/or (iii) interferes with and eviscerates  
10 Defendants' preexisting legal obligations to Plaintiffs under state and federal law, including  
11 antidiscrimination, false advertising, consumer protection, and the express and implied promises set  
12 forth in Defendants' operative contract(s) with Plaintiffs.

13 43. Plaintiffs file this lawsuit, therefore, to hold Defendants to account for their  
14 intentional and systemic racist conduct and practices, by asserting claims for legal and equitable  
15 relief:

- 16 (i.) Breach of contract, implied breach of contract covenant, and promissory estoppel;  
17 (ii.) Racial discrimination in contract in violation of federal law under 42 U.S.C. § 1981;  
18 (iii.) Racial discrimination in violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51,  
19 *et seq.*;  
20 (iv.) Unlawful, deceptive, and unfair discriminatory business practices in violation of the  
21 Unfair Competition Laws under California Business and Professions Code § 17200, *et seq.*;  
22 (v.) False advertising and commercial disparagement in violation of the Lanham Act, 15  
23 U.S.C. § 1125, *et seq.*;  
24 (vi) Discrimination in violation of the Liberty of Speech Clause under Article I, Section 2 of  
25 the California Constitution; and  
26 (vii) Discrimination in violation of First Amendment of the U.S. Constitution arising from  
27 Defendants' use of Section 230(c) to immunize them from liability for discrimination.  
28

1           44. In addition, Plaintiffs also seek a declaratory judgment that: either (i) the plain  
2 language Section 230(c) does not apply to racial profiling and discriminatory access restrictions  
3 that are based on a person's race, identity, or viewpoints, rather than the "on line material" that  
4 actually appears on YouTube; or (ii) if Section 230(c) is construed to permit on line racial, identity  
5 or viewpoint based discrimination restrictions against YouTube users, Section 230(c) is  
6 unconstitutional because it violates the First Amendment's limits on permissive private party  
7 speech regulation.

## 8

## 9 **II. PARTIES**

10           45. Plaintiff Kimberly Carleste Newman, also known as Kimberly Santana ("Plaintiff  
11 Newman"), is an African American woman residing in the State of California who is the creator  
12 and owner of "The True Royal Family," and "True Royal," two YouTube channels dedicated to  
13 developing and posting videos that discuss and present information regarding issues and current  
14 events which are important to the African American community. Plaintiff Newman created "The  
15 True Royal Family" channel in 2015, followed by "True Royal," in 2016. Since its creation,  
16 Plaintiff Newman's "The True Royal Family" channel has posted more than 1654 separate videos,  
17 only 954 of which are still posted because Defendants removed 700 or more individual videos and  
18 have refused to restore them; the "True Royal" channel has posted 209 videos. "The True Royal  
19 Family" channel has garnered a total of 4.4 million views since creation, and the "True Royal"  
20 channel has garnered 583,000 views since creation. Plaintiff Newman is a YouTube "partner," and  
21 has generated total revenue of \$2,672.68 for videos posted on "The True Royal Family," and  
22 \$123.96 for videos posted on "True Royal."

23           46. Plaintiff Lisa Cabrera ("Plaintiff Cabrera") is an African American woman residing  
24 in the State of New Jersey who is the creator and owner of "Lisa Cabrera" and "Lisa C," two  
25 YouTube channels dedicated to developing and posting videos that discuss and present information  
26 regarding issues and current events which are important to the African American community.  
27 Plaintiff Cabrera created the "Lisa Cabrera" channel in 2015. Since creation, Plaintiff Cabrera's  
28 "Lisa Cabrera" channel has posted 4,423 videos (68 of which Defendants archived for unknown

1 reasons and can no longer be viewed by anyone), which have garnered 20 million views. Plaintiff  
2 Cabrera is a YouTube partner who has generated a total of \$25,500 for videos posted on the “Lisa  
3 Cabrera” channel.

4 47. Plaintiff Catherine Jones (“Plaintiff Jones”) is an African American woman residing  
5 in the State of Vermont who is the creator and owner of “Cooking with Carmen Caboom,” a  
6 YouTube cooking channel for African Americans, and “Carmen Caboom,” and “Carmen Caboom  
7 Reloaded,” two YouTube channels dedicated to developing and posting both parodies and serious  
8 videos that discuss and present information about issues and current events which are important to  
9 the African American community. Plaintiff Jones created the “Carmen Caboom” channel in 2010,  
10 a backup “Carmen Caboom” channel in 2014, the “Cooking with Carmen Caboom” channel in  
11 2015 and the “Carmen Caboom Reloaded,” channel in 2018. Defendants improperly removed the  
12 original “Carmen Caboom” channel for purported nudity when no video posted to the channel  
13 included any nudity. Plaintiff Jones is a YouTube partner. Since creation, Plaintiff Jones’ 2014  
14 “Carmen Caboom” channel has posted numerous videos, several of which Defendants improperly  
15 removed as hate speech, the remaining videos have garnered approximately 500 -1,200 views per  
16 video overall which have generated approximately \$500 per year.

17 48. Plaintiff Denotra Nicole Lewis (“Plaintiff Lewis”) is an African American woman  
18 residing in the State of Texas who is the creator and owner of “Nicole’s View,” a YouTube channel  
19 dedicated to developing and posting videos that discuss and present information regarding issues  
20 and current events which are important to the African American community. Plaintiff Lewis  
21 created the “Nicole’s View” channel in 2006. She became a YouTube partner sometime between  
22 2016 and 2017. Plaintiff Lewis has uploaded 748 videos to the “Nicole’s View” channel, 17 of  
23 which Defendants wrongly removed or archived for unknown reasons, the remainder of which have  
24 generated 10.6 million views and has generated approximately \$6,000-7,000 in revenue per year,  
25 approximately \$25,000 over the life of the channel.

26 49. Defendant YouTube, LLC is a for-profit limited liability corporation, wholly owned  
27 by Google LLC, and organized under the laws of the State of Delaware. YouTube’s principal place  
28 of business is Mountain View, California and it regularly conducts business throughout California,

1 including Santa Clara County, California. Defendant YouTube, LLC operates the largest and most  
2 popular internet video viewer site, platform, and service in California, the United States, and the  
3 world, and holds itself out as one of the most important and largest public forums for the  
4 expression of ideas and exchange of speech available to the public. Plaintiffs are informed and  
5 believe that at all relevant times Defendant YouTube, LLC acts as an agent of Defendant Google  
6 LLC and uses, relies on, and participates with Defendant Google LLC in restricting speech on the  
7 YouTube site, platform, or service.

8         50. Defendant Google LLC is a for-profit, limited liability company organized under the  
9 laws of the State of Delaware, with its principal place of business in Mountain View, California; it  
10 regularly conducts business throughout California, including Santa Clara County. Plaintiffs are  
11 informed and believe, and thereon allege that, at all relevant times, Defendant Google LLC has  
12 acted as an agent of Defendant YouTube, LLC, and controls or participates in censoring and  
13 restricting speech on the YouTube service or platform.

14         51. Defendant Alphabet Inc. is a for-profit American multinational corporation  
15 conglomerate incorporated under the laws of the State of Delaware, with its principal place of  
16 business in Mountain View, California. According to Defendants, Alphabet Inc. was created as art  
17 of a corporate restructuring of Defendants Google, YouTube, and other subsidiary or affiliate  
18 entities on October 2, 2015. At that time, Alphabet Inc. became the parent company of Google and  
19 other former Google subsidiary or affiliated entities, including Defendant YouTube. Defendants  
20 also claim that the creation and establishment of Alphabet Inc. was prompted by the desire to make  
21 Defendants' core businesses "cleaner and more accountable" while allowing greater autonomy to  
22 group companies that operate in businesses other than internet services.

23         52. The true names and capacities, whether individual, corporate, associate, or  
24 otherwise, of Defendants Does 1 through 100, inclusive, are presently unknown to Plaintiffs, and  
25 for that reason these Defendants are sued by such fictitious names. Plaintiffs are informed and  
26 believe and thereon allege that each of the Doe Defendants is in some way legally responsible for  
27 the violations of law, injuries, and harm caused, as alleged herein. If, and when appropriate,  
28

1 Plaintiffs will seek leave of the Court to amend this Complaint when the true names and capacities  
2 of said defendants are known.

### 3 **III. JURISDICTION AND VENUE**

4 53. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§  
5 1331, 1337(a), and 2201. The Complaint includes Federal questions, and the amount in  
6 controversy arising from the claims asserted on behalf of Plaintiffs and all other persons similarly  
7 situated exceeds \$5 million, exclusive of interest and costs. Plaintiffs and all other persons  
8 similarly situated also challenge the construction and constitutionality of 47 U.S.C. § 230(c)(1) and  
9 (2), and seek a declaratory judgment that this statute does not immunize Defendants for overt  
10 intentional and systematic racial discrimination on the YouTube platform.

11 54. Venue is proper in the Northern District of California (San Jose Division) under 28  
12 U.S.C. § 1391. Defendants reside and/or transact business in the County of Santa Clara, and are  
13 within the jurisdiction of this Court for purposes of service of process. Defendants' TOS require  
14 that Plaintiffs and all other persons similarly situated file this Lawsuit in a court of competent  
15 jurisdiction located within Santa Clara County.

### 16 **IV. FACTS COMMON TO ALL CLAIMS**

17 55. On June 2, 2020, this Court held a hearing on Defendants' Motion to Dismiss in  
18 *Divino*. At the hearing, the Court asked Defendants if they were claiming immunity from liability  
19 for denying access to YouTube based on the user's race. In response, Defendants' counsel  
20 conceded that a case involving intentional race discrimination by an ISP may not be covered by  
21 Section 230(c):

22 I THINK THERE COULD BE SOME STARK CASES WHERE A COURT MIGHT FIND  
23 UNDER A PARTICULAR SET OF CIRCUMSTANCES THAT SOME ALLEGED  
24 DISCRIMINATION DIDN'T TAKE THE FORM OF A PUBLISHER OF ACTUALLY  
25 TARGETING PUBLISHER CONDUCT, AND, THEREFORE, DIDN'T COME WITHIN  
26 (C)(1).

27 \* \* \* \*

1 I CAN IMAGINE SOME COURTS TAKING THE POSITION THAT A PROPERLY  
2 PLEADED CLAIM OF THE SORT THAT YOU DESCRIBE AS SORT OF FACIAL  
3 RACE DISCRIMINATION CLAIM MAY NOT BE GOOD FAITH UNDER (C)(2), I  
4 CAN IMAGINE A COURT TAKING THAT POSITION.

5 Attached as Exhibit E is a true and correct copy of the June 2, 2020-Transcript of Oral Argument  
6 before the Hon. Virginia DeMarchi; Exhibit E at 10:45 15-22.

7 56. This Lawsuit is that “stark case.” Defendants are engaged in intentional race  
8 discrimination against Plaintiffs and other persons similarly situated, that violates Defendants’  
9 contractual promises not to discriminate, and also violates long established laws that prohibit  
10 racism for profit.

11 57. The central allegation in this Lawsuit is that Defendants engage in identity and  
12 viewpoint-based filtering and service access restrictions that utilize and base access restrictions on  
13 Plaintiffs’ race, identity, and/or viewpoints.

14 58. Defendants profile, use, and consider Plaintiffs’ race, personal identity, or  
15 viewpoint, in order to interfere with, restrict, or block video viewing, promotion, advertising,  
16 engagement, and/or monetization services because Plaintiffs are African American. This is  
17 unlawful and cannot be immunized by Congress.

18 59. Defendants’ profiling, review, use, and consideration of Plaintiffs’ race, ethnicity,  
19 religion, political affiliations or personal identity or viewpoints is prohibited not only under  
20 Defendants’ TOS and other related agreements with Plaintiffs, but it also violates laws dating back  
21 to the Civil War which prohibit racial discrimination in contract and business relationships.

22 **A. The Governing Agreements**

23 60. Each time that Plaintiffs (or any other member of the public) access the YouTube  
24 user interface, Plaintiffs and Defendants execute binding contract(s) that govern the parties  
25 respective rights and obligations on YouTube, including the TOS.

26 61. The provisions in the TOS and other agreements are part of a uniform consumer  
27 contract that every one of YouTube’s 2.3 billion users must execute and agree to upon accessing  
28 the website.

1           62.     The TOS and other agreement(s) are governed by California law.

2           63.     Under the agreement(s), Defendants designate YouTube as a “passive website,” that  
3 is open to the public, provided that any person who “uses or visits” the YouTube website or “any  
4 YouTube products software, data feeds, and services provided” consents and legally agrees to  
5 YouTube’s “TOS,” “Google’s Privacy Policy,” and “Community Guidelines,” as “incorporated by  
6 reference” and are further clarified or modified by Defendants “without notice” (collectively the  
7 “Agreement”).

8           64.     The contract(s) allow Defendants not only collect, store, analyze, and organize the  
9 personal, financial, political, and other data for each of the YouTube Platform users, but  
10 Defendants also use and sell that data to third parties on the open market.

11           65.     In 2018, Defendants’ authorized representatives testified under oath to Congress and  
12 confirmed that YouTube is “a neutral public forum” in which Defendants “enforce [their] policies  
13 in a politically neutral way.”

14           66.     Among other statements, Defendants affirmatively represent to the public and  
15 YouTube users that all access rules and restrictions apply equally to all without consideration of the  
16 race, personal identity, or viewpoint of the user and that YouTube is a “forum” where the public  
17 can engage in “freedom of expression,” to communicate and interact with other users subject to  
18 viewpoint neutral content based filtering and regulations that apply equally to all.

19           67.     As of the filing date of this lawsuit, YouTube’s CEO and other senior officers of  
20 Defendants continue to represent and insist to the public that YouTube’s regulation and restriction  
21 of access to its services is undertaken solely by “viewpoint neutral” application of specific content  
22 based rules limited to actual video content and does not use, consider, or take into account the  
23 user’s race, sexual identity, political or religious association, or any other personal identity trait or  
24 viewpoint of the user.

25           68.     Based on Plaintiffs’ experience, and the experience of other YouTube users who are  
26 members of other protected racial classifications under the law, that is a lie. And Defendants have  
27 admitted as much on multiple occasions dating back to at least 2017.

28

1                   **1. The General Terms Of Use And Contract-Based Promises**

2           69. As with many large public consumer businesses, Defendants contract with users  
3 through the use of an online, consumer form service contract(s).

4           70. Like many other consumer service contracts, the TOS and other related  
5 agreement(s) that govern the consumer's respective obligations and rights is not a beacon of clarity.  
6 Specifically, Defendants utilize a myriad of confusing, ambiguous, vague, overbroad, overlapping,  
7 interconnected, and inconsistent provisions to govern the parties' respective rights and obligations,  
8 including integrating or incorporating service and access provisions that are not specific to the  
9 YouTube platform, but apply to any service or product that Defendant Google provides or markets  
10 to the public.

11           71. In or about December 2019, Defendant Google merged its general terms of service  
12 for its products and services with that of YouTube's TOS for all purposes. Consequently, access  
13 actions, restrictions, or blocking that occur on YouTube may also be used by Defendants to review,  
14 restrict, block, or deny any service that either entity provides, including Android devices and use,  
15 personal email, publisher advertising, confidential health record data storage and access, all  
16 applications sold in Google's Android App store, election monitoring services, public health and  
17 law enforcement services search, and any and all other communication or information services that  
18 Google, YouTube, or their affiliates provide to consumers or the public.

19           72. The result is a complex and indecipherable web of service provisions that are not  
20 readily available to users and require each user to locate and navigate as part of a convoluted,  
21 confusing and complicated disclosure process, which may not be functionally accessible to the  
22 user.

23           73. The user is also required to figure out what agreements and provisions govern what  
24 conduct and restrictions, and which agreements are in place at the time to govern the specific  
25 conduct.

26           74. This is virtually impossible, because as is the case here, Defendants routinely  
27 change or amend the provisions of these agreements and do so unilaterally, without adequate notice  
28 to users.



1           75.     Because each Plaintiff executed a new TOS agreement every time they access  
2 YouTube on their internet browsers, only Defendants know what versions of the agreements and  
3 policies apply to the conduct at issue during the period of time governing the claims in this  
4 Lawsuit.

5           76.     The TOS and other agreement(s) exist as electronic, on line documents. The  
6 agreements are executed electronically from drop down menus. Consequently, users often do not  
7 have access to or understand the TOS or agreement(s), let alone which version of the TOS and  
8 other agreement(s) may govern a particular action or conduct that occurs on a particular date.

9           77.     One fundamental provision of the TOS and agreement(s), however, has not changed.  
10 In every TOS or agreement during the relative period of this Lawsuit, Defendants promise users  
11 equal and full access to all YouTube services, subject only to viewpoint neutral content-based rules  
12 that apply equally to all.

13           78.     On January 17, 2018, Defendants testified to Congress under oath that access to all  
14 services offered by Defendants in connection with YouTube are available to Plaintiffs, and all  
15 users, subject only to viewpoint neutral content-based rules that apply equally to all users:

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

19           \* \* \* \*

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

22           **Senator Cruz:** Ms. Downs?

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

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

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

1 \* \* \* \*

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

5 See [https://www.c-span.org/video/?439849-1/facebook-twitter-youtube-officials-testify-combating-](https://www.c-span.org/video/?439849-1/facebook-twitter-youtube-officials-testify-combating-extremism)  
6 [extremism](https://www.c-span.org/video/?448566-1/house-judiciary-committee-examines-social-media-filtering-practices) and [https://www.c-span.org/video/?448566-1/house-judiciary-committee-examines-](https://www.c-span.org/video/?448566-1/house-judiciary-committee-examines-social-media-filtering-practices)  
7 [social-media-filtering-practices](https://www.c-span.org/video/?448566-1/house-judiciary-committee-examines-social-media-filtering-practices) at 02:34:28 – 02:35:29 of the full hearing recording (emphasis  
8 added).

9 79. Before and after that date, up to the time of the filing of this lawsuit, YouTube's  
10 CEO Susan Wojcicki and other senior officers of Defendants have repeatedly reaffirmed and  
11 maintained that all of access decisions are based on viewpoint neutral application of the content  
12 based rules governing the service that apply equally to all.

13 80. Thus, whatever ambiguity exists in their agreements with Plaintiffs, Defendants  
14 admit that all of the agreements and the application of the provisions in those agreements are  
15 governed by a core and fundamental promise: access to the YouTube platform and all services is  
16 open and available to any member of the public who uses YouTube, subject only to viewpoint  
17 neutral content based rules that apply equally to all.

18 81. That promise governs all of a user's content based rights and obligations associated  
19 with YouTube and all services. It applies not only to Plaintiffs and to all public users, but also to  
20 Defendants, who sponsor video content that competes directly with Plaintiffs and other public users  
21 for CPMs, viewer reach and expansion, promotion and advertising, and monetization of revenue  
22 generated by each video that is posted on the YouTube platform and/or is available through viewer  
23 subscription services.

24 82. Defendants' core, fundamental promise of ensuring equal access to YouTube, under  
25 neutral content-based rules is illusory, false, and unenforceable.

26 83. Defendants exercise "unfettered discretion" when applying YouTube's content-  
27 based service rules and provisions and determining what access to give each user. Defendants  
28

1 admit that at least since 2016, the exercise of this “unfettered discretion” by Defendants is not  
2 viewpoint or identity neutral.

3 84. Since at least 2017, Defendants have grudgingly admitted that they “target” and  
4 deny access or services to Plaintiffs based, not on the video content posted by a Plaintiff, but “for  
5 any reason, or no reason,” including the race, personal identity, or personal viewpoint, of YouTube  
6 content creators, viewers, and users.

7 85. The practice of using its “discretion” to deny access to any Plaintiffs, or any user,  
8 based on race, identity, or viewpoint, rather than video content, violates and breaches the express  
9 and implied promises set forth in YouTube’s TOS and other service or access agreements, because  
10 those agreements are governed in their entirety by California law, and expressly limit the exercise  
11 of Defendants’ “discretion” to that “permitted” by law.

12 86. Thus, Defendants’ admissions that they are engaged in identity and viewpoint based  
13 access denials and targeting, breach the express and implied promises that discretionary access  
14 decision must be viewpoint neutral in application and comply with all federal and state laws  
15 prohibiting discrimination in contract, including 42 U.S.C. § 1981, the Unruh Act, and §§17200, *et*  
16 *seq.* of the California Business & Professions Code.

## 17 2. The License Provisions

18 87. The current (and/or prior versions) of YouTube’s TOS at issue in this discrimination  
19 case require Plaintiffs to “grant” Defendants a renewable, “irrevocable” and “perpetual” license to  
20 any and all video content or communication that occurs on YouTube. This includes, but is not  
21 limited to, the property rights for all personal data and other revenue streams that Plaintiffs hold an  
22 interest in or otherwise derive from the posting, viewing, advertising, or monetization of their  
23 videos on YouTube.

24 88. Under the TOS, Plaintiffs “grant” Defendants a “worldwide, non-exclusive, royalty-  
25 free, sublicensable and transferable license to use that Content . . . in connection with the Service  
26 and YouTube’s . . . . business . . . .”

27  
28

1           89.     The TOS also grant other YouTube “users” a “non-exclusive, royalty-free license to  
2 access” content, “reproduce, distribute, prepare derivative works, display, and perform it . . . as  
3 enabled by a feature of the Service.”

4           90.     This license includes the right of Defendants and other users to post and monetize  
5 Plaintiffs’ “[c]ontent or other material” that makes Plaintiffs (i) “solely responsible for” the content  
6 and its “consequences,” including (ii) all intellectual property rights and restrictions on the video  
7 content, and (iii) not posting content or seeking access to services in a manner that is “contrary to  
8 the YouTube Community Guidelines.”

9           91.     In applying these provisions, Defendants reserve “the right to decide whether  
10 Content violates these Terms,” including, “but not limited to, pornography, obscenity, or excessive  
11 length,” and, “in so doing, remove such Content and/or terminate a user’s account” if, “in its sole  
12 discretion . . . submitting such material is determined to be “in violation of these Terms.”

13           92.     Defendants’ acquisition of the licensing rights to 95% of the world’s public video  
14 content along with the personal and financial information data that belongs to the 2.3 billion users  
15 who post or view the content is not free or a gift to the largest and most powerful tech enterprise in  
16 the history of the world. Rather, the license rights are obtained through for tangible and valuable  
17 consideration: the right of the licensor or user to equal access to the YouTube platform and all of its  
18 services, subject to and limited only by the viewpoint neutral application of YouTube’s content-  
19 based rules.

20           93.     Thus, under the TOS, Defendants’ license agreement binds and requires them to  
21 apply and impose access restrictions for viewpoint neutral content based violations of a third  
22 party’s intellectual property rights, Defendants’ Community Guidelines, and other content based  
23 terms of YouTube’s service, and to do so in a manner “permitted” by the law.

24           94.     Defendants’ past, present, and continuing violations of the TOS is a fundamental  
25 and material breach of the trillion dollar licensing provisions by which Defendants obtained  
26 perpetual” and “irrevocable” right to use, display, and monetize 95% of the public’s video content  
27 that exists or has ever existed in the world, as well as the personal and proprietary data of the 2.3  
28 billion people who use or access the site.

1           **B. Defendants Are Engaged In Anti-Competitive, Unlawful, Deceptive And Unfair**  
2           **Business Practices**

3           95. Defendants shuffle between three conflicting and irreconcilable roles in connection  
4 with YouTube:

5           a. When Defendants put on their “ISP” hat, Defendants host, review, curate,  
6 and monetize the video content of third party users who license their content, and the personal data  
7 property rights of these users, in return for providing equal access to YouTube content and services,  
8 subject only to viewpoint neutral rules that apply equally to all.

9           b. When Defendants put on their “creator” hat, Defendants create videos and  
10 partner with hand-picked creators to sponsor their content, and both operate and act as the largest  
11 and most powerful of YouTube users to compete directly and aggressively with Plaintiffs and other  
12 third party users for views, reach, engagements, CPM revenue, advertisers, and a host of other user  
13 based revenue streams on YouTube.

14           c. When Defendants put on their “advertiser” hat, Defendants review,  
15 categorize, and classify the video content of third party users for purposes of selling advertisements  
16 on the YouTube platform in connection with individual videos and/or YouTube channels, based on  
17 demographic information in the form of Defendants’ metadata that they generate for individual  
18 videos which is gleaned from video titles and tags (posted by Plaintiffs when the individual videos  
19 are posted to the platform), Plaintiffs’ channel profiles (which were input when the channels were  
20 first created), the profiles of Plaintiffs’ subscribers (which individual subscribers input when they  
21 first registered with Defendants) and the subscribers’ video viewing histories (which Defendants  
22 gather, analyze and summarize in the form of metadata), as well as the profiles of other users who  
23 view Plaintiffs’ videos (which were input when they first registered with Defendants) and the  
24 viewers’ video viewing histories (which Defendants also gather, analyze and summarize in the  
25 form of metadata). Using the enormous wealth of information Defendants have about the  
26 Plaintiffs, their subscribers and the viewers of their videos, Defendants can identify, price and sell  
27 advertising space on the YouTube platform in connection with individual videos posted, based on  
28 the demographics of the channel subscribers and video viewers. In this way, Defendants can

1 identify, market and sell advertising based on the race, identity and viewpoints of the YouTube  
2 users and generate revenue for Defendants, their affiliated creators, and affluent white YouTube  
3 creators, without ever reviewing any of the millions of individual videos posted on the YouTube  
4 platform. In short, Defendants divvy up the video content on the platform by race, identity and  
5 viewpoint in order to sell advertisements to third parties without regard to the actual content of  
6 videos; moreover, Defendants fully monetize those creators whose subscribers and viewers fit the  
7 “right demographic,” paying them collectively millions of dollars each month regardless of whether  
8 their individual videos comply with Defendants’ own Community Guidelines and TOS.

9       96. Defendants’ multiple roles create platform wide conflicts of interest, in which  
10 Defendants utilize their unfettered authority to curate third party content on YouTube as a pretext  
11 to impose access and content restrictions on Plaintiffs and all other persons similarly situated, that  
12 are not imposed on content posted or sponsored directly or derivatively by Defendants or other  
13 parties with whom they contract with for sponsorship.

14       97. In the last four years, Defendants have invested in and expanded their business to  
15 become the largest a production and media company in the world. *See*  
16 <https://www.feedough.com/youtube-business-model-how-does-youtube-make-money/>.

17       98. Among other things, Defendants announced that “[t]he company has partnered with  
18 its top content creators who wanted to charge a subscription rental or purchase fees for their content  
19 and made their uploaded content as paid content which requires users to pay for a subscription or  
20 purchase fees to access the content of the channel.” Furthermore, Defendants decided to partner  
21 with “affiliates” whose “related product” advertisements are placed with some videos on YouTube.  
22 These products link to the affiliate partners, which pay a commission to Defendants if their  
23 products are purchased.

24       99. Defendants understand that the YouTube Platform has effectively surpassed its user  
25 saturation point, and that monetizing and profiting from YouTube by merely hosting content on the  
26 platform is no longer financially feasible to satisfy Defendants’ insatiable lust for revenue and  
27 profits.

28

1           100. Thus, in addition to hosting their own video channels on YouTube, Defendants have  
2 entered into lucrative preferred provider production deals with other global media companies,  
3 including PBS, MSNBC, HBO, Fox News, Breitbart, and other media and entertainment  
4 conglomerates.

5           101. Defendants have also entered the digital TV market with the advent of YouTube  
6 TV. Defendants use their control over third party user content, on and access to the YouTube  
7 platform to induce consumers to purchase their TV and entertainment services by using the  
8 YouTube hosting platform, user interface to that platform, and content curation powers to induce  
9 consumers to use YouTube for all digital based TV or video content, including movies, music,  
10 sports, and entertainment.

11           102. Defendants compete for that public audience or viewership unfairly and unlawfully,  
12 in a manner which gives their “preferred content” a competitive advantage, by among other things,  
13 using their filtering tools and criteria to restrict the access and reach of the smaller third-party users  
14 it hosts on YouTube. Thus, under the pretext of making the site safe for their users, Defendants  
15 arbitrarily, capriciously, and deceptively restrict access and audience reach to the videos of their  
16 competitors on the platform, like Plaintiffs, while at the same time allowing their own content to  
17 avoid those same restrictions and restraints -- even when that content violates their own guidelines.  
18 In so doing, Defendants effectively clear space on the platform for content which they, or their  
19 preferred users supply, to better reach the sites’ 2.3 billion users, by censoring the content of their  
20 competitors.

### 21           **C. Defendants’ Tool Kit For Unlawful Conduct**

22           103. Defendants utilize a series of discriminatory, anticompetitive and unlawful  
23 suppression practices and conduct to grow their profits, financial, interests, and unprecedented  
24 consolidation and control over information, speech, advertising, expression, and internet  
25 viewership.

#### 26                   **1. Artificial Intelligence Algorithm Restrictions**

27           104. The central mechanism used by Defendants to achieve these objectives are A.I.  
28 based algorithms (“A.I.”), and computer driven filtering tools that profile, regulate, restrict, flag,

1 and block creator content and access on YouTube. Defendants surreptitiously collect information  
2 regarding Plaintiffs and all other persons similarly situated, their subscribers, and the viewers of  
3 their videos, and generate metadata that is embedded, appended or associated with individual  
4 videos to facilitate Defendants' unlawful discriminatory and anticompetitive filtering and review  
5 tools to restrict or block the video content and access to the YouTube platform by Plaintiffs and all  
6 other persons similarly situated, both as YouTube creators and as viewers.

7 105. Defendants *claim* that these algorithms are viewpoint and identity neutral, and that  
8 they ensure that the "same standards apply equally to all" when it comes to the content regulation  
9 of speech on YouTube. Defendants claim that their employees conduct "manual reviews" to  
10 supplement the electronic filtering and regulation of video content.

11 106. But the evidence, including statements by Defendants' employees familiar with both  
12 electronic and manual filtering and regulation of speech that takes place on the YouTube Platform,  
13 suggests that Defendants' representations of neutral viewpoint and identity-based content  
14 regulation are *also* false. The A.I. and algorithmic filtering tools are embedded with code that  
15 regulates content based on purely subjective, viewpoint, topic, and identity animus, and other  
16 unlawful criteria. Even before October 2016, Defendants' engineers began making changes to the  
17 code and operations of the algorithms and filtering tools in order to ensure that Defendants could  
18 filter videos and regulate access to video content based upon overt discrimination based on race,  
19 sexual or gender orientation, ethnic, political or religious animus, as well as for financial and/or  
20 anticompetitive purposes.

21 107. Similarly, Defendants' viewpoint bias, animus, and discrimination towards the  
22 user's identity or viewpoint is institutionally and culturally rampant in Defendants' work place and  
23 employment practices. Among other things, Defendants operate and administer "Restricted Mode"  
24 through employees, including engineers and content reviewers, and independent contractors. These  
25 people work in what has been widely reported and acknowledged as a dysfunctional work  
26 environment and often work outside of the United States in countries and cultural settings where  
27 discrimination against Plaintiffs and all other persons similarly situated is not only condoned but is  
28 deeply embedded in social mores.



1           108. Internal emails by and between Defendants' employees show that many employees  
2 are routinely subjected to harassment, threats, blacklisting, discipline, and hazing based on their  
3 race, or political or religious viewpoints. The dysfunction and viewpoint bias emanate from, and  
4 are enforced at, the highest ranks of Defendants' upper management, and drive the actions of  
5 employee supervisors, co-workers, third-party affiliates, and advertisers.

6           109. Consequently, even when manual employee reviews of video content are used to  
7 check and audit restrictions on videos generated from the digital algorithms or from flagging by  
8 other YouTube users, Defendants apply "Restricted Mode" and other discretionary and vague  
9 content based criteria, to restrict access to Plaintiffs' videos using vague and undefined terms such  
10 as "mature" or "sensitive" for certain audiences, solely because the video discusses a topic  
11 involving abbreviations like "BLM," "KKK;" terms such as "Black," "White," "Racism,"  
12 "Boogaloo," "White Supremacy," "Racial Profiling," "Police Shootings," "Police Brutality,"  
13 "Black Lives Matter;" names of individuals such as those killed by law enforcement, "Bill Cosby,"  
14 "Louis Farrakhan;" names of organizations such as "Ku Klux Klan," "Nazi," "Neo-Nazi," "Aryan  
15 Brotherhood," and/or other euphemisms that are known and particular to the African American  
16 Community, or the video's title or tag words includes these trigger words.

17           110. Defendants' conduct creates censorship, restraint of speech, and discrimination  
18 based on the race, identity, and/or viewpoint of Plaintiffs and all other persons similarly situated,  
19 not based upon video content which might violate a narrow, neutral, objective, and specifically  
20 verifiable criteria that furthers a compelling and legitimate public interest.

21           111. Defendants' conduct also forces Plaintiffs and all other persons similarly situated to  
22 self-censor and to avoid not only using abbreviations like "BLM," "KKK;" terms such as "Black,"  
23 "White," "Racism," "Boogaloo," "White Supremacy," "Racial Profiling," "Police Shootings,"  
24 "Police Brutality," "Black Lives Matter;" names of individuals such as those killed by law  
25 enforcement, "Bill Cosby," "Louis Farrakhan;" names of organizations such as "Ku Klux Klan,"  
26 "Nazi," "Neo-Nazi," "Aryan Brotherhood," and/or other euphemisms that are known and particular  
27 to the African American Community in video titles and tag words, but to avoid mentioning these in  
28 the video content, in order to avoid having Defendants remove videos or issue a "strike" against the

1 channel, purportedly for posting “hate speech” or violating one or more of Defendants’ unidentified  
2 Community Guidelines and TOS.

3 112. Defendants’ A.I. tools and practices effectively silence the voices of Plaintiffs and  
4 all other persons similarly situated concerning some of the most important issues and current events  
5 affecting their communities.

6 113. Because Defendants’ A.I. tools and practices single out the videos of Plaintiffs and  
7 all other persons similarly situated for adverse treatment (e.g., removal, restricted access if any,  
8 and/or limited or no monetization), the Plaintiffs and class members cannot generate sufficient  
9 viewers or subscribers to grow their channels so as to qualify for all of the Defendants’ special  
10 programs and perks, such as YouTube partnership, Channel Membership, mobile Livestreaming, or  
11 SuperChat applications, resulting in the creation of a ghetto tier of YouTube creators based on their  
12 race, identity and/or viewpoints, who are doomed to create videos for very limited audiences for  
13 little to no money.

## 14 2. Excluding Channels And Videos From Full Revenue Generation

15 114. In addition to creating and using metadata to racially profile Plaintiffs and all other  
16 persons similarly situated, as well as their subscribers and viewers, for purposes of restricting  
17 access to the YouTube platform, Defendants use the same or similar metadata to limit the revenue  
18 which can be generated from individual videos. Defendants use A.I., algorithms, and filtering tools  
19 and practices in conjunction with the metadata they create, to prevent Plaintiffs and other persons  
20 similarly situated from earning money from videos merely because the metadata reflects the video  
21 title and/or tags include abbreviations like “BLM,” “KKK;” terms such as “Black,” “White,”  
22 “Racism,” “Boogaloo,” “White Supremacy,” “Racial Profiling,” “Police Shootings,” “Police  
23 Brutality,” “Black Lives Matter;” names of individuals such as those killed by law enforcement,  
24 “Bill Cosby,” “Louis Farrakhan;” names of organizations such as “Ku Klux Klan,” “Nazi,” “Neo-  
25 Nazi,” “Aryan Brotherhood,” and/or other euphemisms that are known and particular to the African  
26 American Community. Defendants also use the same or similar metadata to limit or prevent  
27 revenue generation from videos posted by Plaintiffs or other persons similarly situated, simply  
28 because the videos were created by Plaintiffs or members of other races, by other similar

1 communities, or by those sharing the same viewpoints, or because the videos were posted on  
2 channels that are popular with members of Plaintiffs' communities, or are widely viewed by  
3 viewers who share Plaintiffs' race, identity, and/or viewpoints.

4 115. Because Defendants use metadata based on video titles and tags to flag videos for  
5 limited monetization or demonetization, Plaintiffs and other persons similarly situated self-censor  
6 and either avoid posting videos regarding issues and current events that are important to their  
7 community (e.g., videos regarding the deaths of unarmed African Americans at the hands of law  
8 enforcement, healthcare providers' refusals to test or treat African Americans for the Covid-19  
9 virus, the disparate infection, death and unemployment rates experienced by African Americans as  
10 a result of the Covid-19 pandemic), or they misspell key words like "Black," "White," "Race,"  
11 "Racist," and "Racism," or they rely on euphemisms known only to the African American  
12 community.

13 116. Defendants' conduct and practices cause Plaintiffs and other persons similarly  
14 situated to lose revenue which their fully compliant videos would otherwise have generated, as well  
15 to lose subscribers and viewers, and the opportunity to grow their channels and to qualify for full  
16 access to all of the perks that Defendants offer others.

### 17 3. Misapplying "Restricted Mode"

18 117. Defendants also use the same or similar metadata to restrict access to the full  
19 YouTube platform and related benefits by misapplying "Restricted Mode" to the videos of  
20 Plaintiffs and all persons similarly situated. "Restricted Mode" is one of Defendants' primary tools  
21 for platform control and curation. "Restricted Mode" affects tens of millions of YouTube users  
22 every single day.

23 118. According to Alice Wu, a Senior Manager of Trust & Safety at YouTube, LLC,  
24 about 1.5 percent of YouTube's daily views (or approximately 75 million of the nearly 5 billion  
25 views every single day) come from people who have activated Defendants' "Restricted Mode."

26 119. According to Defendants, "Restricted Mode" is supposed to function much like a  
27 curtain that blocks access to the hardcore pornography section at the corner video rental shop,  
28

1 limiting viewer access by younger, sensitive audiences to video content that contains certain  
2 specifically enumerated “mature” aspects.

3 120. Defendants assert that “Restricted Mode” is a tool “to help institutions like schools  
4 as well as people who wanted to better control the content they see on YouTube with an option to  
5 choose an intentionally limited YouTube experience.” “Restricted Mode” also can be activated by  
6 system administrators to restrict all access on computer networks to all users and electronic devices  
7 connected to the network, including viewers who seek to access video content in public libraries,  
8 schools, and other public institutions or private workplaces.

9 121. While Defendants claim that viewers control the use of “Restricted Mode,” and can  
10 choose to turn on “Restricted Mode” for their personal accounts, there is growing evidence that it  
11 sweeps more broadly. In certain instances, for viewers who do not have YouTube accounts and  
12 seek to view videos posted on YouTube by Plaintiffs and other persons similarly situated,  
13 Defendants have applied “Restricted Mode” to prevent those viewers from accessing videos  
14 through links posted on other social media platforms that are not owned or controlled by  
15 Defendants, as well as to prevent YouTube users who have not activated “Restricted Mode” from  
16 accessing those videos.

17 122. According to Defendants, “Restricted Mode” can be applied to videos in three ways.

18 a. First, Defendants examine certain “signals” like the video’s metadata, title,  
19 and tag words associated with the video. When creators post videos, Defendants invite them to  
20 include certain information in the title or to input “tag” words which are purportedly designed to  
21 help viewers find videos in which they are interested, such as a title reflecting the subject of the  
22 video, and tag words indicating the video’s themes or content. Plaintiffs and other persons  
23 similarly situated unwittingly provide Defendants with such titles and tag words along with their  
24 posted videos. Defendants then generate metadata which is additional content that they insert into,  
25 append to, or associate with the videos that are posted, which allows Defendants apply A.I.,  
26 algorithms and other filtering tools to profile Plaintiffs, their subscribers and viewers, as well as  
27 other persons similarly situated, and to sort them by race, identity and viewpoints. Defendants  
28 ultimately apply “Restricted Mode” to the otherwise compliant videos posted by Plaintiffs and

1 other persons similarly situated, because the videos have titles or tag words that reflect issues of  
2 importance to African American or other racial communities, and those who simply watch videos  
3 popular in such communities – essentially relegating these videos to a limited audience which  
4 excludes white, conservative and/or “more sensitive viewers,” simply because the videos were  
5 made by or for members of protected racial classifications under the law.

6           b.       Second, Defendants claim that such metadata “signals” identify videos  
7 which violate Defendants’ Community Guidelines or TOS. However, these “signals” are used by  
8 Defendants as a pretext to segregate disfavored content using “Restricted Mode,” regardless of  
9 whether the video contains material which is unsuitable for children, younger audiences or more  
10 sensitive viewers. Defendants themselves create all such metadata and insert, embed or associate  
11 that metadata which reflects demographic information regarding the video creators, channel  
12 subscribers and viewers, along with individual videos to create more “signals” for A.I., algorithms,  
13 and filtering tools to utilize. Thus, in certain cases, videos that would otherwise pass through the  
14 filtering process without incident, are flagged for restrictions by Defendants; not because of  
15 anything in the video content, but because of metadata or other “signal” information that  
16 Defendants themselves have inserted, embedded or associated with the video. These signals  
17 include information about the race, identity and/or individual viewpoint of the video creator, her  
18 subscribers, and her viewers.

19           c.       Third, Defendants also purportedly use “Restricted Mode” to passively  
20 restrict a video if it is “flagged” as “inappropriate” by anyone in the “community” of YouTube  
21 users. According to Defendants, the so-called “flagged” videos are subsequently reviewed by a  
22 “team” of human reviewers for “violations” of Community Guidelines and/or TOS. But flagged  
23 videos are subject to Defendants’ own internal review procedures that are race, identity and  
24 viewpoint based, so that many flagged videos posted by Plaintiffs and other persons similarly  
25 situated may never receive an independent content review by a human being, much less a YouTube  
26 employee.

27           123.   As shown below, when a network administrator or an individual viewer activates  
28 “Restricted Mode,” each video subject to “Restricted Mode” appears with Defendant’s custom

1 stamp of disapproval, including a red face including a red square bearing a foreboding facial  
2 expression, together with text showing “This video is unavailable with Restricted Mode enabled.  
3 To view this video, you will need to disable Restricted Mode.”

4 124. Defendants’ stamp of disapproval thus makes a specific and falsifiable  
5 misrepresentation to viewers of videos posted by Plaintiffs and other persons similarly situated, that  
6 the specific video that they have attempted to access contains content that is so inappropriate,  
7 shocking and outrageous, that the viewer must be protected from that content and that the  
8 YouTuber creator who has posted that content is responsible for having created and uploaded such  
9 inappropriate, shocking, and outrageous content.

10 125. These specific and falsifiable factual representations are by no means limited to  
11 Defendants’ “Restricted Mode” stamp of disapproval. Viewers who attempt to ascertain why a  
12 particular video has been subjected to “Restricted Mode” are told by Defendants that videos are  
13 eliminated from “Restricted Mode” when they include specific pieces of content, including content  
14 (1) talking about drug use or abuse, or drinking alcohol in videos; (2) overly detailed conversations  
15 about or depictions of sex or sexual activity; (3) graphic descriptions of violence, violent acts,  
16 natural disasters and tragedies, or even violence in the news; (4) videos that cover specific details  
17 about events related to terrorism, war, crime, and political conflicts that resulted in death or serious  
18 injury, even if no graphic imagery is shown; (5) inappropriate language, including profanity; and  
19 (6) video content that is gratuitously incendiary, inflammatory, or demeaning towards an individual  
20 or group.

21 126. In reality Defendants’ definition of “Restricted Mode” is applied in a significantly  
22 over inclusive and under inclusive manner, which has caused significant damage to Plaintiffs and  
23 other persons similarly situated. Even the most simple examination of Plaintiffs’ videos subject to  
24 “Restricted Mode” shows that Defendants are not only dead wrong in their representations to the  
25 public concerning African American videos that Defendants subject to the “Restricted Mode”  
26 stamp of disapproval, but Defendants are hiding from the public valuable content and are doing so  
27 in bad faith.

28

1           127. To the extent that videos which have titles or tags which include “abbreviations like  
2 “BLM,” “KKK;” terms such as “Black,” “White,” “Racism,” “Boogaloo,” “White Supremacy,”  
3 “Racial Profiling,” “Police Shootings,” “Police Brutality,” “Black Lives Matter;” names of  
4 individuals such as those killed by law enforcement, “Bill Cosby,” “Louis Farrakhan;” names of  
5 organizations such as “Ku Klux Klan,” “Nazi,” “Neo-Nazi,” “Aryan Brotherhood,” and/or other  
6 euphemisms that are known and particular to the African American Community,” Defendants apply  
7 the “Restricted Mode” filter to these videos and limit viewer access to many compliant videos  
8 posted by Plaintiffs and other persons similarly situated, which contain content of interest to the  
9 African American community. Defendants do so, despite the fact that the videos do not contain  
10 materials which discuss drug use or abuse or drinking alcohol; overly detailed conversations about  
11 or depictions of sexual activity; graphic depictions of violence, violent acts; natural disasters or  
12 tragedies or violence in the news; specific details about events related to terrorism, war, crime and  
13 political conflicts that resulted in death or serious injury even if no graphic imagery is shown;  
14 inappropriate language, including profanity, or content that is gratuitously incendiary,  
15 inflammatory, or demeaning toward an individual or group.

16           128. Defendants effectively use “Restricted Mode” as a damper to quiet the voices of  
17 Plaintiffs and other persons similarly situated, from being heard by all YouTube users and to limit  
18 Plaintiffs’ reach, thereby preventing them from growing their channels, increasing subscribers and  
19 viewers, generating revenue, and meeting minimum participation standards to qualify for  
20 Defendants’ other benefits such as YouTube partnership, Channel Membership, Mobile Streaming  
21 and SuperChat.

22           129. Once Defendants apply “Restricted Mode” to a video, Plaintiffs and other persons  
23 similarly situated are then forced to spend time and effort to appeal Defendants’ decision and  
24 persuade a human being to actually look at the content of the video. Even when the appeal is won,  
25 Plaintiffs and other persons similarly situated lose the opportunity to generate interest in and  
26 revenue from the new video for a period of weeks to months, and to thereby grow their channel  
27 during the period that the video is restricted. Defendants never compensate for the erroneous  
28

1 application of “Restricted Mode,” regardless of the length of time it takes for Defendants to  
2 actually review the restricted video content.

3 130. Defendants impose these restrictions to justify anticompetitive and unlawful actions  
4 intended to gain a competitive advantage for their own video content and/or to ensure that their  
5 sponsored creators, content partners, and advertisers have an unfair competitive advantage in the  
6 YouTube video market. By placing no restrictions on the monetization of their own videos or those  
7 of Defendants’ sponsored creators, content partners and preferred advertisers, Defendants gain a  
8 competitive advantage by restricting the financial reach of Plaintiffs and other disfavored users,  
9 while simultaneously ensuring that their own video content (and those of their sponsored creators,  
10 content partners and preferred advertisers) are not subjected to the same (or any) Advertising  
11 Restrictions.

12 131. Defendants also impose these restrictions to facilitate their advertising practices,  
13 whereby they profile videos by the race, identity and viewpoint of creators, subscribers and viewers  
14 so as to identify the videos with the most valuable demographics which command the highest  
15 prices from most advertisers, without regard to whether there are any advertisers which are willing  
16 to purchase spots associated with videos posted by Plaintiffs and other persons similarly situated.

17 132. Defendants’ actual practices unlawfully provide Defendants with monopoly power  
18 over the video posting and viewership market, the video advertising market, and the ability to  
19 manipulate, bully, and falsely denigrate legitimate YouTube users, like Plaintiffs and other persons  
20 similarly situated, by subjectively designating their speech as “inappropriate,” because Defendants  
21 do not like or agree with the speakers’ race, identity or point of view; or because Defendants are  
22 too cheap to actually review the videos posted to the platform, and desire to rely on inexpensive  
23 A.I., algorithms, and other filtering tools for purposes of selling advertisements and curating videos  
24 on YouTube.

#### 25 4. Shadow Banning Channels And Videos

26 133. Defendants treat videos that present or discuss serious issues and current events that  
27 are important to the communities of the Plaintiffs and all other persons similarly situated as “not  
28 family friendly,” and as if they are inappropriate for all audiences simply because they were



1 uploaded by creators whose races, identities, and/or viewpoints are disfavored by Defendants.  
2 Defendants are not merely removing, restricting access to or limiting monetization for videos  
3 posted by Plaintiffs and all other persons similarly situated, Defendants are making those videos,  
4 and some channels invisible on the YouTube Platform, despite the fact that the videos comply with  
5 all of Defendants' Community Guidelines and TOS.

6 134. In shadow banning videos, Defendants effectively prevent Plaintiffs' subscribers  
7 and potential viewers from locating new videos which discuss issues and current events that are  
8 followed by the African American community; by excluding such videos from the YouTube search  
9 function on the platform, Defendants are preventing creators like Plaintiffs and all other persons  
10 similarly situated from growing their channels by securing the necessary subscriber and viewer  
11 numbers required to qualify for Defendants' special programs and perks, such as YouTube  
12 partnership, channel membership, mobile Livestreaming, or SuperChat applications, and are  
13 preventing them from generating revenue from their videos.

14 135. Defendants also shadow ban entire channels belonging to Plaintiffs and other  
15 similarly situated persons, by making the channels unsearchable on the platform. Without a link to  
16 Plaintiffs' channels, subscribers and viewers cannot access Plaintiffs' videos. As a result of  
17 shadow banning of channels, many Plaintiffs and other persons similarly situated can only attract  
18 new subscribers or viewers by "word of mouth," and referrals from other members of their  
19 community, or from other social media platforms where links to Plaintiffs' YouTube channels are  
20 posted.

21 136. Defendants' shadow bans not only impair the growth of channels belonging to, and  
22 revenue generated from videos posted by Plaintiffs and other persons similarly situated,  
23 Defendants' conduct both effectively reduces the audience for videos posted by Plaintiffs and  
24 muffles their voices across the platform, making it impossible for new YouTube viewers to locate  
25 video content that is important to their specific communities. As a result, Plaintiffs, as African  
26 American creators, and other persons similarly situated, cannot expand subscriber and viewer  
27 numbers sufficient to grow their channels and fully enjoy full access to the YouTube platform and  
28 all of the benefits Defendants offer others.

1                   **5. Delegating Content Review And Regulation To Racists And White**  
2                   **Supremacists**

3           137. Defendants have configured the YouTube platform to allow any user to “report” or  
4 “flag” videos which they believe violate the Google/YouTube Community Guidelines or TOS, e.g.,  
5 video content which contains hate speech, nudity, profanity, graphic depictions of sexuality or  
6 violence, disparaging remarks, content which violates existing copyrights or trademarks held by  
7 persons other than the creator posting the video, or descriptions of violent events and scenes which  
8 may disturb younger or more sensitive viewers. Defendants not only allow users to “report” or  
9 “flag” videos posted by Plaintiffs and other persons similarly situated, Defendants take action  
10 based on those third-party reports and flags and proceed to remove, restrict, and/or demonetize  
11 individual videos; issue community “strikes;” and to suspend, and/or remove whole channels of  
12 Plaintiffs and other persons similarly situated. Defendants do so without first verifying that the  
13 flagged video violates a specific Community Guideline or Term of Service. In effect, Defendants  
14 deputize YouTube users, including racists, sexists, white supremacists, Neo-Nazis, and other hate  
15 speech trolls. These delegated and affiliated users, exercise censorship powers on YouTube,  
16 including reporting, flagging, bullying and threatening creators whenever Plaintiffs and other  
17 persons similarly situated post content with which Defendants’ racist agents disagree.

18           138. In allowing third parties to wield the power to report or flag a video as violating the  
19 applicable Community Guidelines and TOS, Defendants have deprived Plaintiffs and other persons  
20 similarly situated, of equal access to the YouTube platform and all of the services Defendants make  
21 available to others by creating the presumption that any flagged video does in fact contain content  
22 which violates the Community Guidelines and/or TOS. After being flagged by a third party,  
23 Plaintiffs and other persons similarly situated are forced to spend substantial time and effort to  
24 appeal the flag in order to restore the channel/video, remove the restriction, or obtain full  
25 monetization for channel/video, which, but for the flag, would have reached a wide audience and  
26 would have generated substantial revenue.

27           139. Because of Defendants’ conduct and practices, trolls regularly appear on the  
28 channels of Plaintiffs and other persons similarly situated, threaten to shut down the channels – and

1 within a few days, the trolls succeed in getting Defendants to suspend the channels. As a result,  
2 Plaintiffs and other persons similarly situated engage in self-censorship and avoid posting videos  
3 that address issues of historical, political, cultural, and educational significance to their  
4 communities. Recently, Plaintiffs and other persons similarly situated have avoided timely topics  
5 such as the denial of Covid-19 testing and treatment to African American healthcare workers, the  
6 inability of African American businesses to apply for CARE loans, and the disparate enforcement  
7 of stay at home orders against African American communities. Defendants' conduct therefore  
8 encourages and enables the agendas of racists, white supremacists, and Neo-Nazis on YouTube, by  
9 silencing the voices of Plaintiffs and other persons similarly situated.

#### 10 **6. Interfering With Livestream Broadcasts**

11 140. Livestream broadcasts are videos that are posted in a streaming live format which  
12 are controlled exclusively by creators or by the moderators designated and authorized by individual  
13 creators to review, edit, and remove viewer comments which appear as the video progresses over  
14 time. Livestream broadcasts allow real time viewer participation in discussions on YouTube  
15 channels and often involve hundreds of people all making comments regarding important issues,  
16 current events, or topics. YouTube's Livestream broadcast application allows the video creator and  
17 her designated moderators to control the content of the broadcast. They control the viewer  
18 participation in the comments section of the screen while the Livestream is played.

19 141. Because Defendants routinely restrict viewer access to and revenue generation from  
20 videos posted by Plaintiffs and other persons similarly situated, depressing subscriber and viewer  
21 numbers, many African American channels do not generate significant income from advertising or  
22 Channel Membership. They must rely on other applications to generate revenue, such as  
23 Defendants' SuperChat, Livestream Donations or Patreon Donations. As a result, Livestream  
24 broadcasts have become a primary revenue generator.

25 142. Defendants regularly interfere with the Livestream broadcasts by Plaintiffs and all  
26 persons similarly situated, either using employees or independent contractors which Defendants  
27 hire. Defendants' Livestream interference includes such tactics as: (a) stopping Livestream  
28 broadcasts, and forcing the creator to restart the broadcast, at the loss of viewers and to the

1 irritation of subscribers; (b) throttling (intentionally slowing ) broadcasting speeds during  
2 Livestream which distorts the oral discussion and disrupts viewer comments on the screen; (c)  
3 inserting new voice content and/or visual images into the video which are entirely unrelated to the  
4 decisions and choices of the channel creator and her chosen moderators, often such new voice  
5 overs and images are unrelated to the Livestream topic, and are offensive, misogynistic, racist, or  
6 obscene; (d) removing positive comments from viewers; and (e) disconnecting individual viewers  
7 who are in the process of leaving positive comments, thereby silencing viewers who would  
8 otherwise support the video or make monetary donations on the Livestream broadcast.

9       143. For the past two years, until stay at home orders for nonessential businesses were  
10 imposed in the Bay Area in March of this year, Defendants' Livestream broadcast interference was  
11 relentless, causing Plaintiffs either to suspend Livestream broadcasts, to self-censor and refrain  
12 from discussing issues or current events of interest to the African American community, or to  
13 conduct them at odd hours without prior announcements. Defendants' conduct in interfering with  
14 Livestream broadcasts has reduced subscriber and viewer numbers for the channels of Plaintiffs  
15 and other persons similarly situated, has reduced revenue generated from Livestream broadcasts  
16 and from the channels overall, and has prevented the African American community from receiving  
17 information about and discussing issues and current events which are important to members of that  
18 community.

19       144. Notably, for the weeks while stay at home orders were in place for the Bay Area,  
20 Plaintiffs were able to conduct Livestream broadcasts unmolested. However, Defendants'  
21 interference has recommenced with the lifting of stay at home orders. Defendants' interference is  
22 now ongoing.

### 23                   7.       **Excluding Videos From "Trending" And "Up Next" Video** 24                                   **Recommendations**

25       145. Defendants routinely exclude videos posted by Plaintiffs and all persons similarly  
26 situated from YouTube's "Trending" and "Up Next" Recommendations which appear on users'  
27 screens when they watch videos on YouTube. While Defendants exclude the videos of Plaintiffs  
28 and other persons similarly situated, they include in the "Trending" and "Up Next" applications

1 both reaction videos which copy, pirate, or parody the videos of Plaintiffs, and videos which violate  
2 Defendants' Community Guidelines and/or TOS in so far as the videos contain hate speech,  
3 obscene, misogynistic, violent, threatening, or disparaging content which is directed specifically at  
4 Plaintiffs and other persons similarly situated. Defendants have continued to include these videos  
5 posted by third parties over the repeated flags, written objections, and complaints by Plaintiffs and  
6 their subscribers, and they have fully monetized many such videos despite having received flags,  
7 objections and complaints that the videos violate Defendants' Community Guidelines and TOS.

#### 8 **8. Freezing Channel Analytics Re Subscribers And Viewers**

9 146. Defendants have stopped reporting accurate current data on the "Analytics" pages  
10 for the channels of Plaintiffs and other persons similarly situated. For the past two years, many of  
11 the Plaintiffs' "Analytics" have remained the same or have varied by very small increments with  
12 respect to the number of subscribers, viewers, and view time. This has been the case regardless of  
13 the number of videos posted or the number of Livestream events broadcast on the channel.

14 147. As with the Defendants' interference with Livestream broadcasts, during the period  
15 of time that stay at home orders were in effect in the Bay Area in the Spring of 2020, new and  
16 larger numbers have been appearing on the "Analytics" pages for some of the channels of Plaintiffs  
17 and other persons similarly situated. Whether the "Analytics" pages will continue to be updated  
18 after the lifting of stay at home orders remains to be seen.

19 148. Because Defendants stopped reporting accurate data regarding the number of  
20 subscribers, viewers and view time for the channels of Plaintiffs and other persons similarly  
21 situated, Plaintiffs have been unable to grow their channels, to demonstrate that they qualify for  
22 Defendants' additional benefits and perks such as monetization, Channel Membership, Mobile  
23 Access, or SuperChat. Plaintiffs and other persons similarly situated have also lost revenue as they  
24 are unable to prove to Defendants the number of viewers for their videos which have at least  
25 limited monetization.

26  
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28

1                   **9. Promoting And Profiting From Hate Speech**

2           149. Defendants regularly promote and monetize hate speech targeting Plaintiffs and all  
3 persons similarly situated on the YouTube platform in direct violation of Defendants' Community  
4 Guidelines and TOS, and ignore repeated flags, reports and complaints regarding those videos.

5           150. Many hate speech videos targeting the African American community on YouTube  
6 include identifying information regarding Plaintiffs and other persons similarly situated, including  
7 without limitation their telephone numbers, residential addresses, registered trademarks, original  
8 copyrighted material, or personal likenesses, in direct violation of Defendants' Community  
9 Guidelines and TOS. Plaintiffs and other persons similarly targeted on the YouTube platform have  
10 followed Defendants' published procedures to remove the hate speech, including flagging the  
11 videos, reporting the violations of Defendants' Community Guidelines and Terms of Use by email,  
12 and sending follow up emails complaining of both the videos and the channels on which the videos  
13 are posted. The subscribers of Plaintiffs have reported that they too have flagged, reported and  
14 written follow up emails to Defendants complaining of the hate speech videos and their related  
15 channels.

16           151. Despite having received repeated, multiple flags, reports and written complaints  
17 over a period of months concerning specific hate speech videos posted by Defendants' favored  
18 partners, Defendants have refused to do anything to enforce their own published Community  
19 Guidelines and TOS and have not removed the videos or suspended the channels posting such  
20 videos. To this day, many hate speech videos remain posted without restriction, and fully  
21 monetized to generate revenue for their creators, despite having content that is patently false, racist,  
22 and/or sexist, violent, abusive or obscene. Some of the hate speech videos include threats of bodily  
23 harm or death specifically directed at the Plaintiffs and other persons similarly situated. Some hate  
24 speech videos are posted in a way that falsely indicates that it was posted by Plaintiffs.

25           152. Among the many YouTube channels which Defendants insulate for enforcement of  
26 Community Guidelines and TOS, the channels of Tommy Sotomayor and Candace Owens  
27 particularly stand out for their hateful, racist, and misogynist video content. Tommy Sotomayor  
28 regularly posts videos which promote violence against members of the African American

1 community. Candace Owens regularly posts videos disparaging male members of the African  
2 American community. Though Plaintiffs, their subscribers and other persons similarly situated  
3 repeated flagged, reported and complained about these two channels and their posted videos, as  
4 wells as their trolls who engage in abusive, bullying conduct directed to YouTube users who  
5 mention Sotomayor or Owens, Defendants nonetheless regularly include videos posted by  
6 Sotomayor and by Owens in the “Trending,” and “Up Next” recommendation applications on the  
7 screens of African American viewers. Defendants have rendered “flag proof” the channels of  
8 Sotomayor and Owens, and videos posted there.

9 153. Defendants’ refusal to enforce their own Community Guidelines and TOS equally to  
10 all YouTube users to eliminate hate speech videos; Defendants’ continued promotion of hate  
11 speech videos by including them in the “Trending,” and “Up Next” applications; and Defendants’  
12 continued monetization of hate speech videos and profiting from the sale of advertisements in  
13 connection with such videos have substantially reduced racial diversity on the YouTube platform  
14 and have endangered YouTube users like Plaintiffs and other persons similarly situated.  
15 Defendants’ conduct has stifled the voices of Plaintiffs and other persons similarly situated, who  
16 are unable to reach their intended audiences or to post videos which address or discuss issues and  
17 current events of concern to the African American community because while Plaintiffs’ compliant  
18 videos are wrongly removed, restricted and demonetized as “hate speech,” Defendants protect,  
19 promote and profit from vile, vicious, hate speech, and personal attacks on Plaintiffs and other  
20 persons similarly situated. Plaintiffs have received harassing telephone calls and written  
21 communications, forcing them to change their telephone numbers and to move from their homes.  
22 They have also lost subscribers, viewers and revenue as a result of Defendants’ failure and refusal  
23 to enforce their own Community Guidelines and TOS equally on all YouTube users.

#### 24 **10. Interfering With, Obstructing, Ignoring And Delaying Appeals**

25 154. Following Defendants’ actions to limit monetization or demonetize a video, or to  
26 remove or restrict a video, or to issue a strike against or to suspend a channel, Plaintiffs and other  
27 persons similarly situated are forced to spend time and effort to appeal Defendants’ decision and to  
28 persuade a human being to actually look at the otherwise compliant video(s) in question. Often,

1 appeals by Plaintiffs and other persons similarly situated drag on for months before Defendants  
2 respond to the appeal, but Defendants often do not even respond to Plaintiffs' appeals and either  
3 ignore them entirely or confirm the action out of hand, without having a human being review the  
4 video content that was the basis for Defendants' actions. In reality, Plaintiffs and other persons  
5 similarly situated often have no real appeal at all.

6 155. On those rare events when an appeal filed by Plaintiffs or other persons similarly  
7 situated are successful, after a human being actually review the video content in question and  
8 concludes that Defendants' action was wrongly imposed, Defendants do not reimburse the creator  
9 for lost revenue from the video(s) or the channel during the appeal process. Defendants therefore  
10 have a perverse incentive built in their platform regulation, filtering and curation process: by  
11 automating the application of "Restricted Mode," the monetization limitation process, and  
12 authorizing members of the YouTube community to flag videos and channels following, which  
13 Defendants automatically rely and act on those flags without first verifying videos/channels are in  
14 violation of Community Guidelines or TOS, Defendants don't have to pay the affected creators for  
15 the use of their video content, and can withhold payment unless and until a success appeal occurs.  
16 At each step of the appeal process, Defendants continue to withhold payment of revenue generated  
17 by the affected videos, profiting from their own improper decisions. Defendants absolutely control  
18 the process: they can ignore an appeal, delay the process by weeks, months or even years, or  
19 simply confirm the adverse action without ever examining the offending video content – there is no  
20 oversight, no higher authority, no way to force Defendants to follow their own Community  
21 Guidelines or TOS.

22 156. Defendants' conduct in interfering with, obstructing, ignoring and/or delaying  
23 appeals has deprived Plaintiffs and all persons similarly situated of the use of hundreds of their own  
24 videos which Defendants have wrongly removed from the YouTube platform or placed in archives  
25 where they cannot be viewed by anyone, have deprived Plaintiffs and all persons similarly situated  
26 of subscriber and viewer numbers generated from their channels which Defendants have wrongly  
27 suspended or removed from the YouTube platform, and have deprived Plaintiffs and all persons  
28 similarly situated of the full financial benefits from all of their otherwise compliant videos which



1 Defendants have improperly removed, restricted or demonetized for any period of time.  
2 Defendants operate the YouTube platform like a Las Vegas casino, ensuring that “the house always  
3 wins,” no matter how much time, effort, or value Plaintiffs and other persons similarly situated  
4 contribute to the platform because in the end, Defendants pick the winners based on race and other  
5 immutable identity traits, and viewpoints; Defendants write and rewrite the Community Guidelines  
6 and TOS; Defendants determine which users are exempt from those Community Guidelines and  
7 TOS; and Defendants define the appeal process to be whatever they want for any given YouTube  
8 user.

9 **D. Defendants Have Violated And Continue To Violate The Rights Of Plaintiffs**  
10 **And The Class**

11 **1. Kimberly Carleste Newman**

12 157. Plaintiff Newman has been a registered YouTube user since 2015, creating and  
13 posting approximately 1,654 videos on her “The True Royal Family” YouTube channel; and since  
14 2016, creating and posting 209 videos on her “True Royal” YouTube channel. Plaintiff Newman is  
15 an African American woman who identifies as such.

16 158. Plaintiff Newman makes and posts videos that discuss and present information  
17 regarding issues and current events which are important to the African American community, from  
18 a Black perspective. While her videos are pro-Black, they are not intended solely to inform and  
19 entertain the African American Community; they are suitable for members of other communities  
20 who are sympathetic to or curious about issues and current events as perceived from a Black  
21 perspective. “The True Royal Family” channel has generated approximately 1 million views  
22 annually. The “True Royal” channel has generated approximately 200,000 views annually.  
23 Notwithstanding the substantial annual viewer numbers generated by her channels, Plaintiff  
24 Newman has only generated total revenues of \$2,672.68 for videos posted on “The True Royal  
25 Family,” and \$123.96 for videos posted on the “True Royal” channel.

26 159. Plaintiff Newman is informed and believes that Defendants have gathered extensive  
27 information in order to generate metadata and then insert, embed, append, or associate such  
28 metadata with the videos posted to “The True Royal Family,” and “True Royal.” Defendants

1 gathered information regarding her race (Defendants know that Plaintiff Newman is an African  
2 American woman); that she makes and posts videos which have as a subject, relate to or discuss  
3 issues and current events that are important to members of the African American community; her  
4 subscribers either self-identify as members of the African American community or watch many  
5 videos posted by other creators who have self-identified as members of the African American  
6 community; and many of those who view her videos either self-identify as members of the African  
7 American community or watch videos posted by other creators who have self-identified as  
8 members of the African American community.

9 160. Plaintiff Newman is informed and believes that Defendants have applied “Restricted  
10 Mode” and have limited monetization for videos she posted to “The True Royal Family” and “True  
11 Royal” because Defendants have a policy and practice of using A.I., algorithms, and other filtering  
12 tools to classify, curate, censor, and sell advertisements for YouTube videos based on metadata  
13 Defendants create from information regarding the race, identity and viewpoint of creators,  
14 subscribers and viewers, rather than the content of the videos posted to the YouTube platform.

15 161. Defendants have applied “Restricted Mode” and have limited monetization to nearly  
16 all of the videos which remain visible to viewers on “The True Royal Family,” and nearly all of the  
17 videos posted to “True Royal,” despite the fact that each of the videos fully complies with all of  
18 Defendants’ Community Guidelines and TOS, and contain no nudity, sexualized scenes or  
19 language, graphic depictions of sex or violence, drug abuse, or alcohol consumption. Defendants  
20 have applied “Restricted Mode” to most of the videos posted, and have allowed only very limited  
21 monetization for some videos, without any explanation or rationale for doing so. Plaintiff Newman  
22 is informed and believes that the sole reason that Defendants have acted in this fashion is that  
23 Defendants discriminate against Plaintiffs and other persons similarly situated based on race, e.g.,  
24 the videos were created by an African American; the videos relate to issues and events of concern  
25 to the African American community, and the videos are viewed by large numbers of members of  
26 the African American community.

27 162. For various periods, off and on, throughout the past five years, Defendants have  
28 shadow banned both individual videos posted by Plaintiff Newman, and her channels, “The True

1 Royal Family,” and “True Royal.” Viewers have informed Plaintiff Newman that they were unable  
2 to locate individual videos using YouTube search applications and terms such as “Kimberly  
3 Santana,” “The True Royal Family,” “True Royal,” or using as search terms the names of  
4 individual videos posted by Plaintiff Newman. Viewers have further informed Plaintiff Newman  
5 that when they searched for “African American” video content, YouTube search applications  
6 produced videos posted by Tommy Sotomayor consisting of hate speech and content which  
7 disparages members of the African American Community.

8 163. Defendants do not provide any receipt or record of any kind when YouTubers  
9 “flag,” report, or complain about videos posted by other YouTube creators. Because of  
10 Defendants’ practices regarding such YouTube users’ efforts to obtain redress for violations of  
11 their rights, individual creators like Plaintiffs and other persons similarly situated are not able to  
12 prove that they, in fact, flagged any individual video or channel. For those users whom Defendants  
13 disfavor, the videos and channels are not automatically removed, restricted or demonetized, and the  
14 injured YouTube user cannot prove that she flagged the noncompliant or infringing video or  
15 channel. Rather, disfavored users like Plaintiffs and other persons similarly situated are left to  
16 make repeated written reports and complaints regarding the noncompliant or infringing video or  
17 channel, often, to no effect whatsoever. Defendants merely ignore those written reports and  
18 complaints too.

19 164. Plaintiff Newman registered “The True Royal Family” name and an associated  
20 image as trademarks. As part of the channel creation process, Defendants ask YouTube creators if  
21 they are using marks which have been registered as a trademark. When she created “The True  
22 Royal Family” channel, Plaintiff Newman informed Defendants that she had registered her channel  
23 name and a specific image used with thumbnail tiles as trademarks. Nonetheless, Defendants  
24 refused to remove videos using Plaintiff Newman’s registered trademark image from the channels  
25 of other YouTube creators in response to Plaintiff’s repeatedly flagging such videos, reporting the  
26 trademark infringement for the mark by the channel, and repeated unauthorized uses of “The True  
27 Royal Family” name. For a period of years, Defendants have ignored Plaintiff Newman’s  
28

1 complaints and allowed other YouTube users to infringe on her trademarks with impunity, in  
2 violation of Defendants' own Community Guidelines and TOS.

3 165. While Defendants refuse to protect the intellectual property of Plaintiffs and other  
4 persons similarly situated, Defendants routinely flag or remove videos, and suspend channels for  
5 violating the intellectual property of others. Defendants flagged a video posted by Plaintiff  
6 Newman in which she personally sings acapella a song written by Stevie Wonder on grounds that  
7 she was infringing the copyright for the song. Plaintiff's channel was suspended for two weeks for  
8 the purported infringement.

9 166. In September 2019, a third party hacked "The True Royal Family" channel and  
10 removed over 600 of Plaintiff Newman's videos so that neither the public nor Plaintiff Newman  
11 could view, access, or download any of the videos or portions thereof. Plaintiff Newman promptly  
12 applied to Defendants, asking that they restore the videos to "The True Royal Family" channel.  
13 Defendants agreed to return the videos, but has not done so.

14 167. Months later, in 2020, rather than restoring the original 600+ videos, Defendants  
15 removed another group of videos from the channel totaling more than 100 individual videos.  
16 Plaintiff Newman again appealed to Defendants to restore or return all of the 700+ missing videos  
17 removed from "The True Royal Family," but Defendants have failed and refused to do so without  
18 any explanation as to why the original 600+ videos have not been restored, why the additional  
19 100+ videos were removed, or why they have not been restored or returned.

20 168. Plaintiff Newman has been deprived of subscribers, viewers and revenue from the  
21 700+ missing videos for more than nine months, and Defendants have done nothing to address her  
22 ongoing injury or lost revenue.

23 169. Defendants have used A.I., algorithms, and filtering tools to restrict the reach of her  
24 videos and to prevent her from increasing subscriber and viewer numbers to grow her channels and  
25 generate revenue. For the past several years, the analytics page reflecting subscriber and viewer  
26 numbers for "The True Royal Family" channel have remained steady, varying little from month to  
27 month regardless of the number of new videos posted or the Livestream broadcasts. To avoid the  
28 impact of Defendant' A.I., algorithms and filtering tools on Defendants' metadata generated from

1 video titles and tags, Plaintiff Newman intentionally self-censors: (a) she avoids using  
2 controversial video titles; (b) she avoids using abbreviations like “BLM,” “KKK;” terms such as  
3 “Black,” “White,” “Racism,” “Boogaloo,” “White Supremacy,” “Racial Profiling,” “Police  
4 Shootings,” “Police Brutality,” “Black Lives Matter;” names, such as those of individuals such as  
5 those killed by law enforcement, “Bill Cosby,” “Louis Farrakhan;” names of organizations such as  
6 “Ku Klux Klan,” “Nazi,” “Neo-Nazi,” “Aryan Brotherhood,” and euphemisms that are known and  
7 particular to the African American Community; she intentionally misspells terms such as “Black,”  
8 “White,” “Race,” “Racism,” and “Racial Profiling,” because Defendants routinely flags such terms.

9 170. Despite her efforts to self-censor and avoid the reach of Defendants’ A.I.,  
10 algorithms, and filtering tools, most of the videos posted on “The True Royal Family” and “True  
11 Royal” have only limited monetization, if any, and produce next to no revenue.

12 171. Plaintiff Newman has increasingly turned to Livestream broadcasts to generate  
13 revenue from her video content. Viewers can make monetary donations to YouTube creators like  
14 Plaintiffs using SuperChat during Livestream broadcasts. However, for the past two years,  
15 Defendants have been interfering with Livestream broadcasts on “The True Royal Family.”  
16 Subscribers to “The True Royal Family” have informed Plaintiff Newman that their favorable  
17 comments have been interrupted or removed, they have been booted off of the Livestream or  
18 prevented from posting comments, and they have been prevented from making donations during  
19 Livestream broadcasts. The subscribers’ experiences, as related to Plaintiff Newman, involve  
20 conduct which is the exclusive province of the channel owner or their designated moderator(s).  
21 Plaintiff Newman had not designated any moderator for the Livestream broadcasts which were the  
22 subjects of subscriber complaints. Defendants also have been throttling, interrupting and even  
23 cutting off Livestream video broadcasts in the middle of the event. Additionally, Defendants have  
24 been inserting voice and visual content which blocks out that which Plaintiff Newman is posting  
25 live.

26 172. Defendants’ conduct during “The True Royal Family” Livestream broadcasts have  
27 reduced subscriber participation and interest in such events, have reduced new viewer participation,  
28

1 and have reduced the number and size of viewer donations to “The True Royal Family” channel  
2 depriving Plaintiff Newman of new subscribers and revenue.

3 173. Plaintiff Newman has also experienced significant and extended bullying,  
4 harassment, disparaging remarks and threats of physical violence on YouTube, both in the form of  
5 trolls leaving comments on “The True Royal Family” channel, and in the form of abusive and  
6 threatening videos posted by other YouTube creators. Videos bearing Plaintiff Newman’s name, and  
7 containing profanity and obscene content have been posted on the YouTube platform. A video  
8 threatening to kill her was also posted on the platform. Such videos violate Defendants’ Community  
9 Guidelines and TOS, and should be removed as such. However, Defendants’ A.I., algorithm, and  
10 other filtering tools not only failed to identify these violations of the applicable rules, Defendants  
11 failed and refused to respond to efforts by Plaintiff and her subscribers to flag the videos, or to  
12 written reports and complaints regarding the disparaging and threatening videos, much less to  
13 enforce Defendants’ own public standards and remove the videos or suspend the channels  
14 responsible for posting the videos.

15 174. As a direct and proximate result of Defendants’ racial discrimination and wrongful  
16 conduct, “The True Royal Family” and “True Royal” have not substantially increased their  
17 respective subscriber and viewer numbers in recent years. Plaintiff Newman has suffered, and  
18 continues to suffer from the loss of 700+ individual videos, improper application of Defendants’  
19 A.I., algorithms, and other filtering tools resulting in the shadow banning of her videos and her  
20 channels, the misapplication of “Restricted Mode,” the improper limitations on monetization for  
21 most of her videos, violations of her intellectual property rights and personal disparagement and  
22 threats to her person. Defendants’ conduct is willful, intentional and unlawful in discriminating  
23 against Plaintiff based on her race, identity and viewpoints, and those of her subscribers and  
24 viewers in limiting access to the YouTube platform, related benefits, and opportunities to generate  
25 revenue.

## 26 2. Lisa Cabrera

27 175. Plaintiff Cabrera has been a registered YouTube creator since 2015 when she  
28 created the “Lisa Cabrera” channel. Plaintiff Cabrera registered “Lisa Cabrera” as a trademark in

1 connection with her YouTube channel. 4,423 individual videos have been posted to the “Lisa  
2 Cabrera” channel, 68 of those videos were archived by Defendants. The “Lisa Cabrera” videos  
3 have generated more than 20 million views, with 830,000 views in just the past 28 days.

4 176. Plaintiff Cabrera is a YouTube partner. She creates and posts videos about current  
5 events and news on her channels, displaying pictures and news clips in her videos with original  
6 voice over commentary and narration accompanying the visual images. Despite the substantial  
7 number of total and monthly views generated by the “Lisa Cabrera” channel, it has only generated  
8 revenue totaling \$25,500 over the past four years.

9 177. Plaintiff Cabrera is informed and believes that Defendants have gathered extensive  
10 information in order to generate metadata and then insert, embed, append, or associate such  
11 metadata with the videos posted to “Lisa Cabrera,” and “Lisa C.” Defendants gathered information  
12 regarding her race (Defendants know that Plaintiff Cabrera is an African American woman); that  
13 she makes and posts videos which have as a subject, relate to or discuss news and current events  
14 that are important to members of the African American community; her subscribers either self-  
15 identify as members of the African American community or watch many videos posted by other  
16 creators who have self-identified as members of the African American community; and many of  
17 those who view her videos either self-identify as members of the African American community or  
18 watch videos posted by other creators who have self-identified as members of the African  
19 American community.

20 178. Plaintiff Cabrera is informed and believes that Defendants have applied “Restricted  
21 Mode” and have limited monetization for videos she posted to “Lisa Cabrera” and “Lisa C”  
22 because Defendants have a policy and practice of using A.I., algorithms, and other filtering tools to  
23 classify, curate, censor, and sell advertisements for YouTube videos based on metadata Defendants  
24 create from information regarding the race, identity and viewpoint of creators, subscribers and  
25 viewers, rather than the content of the videos posted to the YouTube platform.

26 179. Defendants have applied “Restricted Mode” and have limited monetization to most  
27 of the videos on “Lisa Cabrera,” despite the fact that each of the videos fully complies with all of  
28 Defendants’ Community Guidelines and TOS, and contains no nudity, sexualized scenes or

1 language, graphic depictions of sex or violence, drug abuse, or alcohol consumption. Defendants  
2 have applied “Restricted Mode” to most of the videos posted, and have allowed only very limited  
3 monetization for some videos, without any explanation or rationale for doing so. Plaintiff Cabrera  
4 is informed and believes that the sole reason that Defendants have acted in this fashion is that  
5 Defendants discriminate against Plaintiffs and other persons similarly situated based on race, e.g.,  
6 Defendants restrict and demonetize the videos because they were created by an African American;  
7 they relate to issues and events of concern to the African American community, and they are  
8 viewed by large numbers of members of the African American community.

9 180. In addition to the Defendants’ efforts to reduced Plaintiff Cabrera’s reach by  
10 misapplication of “Restricted Mode,” for various periods, off and on, throughout the past five  
11 years, Defendants have shadow banned both individual videos posted by Plaintiff Cabrera, and her  
12 channels, “Lisa Cabrera,” and “Lisa C” in their entirety. Viewers have informed Plaintiff that they  
13 were unable to locate individual videos using YouTube search applications and terms such as “Lisa  
14 Cabrera,” “Lisa C,” or using as search terms the names of individual videos posted by Plaintiff  
15 Cabrera.

16 181. Because Defendants single out Plaintiffs and other persons similarly situated for  
17 rigorous enforcement of Defendants’ Community Guidelines and TOS, to avoid receiving a  
18 “strike” for copyright infringement and related channel suspension, Plaintiff Cabrera is careful  
19 about complying with ‘fair use’ rules when using clips from someone else’s videos: she keeps  
20 news clips short, averaging 1-4 minutes in length; she does not alter the original material in any  
21 way; she always gives full credit in the video to the source of the original material of others.

22 182. Sometimes, Plaintiff Cabrera posts identical videos both on the “Lisa Cabrera”  
23 channel and the “Lisa C” back up channel to see if they generate similar viewer numbers and are  
24 treated the same by Defendants’ A.I., algorithms and other filtering tools. Sometimes, the identical  
25 videos posted on the “Lisa C” channel generate more viewers and revenue than those posted on the  
26 “Lisa Cabrera” channel. On six different occasions, Defendants flagged the “Lisa C” channel for  
27 posting “100% of the video of another YouTube creator, despite the fact that the video was created  
28 by Plaintiff Cabrera, registered owner of both channels, and despite Plaintiff Cabrera’s written



1 communications to Plaintiffs notifying them that she had given permission to “Lisa C” to repost  
2 each of the videos. Ultimately, Plaintiff was forced to archive each of the six videos that  
3 Defendants had flagged on the “Lisa C” channel simply because Defendants claimed that she was  
4 violating her own copyright on her own channel.

5 183. Defendants removed 68 of Plaintiff Cabrera’s videos without notice, explanation or  
6 justification other than the videos involved copyright infringements. Though she promptly  
7 appealed each removal, she was unable to have Defendants resolve the removal of the videos.  
8 Defendants permanently archived those 68 videos. Now they cannot be viewed, accessed or copied  
9 by anyone. They are simply “lost” to Plaintiff Cabrera. Defendants never informed Plaintiff  
10 whether someone had flagged any of these videos; who, if anyone, asserted a copyright interest in  
11 any content of any individual video; what, if anything, in the video triggered the Defendants’  
12 conduct. Without such information, Plaintiff Cabrera could neither understand the Defendants’  
13 strike against any one video or attempt to resolve the strike for any video.

14 184. Defendants wrongly suspended the “Lisa Cabrera” channel for “hate speech in  
15 connection with a video Plaintiff posted commenting on a report by NBC regarding the purchase of  
16 illicit narcotics on the dark web. Plaintiff Cabrera promptly appealed the suspension. Defendants  
17 rejected the appeal and refused to actually watch the video. It was only after Plaintiff Cabrera filed  
18 a case against Defendants in small claims court that Defendants finally contacted Plaintiff Cabrera  
19 and informed her that the suspension was erroneous. In all, “Lisa Cabrera” was suspended and  
20 fully demonetized for six weeks due to Defendants’ error.

21 185. Following the lifting of the suspension for the “Lisa Cabrera” channel, the channel  
22 remained demonetized, without the SuperChat application, and with 0 subscribers listed for the  
23 channel. Defendants waited two additional weeks to restore monetization for individual videos,  
24 SuperChat and the prior existing subscribers for the channel. In all, Plaintiff Cabrera lost 8 weeks  
25 of revenue due to Defendants’ wrongful conduct and refusal to even look at the video content that  
26 they had improperly flagged as “hate speech.” Defendants never offered to compensate her for the  
27 lost revenue they caused.

28

1 186. Defendants deputize YouTube users (those who are not members of disfavored  
2 groups like those to which Plaintiffs and other persons similarly situated belong) to flag videos and  
3 channels that purportedly violate Defendants' Community Guidelines and TOS, and then  
4 automatically remove, restrict, or demonetize flagged videos, and suspend or remove flagged  
5 channels, without verifying that the videos or channels in question actually violate any published  
6 standard. As a result of Defendants' abdication to anonymous YouTubers of responsibility for  
7 enforcing applicable standards, Plaintiffs and other persons similarly situated are subjected to  
8 racist, misogynist, abusive trolls who target Plaintiffs' videos and channels for adverse action by  
9 Defendants.

10 187. In January of this year, Defendants again suspended all monetization for videos  
11 posted to "Lisa Cabrera" following a threat made by YouTube user, Oxyman, during a Livestream  
12 broadcast on his channel where he vowed, "I'm gonna make sure [Lisa Cabrera's] channel gets  
13 demonetized." Plaintiff Cabrera is informed and believes that Oxyman flagged her channel  
14 purportedly for violating Defendants' Community Guidelines or TOS. Without taking any steps to  
15 verify the flag or reported violation, Defendants then demonetized the "Lisa Cabrera" channel in  
16 January of this year without any prior notification or explanation given to Plaintiff.

17 188. Thereafter, Plaintiff Cabrera promptly appealed the Defendants' action. Defendants  
18 informed her that she could reapply for access to monetization only after waiting 30 days.

19 189. After 60 days, Defendants restored monetization for the "Lisa Cabrera" channel  
20 videos without any explanation as to why they had demonetized the channel to begin with.  
21 Defendants never offered to compensate her for the lost revenue they caused by blindly assuming  
22 the validity of Oxyman's flag on the "Lisa Cabrera" channel.

23 190. To compound the financial injury to Plaintiff Cabrera, during this same period,  
24 Defendants were running advertisements for the World Health Organization regarding Covid-19  
25 prevention, and receiving advertising revenue at the same time that "Lisa Cabrera" was completely  
26 demonetized.

27 191. Plaintiff Cabrera has also been the subject of improper posts by YouTube creator,  
28 Michael Anderson, a known white supremacist. Michael Anderson posted a false video which had

1 as a subject Plaintiff Cabrera and disparaged her personally. Mr. Anderson also posted Plaintiff's  
2 name and residential address in the comments section of his video. After recording an image of the  
3 video displaying Lisa Cabrera's name and address in the comments section; Mr. Anderson then  
4 removed the video and reposted it without Lisa Cabrera's address.

5 192. Following Mr. Anderson's posting of the video and Plaintiff Cabrera's residential  
6 address, numerous additional copies of the video with the address in the comments section  
7 appeared on multiple additional YouTube channels.

8 193. Plaintiff Cabrera used Defendants' reporting tool, which sent links to the video to  
9 Defendants. Defendants never responded to Plaintiff. Approximately fifty of the subscribers to the  
10 "Lisa Cabrera" channel informed Plaintiff that they too had reported links to the video to  
11 Defendants using the reporting tool. Defendants took no apparent steps to remove the disparaging  
12 video featuring Plaintiff Cabrera's name and false information regarding her, despite the fact that  
13 the video clearly violated Defendants' Community Guidelines and TOS, while ignoring dozens of  
14 reports with links flagging the Michael Anderson video.

15 194. On another occasion, Michael Anderson made and posted another video which had  
16 Plaintiff Cabrera as the subject, and "Lisa Cabrera" in the video's title. This video featured an  
17 image of Mr. Anderson in a car brandishing a revolver and talking about Plaintiff Cabrera. Again,  
18 Plaintiff Cabrera used Defendants' reporting tool and sent to Defendants a link to the video which  
19 communicated a clear threat of violence by Mr. Anderson against Plaintiff Cabrera. Again multiple  
20 subscribers to "Lisa Cabrera" communicated to Plaintiff that they too had flagged the video using  
21 Defendants' reporting tool. And again, Defendants did absolutely nothing to remove the video, or  
22 to suspend or remove Michael Anderson's channel for violating Defendants' Community  
23 Guidelines or TOS.

24 195. As a direct and proximate result of Defendants' blatant and overt racial  
25 discrimination and wrongful conduct, "Lisa Cabrera" has not grown in subscriber numbers, viewer  
26 numbers or view times as the channel would have otherwise grown absent Defendants' conduct.  
27 Plaintiff Cabrera has been subjected to public disparagement, racist and misogynist abuse, public  
28 posting of her private contact information and overt threats of physical violence – all of which has

1 occurred with the tacit, if not overt, approval of Defendants who have repeatedly refused to enforce  
2 their own Community Guidelines and TOS. Plaintiff Cabrera has suffered lost revenue directly due  
3 to Defendants' racist profiling, A.I., algorithms and other filtering tools, while her channel was  
4 demonetized, while her channel was suspended, while Defendants have held her 68 videos in  
5 "archive," and Defendants continue to misapply "Restricted Mode" and limited monetization to  
6 individual videos she has posted.

### 7 **3. Catherine Jones**

8 196. Plaintiff Catherine Jones ("Plaintiff Jones") is an African American woman residing  
9 in the State of Vermont who is the creator and owner of "Cooking with Carmen Caboom," a  
10 YouTube cooking channel for African Americans, and "Carmen Caboom," and "Carmen Caboom  
11 Reloaded," two YouTube channels dedicated to developing and posting both parodies and serious  
12 videos which discuss and present information regarding issues and current events which are  
13 important to the African American community.

14 197. Plaintiff Jones created the "Carmen Caboom" channel in 2010, a backup "Carmen  
15 Caboom" channel in 2014, the "Cooking with Carmen Caboom" channel in 2015 and the "Carmen  
16 Caboom Reloaded," channel in 2018. Defendants improperly removed the original "Carmen  
17 Caboom" channel for purported nudity when no video posted to the channel included any nudity.

18 198. Plaintiff Jones is also a YouTube partner. Since creation, Plaintiff Jones' 2014  
19 "Carmen Caboom" channel has posted many videos, several of which Defendants improperly  
20 removed as hate speech, the remaining videos have garnered approximately 500 -1,200 views per  
21 video overall which have generated approximately \$500 per year.

### 22 **4. Denotra Nicole Lewis**

23 199. Plaintiff Lewis has been a registered YouTube user since 2006 and has posted her  
24 own videos on her YouTube channel, "Nicole's View" since 2016. When she registered "Nicole's  
25 View," Plaintiff Lewis answered Defendants' online questionnaire and self-identified as African  
26 American or Black. Had Defendants not requested that she provide personal information about  
27 herself for her profile, Plaintiff Lewis would not have done so. When she provided this  
28 information, she had no idea that Defendants would use information about her race to generate

1 metadata about her, the videos she watched, and the videos she posted or that Defendants would  
2 insert, embed or associate such metadata with videos she posted, with her subscribers or with her  
3 viewers, much less that Defendants would do so to sell advertising based on race, identity or  
4 viewpoint; or that Defendants would filter, censor or restrict her videos based on information  
5 regarding her race, identity or viewpoint.

6 200. Plaintiff Lewis creates and posts videos to inform and entertain the African  
7 American community with respect to current events and issues of import to Black Americans. To  
8 date, she has posted 748 videos to her channel, some of which Defendants have removed from the  
9 platform, leaving only 731 of which remain available to be viewed by the public. While “Nicole’s  
10 View” has generated in excess of 10.6 million views since 2016, she has generated approximately  
11 \$25,000 in all from those views.

12 201. Plaintiff Lewis is informed and believes that Defendants have gathered extensive  
13 information in order to generate metadata based on that information, and then insert, embed,  
14 append, or associate such metadata with videos posted on “Nicole’s View.” Defendants gathered  
15 information regarding her race (Defendants know that Plaintiff Lewis is an African American  
16 woman); that she makes and posts videos which have as a subject, relate to or discuss issues and  
17 current events that are important to members of the African American community; her subscribers  
18 either self-identify as members of the African American community or watch many videos posted  
19 by other creators who have self-identified as members of the African American community; and  
20 many of those who view her videos either self-identify as members of the African American  
21 community or watch videos posted by other creators who have self-identified as members of the  
22 African American community.

23 202. Plaintiff Lewis is informed and believes that Defendants have applied “Restricted  
24 Mode” and have limited monetization for the videos she posted to “Nicole’s View” because  
25 Defendants have a policy and practice of using A.I., algorithms, and other filtering tools to classify,  
26 curate, censor, and sell advertisements for YouTube videos based metadata Defendants create from  
27 information regarding the race, identity and viewpoint of creators, subscribers and viewers, rather  
28 than the content of the videos.

1           203. Defendants routinely limit viewer access by applying “Restricted Mode” and by  
2 limiting monetization to most of the videos posted on the “Nicole’s View” channel, despite the fact  
3 that the videos fully comply with all of Defendants’ Community Guidelines and TOS, and contain  
4 no nudity, sexualized scenes or language, graphic depictions of sex or violence, drug abuse, or  
5 alcohol consumption. Defendants have applied “Restricted Mode” to most of the videos posted,  
6 and have allowed only limited monetization to some videos, without any explanation or rationale  
7 other than to indicate that the “content identified is unsuitable for most advertisers.” Plaintiff  
8 Lewis is informed and believes that the sole reason that Defendants find the content is “unsuitable  
9 for most advertisers,” is because Defendants discriminate against Plaintiffs and other persons  
10 similarly situated based on race, e.g., the content was created by an African American, relates to  
11 issues and events of concern to the African American community, and is viewed by many members  
12 of the African American community.

13           204. For certain periods over the past four years, Defendants have shadow banned certain  
14 individual compliant videos posted by Plaintiff Lewis on “Nicole’s View.” During various periods  
15 of time, those videos did not appear in YouTube searches using the terms “Nicole Lewis,” or  
16 “Nicole’s View,” or using their individual video titles as search terms.

17           205. “Nicole’s View” video content consists roughly of 75% pre-recorded videos and  
18 25% Livestream broadcasts. For Livestream broadcasts, she sometimes has as many as 1000  
19 viewers participating. Plaintiff Lewis employs designated moderators to monitor, control and  
20 censor viewer comments to ensure compliance with Defendants’ Community Guidelines and TOS,  
21 promptly removing any non-compliant comments and blocking offending participants.

22           206. For the past two years, Defendants have used A.I., algorithms, and filtering tools to  
23 restrict the reach of videos posted on “Nicole’s View,” resulting in stagnant subscriber and viewer  
24 numbers. “Nicole’s View” is no longer growing. The channel’s analytics page from month to  
25 month reflects only minor changes to the numbers of subscribers, viewers, and view times. To  
26 avoid the impact of Defendant’ A.I., algorithms and filtering tools on Defendants’ metadata  
27 generated from video titles and tags, Plaintiff Lewis intentionally self-censors: (a) she avoids using  
28 controversial video titles; (b) she avoids using abbreviations like “BLM,” “KKK;” terms such as

1 “Black,” “White,” “Racism,” “Boogaloo,” “White Supremacy,” “Racial Profiling,” “Police  
2 Shootings,” “Police Brutality,” “Black Lives Matter;” names, such as those of individuals such as  
3 those killed by law enforcement, “Bill Cosby,” “Louis Farrakhan;” names of organizations such as  
4 “Ku Klux Klan,” “Nazi,” “Neo-Nazi,” “Aryan Brotherhood,” and euphemisms that are known and  
5 particular to the African American Community; she intentionally misspells terms such as “Black,”  
6 “White,” “Race,” “Racism,” and “Racial Profiling,” because Defendants routinely flags such terms.

7 207. Despite Plaintiff Lewis’ efforts to self-censor and avoid the reach of Defendants’  
8 A.I., algorithms, and filtering tools, most of the videos posted on “Nicole’s View” have only  
9 limited monetization, if any.

10 208. On February 11, 2020, Plaintiff Lewis received an email from Defendants indicating  
11 that “SuperChat was disabled,” purportedly because “Nicole’s View” was using the original  
12 content of other YouTubers. However, after a week, it became apparent that Defendants had not  
13 merely disabled SuperChat, but had completely demonetized the entire “Nicole’s View” channel.  
14 Defendants did so without notice or explanation. Plaintiff Lewis promptly filed an appeal of the  
15 decision to disable SuperChat and to demonetize the entire channel.

16 209. Mindful of the stringent standards which Defendants have always applied to the  
17 channels of Plaintiffs and other persons similarly situated, Plaintiff Lewis has always followed  
18 Defendants’ Community Guidelines, and TOS. Whenever she uses a news clip, she limits the clip  
19 to several minutes and generates her own original commentary as video content to accompany the  
20 clip. The originators of all news clips incorporated into videos posted by Plaintiff Lewis are always  
21 accorded full proper and credit in the video so that there is no possibility of viewers confusing the  
22 news clip with her original commentary or content.

23 210. Defendants did not respond to Plaintiff Lewis’ appeal. On or about June 7, 2020,  
24 she suddenly noticed that Defendants had resumed placing advertisements on videos posted to  
25 “Nicole’s View.” When she checked the channel’s analytics page, it reflected that her monetized  
26 videos were again generating revenue and her Livestream broadcasts were generating donations.  
27 Defendants have neither explained why the channel was fully demonetized for nearly two months,  
28

1 nor why it was remonetized; nor have they offered compensation for the revenue which the channel  
2 lost during that period.

3 211. As a direct and proximate result of Defendants’ racial discrimination and wrongful  
4 conduct, “Nicole’s View” has not grown in subscriber numbers, viewer numbers or view times and  
5 it would have grown otherwise and Plaintiff Lewis has been deprived of significant revenue from  
6 Defendants’ sale of advertising, SuperChat and Livestream donations over the life of her channel.  
7 Plaintiff Lewis’ videos were all fully demonetized between February 11, 2020 and June 7, 2020,  
8 during which period “Nicole’s View” generated no income whatsoever.

9 **V. CLASS ALLEGATIONS**

10 212. Plaintiffs bring this action on behalf of themselves and a putative class of similarly  
11 situated persons who use or have used YouTube or any of the services that Defendants offer in  
12 connection with YouTube and who come within the definition or classification of a protected class  
13 of persons under 42 U.S.C. 1981 (the “Class”).

14 213. Each and every claim alleged in this case is also alleged on behalf of every member  
15 of the Class.

16 214. The Class seeks both monetary damages, restitution, and/or other injunctive relief on  
17 behalf of any persons who fall within the Class Definition:

18 All persons or entities in the United States who are or were:

- 19 (i) a person or entity defined or classified as a protected class or  
20 person under 42 U.S.C. §1981; and  
21 (ii) are members, users and or consumers of YouTube who uploaded,  
22 posted, or viewed video content on YouTube subject to  
23 Google/YouTube’s Terms of Service, Mission Statement,  
24 Community Guidelines, and/or any other content-based filtering,  
25 monetization, distribution, personal data use policies, advertising or  
26 regulation and practices any other regulations or practices that are  
27 related to the YouTube Platform on or after January 1, 2015 and  
28 continuing through to June 16, 2020 (the “Class Period”).



1 Excluded from the Class are Defendants and their employees,  
2 affiliates, parents, subsidiaries, and co-conspirators, whether or not  
3 named in this Complaint, and the United States government.

4 215. Class certification for the Class is authorized under Federal Rule of Civil Procedure  
5 23 and applies to both claims for injunctive and equitable relief, including restitution, under Rule  
6 23(b) (2) and for monetary damages under Rule 23(b)(3).

7 216. There are at least 42 million members of the Class.

8 217. The number of persons who fall within the definitions of the Class are so numerous  
9 and geographically dispersed so as to make joinder of all members of the Class or Subclass in their  
10 individual capacities impracticable, inefficient, and unmanageable, and without class wide relief,  
11 each member of the Class would effectively be denied his, her, its, or their rights to prosecute and  
12 obtain legal and equitable relief based on the claims and allegations averred in this Complaint.

13 218. There are questions of law and fact common to the Class that relate to and/or are  
14 dispositive of the nature and allegations of unlawful conduct alleged in the Complaint, and the  
15 nature, type and common pattern of injury and harm caused by that unlawful conduct and sustained  
16 by the putative members of the Class and Subclass including, but not limited to:

17 a. Whether Defendants' regulations and content-based restrictions violate the  
18 free speech, antidiscrimination, consumer fraud and unfair competition, and contractual rights of  
19 the members of the Class with respect to each cause of action averred by the Plaintiffs below.

20 b. Whether Defendants concealed, misrepresented or omitted to disclose  
21 material policies and practices regarding the unlawful regulation of video content, advertising,  
22 distribution, monetization, contractual obligations, and characteristics of the YouTube Platform to  
23 the members of the Class;

24 c. Whether Defendants use or have used unlawful, discriminatory,  
25 anticompetitive and fraudulent, deceptive, unfair, and/or bad faith filtering tools and practices, in  
26 the code and operation of their machine based, algorithmic, or A.I. filtering tools, and/or other  
27 practices and procedures to review, regulate, and restrict content, and/or regulate and restrict the  
28 advertising, monetization, distribution, and property rights of the Class;

1 d. Whether Defendants are or have engaged in discriminatory practices against  
2 the members of the Class based on protected characteristics under 42 U.S.C § 1981 or the Unruh  
3 Civil Rights Act;

4 e. Whether Defendants breached or are in breach of their form consumer  
5 contracts and obligations to the Class;

6 f. Whether Defendants have or are engaged in unlawful, deceptive, unfair, or  
7 anticompetitive practices that violate federal or California law, and harmed and injured the Class;

8 g. Whether the conduct of Defendants, as alleged in this Complaint, caused  
9 injury to the business and property of Plaintiffs and the members of the Class;

10 h. Whether Defendants' alleged regulations, practices, and conduct have caused  
11 or threaten to cause irreparable harm to the speech of the Class so as to warrant the issuing of  
12 temporary, preliminary and/or final injunctive relief and corresponding declaratory relief with  
13 respect to the legal rights of the Class;

14 i. The scope, nature, substance, and enforcement of injunctive and equitable  
15 relief sought by the Class;

16 j. Whether Defendants were unjustly enriched or obtained profits or ill-gotten  
17 financial gains as a result of the unlawful, discriminatory, deceptive, unfair, or anticompetitive  
18 practices perpetrated against the Class;

19 k. Whether Defendants breached or are in breach of their contractual  
20 obligations, implied duty of good faith and fair dealing, and or other promises under the consumer  
21 form contracts entered into with members of the Class during the Class Period;

22 l. Whether Defendants' content-based regulations and filtering practices, on  
23 their face and/or as applied, violate the free speech rights of Plaintiffs and the Class under  
24 California or federal law; and

25 m. whether the Class is entitled to declaratory and other relief based on  
26 Defendants' assertion of immunity from liability under the Communications Decency Act, 15  
27 U.S.C. § 230 (c) (the "CDA"), with respect to any of the claims or allegations asserted by Plaintiffs  
28 and the Class in this Lawsuit.

1           219. Each of individual named Plaintiffs is a person protected under 42 U.S.C. § 1981,  
2 and a member of the Class.

3           220. The claims of Plaintiffs are typical of and identical to those of the Class.

4           221. Plaintiffs will fairly and adequately protect the interests of the members of the Class.

5           222. Plaintiffs are represented by counsel who are competent and experienced in the  
6 prosecution and defense of similar claims and litigation, including class actions filed, prosecuted,  
7 defended, or litigated in under California and federal law, in California and federal courts, in  
8 connection with claims and certification of consumer and civil rights classes composed of members  
9 who reside in California and/or the United States.

10           223. The prosecution of separate actions by individual members of the Class would  
11 create a risk of inconsistent or varying adjudications.

12           224. The questions of law and fact common to the members of the Class predominate  
13 over any questions of law or fact affecting only individual members of the Class or Subclass,  
14 including legal and factual issues relating to liability and the nature of the harm caused by  
15 Defendants' unlawful actions.

16           225. The questions of law and fact common to the members of the Class also  
17 predominate over any questions of law or fact affecting only individual members of the Class  
18 because all claims in this Lawsuit are governed under California or controlling federal law,  
19 including legal and factual issues relating to liability and the nature of the harm caused by  
20 Defendants' unlawful actions.

21           226. A class action is superior to other available methods for the fair and efficient  
22 adjudication of this controversy. Treatment as a class action will permit a large number of  
23 similarly situated persons to adjudicate their common claims in a single forum simultaneously,  
24 efficiently and without the duplication of effort and expense that numerous individual actions  
25 would engender.

26           227. Certification of the Class is also superior to other available methods for the fair and  
27 efficient adjudication of this controversy because and all claims in this Lawsuit must be brought  
28 and venued in a court of competent jurisdiction located Santa Clara County.



1           233. On November 19, 2019, the Honorable Brian C. Walsh, Judge of the Superior Court  
2 of the County of Santa Clara (the “State Court”), ruled in *Prager University v. Google LLC*, Santa  
3 Clara County Superior Court Case No. 19CV340667, that 47 U.S.C. § 230(c) “immunizes service  
4 providers [such as Defendants] who endeavor to restrict access to material deemed objectionable,”  
5 by employing filters to remove users’ content from their platforms based on the political, religious,  
6 or other personal identity or viewpoint of the user rather than the actual online content posted by  
7 the user on the platform. 2019 WL 8640569, at \*7 (Cal. Super. Ct. Nov. 19, 2019).

8           234. Furthermore, the State Court ruled that, notwithstanding the express good faith  
9 language in Section 230(c)(2)(A), the content filtering and restrictions that internet service  
10 providers like Defendants engage in are not subject to any good faith, objective judicial review of  
11 the underlying content, or the internet providers filtering or restriction practices, but reside within  
12 and are left to the sole, unfettered discretion of the internet provider who acts to filter and restrict  
13 content at its whim. 2019 WL 8640569, at \*10-11.

14           235. In *Prager*, therefore, at least one state trial court has construed Section 230(c) as  
15 granting Defendants absolute immunity for all content curation decisions, including decisions  
16 based not on the actual on line material, but on the race, sex, or other identity and dismissing  
17 plaintiffs’ claims without leave to amend despite detailed factual allegations, evidence, and party  
18 admissions of identity and viewpoint based discrimination and animus in regulating and filtering  
19 speech on YouTube). 2019 WL 8640569, at \*10-12.

20           236. A true and correct copy of the November 19, 2019-Order issued by the Hon. Brian  
21 Walsh, granting Defendants’ immunity and dismissing all of plaintiffs’ claims for relief without  
22 leave to amend is attached as Exhibit B hereto.

23           237. On December 19, 2019, plaintiff timely filed a notice of appeal. The notice of  
24 appeal rendered state court decision uncitable and of no precedential or legal value unless and until  
25 the California appellate courts affirm the application of Section 230(c) to intentional discrimination  
26 and the federal courts, which are the final authority on federal questions of law, concur in that  
27 decision.

28

1           238. On May 18, 2020, the United States Department of Justice intervened in the *Divino*  
2 case and filed a brief defending the application of Section 230(c) to ISP's who filter, review,  
3 restrict, block, or censor on line speech based on a user's racial, sexual, or other identity or  
4 viewpoint without regard to whether the online speech of the user violated the content based rules  
5 of the internet site or the provisions of Section 230(c). A true and correct copy of the United States  
6 Department of Justice's Notice of Intervention (Dkt.# 46) and Memorandum of Law in Support  
7 (Dkt.#47) are attached as Exhibit C.

8           239. On May 28, 2020 the President of The United States issued an Executive Order  
9 repudiating both the State Court decisions in *Prager* and contradicting the United States' position  
10 that Section 230(c) applies or can be applied to an ISP who engages in intentional race , sex or  
11 other identity or viewpoint based discrimination alleged in this Lawsuit and *Divino*.

12           240. In the May 28 Order, the President directed the U.S. Department of Justice ("DOJ")  
13 and other Article 2 agencies or departments to enforce the "policy of the United States" that  
14 immunity law may not be applied or enforced with respect to any on line, publishing, filtering,  
15 blocking, or censorship conduct undertaken by an Internet Service Provider (ISP) that was based in  
16 any part on the user's race, sex, or other personal identity or viewpoint.

17           241. The May 28 Executive Order states in pertinent part:

18           **Section 2 Protections Against Online Censorship.**

19           (a) It is the policy of the United States to foster clear ground rules promoting free and open  
20 debate on the internet. Prominent among the ground rules governing that debate is the  
21 immunity from liability created by section 230(c) of the Communications Decency Act  
22 (section 230(c)). 47 U.S.C. 230(c). It is the policy of the United States that the scope of that  
23 immunity should be clarified: the immunity should not extend beyond its text and purpose  
24 to provide protection for those who purport to provide users a forum for free and open  
25 speech, but in reality use their power over a vital means of communication to engage in  
26 deceptive or pretextual actions stifling free and open debate by censoring certain  
27 viewpoints. \* \* \* \*

28

1           242. In particular, subparagraph (c)(2) expressly addresses protections from "civil  
2 liability" and specifies that an interactive computer service provider may not be made liable "on  
3 account of" its decision in "good faith" to restrict access to content that it considers to be "obscene,  
4 lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable." It is the policy  
5 of the United States to ensure that, to the maximum extent permissible under the law, this provision  
6 is not distorted to provide liability protection for online platforms that -- far from acting in "good  
7 faith" to remove objectionable content -- instead engage in deceptive or pretextual actions (often  
8 contrary to their stated TOS) to stifle viewpoints with which they disagree. Section 230 was not  
9 intended to allow a handful of companies to grow into titans controlling vital avenues for our  
10 national discourse under the guise of promoting open forums for debate, and then to provide those  
11 behemoths blanket immunity when they use their power to censor content and silence viewpoints  
12 that they dislike. When an interactive computer service provider removes or restricts access to  
13 content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial  
14 conduct. It is the policy of the United States that such a provider should properly lose the limited  
15 liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and  
16 publisher that is not an online provider.

17           **(b)** To advance the policy described in subsection (a) of this section, all executive  
18 departments and agencies should ensure that their application of section 230(c)  
19 properly reflects the narrow purpose of the section and take all appropriate actions in  
20 this regard. In addition, within 60 days of the date of this order, the Secretary of  
21 Commerce (Secretary), in Case 5:19-cv-04749-VKD Document 57 Filed 06/01/20  
22 Page 6 of 8 consultation with the Attorney General, and acting through the National  
23 Telecommunications and Information Administration (NTIA), shall file a petition  
24 for rulemaking with the Federal Communications Commission (FCC) requesting  
25 that the FCC expeditiously propose regulations to clarify:

26           (i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in  
27 particular to clarify and determine the circumstances under which a provider of an  
28 interactive computer service that restricts access to content in a manner not

1 specifically protected by subparagraph (c)(2)(A) may also not be able to claim  
2 protection under subparagraph (c)(1), which merely states that a provider shall not  
3 be treated as a publisher or speaker for making third-party content available and  
4 does not address the provider's responsibility for its own editorial decisions; (ii) the  
5 conditions under which an action restricting access to or availability of material is  
6 not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section  
7 230, particularly whether actions can be "taken in good faith" if they are:  
8 (A) deceptive, pretextual, or inconsistent with a provider's terms of service; or (B) taken  
9 after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity  
10 to be heard; and (iii) any other proposed regulations that the NTIA concludes may be  
11 appropriate to advance the policy described in subsection (a) of this section. (c) The  
12 Department of Justice shall review the viewpoint-based speech restrictions imposed by each  
13 online platform identified in the report described in subsection (b) of this section and assess  
14 whether any online platforms are problematic vehicles for government speech due to  
15 viewpoint discrimination, deception to consumers, or other bad practices. \* \* \* \*

16 **Sec. 4. Federal Review of Unfair or Deceptive Acts or Practices.** (a) It is the  
17 policy of the United States that large online platforms, such as Twitter and  
18 Facebook, as the critical means of promoting the free flow of speech and ideas  
19 today, should not restrict protected speech. The Supreme Court has noted that social  
20 media sites, as the modern public square, "can provide perhaps the most powerful  
21 mechanisms available to a private citizen to make his or her voice heard."

22 *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Communication  
23 through these channels has become important for meaningful participation in  
24 American democracy, including to petition elected leaders. These sites are  
25 providing an important forum to the public for others to engage in free expression  
26 and debate. *Cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980). \*

27 \* \*Sec. 5. State Review of Unfair or Deceptive Acts or Practices and Anti-  
28 Discrimination Laws.



1 (a) The Attorney General shall establish a working group regarding the potential  
2 enforcement of State statutes that prohibit online platforms from engaging in unfair or  
3 deceptive acts or practices. The working group shall also develop model legislation for  
4 consideration by legislatures in States where existing statutes do not protect Americans  
5 from such unfair and deceptive acts and practices. The working group shall invite State  
6 Attorneys General for discussion and consultation, as appropriate and consistent with  
7 applicable law.

8 (b) Complaints described in section 4(b) of this order will be shared with the working  
9 group, consistent with applicable law. The working group shall also collect publicly  
10 available information regarding the following:

11 (i) increased scrutiny of users based on the other users they choose to follow, or their  
12 interactions with other users;

13 (ii) algorithms to suppress content or users based on indications of political alignment or  
14 viewpoint;

15 (iii) differential policies allowing for otherwise impermissible behavior, when committed by  
16 accounts associated with the Chinese Communist Party or other anti-democratic  
17 associations or governments;

18 (iv) reliance on third-party entities, including contractors, media organizations, and  
19 individuals, with indicia of bias to review content; and

20 (v) acts that limit the ability of users with particular viewpoints to earn money on the  
21 platform compared with other users similarly situated.

22 A true and correct copy of the President's Executive Order is attached as Exhibit D to this  
23 Complaint.

24 243. In *Divino*, the "related" case to this Lawsuit, the LGBTQ+ plaintiffs asserted a claim  
25 for a declaratory judgment under 28 U.S.C. § 2201, *et seq.* asking this Court to declare that the  
26 immunity provision of Section 230(c) does not extend to intentional identity or viewpoint  
27 discrimination conduct by an ISP and, if not so construed, the law is unconstitutional, both as  
28 applied and on its face, under *Denver Area* and progeny.

1           244. On June 2, 2020, this Court held a hearing in the *Divino* case on, among other  
2 things, the extent to which Section 230(c) applies, if at all, to intentional identity or viewpoint  
3 based discrimination by Defendants.

4           245. Defendants argued that Section 230(c)(1) immunizes them from identity and  
5 viewpoint based discrimination because such discrimination is “publishing conduct” that Congress  
6 enacted Section 230(c)(1) to protect.

7           246. Defendants contended that Section 230(c)(1) grants absolute immunity to an ISP for  
8 “publishing conduct” that includes discriminating against user based on the person’s racial or  
9 sexual identity to filter, review, or block the access of the online user or its content on a website  
10 that is otherwise open to the general public.

11           247. Although Defendants conceded at the oral argument that immunity might not be  
12 available in limited but unspecified “circumstances” involving race discrimination, Defendants  
13 maintained that intentional and systematic discrimination used to profile, review, and block the  
14 access and content of LGBTQ+ users was a traditional publishing function that comes within the  
15 conduct that Congress intended to protect under Section 230(c)(1).

16           248. The LGBTQ+ plaintiffs in *Divino* argued that Section 230(c)(1) does not prevent the  
17 enforcement of contractual promises and other preexisting legal relationships between an ISP and  
18 user, including contractual based promises that Defendants may only filter, review and impose  
19 access restrictions on users based on the content of the video under specific rules that apply equally  
20 to all without reference or consideration of the user’s identity or viewpoint.

21           249. The breaching of these legally enforceable promises and obligations, express or  
22 implied, in a contract and license agreements between a user and an the ISP, and the other  
23 obligations and rights codified in the state or federal laws that regulate businesses that prohibit  
24 discrimination based on identity are neither specific or unique to publishers or traditional editorial  
25 function, and do not implicate liability for third party defamation or wrongs, but are legal  
26 obligations that apply to all business under contract and other legal obligations imposed on any  
27 business and its customer or consumer.

28

1           250. The *Divino* plaintiffs also argued, as the Plaintiffs and all persons similarly situated  
2 argue in this Lawsuit, that Section 230(c) applies only to the filtering, reviewing, restricting, or  
3 blocking of on line “material” not to or based upon a person’s identity or viewpoint, because racial  
4 profiling and identity or viewpoint censorship has nothing to do with and does not further the  
5 express statutory purpose of protecting minors from “offensive material” on the internet.

6           251. The extension of Section 230(c)(1) beyond a limited immunity for defamation and  
7 other liabilities that arise from the failure to block unlawful third party content also renders Section  
8 230(c)(2) statutory limits prohibiting bad faith or discriminatory filtering and blocking of on line  
9 appropriate content unenforceable, meaningless, and pure statutory surplusage.

10           252. Finally, as in *Divino*, the application of either Section 230(c)(1) or (2) to immunize  
11 an ISP that uses identity or viewpoint discrimination to regulate on line speech is an  
12 unconstitutional permissive speech regulation law violates the First Amendment under *Denver*  
13 *Area* and progeny.

14           253. The use of Section 230(c) to censor users based on their race, identity, or viewpoint  
15 is not viewpoint neutral, narrowly tailored to protect children from “offensive” material without  
16 creating a risk of erroneous private veto over otherwise appropriate speech, and eviscerates the pre-  
17 existing legal relationships, including the contractual and statutory obligations, and rights of the  
18 parties that would otherwise be enforceable in a court of law.

19           254. The Court has taken the arguments under submission.

20           255. A true and correct copy of the transcript of the Section 230(c) arguments recorded at  
21 the hearing in *Divino* is attached as Exhibit E to this complaint.

22           **B. Justiciable Legal Controversies Currently Exist Regarding The Construction**  
23           **And Constitutionality Of 47 U.S.C. § 230(c).**

24           256. At least four actual controversies now exist between the parties regarding the proper  
25 construction, scope, application, and constitutionality of the CDA statutory immunity granted to  
26 internet service providers given the unique allegations and claims asserted against Defendants in  
27 this case.  
28

1           257. Each of the controversies arise from a dispute about the extent to which Section  
2 230(c) immunizes an internet service provider that discriminates against users because of the user’s  
3 race, personal identity or viewpoints, including any profiling or consideration of Plaintiffs’ race in  
4 making access decisions on YouTube

5                   **1. An Actual Controversy Exist As To Whether The Provisions Of Section**  
6                   **230(c) Immunize Defendants From Race, Personal Identity, or**  
7                   **Viewpoint Discrimination In Filtering And Blocking On line Content**  
8                   **And Access**

9           258. A justiciable controversy exist as to whether Section 230(c)(1) or (2) grants  
10 immunity to an ISP that breaches and express or implied contractual promises not to discriminate  
11 against users based on a person’s identity, or viewpoint when reviewing, restricting, or denying  
12 access to YouTube under license and use agreements between the user and the ISP.

13                   **2. An Actual Controversy Exists As To Whether Section 230(c) Immunizes**  
14                   **Defendants For Conduct That Violates**

15           259. A second justiciable controversy exists as to whether the provisions of Section  
16 230(c)(1) or (2) permit Defendants to engage unlawful conduct that uses person’s race, identity, or  
17 viewpoint to restrict on line material and access in contravention of established federal and state  
18 laws prohibiting such discrimination in contract, 42 U.S.C. § 1981 and Unruh Civil Rights Act,  
19 Cal. Civ. Code §§51, *et seq.*, unlawful, deceptive or anticompetitive business practices, including  
20 conduct prohibited under section 1124 of the Lanham Act and section 17200 of the California  
21 Business and Professions Code, and discriminatory censorship in violation of the Liberty of Speech  
22 Clause enshrined in Article 1, Section 2 of the California Constitution.

23                   **3. The Provisions And/or Application Of Any Part Of Section 230(c) To**  
24                   **Claims Arising Out Of Race, Identity, Or Viewpoint Discrimination Is**  
25                   **Unconstitutional**

26           260. As a third justiciable controversy exists as to whether Section 230(c) is  
27 unconstitutional because it violates the First Amendment and/or Equal Protection clause of the U.S.  
28 Constitution on its face and/or as applied to this Lawsuit.

          261. Construing any provision of the “Good Samaritan Immunity For Blocking On line  
Material” under Section 230(c) as permitting an ISP to use a person’s race, identity, or viewpoint to

1 filter, review, or block on line access or content is unconstitutional under the test governing the  
2 constitutionality of permissive private party speech laws.

3 262. Section 230(c) (1) and (2) is congressional law that was enacted to permit a private  
4 party to regulate on line speech. Consequently, under *Denver Area* and progeny, the law cannot be  
5 applied in a manner that is NOT identity or viewpoint neutral, must be narrowly tailored and  
6 applied to avoid the risk of erroneous private censorship, and may not be used to interfere or alter  
7 the pre-existing legal relationships between the parties.

8 **4. The Executive Order Precludes The Government From Arguing Or**  
9 **Enforcing Section 230(c) To Claims Based On Intentional Identity Or**  
10 **Viewpoint Discrimination.**

11 263. A fourth justiciable controversy exists as to legal effect of the President's Executive  
12 Order on the application of Section 230(c) to on line content and access regulation based on a  
13 user's identity and viewpoint, as is set forth in this Lawsuit.

14 264. In the Order, the President declares that is the policy of the United States to ensure  
15 that Section 230(c) must be applied in a manner that is viewpoint neutral and does not permit ISPs  
16 to censor on line content or block on line user access based on the identity or viewpoint of the user.  
17 If given full legal affect, the Executive Order mandates the obvious: Section 230(c) applies only to  
18 filtering and blocking "offensive material," not the persons who use the internet.

19 265. The Executive Order provides that its application does not create a substantive legal  
20 right that did not exist before, or otherwise alter the parties' relationships. But that language begs  
21 the question as to what rights and relationships already exist under Section 230(c) in this Lawsuit.  
22 The Executive Order directs the United States to enforce the law and promulgate regulations that  
23 preclude what Defendants want to use its provisions for in this Lawsuit: to discriminate against  
24 Plaintiffs based on their race, identity and viewpoints.

25 266. Consequently, the Executive Order also creates a conflict of interest for the  
26 Department of Justice under Rule 5.1. The Order specifically instructs DOJ to take all steps,  
27 including, but not limited to, promulgating regulations to ensure that Section 230(c) is not and will  
28 never be used to permit identity or viewpoint discrimination in the regulation of on line content.

1           267. At the same time, DOJ has intervened and formally taken the opposite position  
2 before this Court regarding the application of Section 230(c) to the very identity and viewpoint  
3 discrimination that the President has instructed DOJ to prohibit. That position effectively precludes  
4 DOJ or any agency of the United States from promulgating and enforcing the very regulations and  
5 other steps in the Order that preclude identity and viewpoint discrimination.

6           268. Furthermore, because of the conflicting positions taken by DOJ in *Divino*, the  
7 United States may be judicially estopped from enforcing or giving any affect to the President's  
8 Executive Order.

9           **C. Plaintiffs Served Rule 5.1 Notice On The U.S. Attorney General**

10           269. In challenging the Constitutionality of the CDA, Plaintiffs must comply with  
11 Federal Rule of Civil Procedure 5.1 which requires that "[A] party . . . promptly [] file a notice of  
12 constitutional question stating the question and identifying the paper that raises," where "a federal  
13 statute is questioned and the parties do not include the United States, one of its agencies, or one of  
14 its officers or employees in an official capacity." Fed. R. Civ. P. 5.1. Under Rule 5.1 "statute"  
15 means any congressional enactment that would qualify as an "Act of Congress."

16           270. Rule 5.1 requires more than the court certification provided by 28 U.S.C. § 2403;  
17 Rule 5.1 requires notice and certification to the United States Attorney General of any  
18 constitutional challenge to a federal statute, not merely to challenges of laws "affecting the public  
19 interest." 28 U.S.C. § 2403.

20           271. The CDA constitutes a federal statute under Rule 5.1.

21           272. Plaintiffs have served the Rule 5.1 Notice on the United States Attorney General  
22 stating that Plaintiffs are challenging the constitutionality of 47 U.S.C. § 230(c), identifying the  
23 CDA, and attaching a copy of this Complaint, and a copy of Judge Walsh's November 19,  
24 2019 Order.

25           273. Plaintiffs have served the Rule 5.1 Notice and attachments by certified mail and  
26 have sent a copy of the Notice and attachments to the United States Attorney General by overnight  
27 delivery service.

28



1 those agreements are governed and subject to California law, including federal law that California  
2 is obligated to enforce under the supremacy clause of the U.S. Constitution.

3 280. The elements of a breach of contract under California law are: (1) existence of a  
4 valid contract between Plaintiffs and Defendants; (2) Plaintiffs' performance (or excuse for non-  
5 performance) under the contract; (3) Defendants' breach of the contract; and (4) proof of harm or  
6 financial injury as a result of the breach.

7 281. Plaintiffs and Defendants have entered into agreement, including the TOS and  
8 related agreement(s) that are enforceable contract(s) governed by and under California law;

9 282. Plaintiffs have performed their obligations under the TOS and/or other contract(s),  
10 including complying with YouTube's viewpoint neutral content based access rules and granting  
11 Defendants a perpetual and irrevocable license to their video content and all personal data and  
12 consumer information derived or used in connection with Plaintiffs' content on or use of YouTube.

13 283. Defendants have breached their promises to provide Plaintiffs' equal access to  
14 YouTube and all related services that Defendants offer to other users, and are subject only to  
15 content based rules that are viewpoint neutral and apply equally to all. Specifically, Defendants  
16 have denied and interfered with Plaintiffs' right of equal access to YouTube and its related services  
17 by profiling and using Plaintiffs' race, identity or viewpoints, not merely the material in the video  
18 content, to review, filter and restrict Plaintiffs' access to YouTube in a manner that is not permitted  
19 by federal and California law.

20 284. As a direct and proximate result of Defendants' breach, Plaintiffs have suffered  
21 monetary damages and other financial harms and losses in excess of \$500.00 per year plus other  
22 lost revenues, the total amount of which will be determined at trial.

23 285. As a direct and proximate result of Defendants' breach, Plaintiffs have also suffered  
24 irreparable harm to their contractual based rights of free speech and expression provided for under  
25 the express and implied provisions of the TOS and other contract(s).

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1 under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the  
2 defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and  
3 (5) the plaintiff was harmed by the defendant's conduct. Judicial Council of California Civil Jury  
4 Instruction 325.

5 291. Plaintiffs and Defendants have entered into contracts, including the TOS, in  
6 connection with Plaintiffs' use and access to YouTube and the related services Defendants offer  
7 under those contracts.

8 292. Plaintiffs have fulfilled their obligations under the TOS and other agreement(s) and  
9 fulfilled or performed the conditions precedent, if any, under those agreement(s), including  
10 complying with YouTube's viewpoint neutral content based access rules and granting Defendants  
11 an irrevocable and perpetual license to their video content and any personal information and data  
12 derived from Plaintiffs' use or content on YouTube, and paying Defendants other consideration for  
13 services and access.

14 293. Defendants unfairly interfered with Plaintiffs' rights by profiling and using their  
15 race, personal identity or viewpoint to deny them equal access to YouTube and its related services  
16 based on conduct that that is prohibited by and not permitted under California or federal law.

17 294. As a direct and proximate result of Defendants' breach, Plaintiffs have suffered  
18 monetary damages and other financial harms and losses in excess of \$500.00 per year plus other  
19 lost revenues, including the monetary value of unlawfully acquired property and license rights to  
20 Plaintiffs' content and the personal data and information derived from Plaintiffs and their  
21 subscribers and viewers, the total amount of which will be determined at trial.

22 295. As a direct and proximate result of Defendants' breach, Plaintiffs have also suffered  
23 irreparable harm to their contractual based speech rights and expression provided for subject to  
24 only to viewpoint neutral content based rules as set forth in the express and implied provisions of  
25 the TOS and other contract(s).

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1 **FOURTH CAUSE OF ACTION**  
2 **FOR PROMISSORY ESTOPPEL**  
3 **(On Behalf Of Each Plaintiff Individually And The Class)**

4 296. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations  
5 alleged in paragraphs 1 through 295.

6 297. “The elements of promissory estoppel are (1) a promise, (2) the promisor should  
7 reasonably expect the promise to induce action or forbearance on the part of the promisee or a third  
8 person, (3) the promise induces action or forbearance by the promisee or a third person (which we  
9 refer to as detrimental reliance), and (4) injustice can be avoided only by enforcement of the  
10 promise. *West v. JPMorgan Chase Bank, N.A.*, 214 Cal.App.4th 780, 803 (2013).

11 298. Defendants have made at least 5 promises to Plaintiffs and other similarly situated  
12 users:

13 a. Defendants promise Plaintiffs equal access to YouTube subject only to  
14 viewpoint neutral content-based rules that apply equally to all users;

15 b. Defendants promise not to discriminate against Plaintiffs based on their race,  
16 sexual identity, commercial status or identity, or the personal viewpoints except as permitted under  
17 California or controlling federal law;

18 c. Defendants promise to provide viewer and audience reach, advertising,  
19 subscription, monetization, and content curation services to Plaintiffs and other users who comply  
20 with YouTube’s viewpoint neutral content-based rules;

21 d. Defendants promise only to use, appropriate, or derive revenue from  
22 Plaintiffs’ content and data, and that of their viewers and subscribers subject to Defendants’  
23 honoring and fulfilling their express and implied terms and obligations under the TOS and other  
24 agreement(s); and

25 e. Defendants promise to operate YouTube as a public forum for freedom of  
26 expression that is subject only to narrowly tailored, viewpoint neutral content based rules.  
27  
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1 299. Defendants made these promises with the reasonable expectation and intent of  
2 inducing Plaintiffs to grant Defendants an irrevocable license rights and other valuable  
3 consideration derived from Plaintiffs' use of YouTube.

4 300. Defendants also made these promises with the intent of inducing Plaintiffs, as well  
5 as their viewers, subscribers, and followers, to access and use YouTube so that Defendants can  
6 monetize, advertise, and profit from user access and use of YouTube and the related services that  
7 Defendants offer.

8 301. Defendants, through these promises, induced Plaintiffs to grant Defendants an  
9 irrevocable license, rights and other valuable consideration derived from Plaintiffs' use of  
10 YouTube.

11 302. Defendants, through these promises, induced Plaintiffs, as well as their viewers,  
12 subscribers, and followers, to access and use YouTube so that Defendants can monetize, advertise,  
13 and profit from user access and use of YouTube and the related services that Defendants offer.

14 303. Enforcing Defendants' promises will avoid injustices, including stopping overt,  
15 intentional, and race and sex discrimination against Plaintiffs, prohibiting from misappropriating  
16 Plaintiffs' content and data, and prohibiting Defendants to become unjustly enriched and unfairly,  
17 inequitably, and illegally obtain the benefits of promises that Defendants have failed to honor,  
18 comply with, or enforce.

19 304. As a proximate result of Defendants' failure to honor and fulfill each of their  
20 promises, Plaintiffs have suffered financial and monetary losses, had their intellectual and other  
21 property rights unjustly misappropriated by Defendants' own personal financial and unjust gain,  
22 and have suffered irreparable harm to speech and expression promised by Defendants, in an amount  
23 to be determined at trial.

24 **FIFTH CAUSE OF ACTION**  
25 **FOR DISCRIMINATION IN CONTRACT IN VIOLATION OF 42 U.S.C. § 1981**  
26 **(On Behalf Of Each Plaintiff Individually And The Class)**

27 305. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations  
28 alleged in paragraphs 1 through 304.

1           306. Title 42, Section 1981 of the U.S. Code codifies the right of each individual member  
2 of a protected racial classification to “have the same right in every State and Territory to make and  
3 enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and  
4 proceedings for the security of persons and property as is enjoyed by white citizens.” 42 U.S.C. §  
5 1981(a).

6           307. The statute defines “make and enforce contracts” as including “the making,  
7 performance, modification, and termination of contracts, and the enjoyment of all benefits,  
8 privileges, terms, and conditions of the contractual relationship.” *Id.* § 1981(b). The statutory  
9 protections apply to both “nongovernmental discrimination” and “impairment under color of State  
10 law.” *Id.* § 1981(c).

11           308. The elements of a claim for relief under 42 U.S.C. § 1981 are: (1) Plaintiff is a  
12 member of a protected class; (2) impairment of a contractual relationship under which plaintiff has  
13 rights; (3) defendant impaired that relationship on account of racial discrimination (such that, but  
14 for race, plaintiff would not have suffered the loss of a legally protected right); and (4) plaintiff was  
15 deprived of such services while similarly situated persons outside the protected class were not. *See*  
16 *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020); *Astre v.*  
17 *McQuaid*, 804 Fed. App’x 665, 666-67 (Mar. 25, 2020); *Lindsey v. SLT Los Angeles, LLC*, 447  
18 F.3d 1138, 1145 (9th Cir. 2006).

19           309. Plaintiff are African Americans and are members of the protected class under  
20 section 1981.

21           310. Plaintiffs entered into binding and legally enforceable contracts with Defendants  
22 including the TOS and related agreement(s) under California and controlling federal law.

23           311. The contractual relationship between each Plaintiff and Defendants was impaired  
24 with respect to the TOS and each and every one of the related agreement(s) in at least five ways:

25           a. Defendants’ TOS and, any other agreements, under which they claim the  
26 right to exercise “unfettered” discretion to impose content, use or services access restrictions based,  
27 in any way, on Plaintiffs’ racial identity or viewpoint, violates and impairs the TOS, license  
28 agreements, and other service agreement(s) on its face;

1           b. Defendants continue to breach the TOS and other agreement(s), by  
2 exercising their contractual discretion to profile, filter, restrict, and block Plaintiffs’ content and  
3 access to YouTube, based on Plaintiffs’ racial identity and viewpoint, in a manner that is not  
4 permitted, but is expressly prohibited under California and federal law;

5           c. Defendants breached and continue to breach their express and implied  
6 promises under the TOS and other related agreement(s) that, You Tube shall not profile, use, base,  
7 or impose any restrictions on Plaintiffs’ content or access to YouTube based, in any way, on a  
8 user’s racial identity or viewpoint, and only review, filter, and restrict Plaintiffs’ videos based on  
9 on line video material that runs afoul of YouTube’s viewpoint neutral content based rules;

10           d. Defendants’ use of content filtering, review, restricting, and blocking tools  
11 and procedures to profile and use Plaintiffs’ racial identity and viewpoint with respect to any  
12 provision in the TOS or related agreements, impairs each and every one of Plaintiffs’ rights,  
13 express or implied, that exist in the TOS or other related agreement(s) that Defendants entered into  
14 with Plaintiffs; and

15           e. Defendants impaired their contractual relationship with each Plaintiff  
16 because of Defendants’ intentional use of Plaintiffs’ racial identity or viewpoint to review, filter,  
17 regulate, restrict, and block Plaintiffs’ videos and access to YouTube under the false pretext that the  
18 material in the video was properly reviewed and found to violate one of YouTube’s content based  
19 rules governing user content and access to the platform.

20           312. Defendants impaired their contractual relationship with each Plaintiff on account of  
21 intentional racial discrimination. Despite their promises of neutrality and a diversity of viewpoints,  
22 Defendants engage in a pattern and practice of intentional willful and malicious discrimination in  
23 the provision of their services, including discriminating against and censoring of Plaintiffs’ speech,  
24 based not upon the content of speech, but on their race. Through the acts complained of herein,  
25 Defendants intentionally denied, and aided or incited in denying, Plaintiffs full and equal  
26 accommodations, advantages, privileges, and services, by discriminating against them in  
27 demonetizing Plaintiffs’ content and by placing their videos in “Restricted Mode.” But for their  
28

1 race, Plaintiffs would not have been subjected to Defendants' filtering or the denial of their  
2 contractual benefits under the Agreements.

3 313. While Defendants have impaired and denied, and continue to impair and deny,  
4 Plaintiffs' contractual benefits under the TOS and related agreement(s), similarly situated persons  
5 who are not protected under the section 1981 protected class were not similarly treated, including  
6 persons affiliated with or working for Defendants and/or their preferred users. Such persons are  
7 not being racially profiled and are not subject to the same content or access filtering, restrictions, or  
8 blocking despite material in their videos that violates YouTube's content based rules.

9 314. As a direct and proximate result of Defendants' unlawful discriminatory actions,  
10 Plaintiffs suffered, and continue to suffer, irreparable injury in fact, including, but not limited to:  
11 lower viewership, lost advertising opportunities otherwise available to other nonprofits, decreased  
12 ad revenue, and reputational damage, for which there exists no adequate remedy at law.

13 **SIXTH CAUSE OF ACTION**  
14 **FOR UNLAWFUL DISCRIMINATION**  
15 **IN VIOLATION OF THE UNRUH CIVIL RIGHTS ACT**  
16 **(On Behalf Of Each Plaintiff Individually And The Class)**

17 315. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations  
18 alleged in paragraphs 1 through 314.

19 316. The elements of a claim for discrimination under the Unruh Civil Rights Act,  
20 California Civil Code §§ 51, *et seq.* are: (1) Defendants denied, aided or incited a denial of full and  
21 equal accommodations or services to Plaintiffs; (2) that a motivating reason for Defendants'  
22 conduct was Plaintiffs' race or national origin; (3) that Plaintiffs were harmed and (4) that  
23 Defendants' conduct was a substantial factor in causing that harm. *Nkwuo v. Metro PCS, Inc.*, No.  
24 5:14-cv-05027-PSG, 2015 WL 4999978, at \*2 (N.D. Cal. Aug. 21, 2015).

25 317. Defendants Google and YouTube host business establishment(s) that solicit, induce,  
26 provide, and grant members of the public like Plaintiffs the right to access and use YouTube and its  
27 services, subject only to viewpoint neutral content based rules that apply equally to all..

28 318. Defendants grant members of the public like Plaintiffs the right to use and access  
YouTube for commercial reasons and consideration, including obtaining a perpetual and

1 irrevocable license to Plaintiffs’ and the other public users’ content and data, including the right to  
2 appropriate that content and data for sale and other forms of monetization including advertising,  
3 data information sales and services, and other revenue and profit stream on YouTube through  
4 contract and business transactions including the TOs and related agreement(s).

5 319. A substantial motivating reason for Defendants’ conduct is Defendants’ use of the  
6 racial identity, viewpoints, and other protected racial classifications under the law of Plaintiffs and  
7 other persons similarly situated to impose restrictions on their video content.

8 320. Defendants’ conduct is the result of arbitrary, capricious, invidious, and pretext-  
9 based discrimination against Plaintiffs’ political and religious identity and race, color and/or  
10 national origin and viewpoints.

11 321. Defendants’ use of Plaintiffs’ racial or other identities to restrict their right to equal  
12 access to YouTube is unlawful and fails to further any lawful, legitimate business interest,  
13 including ensuring compliance with YouTube’s content based rules or protecting younger and  
14 “sensitive” audiences.

15 322. Defendants have censored and treated, and continue to censor and treat, Plaintiffs  
16 and their videos differently from Defendants’ own or preferred content, solely because of  
17 discriminatory animus towards Plaintiffs’ identities and views.

18 323. Specifically, Defendants use AI, Algorithm, and other filtering machines,  
19 procedures, and systems to knowingly and intentionally engage in and effectuate a pattern and  
20 practice of discrimination for profit by reviewing, filtering, restricting, and blocking Plaintiffs’  
21 content and access to YouTube based on Plaintiffs’ racial or other identity or viewpoints and other  
22 traits or viewpoint that discriminate against Plaintiffs based on classifications that are protected  
23 under the Unruh Act, namely race, color and/or national origin.

24 324. Defendants’ wrongful actions were knowing and intentional, taken with oppression,  
25 fraud and/or malice, and effectuated through algorithms, machines, and human reviews that use  
26 Plaintiffs’ racial identity and viewpoints, or other protected classifications to interfere with and  
27 block Plaintiffs’ content and access on YouTube under the pretextual promise that everyone has  
28



1 equal access to YouTube subject only to viewpoint t neutral content based rules that apply equally  
2 to all.

3 325. As a direct and proximate result of Defendants’ unlawful discriminatory actions,  
4 Plaintiffs suffered, and continue to suffer, irreparable injury in fact, for which there is no complete  
5 adequate remedy at law, including, but not limited harm and injury to contract based speech rights,  
6 and lost financial and business opportunities including viewership, advertising, monetization, and  
7 other opportunities and rights to gain popularity and revenues that are otherwise available to other  
8 users who are not profiled and regulated on YouTube based on their racial identity or viewpoints.

9 326. As a direct and proximate result of Defendants’ discriminatory acts and practices,  
10 Plaintiffs have also suffered monetary damages in an amount to be determined at trial.

11 327. Defendants’ violations of the Unruh Act further entitle Plaintiffs to recover statutory  
12 damages of up to three times the amount of actual damages in an amount to be proven at trial, or a  
13 minimum of \$4,000 per violation.

14 **SEVENTH CAUSE OF ACTION**  
15 **FOR FALSE ADVERTISING IN VIOLATION OF**  
16 **THE LANHAM ACT, U.S.C. § 1125, et seq.**  
**(On Behalf Of Each Plaintiff Individually And The Class)**

17 328. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations  
18 alleged in paragraphs 1 through 327.

19 329. The elements of a false advertising claim under the Lanham Act, 47 U.S.C. § 1125,  
20 *et seq.*, are: (1) false statement of fact by defendant in a commercial advertisement about its own or  
21 another’s product; (2) the false statement actually deceived or has the tendency to deceive a  
22 substantial segment of the YouTube consumers or users; (3) the false statement is material, in that  
23 it is likely to influence the purchasing decision by a YouTube user; (4) the false statement entered  
24 interstate commerce; and (5) Plaintiffs have been, and are likely, to be injured as a result of the  
25 false statement. *Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc.*, 758 F.3d 1069, 1071 (9th Cir.  
26 2014).

27 330. Defendants’ statements that Plaintiffs or their videos are “Restricted” is false  
28 because only videos that are reviewed and found to contain material that violates Plaintiffs’ content

1 based rules, including nudity, vulgarity, violence, hate, shocking or sexually explicit material are  
2 can be “Restricted.” Plaintiffs’ videos do not contain such “Restricted Material.”

3 331. Defendants’ statements are further false because Defendants used Plaintiffs’ race,  
4 identity or viewpoint to Restrict the video rather than any material that based on a review of the  
5 video violated YouTube’s rules.

6 332. Defendants’ false statements are also “commercial advertising” because the  
7 statements were made to penetrate the market of YouTube users and have the effect of limiting or  
8 steering viewers away from Plaintiffs’ channels and videos, to video content, channels, or creators  
9 who are sponsored by Defendants and for which or whom Defendants compete with Plaintiffs for  
10 viewers, advertising, monetization, and other revenue streams on YouTube.

11 333. Defendants’ false statements are likely to deceive users and advertisers on YouTube  
12 because the expressly and implicitly insinuate that there is something inappropriate, offensive,  
13 improper, or prohibited under YouTube’s viewpoint neutral rules.

14 334. Defendants’ false statements are also material. They likely influence and affect a  
15 user’s and/or advertiser’s viewing/purchasing decisions. Users and/or advertisers are likely  
16 deceived that the video contains offensive material that violates YouTube’s rules after Defendants  
17 reviewed the video for content violations under YouTube’s Community Guidelines, Age  
18 Restrictions, and “Restricted Mode” prohibitions, when the basis for the restriction was Plaintiffs’  
19 race, identity or viewpoint and was not undertaken in compliance with YouTube’s rules.

20 335. Defendants’ false statements not only influence but categorically control every user  
21 or advertiser’s purchasing decisions because the statement results blocking of a user or advertisers  
22 access to the video on YouTube and precludes the user or advertiser from ever accessing, viewing  
23 and purchasing the video or purchasing and placing and ad for the video, or otherwise making any  
24 purchasing decision contrary to that of Defendants.

25 336. Defendants’ false statements entered internet commerce and reached millions of  
26 viewers who reside in all 50 States, U.S. Territories, and other users across the world.

27 337. Plaintiffs are and are likely to continue to be financially harmed by the false  
28 statements, including losing substantial amounts revenues for viewer CPMs, advertising,

1 monetization, and other user or advertiser revenue streams on YouTube in an amount to be  
2 determined at trial.

3 **EIGHTH CAUSE OF ACTION**  
4 **FOR UNLAWFUL, DECEPTIVE, AND UNFAIR BUSINESS PRACTICES**  
5 **CAL. BUS. & PROFS. CODE §17200, *et seq.***  
6 **(On Behalf Of Each Plaintiff Individually And The Class)**

7 338. Plaintiffs re-allege and incorporate by reference in whole or in part the allegations  
8 alleged in paragraphs 1 through 337.

9 339. Defendants have committed acts of unfair competition, as defined by California  
10 Business and Professions Code § 17200, by engaging in the practices described above.

11 340. Defendants' profiling, filtering, restricting, and blocking Plaintiffs' content and  
12 access on YouTube based on Plaintiffs' race, identity, or viewpoint is an unlawful business practice  
13 under section 17200 because those practices, acts, and conduct violates 42 U.S.C. § 1981 and the  
14 Unruh Civil Rights Act.

15 341. Defendants' profiling, filtering, restricting, and blocking Plaintiffs' content and  
16 access on YouTube based on Plaintiffs' race, identity, or viewpoint are also deceptive business acts  
17 or practices as defined under section 17200 because they are based on intentionally false promises  
18 by Defendants to Plaintiffs, and other users, and advertisers that YouTube only restricts or blocks  
19 content or access based on violations of YouTube's content based rules that apply equally to all. In  
20 fact, Defendants have knowingly and intentionally use Plaintiffs' racial or other identity or  
21 viewpoint to block content and access to YouTube under the false pretext that the video was  
22 reviewed like all videos on YouTube, including those sponsored by Defendants, and that the review  
23 found that Plaintiffs' videos actually contain material that violates YouTube's viewpoint neutral  
24 rules.

25 342. Defendants' profiling, filtering, restricting, and blocking Plaintiffs' content and  
26 access on YouTube based on Plaintiffs' race, identity, or viewpoint are also unfair business acts or  
27 practices as defined under section 17200 because Defendants operate as both content review  
28 curators and content sponsors on YouTube. This conflict is on full display when Defendants use  
their "unfettered" authority to restrict or block Plaintiffs' videos based on their race, identity, or

1 viewpoint but permit their own content or that of their preferred or sponsored content creators or  
2 channels to go without review, restriction, or blocking even where the content violates YouTube's  
3 content based rules.

4 343. This includes inserting metadata and other signals into Plaintiffs' videos that permit  
5 Defendants to profile and restrict or block content without reviewing the video and results in  
6 restrictions and blocking of Plaintiffs' content based on Defendants' embedding and creating the  
7 metadata, signals, or other racial profiling content that results in the restriction or blocking.

8 344. There is no utility to the public for Defendants' actions, and the unlawful, deceptive  
9 and unfair practices and conduct do not further a legitimate interest in protecting users from  
10 offensive content.

11 345. As a direct and proximate result of Defendants' unlawful, deceptive, and unfair  
12 practices, conduct, and acts, Plaintiffs have suffered, and continue to suffer, immediate and  
13 irreparable injury in fact, including lost income, reduced viewership, and damage to brand,  
14 reputation, and goodwill, for which there exists no adequate remedy at law.

15 346. Furthermore, as a result of such practices, conduct, and acts, Defendants  
16 misappropriate and are unjustly enriched by taking consideration in the form of property rights to  
17 content and data, and revenue that belongs to Plaintiffs in an amount that exceeds \$5 million.

18 347. Plaintiffs are therefore entitled to restitution of that and other amounts, as well as  
19 other equitable relief to be determined at trial.

20 348. At all times Defendants' wrongful actions were taken with oppression, fraud and/or  
21 malice. Indeed, at least dating back to 2017, Defendants have admitted and known that they were  
22 targeting users like Plaintiffs, based on their race, identity, or viewpoint, in violation of their  
23 promises and rules not to discriminate based on race, or any other identity or viewpoint.

24 **NINTH CAUSE OF ACTION**  
25 **FOR VIOLATION OF CALIFORNIA CONSTITUTION ARTICLE I, SECTION 2**  
26 **(On Behalf Of Each Plaintiff Individually And The Class)**

27 349. Plaintiffs re-allege and incorporate herein by reference, as though set forth in full,  
28 each of the allegations set forth in paragraphs 1 through 348 above.

1           350. Article I, section 2 of the California Constitution enshrines the right to liberty of  
2 speech: “Every person may freely speak, write and publish his or her sentiments on all subjects,  
3 being responsible for the abuse of this right.” Cal. Const., art. I, § 2, subd. (a).

4           351. The Liberty of Speech Clause is broader and more protective than the federal First  
5 Amendment. *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352, 366-367  
6 (2000).

7           352. The Liberty of Speech provision “grants broader rights to free expression than does  
8 the First Amendment to the United States Constitution” because it enshrines the fundamental “idea  
9 that private property can constitute a public forum for free speech if it is open to the public in a  
10 manner similar to that of public streets and sidewalks.” *Fashion Valley Mall, LLC v. Nat’l Labor*  
11 *Relations Bd.*, 42 Cal.4th 850, 857-58 (2007).

12           353. Under the California Constitution, a person’s Liberty of Speech enjoys full  
13 constitutional protection when it occurs on any private property that is used or designated by the  
14 owner or operator as a place similar to areas that have already been determined to be public forums.  
15 That includes privately owned internet sites.

16           354. Consequently, the California Constitution protects the right to free speech on private  
17 property even in cases when the federal Constitution may not.

18           355. The threshold element of a claim under the Liberty of Speech Clause is that the  
19 defendant property owner has so opened up his or her property for public use as to make it the  
20 functional equivalent of a traditional public forum based on three factors: (1) the nature, purpose,  
21 and primary use of the property; (2) the extent and nature of the public invitation to use the  
22 property; and (3) the relationship between the ideas sought to be presented and the purpose of the  
23 property’s occupants.” *Albertson’s, Inc. v. Young*, 107 Cal. App. 4th 106, 119 (2003); 73 Op. Cal.  
24 Atty. Gen. 213, 222– 223 (1990).

25           356. Defendants operate YouTube for the express purpose of inviting the public to use  
26 the platform as a for profit “public forum” where the public is invited to engage in “freedom of  
27 expression,” where everyone’s voice may be heard, subject only to viewpoint neutral rules that  
28 apply equally to all and Defendants’ right to monetize and profit from the expression, speech, or

1 material that appears on YouTube through the property based license rights that the user must grant  
2 Defendants as the price of admission to the forum.

3 357. According to Defendants, the purpose, use, nature, invitation to use the forum, and  
4 relationship between that purpose and invitation, on the one hand, and the ideas sought to be  
5 presented the public, on the other, is that Defendants offer public internet service “that enables  
6 more than a billion users around the world to upload” videos, where users are urged to “Broadcast  
7 Yourself,” “promote yourself” or “do the broadcasting yourself.”

8 358. Under the TOS, Defendants also represent that YouTube is open to everyone for  
9 free expression and communication, regardless of race, identity, or viewpoint as long as the video  
10 material complies with viewpoint neutral rules that apply equally to all.

11 359. Based on these and other representations, Defendants have induced or attracted 2.3  
12 billion people to use YouTube and Defendants currently use the YouTube “public forum” control  
13 and regulate 95% of the global public video content that has currently or has ever existed in the  
14 world.

15 360. Under California law, Defendants’ regulation of speech on the YouTube platform is  
16 state action because Defendants perform an exclusively and traditionally public function: the  
17 regulation of 95% of the world’s public video based speech content by designating and operating  
18 YouTube as a viewpoint neutral public forum for freedom of expression under California law.

19 361. Accordingly, Defendants are prohibited from arbitrarily, unreasonably, or  
20 discriminatorily excluding, regulating, or restricting videos or user access to services on YouTube  
21 on the basis of viewpoint or identity of the speaker. And any such exclusions, restrictions, or  
22 regulations must comply with protections afforded Plaintiffs’ free speech and expression under the  
23 Liberty of Speech Clause, and the established jurisprudence that such protections apply to private  
24 parties who use their property for purposes similar to the use of a government owned and operated  
25 public forum.

26 362. Plaintiffs’ video content and access services constitute expressive speech and  
27 activity that is protected by Article I, section 2 of the California Constitution.

28

1 363. Defendants have filtered, restricted, blocked or interfered with Plaintiffs' rights to  
2 access, use, and express themselves on YouTube.

3 364. Defendants' filtering, restricting, and blocking on Plaintiffs' speech and expressive  
4 conduct on YouTube violates Plaintiffs' Liberty of Speech because they are not based on the  
5 platform's viewpoint neutral rules governing what content is and is not permissible, but on the race,  
6 identity or viewpoint of Plaintiffs.

7 365. Defendants' censorship and other speech regulation conduct harms and violates  
8 Plaintiffs' Liberty of Speech rights on YouTube in direct contravention of the procedural and  
9 substantive rules that Defendants created, published, and use to regulate that speech on YouTube.

10 366. Furthermore Defendants' rules, both as applied and on their face, are subjective,  
11 vague, and overbroad criteria and proscription that Defendants use with unfettered and unbridled  
12 discretion to censor speech for any reason, or no reason at all, no matter how arbitrary or capricious  
13 in further violation of Plaintiffs' Liberty of Speech rights.

14 367. Defendants also maliciously use and apply the rules as a pretext to censor and  
15 restrict Plaintiffs' speech for unlawful purposes including race and identity discrimination against  
16 protected classes of users and to gain a competitive advantage over Plaintiffs and other users who  
17 Defendants compete with in YouTube.

18 368. Defendants' conduct, including the application of purportedly viewpoint neutral  
19 rules, are arbitrary and capricious, and unlawfully restrains and harms Plaintiffs based upon racial,  
20 political, religious, or other identity or viewpoint profiling the speaker, rather than the actual  
21 content of the speakers words or expression. Defendants' actions, therefore, also violate Plaintiffs'  
22 right to free association and assembly under the Liberty of Speech Clause.

23 369. Defendants' actions violate Plaintiffs' right to free association and assembly because  
24 , by blocking viewers' access to videos and comments based on the identity or viewpoint of the  
25 speakers or their opinions or other content featured in their videos that do not violate YouTube's  
26 viewpoint neutral content based rules

27 370. No compelling, significant, or legitimate reason justifies any or all of Defendants'  
28 actions, including the purported interest claimed by Defendants for the need to protect minors or

1 sensitive audiences from offensive content because Plaintiffs' content is not "offensive" or  
2 otherwise violates Defendants' purported viewpoint neutral rules.

3 371. And even if such interests did exist to justify Defendants' restriction and  
4 demonetization rules in theory, the conduct and restrictions imposed on Plaintiffs' speech are  
5 unconstitutional because they are not narrowly or reasonably tailored to further such interests, but  
6 sweep within their ambit speech and expression that complies with the rules that Defendants use to  
7 purportedly protect minors and sensitive audiences and are applied by Defendants with unfettered  
8 power to censor speech based in race, identity, or viewpoint or for any other discriminatory or  
9 unlawful reason or no reason at all.

10 372. Given Defendants' monopolistic control over search results, on line advertising,  
11 public video content, and the myriad of other information services that Defendants unilaterally  
12 control, Plaintiffs have no alternative affording it a reasonable opportunity to reach their full  
13 intended audience.

14 373. Defendants' discriminatory policies and application of those policies are not  
15 viewpoint-neutral, are unreasonable in time, place, and manner, and are unreasonable in relation to  
16 the nature, purpose, and use of the forum, but are unreasonable prior restraints on Plaintiffs'  
17 protected political speech, motivated by impermissible discrimination against Plaintiffs' racial  
18 identity and viewpoint.

19 374. Defendants' intentional and wrongful actions were taken with oppression, fraud,  
20 malice and/or are arbitrary and capricious, and as part of Defendants' normal course of business,  
21 effectuated through both algorithms, as well as through human agents. Additionally, Defendants'  
22 actions were done knowingly and intentionally to deprive Plaintiffs and their viewers of their rights  
23 under the California Constitution.

24 375. As a direct and proximate result of Defendants' violations of clearly established law  
25 regarding public fora, Plaintiffs and all other persons similarly situated have suffered, and continue  
26 to suffer, immediate and irreparable injury in fact to their right to Liberty of Speech, including, but  
27 not limited to financial harms of lost income, reduced viewership, and damage to brand, reputation,  
28 and goodwill, for which there exists no adequately complete remedy at law.





1 a privately owned television channel available for as a forum for speech: “a private entity who  
2 provides a forum for speech is not transformed by that fact alone into a state actor.” *Manhattan*  
3 *Cnty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930, 204 L. Ed. 2d 405 (2019).

4 383. In so doing, however, the Court in *Halleck* limited its 5-4 decision to the  
5 circumstances of that case and declined to overrule prior cases in which a private party who  
6 regulates speech or engages in conduct that is otherwise prohibited under the Constitution was  
7 found to be a “state actor” who was subject to constitutional scrutiny.

8 384. Instead, the Court “stressed” that “very few” functions fall into that category of  
9 “state action,” including, “for example, running elections and operating a company town. *Id.* at  
10 1929, 204 (citing *Terry v. Adams*, 345 U.S. 461, 468–470, 73 S. Ct. 809, 97 L. Ed. 1152 (1953)  
11 (elections); *Marsh v. Alabama*, 326 U.S. 501, 505–509, 66 S. Ct. 276, 90 L. Ed. 265 (1946)  
12 (company town); *Smith v. Allwright*, 321 U.S. 649, 662–666, 64 S. Ct. 757, 88 L. Ed. 987 (1944)  
13 (elections); *Nixon v. Condon*, 286 U.S. 73, 84–89, 52 S. Ct. 484, 76 L. Ed. 984 (1932) (elections).

14 385. The Court also stated that “a variety of functions do not fall into that category,  
15 including, for example: running sports associations and leagues, administering insurance payments,  
16 operating nursing homes, providing special education, representing indigent criminal defendants,  
17 resolving private disputes, and supplying electricity.” *Id.* (citing *American Mfrs. Mut. Ins. Co. v.*  
18 *Sullivan*, 526 U.S. 40, 55–57, 119 S. Ct. 977, 143 L.Ed.2d 130 (1999) (insurance payments);  
19 *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 197, n. 18, 109 S. Ct. 454, 102 L.  
20 Ed.2d 469 (1988) (college sports); *San Francisco Arts & Athletics, Inc. v. United States Olympic*  
21 *Comm.*, 483 U.S. 522, 544–545, 107 S. Ct. 2971, 97 L.Ed.2d 427 (1987) (amateur sports); *Blum*,  
22 457 U.S. at 1011–1012, 102 S. Ct. 2777 (nursing home); *Rendell-Baker*, 457 U.S. at 842, 102 S. Ct.  
23 2764 (special education); *Polk County v. Dodson*, 454 U.S. 312, 318–319, 102 S. Ct. 445, 70 L.  
24 Ed.2d 509 (1981) (public defender); *Flagg Bros.*, 436 U.S. at 157–163, 98 S. Ct. 1729 (private  
25 dispute resolution); *Jackson*, 419 U.S. at 352–354, 95 S. Ct. 449 (electric service).

26 386. Consequently, allegations that the relevant function in this case is only the operation  
27 of public access channels on a cable system, is not a “function [that is] traditionally and exclusively  
28 been performed by government to be establish “state action” under the Public Function Test. *Id.*

1           387. Beyond those statements, however, the Court in *Halleck* did not specify what the  
2 pleading requirements are for establishing state action under one of the few “public functions” that  
3 would trigger constitutional scrutiny. Nor was it presented with or had occasion to consider  
4 whether the private parties conduct was undertaken under a government enacted law that permitted  
5 unlawful conduct, including race discrimination, in contravention of fundamental constitutional  
6 rights, so as to trigger a limited state action under the Permissive Endorsement Test set forth in  
7 *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 1407, 103 L. Ed. 2d 639  
8 (1989).

9           388. In *Prager University v. Google LLC*, the Ninth Circuit applied *Halleck* to hold that  
10 YouTube does not “lose its private character merely because the public is generally invited to use it  
11 for designated purposes” because “YouTube may be a paradigmatic public square on the Internet,  
12 but it is ‘not transformed’ into a state actor solely by “provid[ing] a forum for speech.” *Prager*  
13 *Univ. v. Google LLC*, 951 F.3d 991, 997 (9th Cir. 2020) (citing *Halleck*, 139 S. Ct. at 1930, 1934).

14           389. But like *Halleck*, *Prager* did not, nor could it, overrule or eliminate the Public  
15 Function Test doctrine of state action nor did it specify what the pleading requirement were for  
16 establishing one of “the few” functions that will trigger state action. And it appears that the  
17 decision may be in conflict with *Halleck* and earlier cases when it held that public forum  
18 designations are “not a matter of election by a private entity” and “[we] decline to subscribe to  
19 Prager U’s novel opt-in theory of the First Amendment. *Id.* at 999 (9th Cir. 2020) (citing *Cent.*  
20 *Hardware*, 407 U.S. at 547, 92 S. Ct. 2238 (holding only that “[b]efore an owner of private  
21 property can be subjected to the commands of the First and Fourteenth Amendments the privately  
22 owned property must assume to some significant degree the functional attributes of public property  
23 devoted to public use”).

24           390. Furthermore, the Ninth Circuit did not mention, or consider in any manner, the more  
25 limited theory of Permissive Endorsement “state action” based on Defendants’ use of Section  
26 230(c), a congressional speech regulation law, to unlawfully restrict speech 95% of the world’s  
27 video speech based on race discrimination and other protected identity classifications or  
28

1 viewpoints that conflict with Plaintiffs’ fundamental equal protection and speech rights under the  
2 Supreme Court’s seminal case in *Skinner*.

3 391. Consequently, no Court has ruled, nor could it, that Defendants can never engage,  
4 under any circumstances, in “state action” that is subject to judicial scrutiny under the First  
5 Amendment. Nor has the pleading standards and requirement for such a claim been established,  
6 other than Defendants must be engaged in one of the few public functions identified in *Halleck* or  
7 use a congressional statute to do what they could not otherwise do under established law:  
8 discriminate against Plaintiffs’ speech based on their race, identity or viewpoint.

9 **B. Permissive Endorsement Allegations Of State Action**

10 392. In *Skinner*, private railroad companies were preparing to implement suspicion-based  
11 breath and urine testing of their employees pursuant to recently enacted federal regulations referred  
12 to in the case as “Subpart D.” *Skinner*, 489 U.S. at 611. Like Section 230(c)(2) of the CDA,  
13 Subpart D was “permissive”; it did not compel the testing, but rather left the decision to the  
14 railroads. *Id.* Crucially, however, again like Section 230(c)(2), Subpart D conferred state-law  
15 immunity: it protected railroads from being sued under state law if they chose to test. *Skinner*, 489  
16 U.S. at 611, 614-15 (Subpart D “pre-empt[ed] state laws, rules or regulations covering the same  
17 subject matter” and thus “removed all legal barriers to the testing”). In so doing, a unanimous  
18 Supreme Court held:

19 “[t]he fact that the Government has not compelled a private party to perform a  
20 search does not, by itself, establish that the search is a private one. Here, specific  
21 features of the regulations combine to convince us that the Government did more  
22 than adopt a passive position toward the underlying private conduct.

23 *Id.* at 615.

24 393. Under *Skinner*, the elements of a state action claim under the Permissive  
25 Endorsement Test are: (1) reliance on a government law that removes all laws and legal barriers to  
26 private conduct that would otherwise unlawful and does so in a way that impacts a fundamental  
27 constitutional right; (2) a defendant uses the law to engage in that unlawful conduct; and (3) the  
28 government shares in the fruits or benefits in some way from the unlawful conduct.

1           394. Defendants rely on Section 230 to unlawfully discriminate against Plaintiffs and  
2 regulate their speech based on race, identity, viewpoint or in some other manner that violates  
3 federal or state law.

4           395. Defendants use Section 230(c) to pre-empt state law and obtain complete immunity  
5 in a manner that removes all legal barriers to the regulating, blocking, or restricting of content  
6 based on Plaintiffs' race, identity, or viewpoint.

7           396. Plaintiffs are forced to submit to race discrimination and other violations of their  
8 legal rights when they use YouTube.

9           397. The Communications Decency Act was, as the statute's name indicates, enacted by  
10 Congress to restrict access to "indecent" content on the Internet. 141 Cong. Rec. S8330 (daily ed.  
11 June 14, 1995) (statement of Sen. Exon).

12           398. The express purpose of Section 230(c)(2) is to encourage Internet platforms like  
13 Google and YouTube to "restrict" "obscene, lewd, lascivious, filthy, excessively violent, harassing,  
14 or otherwise objectionable" material. 47 U.S.C. § 230(c)(2).

15           399. "The intent of Congress in enacting § 230(c)(2) was *to encourage efforts by Internet*  
16 *service providers to eliminate such material.*" *Goddard v. Google*, No. C 08-2738 JF (PVT), 2008  
17 WL 5245490, at \*6 (N.D. Cal. Dec. 17, 2008) (emphasis added).

18           400. Section 230(c) makes clear Congress' "strong preference" for regulating on line  
19 speech based on race, identity or viewpoint and for allowing Defendants to discriminate against  
20 Plaintiffs in violation of established federal and state law.

21           401. The federal government has also made clear its "desire to share the fruits" of the  
22 unlawful and discriminatory conduct undertaken by Defendants with respect to regulating on line  
23 speech, law enforcement, information gathering, and other government services.

24           402. By way of one example only, in the six-month period from January to June 2017,  
25 when Defendants first admitted that they were knowingly and intentionally profiling and targeting  
26 users based on race, identity, and viewpoint, Google received almost 17,000 requests from U.S. law  
27 enforcement to turn over information regarding users' content and searches. *See Cooperation or*  
28

1 *Resistance?: The Role of Tech Companies in Government Surveillance*, 131 Harv. L. Rev. 1722,  
2 1722 (2018). Google provided information to the government in some 80% of those cases.

3 403. Under Section 230(c), Congress allows and affirmatively endorses the unlawful  
4 discrimination and other conduct by Defendants.

5 404. Defendants’ use of Section 230(c) to engage in discrimination and other unlawful  
6 conduct under state and federal law to regulate on line “ material” on the internet is government  
7 endorsed of the unlawful conduct and renders that conduct “state action” under *Skinner* and the  
8 Permissive Endorsement Test.

9 **C. State Action Allegations Under The Public Function Test**

10 405. Under *Halleck* and *Prager*, the elements of state action under the Public Function  
11 Test Appear to be: (1) Defendants are engaged in functions and conduct that fall into that  
12 categories of “state action” that includes, but is not limited to, “running elections and operating a  
13 company town.”

14 406. On or about December 2019, Defendants merged their different TOS into a single  
15 contract whereby Defendants’ discretion to find a violation YouTube’s content based rules can be  
16 used by Defendants to bar the user from using any or all services offered by Defendants in any way  
17 including, the purchase and use of hand held smart phone, email, search engines, applications, and  
18 information or other services that are essential for public health, safety, law enforcement, election  
19 administration, taxation, and any other service performed by governments.

20 407. Defendants also operate a “company town” in which they control essential  
21 information and communication services without which local, state, or federal government agencies  
22 cannot provide or otherwise administer essential services including elections.

23 408. Until, if ever, the Supreme Court eliminates the Public Function Test for “state  
24 action” in all cases as a matter of law, Defendants’ use and regulation of speech and information  
25 services on YouTube involves the “very few” functions that satisfy the Public Function Test for  
26 “state action.”

27  
28

1           **D. Defendants’ Conduct Violates The First Amendment**

2           409. Defendants continue to filter, restrict, block and/or interfere with Plaintiffs’ rights to  
3 access, use, and express themselves on YouTube.

4           410. Defendants’ filtering, restricting, and blocking on Plaintiffs’ speech and expressive  
5 conduct on YouTube violates Plaintiffs’ First Amendment rights because the conduct is not based  
6 on the platform’s viewpoint neutral rules governing what content is and is not permissible, but on  
7 the race, identity or viewpoint of Plaintiffs.

8           411. Defendants’ censorship and other speech regulation conduct harms and violates  
9 Plaintiffs’ speech rights on YouTube in direct contravention of the procedural and substantive  
10 viewpoint neutral content based rules that Defendants created, published, and use to regulate  
11 speech on YouTube.

12           412. Furthermore Defendants’ rules, both as applied and on their face, are subjective,  
13 vague, and overbroad criteria and proscription that Defendants use with unfettered and unbridled  
14 discretion to censor speech for any reason, or no reason at all, no matter how arbitrary or capricious  
15 in further violation of Plaintiffs’ First Amendment Rights.

16           413. Defendants also maliciously use and apply the Rules as a pretext to censor and  
17 restrict Plaintiffs’ speech for unlawful purposes including race and identity discrimination against  
18 protected classes of users and to gain a competitive advantage over Plaintiffs and other users who  
19 Defendants compete with in YouTube.

20           414. Defendants’ conduct, including the application of purportedly viewpoint neutral  
21 rules, are arbitrary and capricious, and unlawfully restrains and harms Plaintiffs and all other  
22 persons similarly situated, based upon racial, political, religious, or other identity or viewpoint  
23 profiling of the speaker, rather than the actual content of the speaker’s words or expression.  
24 Defendants’ actions, therefore, also violate Plaintiffs’ right to free association and assembly under  
25 the First Amendment.

26           415. Defendants’ actions violate Plaintiffs’ right to free association and assembly because  
27 , by blocking viewers’ access to videos and comments based on the identity or viewpoint of the  
28

1 speakers or their opinions or other content featured in their videos that do not violate YouTube's  
2 viewpoint neutral content based rules

3 416. No compelling, significant, or legitimate reason justifies any or all of Defendants'  
4 actions, including the purported interest claimed by Defendants for the need to protect minors or  
5 sensitive audiences from offensive content because Plaintiffs' content is not "offensive" or  
6 otherwise violates Defendants' purported viewpoint neutral rules.

7 417. And even if such interests did exist to justify Defendants' restriction and  
8 demonetization rules in theory, the conduct and restrictions imposed on Plaintiffs' speech are  
9 unconstitutional because they are not narrowly or reasonably tailored to further such interests, but  
10 sweep within their ambit speech and expression that complies with the rules that Defendants use to  
11 purportedly protect minors and sensitive audiences and are applied by Defendants with unfettered  
12 power to censor speech based in race, identity, or viewpoint or for any other discriminatory or  
13 unlawful reason or no reason at all.

14 418. Given Defendants' monopolistic control over search results, online advertising,  
15 public video content, and the myriad of other information services that Defendants unilaterally  
16 control, Plaintiffs have no alternative affording them a reasonable opportunity to reach their full  
17 intended audience.

18 419. Defendants' discriminatory policies and application of those policies are not  
19 viewpoint-neutral, are unreasonable in time, place, and manner, and are unreasonable in relation to  
20 the nature, purpose, and use of the forum, but are unreasonable prior restraints on Plaintiffs'  
21 protected political speech, motivated by impermissible discrimination against Plaintiffs' identity  
22 and viewpoint.

23 420. Defendants' intentional and wrongful actions were taken with oppression, fraud,  
24 malice and/or are arbitrary and capricious, and as part of Defendants' normal course of business,  
25 effectuated through both algorithms, as well as through human agents. Defendants' actions were  
26 done knowingly and intentionally to deprive Plaintiffs and their viewers of their rights under the  
27 California Constitution.

28



1           421. As a direct and proximate result of Defendants’ violations of clearly established law  
2 regarding constitutional speech regulation on YouTube, Plaintiffs have suffered, and continue to  
3 suffer, immediate and irreparable injury in fact to their right to Liberty of Speech, including, but  
4 not limited to financial harms of lost income, reduced viewership, and damage to brand, reputation,  
5 and goodwill, for which there exists no adequately complete remedy at law.

6 **VII. PRAYER FOR RELIEF**

7           Wherefore Plaintiffs and all other persons similarly situated request that the Court grant the  
8 following relief:

9           1. A declaratory judgment remedy under 28 U.S.C. § 2201, et seq. for Plaintiffs’ First  
10 Cause of Action challenging the construction, application, and constitutionality of Section 230(c)  
11 of the Communications Decency Act, 47 USC § 230(c), that Section 230(c) does not grant  
12 immunity to Defendants, or otherwise apply to claims and allegations that arise from, relate to, or  
13 are based on, Defendants Google/YouTube’s unlawful racial profiling and use of the user’s race, or  
14 other identity or viewpoint to filter, restrict, or block content, or otherwise deny Plaintiffs’ access  
15 or use of any services offered by Google/YouTube in connection with Plaintiffs’ use of YouTube  
16 on the grounds that:

17                   a. The plain language of sections 230(c)(1) and/or (2) only immunizes and ISP  
18 for filtering and blocking “offensive material,” and does not immunize the regulating, restricting or  
19 blocking of material based on the racial, or other identity or viewpoint of the user posting or  
20 viewing the video;

21                   b. Sections 230(c)(1) or (c)(2) does not immunize an ISP who engages in race  
22 based identity or viewpoint discrimination under contracts and other business conduct that violates  
23 42 U.S.C. § 1981 or the Unruh Civil Rights Act;

24                   c. The application of Section 230(c) in any way to permit and immunize race,  
25 sex, or other identity or viewpoint based profiling and regulation of content and access on YouTube  
26 is unconstitutional and violates the First Amendment under Denver Area 518 U.S. 727, 766-67;  
27 and/or

28

1           d.       The President’s Executive Order date May 28, 2020, prohibits the  
2 application of Section 230(c) immunity to the content and access filtering, restricting, and blocking  
3 decisions and requires the Department of Justice to clarify and enforce the law in accordance with  
4 identity and viewpoint neutrality.

5           2.       A declaratory judgment remedy under section 2201 that Defendants have violated  
6 and continue to violate Plaintiffs’ rights to free speech and expression subject only to viewpoint  
7 neutral content based rules that apply equally to all under Plaintiffs Second through Sixth, and  
8 Eighth through Tenth Causes of Action;

9           3.       An injunction requiring Defendants to:

10           a.       Cease and desist from capriciously restricting, demonetizing, or otherwise  
11 censoring any content of videos uploaded to the YouTube based on Plaintiffs’ race, or other  
12 identity or viewpoint in violation of federal and California law; and

13           b.       Cease and desist from censoring, restricting, restraining, or regulating speech  
14 based on the discretionary use or application of discriminatory, animus-based, arbitrary, capricious,  
15 vague, unspecified, or subjective criteria, rules, guidelines, and/or practices;

16           4.       Compensatory, special, and statutory damages in an amount to be proven at trial,  
17 including statutory damages pursuant to, *inter alia*, Civil Code § 51, 51.5, 52, Civil Procedure Code  
18 § 1021.5, 15 U.S.C. § 1117, 42 U.S.C. §§ 1981, 1983;

19           5.       A civil penalty of \$2,500 for each violation pursuant to Business and Professions  
20 Code §§ 17200, 17206, and 17536;

21           6.       Punitive damages and exemplary damages in an amount to be proven at trial;

22           7.       Restitution of financial losses or harm caused by Defendants’ conduct and ill-gotten  
23 gains, and disgorgement of profit obtained from all unlawful conduct in an amount to be proven at  
24 trial;

25           8.       Attorneys’ fees and costs of suit;

26           9.       Prejudgment and post-judgment interest; and

27           10.      Any and all other relief that the Court deems just and proper.

28



# **Exhibit “A”**

1 BROWNE GEORGE ROSS LLP  
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9 Attorneys for LGBTQ+ Plaintiffs Divino Group  
LLC, Chris Knight, Celso Dulay, Cameron Stiehl,  
10 BriaAndChrissy LLC, Bria Kam, Chrissy  
Chambers, Chase Ross, Brett Somers, and  
11 Lindsay Amer, Stephanie Frosch, Sal  
Cinquemani, Tamara Johnson and Greg Scarnici  
12

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

15 DIVINO GROUP LLC, a California limited  
liability company, CHRIS KNIGHT, an  
16 individual, CELSO DULAY, an individual,  
CAMERON STIEHL, an individual,  
17 BRIAANDCHRISSY LLC, a Georgia limited  
liability company, BRIA KAM, an individual,  
18 CHRISSY CHAMBERS, an individual,  
CHASE ROSS, an individual, BRETT  
19 SOMERS, an individual, and LINDSAY  
AMER, an individual, STEPHANIE  
20 FROSCH, an individual, SAL  
CINEQUEMANI, an individual, TAMARA  
21 JOHNSON, an individual, and GREG  
SCARNICI, an individual,  
22

23 Plaintiffs,

24 vs.

25 GOOGLE LLC, a Delaware limited liability  
company, YOUTUBE, LLC, a Delaware  
limited liability company, and DOES 1-25,  
26

27 Defendants.  
28

Case No. 5:19-cv-004749-VKD

**DECLARATION OF STEPHANIE  
FROSCH IN SUPPORT OF PLAINTIFFS'  
MOTION FOR LEAVE TO FILE SUR-  
REPLY BRIEF AND REQUEST FOR  
HEARING AND CASE MANAGEMENT  
CONFERENCE**

*(Filed concurrently with Plaintiffs' Sur-Reply  
Brief; Declaration of Peter Obstler)*

Date:  
Time: 10:00 a.m.  
Place: Courtroom 2  
Before: Magistrate Judge Virginia DeMarchi

1 I, Stephanie Frosch, declare:

2 1. I am a named Plaintiff in the above-captioned action. I have firsthand, personal  
3 knowledge of the facts set forth below and if called as a witness could competently testify thereto,  
4 unless other specified.

5 2. I am an LGBTQ internet content creator and YouTube user who is active in the  
6 YouTube Community.

7 3. In 2009, I became a YouTube content creator and now operate two YouTube  
8 channels: Youtube.com/ElloSteph and Youtube.com/StephFrosch.

9 4. From 2009 through 2016, my YouTube channels were successful. However, in  
10 2017, I started having problems with YouTube:

11 a. YouTube was classifying many of my videos as subject to Restricted Mode,  
12 making them unavailable to a large number of viewers, even though the videos contained no  
13 nudity, profanity, sexual conduct, or discussions of sexual activities. YouTube also allowed other  
14 YouTube channels to copy my videos without permission, and the content in those videos was re-  
15 posted by another user and was not subjected to Restricted Mode. .

16 b. Many of my videos were demonetized or subject to reduced monetization  
17 despite the fact that they do not include graphic images of violence or sexuality, nudity, profanity,  
18 sexual conduct, or discussions of sexual activities.

19 c. YouTube was running ads on channels which were posting copies of my  
20 videos without permission.

21 d. At least one of the customized thumbnail images I crafted for each of my  
22 videos uploaded to my channels was removed.

23 e. Longtime subscribers to my channels were being dropped from my  
24 channels, and YouTube was preventing them from re-subscribing. As a result, my subscribers  
25 were not receiving notices when I posted new content.

26 5. YouTube no longer allows me to see the revenue I generated before October 2009.  
27 My best recollection is that I earned approximately \$23,000 from YouTube ad revenue in 2009. In  
28 addition to ad revenue, I earn money from the sale of merchandise, from separate brand

1 sponsorship agreements connected with videos posted on my channels, and from the sale of  
2 merchandise from the website [www.districtlines.com/ellosteph](http://www.districtlines.com/ellosteph). This is a separate website which  
3 sells merchandise relating to my original videos posted to YouTube.

4           6.       In 2017, I joined with other LGBTQ+ YouTube creators to publicly raise  
5 awareness about issues and concerns regarding Defendants' discriminatory treatment of LGBTQ+  
6 channels. Among other issues, I expressly raised the concern that changes to YouTube's  
7 algorithms and other content curation machine based procedures were disproportionately  
8 restricting and affecting access to and the reach of content, as well as affecting other YouTube  
9 services for LGBTQ+ YouTube creators and viewers who are members of what Defendants call  
10 the "YouTube Community."

11           7.       On September 8, 2017, an LGBTQ+ YouTube content creator forwarded to me an  
12 email dated August 25, 2017, from Laura Chernikoff of the "Internet Creators Guild" inviting him  
13 to an event co-sponsored by YouTube regarding changes to YouTube's algorithm which were  
14 adversely affecting the LGBTQ+ community.

15           Ms. Chernikoff's invitation stated:

16           You're invited to an upcoming event put on by the Internet Creators Guild, in  
17 partnership with YouTube on Thursday, September 14th at 11:00 AM.

18           Following the advertising situation on YouTube this spring (dubbed the  
19 "Adpocalypse"), YouTube is interested in hearing about creators' experiences on  
20 the platform. In particular, it's important for creators to understand the advertising  
21 guidelines and tools that brands interact with, in order to be aware how it may  
22 affect your monetization.

23           We've been discussing this issue with YouTube, who have been working to address  
24 creator concerns on this topic. They would like to share this presentation, which  
25 will be under NDA, in order to hear from ICG Members and creators we're in  
26 touch with as part of a small focus group.

27           We thought you would be an engaged and thoughtful participant and hope you're  
28 able to attend.

Attached as Exhibit 1 is a true and correct copy of the email I received with the invitation to the  
September 14-event. Based on the email, I understood that *before* YouTube would even speak to  
me or any other members of the group of LGBTQ+ creators about the problems with the new  
YouTube algorithm implemented in May of 2017, *YouTube required each of us to sign a Non-*

1 **Disclosure Agreement** (the “NDA”).

2           8.       Ms. Chernikoff sent an email to me dated September 11, 2017 which confirms my  
3 participation in the September 14-event and states: “Please note that a non-disclosure agreement  
4 (NDA) will be sent via email by a member of the YouTube team and is required to be signed prior  
5 to the event, so keep an eye out!” Attached as Exhibit 2 is a true and correct copy of the email  
6 dated September 11, 2017 from Ms. Chernikoff.

7           9.       On September 13, 2017, Defendants sent to me by email a request for my signature  
8 on an electronic Non-Disclosure Agreement in connection with the September 14-event. Upon  
9 signing the electronic document, I received a confirmation email which has a subject: “You have  
10 accepted Google’s Non-Disclosure Agreement.” The text of the email sets forth my personal  
11 information and a copy of the Non-Disclosure Agreement. Attached as Exhibit 3 is a true and  
12 correct copy of the email from Google confirming receipt of my signed Non-Disclosure  
13 Agreement.

14           10.      The Non-Disclosure Agreement states:

15                    “In order to evaluate and possibly enter into a business transaction (the “Purpose”),  
16                    Google Inc., for itself and its subsidiaries and affiliates, and the other party  
                      identified below hereby agree:”

17 At the time that I signed the agreement, I had no idea what “business transaction” the document  
18 was referring to. As a YouTube user, I had previously entered into a YouTube Terms of Service  
19 Agreement and an AdSense Agreement. As of September 13, 2017, I was not thinking about  
20 entering into any new “business transaction” with YouTube or Google, or changing the existing  
21 agreements I had with YouTube and AdSense. Neither YouTube nor Google had mentioned any  
22 new business transaction, or changes to any existing agreements. I was merely trying to meet with  
23 YouTube representatives to discuss with them the many problems that I had been having with my  
24 YouTube channel and the falling views and revenue I was experiencing as a result of changes  
25 YouTube made to their algorithm in May of 2017. I did not expect for YouTube or Google to  
26 give me trade secrets, computer codes, or any other proprietary information at the meeting. And  
27 they did not. I simply talked to YouTube and/or Google about my problems and how to resolve  
28 them.



1           11.     The Non-Disclosure Agreement does not define what “Confidential Information”  
2 is, except to say that it is whatever “the Discloser considers” to be “confidential.” I have no way  
3 of knowing what YouTube or Google consider to be confidential, or expect me to treat as  
4 confidential. “Confidential Information” is not limited to trade secrets such as YouTube or  
5 Google’s customer lists, computer codes, or processes.

6           12.     On September 14, 2017, I went to the event at the YouTube Playa Vista Office in  
7 Los Angeles, California. Upon arrival at the September 14-event, I checked in at 11:00 a.m.  
8 YouTube provided lunch for the participants. Around 11:30, a YouTube representative announced  
9 that the YouTube analytics guy had limited time and was running late. The YouTube  
10 representative asked us to quickly sign a hard copy Non-Disclosure Agreement so that we could  
11 get started as fast as possible, and indicated that we had to move quickly so that there was time  
12 with the analytics representative. The representative then came up to me, handed me a hard copy  
13 Non-Disclosure Agreement, and asked me to sign it while he stood there waiting. I was not given  
14 time to read the document which had multiple pages and appeared to be longer and more detailed  
15 than the one I had signed online. The representative then took my signed document, and quickly  
16 approached another creator requesting their signature. YouTube did not offer me a copy of this  
17 Non-Disclosure Agreement. Immediately after signing the document, I was ushered into a large  
18 conference room.

19           13.     The September 14 event involved 12 to 20. YouTube creators, each representing a  
20 different class of video. While I was the only LGBTQ representative creator, there were other  
21 LGBTQ creators who were posting videos in other categories. I recall there were individual  
22 representatives for cooking, comedy, and gaming videos, some of which happened to identify as  
23 LGBTQ although they were not specifically creating videos for the LGBTQ community. We were  
24 seated at a large oval conference table, and offered notebooks and pens. The presenters all  
25 identified as YouTube employees.

26           14.     During the September 14 event, we watched a PowerPoint presentation. We heard  
27 from a man who identified himself as the YouTube employee responsible for analytics and a  
28 woman who addressed algorithm issues. Also present were Ben Cramer and someone who was

1 handing out YouTube swag. In all, I recall that there were five YouTube representatives present at  
2 the event, in addition to the man who got me to sign the second Non-Disclosure Agreement before  
3 I entered the conference room for the presentation. YouTube specifically prohibited us from  
4 taking photos or recording the event.

5         15.       The YouTube presenters stated that they wanted to work with us creators, and  
6 explained that YouTube makes money off of the creators who make the video content from  
7 advertisers, and that creators win by sharing in the advertising money. They explained that  
8 advertisers buy ads based on viewer demographics for the videos. YouTube and creators monetize  
9 off of each other and YouTube does not want to hurt creators. The YouTube presenters discussed  
10 problems with filtering video content for purposes of restricted mode, monetization and the  
11 payments for cpm (clicks per minute).

12         16.       When asked why videos which use gay couples are getting blocked as mature  
13 content or inappropriate for all audiences, or videos are getting blocked for mentioning the word  
14 “queer,” the YouTube representative made the following statements:

15                 a.       Blocking LGBTQ videos was caused when YouTube started using an  
16 artificial intelligence algorithm to filter content based on what advertisers want; it is the algorithm  
17 that is “targeting” LGBTQ videos. YouTube was not discriminating, the algorithm was  
18 discriminating. The YouTube representative was talking about the algorithm as if it were some  
19 independent video censor that was entirely unrelated to YouTube and its employees, and beyond  
20 their control; rather than a tool which YouTube specifically designed and put in place to regulate  
21 videos on the platform, which YouTube could change or remove from the platform entirely.

22                 b.       There are too many videos on YouTube to review all content manually.  
23 YouTube must use artificial intelligence to conduct the content reviews on the YouTube platform.

24                 c.       The artificial intelligence algorithm identifies people, including the racial or  
25 sexual identities or viewpoints of the creator or viewers when filtering and curating content and  
26 restricting access to YouTube services; it does not review and make restrictions based only on the  
27 video content. This is due in part to the fact that advertisers want to be able to target audiences  
28 based on the demographics of the creators and their audiences. The result is that the algorithm

1 discriminates based on the identity of the creator or its intended audience when making what are  
2 supposed to be neutral content based regulations and restrictions for videos that run on YouTube.

3 d. Despite the problems with the algorithm, YouTube and the creators are on  
4 the “same side.” The rules should apply equally to all regardless of the identity or viewpoint of  
5 the creator.

6 e. When the creators told YouTube representatives that they understood why  
7 an advertiser would not want a Pampers ad on video content featuring guns, they still did not  
8 understand why content from homosexual creators was being demonetized when identical content  
9 from heterosexual creators was not, the YouTube representatives said that they were “going to fix  
10 it.” No details of what they were doing, or planned on doing to fix the algorithm were provided  
11 and no one (at the meeting or since) indicated when, if ever, the fix for this “problem” would be  
12 completed.

13 f. In response to further questions from creators, the YouTube representatives  
14 specifically acknowledged that the algorithm was looking at and profiling the sexual identities,  
15 races, disabilities, religious and political affiliations of creators, intended audiences and viewers  
16 alike.

17 17. The YouTube representatives discussed the example of a YouTube creator who had  
18 a chef’s channel and posted cooking videos: if the creator identified as gay, or had a lot of  
19 subscribers or viewers who accessed a lot of LGBTQ related videos, the cooking video would be  
20 tagged as a “gay” video for monetization and restricted mode purposes, regardless of the actual  
21 content of the video.

22 18. Towards the end of the September 14-event, which lasted about 2 hours, I  
23 specifically asked the YouTube representative, “What are you doing to fix the problems we have  
24 identified?” and “When will you be done fixing the problems?” The YouTube representative  
25 responded to each question saying, “I cannot answer that question.” To this date, no one at the  
26 September 14 event has ever provided me any substantive response to my questions regarding the  
27 problems or the fix.

28 19. As far as I can recall, no one at the September 14-event -- (a) said that what they

1 were saying was “confidential” in connection with either the online or hard copy Non-Disclosure  
2 Agreements; (b) said that what they were talking about was a “trade secret;” (c) described actual  
3 YouTube’s computer code or proprietary processes used in connection with YouTube, the  
4 analytics, the algorithm, or AdSense; (d) asked me not to repeat anything that was said during the  
5 event by other creators.

6       20.     Until the time that Defendants finally released me from my NDAs in March of this  
7 year, I was prohibited by the NDAs from discussing, with anyone, including my attorneys in this  
8 case, the substance, nature, and details of the September 14-event, including the statements made  
9 by the YouTube representatives about identity and viewpoint discrimination in regulating  
10 monetization, access to content and services. Consequently, the information and statements  
11 presented at the September 14-event could not be included in the Second Amended Complaint.  
12 Even though I have no idea what, if anything Defendants claim is “confidential,” I was afraid and  
13 at risk that if I ever talked about what was said at the meeting, YouTube could or would sue me  
14 for violating the NDA(s). I have also been afraid that Defendants would suspend or terminate my  
15 channel, my gmail account, or even suspend my access to Google searches if I violated the  
16 NDA(s).

17       21.     On March 26, 2020, after my lawyers had notified YouTube that I had decided to  
18 file a motion to void or release me from the gag provisions of the NDAs, Defendants informed my  
19 lawyers in writing that they had “no intention of enforcing the NDA.” Attached as Exhibit 4 is a  
20 true and correct copy of the correspondence between my lawyers and Defendants’ attorneys,  
21 including the email releasing me from the NDAs.

22       22.     Following the receipt of that email, I was finally able to inform my lawyers of the  
23 substance of what was said by the YouTube representatives at the September 14-event.

24       23.     I have reviewed the Defendants’ Motion to Dismiss the Second Amended  
25 Complaint. In the Motion to Dismiss, Defendants make a number of factual assertions which are  
26 loosely based on allegations in the Complaint. As stated below, I believe that Defendants’ factual  
27 assertions are either wrong or misleading, as indicated below:

28             a.     Defendants state in their Motion:

1 Content creators upload videos to the service free of charge, enabling YouTube’s  
2 billions of users to view them, comment on them, and subscribe to their favorite  
creators’ channels. ¶ 52. MTD at 3:2-4.

3 In truth, while there is no monetary charge for uploading videos, in exchange for the  
4 opportunity to use the YouTube website, Defendants required me to give them a license to use all  
5 of my original video content that is posted to the YouTube website, the right to collect data about  
6 me, and my use of the YouTube website, and also the right to collect data about people who view  
7 my videos on the YouTube website.

8 b. Defendants state in their Motion:

9 YouTube values the perspectives and experiences that LGBTQ+ content creators  
10 bring to the platform. MTD at 3:17-18.

11 My experience with YouTube since 2017 is directly contrary to this statement. After the  
12 September 14-event, no one at YouTube followed up with me – no one checked to see if my  
13 problems had been resolved; no one checked to see how much the algorithm had cost me in lost  
14 subscribers, advertising revenue, cpm, or reduced viewers. In fact, no one from YouTube ever  
15 helped me solve the problems identified at the September 14-event. Rather, following the event,  
16 my subscribers, advertising revenues, cpm, and viewers continued to decline. Though my  
17 viewership was stable, AdSense revenues dropped substantially.

18 24. Since filing the lawsuit, YouTube shut off the analytics for the cpm so that creators  
19 like me are no longer able to calculate the lost revenue from reduced cpm due to demonetization.  
20 My viewer numbers have been cut dramatically and subscribers complain that they cannot get new  
21 video notices. Recently, I co-created a video with my girlfriend, who does not identify as  
22 LGBTQ. We both posted the same identical video at the same time. While my girlfriend earned  
23 \$3,000 from the video, I earned only \$300.

24 a. Defendants state in their Motion:

25 In 2017, when LGBTQ+ creators raised issues about Restricted Mode, YouTube  
26 acknowledged that the feature was not fully working as intended and agreed to  
make improvements. ¶¶ 28, 87. MTD at 3:21-4:1.

27 Defendants’ description of YouTube’s “acknowledgment” is misleading. Contrary to the  
28 Motion’s spin on the allegations in the Complaint, the concerns I and other LGBTQ+ creators

1 raised were not limited to Restricted Mode, but extended to demonetization and cpm. In fact, at  
 2 the September 14-event, YouTube’s representatives acknowledged that the algorithm was  
 3 discriminating against LGBTQ creators as well as other creators based on their identities and  
 4 personal affiliations, as well as those of their subscribers and viewers. YouTube’s representatives  
 5 also stated that the feature was working as YouTube intended: it was profiling creators and  
 6 viewers for YouTube’s advertisers so that the advertisers could target audiences based on personal  
 7 identity including whether viewers were gay, disabled, members of a racial group or affiliated with  
 8 specific viewpoints or groups. YouTube’s representatives confirmed that decisions regarding a  
 9 video’s status vis a vis restricted mode, monetization and cpm were being made on grounds that  
 10 were unrelated to the actual content of the video. While the YouTube representatives agreed that  
 11 they were working to fix the problems, they did not specify what they were doing to stop the  
 12 discrimination in the interim or to otherwise provide a timeframe for completing the fix.

13 b. Defendants state in their Motion:

14 As for the Plaintiffs here, YouTube has addressed their individual concerns in good  
 15 faith, and often removed restrictions from their videos, when appropriate under  
 16 YouTube’s policies, in response to their appeals. ¶¶ 186, 223, 227, 230, 233, 236.a.  
 17 MTD at 4:1-4.

18 Defendants’ statement is grossly misleading to the extent that it suggests that YouTube  
 19 actually resolved any of the complaints I (or any other LGBTQ+ creator) raised at the 2017  
 20 meeting with the Defendants. YouTube has not “addressed” my concerns, continues to profile  
 21 my videos based on my identity as a member of the LGBTQ community and my affiliation with  
 22 LGBTQ groups and has increased its discrimination against me by restricting the majority of my  
 23 videos, and gutting my subscriber lists, viewers, ad revenue, and cpm.

24 c. Defendants state in their Motion:

25 The use of its service is governed by rules and an array of content policies. ¶¶ 10,  
 26 248, 288. Before creating channels and uploading their content to the service,  
 27 Plaintiffs acknowledge they agreed to YouTube’s Terms of Service and the  
 28 incorporated Community Guidelines. ¶¶ 10, 14, 59, 248,

The Terms of Service provide that “YouTube reserves the right to remove Content  
 without prior notice,” including videos uploaded by content creators. Ex. 2-3. The  
 Community Guidelines are twelve “common-sense rules” prohibiting certain kinds  
 of content, including “[n]udity or sexual content” and “[v]ulgar language.” Exs. 3-  
 4. Google and YouTube reserve the right to remove any content that they believe to

1 be contrary to the Terms of Service and the incorporated Community Guidelines.  
2 Ex. 2. MTD at 4:6-15.

3 YouTube allows content creators whose channels meet certain minimum  
4 viewership requirements to earn revenue from (or “monetize”) their videos by  
5 running advertisements with them as part of the YouTube Partner Program. To be  
6 eligible to monetize their videos, in addition to the Terms of Service and  
7 Community Guidelines discussed above, Plaintiffs agreed to certain additional  
8 “written contracts,” including YouTube’s Partner Program Terms and the AdSense  
9 Terms of Service. See ¶ 331; Exs. 5-6, 10. In addition, Plaintiffs agreed to comply  
10 with YouTube’s monetization policies, including the Advertiser-friendly content  
11 guidelines, which are designed to ensure that ads do not appear alongside videos  
12 with content that certain audiences might find objectionable. See ¶¶ 152, 248, 331;  
13 Exs. 5-11. YouTube uses automated software to identify content as inappropriate  
14 for advertising, and creators may appeal demonetization decisions for manual  
15 review. ¶ 94; Ex. 9. MTD at 5:9-19.

16 Defendants’ description of the website rules is misleading and deceptive: When I agreed  
17 to Defendants’ Terms of Service, Community Guidelines, Partnership Program Terms, and  
18 AdSense Terms of Service, I understood that these terms were nonnegotiable and that each  
19 YouTube user was agreeing to these same terms. YouTube stated in its Terms of Service and  
20 Community Guidelines that the rules to which I agreed would be applied equally to all YouTube  
21 users, in a neutral manner. At the September 14-event, YouTube representatives reaffirmed their  
22 commitment to the universal set of rules which apply equally to all; however, they also confirmed  
23 that they were using an artificial intelligence algorithm which discriminates against users based on  
24 their identities. As long as YouTube’s algorithm profiles users, then YouTube cannot be applying  
25 the same rules equally to all users in a neutral manner.

26 25. YouTube did not inform me that my videos would be distributed, made available  
27 for viewing, or monetized for profit based on who I am (a lesbian educator) or on my stated views  
28 regardless of the actual content of the video posted. Nor did YouTube inform me that to the extent  
that it sponsored other creators, or their channels or individual videos, that those sponsored  
creators/channels/videos would not be subject to the same Terms of Service, Community  
Guidelines, Partnership Program Terms, or AdSense Terms of Service that I must follow. Nor did  
YouTube inform me that it would be creating Defendants’ own original video content which  
would not be subjected to the same Terms of Service, Community Guidelines, Partnership  
Program Terms, or AdSense Terms of Service that I and other third-party users must follow.

1           26.     YouTube did not inform me that in giving Defendants a license to use the videos I  
2 posted, that it would allow other YouTube users to copy my original videos, post them on the  
3 channels of other YouTube users, or receive revenue related to my original videos.

4           27.     Tamara Johnson, one of the named Plaintiffs, is an LGBTQ+ creator who operates  
5 the YouTube channel, SVTV Network. Ms. Johnson also owns and operates an internet online  
6 on-demand monthly subscription network <https://www.svtvnetwork.com/> dedicated to original  
7 content specifically designed for LGBTQ+ audiences. Ms. Johnson is an African American. Her  
8 original web series videos feature African American members of the LGBTQ community.

9           28.     In their Reply Brief, Defendants assert that:

10           . . . Plaintiffs’ opposition brief also purports to represent the interests of “African  
11 American content creators and users” (see, e.g., Opp. 1), but the Complaint does  
12 not include any actual allegations in support of any claim for racial discrimination.  
13 Reply fn.2 at p.3.

14 This is not true. Plaintiffs’ Second Amended Complaint includes allegations that Defendants  
15 unlawfully use “data regarding the video **creators,’ subscribers,’ or viewers’ . . . race**, ethnicity,  
16 commercial, or political identities or viewpoints” (paragraph 7 emphasis added); and Defendants  
17 “rely upon and invoke federal law under Section 230(c) to preempt and immunize unlawful  
18 filtering, regulations, and practices on the YouTube Platform, including **practices which**  
19 **discriminate based upon race . . .** or individual viewpoints, and in doing so, engage in unlawful  
20 discriminatory, arbitrary, and capricious repression of public speech under color of federal law.”  
21 [Paragraph 289 emphasis added.] The Second Amended Complaint also alleges that Defendants  
22 are “using identity based censorship to determine who can and cannot continue to use the  
23 YouTube Platform” (paragraph 8); and that their representative “promised LGBTQ+ YouTubers  
24 that Defendants would ensure that **‘Restricted Mode’ should not filter out content belonging to**  
25 **individuals or groups based on certain attributes like** gender, gender identity, political  
26 viewpoints, **race**, religion or sexual orientation,” (paragraph 29, 121, emphasis added).

27           29.     The allegations of the Second Amended Complaint identified above are consistent  
28 with and supported by what I was told by the YouTube representatives at the September 14-event  
regarding racial profiling and discrimination embedded in the algorithm. When called to testify as



1 a witness, I will testify specifically that the YouTube representatives at the September 14 event  
2 said that the algorithm was targeting African American creators, subscribers and viewers in the  
3 same way that it was targeting LGBTQ creators, subscribers and viewers.

4 I declare under penalty of perjury under the laws of the United States of America that the  
5 foregoing is true and Executed this 20th day of April, 2020, at New York, New York.

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STEPHANIE FROSCH

# **Exhibit “1”**

From: **Steph Frosch** <[ellosteph@gmail.com](mailto:ellosteph@gmail.com)>  
Date: Tue, Aug 20, 2019 at 12:04 AM  
Subject: Fwd: Focus Group event: YouTube's Advertising Guidelines  
To: Stephanie Frosch <[stephfrosch@gmail.com](mailto:stephfrosch@gmail.com)>

----- Forwarded message -----

From: **Laura Chernikoff** <[laura@internetcreatorsguild.com](mailto:laura@internetcreatorsguild.com)>  
Date: Thu, Sep 21, 2017 at 11:46 AM  
Subject: Re: Focus Group event: YouTube's Advertising Guidelines  
To: Steph Frosch <[ellosteph@gmail.com](mailto:ellosteph@gmail.com)>

Thanks for participating in this ICG event with YouTube. We know this session had some logistical challenges with the timing and apologize. We're still experimenting with this type of event, and thinking about ways to advocate for creators about the difficult monetization and advertising guidelines challenges. We'd love to hear about your experience – you can share your honest feedback by [filling out this brief survey](#).

Laura

**Laura Chernikoff**  
*Executive Director*  
Internet Creators Guild  
[internetcreatorsguild.com](http://internetcreatorsguild.com)

On Wed, Sep 13, 2017 at 2:57 PM, Steph Frosch <[ellosteph@gmail.com](mailto:ellosteph@gmail.com)> wrote:  
Signed and sent! Looking forward to tomorrow.

All the best,  
Stephanie Frosch  
[YouTube.com/ElloSteph](https://www.youtube.com/ElloSteph)

On Wed, Sep 13, 2017 at 11:21 AM, Laura Chernikoff <[laura@internetcreatorsguild.com](mailto:laura@internetcreatorsguild.com)> wrote:

Hey, I wanted to send a quick reminder to sign the NDA YouTube sent for tomorrow's event. They need everyone attending the event to sign in order to participate, so I wanted to make sure you hadn't missed it. Let me know if you have any questions or concerns!

Laura

**Laura Chernikoff**  
*Executive Director*  
Internet Creators Guild  
[internetcreatorsguild.com](http://internetcreatorsguild.com)

On Mon, Sep 11, 2017 at 11:07 AM, Laura Chernikoff <[laura@internetcreatorsguild.com](mailto:laura@internetcreatorsguild.com)> wrote:

Thanks Davey! Moving you to bcc.

Steph, we're excited to have you at this event this week. Here's a confirmation with details about the location.

Please note that a non-disclosure agreement (NDA) will be sent via email by a member of the YouTube team and is required to be signed prior to the event, so keep an eye out!

**RSVP:** You are confirmed.

**Date:** Thursday, September 14th

**Check In Time:** 11am

**Presentation Starts:** 11:30am

\*Lunch and an opportunity to mingle with your fellow creators will be included.

**Location:** YouTube Playa Vista Office –

[12400 W. Bluff Creek Drive, Los Angeles, CA 90094](#)

**Directions:** At the intersection of S Centinela Ave & Jefferson Blvd, turn onto S Campus Center Dr. Drive to the end of Campus Center Dr. Turn left on West Bluff Creek Drive and make a quick right into “Lot B”. US-PLV-H10 will be the building just West of the parking lot.

If you have trouble finding the office, contact **Ben Kramer:** [benkramer@google.com](mailto:benkramer@google.com) // [650-495-7545](tel:650-495-7545)

If your plans have changed and you are unable to attend, please let us know ASAP.

Laura

**Laura Chernikoff**

*Executive Director*

Internet Creators Guild

[internetcreatorsguild.com](http://internetcreatorsguild.com)

On Fri, Sep 8, 2017 at 5:36 PM, Davey Wavey <[davey@daveywavey.tv](mailto:davey@daveywavey.tv)> wrote:

Hey Laura,

CC'ing Steph Frosch on this. She'd love to attend!

On Thu, Aug 31, 2017 at 6:06 PM, Laura Chernikoff <[laura@internetcreatorsguild.com](mailto:laura@internetcreatorsguild.com)> wrote:  
Unfortunately this event is in-person only. Sorry to hear you can't make it, but we'll keep you in mind for similar events in the future.

Do any other LA-based creators come to mind who were effected by this issue? I know the LGBT community especially deals with this and I want to make sure their voices are well represented in that room.

Laura

**Laura Chernikoff**

*Executive Director*

Internet Creators Guild  
[internetcreatorsguild.com](http://internetcreatorsguild.com)

On Tue, Aug 29, 2017 at 9:52 AM, Davey Wavey <[davey@daveywavey.tv](mailto:davey@daveywavey.tv)> wrote:  
Hey Laura,

I'll be traveling - is there a remote option for attending?

Best,  
Davey

On Fri, Aug 25, 2017 at 1:28 PM, Laura Chernikoff <[laura@internetcreatorsguild.com](mailto:laura@internetcreatorsguild.com)> wrote:  
Hey Davey,

You're invited to an upcoming event put on by the Internet Creators Guild, in partnership with YouTube on Thursday, September 14th at 11:00 AM.

Following the advertising situation on YouTube this spring (dubbed the "Adpocalypse"), YouTube is interested in hearing about creators' experiences on the platform. In particular, it's important for creators to understand the advertising guidelines and tools that brands interact with, in order to be aware how it may affect your monetization.

We've been discussing this issue with YouTube, who have been working to address creator concerns on this topic. They would like to share this presentation, which will be under NDA, in order to hear from ICG Members and creators we're in touch with as part of a small focus group.

We thought you would be an engaged and thoughtful participant and hope you're able to attend.

**Please RSVP with either yes, no, or maybe by September 5th.**

Thursday, September 14th  
Check in 11:00 AM; presentation at 11:30 AM  
YouTube Playa Vista Campus

### ***Understanding YouTube's Advertising-Friendly Content Guidelines***

*In this session, YouTube will cover the recent changes to the platform's Advertiser-Friendly Content Guidelines and what they mean to both advertisers and creators. They will review the updated guidelines, discuss how YouTube surfaces ads, and the targeting systems advertisers leverage to place their ads. This will be followed by a Q&A, where creators will be able to ask questions, as well as share their experiences and feedback on these changes.*

This event is invite-only and has limited space. If you know of other creators who would be interested in the topic and available to attend, please let me know their name, channel, and email address.

Thanks!

Laura

**Laura Chernikoff**

*Executive Director*

Internet Creators Guild

[internetcreatorsguild.com](http://internetcreatorsguild.com)

--

Davey Wavey

Digital Storyteller | [daveywavey.tv](http://daveywavey.tv)

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Davey Wavey

Digital Storyteller | [daveywavey.tv](http://daveywavey.tv)

**Stephanie Frosch**

*→ ElloSteph →*

[YouTube](#) | [Instagram](#) | [Twitter](#)

--



**Stephanie Frosch**

she/her/hers

Storyteller || Activist || Educator ||

phone: +1 954.235.4604



## **Exhibit “2”**

From: **Laura Chernikoff** <[laura@internetcreatorsguild.com](mailto:laura@internetcreatorsguild.com)>  
Date: Mon, Sep 11, 2017 at 1:08 PM  
Subject: Re: Focus Group event: YouTube's Advertising Guidelines  
To:  
Cc: Steph Frosch <[ellosteph@gmail.com](mailto:ellosteph@gmail.com)>

Thanks Davey! Moving you to bcc.

Steph, we're excited to have you at this event this week. Here's a confirmation with details about the location.

Please note that a non-disclosure agreement (NDA) will be sent via email by a member of the YouTube team and is required to be signed prior to the event, so keep an eye out!

**RSVP:** You are confirmed.

**Date:** Thursday, September 14th

**Check In Time:** 11am

**Presentation Starts:** 11:30am

\*Lunch and an opportunity to mingle with your fellow creators will be included.

**Location:** YouTube Playa Vista Office –  
12400 W. Bluff Creek Drive. Los Angeles, CA 90094

**Directions:** At the intersection of S Centinela Ave & Jefferson Blvd, turn onto S Campus Center Dr. Drive to the end of Campus Center Dr. Turn left on West Bluff Creek Drive and make a quick right into “Lot B”. US-PLV-H10 will be the building just West of the parking lot.

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If your plans have changed and you are unable to attend, please let us know ASAP.

Laura

**Laura Chernikoff**

*Executive Director*

Internet Creators Guild

[internetcreatorsguild.com](http://internetcreatorsguild.com)

On Fri, Sep 8, 2017 at 5:36 PM, Davey Wavey <[davey@daveywavey.tv](mailto:davey@daveywavey.tv)> wrote:  
Hey Laura,

CC'ing Steph Frosch on this. She'd love to attend!

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Do any other LA-based creators come to mind who were effected by this issue? I know the LGBT community especially deals with this and I want to make sure their voices are well represented in that room.

Laura

**Laura Chernikoff**

*Executive Director*

Internet Creators Guild

[internetcreatorsguild.com](http://internetcreatorsguild.com)

On Tue, Aug 29, 2017 at 9:52 AM, Davey Wavey <[davey@daveywavey.tv](mailto:davey@daveywavey.tv)> wrote:  
Hey Laura,

I'll be traveling - is there a remote option for attending?

Best,  
Davey

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We've been discussing this issue with YouTube, who have been working to address creator concerns on this topic. They would like to share this presentation, which will be under NDA, in order to hear from ICG Members and creators we're in touch with as part of a small focus group.

We thought you would be an engaged and thoughtful participant and hope you're able to attend.

**Please RSVP with either yes, no, or maybe by September 5th.**

Thursday, September 14th  
Check in 11:00 AM; presentation at 11:30 AM  
YouTube Playa Vista Campus

***Understanding YouTube's Advertising-Friendly Content Guidelines***

*In this session, YouTube will cover the recent changes to the platform's Advertiser-Friendly Content Guidelines and what they mean to both advertisers and creators. They will review the updated guidelines, discuss how YouTube surfaces ads, and the targeting systems advertisers leverage to place their ads. This will be followed by a Q&A, where creators will be able to ask questions, as well as share their experiences and feedback on these changes.*

This event is invite-only and has limited space. If you know of other creators who would be interested in the topic and available to attend, please let me know their name, channel, and email address.

Thanks!

Laura

**Laura Chernikoff**  
*Executive Director*  
Internet Creators Guild  
[internetcreatorsguild.com](http://internetcreatorsguild.com)

Davey Wavey  
Digital Storyteller | [daveywavey.tv](http://daveywavey.tv)

Davey Wavey  
Digital Storyteller | [daveywavey.tv](http://daveywavey.tv)

**Stephanie Frosch**



[YouTube](#) | [Instagram](#) | [Twitter](#)

## **Exhibit “3”**

From: **Google Legal** <[nda-noreply@google.com](mailto:nda-noreply@google.com)>  
Date: Wed, Sep 13, 2017 at 4:56 PM  
Subject: You have accepted Google's Non-Disclosure Agreement  
To: <[StephFrosch@gmail.com](mailto:StephFrosch@gmail.com)>

You have accepted the terms and conditions presented in Google's Non-Disclosure Agreement on 2017-09-13 20:56:35.

Company Name: ElloSteph  
Name: Stephanie Frosch  
Title: Content Creator  
Email: [StephFrosch@gmail.com](mailto:StephFrosch@gmail.com)  
Address:  
1300 N Curson Ave Apt 4  
West Hollywood, California, 90046  
United States

Below is a copy of the Agreement for your reference:

#### NON-DISCLOSURE AGREEMENT

In order to evaluate and possibly enter into a business transaction (the "Purpose"), Google Inc., for itself and its subsidiaries and affiliates, and the other party identified below hereby agree:

1. The Effective Date of this agreement is the date this agreement is accepted by the party identified below.
2. A party (the "Discloser") may disclose to the other party (the "Recipient") information pertaining to the Purpose that the Discloser considers confidential ("Confidential Information").
3. Recipient may use Confidential Information only for the Purpose. Recipient must use a reasonable degree of care to protect Confidential Information and to prevent any unauthorized use or disclosure of Confidential Information. Recipient may share Confidential Information with its employees, directors, agents or third party contractors who need to know it and if they have agreed with either party in writing to keep information confidential.
4. Confidential Information does not include information that: (a) was known to Recipient without restriction before receipt from Discloser; (b) is publicly available through no fault of Recipient; (c) is rightfully received by Recipient from a third party without a duty of confidentiality; or (d) is independently developed by Recipient. A party may disclose Confidential Information when compelled to do so by law if it provides

reasonable prior notice to the other party, unless a court orders that the other party not be given notice.

5. Either party may terminate this agreement with thirty days prior written notice, but this agreement's provisions will survive as to Confidential Information that is disclosed before termination.

6. Unless the parties otherwise agree in writing, Recipient's duty to protect Confidential Information expires five years from disclosure.

7. This agreement imposes no obligation to proceed with any business transaction.

8. No party acquires any intellectual property rights under this agreement except the limited rights necessary to use the Confidential Information for the Purpose.

9. This agreement does not create any agency or partnership relationship. This agreement is not assignable or transferable by either party without the prior written consent of the other party.

10. This agreement is the parties' entire agreement on this topic, superseding any prior or contemporaneous agreements. Any amendments must be in writing. The parties may execute this agreement in counterparts, which taken together will constitute one instrument. Failure to enforce any of provisions of this agreement will not constitute a waiver.

11. This agreement is governed by the laws of the State of California, excluding its conflict-of-laws principles. The exclusive venue for any dispute relating to this agreement shall be Santa Clara County, California.

CommMutual Rev 112707



## Stephanie Frosch

she/her/hers

Storyteller || Activist || Educator ||

phone: +1 954.235.4604



# **Exhibit “4”**

**From:** White, Lauren Gallo <lwhite@wsgr.com>  
**Sent:** Thursday, March 26, 2020 6:21 PM  
**To:** Debi Ramos <dramos@bgrfirm.com>  
**Cc:** Kramer, David <DKramer@wsgr.com>; Willen, Brian <bwillen@wsgr.com>; Knoll, Kelly <kknoll@wsgr.com>; Peter Obstler <pobstler@bgrfirm.com>; Grubbs, Deborah <DGrubbs@wsgr.com>; Kathleen McCormick <kmccormick@bgrfirm.com>  
**Subject:** Re: Divino Group, LLC v Google LLC, et al. [IWOV-DOCSLA.FID349140]

Debi:

As I said in my letter, further discussion would be productive to identify whether the information Ms. Frosch wishes to disclose might be protected by her NDA with YouTube. That is because we share your position that “any protective order [cannot] be used to keep non-confidential information from being presented to the Court and the public.” Your continued argument and apparent insistence on running to court despite defendants’ desire to meet and confer—and despite the parties’ obligation to do so—are unwarranted and improper. Nevertheless, because defendants are not aware of any confidential information that Ms. Frosch might have learned at the September 14, 2017 event that might be protected by her NDA with YouTube, defendants have no intention of enforcing the NDA against her. While it would of course be premature to introduce testimony or other evidence at the current stage of the case, in the event this case gets past the pleadings, defendants will not enforce the NDA to prevent Ms. Frosch from testifying about her September 14, 2017 meeting. But YouTube’s willingness to release Ms. Frosch from her obligations is not license to you to misstate the record, make misrepresentations, or improperly offer evidence to the Court.

Best regards,  
Lauren

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**PROOF OF SERVICE**

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

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

On April 20, 2020, I served true copies of the following document(s) described as

**PLAINTIFFS' MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF;  
DECLARATION OF PETER OBSTLER; DECLARATION OF STEPHANIE FROSCH;  
(Proposed) ORDER TO FILE SUR-REPLY**

on the interested parties in this action as follows:

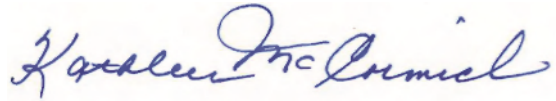
**SEE ATTACHED SERVICE LIST**

**BY MAIL ON 4/21/20:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Browne George Ross LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Los Angeles, California.

**BY EMAIL ON 4/20/20:** I served the document via email transmission to the email address listed above and did not, within a reasonable period of time, receive notice of an unsuccessful submission.

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

Executed on April 20, 2020, at Los Angeles, California.



Kathleen McCormick



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**SERVICE LIST**  
**Divino Group LLC v. Google LLC and YouTube, LLC**  
**United States District Court - Case No. 5:19-cv-00479-VKD**

INDRANEEL SUR  
Trial Attorney  
Civil Division, Federal Programs Branch  
1100 L Street, NW  
Washington, DC 20530  
202-616-8488  
EMAIL: indraneel.sur@usdoj.gov

# **Exhibit “B”**

Electronically Filed  
by Superior Court of CA,  
County of Santa Clara,  
on 11/19/2019 3:51 PM  
Reviewed By: R. Walker  
Case #19CV340667  
Envelope: 3671559

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA

PRAGER UNIVERSITY,

Plaintiff,

vs.

GOOGLE LLC, et al.,

Defendants.

Case No.: 19CV340667

**ORDER AFTER HEARING ON  
OCTOBER 25, 2019**

- (1) Demurrer by Defendants Google LLC and YouTube, LLC to the First Amended Complaint**
- (2) Motion by Plaintiff Prager University for Preliminary Injunction**

The above-entitled matter came on for hearing on Friday, October 25, 2019 at 11:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh presiding. A tentative ruling was issued prior to the hearing. The appearances are as stated in the record. The Court has reviewed and considered the written submissions of all parties and has reflected on the oral argument of counsel, including by reviewing the transcript lodged by plaintiff on November 14, 2019. Being fully advised, the Court adopts the tentative ruling as follows:

This action arises from Prager University's allegations that YouTube, LLC and its parent company Google LLC have unlawfully restricted content created by Prager on YouTube, defendants' social media and video sharing platform. Before the Court are defendants' demurrer

1 to the operative First Amended Complaint (“FAC”) and Prager’s motion for a preliminary  
2 injunction. Both motions are opposed.

3  
4 I. Factual and Procedural Background

5 As alleged in the FAC, Prager is a non-profit, 501(c)(3) tax exempt, educational  
6 organization that promotes discussion on historical, religious, and current events by  
7 disseminating educational videos intended for younger, student-based audiences between the  
8 ages of 13 and 35. (FAC, ¶ 10.) The videos depict scholars, sources, and other prominent  
9 speakers who often espouse viewpoints in the mainstream of conservative thought. (*Ibid.*)

10 Defendants operate YouTube as the largest and most profitable mechanism for  
11 monetizing free speech and freedom of expression in the history of the world, generating \$10 to  
12 15 billion in annual revenue by monetizing the content of users like Prager who are invited to  
13 post videos to YouTube. (FAC, ¶ 11.) Since its inception, Prager has posted more than 250 of  
14 its videos to YouTube. (*Id.* at ¶ 39.)

15 A. The Alleged Content Restriction Scheme

16 To induce users like Prager to upload video content, defendants represent that YouTube  
17 is a public place for free speech defined by “four essential freedoms” that govern the public’s use  
18 of the platform:

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

1 (FAC, ¶ 12.) Defendants further promise that YouTube is governed by content-based rules and  
2 filtering which “apply equally to all,” regardless of the viewpoint, identity, or source of the  
3 speaker. (*Id.* at ¶ 13.)

4 However, contrary to these representations, defendants censor, restrict, and restrain video  
5 content based on animus, discrimination, profit, and/or for any other reason “or no reason.”  
6 (FAC, ¶ 14.) According to Prager, an internal memo and presentation entitled “The Good  
7 Censor” shows that defendants have secretly decided to “ ‘migrate’ away from [serving as] a  
8 hosting platform ... where the public is invited to engage in freedom of expression” to become a  
9 media company that profits “by promoting Defendants’ own, or their preferred content through  
10 the exercise of unfettered discretion to censor and curate otherwise public content.” (*Id.* at  
11 ¶¶ 56-65.) To effectuate their discriminatory practices, defendants use clandestine filtering tools,  
12 including algorithms and other machine-based and manual review tools, that are embedded with  
13 discriminatory and anti-competitive animus-based code, including code that is used to identify  
14 and restrict content based on the identity, viewpoint, or topic of the speaker. (*Id.*, ¶ 19.) They  
15 also “ensure that the YouTube employees charged with administering the content filtering and  
16 regulation scheme ... operate in a dysfunctional and politically partisan workplace environment.”  
17 (*Id.* at ¶ 20.)

18 Against this background, Prager’s rights under California law have been violated by two  
19 unlawful content-based restrictions: (i) “Restricted Mode,” a filtering protocol that defendants  
20 use to block what they deem, in their sole, unfettered discretion, to be “inappropriate” for  
21 “sensitive” audiences and (ii) “Advertising Restrictions,” a content-based video advertising  
22 restriction policy that prohibits potential advertisers from accessing videos that defendants deem  
23 “inappropriate” for advertising. (FAC, ¶ 17.) Defendants use these mechanisms as a pretext to  
24 restrict and censor Prager’s videos, even though the content of its videos complies with  
25 YouTube’s Terms of Service, Community Guidelines, and criteria for “sensitive audiences” and  
26 advertisers, while they fail to restrict the content of other preferred users, content partners, and  
27 content produced by defendants themselves that is not compliant. (*Id.* at ¶¶ 18, 23.) Defendants  
28

1 have provided no rational basis for restricting Prager’s content while allowing similar or  
2 noncompliant content to go unrestricted. (*Id.* at ¶ 25.)

### 3 B. Restricted Mode

4 According to defendants, Restricted Mode is intended “to help institutions like schools as  
5 well as people who wanted to better control the content they see on YouTube with an option to  
6 choose an intentionally limited YouTube experience.” (FAC, ¶ 68.) Viewers can choose to turn  
7 Restricted Mode on from their personal accounts, but it may also be turned on by system  
8 administrators for libraries, schools, and other institutions or workplaces. (*Ibid.*) Defendants  
9 estimate that about 1.5 percent of YouTube’s daily views (or approximately 75 million views per  
10 day) come from individuals using Restricted Mode. (*Id.* at ¶ 69.) When Restricted Mode is  
11 activated, a video’s name, creator or subject, and content, along with any other information  
12 related to the video, are blocked, as if the video did not exist on the YouTube platform. (*Id.* at  
13 ¶ 68.)

14 Defendants claim to restrict content in Restricted Mode based upon their “Restricted  
15 Mode Guidelines,” which identify five criteria for determining whether content warrants  
16 restriction:

- 17 1. Talking about drug use or abuse, or drinking alcohol in videos;
- 18 2. Overly detailed conversations about or depictions of sex or sexual activity;
- 19 3. Graphic descriptions of violence, violent acts, natural disasters and tragedies, or even  
20 violence in the news;
- 21 4. Videos that cover specific details about events related to terrorism, war, crime, and  
22 political conflicts that resulted in death or serious injury, even if no graphic imagery is  
23 shown;
- 24 5. Inappropriate language, including profanity; and
- 25 6. Video content that is gratuitously incendiary, inflammatory, or demeaning towards an  
26 individual or group.

27 (FAC, ¶ 70.) Videos are initially restricted through an automated filtering algorithm that  
28 examines certain “signals” like the video’s metadata, title, and language, or following manual  
review if a video is “flagged” as inappropriate by public viewers. (*Id.*, ¶ 71.)

YouTube also publishes “Community Guidelines” and “Age Based Restriction”  
guidelines similar to its “Restricted Mode Guidelines”; however, content that complies with

1 these guidelines may nevertheless be subject to Restricted Mode. (FAC, ¶¶ 72-73.) Prager's  
2 videos have never been age restricted or found to violate YouTube's Community Guidelines.  
3 (*Id.* at ¶ 75.)

4 Defendants have admitted that they make "mistakes in understanding context and  
5 nuances when [assessing] which videos to make available in Restricted Mode." (FAC, ¶ 91.)  
6 For example, on March 19, 2017, they publicly admitted that they improperly restricted videos  
7 posted or produced by members of the LGBTQ community and changed their policy, filtering  
8 algorithm, and manual review policies in response to complaints from this community. (*Id.* at  
9 ¶¶ 94-96.) However, Prager alleges that defendants have continued to improperly restrict videos  
10 by LGBTQ users, which is evidence of viewpoint animus. (*Id.* at ¶¶ 97-98.)

### 11 C. Advertising Restrictions

12 Defendants also restrict users like Prager "from monetizing or boosting the reach or  
13 viewer distribution of [their] videos." (FAC, ¶ 78.) Prager alleges that these restrictions are  
14 ostensibly governed by the "AdSense program policies," which it suggests are "similar[ly]  
15 vague, ambiguous, and arbitrary" to the Restricted Mode Guidelines. (*Id.* at ¶¶ 78, 80.) Prager  
16 claims that, similar to their "mistakes" in applying "Restricted Mode," defendants once "denied a  
17 reach boost or ad product" on the ground of "shocking content" based on a user's sexual or  
18 gender orientation and viewpoint. (*Id.* at ¶ 81.) It alleges that the application of such an  
19 "inappropriate" or "shocking content" designation falsely and unfairly stigmatizes Prager as  
20 well. (*Id.* at ¶ 82.) (However, while Prager alleges that certain of its videos have been  
21 demonetized, it does not allege whether defendants gave specific reasons for these actions or  
22 what those reasons were.) (See *id.* at ¶ 84.)

### 23 D. The Parties' Dispute

24 In July of 2016, Prager discovered that defendants were restricting user access to its  
25 videos through Restricted Mode. (FAC, ¶ 101.) It raised the issue with defendants, but they  
26 have failed to offer any reasonable or consistent explanation for why Prager's videos are being  
27 restricted. (*Id.* at ¶¶ 101-117.) In 2016, at least 16 Prager videos were restricted; by 2017, a total  
28 of 21 were. (*Ibid.*) By the time the FAC was filed in May of 2019, the total had risen to 80. (*Id.*

1 at ¶ 127.) Prager’s videos were either “restricted as to content, demonetized, or both.” (*Id.* at  
2 ¶ 116.) Defendants also discontinued Prager’s “ad grants” account for more than six days in  
3 October of 2017. (*Id.* at ¶ 118.) On pages 9-17 of the FAC, Prager provides a chart listing its  
4 restricted videos by title, along with videos from defendants’ “preferred content providers” with  
5 similar titles that are unrestricted. (*Id.* at ¶ 23.)

6 On October 23, 2017, Prager sued defendants in federal court, asserting claims for  
7 (1) violation of Article I, section 2 of the California Constitution; (2) violation of the First  
8 Amendment of the United States Constitution; (3) violation of the California Unruh Civil Rights  
9 Act (“Unruh Act”), Cal. Civ. Code. § 51 *et seq.*; (4) violation of California’s Unfair Competition  
10 Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*; (5) breach of the implied covenant of  
11 good faith and fair dealing; (6) violation of the Lanham Act, 15 U.S.C. § 1125 *et seq.*; and  
12 (7) declaratory relief. (*Prager University v. Google LLC* (N.D. Cal., Mar. 26, 2018, No. 17-CV-  
13 06064-LHK) 2018 WL 1471939, at \*2.) It filed a motion for a preliminary injunction in the  
14 federal action on December 29, 2017. (*Id.* at \*3.) On March 26, 2018, the federal court granted  
15 defendants’ motion to dismiss Prager’s federal claims and denied Prager’s motion for a  
16 preliminary injunction, finding that Prager had failed to state a claim for violation of the First  
17 Amendment because it did not allege state action, and had also failed to state a claim under the  
18 Lanham Act. (*Id.* at \*5-13.) Having dismissed all of Prager’s federal claims, the court declined  
19 to exercise supplemental jurisdiction over its state law claims, explaining:

20 Here, the factors of economy, convenience, fairness, and comity support dismissal  
21 of Plaintiff’s remaining state law claims. This case is still at the pleading stage,  
22 and no discovery has taken place. Federal judicial resources are conserved by  
23 dismissing the state law theories of relief at this stage. Further, the Court finds  
24 that dismissal promotes comity as it enables California courts to interpret  
25 questions of state law. This is an especially important consideration in the instant  
26 case because Plaintiff asserts a claim that demands an analysis of the reach of  
27 Article I, section 2 of the California Constitution in the age of social media and  
28 the Internet.

(*Prager University v. Google LLC, supra*, 2018 WL 1471939, at \*13.) Prager has appealed the  
federal court’s ruling to the Court of Appeal for the Ninth Circuit, which heard argument in the  
matter on August 27, 2019.



1 Prager filed this action on January 8, 2019, reasserting its state law claims for  
2 (1) violation of Article I, section 2 of the California Constitution; (2) violation of the Unruh Act;  
3 (3) violation of the UCL; and (4) breach of the implied covenant of good faith and fair dealing.  
4 On May 13, the Court entered a stipulated order establishing a briefing schedule for Prager's  
5 anticipated motion for a preliminary injunction and defendants' anticipated demurrer and/or  
6 special motion to strike. On May 20, pursuant to that order, Prager moved for a preliminary  
7 injunction and filed the FAC, which asserts the same four causes of action as its original  
8 complaint. Defendants filed their demurrer on June 28. Both matters are now fully briefed and  
9 came on for hearing by the Court on October 25, 2019.

## 11 II. Demurrer to the FAC

12 Defendants demur to each cause of action in the FAC for failure to state a claim. (Code  
13 Civ. Proc., § 430.10, subd. (e).) They contend that Prager's claims are barred by two provisions  
14 of section 230 of the Communications Decency Act (the "CDA") and by the First Amendment,  
15 and otherwise fail to state a cause of action.

16 Defendants' request for judicial notice, which is unopposed, is GRANTED as to public  
17 web pages displaying the terms of the various YouTube policies at issue in this action (Exhibits  
18 1-9). (Evid. Code § 452, subd. (h); see *Pacific Employers Ins. Co. v. State of Cal.* (1970) 3  
19 Cal.3d 573, 575, fn.1 [where portions of agreement were attached to plaintiff's complaint, the  
20 balance of that agreement was properly a subject of judicial notice]; *Ingram v. Flippo* (1999) 74  
21 Cal.App.4th 1280, 1285 [judicial notice of letter and media release was proper where, although  
22 they were not attached to the complaint, they formed a basis for the claims, and the complaint  
23 excerpted quotes and summarized parts in detail, thus "it is essential that we evaluate the  
24 complaint by reference to these documents"].) Defendants' request is also GRANTED as to a  
25 transcript of a case management conference held in the federal action, although the Court is not  
26 bound by the court's comments or rulings in that case. (Evid. Code § 452, subd. (d).)

27 ///

28 ///

1           A. Legal Standard

2           The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital*  
3 *Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.)

4           Consequently, “[a] demurrer reaches only to the contents of the pleading and such matters as  
5 may be considered under the doctrine of judicial notice.” (*South Shore Land Co. v.*  
6 *Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations and quotations omitted; see also  
7 Code Civ. Proc., § 430.30, subd. (a).) “It is not the ordinary function of a demurrer to test the  
8 truth of the plaintiff’s allegations or the accuracy with which he describes the defendant’s  
9 conduct. ... Thus, ... the facts alleged in the pleading are deemed to be true, however improbable  
10 they may be.” (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal  
11 citations and quotations omitted.)

12           In ruling on a demurrer, the allegations of the complaint must be liberally construed, with  
13 a view to substantial justice between the parties. (*Glennen v. Allergan, Inc.* (2016) 247  
14 Cal.App.4th 1, 6.) Nevertheless, while “[a] demurrer admits all facts properly pleaded, [it does]  
15 not [admit] contentions, deductions or conclusions of law or fact.” (*George v. Automobile Club*  
16 *of Southern California* (2011) 201 Cal.App.4th 1112, 1120.) A demurrer will lie  
17 where the allegations and matters subject to judicial notice clearly disclose some defense or bar  
18 to recovery, including a statutory immunity. (*Casterson v. Superior Court (Cardoso)* (2002) 101  
19 Cal.App.4th 177, 183.)

20           B. Violation of the California Constitution

21           Because concepts related to the parties’ speech rights under the First Amendment and  
22 California Constitution are important to other aspects of its analysis, the Court will first examine  
23 whether Prager states a claim for violation of Article I, section 2 of the California Constitution.

24           As urged by defendants, “California’s free speech clause”—like the First Amendment—  
25 “contains a state action limitation.” (*Golden Gateway Center v. Golden Gateway Tenants*  
26 *Assn.* (2001) 26 Cal.4th 1013, 1023.) However, the California Constitution’s protection of  
27 speech has been interpreted more broadly in this regard. (See *Fashion Valley Mall, LLC v.*  
28 *National Labor Relations Bd.* (2007) 42 Cal.4th 850, 862-863.) Most notably, in the

1 “groundbreaking” decision of *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, the  
2 Supreme Court of California “departed from the First Amendment jurisprudence of the United  
3 States Supreme Court and extended the reach of the free speech clause of the California  
4 Constitution to privately owned shopping centers.” (*Golden Gateway Center v. Golden Gateway  
5 Tenants Assn.*, *supra*, 26 Cal.4th at p. 1016.)

6 More than 20 years after *Robins v. Pruneyard*, *Golden Gateway Center* confirmed and  
7 began to define the scope of the state action limitation under the California Constitution, finding  
8 the requirement was not satisfied where a tenants’ association sought to distribute leaflets in a  
9 private apartment complex that was “not freely open to the public.” (*Golden Gateway Center v.  
10 Golden Gateway Tenants Assn.*, *supra*, 26 Cal.4th at p. 1031.) *Golden Gateway Center* looked  
11 to the reasoning of *Robins* for guidance, noting that “*Robins* relied heavily on the functional  
12 equivalence of the shopping center to a traditional public forum—the downtown or central  
13 business district,” and relied on “the public character of the property,” emphasizing “the public’s  
14 unrestricted access.” (*Id.* at pp. 1032-1033, internal citations and quotations omitted.) *Golden  
15 Gateway Center* held that this unrestricted access is a “threshold requirement for establishing  
16 state action”: without it, private property “is not the functional equivalent of a traditional public  
17 forum.” (*Id.* at p. 1033.) In announcing this requirement, the opinion confirmed that it “largely  
18 follow[ed] the Court of Appeal decisions construing *Robins*,” including *Planned Parenthood v.  
19 Wilson* (1991) 234 Cal.App.3d 1662. (*Id.* at p. 1033.) Those decisions also emphasized  
20 *Robins*’s focus on “the unique character of the modern shopping center and ... the public role  
21 such centers have assumed in contemporary society” by effectively replacing “the traditional  
22 town center business block, where historically the public’s First Amendment activity was  
23 exercised and its right to do so scrupulously guarded.” (*Planned Parenthood v. Wilson, supra*,  
24 234 Cal.App.3d at pp. 1669-1670.) This concept was again emphasized by the California  
25 Supreme Court in *Fashion Valley*, which repeatedly referenced “[t]he idea that private property  
26 can constitute a public forum for free speech if it is open to the public in a manner similar to that  
27 of public streets and sidewalks ....” (*Fashion Valley Mall, LLC v. National Labor Relations Bd.*,  
28 *supra*, 42 Cal.4th at p. 858; see also *id.* at p. 859.)

1 With this fundamental principle in mind, it is apparent that Prager does not state a claim  
2 under the California Constitution. Prager contends that “YouTube is the cyber equivalent of a  
3 town square where citizens exchange ideas on matters of public interest” and that defendants  
4 have opened their platform to the public by advertising its use for this purpose. However, Prager  
5 does not allege that it has been denied access to the core YouTube service. Rather, it urges that  
6 its access to “Restricted Mode” and YouTube’s advertising service has been restricted. Prager  
7 does not persuade the Court that these services are freely open to the public or are the functional  
8 equivalent of a traditional public forum like a town square or a central business district.<sup>1</sup>

9 Considering “the nature, purpose, and primary use of the property; the extent and nature of the  
10 public invitation to use the property; and the relationship between the ideas sought to be  
11 presented and the purpose of the property’s occupants” (*Albertson’s, Inc. v. Young* (2003) 107  
12 Cal.App.4th at p. 119), it is clear that these services are nothing like a traditional public forum.  
13 “Restricted Mode” is an optional service that enables users to limit the content that they (or their  
14 children, patrons, or employees) view in order to avoid mature content. Limiting content is the  
15 very purpose of this service, and defendants do not give content creators unrestricted access to it  
16 or suggest that they will do so. The service exists to permit users to avoid the more open  
17 experience of the core YouTube service. Similarly, the use of YouTube’s advertising service is  
18 restricted to meet the preferences of advertisers. (See FAC, ¶ 80 [stated purpose of advertising  
19 restrictions “is to keep Google’s content and search networks safe and clean for our advertisers  
20 ...”]; Declaration of Brian M. Willen, Exs. 7-9.)

21 Defendants correctly urge that even to recognize the core YouTube platform as a public  
22 forum would be a dramatic expansion of *Robins*. As one federal court observed, “[t]he analogy  
23 between a shopping mall and the Internet is imperfect, and there are a host of potential ‘slippery  
24 slope’ problems that are likely to surface were [*Robins*] to apply to the Internet.” (*hiQ Labs, Inc.*  
25 *v. LinkedIn Corporation* (N.D. Cal. 2017) 273 F.Supp.3d 1099, 1116 [observing that “[n]o court  
26

27  
28 <sup>1</sup> Prager cites no authority that supports its position that a court can never determine the applicability of *Robins* on  
demurrer, and this position is incorrect. (See *Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1577, fn.  
4 [stating that scope of *Robins* can be addressed on demurrer in appropriate circumstances].) Here, the necessary  
facts are alleged in the FAC and/or subject to judicial notice.

1 has expressly extended [*Robins*] to the Internet generally”], *aff’d and remanded* (9th Cir. 2019)  
2 938 F.3d 985.) However the courts of this state ultimately view that analogy with regard to a  
3 dominant, widely-used site like the core YouTube service, the analogy falls apart completely on  
4 the facts alleged here. “Restricted Mode” and YouTube’s advertising service are new, inherently  
5 selective platforms that do not resemble a traditional public forum. As discussed below, even  
6 more than the core YouTube service, these platforms necessarily reflect the exercise of editorial  
7 discretion rather than serving as an open “town square.”

8 Finally, Prager contends that cases that have deemed web sites to be “public forums” for  
9 purposes of California’s “anti-SLAPP” statute require this Court to extend *Robins* to its claim.  
10 However, the anti-SLAPP statute encompasses speech “*in a place open to the public or a public*  
11 *forum in connection with an issue of public interest*” (Code Civ. Proc., § 425.16, subd. (e)(3),  
12 emphasis added), and has been applied to locations that clearly do not meet the standard  
13 described in *Golden Gateway Center*. (See, e.g., *Seelig v. Infinity Broadcasting Corp.* (2002) 97  
14 Cal.App.4th 798, 807 [anti-SLAPP statute applied to comments made during on-air discussion  
15 on talk radio].) “[T]he protections afforded by the anti-SLAPP statute are not coextensive with  
16 the categories of conduct or speech protected by the First Amendment or its California  
17 counterparts (Cal. Const., art. I, §§ 2–4).” (*Industrial Waste & Debris Box Service, Inc. v.*  
18 *Murphy* (2016) 4 Cal.App.5th 1135, 1152.) “As our high court recently reaffirmed, ‘courts  
19 determining whether conduct is protected under the anti-SLAPP statute look not to First  
20 Amendment law, but to the statutory definitions in section 425.16, subdivision (e).’ ” (*Ibid.*,  
21 quoting *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 422.)

22 Defendants’ demurrer to the first cause of action will accordingly be sustained without  
23 leave to amend. In addition to failing to state a claim under *Robins v. Pruneyard*, this cause of  
24 action is barred by section 230 of the CDA for the reasons discussed below. (See *In re*  
25 *Garcia* (2014) 58 Cal.4th 440, 452 [supremacy clause of the federal Constitution requires that  
26 any conflicting state law give way to federal statute], citing U.S. Const., art. VI, cl. 2 [“This  
27 Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall  
28

1 be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in  
2 the Constitution or laws of any state to the contrary notwithstanding”].)

### 3 B. CDA Immunity

4 Section 230(c)(1) of the CDA provides that “[n]o provider or user of an interactive  
5 computer service shall be treated as the publisher or speaker of any information provided by  
6 another information content provider.” “§ 230 precludes courts from entertaining claims that  
7 would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a  
8 service provider liable for its exercise of a publisher’s traditional editorial functions—such as  
9 deciding whether to publish, withdraw, postpone or alter content—are barred.” (*Hassell v.*  
10 *Bird* (2018) 5 Cal.5th 522, 536, quoting *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d  
11 327, 330.)

12 “The CDA—of which section 230 is a part—was enacted in 1996.” (*Delfino v. Agilent*  
13 *Technologies, Inc.* (2006) 145 Cal.App.4th 790, 802.) “Its ‘primary goal ... was to control the  
14 exposure of minors to indecent material’ over the Internet.” (*Ibid.*, quoting *Batzel v. Smith* (9th  
15 Cir. 2003) 333 F.3d 1018, 1026, superseded by statute on another point as stated in *Breazeale v.*  
16 *Victim Services, Inc.* (9th Cir. 2017) 878 F.3d 759, 766.) “Thus, an ‘important purpose of  
17 [the CDA] was to encourage [Internet] service providers to self-regulate the dissemination of  
18 offensive materials over their services.’ ” (*Ibid.*, quoting *Zeran v. America Online, Inc.*, *supra*,  
19 129 F.3d at p. 331.) Section 230(c)(2) consequently immunizes service providers<sup>2</sup> who  
20 endeavor to restrict access to material deemed objectionable, providing that

21 [n]o provider or user of an interactive computer service shall be held liable on  
22 account of--

23 (A) any action voluntarily taken in good faith to restrict access to or availability of  
24 material that the provider or user considers to be obscene, lewd, lascivious, filthy,  
25 excessively violent, harassing, or otherwise objectionable, whether or not such  
material is constitutionally protected; or

26 (B) any action taken to enable or make available to information content providers  
27 or others the technical means to restrict access to material described in

28 <sup>2</sup> There is no dispute that defendants are providers of “an interactive computer service” under section 230.

1 paragraph (1).<sup>3</sup>

2 (47 U.S.C. § 230(c)(2).)

3 A second, but related, objective of the CDA “was to avoid the chilling effect upon  
4 Internet free speech that would be occasioned by the imposition of tort liability upon companies  
5 that do not create potentially harmful messages but are simply intermediaries for their delivery.”  
6 (*Delfino v. Agilent Technologies, Inc.*, *supra*, 145 Cal.App.4th at pp. 802-803.) The legislative  
7 history reflects that Congress was responding to a New York trial court case where “a service  
8 provider was held liable for defamatory comments posted on one of its bulletin boards, based on  
9 a finding that the provider had adopted the role of ‘publisher’ by actively screening and editing  
10 postings.” (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 44.) “ ‘Fearing that the specter of liability  
11 would ... deter service providers from blocking and screening offensive material,’ ” Congress  
12 forbid “ ‘the imposition of publisher liability on a service provider for the exercise of its editorial  
13 and self-regulatory functions.’ ” (*Id.*, quoting *Zeran v. America Online, Inc.*, *supra*, 129 F.3d at  
14 p. 331.) Thus, section 230(c)(1) “ ‘confer[s] broad immunity on Internet intermediaries’ ” in “  
15 ‘a strong demonstration of legislative commitment to the value of maintaining a free market for  
16 online expression.’ ” (*Hassell v. Bird*, *supra*, 5 Cal.5th at p. 539, quoting *Barrett v. Rosenthal*,  
17 *supra*, 40 Cal.4th at p. 56.)

18 Of the two provisions, section 230(c)(1) has been applied more frequently and broadly,  
19 including by courts in the Northern District of California to conduct indistinguishable from that  
20 alleged in this action. Notably, in *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.* (N.D. Cal.  
21 2015) 144 F.Supp.3d 1088, 1090, *aff’d sub nom. Sikhs for Justice, Inc. v. Facebook, Inc.* (9th  
22 Cir. 2017) 697 Fed.App’x. 526, a human rights organization alleged that Facebook blocked  
23 access to its page in India “on its own or on the behest of the Government of India,” because of  
24 discrimination on the grounds of race, religion, ancestry, and national origin. Quoting *Barnes v.*  
25 *Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096 and *Fair Housing Council of San Fernando Valley v.*  
26 *Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157, the court reasoned that

27  
28 <sup>3</sup> It is widely agreed that section 230(c)(2)(B)’s reference to “paragraph (1)” is an error, and the provision should be interpreted to refer to section 230(c)(2)(A) or “paragraph (A).” (See, e.g., *Enigma Software Group USA, LLC v. Malwarebytes, Inc.* (9th Cir. 2019) 938 F.3d 1026, 1031, fn. 1.)

1  
2 [p]ublication involves reviewing, editing, and deciding whether to publish or to  
3 withdraw from publication third-party content. Thus, a publisher decides whether  
4 to publish material submitted for publication. It is immaterial whether this  
5 decision comes in the form of deciding what to publish in the first place or what  
6 to remove among the published material. ***In other words, any 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.***

7 (*Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*, *supra*, 144 F.Supp.3d at p. 1094, emphasis  
8 added, internal citations and quotations omitted.) This approach has been endorsed by the Ninth  
9 Circuit. (See *Riggs v. MySpace, Inc.* (9th Cir. 2011) 444 Fed.App’x. 986, 987 [district court  
10 properly dismissed claims “arising from MySpace’s decisions to delete Riggs’s user profiles on  
11 its social networking website yet not delete other profiles Riggs alleged were created by celebrity  
12 imposters,” citing *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*,  
13 *supra*, 521 F.3d at pp. 1170-1171 for the proposition that “any activity that can be boiled down  
14 to deciding whether to exclude material that third parties seek to post online is perforce immune  
15 under section 230”].) California opinions have similarly reasoned that the “type of activity” at  
16 issue here—“to restrict or make available certain material”—“is expressly covered by section  
17 230.” (*Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 572-573 [describing “the general  
18 consensus to interpret section 230 immunity broadly, extending from *Zeran ...*”]; see also  
19 *Hassell v. Bird*, *supra*, 5 Cal.5th at p. 537 [California “courts have followed *Zeran* in adopting a  
20 broad view of section 230’s immunity provisions”].) This interpretation was recently applied  
21 again by the Northern District in *Federal Agency of News LLC v. Facebook, Inc.* (N.D. Cal., July  
22 20, 2019, No. 18-CV-07041-LHK) --- F.Supp.3d ---, 2019 WL 3254208, where it was held that  
23 section 230(c)(1) immunized Facebook from claims arising from its removal of a Russian  
24 company’s account and page due to its alleged control by an entity found to have interfered in  
25 the 2016 United States presidential election.<sup>4</sup>

26  
27 <sup>4</sup> See also *Langdon v. Google, Inc.* (D. Del. 2007) 474 F.Supp.2d 622, 630-631 (applying immunity under section  
28 230(c)(1) and/or (2) where plaintiff alleged defendants refused to display ads on his web pages criticizing the North  
Carolina and Chinese governments based on political viewpoint discrimination); *Levitt v. Yelp! Inc.* (N.D. Cal., Oct.  
26, 2011, No. C-10-1321 EMC) 2011 WL 5079526, at \*7-9, *aff’d* (9th Cir. 2014) 765 F.3d 1123 (section 230(c)(1)  
immunity applied to allegations that Yelp manipulated plaintiffs’ user reviews in order to induce them to pay for



1 Consistent with the language of section 230(c)(1), these cases do not question the service  
 2 provider's motive in deciding to remove content from its service. While Prager contends that  
 3 section 230(c)(1) immunity should not be applied where a plaintiff alleges a service provider  
 4 acted in bad faith or to stifle competition, it cites no persuasive authority adopting this  
 5 interpretation.<sup>5</sup>

6 Courts have expressed greater concern with the issue of motive when interpreting section  
 7 230(c)(2), perhaps because paragraph (A) of that provision expressly includes a "good faith"  
 8 requirement. Here, defendants rely on paragraph (B) of that provision, which they urge—like  
 9 section 230(c)(1)—does not require good faith. In *Zango, Inc. v. Kaspersky Lab, Inc.* (9th Cir.  
 10 2009) 568 F.3d 1169, 1176-1177, the Ninth Circuit applied section 230(c)(2)(B) to a provider of  
 11 Internet security software that deemed the plaintiff's software to be "malware," noting that the  
 12 plaintiff had waived the issue of "whether subparagraph (B), which has no good faith language,  
 13

14 advertising); *Lancaster v. Alphabet Inc.* (N.D. Cal., July 8, 2016, No. 15-CV-05299-HSG) 2016 WL 3648608, at \*2-  
 15 3 ("§ 230(c)(1) of the CDA prohibits any claim arising from Defendants' removal of Plaintiffs' videos"); *Green v.*  
 16 *YouTube, LLC* (D.N.H., Mar. 13, 2019, No. 18-CV-203-PB) 2019 WL 1428890, at \*6, *report and recommendation*  
 17 *adopted sub nom. Green v. YouTube, Inc.* (D.N.H., Mar. 29, 2019, No. 18-CV-203-PB) 2019 WL 1428311  
 18 (applying immunity under section 230(c)(1) where plaintiff alleged his accounts were improperly shut down);  
 19 *Brittain v. Twitter, Inc.* (N.D. Cal., June 10, 2019, No. 19-CV-00114-YGR) 2019 WL 2423375, at \*3 (section  
 20 230(c)(1) immunity applied where plaintiff alleged improper suspension of his Twitter accounts and that Twitter  
 21 "limit[ed] users who reference new/competing networks and/or utilize Third Party API services"); *King v.*  
 22 *Facebook, Inc.* (N.D. Cal., Sept. 5, 2019, No. 19-CV-01987-WHO) 2019 WL 4221768 (section 230(c)(1) immunity  
 23 applied to theory that "Facebook has violated its (Terms of Service) in removing [plaintiff's] posts and suspending  
 24 his account, and that Facebook treats black activists and their posts differently than it does other groups, particularly  
 25 white supremacists and certain 'hate groups'").

26 <sup>5</sup> To the extent *e-ventures Worldwide, LLC v. Google, Inc.* (M.D. Fla. 2016) 188 F.Supp.3d 1265 adopts Prager's  
 27 view, it does so by conflating section 230(c)(1) and section 230(c)(2) with no analysis. The Court does not find this  
 28 persuasive. While a subsequent, unpublished opinion in that action, *e-ventures Worldwide, LLC v. Google,*  
 29 *Inc.* (M.D. Fla., Feb. 8, 2017, No. 214CV646FTMPAMCM) 2017 WL 2210029, \*3-4 reasoned that applying  
 30 section 230(c)(1) to service providers' editorial decisions regarding a plaintiff's own content would swallow "the  
 31 more specific immunity in (c)(2)" with its good faith requirement, the opinion went on to grant summary judgment  
 32 based on the First Amendment's protection of editorial judgments, "no matter the motive." This case does not  
 33 persuade the Court to part ways with the courts that apply section 230(c)(1) to the same end based on the same  
 34 reasoning.

35 Similarly, *Levitt v. Yelp! Inc.* (N.D. Cal., Mar. 22, 2011, No. C 10-1321 MHP) 2011 WL 13153230, at \*9 deemed it  
 36 "a[] close[] question ... whether Yelp may be held liable for its removal of positive reviews for the alleged purpose  
 37 of coercing businesses to purchase advertising," considering that this theory implicated bad faith. The court  
 38 ultimately did not resolve the issue as it found the complaint otherwise failed to state a cause of action. A  
 39 subsequent opinion in that case, *Levitt v. Yelp! Inc.* (N.D. Cal., Oct. 26, 2011, No. C-10-1321 EMC) 2011 WL  
 40 5079526, \*9 held that section 230(c)(1) does not include a good faith requirement, and applied "even assuming  
 41 Plaintiffs have adequately pled allegations stating a claim of an extortionate threat with respect to Yelp's alleged  
 42 manipulation of user reviews." The Court finds the reasoning of the subsequent opinion more persuasive.

1 should be construed implicitly to have a good faith component like subparagraph (A).” The  
2 concurring opinion expressed concern with extending immunity beyond the facts present in that  
3 case:

4 Congress plainly intended to give computer users the tools to filter the Internet’s  
5 deluge of material *users* would find objectionable, in part by immunizing the  
6 providers of blocking software from liability. *See* § 230(b)(3). But under the  
7 generous coverage of § 230(c)(2)(B)’s immunity language, a blocking software  
8 provider might abuse that immunity to block content for anticompetitive purposes  
or merely at its malicious whim, under the cover of considering such material  
“otherwise objectionable.”

9 (*Zango, Inc. v. Kaspersky Lab, Inc.*, *supra*, 568 F.3d at p. 1178 (conc. opn. of Fisher, J).)

10 Noting that “[d]istrict courts nationwide have grappled with the issues discussed in *Zango*’s  
11 majority and concurring opinions, and have reached differing results,” the Ninth Circuit recently  
12 held that a service provider’s intent may be relevant under section 230(c)(2)(B): specifically,  
13 where a plaintiff alleges blocking by a direct competitor for anticompetitive purposes, its claims  
14 survive dismissal. (*Enigma Software Group USA, LLC v. Malwarebytes, Inc.* (9th Cir. 2019) 938  
15 F.3d 1026.)

16 Here, defendants’ creation of a “Restricted Mode” to allow sensitive users to voluntarily  
17 choose a more limited experience of the YouTube service is exactly the type of self-regulation  
18 that Congress sought to encourage in enacting section 230, and fits within section 230(c)(2)(B)’s  
19 immunity for “any action taken to enable or make available to ... others,” namely, YouTube  
20 users, “the technical means to restrict access to” material “that the provider or user considers to  
21 be obscene, ... excessively violent, ... or otherwise objectionable.” Rather than unilaterally  
22 restricting access to material on its core platform as contemplated by section 230(c)(2)(A)—  
23 which contains a “good faith” requirement—defendants allow users to voluntarily restrict access  
24 to material that defendants deem objectionable for the stated reason that, like the categories of  
25 material enumerated by the statute, it may be inappropriate for young or sensitive viewers.<sup>6</sup> The  
26

27  
28 <sup>6</sup> Consistent with these circumstances, a page discussing options for administrators employing “Restricted Mode,”  
which was submitted by Prager in connection with its motion for preliminary injunction, indicates that  
“[a]dministrators and designated approvers can now whitelist entire channels,” in addition to individual videos, to  
ensure a channel is “watchable by your users.” (Declaration of Peter Obstler, Ex. L.) Thus, it appears that users can

1 Court views this as a critical difference between the two provisions and disagrees with the  
2 majority in *Enigma*,<sup>7</sup> who ignore the plain language of the statute by reading a good faith  
3 limitation into section 230(c)(2)(B). (See *Enigma Software Group USA, LLC v. Malwarebytes,*  
4 *Inc., supra*, 938 F.3d at p. 1040 (dis. opn. of Rawlinson, J.) [“The majority’s policy arguments  
5 are in conflict with our recognition in *Zango* that the broad language of the Act is consistent with  
6 ‘the Congressional goals for immunity’ as expressed in the language of the statute. [Citation.]  
7 As the district court cogently noted, we ‘must presume that a legislature says in a statute what it  
8 means and means in a statute what it says there.’ ”].)

9 Finding CDA immunity here is also consistent with cases that apply it in  
10 indistinguishable circumstances based on section 230(c)(1), and with their reasoning, which  
11 recognizes that challenges to a service provider’s editorial discretion “treat[]” the provider “as a  
12 publisher.” (See *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc., supra*, 144 F.Supp.3d 1088  
13 [applying section 230(c)(1) to claim under Title II of the Civil Rights Act of 1964]; *Federal*  
14 *Agency of News LLC v. Facebook, Inc., supra*, 2019 WL 3254208 [applying section 230(c)(1) to  
15 claims under Title II of the Civil Rights Act of 1964, the Unruh Act, and for breach of the  
16 implied covenant of good faith and fair dealing].) The Court finds that immunity under section  
17 230(c)(1) also applies here, to the allegations involving both “Restricted Mode” and defendants’  
18 advertising service.

19 While the Court understands Prager’s argument that all three provisions of section 230  
20 should have a good faith requirement, this argument is contrary to the plain language of the  
21 statute. (See *Hassell v. Bird, supra*, 5 Cal.5th at p. 540 [noting that *Barrett v. Rosenthal, supra*,  
22 40 Cal.4th 33 voiced “qualms” that *Zeran*’s interpretation of section 230 provides blanket  
23 immunity for those who intentionally redistribute defamatory statements, but held “these  
24 concerns were of no legal consequence” where principles of statutory interpretation compelled a  
25

26 specifically override defendants’ decisions to disable certain videos or channels in “Restricted Mode,” confirming  
27 that “Restricted Mode” is a tool made available to users rather than a unilateral ban.

28 <sup>7</sup> See *People v. Williams* (1997) 16 Cal.4th 153, 190 (“Decisions of lower federal courts interpreting federal law are not binding on state courts.”); *Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034 (although at times entitled to great weight, the decisions of the lower federal courts on federal questions are merely persuasive).

1 broad construction].) And while it is not this Court's role to judge the wisdom of the policy  
2 embodied by section 230, there are good reasons to support it. As the court in *Levitt v. Yelp!*  
3 *Inc.* (N.D. Cal., Oct. 26, 2011, No. C-10-1321 EMC) 2011 WL 5079526 reasoned,

4 traditional editorial functions often include subjective judgments informed by  
5 political and financial considerations. [Citation.] Determining what motives are  
6 permissible and what are not could prove problematic. Indeed, from a policy  
7 perspective, permitting litigation and scrutin[izing] motive could result in the  
8 "death by ten thousand duck-bites" against which the Ninth Circuit cautioned in  
9 interpreting § 230(c)(1). [(*Fair Housing Council of San Fernando Valley v.*  
10 *Roommates.Com, LLC, supra*, 521 F.3d at p. 1174.)]

11 One of Congres[s]'s purposes in enacting § 230(c) was to avoid the chilling effect  
12 of imposing liability on providers by both safeguarding the "diversity of political  
13 discourse ... and myriad avenues for intellectual activity" on the one hand, and  
14 "remov[ing] disincentives for the development and utilization of blocking and  
15 filtering technologies" on the other hand. §§ 230(a), (b); *see also* S.Rep. No. 104-  
16 230, at 86 (1996) (Conf.Rep.), *available at* 1996 WL 54191, at \*[194] (describing  
17 purpose of section 230 to protect providers from liability "for actions to restrict or  
18 to enable restrict[ion] of access to objectionable online material"). For that reason,  
19 "[C]lose cases ... must be resolved in favor of immunity, lest we cut the heart out  
20 of section 230 ...." [(*Fair Housing Council of San Fernando Valley v.*  
21 *Roommates.Com, LLC, supra*, 521 F.3d at p. 1174.)]

22 As illustrated by the case at bar, finding a bad faith exception to immunity under  
23 § 230(c)(1) could force Yelp to defend its editorial decisions in the future on a  
24 case by case basis and reveal how it decides what to publish and what not to  
25 publish. Such exposure could lead Yelp to resist filtering out false/unreliable  
26 reviews (as someone could claim an improper motive for its decision), or to  
27 immediately remove all negative reviews about which businesses complained (as  
28 failure to do so could expose Yelp to a business's claim that Yelp was strong-  
arming the business for advertising money). The Ninth Circuit has made it clear  
that the need to defend against a proliferation of lawsuits, regardless of whether  
the provider ultimately prevails, undermines the purpose of section 230.

(*Levitt v. Yelp! Inc., supra*, 2011 WL 5079526, at \*8-9.) In the Court's view, these concerns are  
particularly salient here, where the challenged services are by definition more curated than  
defendants' core service and could not exist without more robust screening by defendants.

In opposition to defendants' demurrer, Prager cites a number of cases that affirm the  
principle applied in *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC,*  
*supra*, 521 F.3d 1157, which held that a service provider is not entitled to CDA immunity with

1 regard to content it develops itself. However, this principle is inapposite here. Prager does not  
2 allege that defendants developed any of Prager’s content or appended any commentary to it—to  
3 the contrary, they allege the content became completely invisible in “Restricted Mode” or was  
4 simply demonetized. Applying CDA immunity under these circumstances does not conflict with  
5 *Roommates*. (See *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*,  
6 *supra*, 521 F.3d at p. 1163 [in enacting CDA immunity, “Congress sought to immunize  
7 the *removal* of user-generated content, not the *creation* of content”].)<sup>8</sup>

8 Finally, Prager contends that applying CDA immunity here would constitute an unlawful  
9 prior restraint on its speech in violation of the First Amendment. However, a federal court has  
10 already held that defendants’ conduct does not violate the First Amendment, and this Court  
11 agrees with that analysis for the reasons discussed in connection with its analysis of Prager’s  
12 claim under the California Constitution. Moreover, Prager does not allege that defendants  
13 prevented it from engaging in speech, even on their own platform—again, it contends that certain  
14 videos were excluded from “Restricted Mode” and/or were demonetized.

15 The Court consequently finds that section 230(c)(2)(B) bars Prager’s claims related to  
16 “Restricted Mode” and section 230(c)(1) bars all of its claims, with the possible exception of  
17 those based on its own promises and representations, which are discussed below.<sup>9</sup>

18 C. Breach of the Implied Covenant of Good Faith and Fair Dealing and Fraud Under  
19 the UCL

20 Finally, Prager correctly urges that some California authority holds section 230(c)(1) of  
21 the CDA does not apply to claims based on a defendant’s own promises and representations to a  
22 plaintiff, rather than its role as a publisher. (See *Demetriades v. Yelp, Inc.* (2014) 228  
23 Cal.App.4th 294, 313 [this immunity does not apply where “plaintiff seeks to hold Yelp liable  
24 for its own statements regarding the accuracy of its filter”]; but see *Hassell v. Bird, supra*, 5  
25 Cal.5th at p. 542 [disapproving of “creative pleading” in an attempt to avoid section 230  
26

27 <sup>8</sup> Although it does not bring a claim for defamation, Prager appears to suggest that defendants have defamed it by  
28 removing its content from “Restricted Mode” or demonetizing it. Such a claim would likely be foreclosed by the  
ruling in *Bartholomew v. YouTube, LLC*. (2017) 17 Cal.App.5th 1217, 1234.

<sup>9</sup> The Court thus does not address defendants’ argument that Prager’s claims are barred by the First Amendment.

1 immunity].) This authority does not apply to the Court’s finding of immunity under section  
2 230(c)(2)(B). In any event, Prager’s claims asserting this type of theory—namely, its claim for  
3 breach of the implied covenant of good faith and fair dealing and its claim under the fraud prong  
4 of the UCL—do not state a cause of action.

5 Prager does not and cannot state a claim for breach of the implied covenant of good faith  
6 and fair dealing in light of the express provisions of YouTube’s Terms of Service, which provide  
7 that “YouTube reserves the right to remove Content without prior notice” and which also allow  
8 YouTube to “discontinue any aspect of the Service at any time.” (See Declaration of Brian  
9 Willen, Ex. 1; *Song fi Inc. v. Google, Inc.* (N.D. Cal. 2015) 108 F.Supp.3d 876, 885 [plaintiff  
10 could not state a claim for violation of the covenant of good faith and fair dealing based on  
11 content removal in light of YouTube’s Terms of Service].) Similarly, YouTube’s AdSense  
12 Terms of Service reserve the right “to refuse or limit your access to the Services.” (Declaration  
13 of Brian Willen, Ex. 8; see *Sweet v. Google Inc.* (N.D. Cal., Mar. 7, 2018, No. 17-CV-03953-  
14 EMC) 2018 WL 1184777, at \*9-10 [plaintiff could not state a claim for violation of the covenant  
15 of good faith and fair dealing based on demonitization in light of similar reservation of rights in  
16 YouTube’s Partner Program Terms].) “[C]ourts are not at liberty to imply a covenant directly at  
17 odds with a contract’s express grant of discretionary power except in those relatively rare  
18 instances when reading the provision literally would, contrary to the parties’ clear intention,  
19 result in an unenforceable, illusory agreement.” (*Third Story Music, Inc. v. Waits* (1995) 41  
20 Cal.App.4th 798, 808.) That is not the case here, and Prager does not contend that it is. (See  
21 *Sweet v. Google Inc., supra*, 2018 WL 1184777, at \*9-10 [applying *Third Story*].)

22 As to the UCL fraud claim, to the extent it is based on the “four essential freedoms” set  
23 forth above and similar statements, these statements are non-actionable puffery. (See  
24 *Demetriades v. Yelp, Inc., supra*, 228 Cal.App.4th at p. 311 [“ ‘a statement that is quantifiable,  
25 that makes a claim as to the “specific or absolute characteristics of a product,” may be an  
26 actionable statement of fact while a general, subjective claim about a product is non-actionable  
27 puffery,’ ” quoting *Newcal Industries, Inc. v. Ikon Office Solution* (9th Cir.2008) 513 F.3d 1038,  
28 1053]; *Prager University v. Google LLC, supra*, 2018 WL 1471939, at \*11 [“None of the

1 statements about YouTube’s viewpoint neutrality identified by Plaintiff resembles the kinds of  
2 ‘quantifiable’ statements about the ‘specific or absolute characteristics of a product’ that are  
3 actionable under the Lanham Act.”.] )

4 Prager also alleges that defendants represented that “the ‘same standards apply equally to  
5 all’ when it comes to the content regulation on YouTube.” (FAC, ¶ 85; see also *id.* at ¶ 13.)  
6 While this statement is arguably more than mere puffing (see *Demetriades v. Yelp, Inc., supra*,  
7 228 Cal.App.4th at p. 311-312), Prager does not allege that it suffered a loss of money or  
8 property as a result of its reliance on this statement. “There are innumerable ways in which  
9 economic injury from unfair competition may be shown,” including where a plaintiff “ha[s] a  
10 present or future property interest diminished.” (*Kwikset Corp. v. Superior Court (Benson)*  
11 (2011) 51 Cal.4th 310, 323; see also *Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235  
12 Cal.App.4th 29, 38 [UCL “unlawful” plaintiffs established standing by alleging diminished  
13 credit score caused by defendant’s false negative reporting to credit agencies, even where they  
14 never made payments on the loan at issue].) The “lost income, reduced viewership, and damage  
15 to brand, reputation, and goodwill” that Prager alleges (FAC, ¶ 157) would certainly satisfy this  
16 requirement if there were a causal connection between Prager’s alleged reliance on defendants’  
17 statement in participating in the YouTube service and these harms. However, these injuries  
18 cannot have resulted from Prager’s decision to use YouTube: they could only have been caused  
19 by YouTube’s later decisions to restrict and/or demonetize Prager’s content. (See *Prager*  
20 *University v. Google LLC, supra*, 2018 WL 1471939, at \*11-12 [“Plaintiff has not sufficiently  
21 alleged that it ‘has been or is likely to be injured as the result of the’ statements about YouTube’s  
22 viewpoint neutrality. [Citation.] As discussed above, any harm that Plaintiff suffered was  
23 caused by Defendants’ decisions to limit access to some of Plaintiff’s videos.”].) These later  
24 decisions by YouTube could not have been relied on by Prager. (See *id.* at \*11 [“Although  
25 Plaintiff asserts that it has suffered injury in the form of ‘lower viewership, decreased ad  
26 revenue, a reduction in advertisers willing to purchase advertisements shown on Plaintiff’s  
27 videos, diverted viewership, and damage to its brand, reputation and goodwill,” ... nothing in  
28 Plaintiff’s complaint suggests that this harm flowed directly from Defendants’ publication of

1 their policies and guidelines. Instead, any harm that Plaintiff suffered was caused by Defendants'  
2 decisions to limit access to some of Plaintiff's videos ...."].) Moreover, recognizing this theory  
3 would appear to conflict with principles of defamation law as recently discussed in *Bartholomew*  
4 *v. YouTube, LLC*. (2017) 17 Cal.App.5th 1217.

5 Prager thus fails to state a cause of action based on the implied covenant of good faith  
6 and fair dealing or the fraud prong of the UCL.

7 D. Conclusion and Order


8 For all these reasons, the demurrer to the first through fourth causes of action is  
9 SUSTAINED WITHOUT LEAVE TO AMEND.

10  
11 III. Motion for Preliminary Injunction

12 As discussed above, Prager has not shown a reasonable probability of success on the  
13 merits in this action. Its motion for a preliminary injunction is consequently DENIED. (See *San*  
14 *Francisco Newspaper Printing Co. v. Superior Court (Miller)* (1985) 170 Cal.App.3d 438, 442.)

15  
16 IT IS SO ORDERED.

17 Dated: Nov. 19, 2019

18   
19 Honorable Brian C. Walsh  
20 Judge of the Superior Court



# **Exhibit “C”**

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9

10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN JOSE DIVISION**

13 DIVINO GROUP LLC, a California limited  
liability company, CHRIS KNIGHT, an  
14 individual, CELSO DULAY, an individual,  
CAMERON STIEHL, an individual,  
15 BRIAANDCHRISY LLC, a Georgia limited  
liability company, BRIA KAM, an individual,  
16 CHRISY CHAMBERS, an individual, CHASE  
ROSS, an individual, BRETT SOMERS, an  
17 individual, and LINDSAY AMER, an individual,  
STEPHANIE FROSCH, an individual, SAL  
18 CINEQUEMANI, an individual, TAMARA  
JOHNSON, an individual, and GREG  
19 SCARNICI, an individual,

20 Plaintiffs,

21 vs.

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

24 Defendants.  
25  
26  
27  
28

Case No. 5:19-cv-004749-VKD

**UNITED STATES OF AMERICA'S  
NOTICE OF INTERVENTION  
TO DEFEND THE  
CONSTITUTIONALITY OF  
47 U.S.C. § 230(c)**

Action Filed: August 13, 2019  
Trial Date: None Set  
Rule 5.1 Notice Filed: December 20, 2019

1 Under Federal Rules of Civil Procedure 5.1(c) and 24(a)(1), and in accordance with  
2 the authorization of the Solicitor General of the United States, the United States hereby  
3 intervenes in this action for the limited purpose of defending the constitutionality of Section  
4 230(c) of the Communications Decency Act of 1996 (“CDA”) (Pub. L. No. 104-104, § 509,  
5 codified at 47 U.S.C. § 230(c)).

6 On December 20, 2019, Plaintiffs filed a notice of constitutional challenge regarding  
7 47 U.S.C. § 230(c) (Doc. 21). In that Notice, Plaintiffs stated that their pleadings allege that  
8 “Section 230(c) does not, and cannot, apply in this case, under the plain language of the  
9 statute or under the Constitution, to prevent the Plaintiffs from seeking legal redress for  
10 harms and injuries caused by Defendants’ discrimination against them and other similarly  
11 situated Plaintiffs and users of YouTube.” *Id.* at 3. Moreover, in opposition to the motion  
12 to dismiss the operative complaint filed by Defendants (Doc. 25), Plaintiffs in their brief filed  
13 February 24, 2020 made certain contentions regarding the constitutionality of 47 U.S.C. §  
14 230(c) (Doc. 28). The Court has not yet certified a constitutional question under Rule 5.1(b)  
15 and 28 U.S.C. § 2403.

16 The United States is entitled to intervene in this action under the Federal Rules of  
17 Civil Procedure and by statute. Rule 5.1(c) permits the Attorney General to intervene in an  
18 action where, as here, the constitutionality of a federal statute is challenged. *See* Fed. R. Civ.  
19 P. 5.1(c). Rule 24 further permits a non-party to intervene when the non-party “is given an  
20 unconditional right to intervene by a federal statute.” Fed. R. Civ. P. 24(a)(1). The United  
21 States has an unconditional statutory right to intervene “[i]n any action . . . wherein the  
22 constitutionality of any Act of Congress affecting the public interest is drawn in question  
23 . . . .” 28 U.S.C. § 2403(a). In such an action, “the court . . . shall permit the United States  
24 to intervene . . . for argument on the question of constitutionality.” *Id.* Here, Plaintiffs have  
25 “drawn in question” the constitutionality of 47 U.S.C. § 230(c), and the United States has an  
26 unconditional right to intervene to defend the statute.

27 The United States will immediately hereafter file its memorandum in defense of the  
28 constitutionality of 47 U.S.C. § 230(c). The United States’ intervention, including its filing

1 of a memorandum in support of the constitutionality of 47 U.S.C. § 230(c), will not interfere  
2 with the timely adjudication of this action. This notification is also timely. By this Court's  
3 order of April 23, 2020, the United States' deadline for intervention is today. Doc. 44.

4 Accordingly, the United States hereby provides notice of intervention in this action  
5 for the purpose of defending the constitutionality of 47 U.S.C. § 230(c).

6  
7 DATED: May 8, 2020

Respectfully submitted,  
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Assistant Attorney General

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11 INDRANEEL SUR  
12 Trial Attorney

13 By: /s/ Indraneel Sur  
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 10 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
 11 **SAN JOSE DIVISION**

12 DIVINO GROUP LLC, a California limited  
 13 liability company, CHRIS KNIGHT, an  
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 14 CAMERON STIEHL, an individual,  
 BRIAANDCHRISY LLC, a Georgia limited  
 15 liability company, BRIA KAM, an individual,  
 CHRISSY CHAMBERS, an individual, CHASE  
 16 ROSS, an individual, BRETT SOMERS, an  
 individual, and LINDSAY AMER, an individual,  
 17 STEPHANIE FROSCH, an individual, SAL  
 CINEQUEMANI, an individual, TAMARA  
 18 JOHNSON, an individual, and GREG  
 SCARNICI, an individual,

19 Plaintiffs,

20 vs.

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

23 Defendants.  
 24  
 25  
 26  
 27  
 28

Case No. 5:19-cv-004749-VKD

**MEMORANDUM OF LAW FOR  
 INTERVENOR UNITED STATES  
 IN SUPPORT OF THE  
 CONSTITUTIONALITY OF  
 47 U.S.C. § 230(C)**

Action Filed: August 13, 2019  
 Trial Date: None Set  
 Rule 5.1 Notice Filed: December 20, 2019

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## INTRODUCTION

1  
2 Plaintiffs, who are video creators seeking monetary and other recovery based on the  
3 alleged editorial decisions of a popular Internet platform, YouTube, have raised a  
4 constitutional challenge to Section 230(c) of the Communications Decency Act of 1996  
5 (“CDA”) (Pub. L. No. 104-104, § 509, codified at 47 U.S.C. § 230(c)). When the World Wide  
6 Web was in its early days in 1996, Congress sought through Section 230(c) to promote and  
7 protect “Good Samaritan” blocking and screening of offensive material by limiting the  
8 liability of website owners and operators. The statute immunizes for certain liability purposes  
9 an “interactive computer service” provider from being treated as the publisher or speaker of  
10 content created by third parties and hosted by the service (47 U.S.C. § 230(c)(1)), or for  
11 removing or restricting access to certain types of offensive material (§ 230(c)(2)).

12 In seeking Rule 12(b)(6) dismissal of the operative complaint, YouTube has invoked  
13 the statute as an affirmative defense to Plaintiffs’ claims, and Plaintiffs have responded by  
14 arguing, among other things, that the statute violates the First Amendment and the equal  
15 protection guarantee of the Fifth Amendment to the extent it shields YouTube from liability  
16 for Plaintiffs’ claims. Plaintiffs also seek a declaratory judgement to that effect.

17 The United States intervenes today in response to Plaintiffs’ constitutional challenge,  
18 and, in defense of the statute, respectfully limits this brief to two arguments.

19 *First*, under the doctrine of constitutional avoidance, this Court should start by  
20 deciding the statutory arguments presented by the parties regarding the pending Rule 12(b)(6)  
21 motion, because those non-constitutional grounds may obviate the need for decision on any  
22 constitutional question. A court should decide a constitutional question only when  
23 necessary, which would not be the situation here if the Court were to conclude that statutory  
24 grounds suffice to dispose of the case.

25 *Second*, if the Court concludes that it must reach the constitutional question, Plaintiffs’  
26 challenge should be rejected on the merits. Section 230(c) does not regulate Plaintiffs’  
27 primary conduct. Instead, the statute establishes a rule prohibiting liability for certain  
28 conduct by online platforms, including YouTube. Because the United States is intervening

1 for the limited purpose of defending the constitutionality of Section 230(c), it does not take  
2 a position on whether the statute forecloses the particular claims Plaintiffs have alleged. But  
3 assuming it does, that would not violate the First Amendment’s Speech Clause, because—as  
4 the Ninth Circuit squarely held in *Prager University v. Google LLC*, 951 F.3d 991 (9th Cir.  
5 2020)—YouTube is not a state actor capable of denying the freedom of speech. In other  
6 words, Section 230(c) would not deny Plaintiffs any constitutional claim they otherwise  
7 would have. Nor do Plaintiffs’ arguments find support in the First Amendment’s Petition  
8 Clause or in the constitutional guarantee of equal protection. In short, however Plaintiffs’  
9 challenge to Section 230(c) is framed, it is meritless, and should be rejected.

## 10 STATEMENT

### 11 **I. Statutory Background**

12 Section 230(c) of the CDA is entitled “Protection for ‘Good Samaritan’ blocking and  
13 screening of offensive material.” The Ninth Circuit has described the statute as  
14 “immuniz[ing] providers of interactive computer services against liability arising from  
15 content created by third parties.” *Fair Hous. Council of San Fernando Valley v. Roommates.Com,*  
16 *LLC*, 521 F.3d 1157, 1163-64 (9th Cir. 2008) (*en banc*) (footnotes omitted).

17 In particular, Paragraph (1) states: “No provider . . . of an interactive computer  
18 service shall be treated as the publisher or speaker of any information provided by another  
19 information content provider.” 47 U.S.C. § 230(c)(1). The statute also provides that “[n]o  
20 cause of action may be brought and no liability may be imposed under any State or local law  
21 that is inconsistent with this section.” *Id.* § 230(e)(3). The result is to protect online  
22 platforms from such liabilities as those the common law imposed on publishers or speakers  
23 for libel or slander. Some courts have also construed the limitation to shield online platforms  
24 against certain liabilities under federal law. *See, e.g., Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*,  
25 144 F. Supp. 3d 1088, 1096 (N.D. Cal. 2015), *aff’d sub nom. Sikhs for Justice, Inc. v. Facebook, Inc.*,  
26 697 F. App’x 526 (9th Cir. 2017). The immunity applies only when the interactive computer  
27 service provider is not also the “information content provider” of the material in question—  
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1 *i.e.*, the person “responsible, in whole or in part, for the creation or development of” the  
 2 “offending content.” *See Roommates*, 521 F.3d at 1162-63 (quoting § 230(f)(3)).

3 For its part, Paragraph (2) describes a separate immunity. It states:

4 No provider or user of an interactive computer service shall be held liable on account  
 5 of —

6 (A) any action voluntarily taken in good faith to restrict access to or  
 7 availability of material that the provider or user considers to be obscene,  
 8 lewd, lascivious, filthy, excessively violent, harassing, or otherwise  
 9 objectionable, whether or not such material is constitutionally protected;  
 10 or

11 (B) any action taken to enable or make available to information  
 12 content providers or others the technical means to restrict access to  
 13 material described in paragraph [A].

14 47 U.S.C. § 230(c)(2).\*

15 The problem Congress sought to solve in Section 230(c) arose from a New York state  
 16 trial court’s ruling that an internet service provider that had voluntarily deleted some  
 17 messages from an online message board was then “legally responsible for the content of  
 18 defamatory messages that it failed to delete.” *See Roommates*, 521 F.3d at 1163 (discussing  
 19 *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May  
 20 24, 1995)). The statute responded by “immuniz[ing] the *removal* of user-generated content,  
 21 not the *creation* of content.” *Id.* That is, Section 230 “provides ‘Good Samaritan’ protections  
 22 from civil liability for providers . . . of an interactive computer service for actions to restrict  
 23 . . . access to objectionable online material. One of the specific purposes of this section is to  
 24 overrule *Stratton* . . . which . . . treated such providers . . . as publishers or speakers of content  
 25 that is not their own because they have restricted access to objectionable material.”  
 26 H.R. Rep. No. 104-458 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 10.

27 \* The text of Paragraph (2)(B) refers to “the material described in paragraph (1),” but  
 28 the Ninth Circuit “take[s] it that the reference to the ‘material described in paragraph (1)’ is  
 a typographical error, and that instead the reference should be to . . . § 230(c)(2)(A),”  
 because “Paragraph (1) pertains to the treatment of a publisher or speaker and has nothing  
 to do with ‘material,’ whereas subparagraph (A) pertains to and describes material.” *Zango,*  
*Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1173 n.5 (9th Cir. 2009).

1           According to the Ninth Circuit, Section 230(c)(1) shields the defendant from a claim  
2 wherever “the duty that the plaintiff alleges the defendant violated derives from the  
3 defendant’s status or conduct as a ‘publisher or speaker.’” *Barnes v. Yahoo!, Inc.*, 570 F.3d  
4 1096, 1102 (9th Cir. 2009). In that context, the Ninth Circuit views “publication” as  
5 “involv[ing] reviewing, editing, and deciding whether to publish or to withdraw from  
6 publication third-party content.” *Id.* The Ninth Circuit has remarked in an *en banc* opinion  
7 that “any activity that can be boiled down to deciding whether to exclude material that third  
8 parties seek to post online is perforce immune” under Section 230(c)(1). *Roommates*, 521 F.3d  
9 at 1170-71.

10           The Ninth Circuit has described one of the policies behind the liability shield as  
11 promotion of speech—that is, to “avoid the chilling effect upon Internet free speech that  
12 would be occasioned by the imposition of tort liability upon companies that do not create  
13 potentially harmful messages but are simply intermediaries for their delivery.” *Doe v. Internet*  
14 *Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016) (quoting *Delfino v. Agilent Techs., Inc.*, 145  
15 Cal. App. 4th 790, 52 Cal. Rptr. 3d 376, 387 (Cal. Ct. App. 2006)). In enacting Section 230(c),  
16 Congress made findings describing online platforms as offering “a forum for a true diversity  
17 of political discourse, unique opportunities for cultural development, and myriad avenues for  
18 intellectual activity.” § 230(a)(3). Accordingly, “the policy of the United States” is “to  
19 preserve the vibrant and competitive free market that presently exists for the Internet and  
20 other interactive computer services, *unfettered by Federal or State regulation.*” § 230(b)(2)  
21 (emphasis added). To be sure, Congress also determined that it was the policy of the United  
22 States “to ensure vigorous enforcement of *Federal criminal laws* to deter and punish trafficking  
23 in obscenity, stalking, and harassment by means of computer.” § 230(b)(5) (emphasis added).  
24 But in balancing the various interests, Congress sought “not to deter harmful online speech  
25 through the separate route of imposing *tort liability* on companies that serve as intermediaries  
26 for other parties’ potentially injurious messages.” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-  
27 31 (4th Cir. 1997) (Wilkinson, C.J.) (emphasis added).

## II. Proceedings In Plaintiffs' Case

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The instant Plaintiffs are “Lesbian, Gay, Bisexual, Transgender, Transsexual or Queer internet content creators” who make videos, including many that “discuss issues which affect members of the LGBTQ+ community.” 2d Am. Compl. ¶¶ 1, 41 (Doc. 20) (“SAC”). YouTube, owned by Google, is allegedly the dominant Internet video platform, hosting “roughly 95%” of global “public video-based content,” and “monetizing the free speech and expression of . . . the 2.3 billion people who now use” it. SAC ¶ 15. Plaintiffs allegedly contracted with YouTube, licensing it to distribute their videos while agreeing that YouTube retained various rights—including the right to enforce its community guidelines, and the right to determine “in its sole discretion” whether the videos contained “material . . . in violation of” the agreement. Rule 12(b)(6) Opp. 4 (Doc. 28); *see* SAC ¶¶ 10, 117(d), 288. According to Plaintiffs, YouTube “monetize[s]” the videos by selling advertisements for display along with them, and some Plaintiffs have paid YouTube to promote their videos (individually or grouped into channels) to potential viewers. SAC ¶¶ 55, 89, 131. YouTube allegedly retains “unfettered and absolute discretion to restrict the viewership, reach, and monetization of [the] videos.” SAC ¶ 118.

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One way that YouTube allegedly exercises that discretion is through its “Restricted Mode,” which works “much like a curtain” to “block[] access” by “younger, sensitive audiences to video content that contains certain specifically enumerated ‘mature’ aspects.” SAC ¶ 77. When a viewer turns on “Restricted Mode” for a personal account (or when it is activated by a parent or system administrator, such as one acting on behalf of a public library, school, or other work place) and lands on a video placed in “Restricted Mode,” instead of showing the video, YouTube displays a warning, stating that the video is unavailable and that to view the video the viewer would “need to disable Restricted Mode.” SAC ¶¶ 77-79, 83, 343. YouTube allegedly tells viewers who inquire that videos are placed in “Restricted Mode” when they include, among other things, “[o]verly detailed conversations about or depictions of sex or sexual activity,” “inappropriate language, including profanity,” or other sensitive

1 content. SAC ¶¶ 26, 85, 344, 345, 346. “On average, 1.5–2% of users view YouTube  
2 through Restricted Mode.” *Prager Univ.*, 951 F.3d at 996.

3 YouTube has allegedly styled itself (including in testimony to Congress) as a “neutral  
4 public forum.” SAC ¶¶ 61, 287, 342. But Plaintiffs allege that YouTube has used its “power  
5 over filtering” as a “censorship power to silence and crush Plaintiffs because they identify  
6 [as] LGBTQ+ and express LGBTQ+ viewpoints.” SAC ¶ 21. In particular, Plaintiffs allege  
7 that YouTube placed some of their videos into “Restricted Mode,” or rendered certain videos  
8 ineligible for generation of advertising revenue by “demonetizing” them, justified by  
9 YouTube’s alleged false statements that the videos contained “inappropriate” or “otherwise  
10 objectionable” content. SAC ¶¶ 3, 26, 151, 345-47. According to Plaintiffs, the episodes of  
11 “Restricted Mode” and demonetization misuse they allege are not isolated; rather, YouTube  
12 purportedly has a “‘company policy’ of not selling ads to ‘gay’ content creators because the  
13 ‘gay thing’ render[s] [their] video[s] ‘shocking’ and sexually explicit regardless of the actual  
14 content of the video[s].” SAC ¶ 20; *see* SAC ¶¶ 122, 134, 146; SAC Ex. A (transcript of  
15 communication with Google Support staff in Bangalore, India allegedly describing policy).

16 Plaintiffs seek a declaration that 47 U.S.C. § 230(c) violates the First and Fourteenth  
17 Amendments; they allege that applying the statute as a bar on their claims would be “both  
18 an unconstitutional restraint on Plaintiffs’ First Amendment rights to freedom of petition  
19 and speech, and a violation of equal protection of law under the Fourteenth Amendment.”  
20 SAC ¶ 261; *see* SAC ¶¶ 280-82. Plaintiffs also assert various claims against YouTube,  
21 including two federal statutory claims—one alleging that YouTube engaged in  
22 unconstitutional “[v]iewpoint-[b]ased [d]iscrimination” remediable under 42 U.S.C. § 1983  
23 (SAC ¶¶ 283-303), and the other alleging that YouTube engaged in false advertising and false  
24 association in violation of the Lanham Act, 15 U.S.C. § 1125 *et seq.* (SAC ¶¶ 337-48).

25 This Court has not yet certified any constitutional question under 28 U.S.C. § 2403  
26 and Rule 5.1. On March 9, 2020, this Court endorsed a stipulation providing the United  
27 States until April 24, 2020 to determine whether to intervene and to file a brief, if any. Doc.

1 32. On the Government’s motion, the Court later enlarged the time for the United States to  
 2 intervene to May 8, 2020. Doc. 44.

### 3 ARGUMENT

#### 4 **I. The Court Should First Decide The Potentially Dispositive Statutory Issues** 5 **Because They May Obviate The Need To Address Plaintiffs’** 6 **Constitutional Challenge**

7 As an initial matter, this Court should not address the constitutionality of Section  
 8 230(c) unless it first determines that the pending motion to dismiss cannot be resolved on  
 9 non-constitutional grounds. “If there is one doctrine more deeply rooted than any other in  
 10 the process of constitutional adjudication, it is that we ought not to pass on questions of  
 11 constitutionality . . . unless such adjudication is unavoidable.” *Dep’t of Commerce v. U.S. House*  
 12 *of Representatives*, 525 U.S. 316, 343 (1999) (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S.  
 13 101, 105 (1944)); *see id.*, 525 U.S. at 344 (“[I]f a case can be decided on either of two grounds,  
 14 one involving a constitutional question, the other a question of statutory construction or  
 15 general law, the Court will decide only the latter”) (quoting *Ashwander v. TVA*, 297 U.S. 288,  
 347 (1936) (Brandeis, J., concurring)).

16 This Court should adhere to that doctrine of constitutional avoidance here and  
 17 decline to rule on the constitutionality of Section 230(c) unless the motion to dismiss cannot  
 18 be resolved on other grounds. The United States has intervened solely for the purpose of  
 19 defending the constitutionality of Section 230(c) and therefore takes no position on the  
 20 merits of the non-constitutional issues. It is apparent, however, that the Court’s resolution  
 21 of those issues might obviate the need to consider Section 230(c)’s constitutionality.

22 Here is one example: Plaintiffs assert a Section 1983 claim (SAC ¶¶ 283-303), and  
 23 Lanham Act claims for false advertising and false association (SAC ¶¶ 337-48). This Court  
 24 might decide that Plaintiffs have not alleged the elements of either of those federal statutory  
 25 claims in light of the Ninth Circuit’s twin conclusions in *Prager University* that (1) YouTube is  
 26 not a state actor constrained by the First Amendment (951 F.3d at 999), and (2) “YouTube’s  
 27 statements concerning its content moderation policies do not constitute ‘commercial  
 28 advertising or promotion’” within the meaning of the Lanham Act (*id.* at 999-1000 (quoting



1 15 U.S.C. § 1125(a)(1)(B))). And this Court might similarly decide that Plaintiffs have not  
2 alleged the elements of their state law claims.

3 Here is another example: Plaintiffs contend that Section 230(c) does not apply to the  
4 misconduct alleged. Rule 12(b)(6) Opp. 13-21. If the Court were to conclude that  
5 YouTube's acts as alleged by Plaintiffs do not fit within the terms of either paragraph  
6 230(c)(1) or (2), then the statute would not apply, and there would be no occasion for passing  
7 on the constitutionality of the statute.

8 In short, where "dispositive" statutory grounds may be available, it is "incumbent on"  
9 this Court to examine and decide the case on those grounds first. *Cf. N.Y.C. Transit Auth. v.*  
10 *Beazer*, 440 U.S. 568, 582 (1979) ("Before deciding the constitutional question, it was  
11 incumbent on [lower courts] to consider whether the statutory grounds might be  
12 dispositive.").

## 13 **II. If The Court Reaches the Question, It Should Conclude That** 14 **Section 230(c) Is Constitutional**

15 If the Court were to reach the constitutional question, it should conclude that  
16 Plaintiffs' challenge fails on the merits. Section 230(c) does not regulate or limit Plaintiffs'  
17 primary conduct, such as their expressive activities. For example, Plaintiffs do not allege that  
18 Section 230(c) prevents them from creating videos or posting them on the Internet. *Cf.*  
19 *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (restriction on virtual child pornography  
20 challenged by creators of erotic and nudist works). Instead, Section 230(c) establishes a  
21 substantive limitation on the liability of certain Internet companies for claims arising from  
22 certain specified conduct. But Plaintiffs cannot show that Congress violated Plaintiffs'  
23 constitutional rights by making that affirmative defense available here to YouTube, because  
24 none of the clauses of the Constitution on which Plaintiffs rely confers on Plaintiffs any right  
25 to bring an underlying claim.

26 *First*, Plaintiffs do not identify any valid underlying First Amendment speech claim  
27 they could have brought against YouTube had Section 230(c) not been in force. To the  
28 contrary, the Ninth Circuit explicitly held in *Prager University* that "YouTube is a private

1 entity” that is not a state actor subject to the constraints of the First Amendment. *See* 951  
2 F.3d at 996, 999. The Ninth Circuit observed that “courts have uniformly concluded that  
3 digital internet platforms that open their property to user-generated content do not become  
4 state actors,” and held that “the state action doctrine precludes constitutional scrutiny of  
5 YouTube’s content moderation pursuant to its Terms of Service and Community  
6 Guidelines.” *See id.* at 997, 999. The Ninth Circuit thus concluded that “YouTube may be a  
7 paradigmatic public square on the Internet, but it is ‘not transformed’ into a state actor solely  
8 by ‘provid[ing] a forum for speech.” *Id.* at 997 (quoting *Manhattan Cmty. Access Corp. v.*  
9 *Halleck*, 139 S. Ct. 1921, 1930, 1934 (2019)).

10 The Ninth Circuit relied on the “Supreme Court’s state action precedent,” including  
11 “its recent teaching in *Halleck*.” *Id.* In that 2019 decision, the Supreme Court explained:  
12 “[W]hen a private entity provides a forum for speech, the private entity is not ordinarily  
13 constrained by the First Amendment because the private entity is not a state actor. The  
14 private entity may thus exercise editorial discretion over the speech and speakers in the  
15 forum.” *Halleck*, 139 S. Ct. at 1930. As one illustration, the Court commented: “Benjamin  
16 Franklin did not have to operate his newspaper as ‘a stagecoach, with seats for everyone.”  
17 *Halleck*, 139 S. Ct. at 1931 (quoting F. Mott, *American Journalism* 55 (3d ed. 1962)). And the  
18 Supreme Court made clear that an “imprecise and overbroad phrase” in “passing dicta” in  
19 one of its prior decisions “should not be read to suggest that private property owners or  
20 private lessees are subject to First Amendment constraints whenever they dedicate their  
21 private property to public use or otherwise open their property for speech.” *See id.* at 1931  
22 n.3 (discussing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985)).  
23 No exception to that principle about private property owners applies to YouTube, as the  
24 Ninth Circuit reasoned. *See Prager Univ.*, 951 F.3d at 997-99.

25 Because YouTube is not a state actor, its alleged misconduct toward Plaintiffs does  
26 not implicate Plaintiffs’ freedom of speech. And because YouTube’s actions do not implicate  
27 the First Amendment, the liability protection Section 230(c) affords to YouTube likewise  
28

1 does not implicate the First Amendment. Or, put another way, Section 230(c) has not  
2 deprived Plaintiffs of any valid underlying Speech Clause claim.

3 *Second*, although Plaintiffs' Petition Clause argument lacks detailed explanation, they  
4 appear to contend that the Petition Clause requires Congress to allow them to proceed with  
5 their federal and state law claims even though the challenged statute provides an affirmative  
6 defense potentially foreclosing those claims. *See* SAC ¶ 281 (alleging that unconstitutionality  
7 stems from "Google/YouTube's use of Section 230(c) as a shield to prevent Plaintiffs from  
8 *petitioning the courts for relief* to redress violations of their civil, consumer, and contractual rights,  
9 including rights which expressly protect Plaintiffs as a class from identity or viewpoint based  
10 discrimination and speech restrictions") (emphasis added); *see also* Rule 12(b)(6) Opp. 20-21  
11 (contending that "the [Communications Decency Act] cannot be construed to preclude  
12 Plaintiffs from *petitioning the Courts* to redress discriminatory and unlawful restrictions their  
13 rights to free speech and equal benefits and protection of the law") (emphasis added). That  
14 assertion mistakenly posits that the Petition Clause requires the Government to guarantee  
15 Plaintiffs the ability to continue to litigate the particular claims for relief they have alleged  
16 and to reach a particular outcome (here, denial of the Rule 12(b)(6) motion). Tellingly,  
17 Plaintiffs have cited no precedents construing the Petition Clause as guaranteeing such an  
18 outcome in litigation.

19 To be sure, the Supreme Court has observed that its "precedents confirm that the  
20 Petition Clause protects the right of individuals to appeal to courts and other forums  
21 established by the government for resolution of legal disputes. "[T]he right of access to courts  
22 for redress of wrongs is an aspect of the First Amendment right to petition the government."  
23 *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) (quoting *Sure-Tan, Inc. v. NLRB*, 467  
24 U.S. 883, 896-97 (1984)). "A petition," the Supreme Court has further explained, "conveys  
25 the special concerns of its author to the government and, in its usual form, requests action  
26 by the government to address those concerns." *Guarnieri*, 564 U.S. at 388-89 (citing *Sure-*  
27 *Tan*, 467 at 896-97).

1 But the requirements of the Petition Clause have already been fully satisfied in this  
2 case, given that, by commencing this action, Plaintiffs “convey[ed] [their] special concerns  
3 . . . to the government and . . . request[ed] action by the government to address those  
4 concerns.” *See Guarnieri*, 564 U.S. at 388-89. And Plaintiffs remain free to urge Congress to  
5 amend the statute. The Petition Clause, however, does not mandate the substantive response  
6 to their petition that Plaintiffs desire—*i.e.*, a decision disregarding the affirmative defense set  
7 forth in Section 230(c).

8 Were it otherwise, every statute or precedent limiting or preempting previously-  
9 available legal remedies would violate the Petition Clause. To the contrary: As the Supreme  
10 Court explained in interpreting the Due Process Clause of the Fourteenth Amendment, a  
11 State (and, accordingly, the Federal Government) “remains free to create substantive  
12 defenses or immunities for use in adjudication—or to eliminate its statutorily created causes  
13 of action altogether . . . .” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982).

14 Plaintiffs’ Petition Clause argument resembles the Due Process Clause argument the  
15 Ninth Circuit rejected in *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009). The plaintiffs there  
16 challenged a federal statute limiting the liability of firearms manufacturers in certain  
17 circumstances. In upholding the law, the Ninth Circuit concluded that Congress’s “legislative  
18 determination” creating the liability protection “provides all the process that is due.” *Id.* at  
19 1141-42 (internal quotation marks omitted). The court also rejected the contention that the  
20 statutory liability limitation deprived the plaintiffs of a property right, reasoning that “a  
21 party’s property right in any cause of action does not vest until a final unreviewable judgment  
22 is obtained.” *See id.* at 1140-41 (quoting *Fields v. Legacy Health Sys.*, 413 F.3d 943, 956 (9th  
23 Cir. 2005)).

24 Although Plaintiffs have not explicitly invoked the Due Process Clause as a basis for  
25 their challenge here, they advance an interpretation of the Petition Clause that would  
26 effectively circumvent *Logan* and *Ileto*. At least where, as here, Plaintiffs did not obtain a  
27 “final unreviewable judgment” in their favor before Section 230(c) came into force, they have  
28 no entitlement to the particular legal theories they have alleged. *See Ileto*, 565 F.3d at 1140-

1 41. Congress therefore retained authority to impose limitations on those theories by enacting  
2 Section 230(c). *Logan* and *Ileto* thus provide additional confirmation that Plaintiffs’ Petition  
3 Clause theory lacks merit.

4 *Third*, Plaintiffs’ equal protection challenge fails for the same reasons as their First  
5 Amendment Speech and Petition claims, and does not require separate analysis under Ninth  
6 Circuit precedent. “It is generally unnecessary to analyze laws which burden the exercise of  
7 First Amendment rights by a class of persons under the equal protection guarantee, because  
8 the substantive guarantees of the Amendment serve as the strongest protection against the  
9 limitation of these rights.” *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001) (quoting  
10 John E. Nowak, Ronald D. Rotunda & J. Nelson Young, *Handbook on Constitutional Law*  
11 (1978)). On that basis, the Ninth Circuit treated an “equal protection claim as subsumed by,  
12 and co-extensive with, [the Section 1983 plaintiff’s] First Amendment claim.” *Id.* This Court  
13 need go no further in rejecting Plaintiffs’ equal protection theory.

14 **CONCLUSION**

15 For the foregoing reasons, the Court should decide Defendants’ Rule 12(b)(6) motion  
16 without reaching any constitutional question if possible. If the Court reaches Plaintiffs’  
17 challenge to the constitutionality of 47 U.S.C. § 230(c), it should reject it.

18 DATED: May 8, 2020

Respectfully submitted,  
19 JOSEPH H. HUNT  
Assistant Attorney General

20 ERIC WOMACK  
Assistant Branch Director

21 INDRANEEL SUR  
22 Trial Attorney

23 By: /s/ Indraneel Sur  
24 INDRANEEL SUR

25 U.S. Department of Justice  
26 Counsel for the United States of America  
27  
28

# **Exhibit “D”**

## EXECUTIVE ORDER

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### PREVENTING ONLINE CENSORSHIP

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people. In a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet. This practice is fundamentally un-American and anti-democratic. When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. They cease functioning as passive bulletin boards, and ought to be viewed and treated as content creators.

The growth of online platforms in recent years raises important questions about applying the ideals of the First Amendment to modern communications technology. Today, many Americans follow the news, stay in touch with friends and family, and share their views on current events through social media and other online platforms. As a result, these platforms function in many ways as a 21st century equivalent of the public square.

Twitter, Facebook, Instagram, and YouTube wield immense, if not unprecedented, power to shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see.

As President, I have made clear my commitment to free and open debate on the internet. Such debate is just as important online as it is in our universities, our town halls, and our homes. It is essential to sustaining our democracy.

Online platforms are engaging in selective censorship that is harming our national discourse. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms "flagging" content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse.

Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called "Site Integrity" has flaunted his political bias in his own tweets.

At the same time online platforms are invoking inconsistent, irrational, and groundless justifications to censor or otherwise restrict Americans' speech here at home, several online platforms are profiting from and promoting the aggression and disinformation spread by foreign governments like China. One United States company, for example, created a search engine for the Chinese Communist Party that would have blacklisted searches for "human rights," hid data unfavorable to the Chinese Communist Party, and tracked users determined appropriate for surveillance. It also established research partnerships in China that provide direct benefits to the Chinese military. Other companies have accepted advertisements paid for by the Chinese government that spread false information about China's mass imprisonment of religious minorities, thereby enabling these abuses of human rights. They have also amplified China's propaganda abroad, including by allowing Chinese

government officials to use their platforms to spread misinformation regarding the origins of the COVID-19 pandemic, and to undermine pro-democracy protests in Hong Kong. As a Nation, we must foster and protect diverse viewpoints in today's digital communications environment where all Americans can and should have a voice. We must seek transparency and accountability from online platforms, and encourage standards and tools to protect and preserve the integrity and openness of American discourse and freedom of expression.

Sec. 2. Protections Against Online Censorship. (a) It is the policy of the United States to foster clear ground rules promoting free and open debate on the internet. Prominent among the ground rules governing that debate is the immunity from liability created by section 230(c) of the Communications Decency Act (section 230(c)). 47 U.S.C. 230(c). It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.

Section 230(c) was designed to address early court decisions holding that, if an online platform restricted access to some content posted by others, it would thereby become a "publisher" of all the content posted on its site for purposes of torts such as defamation. As the title of section 230(c) makes clear, the provision provides limited liability "protection" to a provider of an interactive computer service (such as an online platform) that engages in "'Good Samaritan' blocking" of harmful content. In particular, the Congress sought to provide protections for online platforms that attempted to protect minors from harmful content and intended to ensure that such providers would not be discouraged from taking down harmful material. The provision was also intended to further the express vision of the Congress that the internet is a "forum for a true diversity of political discourse." 47 U.S.C. 230(a)(3). The limited protections provided by the statute should be construed with these purposes in mind.

In particular, subparagraph (c)(2) expressly addresses protections from "civil liability" and specifies that an interactive computer service provider may not be made liable "on account of" its decision in "good faith" to restrict access to content that it considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable." It is the policy of the United States to ensure that, to the maximum extent permissible under the law, this provision is not distorted to provide liability protection for online platforms that -- far from acting in "good faith" to remove objectionable content -- instead engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree. Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.

(b) To advance the policy described in subsection (a) of this section, all executive departments and agencies should ensure that their application of section 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard. In addition, within 60 days of the date of this order, the Secretary of Commerce (Secretary), in



consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA), shall file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify:

- (i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its own editorial decisions;
- (ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are:
  - (A) deceptive, pretextual, or inconsistent with a provider's terms of service; or
  - (B) taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard; and
- (iii) any other proposed regulations that the NTIA concludes may be appropriate to advance the policy described in subsection (a) of this section.

Sec. 3. Protecting Federal Taxpayer Dollars from Financing Online Platforms That Restrict Free Speech. (a) The head of each executive department and agency (agency) shall review its agency's Federal spending on advertising and marketing paid to online platforms. Such review shall include the amount of money spent, the online platforms that receive Federal dollars, and the statutory authorities available to restrict their receipt of advertising dollars. (b) Within 30 days of the date of this order, the head of each agency shall report its findings to the Director of the Office of Management and Budget.

(c) The Department of Justice shall review the viewpoint-based speech restrictions imposed by each online platform identified in the report described in subsection (b) of this section and assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.

Sec. 4. Federal Review of Unfair or Deceptive Acts or Practices. (a) It is the policy of the United States that large online platforms, such as Twitter and Facebook, as the critical means of promoting the free flow of speech and ideas today, should not restrict protected speech. The Supreme Court has noted that social media sites, as the modern public square, "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. Cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980).

(b) In May of 2019, the White House launched a Tech Bias Reporting tool to allow Americans to report incidents of online censorship. In just weeks, the White House received over 16,000 complaints of online platforms censoring or otherwise taking action against users based on their political viewpoints. The White House will submit such complaints received to the Department of Justice and the Federal Trade Commission (FTC).

(c) The FTC shall consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices in or affecting commerce, pursuant to section 45 of title 15, United States Code. Such unfair or deceptive acts or practice may include

practices by entities covered by section 230 that restrict speech in ways that do not align with those entities' public representations about those practices.

(d) For large online platforms that are vast arenas for public debate, including the social media platform Twitter, the FTC shall also, consistent with its legal authority, consider whether complaints allege violations of law that implicate the policies set forth in section 4(a) of this order. The FTC shall consider developing a report describing such complaints and making the report publicly available, consistent with applicable law.

Sec. 5. State Review of Unfair or Deceptive Acts or Practices and Anti-Discrimination Laws.

(a) The Attorney General shall establish a working group regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group shall also develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group shall invite State Attorneys General for discussion and consultation, as appropriate and consistent with applicable law.

(b) Complaints described in section 4(b) of this order will be shared with the working group, consistent with applicable law. The working group shall also collect publicly available information regarding the following:

(i) increased scrutiny of users based on the other users they choose to follow, or their interactions with other users;

(ii) algorithms to suppress content or users based on indications of political alignment or viewpoint;

(iii) differential policies allowing for otherwise impermissible behavior, when committed by accounts associated with the Chinese Communist Party or other anti-democratic associations or governments;

(iv) reliance on third-party entities, including contractors, media organizations, and individuals, with indicia of bias to review content; and

(v) acts that limit the ability of users with particular viewpoints to earn money on the platform compared with other users similarly situated.

Sec. 6. Legislation. The Attorney General shall develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order.

Sec. 7. Definition. For purposes of this order, the term "online platform" means any website or application that allows users to create and share content or engage in social networking, or any general search engine.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP  
THE WHITE HOUSE,  
May 28, 2020.

**EXHIBIT "E"**

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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

DIVINO GROUP LLC, ET AL.,

PLAINTIFFS,

CASE NO. CV-19-4749-VKD

VS.

SAN JOSE, CALIFORNIA

GOOGLE LLC, ET AL.,

JUNE 2, 2020

DEFENDANT.

PAGES 1 - 51

TRANSCRIPT OF ZOOM PROCEEDINGS  
BEFORE THE HONORABLE VIRGINIA K. DEMARCHI  
UNITED STATES DISTRICT JUDGE

A-P-P-E-A-R-A-N-C-E-S BY ZOOM

FOR THE PLAINTIFFS: BROWNE GEORGE ROSS LLP  
BY: PETER OBSTLER  
44 MONTGOMERY STREET  
SUITE 1280  
SAN FRANCISCO, CALIFORNIA 94104

BY: DEBI ANN RAMOS  
801 S. FIGUEROA ST., SUITE 2000  
LOS ANGELES, CALIFORNIA 90067

FOR THE DEFENDANTS: WILSON SONSINI GOODRICH & ROSATI  
BY: BRIAN M. WILLEN  
1301 AVENUE OF THE AMERICA, 40TH  
FLOOR  
NEW YORK, NEW YORK 10019-6022

BY: LAUREN G. WHITE  
650 PAGE MILL ROAD  
PALO ALTO, CALIFORNIA 94304-1050

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE L. RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,  
TRANSCRIPT PRODUCED WITH COMPUTER.

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A P P E A R A N C E S BY ZOOM: (CONT'D)

FOR INTERESTED PARTY:

US DEPARTMENT OF JUSTICE  
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH  
BY: INDRANEEL SUR  
1100 L ST.  
RM. 12010  
WASHINGTON, DC 20530

1 SAN JOSE, CALIFORNIA

JUNE 2, 2020

2 P R O C E E D I N G S

10:24AM 3 (COURT CONVENED AT 10:24 A.M.)

10:24AM 4 THE CLERK: THE NEXT MATTER IS DIVINO GROUP VERSUS  
10:24AM 5 GOOGLE, CASE NUMBER 19-CV-4749.

10:24AM 6 THE COURT: GOOD MORNING. I'M WAITING FOR THE PRIOR  
10:24AM 7 MATTER AND ALSO WITH OUR TECHNOLOGY.

10:24AM 8 WHO WILL BE SPEAKING ON BEHALF OF DIVINO GROUP TODAY?

10:24AM 9 MR. OBSTLER, YOU'RE ON MUTE.

10:24AM 10 MR. OBSTLER: SORRY ABOUT THAT, YOUR HONOR. THIS IS  
10:24AM 11 THE MOST NERVE-RACKING PART OF THE WHOLE HEARING IS TRYING TO  
10:24AM 12 GET THIS THING TO WORK.

10:24AM 13 (LAUGHTER.)

10:24AM 14 MR. OBSTLER: PETER OBSTLER, MYSELF, WILL BE  
10:24AM 15 SPEAKING ON BEHALF OF THE DIVINO PLAINTIFFS, YOUR HONOR.

10:24AM 16 THE COURT: OKAY. WHO WILL BE SPEAKING ON BEHALF OF  
10:24AM 17 GOOGLE TODAY?

10:24AM 18 MR. WILLEN: GOOD MORNING, YOUR HONOR. THIS IS  
10:24AM 19 BRIAN WILLEN. ME AND MY COLLEAGUE, MS. WHITE, WILL BOTH BE  
10:24AM 20 SPEAKING FOR GOOGLE.

10:24AM 21 I WILL BE ADDRESSING ANY ISSUES RELATED TO SECTION 230,  
10:24AM 22 AND MS. WHITE WILL BE ADDRESSING ANY ISSUES RELATED TO THE  
10:24AM 23 UNDERLYING CAUSES OF ACTION.

10:24AM 24 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

10:24AM 25 AND I DO HAVE MR. SUR ON BEHALF OF THE UNITED STATES.

10:25AM 1 ALL RIGHT. SO WE ARE HERE ON THE DEFENDANTS' MOTION TO  
10:25AM 2 DISMISS THE SECOND AMENDED COMPLAINT.

10:25AM 3 I WILL HEAR FROM ALL PARTIES, BUT I WOULD LIKE TO START  
10:25AM 4 JUST BY IDENTIFYING THE ISSUES THAT I AM MOST INTERESTED IN  
10:25AM 5 HEARING ABOUT, AND THEN I'LL LET YOU MAKE YOUR ARGUMENTS, AND I  
10:25AM 6 HAVE SOME VERY SPECIFIC QUESTIONS.

10:25AM 7 SO PLAINTIFFS HAVE EIGHT CLAIMS FOR RELIEF, REALLY SEVEN  
10:25AM 8 CLAIMS FOR RELIEF SINCE THE EIGHTH ONE IS A REQUEST FOR  
10:25AM 9 DECLARATORY RELIEF AND MORE OF A REQUEST FOR A REMEDY.

10:25AM 10 MY PRINCIPAL CONCERN IS THE PRAGER DECISION. IT DOES SEEM  
10:25AM 11 THAT THE NINTH CIRCUIT'S DECISION IN PRAGER IS DISPOSITIVE WITH  
10:25AM 12 RESPECT TO THE FEDERAL CLAIMS AND PERHAPS THE CALIFORNIA  
10:25AM 13 CONSTITUTION CLAIM BECAUSE OF THE FINDING THAT THE  
10:25AM 14 NINTH CIRCUIT MADE THAT GOOGLE AND YOUTUBE ARE NOT STATE  
10:25AM 15 ACTORS. THAT CONCLUSION SEEMS TO ELIMINATE THOSE CLAIMS.

10:25AM 16 THE CALIFORNIA CONSTITUTION CLAIMS ARE ALSO PREMISED ON  
10:26AM 17 THE IDEA THAT GOOGLE AND YOUTUBE ARE STATE ACTORS, SO THAT ONE  
10:26AM 18 ALSO SEEMS TO BE ELIMINATED BY THIS DECISION.

10:26AM 19 AND THEN WITH RESPECT TO THE LANHAM ACT CLAIM, THE FINDING  
10:26AM 20 THAT THE TERMS OF SERVICE AND COMMUNITY GUIDELINES ARE NOT  
10:26AM 21 COMMERCIAL ADVERTISING OR PROMOTION AND THAT THE OTHER  
10:26AM 22 STATEMENTS THAT ARE CONTAINED -- THAT ARE HIGHLIGHTED IN THE  
10:26AM 23 SECOND AMENDED COMPLAINT ARE OPERATIONAL OR PUFFERY MEANS THAT  
10:26AM 24 THE PLAINTIFFS COULD NOT PREVAIL ON THE LANHAM ACT CLAIM.

10:26AM 25 SO I WOULD LIKE TO UNDERSTAND THE PARTIES' VIEWS ON THE

10:26AM 1 SIGNIFICANCE OF PRAGER. THAT'S THE FIRST THING.

10:26AM 2 AND THE SECOND ITEM THAT CAUGHT MY ATTENTION WAS THE  
10:26AM 3 UNRAH ACT CLAIM WHICH DOESN'T HAVE -- DOESN'T GIVE MUCH  
10:26AM 4 DISCUSSION IN THE PARTIES' PAPERS, BUT HERE'S MY QUESTION ABOUT  
10:26AM 5 THE UNRAH ACT CLAIM, OR QUESTIONS.

10:26AM 6 DOES IT ACTUALLY APPLY TO THE GOOGLE YOUTUBE PLATFORM?  
10:26AM 7 AND IF SO, UNDER WHAT SPECIFIC THEORY?

10:26AM 8 IF I CONSTRUE THE SECOND AMENDED COMPLAINT AS ALLEGING AN  
10:27AM 9 UNWRITTEN POLICY TO DISCRIMINATE AGAINST THE LGBTQ CONTENT  
10:27AM 10 CREATORS, IS THAT REALLY WITHIN THE SCOPE OF PUBLISHING  
10:27AM 11 ACTIVITY UNDER SECTION 230(C)(1) OR (C)(2), WHICH HAS A GOOD  
10:27AM 12 FAITH REQUIREMENT?

10:27AM 13 IS THAT KIND OF AN UNWRITTEN POLICY SUFFICIENT TO STATE A  
10:27AM 14 CLAIM EVEN IF GOOGLE AND YOUTUBE'S OFFICIAL WRITTEN POLICY IS  
10:27AM 15 VIEWPOINT NEUTRAL?

10:27AM 16 SO I HAVE SOME QUESTIONS AROUND THE UNRAH ACT CLAIM THAT I  
10:27AM 17 WOULD LIKE THE PARTIES TO FOCUS ON.

10:27AM 18 AND THEN FINALLY I DID SEE THAT THE PLAINTIFFS DID FILE  
10:27AM 19 YESTERDAY A REQUEST FOR JUDICIAL NOTICE ABOUT THE RECENT  
10:27AM 20 EXECUTIVE ORDER, AND I'LL PERMIT THE PARTIES TO ADDRESS THAT,  
10:27AM 21 ALTHOUGH I DO NOT SEE HOW THAT HAS ANY BEARING ON THE MOTION TO  
10:27AM 22 DISMISS.

10:27AM 23 BUT THOSE ARE MY HIGH-LEVEL OBSERVATIONS AND FLAGGING  
10:27AM 24 THOSE ISSUES FOR YOUR CONSIDERATION, BUT I WILL LET YOU ARGUE  
10:28AM 25 HOWEVER YOU WOULD LIKE TO ARGUE.



10:28AM 1 AND SINCE IT'S THE DEFENDANTS' MOTION, I WILL GO AHEAD AND  
10:28AM 2 LET GOOGLE START.

10:28AM 3 SO MR. WILLEN.

10:28AM 4 MR. WILLEN: YES. THANK YOU, YOUR HONOR.

10:28AM 5 I THINK I SHOULD PROBABLY TAKE YOUR FIRST SET OF QUESTIONS  
10:28AM 6 FIRST WHICH HAS TO DO WITH THE IMPACT OF THE NINTH CIRCUIT'S  
10:28AM 7 DECISION IN PRAGER, AND SINCE I THINK THAT RELATES TO THE  
10:28AM 8 MERITS OF THE CAUSES OF ACTION RATHER THAN SECTION 230, I WILL  
10:28AM 9 LET MY COLLEAGUE, MS. WHITE, ADDRESS THAT IN THE FIRST  
10:28AM 10 INSTANCE.

10:28AM 11 THE COURT: ALL RIGHT. VERY WELL.

10:28AM 12 MS. WHITE: THANK YOU, YOUR HONOR.

10:28AM 13 TAKING YOUR QUESTIONS IN ORDER, I'LL BEGIN WITH THE FIRST  
10:28AM 14 AMENDMENT. WE ABSOLUTELY AGREE WITH YOUR SUGGESTION THAT THE  
10:28AM 15 NINTH CIRCUIT'S DECISION FORECLOSES PLAINTIFFS' FIRST AMENDMENT  
10:28AM 16 CLAIM.

10:28AM 17 THEIR CLAIM IS PREDICATED ON AN INFRINGEMENT OF THEIR OWN  
10:28AM 18 FIRST AMENDMENT RIGHTS, AND OF COURSE THE CASE LAW IS EXTREMELY  
10:29AM 19 CLEAR FOLLOWING THE SUPREME COURT'S DECISION IN HALLECK AND NOW  
10:29AM 20 THE NINTH CIRCUIT'S DECISION IN PRAGER, WHICH WAS BROUGHT BY  
10:29AM 21 COUNSEL FOR PLAINTIFFS HERE AND ASSERTED CLAIMS BASED ON THE  
10:29AM 22 SAME PRODUCTS AND SERVICES ON YOUTUBE'S PLATFORM THAT ARE AT  
10:29AM 23 ISSUE IN THIS CASE.

10:29AM 24 THERE'S SIMPLY NO PATH FORWARD IN LIGHT OF THE COURT'S  
10:29AM 25 HOLDING TO -- FOR THE COURT TO CONCLUDE THAT YOUTUBE IS A STATE

10:29AM 1 ACTOR.

10:29AM 2 AND PLAINTIFFS HAVE FILED A SURREPLY ADDRESSING THAT  
10:29AM 3 DECISION, ALTHOUGH THEY DID NOT ADDRESS JUDGE KOH'S UNDERLYING  
10:29AM 4 DECISION THAT THE NINTH CIRCUIT AFFIRMED IN THEIR OPPOSITION  
10:29AM 5 BRIEF.

10:29AM 6 AND IN THEIR SURREPLY THEY CLAIM THAT THIS CASE IS  
10:30AM 7 DIFFERENT BECAUSE THEY HAVE ARTICULATED A DIFFERENT STATE  
10:30AM 8 ACTION THEORY UNDER THE SO-CALLED ENDORSEMENT TEST UNDER THE  
10:30AM 9 SUPREME COURT SKINNER DECISION.

10:30AM 10 BUT WHETHER THE COURT CONSIDERS THE ENDORSEMENT TEST OR  
10:30AM 11 THE PUBLIC FUNCTION TEST THAT WAS ARGUED IN PRAGER, THE  
10:30AM 12 PARTY -- THE PLAINTIFFS MUST SHOW THAT IN ORDER TO SHOW STATE  
10:30AM 13 ACTION, THAT THE CONDUCT THAT ALLEGEDLY DEPRIVED THEM OF THEIR  
10:30AM 14 RIGHTS CAN FAIRLY BE ATTRIBUTED TO THE STATE OR THE GOVERNMENT.

10:30AM 15 AND THERE IS NO BASIS TO ARGUE THAT YOUTUBE, IN MONITORING  
10:30AM 16 ITS SERVICE AND MODERATING CONTENT ON ITS SERVICE WAS SOMEHOW  
10:30AM 17 ACTING WITH THE GOVERNMENT'S ENDORSEMENT. AND SECTION 230 BY  
10:30AM 18 ITS EXPRESS TERMS, AND THE LEGISLATIVE HISTORY CONFIRMS, THAT  
10:31AM 19 THE GOVERNMENT WAS, IN FACT, SEEKING TO TAKE ITSELF OUT OF THE  
10:31AM 20 PROCESS OF CONTENT MODERATION ONLINE. SO THERE IS NO BASIS FOR  
10:31AM 21 THE COURT TO CONCLUDE THAT SECTION 230 SOMEHOW PUTS A THUMB ON  
10:31AM 22 THE SCALE IN FAVOR OF THE CONTENT MODERATION DECISIONS THAT  
10:31AM 23 YOUTUBE MADE WITH RESPECT TO THE PLAINTIFFS' CONTENT HERE.

10:31AM 24 THE COURT: IT SEEMS ALMOST LIKE AN ABSENCE OF  
10:31AM 25 ENDORSEMENT, SORT OF AN EXPLICIT NON-ENDORSEMENT OF ANY

10:31AM 1 PARTICULAR MONITORING OR POLICING OR CENSORSHIP OR RESTRICTION.  
10:31AM 2 IT'S LEAVING IT UP TO THE PLATFORM OR THE SERVICE PROVIDER IN  
10:31AM 3 THIS CASE.

10:31AM 4 SO I TAKE YOUR POINT ABOUT THE ENDORSEMENT THEORY. IT  
10:31AM 5 DOESN'T SEEM TO FIT, BUT I WILL HEAR FROM THE PLAINTIFFS ON  
10:31AM 6 THAT.

10:31AM 7 OKAY. SO IN YOUR VIEW -- IN DEFENDANTS' VIEW DOES THE  
10:32AM 8 PRAGER DECISION TAKE CARE OF THE FIRST AMENDMENT CLAIM AS WELL  
10:32AM 9 AS THE CALIFORNIA CONSTITUTION CLAIM?

10:32AM 10 I MEAN, IT DOESN'T SPECIFICALLY ADDRESS THE CALIFORNIA  
10:32AM 11 CONSTITUTION, THE NINTH CIRCUIT DOES NOT. THAT WAS THE  
10:32AM 12 PRAGER II DECISION.

10:32AM 13 MR. WILLEN: THAT'S RIGHT, YOUR HONOR. WE THINK IT  
10:32AM 14 DOES. CALIFORNIA STATE COURTS HAVE MADE CLEAR THAT THE  
10:32AM 15 CALIFORNIA CONSTITUTION HAS A STATE ACTION REQUIREMENT JUST  
10:32AM 16 LIKE THE FIRST AMENDMENT.

10:32AM 17 AND AS THE NINTH CIRCUIT IN PRAGER HELD, THAT TO FIND A  
10:32AM 18 PRIVATE PLATFORM INVOLVED IN HOSTING EXPRESSIVE CONDUCT A STATE  
10:32AM 19 ACTOR WOULD ESSENTIALLY BE A PARADIGM SHIFT AND THAT HOLDING  
10:32AM 20 BEARS ON THE CALIFORNIA CONSTITUTION CLAIM AS WELL.

10:32AM 21 NOW, PLAINTIFFS HAVE INVOKED THIS NARROW AND 40-YEAR-OLD  
10:33AM 22 EXCEPTION ARTICULATED BY THE CALIFORNIA SUPREME COURT IN  
10:33AM 23 ROBINS VERSUS PRUNEYARD, BUT THAT DECISION WAS APPLIED TO REAL  
10:33AM 24 PROPERTY GIVEN THE NATURE OF REAL PROPERTY AND HAS NEVER BEEN  
10:33AM 25 EXTENDED BEYOND THE SCOPE OF REAL PROPERTY.

10:33AM 1 AND, IN FACT, EVERY CASE THAT HAS CONSIDERED SIMILAR  
10:33AM 2 EFFORTS TO EXPAND ITS SCOPE TO ONLINE SERVICES HAS REJECTED  
10:33AM 3 THOSE EFFORTS. IN ADDITION TO PRAGER II THERE WAS THE DOMEN  
10:33AM 4 CASE IN THE SOUTHERN DISTRICT OF NEW YORK AND JUDGE CHEN IN THE  
10:33AM 5 HIQ DECISION.

10:33AM 6 THE COURT: ALL RIGHT. THANK YOU.

10:33AM 7 AND THE LANHAM ACT ISSUE?

10:33AM 8 MS. WHITE: YES. ON THAT, YOUR HONOR, I DON'T  
10:33AM 9 ENTIRELY UNDERSTAND PLAINTIFFS' ARGUMENTS IN THEIR SURREPLY FOR  
10:33AM 10 ATTEMPTING TO DISTINGUISH THE LANHAM ACT, BUT THERE'S  
10:33AM 11 ESSENTIALLY FOUR CATEGORIES OF STATEMENTS AT ISSUE IN THEIR  
10:34AM 12 CLAIM, AND THEY ALL RELATE TO STATEMENTS THAT THE NINTH CIRCUIT  
10:34AM 13 CONSIDERED IN PRAGER, THOSE DEALING WITH THE TERMS OF SERVICE  
10:34AM 14 DESCRIPTIONS OF RESTRICTED MODE AND SOME IMPLICIT STATEMENT BUT  
10:34AM 15 NO ACTUAL STATEMENT REGARDING THE DECISION TO MAKE CERTAIN OF  
10:34AM 16 PLAINTIFFS' VIDEOS UNAVAILABLE IN RESTRICTED MODE.

10:34AM 17 THE NINTH CIRCUIT ADDRESSED EACH OF THOSE CATEGORIES OF  
10:34AM 18 STATEMENTS AND CLEARLY HELD THAT NO LANHAM ACT CLAIM COULD  
10:34AM 19 PROCEED ON THE BASIS OF ANY OF THEM. THEY ARE NOT MADE IN  
10:34AM 20 COMMERCIAL OR PROMOTIONAL CONTEXTS AND THEY, WITH RESPECT TO  
10:34AM 21 YOUTUBE'S PROMOTIONAL STATEMENTS AND MISSION STATEMENTS, ARE  
10:34AM 22 NOT -- ARE ESSENTIALLY NONACTIONABLE PUFFERY.

10:34AM 23 THE COURT: AND IF GOOGLE WERE TO ACT OR HAVE AN  
10:34AM 24 INTERNAL UNWRITTEN POLICY THAT WAS INCONSISTENT WITH THOSE  
10:34AM 25 PUBLIC STATEMENTS, WOULD THE ANSWER STILL BE THE SAME UNDER THE

10:35AM 1 LANHAM ACT? DOES IT MATTER? THOSE ARE -- THE STATEMENTS THAT  
10:35AM 2 ARE PUBLIC FACING AND DESCRIBE THE PLATFORM AS BEING VIEWPOINT  
10:35AM 3 NEUTRAL, THAT'S NOT ADVERTISING, THAT'S NOT PROMOTION, SO IT  
10:35AM 4 DOESN'T MATTER IF, IN FACT, THAT'S NOT THE WAY IT WORKS AND  
10:35AM 5 THERE'S SOME UNWRITTEN POLICY THAT DISCRIMINATES AGAINST THE  
10:35AM 6 LGBT CONTENT CREATORS AND STILL NOT ACTIONABLE UNDER THE  
10:35AM 7 LANHAM ACT WOULD BE YOUR VIEW?

10:35AM 8 MS. WHITE: THAT'S RIGHT, YOUR HONOR. TO STATE A  
10:35AM 9 CLAIM UNDER THE LANHAM ACT FOR FALSE ADVERTISING, WHICH IS WHAT  
10:35AM 10 I UNDERSTAND THE PLAINTIFFS CLAIM TO BE HERE, THEY HAVE TO TIE  
10:35AM 11 THE CLAIM TO SOME ACTUAL STATEMENT.

10:35AM 12 SO IMPLICIT OR ABSTRACT MOTIVE IS NOT SUFFICIENT TO STATE  
10:35AM 13 A CLAIM UNDER THE LANHAM ACT.

10:35AM 14 THE COURT: ALL RIGHT. SO I DID HAVE A QUESTION  
10:35AM 15 ABOUT TRYING TO FOCUS IN ON THIS ISSUE OF PLAINTIFFS ALLEGE  
10:36AM 16 DISCRIMINATION BASED ON THEIR IDENTITY AS OPPOSED TO CONTENT.

10:36AM 17 AND I DON'T KNOW IF THIS IS A QUESTION FOR YOU OR  
10:36AM 18 MR. WILLEN BECAUSE IT REALLY DOES GET INTO THE QUESTION OF WHAT  
10:36AM 19 IS IMMUNIZED AND WHAT IS NOT.

10:36AM 20 PLAINTIFFS SAY IN THEIR COMPLAINT THAT THEIR CONTENT IS  
10:36AM 21 BLOCKED OR RESTRICTED IN SOME WAY NOT BECAUSE OF THE CONTENT  
10:36AM 22 ITSELF BUT BECAUSE THE CREATORS OF THE CONTENT ARE GAY OR ARE  
10:36AM 23 SEEKING TO HAVE THEIR CONTENT VIEWED BY THE LGBT COMMUNITY, SO  
10:36AM 24 THEY'RE TARGETING CONTENT TO THE LGBT COMMUNITY.

10:36AM 25 SO THAT MAKES ME WONDER WHETHER THAT KIND OF CONDUCT IS,

10:36AM 1 AS I ASKED FROM THE BEGINNING, SO IF I CREDIT THAT AS AN  
10:36AM 2 ALLEGATION THAT I MUST ACCEPT AS TRUE THAT IT'S A  
10:36AM 3 DISCRIMINATION BASED ON IDENTITY, IS THAT WITHIN THE SCOPE OF  
10:36AM 4 THE PUBLISHING ACTIVITIES UNDER SECTION (C) (1)?

10:37AM 5 AND THE SECOND PART IS IF YOU HAVE TO SHOW GOOD FAITH  
10:37AM 6 UNDER (C) (2), IS THAT KIND OF DISCRIMINATION, IS THERE A  
10:37AM 7 QUESTION WHETHER THAT KIND OF DISCRIMINATION IS NOT GOOD FAITH  
10:37AM 8 UNDER (C) (2)?

10:37AM 9 SO THOSE ARE QUESTIONS FOR MR. WILLEN.

10:37AM 10 MR. WILLEN: SURE. I'D BE HAPPY TO ADDRESS THOSE,  
10:37AM 11 YOUR HONOR.

10:37AM 12 SO WITH RESPECT TO (C) (1), THE COURT IS NOT WRITING ON A  
10:37AM 13 BLANK SLATE HERE. WE'VE HAD A SERIES OF DECISIONS, AT LEAST  
10:37AM 14 SIX CASES IN THE LAST TWO OR THREE YEARS ALL OF WHICH HAVE  
10:37AM 15 APPLIED SECTION 230 (C) (1) TO CLAIMS UNDER VARIOUS  
10:37AM 16 DISCRIMINATION LAWS, INCLUDING THE UNRAH ACT.

10:37AM 17 SO, FOR EXAMPLE, THE DOMEN CASE THAT MS. WHITE MENTIONED  
10:37AM 18 IN THE SOUTHERN DISTRICT OF NEW YORK WAS A CLAIM OF THE  
10:37AM 19 UNRAH ACT SPECIFICALLY HELD THAT THE STATE, YOU KNOW,  
10:37AM 20 DISCRIMINATION LAWS AND CLAIMS ARISING UNDER THEM ARE WITHIN  
10:37AM 21 THE SCOPE OF PUBLISHING ACTIVITY AT LEAST IN CERTAIN CONTEXTS  
10:38AM 22 UNDER (C) (1).

10:38AM 23 WE HAVE THE SIKHS FOR JUSTICE CASE, JUDGE KOH'S DECISION,  
10:38AM 24 WHICH HELD THE SAME THING AS DID TITLE II OF THE FEDERAL CIVIL  
10:38AM 25 RIGHTS ACT, AND THAT DECISION WAS AFFIRMED IN AN UNPUBLISHED

10:38AM 1 DECISION BY THE NINTH CIRCUIT, WHICH SPECIFICALLY SAID THERE'S  
10:38AM 2 NO, THERE'S NO REASON TO EXEMPT THIS CLAIM FROM SECTION 230.

10:38AM 3 PRAGER HELD THE SAME THING. SIKHS VERSUS FACEBOOK, THE  
10:38AM 4 FEDERAL NEWS AGENCY CASE, ALSO A JUDGE KOH DECISION. SO  
10:38AM 5 THERE'S A LONG SERIES OF CASES THAT HAVE HELD THIS.

10:38AM 6 AND WHAT THAT REFLECTS IS THAT I THINK YOU HAVE TO LOOK IN  
10:38AM 7 A CASE LIKE THIS, AS THOSE COURTS DID, AT THE NATURE OF THE  
10:38AM 8 ACTIVITY THAT IS GIVING RISE TO THE CLAIM.

10:38AM 9 HERE PRIMARILY WHAT THE PLAINTIFFS ARE ALLEGING IS A  
10:38AM 10 CHALLENGE TO TWO THINGS:

10:38AM 11 ONE IS THE DECISIONS THAT YOUTUBE MADE WITH RESPECT TO  
10:38AM 12 RESTRICTED MODE, AND THAT'S THE EXCLUSION OF CERTAIN VIDEOS  
10:38AM 13 FROM BEING ELIGIBLE TO BEING SHOWN IN YOUTUBE'S RESTRICTED  
10:38AM 14 MODE;

10:39AM 15 AND THE SECOND IS THE DECISION TO DEMONETIZE SOME VIDEOS,  
10:39AM 16 ALTHOUGH NOT ALL OF THE VIDEOS.

10:39AM 17 SO MS. WHITE CAN CERTAINLY ADDRESS WHETHER THOSE  
10:39AM 18 ALLEGATIONS EVEN STATE A CLAIM UNDER THE UNRAH ACT, BUT  
10:39AM 19 ASSUMING THAT THEY DID, THAT CHALLENGE, THE SPECIFIC ISSUES AT  
10:39AM 20 ISSUE HERE, PLAINLY QUALIFY AS PUBLISHING ACTIVITY AS IT'S BEEN  
10:39AM 21 DEFINED BY THE NINTH CIRCUIT AND THE SERIES OF NORTHERN  
10:39AM 22 DISTRICT OF CALIFORNIA AND OTHER CASES THAT I MENTIONED.

10:39AM 23 SO WITH RESPECT TO RESTRICTED MODE, THAT WAS THE EXPRESS  
10:39AM 24 HOLDING OF THE PRAGER II STATE COURT DECISION CHALLENGED THE  
10:39AM 25 RESTRICTED MODE CLEARLY COMES UNDER SECTION 230(C) (2) AS

10:39AM 1 PUBLISHING CONDUCT, EXCUSE ME, AND LIKEWISE THE SAME THING WITH  
10:39AM 2 RESPECT TO DEMONETIZATION, AND THAT WAS CONFIRMED EVEN MORE  
10:39AM 3 RECENTLY BY JUDGE KIM'S DECISION IN THE LEWIS CASE WHICH WE  
10:39AM 4 SUBMITTED AS SUPPLEMENTAL AUTHORITY. AND THAT WAS A CASE  
10:40AM 5 INVOLVING DEMONETIZATION, AND THE COURT THERE EXPLAINED VERY  
10:40AM 6 CLEARLY I THINK THAT DEMONETIZATION IS A FORM OF PUBLISHER  
10:40AM 7 ACTIVITY.

10:40AM 8 THE COURT: LET ME PAUSE YOU RIGHT THERE,  
10:40AM 9 MR. WILLEN, BECAUSE I GET THE POINT THAT OTHER CASES HAVE HELD  
10:40AM 10 THAT PUBLISHING ACTIVITY ENCOMPASSES QUITE A BROAD SWATH OF  
10:40AM 11 ACTIVITY, I UNDERSTAND THAT POINT.

10:40AM 12 BUT TO PUT A REALLY FINE POINT ON IT HERE, WHAT I'M  
10:40AM 13 CONCERNED ABOUT IS IF, IF THE ALLEGATION IS, AND I KNOW THAT  
10:40AM 14 GOOGLE DISPUTES THAT THIS IS REALLY WHAT IS ALLEGED, BUT IF THE  
10:40AM 15 ALLEGATION IS THAT, A, SOMEONE WHO DOES ALL OF THOSE PUBLISHING  
10:40AM 16 ACTIVITIES IS NEVERTHELESS DISCRIMINATING ON THE BASIS OF THE  
10:40AM 17 AUTHOR'S IDENTITY, THE CONTENT CREATOR'S IDENTITY, REGARDLESS  
10:40AM 18 OF WHAT IT IS THAT THE CONTENT HAS IN IT, IF THAT'S THE  
10:40AM 19 ALLEGATION, ARE YOU SAYING THAT THAT IS PUBLISHING ACTIVITY,  
10:40AM 20 DISCRIMINATION ON THE BASIS OF, LET'S JUST SAY SEXUAL  
10:41AM 21 ORIENTATION OF THE CONTENT CREATOR, THAT'S WITHIN PUBLISHING  
10:41AM 22 ACTIVITY UNDER (C) (1)?

10:41AM 23 MR. WILLEN: WELL, I WOULD SAY TWO THINGS. SO,  
10:41AM 24 FIRST OF ALL, I THINK IT'S ACTUALLY CLEAR FROM THE FACTS  
10:41AM 25 ALLEGED IN THE COMPLAINT AS OPPOSED TO KIND OF RHETORIC IN THE



10:41AM 1 COMPLAINT THAT THAT'S NOT WHAT IS PLAUSIBLY ALLEGED HERE.

10:41AM 2 YOU KNOW, WE KNOW, FOR EXAMPLE, THAT ALL OF THE -- NONE OF  
10:41AM 3 THE PLAINTIFFS HERE HAVE HAD ALL OF THEIR VIDEOS EXCLUDED FROM  
10:41AM 4 RESTRICTED MODE, NONE OF THEM HAVE ALL OF THEIR VIDEOS NOT  
10:41AM 5 ELIGIBLE FOR MONETIZATION.

10:41AM 6 SO CLEARLY IF YOU ACTUALLY LOOK AT WHAT IS GOING ON IN  
10:41AM 7 THIS CASE, IT'S VERY HARD TO SAY THAT THERE IS ANY SORT OF  
10:41AM 8 IDENTITY OR USER BASE DISCRIMINATION. SO I THINK THAT'S AN  
10:41AM 9 IMPORTANT POINT.

10:41AM 10 BUT AGAIN, WITH RESPECT TO SORT OF THE LEGAL QUESTION  
10:41AM 11 UNDER SECTION 230, I MEAN I THINK IT DOES FOLLOW, AND THERE MAY  
10:41AM 12 BE SOME CASES WHERE THIS COULD NOT BE THE CASE DEPENDING ON THE  
10:41AM 13 PARTICULAR CIRCUMSTANCES.

10:41AM 14 BUT THE NINTH CIRCUIT HAS BEEN VERY CLEAR THAT SECTION  
10:42AM 15 230(C) (1) APPLIES WITHOUT REGARD TO THE NATURE OF THE CAUSE OF  
10:42AM 16 ACTION.

10:42AM 17 THE THING THAT YOU'RE LOOKING AT IS WHAT IS THE DUTY THAT  
10:42AM 18 THE CAUSE OF ACTION IMPOSES AND WHERE THAT DUTY TAKES THE FORM  
10:42AM 19 OF A COMMAND EITHER TO PUBLISH OR NOT TO PUBLISH. THAT IS  
10:42AM 20 PRECISELY WHAT SECTION 230(C) (1) PROTECTS AGAINST. SO  
10:42AM 21 WITHDRAWING CONTENT FROM PUBLICATION, CLEAR PUBLIC ACTIVITY.

10:42AM 22 SO WHERE A DISCRIMINATION CLAIM TAKES THE FORM OF SEEKING  
10:42AM 23 TO IMPOSE A DUTY ON THE PLATFORM TO EITHER PUBLISH OR NOT TO  
10:42AM 24 WITHDRAW FROM PUBLICATION A PARTICULAR PIECE OF CONTENT OR A  
10:42AM 25 PARTICULAR USER'S CONTENT, THAT I THINK JUST UNDER THE

10:42AM 1 ESTABLISHED LAW APPLIES AND KICKS THE IMMUNITY IN.

10:42AM 2 THE COURT: THAT'S WHY I WAS ASKING THIS QUESTION IN  
10:42AM 3 THE CONTEXT OF THE UNRAH ACT BECAUSE THAT TO ME SEEMED LIKE THE  
10:42AM 4 ONLY -- IT'S NOT -- IT CAN'T BE A FIRST AMENDMENT ISSUE. WE  
10:43AM 5 KNOW THAT FROM PRAGER.

10:43AM 6 MR. WILLEN: YEAH.

10:43AM 7 THE COURT: I DIDN'T REALLY SEE HOW . THERE'S A 14TH  
10:43AM 8 AMENDMENT ISSUE. IT'S NOT REALLY PLED THAT WAY.

10:43AM 9 IT'S MORE OF AS A RESPONSE TO THE AFFIRMATIVE RESPONSE  
10:43AM 10 UNDER 230 (C) . SO THAT'S WHY I WAS FOCUSING ON THE UNRAH ACT  
10:43AM 11 BECAUSE IMAGINE THAT A PUBLISHER WAS DISCRIMINATING AGAINST A  
10:43AM 12 CONTENT CREATOR BASED ON RACE, AND JUST MAKE IT REAL  
10:43AM 13 STRAIGHTFORWARD, AND THAT WAS THE ALLEGATION.

10:43AM 14 SO LET'S JUST REMOVE IT FROM THE ACTUAL CASE HERE, BECAUSE  
10:43AM 15 I KNOW THAT GOOGLE HAS A DIFFERENT VIEW OF WHAT ACTUALLY IS  
10:43AM 16 PLED AND WHAT WAS PLAUSIBLY PLED, AND I JUST WANTED TO AVOID  
10:43AM 17 THAT ISSUE.

10:43AM 18 I'M ASKING YOU A HYPOTHETICAL QUESTION. A PUBLISHER IS  
10:43AM 19 DISCRIMINATING AGAINST A CONTENT CREATOR ON THE BASIS OF RACE,  
10:43AM 20 NOT ON CONTENT, IS THAT PUBLISHING ACTIVITY UNDER (C) (1) AND IS  
10:43AM 21 IT IMMUNIZED -- WOULD IT ALSO BE IMMUNIZED UNDER (C) (2)?

10:43AM 22 MR. WILLEN: YEAH. SO I THINK THE (C) (2) QUESTION  
10:43AM 23 IS A DIFFICULT ONE BECAUSE OF THE GOOD FAITH LANGUAGE.

10:44AM 24 OBVIOUSLY WE HAVE NOT SPECIFICALLY RAISED (C) (2) IN  
10:44AM 25 CONNECTION WITH THIS MOTION. I THINK THIS ISSUE HAS NOT

10:44AM 1 SPECIFICALLY COME UP IN THE (C) (2) CONTEXT. I CAN IMAGINE SOME  
10:44AM 2 COURTS TAKING THE POSITION THAT A PROPERLY PLEADED CLAIM OF THE  
10:44AM 3 SORT THAT YOU DESCRIBE AS SORT OF FACIAL RACE DISCRIMINATION  
10:44AM 4 CLAIM MAY NOT BE GOOD FAITH UNDER (C) (2), I CAN IMAGINE A COURT  
10:44AM 5 TAKING THAT POSITION.

10:44AM 6 I THINK AGAIN, THOUGH, (C) (1) DOES NOT HAVE A GOOD FAITH  
10:44AM 7 PROVISION, AND IT APPLIES WITH CIRCUMSTANCES AND APPLIES  
10:44AM 8 DIFFERENTLY.

10:44AM 9 I THINK WE HAVE TO LOOK AT THE CARVE-OUTS THAT DO EXIST  
10:44AM 10 UNDER (C) (1). WE HAVE PARTICULAR STATUTES THAT CONGRESS CHOSE  
10:44AM 11 TO EXEMPT, INTELLECTUAL PROPERTY, FEDERAL INTELLECTUAL PROPERTY  
10:44AM 12 CLAIMS, CRIMINAL PROSECUTIONS, CLAIMS UNDER THE STORED  
10:44AM 13 COMMUNICATIONS AND ELECTRONIC COMMUNICATIONS PRIVACY ACT.  
10:45AM 14 DISCRIMINATION CLAIMS OBVIOUSLY ARE NOT, NOT THERE.

10:45AM 15 I THINK THERE COULD BE SOME STARK CASES WHERE A COURT  
10:45AM 16 MIGHT FIND UNDER A PARTICULAR SET OF CIRCUMSTANCES THAT SOME  
10:45AM 17 ALLEGED DISCRIMINATION DIDN'T TAKE THE FORM OF A PUBLISHER OF  
10:45AM 18 ACTUALLY TARGETING PUBLISHER CONDUCT, AND, THEREFORE, DIDN'T  
10:45AM 19 COME WITHIN (C) (1).

10:45AM 20 I THINK THIS CASE, WHICH IS THE CASE THAT WE HAVE TO LOOK  
10:45AM 21 AT, IS I THINK CLEARLY ON THE OTHER SIDE OF THE LAW GIVEN THE  
10:45AM 22 NATURE OF THE ALLEGATIONS FOCUSSED SPECIFICALLY ON RESTRICTED  
10:45AM 23 MODE, FOCUSSED ON DEMONETIZATION.

10:45AM 24 WE KNOW FROM THE CASES THAT THOSE ARE CORE PUBLISHER  
10:45AM 25 ACTIVITIES, AND WE KNOW FROM THE CASES THAT THE DISCRIMINATION

10:45AM 1 CLAIMS THAT ARE TARGETING THOSE KINDS OF ACTIVITIES HAVE BEEN  
10:45AM 2 REPEATEDLY PRECLUDED BY SECTION 230 (C) (1) .

10:45AM 3 SO I DON'T THINK THERE'S ANY BASIS IN THIS CASE, GIVEN  
10:45AM 4 THESE ALLEGATIONS, TO DEPART FROM THAT CONSENSUS.

10:45AM 5 THE COURT: ALL RIGHT. LET ME JUST ASK, DOES ANYONE  
10:46AM 6 ON BEHALF OF GOOGLE WISH TO ADDRESS THE REQUEST FOR UNUSUAL  
10:46AM 7 NOTICE?

10:46AM 8 MR. WILLEN: SURE. I'D BE HAPPY TO TALK ABOUT THAT  
10:46AM 9 AS WELL. YEAH, I THINK WE SHARE YOUR SENSE, YOUR HONOR, THAT  
10:46AM 10 THE EXECUTIVE ORDER REALLY HAS NOTHING TO DO WITH THE ISSUES ON  
10:46AM 11 THIS MOTION.

10:46AM 12 THE EXECUTIVE ORDER SEEMS TO US, AT LEAST THE ONLY  
10:46AM 13 PROVISION OF IT THAT PURPORTS TO HAVE ANY ACTUAL PRESENT  
10:46AM 14 EFFECT, WHICH IS PARAGRAPH 2, IS ADDRESSED TO AN INTERPRETATION  
10:46AM 15 OF SECTION 230 (C) (2) (A) , WHICH SEEMS TO REDUCE TO IF YOU DON'T  
10:46AM 16 QUALIFY FOR PROTECTION UNDER 230 (C) (2) (A) , YOU'RE NOT PROTECTED  
10:46AM 17 BY SECTION 230 (C) (2) (A) .

10:46AM 18 SO I DON'T THINK THAT HAS ANY BEARING ON THIS MOTION WHICH  
10:46AM 19 DOESN'T RELY ON SECTION 230 (C) (2) AT ALL.

10:46AM 20 EVERYTHING ELSE IN THE ORDER IS SORT OF DIRECTED TO THINGS  
10:46AM 21 THAT MIGHT HAPPEN IN THE FUTURE AND DIRECTIVES FOR RULE MAKING,  
10:47AM 22 ET CETERA.

10:47AM 23 SO I DON'T THINK THERE'S ANYTHING TO DO WITH IT. I DON'T  
10:47AM 24 THINK IT HAS ANY BEARING ON THESE ISSUES, AND CERTAINLY IT  
10:47AM 25 DOESN'T DISPLACE AND IT'S REALLY NOT CAPABLE OF DISPLACING

10:47AM 1 EITHER THE TEXT OF THE STATUTE OR THE LAW THAT HAS BEEN  
10:47AM 2 ESTABLISHED WITH RESPECT TO (C) (1) .

10:47AM 3 THE COURT: ALL RIGHT. THANK YOU FOR THAT.

10:47AM 4 IS THERE ANYTHING ELSE THAT YOU WOULD LIKE TO ARGUE IN  
10:47AM 5 SUPPORT OF YOUR MOTION THAT I HAVEN'T FOCUSSED ON IN PARTICULAR  
10:47AM 6 OR THAT YOU THINK NEEDS FURTHER ELABORATION AT THIS TIME?

10:47AM 7 MR. WILLEN: I THINK THE ONLY THING, AND OBVIOUSLY I  
10:47AM 8 WANT TO HEAR FROM THE PLAINTIFFS AND RESPOND TO WHAT THEY MIGHT  
10:47AM 9 SAY, BUT I DO THINK THAT THE QUESTION OF THE CONSTITUTION, THE  
10:47AM 10 CONSTITUTIONAL CHALLENGE TO SECTION 230 THAT THEY HAVE RAISED I  
10:47AM 11 THINK, AS THE COURT RECOGNIZED, THE FINDING OF NO STATE ACTION  
10:47AM 12 IN THE PRAGER CASE MAKING CLEAR THAT YOUTUBE IS A PRIVATE FORUM  
10:48AM 13 AND NOT A GOVERNMENT ACTOR, I THINK THAT FINDING EQUALLY BARS  
10:48AM 14 NOT JUST THE FIRST AMENDMENT CLAIM BUT ALSO ANY CHALLENGE TO  
10:48AM 15 CONSTITUTIONALITY OF SECTION 230.

10:48AM 16 I THINK THE DECISION THAT IS PROBABLY MOST DIRECTLY ON  
10:48AM 17 POINT IN EXPLAINING WHY THAT CHALLENGE FAILS IS THE  
10:48AM 18 NINTH CIRCUIT'S DECISION IN ROBERTS VERSUS AT&T MOBILITY WHICH  
10:48AM 19 WAS NOT A CASE THAT WE WERE ABLE TO CITE IN OUR PAPERS BECAUSE  
10:48AM 20 IT RELATES TO AN ARGUMENT THAT THE PLAINTIFFS MADE IN THEIR  
10:48AM 21 SURREPLY AND IN THEIR RESPONSE TO THE GOVERNMENT, BUT I THINK  
10:48AM 22 THAT CASE WAS VERY HELPFUL.

10:48AM 23 THE COURT: ALL RIGHT. THANK YOU. THANK YOU VERY  
10:48AM 24 MUCH.

10:48AM 25 MR. OBSTLER, I WOULD LIKE FOR YOU TO HAVE IN MIND THE

10:48AM 1 QUESTIONS THAT THE COURT ASKED AT THE BEGINNING, SO JUST TO  
10:48AM 2 REVIEW THE SIGNIFICANCE OF THE PRAGER DECISION ON YOUR FEDERAL  
10:48AM 3 CLAIMS AND POSSIBLY THE CALIFORNIA CONSTITUTION CLAIM AS WELL;  
10:48AM 4 THE QUESTIONS THAT THE COURT HAD ABOUT THE APPLICATION OF  
10:49AM 5 230(C) (1) AND (2) AND THE CONTEXT OF THE INTENTIONAL  
10:49AM 6 DISCRIMINATION, AND I FRAMED IT AS A QUESTION UNDER THE  
10:49AM 7 UNRAH ACT, BUT YOU MAY THINK OF IT DIFFERENTLY, AND THEN I'LL  
10:49AM 8 ALSO GIVE YOU AN OPPORTUNITY TO -- I WOULD LIKE YOU TO ADDRESS  
10:49AM 9 YOUR REQUEST FOR JUDICIAL NOTICE AND LET ME KNOW WHY YOU THINK  
10:49AM 10 IT MATTERS TO THE MOTION TO DISMISS. AND MAYBE IT'S JUST  
10:49AM 11 SPECIFICALLY TO THE GOVERNMENT'S POSITION ON THE MOTION TO  
10:49AM 12 INTERVENE, BUT I'D LIKE TO JUST UNDERSTAND THAT, AND ANYTHING  
10:49AM 13 ELSE THAT YOU WOULD LIKE TO ARGUE. ALL RIGHT.

10:49AM 14 MR. OBSTLER: THANK YOU SO MUCH, YOUR HONOR.

10:49AM 15 I REALLY APPRECIATE AN OPPORTUNITY TO GET A HEARING ON  
10:49AM 16 THIS CASE BECAUSE I THINK THERE ARE A LOT OF MISCONCEPTIONS  
10:49AM 17 ABOUT WHAT WE HAVE ALLEGED IN 126 PAGES AND 354 PARAGRAPHS.

10:49AM 18 I'M GOING TO ANSWER ALL OF YOUR QUESTIONS, BUT I'M GOING  
10:49AM 19 TO REFER VERY CLOSELY TO THE COMPLAINT IN DOING THAT BECAUSE I  
10:49AM 20 THINK A LOT OF WHAT THEY'RE REALLY ARGUING WHEN YOU PEEL BACK  
10:50AM 21 THE ONION IS FACT BASED. IF THEY'RE DISCRIMINATING, THESE  
10:50AM 22 ARGUMENTS FALL APART.

10:50AM 23 I'LL START WITH THE PRAGER CASE. I THINK WAY TOO MUCH  
10:50AM 24 TIME -- AND I BEAR A LOT OF RESPONSIBILITY FOR THIS BECAUSE I  
10:50AM 25 LITIGATED THE PRAGER CASE -- IS BEING SPENT ON STATE ACTION.

10:50AM 1 I'M GOING TO SUBMIT HERE ON STATE ACTION. I DON'T WANT TO  
10:50AM 2 WASTE ANY MORE TIME ON IT. I THINK YOUR HONOR HAS HER VIEWS.

10:50AM 3 MY ONLY ISSUE WITH THE STATE ACTION DECISIONS THAT HAVE  
10:50AM 4 COME DOWN SO FAR IS THAT THERE IS NOT A CLEAR PLEADING STANDARD  
10:50AM 5 ON WHAT YOU WOULD HAVE TO PLEAD TO PLEAD PUBLIC FUNCTION OR TO  
10:50AM 6 PLEAD ENDORSEMENT.

10:50AM 7 SO IF I COULD KNOW THAT, I COULD THEN MAKE A GOOD FAITH  
10:50AM 8 DECISION AS TO WHETHER OR NOT I CAN ALLEGE THOSE TYPES OF  
10:50AM 9 FACTS. I WOULD LIKE TO HOLD, THOUGH, UNLESS THE COURT REALLY  
10:50AM 10 WANTS TO HEAR FROM ME NOW ON THAT ISSUE, I WOULD REALLY LIKE TO  
10:50AM 11 HOLD THAT TO THE END BECAUSE, FRANKLY, I'M PRETTY MUCH PREPARED  
10:50AM 12 TO SUBMIT ON THAT. WE'RE GOING TO HAVE TO GO UP ON THIS, AND  
10:50AM 13 IT MAY BE THAT PRAGER AND HALLECK ENDS EVERYTHING. I  
10:50AM 14 UNDERSTAND THAT. OKAY. I DON'T THINK THAT'S THE KEY ISSUE IN  
10:50AM 15 MY CASE AT THIS POINT.

10:50AM 16 THE COURT: THE STATE ACTION ISSUE MAKES YOUR FIRST  
10:51AM 17 AMENDMENT CLAIM YOUR WEAKEST CLAIM.

10:51AM 18 MR. OBSTLER: I WOULD ABSOLUTELY AGREE WITH THAT,  
10:51AM 19 YOUR HONOR. I THINK SKINNER AND THE CONSTITUTIONALITY -- AND  
10:51AM 20 SO SKINNER IS SORT OF UPSIDE-DOWN ON THE CONSTITUTIONALITY  
10:51AM 21 ARGUMENT, BUT I WOULD AGREE THAT THAT, OF ALL OF THE CLAIMS IN  
10:51AM 22 THIS CASE AT THIS POINT, DEPENDING ON WHAT THE STANDARD IS, IF  
10:51AM 23 THAT'S THE WEAKEST CLAIM IN THIS CASE.

10:51AM 24 NOW, I WILL SAY THEY HAVE MERGED THEIR TERMS OF SERVICE  
10:51AM 25 RECENTLY SO A VIOLATION ON YOUTUBE CAN ALSO LEAD TO THEM TAKING

10:51AM 1 ANDROID DEVICES AWAY, CAN LEAD TO THEM SHUTTING DOWN ALL SORTS  
10:51AM 2 OF GOOGLE SERVICES. THEY'RE VERY INVOLVED IN ELECTIONS. WE  
10:51AM 3 KNOW THAT FOR WHAT WENT ON IN THE DISASTER THAT HAPPENED IN THE  
10:51AM 4 CAUCUSES.

10:51AM 5 THE COURT: I WOULD RATHER NOT GET INTO THINGS THAT  
10:51AM 6 ARE NOT ALLEGED IN YOUR COMPLAINT.

10:51AM 7 MR. OBSTLER: YOUR HONOR, WE HAVE ALLEGED THAT THEY  
10:51AM 8 ARE INVOLVED IN THESE FUNCTIONS. WE HAVE ALLEGED THAT. IF I  
10:51AM 9 NEED TO ALLEGE MORE SPECIFICITY BECAUSE I'VE GOT SOME VERY  
10:51AM 10 STRINGENT PLEADING REQUIREMENTS HERE, WE CAN TAKE A LOOK AT  
10:52AM 11 THAT.

10:52AM 12 SO MY ONLY REQUEST ON THAT IS THAT THE COURT ARTICULATE  
10:52AM 13 THE STANDARD WHY WE FAIL AND GIVE US LEAVE TO CONSIDER WHETHER  
10:52AM 14 WE CAN AMEND, BUT OTHERWISE WE'RE PREPARED TO GO UP ON THAT  
10:52AM 15 ISSUE, YOUR HONOR.

10:52AM 16 THE COURT: ALL RIGHT. LET'S HEAR ABOUT YOUR  
10:52AM 17 ARGUMENTS THAT DON'T RELY ON STATE ACTION.

10:52AM 18 MR. OBSTLER: OKAY. LET'S START WITH LANHAM. THEY  
10:52AM 19 SEEM TO BE FOCUSED VERY MUCH ON THE STATEMENTS ABOUT FREEDOM  
10:52AM 20 OF EXPRESSION AND ALL THIS TYPE OF STUFF. THAT'S NOT THE BASIS  
10:52AM 21 FOR A LANHAM CLAIM.

10:52AM 22 THE BASIS FOR A LANHAM CLAIM IS THEY WEAR TWO HATS.  
10:52AM 23 THEY'RE ONE OF THE LARGEST CONTENT CREATORS ON THE YOUTUBE  
10:52AM 24 PLATFORM. THEY HAVE PREFERRED CONTENT DEALS WITH MAJOR, MAJOR  
10:52AM 25 MAINSTREAM PUBLISHERS. SO THEY'RE WEARING TWO HATS.



10:52AM 1 AND WHAT THEY'RE DOING, YOUR HONOR, AND I HOPE YOU CAN SEE  
10:52AM 2 THIS, THIS IS WHAT APPEARS --

10:52AM 3 THE COURT: THAT'S OKAY. I HAVE THE COMPLAINT. YOU  
10:52AM 4 DON'T NEED TO PUT IT ON THE VIDEO.

10:52AM 5 MR. OBSTLER: YEAH. THEY ARE SAYING TO ALL SORTS OF  
10:52AM 6 VIEWERS AND AUDIENCES AROUND THE COUNTRY THAT MY CLIENT'S  
10:52AM 7 VIDEOS ARE INAPPROPRIATE BECAUSE THEY CONTAIN SHOCKING CONTENT,  
10:53AM 8 SEXUAL OR NUDDITY, DRUGS, VIOLENCE, ET CETERA. THAT'S WHAT THEY  
10:53AM 9 ARE TELLING THE AUDIENCES WHEN THEY RESTRICT THOSE VIDEOS.

10:53AM 10 THIS CASE, BY THE WAY, IS NOT JUST ABOUT RESTRICTED MODE.  
10:53AM 11 IT'S ABOUT EVERY SINGLE SERVICE THAT GOOGLE AND YOUTUBE OFFER  
10:53AM 12 WHERE THE TRIGGER TO OBTAIN THE SERVICE IS BASED ON A CONTENT  
10:53AM 13 BASED REVIEW OR CONTENT BASED PROCEDURE.

10:53AM 14 SO MY ARGUMENT IN LANHAM IS THAT THEY'RE USING THEIR ROLE  
10:53AM 15 AS CONTENT REGULATORS TO BRAND OUR CONTENT AS INAPPROPRIATE, SO  
10:53AM 16 WHEN THE READER LOOKS TO SEE WHAT IS ON RESTRICTED MODE, THEY  
10:53AM 17 HAVE A LIST AND THAT IS AN AFFIRMATIVE STATEMENT THAT THEY HAVE  
10:53AM 18 REVIEWED THE CONTENT AND THAT THEY HAVE FOUND THE CONTENT TO  
10:53AM 19 VIOLATE THAT RULE.

10:53AM 20 THE COURT: SO LET ME PAUSE YOU THERE FOR A MOMENT  
10:53AM 21 AND LET ME MAKE SURE THAT I UNDERSTAND WHAT YOU'RE SAYING THE  
10:53AM 22 LANHAM ACT CLAIM IS.

10:53AM 23 IS IT A FALSE ADVERTISING CLAIM UNDER 1125(A) (1) (B) ?

10:54AM 24 MR. OBSTLER: YES, YES.

10:54AM 25 THE COURT: OKAY. SO THEN YOU HAVE TO GO THROUGH

10:54AM 1 THE ELEMENTS.

10:54AM 2 SO IF YOU HAD TO TELL ME AN ANSWER TO THIS QUESTION, WHAT  
10:54AM 3 IS THE FALSE OR MISLEADING STATEMENT?

10:54AM 4 MR. OBSTLER: THE FALSE OR MISLEADING STATEMENT THAT  
10:54AM 5 THEY'RE MAKING IS THAT MY CLIENT'S VIDEOS ARE INAPPROPRIATE  
10:54AM 6 SEXUALLY, CONTAIN SEXUAL NUDITY OR MATERIAL, CONTAIN VIOLENCE,  
10:54AM 7 WHEN, IN FACT, THAT IS NOT TRUE BECAUSE THEY'RE NOT EVEN  
10:54AM 8 LOOKING AT THE CONTENT.

10:54AM 9 THE COURT: AND YOU'RE SAYING THAT THE STATEMENT IS  
10:54AM 10 IMPLICIT BECAUSE A SCREEN DISPLAY THAT INDICATES TO THE VIEWER  
10:54AM 11 THAT THAT IS BLOCKED, OR NOT AVAILABLE IN RESTRICTED MODE,  
10:54AM 12 IMPLIES THAT IT MUST MEET ONE OF THOSE CATEGORIES OF CONTENT  
10:54AM 13 THAT GOOGLE WILL NOT PERMIT TO BE SHOWN IN THAT MODE.

10:54AM 14 IS THAT THE THEORY?

10:54AM 15 MR. OBSTLER: THAT IS CORRECT, YOUR HONOR.

10:54AM 16 BUT IT GOES A LITTLE DEEPER THAN THAT, OKAY? BECAUSE IT  
10:54AM 17 ALSO -- AND THIS OVERLAPS WITH THE (C) (1) (A) ISSUE, AND WE'VE  
10:55AM 18 ALLEGED THIS AND THE FROSCHE DECLARATION CONTAINS IT, TOO.

10:55AM 19 THEY'RE NOT ONLY USING DISCRIMINATORY ALGORITHMS TO DO  
10:55AM 20 THIS. THEY'RE ACTUALLY EMBEDDING METADATA INTO MY CLIENT'S  
10:55AM 21 VIDEOS THAT ALLOW THE ALGORITHM TO DO THE PROFILE.

10:55AM 22 AGAIN, UNTIL WE DO DISCOVERY, THIS IS GOING TO BE A VERY  
10:55AM 23 COMPLICATED CASE, AND WE'RE SAYING SHOW US THE CODE AND SHOW US  
10:55AM 24 HOW THIS WORKS.

10:55AM 25 BUT WE DID A TEA VIDEO, AS YOUR HONOR KNOWS, WHERE WE

10:55AM 1 ALLEGED AND WHERE WE PUT IN BOTH TAG LINES AND THEN WE PUT IT  
10:55AM 2 IN WITHOUT THE TAG LINES AND ALL IT SAYS IS WE LIKE TEA. IT  
10:55AM 3 GOT RESTRICTED.

10:55AM 4 AND AS MS. FROSCHE WAS TOLD AT THE MEETINGS, HOW COULD THAT  
10:55AM 5 HAVE HAPPENED UNLESS SOMEBODY PUT SOME METADATA IN THERE THAT  
10:55AM 6 ALLOWED THAT ALGORITHM TO FIND YOU.

10:55AM 7 AND SO WHAT WE'RE SAYING IS THAT BECAUSE THEY'RE SUCH  
10:56AM 8 LARGE CONTENT CREATORS, AND THEY'RE USING THEIR ROLE AS CONTENT  
10:56AM 9 REGULATORS TO ALSO FALSELY BRAND CONTENT THAT IS ABSOLUTELY  
10:56AM 10 APPROPRIATE AS INAPPROPRIATE, AND THAT BLOCKS OUR REACH, AND  
10:56AM 11 THAT'S HOW THEY'RE COMPETING WITH US.

10:56AM 12 THE COURT: RIGHT. SO THAT DOESN'T SOUND SO MUCH  
10:56AM 13 LIKE FALSE ADVERTISING, AND SO THAT'S WHY I WAS ASKING YOU, IS  
10:56AM 14 IT A FALSE ADVERTISING CLAIM OR IS IT SOMETHING ELSE?

10:56AM 15 MR. OBSTLER: WHEN YOU SAY THAT THAT DOESN'T SOUND  
10:56AM 16 LIKE FALSE ADVERTISING --

10:56AM 17 THE COURT: YOU'RE SAYING -- SO YOU'RE FALSELY  
10:56AM 18 BRANDING -- YOUR THEORY IS THAT GOOGLE AND YOUTUBE ARE FALSELY  
10:56AM 19 BRANDING YOUR CLIENT'S CONTENT?

10:56AM 20 MR. OBSTLER: THAT'S CORRECT, BUT THEY'RE DOING IT  
10:56AM 21 BY SHOWING EVERY VIEWER WHO GOES THERE (INDICATING).

10:56AM 22 MY WIFE THE OTHER DAY ACTUALLY GOT A RESTRICTED MODE  
10:56AM 23 NOTICE ON HER FACEBOOK PAGE. SO THE RESTRICTED MODE IS NOW  
10:56AM 24 GOING ACROSS PLATFORM. AND SHE LOOKED IT UP AND SHE SAID WHAT  
10:56AM 25 IS GOING ON HERE?

10:56AM 1 THE POINT IS -- I'M SORRY, THE POINT IS --

10:57AM 2 THE COURT: AGAIN, I'M JUST TRYING TO FIGURE OUT HOW  
10:57AM 3 YOUR CLAIM FITS THE CLAIM THAT YOU'VE ALLEGED UNDER THE  
10:57AM 4 LANHAM ACT, HOW YOUR FACTS FIT THAT CLAIM. I'M STILL  
10:57AM 5 STRUGGLING A LITTLE BIT WITH ALL OF THE ELEMENTS THAT YOU HAVE  
10:57AM 6 TO SHOW FOR THE LANHAM ACT.

10:57AM 7 THE QUESTION THAT THE NINTH CIRCUIT FOCUSSED ON WAS THAT  
10:57AM 8 THE STATEMENTS, AND THE SAME ARGUMENTS WERE MADE IN THAT CASE  
10:57AM 9 AS FAR AS I CAN TELL, THE STATEMENTS WERE NOT MADE IN  
10:57AM 10 COMMERCIAL ADVERTISING OR PROMOTION.

10:57AM 11 MR. OBSTLER: YEP.

10:57AM 12 THE COURT: THE FALSE STATEMENTS.

10:57AM 13 RATHER, THE STATEMENTS THAT WERE MADE WERE DESCRIBING  
10:57AM 14 TRUTHFULLY WHAT HAD HAPPENED AS IN THIS GOT FLAGGED AS  
10:57AM 15 SOMETHING THAT WOULD BE EXCLUDED FROM RESTRICTED MODE.

10:57AM 16 SO -- AND THE IMPLEMENTATION OF THAT, THE GUIDELINES THAT  
10:57AM 17 RESULTED IN THAT DISPLAY BEING AS YOU DESCRIBE WERE NOT  
10:58AM 18 ADVERTISING OR PROMOTION.

10:58AM 19 SO IN LIGHT OF PRAGER, HOW DO YOU AVOID THE CONCLUSIONS  
10:58AM 20 THAT THAT COURT REACHED? HOW DO YOU AVOID THOSE AND  
10:58AM 21 EFFECTIVELY HAVE A CLAIM IN THIS CASE THAT DOESN'T HIT THOSE  
10:58AM 22 SAME BARRIERS?

10:58AM 23 MR. OBSTLER: BECAUSE THE COURT IN PRAGER MADE AN  
10:58AM 24 INAPPROPRIATE FACTUAL FINDING.

10:58AM 25 THE COURT: OKAY. SO WHAT IS THE INAPPROPRIATE

10:58AM 1 FACTUAL FINDING?

10:58AM 2 MR. OBSTLER: YEAH. IT SAID THERE WAS NO  
10:58AM 3 RELATIONSHIP BETWEEN THE STATEMENT THAT IS RESTRICTED IN ANY  
10:58AM 4 ADVERTISING OR STATEMENT ABOUT THE QUALITY OF THE VIDEO. THAT  
10:58AM 5 WAS PLED IN THE COMPLAINT.

10:58AM 6 I ADMIT IT SHOULD HAVE BEEN MORE CLEARER. WE EXPRESSLY  
10:58AM 7 PLED THAT HERE, AND IT IS BY IMPLICATION AS YOU POINTED OUT  
10:58AM 8 UNDER THE GRUBBS DECISION OR WHATEVER.

10:58AM 9 I MEAN, THIS IS THE INTERNET AND THEY'RE USING -- THEY'RE  
10:58AM 10 RESTRICTING THE VIDEO. THE PERSON LOOKED AT THAT RESTRICTION  
10:58AM 11 AND WHAT IS IT -- WHY WOULD THEY RESTRICT THE VIDEO? THERE HAS  
10:58AM 12 TO BE SOMETHING WRONG WITH THAT VIDEO AND PEOPLE SEE THAT.

10:59AM 13 AND I THINK THAT IT IS A FACTUAL ISSUE AS TO WHETHER OR  
10:59AM 14 NOT THERE IS A CONNECTION BETWEEN THIS STATEMENT OF FACT "MY  
10:59AM 15 VIDEO IS RESTRICTED" AND A STATEMENT OF FACT ABOUT WHETHER OR  
10:59AM 16 NOT THAT VIDEO CONTAINS INAPPROPRIATE MATERIAL, SHOCKING AND  
10:59AM 17 SEXUALLY EXPLICIT, OR AS THE FLOOR MANAGER FOR GOOGLE SAID  
10:59AM 18 "BECAUSE YOU'RE GAY" AND PUTTING THAT OUT ON THE NETWORK TO  
10:59AM 19 EVERYBODY.

10:59AM 20 SECOND OF ALL, IF I WOULD GET LEAVE TO AMEND BECAUSE WE  
10:59AM 21 JUST LEARNED THIS, RESTRICTED MODE SWEEPS BROADER THAN WHAT  
10:59AM 22 THEY'VE TOLD US AND WHAT THEY'VE REPRESENTED TO THE COURT. WE  
10:59AM 23 NOW HAVE EVIDENCE THAT RESTRICTED MODE IS GOING TO PEOPLE WHO  
10:59AM 24 DON'T EVEN HAVE IT ON, AND IT'S GOING ACROSS THE PLATFORM.

10:59AM 25 I'M SORRY, I LEARNED THAT RECENTLY. THIS CASE HAS BEEN

10:59AM 1 EVOLVING. WE HAVEN'T GOTTEN A SINGLE LICK OF DISCOVERY ON THIS  
10:59AM 2 TO DATE, YOUR HONOR.

10:59AM 3 THE COURT: RIGHT. IT'S NOT UNUSUAL THAT AT THE  
10:59AM 4 PLEADING STAGE YOU WOULDN'T HAVE HAD DISCOVERY.

10:59AM 5 MR. OBSTLER: FAIR ENOUGH.

11:00AM 6 THE COURT: THAT'S WHY WE'RE AT THE PLEADING STAGE.

11:00AM 7 MR. OBSTLER: YEAH.

11:00AM 8 THE COURT: SO THE ISSUE I STILL THINK IS  
11:00AM 9 CHALLENGING FOR YOU IS CHARACTERIZING THESE STATEMENTS AS  
11:00AM 10 ADVERTISING OR PROMOTION. I THINK THAT'S STILL A CHALLENGING  
11:00AM 11 POINT.

11:00AM 12 AND EVEN IF YOU HAD DISCOVERY ABOUT HOW RESTRICTED MODE IS  
11:00AM 13 BEING APPLIED OR MISAPPLIED IN YOUR VIEW, OR OVERINCLUSIVE OR  
11:00AM 14 UNDERINCLUSIVE, HOW IS THAT ADVERTISING OR PROMOTION IF WHAT  
11:00AM 15 APPLE -- I'M SORRY, APPLE -- IF WHAT GOOGLE AND YOUTUBE ARE  
11:00AM 16 DOING ARE SIMPLY SAYING THIS IS THE RESULT OF WHATEVER IT IS  
11:00AM 17 BEHIND THE SCENES THAT RESULTED IN AN EXCLUSION FROM RESTRICTED  
11:00AM 18 MODE, WHETHER IT'S A HUMAN DOING IT OR AN ALGORITHM DOING IT OR  
11:00AM 19 A COMMUNITY FLAG, OR WHATEVER THE MECHANISM IS, THEY'RE  
11:00AM 20 REPORTING ON THAT BLACK SCREEN THAT THAT PARTICULAR CONTENT IS  
11:00AM 21 SUBJECT TO RESTRICTED MODE.

11:00AM 22 THAT'S A FACTUAL STATEMENT.

11:01AM 23 MR. OBSTLER: CORRECT, YOUR HONOR.

11:01AM 24 THE COURT: AND SO -- YOU KNOW, IT'S A LITTLE BIT --  
11:01AM 25 WE CAN GET TO THE QUESTION OF WHETHER, YOU KNOW, WHAT THE

11:01AM 1 INTERSECT IS WITH SECTION 230, BUT JUST FOCUSING ON JUST THE  
11:01AM 2 LANHAM ACT CLAIM ITSELF AND WHETHER YOU MEET THE ELEMENTS, I'M  
11:01AM 3 STILL HAVING TROUBLE WITH THE ALLEGATION THAT THAT IS REALLY  
11:01AM 4 COMMERCIAL ADVERTISING OR PROMOTION.

11:01AM 5 MR. OBSTLER: BUT THAT IS EXACTLY WHAT THE COURT  
11:01AM 6 STRUGGLED WITH IN GRUBBS. THAT IS EXACTLY WHAT THE COURT  
11:01AM 7 STRUGGLED WITH IN THE DECISIONS THAT ARE CITED IN PRAGER AND  
11:01AM 8 EVERY SINGLE ONE OF THEM WAS DONE ON A FACTUAL RECORD. THERE  
11:01AM 9 ISN'T A MOTION TO DISMISS IN ANY OF THOSE CASES.

11:01AM 10 NOW, I HAD TO MAKE A STRATEGIC DECISION OBVIOUSLY, AS TO  
11:01AM 11 WHETHER WE WERE GOING TO MOVE FOR RECONSIDERATION WITH THE  
11:01AM 12 NINTH CIRCUIT IN PRAGER. WE CHOSE NOT TO DO SO. THAT'S NOT  
11:01AM 13 THIS CASE. IT SHOULDN'T BE HERE, BUT YOU WERE ASKING ABOUT THE  
11:01AM 14 CONSEQUENCES OF PRAGER.

11:01AM 15 FOR PRAGER PURPOSES WE CAN HAVE A LEGITIMATE DISPUTE, BUT  
11:01AM 16 I THINK HERE WE ARE EXPRESSING ALLEGING THAT THESE ARE  
11:02AM 17 STATEMENTS OF FACT THAT ARE BRANDING OUR VIDEOS AS  
11:02AM 18 INAPPROPRIATE AT THE SAME TIME THAT THEY ARE NOT RESTRICTING  
11:02AM 19 THEIR VIDEOS AND PUTTING THAT STUFF ON THEIR STUFF AND THAT TO  
11:02AM 20 ME IS IMPLICIT FALSE ADVERTISING UNDER GRUBBS AND UNDER THE  
11:02AM 21 OTHER CASES.

11:02AM 22 AND IF WE DEVELOP A RECORD, AND IT'S PRETTY CLEAR THAT  
11:02AM 23 THIS IS NOT EVEN IN THE BALLPARK, YOUR HONOR, I'LL DISMISS THE  
11:02AM 24 CLAIM. BUT I THINK WE SHOULD GET AN OPPORTUNITY TO DO SOME  
11:02AM 25 DISCOVERY ON THAT CLAIM. I THINK THIS IS COMMERCIAL

11:02AM 1 ADVERTISING AS ALLEGED, AND I BELIEVE THAT BASED ON DISCOVERY  
11:02AM 2 AND IF YOU LOOK AT THE CASES AND IF YOU LOOK AT WHAT THEY  
11:02AM 3 CONSIDERED IN THOSE CASES, THIS IS NOT A ONE SIZE FITS ALL.  
11:02AM 4 THIS CASE IS EXTREMELY DIFFERENT AND ESPECIALLY GIVEN THE  
11:02AM 5 NATURE OF MY CLIENTS AND WHAT THAT STATEMENT MEANS ON THEIR  
11:02AM 6 VIDEOS.

11:02AM 7 THE COURT: ALL RIGHT. LET ME JUST ASK BECAUSE  
11:02AM 8 THERE SEEMS TO BE SOME AMBIGUITY ABOUT THIS IN THE BRIEFING.

11:02AM 9 DO THE PLAINTIFFS ALSO ALLEGE AN 1125(A) (1) (A) FALSE  
11:02AM 10 ASSOCIATION CLAIM OR ARE YOU LIMITING YOUR CLAIM UNDER THE  
11:02AM 11 LANHAM ACT TO FALSE ADVERTISING?

11:03AM 12 MR. OBSTLER: AT THIS POINT WE'RE LIMITING UNDER  
11:03AM 13 FALSE ADVERTISING.

11:03AM 14 THE COURT: OKAY.

11:03AM 15 MR. OBSTLER: I HAVEN'T THOUGHT ABOUT THE FALSE  
11:03AM 16 ASSOCIATION CLAIM TO BE HONEST, YOUR HONOR.

11:03AM 17 THE COURT: OKAY.

11:03AM 18 MR. OBSTLER: THE CONCERN IS, AND IT GOES TO THE  
11:03AM 19 THEORY IN THE WHOLE CASE, IS THAT WE THINK THAT THE WEARING OF  
11:03AM 20 THE TWO HATS AND THE USE OF THE COMPUTERS, BECAUSE THEY CAN'T  
11:03AM 21 HAVE HUMANS DO THIS STUFF, HAS GOTTEN TO THE POINT WHERE IT HAS  
11:03AM 22 GOTTEN ANTICOMPETITIVE.

11:03AM 23 I UNDERSTAND THE LIMITS OF A LANHAM ACT CLAIM AS OPPOSED  
11:03AM 24 TO AN ANTITRUST OR A UCL CLAIM, AND I RESPECT THAT. I  
11:03AM 25 UNDERSTAND THE ISSUE HERE IS COMMERCIAL ADVERTISING. I



11:03AM 1 UNDERSTAND THAT IT IS VERY LEGITIMATE FOR YOUR HONOR TO SAY,  
11:03AM 2 BOY, IT'S A FACT -- IT'S SAYING YOU'RE RESTRICTED.

11:03AM 3 BUT THE QUESTION IS, YOUR HONOR, DON'T YOU ASK YOURSELF  
11:03AM 4 WHY WHEN YOU SEE THAT? ISN'T IT REASONABLE TO SUGGEST THAT  
11:03AM 5 PEOPLE ARE SAYING WHY?

11:03AM 6 AND FURTHERMORE, IF THE VIDEO ISN'T CONTAINING THAT  
11:03AM 7 MATERIAL, WHY IS IT BEING RESTRICTED? THAT IN AND OF ITSELF IS  
11:04AM 8 A FALSE STATEMENT. IT MAY NOT BE FALSE ADVERTISING.

11:04AM 9 THE COURT: I UNDERSTAND YOUR THESIS FOR THE LANHAM  
11:04AM 10 ACT CLAIM.

11:04AM 11 SO LET ME ASK YOU TO ADDRESS THE QUESTION THAT I HAD  
11:04AM 12 RAISED AND THAT MR. WILLEN AND I SPENT SOME TIME DISCUSSING,  
11:04AM 13 WHICH IS THAT WHETHER THERE IS IMMUNITY UNDER 230(C) (1) AND (2)  
11:04AM 14 IN THE CONTEXT OF A CLAIM FOR INTENTIONAL DISCRIMINATION BASED  
11:04AM 15 ON IDENTITY.

11:04AM 16 MR. OBSTLER: YES, YOUR HONOR. THIS IS PROBABLY THE  
11:04AM 17 MOST IMPORTANT ISSUE IN THIS CASE, ABSOLUTELY THE MOST  
11:04AM 18 IMPORTANT ISSUE IN THIS CASE AND ONE OF THE MOST IMPORTANT  
11:04AM 19 ISSUES FOR THE INTERNET.

11:04AM 20 IT'S DIFFICULT FOR ME TO BELIEVE, AND I START WITH THIS  
11:04AM 21 PREMISE THAT CONGRESS ENACTED THE LAW IN WHICH IT ALLOWED  
11:04AM 22 INTERNET COMPANIES, EVEN IF THEY WANTED, TO SELF-REGULATE TO DO  
11:04AM 23 SO BY FILTERING PEOPLE AND NOT CONTENT.

11:04AM 24 THERE IS NOTHING IN THE LANGUAGE OF (C) (1) OR (C) (2) THAT  
11:04AM 25 PERMITS THIS TYPE OF BEHAVIOR. NOTHING. IT SAYS MATERIAL, IT

11:05AM 1 DOESN'T SAY PEOPLE.

11:05AM 2 OUR ALLEGATION IN THIS CASE IS THEY'RE FILTERING PEOPLE.  
11:05AM 3 THEY'RE NOT FILTERING -- SO GOING TO (C) (1), LET ME MAKE ONE  
11:05AM 4 POINT BEFORE WE GET INTO THE STATUTORY CONSTRUCTION OF THE  
11:05AM 5 WHOLE THING.

11:05AM 6 ON (C) (1), THE REASON THAT, THAT PRAGER II, JUDGE WALSH  
11:05AM 7 DISMISSED THE CLAIM WAS THAT HE SAID THAT THERE WAS NO  
11:05AM 8 ALLEGATION THAT GOOGLE ADDED ANYTHING TO THE CONTENT.  
11:05AM 9 WE HAVE THAT ALLEGATION IN THIS CASE.

11:05AM 10 THE COURT: I'M SORRY, NO ALLEGATION THAT GOOGLE  
11:05AM 11 ADDED ANYTHING --

11:05AM 12 MR. OBSTLER: ANYTHING TO MY CLIENT'S CONTENT. HE'S  
11:05AM 13 SAYING UNDER (C) (1), UNDER ROOMMATES, IF YOU'RE INVOLVED IN ANY  
11:05AM 14 ASPECT OF WHAT THE CONTENT IS THAT IS BEING CENSORED, RIGHT,  
11:05AM 15 THEN YOU DON'T GET IMMUNITY. EVERYBODY AGREES IN ROOMMATES.  
11:05AM 16 IN FACT, GOOGLE --

11:05AM 17 THE COURT: ARE YOU REFERRING TO YOUR ALLEGATION  
11:05AM 18 THAT GOOGLE OR YOUTUBE IS ADDING METADATA TO YOUR CLIENT'S  
11:06AM 19 CONTENT.

11:06AM 20 MR. OBSTLER: YES. YES.

11:06AM 21 THE COURT: AND THAT IS WHAT YOU'RE SAYING IS THE  
11:06AM 22 ADDITION OF CONTENT AS WITH PUBLISHING OR MAKING DECISIONS  
11:06AM 23 ABOUT PUBLISHING?

11:06AM 24 MR. OBSTLER: YES, BECAUSE THE METADATA IS WHAT THE  
11:06AM 25 ALGORITHM IS USING TO MAKE THE DECISION.

11:06AM 1 THE COURT: DOES A PUBLISHER NOT GET TO EDIT?

11:06AM 2 MR. OBSTLER: YES, BUT A PUBLISHER WHO HAS A  
11:06AM 3 CONTRACT WITH ITS AUTHOR THAT IT'S GOING TO BE VIEWPOINT  
11:06AM 4 NEUTRAL DOESN'T GET TO DISCRIMINATE.

11:06AM 5 IN OTHER WORDS, IN OTHER WORDS, CAN THE -- CAN  
11:06AM 6 SIMON & SCHUSTER GET YOUR LICENSING RIGHTS BY YOU AGREEING TO A  
11:06AM 7 TERM OF SERVICE AND SAYING WE'RE GOING TO GIVE YOU VIEWPOINT  
11:06AM 8 NEUTRAL EDITING OF YOUR STUFF AND THEN TURN AROUND AND BREACH  
11:06AM 9 THAT?

11:06AM 10 THE COURT: SO THAT'S A DIFFERENT QUESTION. IF  
11:06AM 11 YOU'RE SAYING THAT THERE'S A BREACH OF CONTRACT HERE BETWEEN A  
11:06AM 12 PUBLISHER AND AN AUTHOR, THAT WOULD BE ONE THING, BUT THAT'S  
11:06AM 13 NOT WHAT WE'RE FOCUSING ON RIGHT NOW.

11:06AM 14 WE'RE TALKING ABOUT WHAT IS ENCOMPASSED WITHIN (C) (1) IN  
11:07AM 15 TERMS PUBLISHING, AND I RAISED THIS QUESTION VERY DIRECTLY WITH  
11:07AM 16 GOOGLE'S LAWYERS, DOES PUBLISHING INCLUDE DISCRIMINATING BASED  
11:07AM 17 ON THE AUTHOR'S IDENTITY? WHAT DOES THAT LOOK LIKE?

11:07AM 18 AND IS THAT AMONG THE FUNCTIONS A PUBLISHER IS ALLOWED TO  
11:07AM 19 CONDUCT IN ITS ROLE AS A PUBLISHER AND THAT IS IMMUNIZED UNDER  
11:07AM 20 (C) (1)?

11:07AM 21 (C) (2) HAS A GOOD FAITH REQUIREMENT. (C) (1) DOES NOT.  
11:07AM 22 YOUR ARGUMENT MAY BE SUBSTANTIALLY STRONGER UNDER (C) (2), BUT  
11:07AM 23 UNDER (C) (1), IF THE PUBLISHER CAN CHOOSE WHAT TO PUBLISH AND  
11:07AM 24 HOW, IT'S A VERY DIFFICULT ARGUMENT TO MAKE, AND THAT'S WHY I  
11:07AM 25 WAS VERY INTERESTED IN THE QUESTION OF -- AND MR. WILLEN MADE

11:07AM 1 THE POINT THAT THERE ARE CERTAIN KINDS OF CAUSES OF ACTION THAT  
11:07AM 2 TAKE CONDUCT OUTSIDE OF THE SCOPE OF 230(C)(1), IS THAT -- IF I  
11:08AM 3 WERE TO CONSTRUE YOUR CLAIM THIS WAY, AND THERE'S A DEBATE  
11:08AM 4 ABOUT WHETHER IT'S APPROPRIATE TO CONSTRUE IT THIS WAY GIVEN  
11:08AM 5 THE FACTS THAT ARE ALLEGED IN YOUR COMPLAINT, THAT THERE WAS  
11:08AM 6 INTENTIONAL DISCRIMINATION BASED ON IDENTITY AS OPPOSED TO  
11:08AM 7 CONTENT, WHAT IS YOUR BEST CASE FOR SAYING THAT 230(C)(1) DOES  
11:08AM 8 NOT ENCOMPASS THAT?

11:08AM 9 MR. OBSTLER: THE QUESTION IS DOES 230(C)(1)  
11:08AM 10 IMMUNIZE THEM AS TO THE SPECIFIC CAUSES OF ACTION IN THE CASE;  
11:08AM 11 RIGHT?

11:08AM 12 THE COURT: YES. YES. SO THE UNRAH ACT IS THE ONLY  
11:08AM 13 ONE THAT I THINK GIVES YOU A LEG TO STAND ON.

11:08AM 14 MR. OBSTLER: WHAT ABOUT BREACH OF CONTRACT,  
11:08AM 15 YOUR HONOR?

11:08AM 16 THE COURT: I'M SORRY?

11:08AM 17 MR. OBSTLER: WHAT ABOUT BREACH OF CONTRACT?

11:08AM 18 THE COURT: SO YOU DON'T HAVE BREACH OF CONTRACT.  
11:08AM 19 YOU HAVE BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR  
11:08AM 20 DEALING, WHICH THAT'S A HARD ONE IN ANY CIRCUMSTANCE,  
11:08AM 21 ESPECIALLY GIVEN THE ALLEGED CONTRACT TERMS THAT YOU CITE  
11:08AM 22 SAYING THAT THERE WAS A BREACH OF THE IMPLIED COVENANT IS  
11:09AM 23 REALLY DIFFICULT JUST ON A 12(B)(6) BASIS.

11:09AM 24 SO YOU DON'T HAVE A BREACH OF CONTRACT CLAIM.

11:09AM 25 MR. OBSTLER: WELL, YOUR HONOR, WOULD YOU GIVE ME

11:09AM 1 LEAVE TO AMEND AND ADD IT?

11:09AM 2 THE COURT: WELL, BEFORE WE GET TO THAT, I'M JUST  
11:09AM 3 REALLY VERY INTERESTED IN THIS QUESTION.

11:09AM 4 MR. OBSTLER: I AM, TOO, YOUR HONOR. LET ME TAKE  
11:09AM 5 ANOTHER SHOT AT IT, PLEASE, IF I COULD.

11:09AM 6 THE COURT: SO WHAT IS THE BEST CASE THAT YOU HAVE?

11:09AM 7 MR. OBSTLER: OKAY. NUMBER ONE, THERE IS NO (C) (1)  
11:09AM 8 COVERAGE HERE BECAUSE THEY'RE ADDING OUR CONTENT, SO JUST ON  
11:09AM 9 THE FACE OF THE STATUTE.

11:09AM 10 NUMBER TWO, CAN CONGRESS ENACT A LAW THAT IMMUNIZES  
11:09AM 11 PUBLISHERS FROM RACE DISCRIMINATION IN THE ACT OF PUBLISHING?  
11:09AM 12 IS THAT LAW CONSTITUTIONAL?

11:09AM 13 I WOULD SAY THAT UNDER DENVER AREA IT IS NOT. THAT'S MY  
11:09AM 14 ARGUMENT.

11:09AM 15 THE COURT: YOUR RESPONSE TO THE COURT'S QUESTION  
11:09AM 16 WOULD BE IF (C) (1) DOES ALLOW IT, IT HAS TO BE  
11:09AM 17 UNCONSTITUTIONAL?

11:09AM 18 MR. OBSTLER: THAT'S CORRECT.

11:09AM 19 THE COURT: IT DOES IMMUNIZE THAT KIND OF -- LET'S  
11:09AM 20 CALL IT INTENTIONAL DISCRIMINATION BASED ON SOME PROTECTED  
11:10AM 21 CHARACTERISTIC, THAT KIND OF STATUTE HAS TO BE  
11:10AM 22 UNCONSTITUTIONAL?

11:10AM 23 MR. OBSTLER: YES, YOUR HONOR.

11:10AM 24 THE COURT: WHY?

11:10AM 25 MR. OBSTLER: BECAUSE UNDER DENVER AREA THE COURT

11:10AM 1 SAID THAT A CONGRESSIONAL ACT THAT DOES PERMISSIVE SPEECH  
11:10AM 2 REGULATION AND THE GRANTING OF IMMUNITY THAT THEY -- I MEAN, I  
11:10AM 3 WOULD BE ABLE TO SUE THEM, RIGHT, BUT FOR THE CDA.

11:10AM 4 SO THEY ARE -- WHAT THE COURT SAID IN DENVER AREA, WHICH  
11:10AM 5 HAS OFTEN BEEN CITED, AND IT'S WHY WE CAME TO THE GAME LATE IN  
11:10AM 6 DENVER, AND I WANT TO APOLOGIZE ON THAT. I HAVE TO ADMIT I  
11:10AM 7 WITHDREW EARLY ON THAT ONE.

11:10AM 8 DENVER AREA WAS A FIGHT INITIALLY OVER WHETHER OR NOT,  
11:10AM 9 EXACTLY WHAT THE GOVERNMENT AND MR. WILLEN ARE MAKING, WHETHER  
11:10AM 10 OR NOT THEY'RE STATE ACTORS AND WHETHER STATE ACTORS -- AND THE  
11:10AM 11 CABLE COMPANY SAID THEY'RE NOT STATE ACTORS. HOW CAN THEIR  
11:10AM 12 PERMISSION TO BLOCK THINGS THAT ARE INDECENT BE IN ANY WAY BE  
11:10AM 13 SUBJECT TO THE FIRST AMENDMENT?

11:11AM 14 AND WHAT JUSTICE BREYER AND SIX JUDGES ON THE SUPREME  
11:11AM 15 COURT SAID IS, YES, IT'S BEING DONE FOR A CONGRESSIONAL ACT,  
11:11AM 16 BUT FOR THAT ACT YOU AND I ARE NOT HAVING THAT DISCUSSION. WE  
11:11AM 17 MAY BE HAVING A DISCUSSION ABOUT WHETHER I STATED A CLAIM, BUT  
11:11AM 18 FOR CONGRESSIONAL LAW THAT ALLOWS THEM IMMUNITY ON THESE  
11:11AM 19 CLAIMS, WE'RE NOT HAVING THIS DISCUSSION.

11:11AM 20 SO IF THEY'RE GETTING IMMUNITY UNDER THIS STATUTE, IT'S  
11:11AM 21 NOT A STATE ACTION ISSUE, IT'S WHETHER THE STATUTE PASSES  
11:11AM 22 MUSTER JUST LIKE SECTION 10(C) OF THE CABLE ACT UNDER  
11:11AM 23 DENVER AREA.

11:11AM 24 WHAT DID THE COURT SAY? THREE THINGS.  
11:11AM 25 GOT TO BE VIEWPOINT NEUTRAL. NOT VIEWPOINT NEUTRAL IN

11:11AM 1 THIS CASE.

11:11AM 2 GOT TO BE NARROWLY TAILORED SO THERE'S NO RISK OF AN  
11:11AM 3 IMPROPER VETO.

11:11AM 4 AND MOST IMPORTANTLY, IT CANNOT INTERFERE WITH PREEXISTING  
11:11AM 5 LEGAL RELATIONSHIPS.

11:11AM 6 THIS IS SPOT ON WITH DENVER, AND THIS STATUTE CANNOT  
11:11AM 7 WITHSTAND SCRUTINY UNDER DENVER. IT IS A PERMISSIVE SPEECH  
11:12AM 8 STATUTE JUST LIKE SECTION 10(C) OF THE CABLE ACT.

11:12AM 9 THE COURT: OKAY. THAT SEEMS LIKE A STRETCH  
11:12AM 10 HONESTLY, THAT THAT -- THAT THIS CASE FITS THE MOLD OF  
11:12AM 11 PERMISSIVE REGULATION IN DENVER AREA.

11:12AM 12 I'LL LET THE GOOGLE FOLKS RESPOND ON THAT POINT, BUT LET  
11:12AM 13 ME JUST MAKE SURE YOU DON'T HAVE ANYTHING FURTHER THAT YOU  
11:12AM 14 WOULD LIKE TO MAKE SURE THAT THE COURT HEARS IN TERMS OF YOUR  
11:12AM 15 ARGUMENT, ANYTHING YOU WOULD LIKE TO ADDRESS FURTHER IN SUPPORT  
11:12AM 16 OF YOUR OPPOSITION.

11:12AM 17 MR. OBSTLER: WELL, I WANTED TO TALK ABOUT THE  
11:12AM 18 EXECUTIVE ORDER.

11:12AM 19 THE COURT: OH, YES.

11:12AM 20 MR. OBSTLER: BUT I WANT TO COME BACK TO THIS POINT,  
11:12AM 21 YOUR HONOR, BECAUSE YOU SAY IT SOUNDS LIKE A STRETCH. AND I'D  
11:12AM 22 BE CURIOUS IN KNOWING WHY YOUR HONOR BELIEVES THAT BECAUSE I  
11:12AM 23 DON'T UNDERSTAND THE DIFFERENCE BETWEEN A STATUTE THAT WAS  
11:12AM 24 ENACTED TO REGULATE IN INDECENT MATERIAL ON CABLE TELEVISION  
11:12AM 25 CHANNELS AND A STATUTE THAT WAS ENACTED OSTENSIBLY TO ALLOW

11:12AM 1 PRIVATE PARTIES TO REGULATE OFFENSIVE MATERIAL ON THE INTERNET.

11:13AM 2 THE COURT: I THINK AT LEAST ONE OF THE KEY  
11:13AM 3 DISTINCTIONS HERE IS THAT SECTION 230 (C) PERMITS PRIVATE  
11:13AM 4 PARTIES TO DO THEIR OWN SELF-REGULATION. THERE'S NO MANDATE.  
11:13AM 5 THERE'S NOTHING -- THERE'S NOTHING THAT IS REQUIRED. THEY MAY  
11:13AM 6 OR MAY NOT. AND IF THEY DO, THEY'RE IMMUNIZED.

11:13AM 7 IT PROVIDES PROTECTION FROM LIABILITY. THAT'S WHAT IT IS.  
11:13AM 8 IT'S NOT A MANDATE TO REGULATE IN ANY WAY, SHAPE OR FORM.

11:13AM 9 MR. OBSTLER: I AGREE WITH YOU.

11:13AM 10 THE COURT: I THINK IT'S AN IMPORTANT DISTINCTION.

11:13AM 11 MR. OBSTLER: THAT'S EXACTLY THE POINT THAT  
11:13AM 12 JUSTICE BREYER MADE. HE SAID THIS IS A PERMISSIVE PORTION.  
11:13AM 13 THERE WAS A MANDATORY PORTION AND A PERMISSIVE PORTION. 10 (C)  
11:13AM 14 WAS THE PERMISSIVE PORTION. IT DOESN'T REQUIRE THEM TO DO IT  
11:13AM 15 BUT THEY'RE PERMITTED TO DO IT, AND THE COURT SAID THAT IS  
11:13AM 16 UNCONSTITUTIONAL.

11:13AM 17 I COMPLETELY AGREE WITH THE DISTINCTION THAT YOUR HONOR IS  
11:13AM 18 MAKING, AND I THINK THAT'S SQUARE WITH DENVER ON THE SECTION  
11:14AM 19 10 (C) CLAIM.

11:14AM 20 THE COURT: WELL, I'LL HEAR FROM GOOGLE ON THAT  
11:14AM 21 POINT, BUT LET ME GIVE YOU AN OPPORTUNITY TO ADDRESS THE OTHER  
11:14AM 22 MATTERS THAT YOU SAID YOU WANTED TO ADDRESS, THE EXECUTIVE  
11:14AM 23 ORDER.

11:14AM 24 MR. OBSTLER: THE REASON WE CAME IN WITH THE  
11:14AM 25 EXECUTIVE ORDER IS THAT WE JUST WEREN'T CLEAR REALLY ON WHAT



11:14AM 1 THE GOVERNMENT'S POSITION REALLY IS.

11:14AM 2 THE COURT: ALL RIGHT.

11:14AM 3 MR. OBSTLER: THEY FILED THIS BRIEF, RIGHT, AND THEY  
11:14AM 4 SAY IT CAN APPLY TO THE VIEWPOINT, IT'S CONSTITUTIONAL, IT CAN  
11:14AM 5 APPLY TO A VIEWPOINT, IT CAN APPLY TO DISCRIMINATION.

11:14AM 6 AND THEN I READ SECTION 2 OF THE EXECUTIVE ORDER SAYING  
11:14AM 7 IT'S THE POLICY OF THE UNITED STATES AND THE DEPARTMENT OF  
11:14AM 8 JUSTICE IS DIRECTED TO DO EVERYTHING THAT THEY ARE ALLEGING IN  
11:14AM 9 THEIR BRIEF.

11:14AM 10 SO I ONLY BRING IT UP TO SAY IF THE ORDER IS ENFORCEABLE  
11:14AM 11 AT SOME POINT THEN I DON'T KNOW IF WE HAVE A NEW ISSUE HERE OR  
11:14AM 12 WHAT. AND IF THE ORDER IS NOT ENFORCEABLE, THEN THEY'RE  
11:14AM 13 ARGUING THAT THE EXECUTIVE ORDER IS JUST SIMPLY NOT  
11:14AM 14 ENFORCEABLE. I'M NOT GOING TO TAKE A VIEW ON THAT, AND I DON'T  
11:14AM 15 REALLY CARE. AND I AGREE WITH YOUR HONOR, I DON'T THINK IT  
11:15AM 16 REALLY MATTERS BECAUSE I THINK AT THE END OF THE DAY I THINK  
11:15AM 17 THE STATUTE ON ITS FACE DOESN'T APPLY, AND I THINK THE STATUTE  
11:15AM 18 IS UNCONSTITUTIONAL.

11:15AM 19 BUT THE ONLY REASON I BROUGHT IT UP WAS JUST I COULD NOT  
11:15AM 20 SQUARE THAT EXECUTIVE ORDER AND HIM DIRECTING THE DEPARTMENT OF  
11:15AM 21 JUSTICE AND SITTING THERE WITH BILL BARR WHEN THEY ANNOUNCED  
11:15AM 22 THE ORDER WITH WHAT WAS IN THEIR BRIEF. THAT WAS THE ONLY  
11:15AM 23 REASON WE WANTED TO.

11:15AM 24 THE COURT: WELL, LET ME GIVE MR. SUR AN OPPORTUNITY  
11:15AM 25 TO ADDRESS THE EXECUTIVE ORDER BUT ALSO ANY OTHER MATTERS

11:15AM 1 RAISED IN THE GOVERNMENT'S MEMORANDUM ON THE CONSTITUTIONALITY  
11:15AM 2 QUESTION.

11:15AM 3 MR. SUR.

11:15AM 4 MR. SUR: THANK YOU VERY MUCH.

11:15AM 5 SINCE THE EXECUTIVE ORDER HAS COME UP, I GUESS I WILL  
11:15AM 6 START THERE BUT MAYBE JUST TRY TO REITERATE IN OUR BRIEF IN  
11:15AM 7 POINT ONE WE SIMPLY ARE RELYING ON ONE OF SEVERAL DOCTRINES OF  
11:15AM 8 CONSTITUTIONAL AVOIDANCE, THE DOCTRINE THAT SAYS DECIDE THE  
11:15AM 9 STATUTORY QUESTIONS FIRST.

11:15AM 10 MUCH OF THE DISCUSSION TODAY WAS ABOUT THE POTENTIAL  
11:16AM 11 NUANCES OF THE STATUTE AND, RECENTLY OR NOT, TAKING A POSITION  
11:16AM 12 ON THAT.

11:16AM 13 BUT OF COURSE THE PARTIES ARE WELL VERSED ON THAT AND SO  
11:16AM 14 YOUR HONOR HAS BEEN WELL FURNISHED, I THINK, BY THE OPPOSING  
11:16AM 15 VIEWS ON THE STATUTORY QUESTION, SIMILARLY WITH THE STATE LAW  
11:16AM 16 CLAIMS AS WELL.

11:16AM 17 POINT TWO SIMPLY ARGUES THAT IF THE COURT DOES REACH THE  
11:16AM 18 CONSTITUTIONAL QUESTION, THAT THERE REALLY IS NO PRECEDENT THAT  
11:16AM 19 WOULD SUPPORT HOLDING THE STATUTE TO BE UNCONSTITUTIONAL,  
11:16AM 20 PRINCIPALLY FOR THE REASONS THAT HAVE ALREADY BEEN DISCUSSED ON  
11:16AM 21 THAT.

11:16AM 22 BUT JUST THE ONE NOTE I WOULD ADD IS DENVER AREA DID NOT  
11:16AM 23 TRANSFORM THE NOTION OF STATE ACTION. JUDGE KOH IN THE OPINION  
11:16AM 24 THAT THE COURT OF APPEALS AFFIRMED IN PRAGER UNIVERSITY,  
11:16AM 25 ALTHOUGH THE COURT OF APPEALS OPINION DIDN'T ADDRESS

11:16AM 1 DENVER AREA, JUDGE KOH DID REJECT RELIANCE ON IT IN THE  
11:16AM 2 UNPUBLISHED OPINION THAT THEN WENT UP TO THE NINTH CIRCUIT AND  
11:17AM 3 SO I DO NOTE THAT.

11:17AM 4 AND AS HAS ALREADY BEEN MENTIONED, BUT I WILL REITERATE,  
11:17AM 5 THE NINTH CIRCUIT'S OPINION IN ROBERTS VERSUS AT&T MOBILITY,  
11:17AM 6 WHICH IS AT 877 F.3D 833, WAS REALLY A DETAILED ANALYSIS OF  
11:17AM 7 THE, QUOTE, "SPLINTERED DECISION" IN DENVER AREA, AND REALLY  
11:17AM 8 INFORMS ANY ATTEMPT TO APPLY IT CERTAINLY FOR THE COURTS WITHIN  
11:17AM 9 THE NINTH CIRCUIT.

11:17AM 10 SO WE THINK THAT VERY HELPFULLY CLARIFIES THAT THE  
11:17AM 11 DENVER AREA DOESN'T TRANSFORM THE NOTION OF THE STATE ACTION IN  
11:17AM 12 A WAY THAT WOULD REALLY, REALLY CHANGE ANYTHING THAT WE HAVE  
11:17AM 13 SAID IN THE BRIEF.

11:17AM 14 HAVING MADE THOSE POINTS, LET ME THEN TURN VERY BRIEFLY TO  
11:17AM 15 THE EXECUTIVE ORDER.

11:17AM 16 I THINK IT IS HELPFUL TO CONSIDER THE TEXT OF THE ORDER AS  
11:17AM 17 A WHOLE AND IN THAT RESPECT I DO THINK THAT IT IS NOT  
11:17AM 18 INSIGNIFICANT THAT THE ORDER HAS A SET OF GENERAL PROVISIONS AT  
11:18AM 19 THE END THAT APPLY TO ANY ATTEMPT TO READ THE ORDER ANYWHERE.

11:18AM 20 SO ONE OF THOSE GENERAL PROVISIONS, AND I REALIZE IT  
11:18AM 21 BECAUSE THEY APPEAR OFTEN IN GENERAL PROVISIONS, MAYBE THEY  
11:18AM 22 DON'T GET THAT MUCH ATTENTION, BUT IT DOES WARRANT SPECIAL  
11:18AM 23 ATTENTION IN THE ATTEMPT TO RELY ON HERE.

11:18AM 24 SECTION 8, LETTER C SAYS THAT THE ORDER IS NOT INTENDED TO  
11:18AM 25 AND DOES NOT CREATE ANY RIGHT OR BENEFIT, SUBSTANTIVE OR

11:18AM 1 PROCEDURAL, ENFORCEABLE AT LAW OR IN EQUITY BY ANY PARTY  
11:18AM 2 AGAINST THE UNITED STATES, ITS DEPARTMENTS, AGENCIES OR  
11:18AM 3 ENTITIES, ITS OFFICERS, EMPLOYEES OR AGENTS OR ANY OTHER  
11:18AM 4 PERSON. SO I THINK WE HAVE TO START THERE.

11:18AM 5 THEN EVEN IF ONE WERE TO ASSUME IN THE ALTERNATIVE THAT  
11:18AM 6 SECTION 8 (C) SOMEHOW DIDN'T APPLY, I DO THINK TAKING EACH  
11:19AM 7 SECTION IN TURN, THE COURT WILL SEE THAT THESE ARE ABOUT POLICY  
11:19AM 8 AND THEY MAY BE EXPRESSED AT LENGTH, BUT THEY ARE ALL POINTS  
11:19AM 9 ABOUT POLICY AND ESSENTIALLY DIRECTING VARIOUS EXECUTIVE BRANCH  
11:19AM 10 ACTORS TO DO VARIOUS THINGS BUT DON'T GO INTO ANY QUESTION OF  
11:19AM 11 CONSTITUTIONALITY.

11:19AM 12 REALLY THE ONLY POINT I WOULD MAKE ABOUT POLICY IS THAT  
11:19AM 13 REALLY WHAT IT BRINGS OUR ATTENTION BACK TO IS PAGE 999 OF THE  
11:19AM 14 OPINION OF THE COURT OF APPEALS IN PRAGER WHERE BEFORE THEY  
11:19AM 15 CONCLUDED THEIR DISCUSSION OF A FIRST AMENDMENT THEY SAID THAT  
11:19AM 16 THE PARTIES IN PRAGER UNIVERSITY HAD PROVIDED EXTENSIVE  
11:19AM 17 ARGUMENTS ABOUT WHAT MIGHT HAPPEN IF THE COURT RULED ONE WAY OR  
11:19AM 18 ANOTHER AND WHILE THOSE POLICY CONCEPTS WERE, QUOTE,  
11:19AM 19 "IMPORTANT," THE COURT OF APPEALS IN THE NINTH CIRCUIT FOCUSED  
11:19AM 20 ON THE FIRST AMENDMENT DOCTRINE.

11:19AM 21 I THINK A SIMILAR CONCLUSION IS APPROPRIATE HERE THAT AT  
11:19AM 22 MOST THE EXECUTIVE ORDER INDICATES THAT THERE MAY BE IMPORTANT  
11:19AM 23 POLICY ISSUES SOMEWHERE IN THE GENERAL REALM OF SECTION 230,  
11:20AM 24 BUT THAT THOSE ARE NOT BEFORE THE COURT IN ASSESSING THE  
11:20AM 25 CONSTITUTIONALITY OF THE STATUTE.

11:20AM 1 REALLY WITH THAT I WILL CONCLUDE, UNLESS THE COURT HAS ANY  
11:20AM 2 FURTHER QUESTION.

11:20AM 3 THE COURT: THANK YOU VERY MUCH, MR. SUR. THAT WAS  
11:20AM 4 VERY HELPFUL. I APPRECIATE IT.

11:20AM 5 MR. SUR: THANK YOU.

11:20AM 6 THE COURT: ALL RIGHT. SO I WOULD LIKE TO HEAR FROM  
11:20AM 7 GOOGLE, YOUTUBE BUT -- WELL, ANYTHING THAT YOU WOULD LIKE TO  
11:20AM 8 RESPOND TO FROM MY CONVERSATION WITH MR. OBSTLER, BUT I AM  
11:20AM 9 INTERESTED IN THE -- IF YOU HAVE ANYTHING FURTHER TO ADD ON THE  
11:20AM 10 DENVER AREA POINT AND ITS SIGNIFICANCE.

11:20AM 11 MR. WILLEN: SURE. SO WHY DON'T I START WITH THAT  
11:20AM 12 AND TALK ABOUT A COUPLE OF THINGS RELATED TO SECTION 230, AND I  
11:20AM 13 CAN LET MS. WHITE TALK ABOUT THINGS RELATED TO THE UNRAH ACT  
11:20AM 14 AND THE LANHAM ACT.

11:20AM 15 WITH RESPECT TO DENVER AREA, I THINK MR. OBSTLER HAS  
11:20AM 16 RIGHTLY POINTED TO THE NINTH CIRCUIT'S DECISION IN ROBERTS  
11:20AM 17 WHICH AT LENGTH EXPLAINS THE VERY, VERY LIMITED, IF ANY, IMPORT  
11:21AM 18 OF DENVER AREA ON THE QUESTION OF STATE ACTION.

11:21AM 19 SO ROBERTS POINTS OUT, FIRST OF ALL, THAT THERE'S NO  
11:21AM 20 MAJORITY OPINION IN THE DENVER AREA CASE. THE OPINION THAT  
11:21AM 21 MR. OBSTLER IS RELYING ON IS JUSTICE BREYER'S OPINION FOR FOUR  
11:21AM 22 JUSTICES THAT DOES NOT SPEAK FOR THE COURT. JUSTICE KENNEDY  
11:21AM 23 AND JUSTICE GINSBERG SUPPLIED TWO ADDITIONAL VOTES BUT ON A  
11:21AM 24 VERY, VERY DIFFERENT THEORY.

11:21AM 25 SO JUSTICE BREYER'S OPINION DOESN'T BY ITS OWN TERMS SAY

11:21AM 1 THAT PERMISSIVE SPEECH REGULATION IS SUBJECT TO SOME BRAND NEW  
11:21AM 2 FIRST AMENDMENT SCRUTINY. IT CONSTRUES A VERY, VERY SPECIFIC  
11:21AM 3 PROVISION OF THE CABLE ACT, AND I THINK THE MOST IMPORTANT  
11:21AM 4 POINT ABOUT THAT IS THAT IN ALLOWING THE CABLE COMPANIES TO  
11:21AM 5 CENSOR, IT ALLOWED THEM TO CENSOR ONLY A PARTICULAR CONTENT  
11:21AM 6 BASED SET OF MATERIALS, WHICH WAS SEXUALLY EXPLICIT CONTENT, SO  
11:22AM 7 IT WAS VERY LIMITED IN THAT RESPECT, AND THE STATUTE WAS  
11:22AM 8 ENACTED AGAINST A BACKDROP THAT THE CASE INVOLVED PUBLIC ACCESS  
11:22AM 9 CHANNELS AND ACCESS CHANNELS ON CABLE NETWORK AND THE VERY  
11:22AM 10 SPECIFIC CONTEXT.

11:22AM 11 ONE, THESE CHANNELS WERE HEAVILY REGULATED AND THE COURT  
11:22AM 12 AND JUSTICE BREYER'S OPINION NOTED AND RELIED ON.

11:22AM 13 SECONDLY, AND I THINK EVEN MORE IMPORTANTLY, PRIOR TO THE  
11:22AM 14 ENACTMENT OF THE STATUTE IN QUESTION, THE LAW FORBAD THE CABLE  
11:22AM 15 COMPANIES FROM ENGAGING IN ANY CONTENT BASED OR ANY REAL  
11:22AM 16 EDITORIAL DISCRETION WITH RESPECT TO THESE CHANNELS.

11:22AM 17 SO IT COMPLETELY CHANGED THE BACKGROUND LEGAL PRINCIPLES  
11:22AM 18 WITH RESPECT TO THE RIGHT OF THE CABLE COMPANIES TO ENGAGE IN  
11:22AM 19 CONTENT RESTRICTION.

11:22AM 20 THAT'S COMPLETELY DIFFERENT FROM WHAT WE HAVE HERE. WE  
11:22AM 21 HAVE A STATUTE THAT IS NOT CONTENT BASED. SECTION 230(C)(1),  
11:22AM 22 AS I THINK THE COURT POINTED OUT, SIMPLY SAYS THAT YOU CANNOT  
11:22AM 23 BE TREATED AS A PUBLISHER FOR ANY SPEECH, SO WHETHER YOU ARE  
11:23AM 24 RESTRICTING ACCESS TO CONTENT, WHETHER YOU ARE NOT RESTRICTING  
11:23AM 25 ACCESS TO CONTENT, AND CERTAINLY NOT WITH RESPECT TO ANY GIVEN

11:23AM 1 CATEGORY OF CONTENT, SECTION 230(C) WILL PROTECT YOU. SO IT'S  
11:23AM 2 NOT EVEN CLOSE TO CONTENT BASED AND VIEWPOINT BASED.

11:23AM 3 AND THEN SECONDLY, AND JUST AS IMPORTANTLY, THE BACKGROUND  
11:23AM 4 PRIOR TO SECTION 230 WAS THAT ONLINE PLATFORMS, PARTICULARLY  
11:23AM 5 PLATFORMS, THE PROGENITORS OF WHAT WE HAVE NOW, GOOGLES AND  
11:23AM 6 TWITTERS, HAD FULL DISCRETION, COMPLETE EDITORIAL DISCRETION  
11:23AM 7 AND INDEED A FIRST AMENDMENT RIGHT TO MAKE EDITORIAL  
11:23AM 8 DETERMINATIONS ABOUT WHAT SPEECH APPEARS ON THEIR PLATFORM.

11:23AM 9 SO SECTION 230 WASN'T CREATING SOME NEW EDITORIAL RIGHT  
11:23AM 10 THAT DIDN'T EXIST BEFORE WHEREAS DENVER AREA VERY MUCH WAS. SO  
11:23AM 11 THAT'S THE FIRST GENERAL POINT.

11:23AM 12 THE SECOND POINT IS WITH RESPECT TO JUSTICE KENNEDY'S  
11:23AM 13 OPINION WHICH SUPPLIED THE SORT OF DECISIVE VOTES FOR THE  
11:23AM 14 PROPOSITION THAT AT LEAST THE ONE PROVISION WAS  
11:24AM 15 UNCONSTITUTIONAL, THAT WHOLE DECISION WAS BASED ON THE  
11:24AM 16 PROPOSITION THAT AT LEAST IN PUBLIC ACCESS CHANNELS WERE A  
11:24AM 17 PUBLIC FORUM UNDER THE CONSTITUTION BECAUSE IT WAS SO HEAVILY  
11:24AM 18 REGULATED AND WHAT I JUST MENTIONED.

11:24AM 19 JUSTICE BREYER'S OPINION DIDN'T GET INTO THAT, BUT THAT'S  
11:24AM 20 REALLY IMPORTANT HERE BECAUSE WE KNOW -- THE THING WE KNOW FROM  
11:24AM 21 PRAGER IS THAT YOUTUBE IS NOT A CONSTITUTIONAL PUBLIC FORUM.  
11:24AM 22 SO GIVEN THAT, IT'S A COMPLETELY DIFFERENT CASE.

11:24AM 23 AND I THINK IT'S QUITE TELLING THAT IN THE HALLECK CASE,  
11:24AM 24 OF COURSE THE SUPREME COURT'S MOST RECENT DISCUSSION OF STATE  
11:24AM 25 ACTION, THE ONE REFERENCE TO DENVER AREA THAT IS MOST --

11:24AM 1 THE OPERATOR: THE RECORDING HAS STOPPED.

11:24AM 2 MR. WILLEN: EXCUSE ME. CITING DENVER AREA, AND  
11:24AM 3 THIS IS A QUOTE FOR THE PROPOSITION THAT THE FREE SPEECH DOES  
11:24AM 4 NOT PROHIBIT PRIOR ABRIDGEMENT OF SPEECH.

11:24AM 5 SO THE SUPREME COURT HAS SPOKEN TO THIS. TO THE EXTENT  
11:25AM 6 THAT DENVER AREA HAS ANY SIGNIFICANCE, IT'S SIMPLY LIMITED TO  
11:25AM 7 ITS UNIQUE FACTS AND DOESN'T APPLY HERE. SO THAT IS  
11:25AM 8 DENVER AREA.

11:25AM 9 THE OTHER COUPLE THINGS I WOULD WANT TO SAY IN RESPONSE TO  
11:25AM 10 MR. OBSTLER, WE DIDN'T GET A CHANCE TO TALK ABOUT SECTION  
11:25AM 11 230(C)(2)(D). WE SPENT MOST OF OUR TIME TALKING ABOUT SECTION  
11:25AM 12 230(C)(1).

11:25AM 13 AS WE ARGUED, SECTION 230(C)(2)(B) IS SORT OF A SEPARATE  
11:25AM 14 IMMUNITY THAT CLEARLY APPLIES, AS WE KNOW FROM THE  
11:25AM 15 PRAGER DECISION, WITH RESPECT TO ANY CLAIM ARISING FROM  
11:25AM 16 RESTRICTED MODE. AND I THINK FOR THE REASONS SET OUT IN  
11:25AM 17 JUDGE DAVILA'S RECENT OPINION IN ASURVIO VERSUS MALWAREBYTES  
11:25AM 18 CASE, THE ALLEGATIONS HERE THAT THERE IS SOME SORT OF  
11:25AM 19 COMPETITIVE RELATIONSHIP JUST AREN'T ENOUGH TO GET PLAINTIFFS  
11:25AM 20 OUTSIDE OF SECTION 230(C)(2)(B), SO THE COURT HAS ANOTHER PATH  
11:25AM 21 AT LEAST WITH RESPECT TO A LOT OF THE CLAIMS HERE.

11:26AM 22 AND THEN I GUESS THE ONLY OTHER POINT I WOULD MAKE IS THAT  
11:26AM 23 MR. OBSTLER WAS, TELLINGLY, NOT ABLE TO CITE ANY CASE THAT  
11:26AM 24 HELPED HIM ON THE PROPOSITION THAT SECTION 230(C)(1) WOULDN'T  
11:26AM 25 APPLY TO A CLAIM UNDER THE UNRAH ACTS UNDER THE CIRCUMSTANCES



11:26AM 1 THAT WE HAVE HERE, AND THAT'S WHY HE RESORTED TO THE ARGUMENT  
11:26AM 2 THAT THE STATUTE WOULD BE UNCONSTITUTIONAL IF APPLIED THAT WAY,  
11:26AM 3 AND I DON'T THINK IT WOULD. AND I DON'T THINK THERE'S ANY  
11:26AM 4 SERIOUS ARGUMENT THAT IT WOULD, BUT HIS INABILITY TO POINT TO  
11:26AM 5 ANY CASE LAW THAT HELPS HIM ON THE APPLICATION OF THE --

11:26AM 6 THE OPERATOR: THIS MEETING IS BEING RECORDED.

11:26AM 7 MR. WILLEN: -- I THINK IS VERY TELLING.

11:26AM 8 SO WITH THAT I WILL TURN IT OVER TO MS. WHITE AND LET HER  
11:26AM 9 TALK ABOUT THE LANHAM ACT AND ANYTHING ELSE THAT SHE WANTS TO  
11:26AM 10 SAY IN RESPONSE TO WHAT WE HAVE HEARD.

11:26AM 11 THE COURT: THANK YOU, MR. WILLEN.

11:26AM 12 MS. WHITE.

11:26AM 13 MS. WHITE: THANK YOU.

11:26AM 14 I'LL BEGIN JUST BRIEFLY ON THE LANHAM ACT QUESTION. AS  
11:27AM 15 YOUR HONOR CORRECTLY RECOGNIZED, TO STATE A CLAIM UNDER THAT  
11:27AM 16 STATUTE PLAINTIFFS HAVE TO ALLEGE THAT YOUTUBE MADE A FALSE OR  
11:27AM 17 MISLEADING STATEMENT IN COMMERCIAL ADVERTISING, AND THEY  
11:27AM 18 HAVEN'T DONE THAT. THEY REFER TO STATEMENTS ABOUT WHAT  
11:27AM 19 RESTRICTED MODE DOES AND WHAT RESTRICTED GUIDELINES ARE, BUT  
11:27AM 20 THOSE STATEMENTS ARE WHAT THE NINTH CIRCUIT HELD WERE NOT  
11:27AM 21 COMMERCIAL ADVERTISING IN PRAGER.

11:27AM 22 THEY ALSO SUGGEST THAT THE DESIGNATION OF SOME OF  
11:27AM 23 PLAINTIFFS' VIDEOS, AND I'LL NOTE THAT I THINK ONLY FOUR OF THE  
11:27AM 24 NAMED PLAINTIFFS SPECIFICALLY ALLEGE THAT ANY OF THEIR VIDEOS  
11:27AM 25 HAVE BEEN MADE UNAVAILABLE IN UNRESTRICTED MODE, BUT WITH

11:27AM 1 RESPECT TO THOSE, THEY ARGUE THAT THAT DESIGNATION SOMEHOW  
11:27AM 2 BRANDS THEM IN A NEGATIVE LIGHT, BUT THE NINTH CIRCUIT  
11:27AM 3 ADDRESSED THAT ARGUMENT DIRECTLY AS WELL AND HELD THAT THAT  
11:27AM 4 DESIGNATION IS NOT MADE IN COMMERCIAL ADVERTISING PROMOTION AND  
11:28AM 5 THAT'S ON PAGE 1,000 OF THE COURT'S OPINION.

11:28AM 6 FINALLY, ANY IMPLICIT STATEMENT ABOUT THE REASON FOR WHY  
11:28AM 7 PLAINTIFFS' VIDEOS WERE MADE UNAVAILABLE IN RESTRICTED MODE,  
11:28AM 8 ONE, THOSE REASONS WERE NOT MADE PUBLIC, AND, TWO, THOSE  
11:28AM 9 REASONS WOULD BE A MATTER OF OPINION WHICH WOULD NOT BE  
11:28AM 10 ACTIONABLE AS A FALSE STATEMENT, AND, AGAIN, NOT A STATEMENT  
11:28AM 11 MADE IN FURTHERANCE OF COMMERCIAL ADVERTISING OR PROMOTION.

11:28AM 12 SO UNLESS YOUR HONOR HAS ANY FURTHER QUESTIONS ABOUT THE  
11:28AM 13 LANHAM ACT, I'LL JUST CONCLUDE BY ADDRESSING THE QUESTIONS  
11:28AM 14 ABOUT THE UNRAH ACT CLAIM.

11:28AM 15 AS MY COLLEAGUE EXPLAINED, WE DO THINK THERE'S NO REASON  
11:28AM 16 WHY SECTION 230(C) (1) AND (C) (2) (B) SHOULD NOT APPLY WITH  
11:28AM 17 RESPECT TO PLAINTIFFS' CLAIM UNDER THE UNRAH ACT BUT IN  
11:29AM 18 ADDITION TO THAT THE PLAINTIFFS HAVE NOT COME CLOSE TO STATING  
11:29AM 19 A CLAIM.

11:29AM 20 THE UNRAH ACT, WHEN PLED HERE AS SEPARATE FROM AN ADA  
11:29AM 21 VIOLATION, IS AN INTENTIONAL DISCRIMINATION STATUTE.  
11:29AM 22 CALIFORNIA COURTS HAVE CLEARLY HELD THAT FACIALLY NEUTRAL  
11:29AM 23 POLICIES ARE NOT ACTIONABLE AND THAT ALLEGATIONS OF DISPARATE  
11:29AM 24 IMPACT ARE NOT ENOUGH.

11:29AM 25 THE COURT: OKAY. SO LET'S PAUSE THERE. THAT WAS

11:29AM 1 THE ARGUMENT YOU MADE IN YOUR BRIEF. THEIR ARGUMENT IS NOT  
11:29AM 2 THERE'S A DISPARATE IMPACT, BUT THAT THERE'S AN ACTUAL POLICY  
11:29AM 3 OF DISCRIMINATION AGAINST LGBT CONTENT CREATORS.

11:29AM 4 SO I KNOW YOU DON'T THINK THAT THAT'S ACTUALLY WHAT THEY  
11:29AM 5 HAVE ALLEGED. BUT IF THAT'S THE ALLEGATION, DO YOU ALSO HAVE A  
11:29AM 6 12(B) (6) ARGUMENT AGAINST -- FOR THE FAILURE TO STATE A CLAIM  
11:29AM 7 UNDER THE UNRAH ACT ISSUE?

11:29AM 8 MS. WHITE: IF THERE WERE AN ALLEGATION THAT THERE  
11:29AM 9 WERE AN ACTUAL AFFIRMATIVE POLICY TO DISCRIMINATE THAT MAY  
11:29AM 10 STATE A CLAIM FOR THE UNRAH ACT, BUT THERE'S NOTHING CLOSE TO  
11:30AM 11 THAT HERE. AND THERE'S A LOT OF RHETORIC. THE COMPLAINT IS --

11:30AM 12 THE COURT: RIGHT. WELL, HERE'S THE QUESTION THAT  
11:30AM 13 NOBODY WAS TALKING ABOUT IN THEIR PAPERS, BUT I JUST WONDERED,  
11:30AM 14 THE UNRAH ACT, YOU KNOW, IN THE ADA CONTEXT YOU HAVE TO HAVE A  
11:30AM 15 PUBLIC ACCOMMODATION AND YOU WOULD HAVE TO HAVE A BUSINESS.

11:30AM 16 DOES THIS PLATFORM QUALIFY FOR -- IN THAT CONTEXT UNDER  
11:30AM 17 THE LANGUAGE OF THE STATUTE?

11:30AM 18 MS. WHITE: SO THE UNRAH ACT APPLIES TO ALL BUSINESS  
11:30AM 19 SERVICES AND THE CALIFORNIA COURTS HAVE HELD THAT THEY DIDN'T  
11:30AM 20 APPLY TO WEBSITES.

11:30AM 21 I THINK THERE IS SOME AMBIGUITY IN PLAINTIFFS' CLAIMS  
11:30AM 22 ABOUT EXACTLY WHAT -- WHO IS BEING DISCRIMINATED AGAINST AND ON  
11:30AM 23 WHAT BASIS THAT THEY REFER TO MAINLY LGBTQ IDENTITIES. THEY  
11:30AM 24 ALSO REFER TO VIEWPOINTS.

11:30AM 25 I THINK WHILE THE UNRAH ACT IS INTENDED TO BE CONSTRUED

11:31AM 1 BROADLY, THERE MAY BE SOME CATEGORIES OF PERSONS TO WHOM IT  
11:31AM 2 WOULDN'T APPLY, BUT GIVEN THEIR FAILURE TO ALLEGE THAT THERE IS  
11:31AM 3 IN FACT A POLICY OF DISCRIMINATION OR THAT THESE PLAINTIFFS  
11:31AM 4 DISCRIMINATED AGAINST BASED ON THEIR SEXUAL IDENTITIES, THE  
11:31AM 5 COURT DOESN'T NEED TO REACH THOSE QUESTIONS IN THIS CASE.

11:31AM 6 THE COURT: ALL RIGHT. THANK YOU.

11:31AM 7 MR. OBSTLER, I'LL GIVE YOU A VERY BRIEF RESPONSE. I DON'T  
11:31AM 8 WANT TO HEAR ANYTHING YOU HAVE TOLD ME BEFORE, BUT IF THERE'S A  
11:31AM 9 VERY BRIEF RESPONSE YOU WOULD LIKE TO MAKE, I'LL LET YOU HAVE  
11:31AM 10 THE LAST WORD.

11:31AM 11 MR. OBSTLER: THANK YOU SO MUCH, YOUR HONOR. AGAIN,  
11:31AM 12 I REALLY APPRECIATE IT. AND YOUR QUESTIONS ARE DEAD ON ON  
11:31AM 13 THIS.

11:31AM 14 FIRST OF ALL, ON DENVER AREA, IT WAS A SIX TO THREE  
11:31AM 15 DECISION ON THE 10(C) PART OF THE OPINION AND PLEASE READ THE  
11:31AM 16 OPINION.

11:31AM 17 THE COURT: I WILL MAKE SURE THAT I AM WELL VERSED  
11:31AM 18 ON THE EXACT HOLDINGS OF --

11:31AM 19 THE OPERATOR: THE RECORDING HAS STOPPED.

11:32AM 20 MR. OBSTLER: ON THE UNRAH ACT ISSUE --

11:32AM 21 THE OPERATOR: THIS MEETING IS BEING RECORDED.

11:32AM 22 MR. OBSTLER: ON THE UNRAH ACT ISSUE, THE THING THAT  
11:32AM 23 REALLY BOTHERS ME HERE IS THAT I FEEL LIKE I'M ARGUING A  
11:32AM 24 FACTUAL ISSUE ON A 12(B)(6) MOTION.

11:32AM 25 WE HAVE ALLEGED THAT WE HAD A CLIENT WHO, OR WE WILL

11:32AM 1 ALLEGE IF YOU TAKE THE DECLARATION, WHO WENT TO A MEETING ON  
11:32AM 2 2017 AND WAS TOLD TO HER FACE FOUR TIMES THAT THE ALGORITHM  
11:32AM 3 IS --

11:32AM 4 THE COURT: YOU KNOW, I WILL READ -- I WILL MAKE  
11:32AM 5 SURE THAT I LOOK AT ALL OF THE MANY, MANY ALLEGATIONS IN YOUR  
11:32AM 6 COMPLAINT. SO I DON'T NEED YOU TO ARGUE AGAIN ABOUT WHETHER  
11:32AM 7 THERE IS A POLICY OF DISCRIMINATION ALLEGED OR NOT.

11:32AM 8 I THINK I AM -- I HAVE THE COMPLAINT, AND I'M GOING TO  
11:32AM 9 RELY ON THE COMPLAINT. THE PARTIES BRIEFED THAT ISSUE  
11:32AM 10 EXTENSIVELY.

11:32AM 11 I'M REALLY TRYING TO SORT OUT THE LEGAL ISSUES HERE.

11:32AM 12 SO IS THERE SOMETHING FURTHER ON WHAT THE UNRAH ACT  
11:33AM 13 REQUIRES OR NOT, THAT IS WHAT I'M LOOKING FOR. IF THERE'S  
11:33AM 14 NOTHING ELSE, YOU DON'T HAVE TO HAVE ANYTHING.

11:33AM 15 MR. OBSTLER: THERE IS ONE OTHER THING.

11:33AM 16 THE COURT: OKAY.

11:33AM 17 MR. OBSTLER: YOU DON'T HAVE TO PLEAD THERE'S A  
11:33AM 18 POLICY UNDER THE UNRAH ACT. ALL I HAVE TO SHOW UNDER THE  
11:33AM 19 UNRAH ACT IS THAT THERE WAS AN ACT OF DISCRIMINATION, AND I  
11:33AM 20 THINK WE HAVE DONE THAT. THAT WOULD BE MY LAST POINT.

11:33AM 21 THERE DOESN'T HAVE TO BE A WRITTEN POLICY UNDER THE  
11:33AM 22 UNRAH ACT. I DON'T THINK ANYBODY WOULD HAVE SUCH A POLICY.  
11:33AM 23 OKAY.

11:33AM 24 THE COURT: ALL RIGHT. THANK YOU ALL VERY MUCH. I  
11:33AM 25 APPRECIATE ALL OF THE PRESENTATIONS AND THE EXTENSIVE BRIEFING.

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AND I APPRECIATE YOU BEARING WITH OUR VERY FIRST ZOOM  
WEBINAR. I WILL TAKE THIS MATTER UNDER SUBMISSION, AND I'LL  
ISSUE A WRITTEN ORDER. ALL RIGHT. THANK YOU VERY MUCH.

MR. WILLEN: THANK YOU, YOUR HONOR.

MR. OBSTLER: THANK YOU, YOUR HONOR. WE APPRECIATE  
YOUR TIME.

(ZOOM COURT CONCLUDED AT 11:33 A.M.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



IRENE RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074

DATED: JUNE 4, 2020