NO. 18-15712

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PRAGER UNIVERSITY,

PLAINTIFF-APPELLANT,

v.

GOOGLE LLC and YOUTUBE LLC,

DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
for the Northern District of California
Case No. 5:17-cv-06064-LHK
The Honorable Lucy H. Koh

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMATION

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

Recognizing the Internet's power as a tool of democratization, for more than 25 years, the Electronic Frontier Foundation (EFF) has worked to protect the rights of users to transmit and receive information online. EFF is a non-profit civil liberties organization with more than 37,000 dues-paying members, bound together by a mutual and strong interest in helping the courts ensure that such rights remain protected as technologies change, new digital platforms for speech emerge and reach wide adoption, and the Internet continues to re-shape governments' interactions with their citizens. EFF frequently files *amicus* briefs in courts across the country, including a brief to the Supreme Court in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), that Appellants rely on here.[2]

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), EFF certifies that no person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. This brief is filed pursuant to Federal Rule of Appellate Procedure Rule 29(a)(2) with the consent of all parties.

[2] *See Amicus Curiae Brief of Electronic Frontier Foundation, Public Knowledge, and Center for Democracy & Technology in Support of Petitioner*, *Packingham v. State of North Carolina* (Sup. Ct. No. 15-1194), https://www.eff.org/files/2016/12/22/2016-12-22_-_packingham_v._nc_-_amicus_brief_of_eff_pk_and_cdt.pdf.

INTRODUCTION

YouTube's moderation of Prager University's content was faulty on many accounts, but it was not unconstitutional.

Although it may seem counterintuitive, on balance, Internet users' rights are best served by preserving the constitutional status quo, whereby private parties who operate private speech platforms have a First Amendment right to edit and curate their sites, and thus exclude whatever other private speakers or speech they choose. To reverse the application of the First Amendment—that is, to make online platforms no longer *protected* by the First Amendment but instead *bound* by it as if they were government entities—would undermine Internet users' interests.

First, online platforms would largely be prohibited from moderating content, even though content moderation can be valuable and is supported by many Internet users when carefully implemented. Second, the emergence of new online platforms would be inhibited by the great legal uncertainty created by the imposition of the multifaceted public forum doctrine on private platforms.

But this brief is not an encomium for Internet platforms, especially the larger ones that enjoy outsized power to steer public discourse. There is no denying that inconsistent and opaque private content moderation is a problem. Although the First Amendment prevents government from dictating content moderation

practices, Internet platforms should voluntarily adopt content moderation practices that follow a human rights framework.

YouTube's actions here with respect to Prager University should be deeply scrutinized in the court of public opinion. But YouTube's actions were constitutionally permissible, and this Court should affirm the dismissal.[3]

I. INTERNET USERS ARE BEST SERVED BY THE AVAILABILITY OF BOTH UNMODERATED AND MODERATED PLATFORMS

Internet users are best served under current law, where the First Amendment and Section 230, taken together, create legal space for the emergence of both unmoderated and highly moderated platforms.

A. In Praise of Unmoderated Platforms

Unmoderated platforms, where the platform operator plays little to no role in selecting the content, benefit Internet users by inhibiting the creation of silos, and allowing users to engage in free-form discussions, participate in debates of their

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[3] Prager University's argument relies heavily on its pleading that YouTube is a "public forum" based on YouTube's public statements. But whether a speech forum is a "public forum," the administration of which is governed by the First Amendment, is a question of law to be determined by the court, not a fact to be pleaded in the complaint and accepted as true for the purposes of a motion to dismiss or a fact conceded by a party. *See Int'l Soc. for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 530 F.3d 768, 770 (9th Cir. 2008), *certified question answered sub nom. Int'l Soc. for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 48 Cal. 4th 446 (2010) (certifying public forum question as a question of law for the California Supreme Court)*; Trenouth v. U.S.*, 764 F.2d 1305, 1307 (9th Cir. 1985) (characterizing public forum question as a "mixed question of law and fact").

choosing, and find unexpected sources of ideas and information. Users need not fear that their communications are actively monitored, nor that they may accidentally run afoul of content rules—both of which can inhibit free speech. Unmoderated platforms can be of special value to political dissidents and others who may be targeted for censorship by governments and private actors.

Indeed, online platforms struggle to draw lines between speech that is and is not permitted *according to their very own content rules*. For example, Facebook recently decided, in the midst of the #MeToo movement, that the statement "men are scum" and similar statements constituted hate speech according to its policies.[4] The company also removed posts of women sharing the hate speech others directed toward them.[5] Twitter shut down the verified account of a prominent Egyptian journalist and human rights activist.[6] Twitter also marked tweets containing the

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[4] Samuel Gibbs, *Facebook bans women for posting "men are scum" after harassment scandals*, The Guardian (Dec. 5, 2017), https://www.theguardian.com/technology/2017/dec/05/facebook-bans-women-posting-men-are-scum-harassment-scandals-comedian-marcia-belsky-abuse.

[5] Tracy Jan and Elizabeth Dwoskin, *A white man called her kids the n-word. Facebook stopped her from sharing it.*, Washington Post (July 31, 2017), https://www.washingtonpost.com/business/economy/for-facebook-erasing-hate-speech-proves-a-daunting-challenge/2017/07/31/922d9bc6-6e3b-11e7-9c15-177740635e83_story.html.

[6] Martin Belam, *Twitter under fire after suspending Egyptian journalist Wael Abbas*, The Guardian (Dec. 18, 2017), https://www.theguardian.com/media/2017/dec/18/twitter-faces-backlash-after-suspending-egyptian-journalist-wael-abbas.

word “queer” as offensive, regardless of context.[7] Through content moderation practices, online platforms have silenced individuals engaging in anti-racist speech[8]; suspended the account of an LGBTQ activist calling out their harasser[9]; disappeared documentation of police brutality[10], the Syrian war[11], and the human rights abuses suffered by the Rohingya[12]. A blanket ban on nudity has repeatedly been used to take down a famous Vietnam war photo.[13] Every year, numerous

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[7] Taylor Wofford, *Twitter was flagging tweets including the word “queer” as potentially “offensive content,”* Mic (June 22, 2017), https://mic.com/articles/180601/twitter-was-flagging-tweets-including-the-word-queer-as-potentially-offensive-content#.kUbwJTI0E.

[8] Natalie Weiner, *Talib Kweli Calls Out Instagram for Deleting His Anti-Racism Post*, Billboard (July 1, 2015), https://www.billboard.com/articles/columns/the-juice/6613208/talib-kweli-instagram-deleted-post-anti-racism-censorship.

[9] Kaitlyn Tiffany, *Twitter criticized for suspending popular LGBTQ academic @meakoopa*, The Verge (June 13, 2017), https://www.theverge.com/2017/6/13/15794296/twitter-suspended-meakoopa-anthony-oliveira-controversy.

[10] Kevin Anderson, *YouTube suspends Egyptian blog activist's account*, The Guardian (Nov. 28, 2007), https://www.theguardian.com/news/blog/2007/nov/28/youtubesuspendsegyptianblog.

[11] Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria*, New York Times (Aug. 22, 2017), https://www.nytimes.com/2017/08/22/world/middleeast/syria-youtube-videos-isis.html.

[12] Betsy Woodruff, *Exclusive: Facebook Silences Rohingya Reports of Ethnic Cleansing*, Daily Beast (Sept. 18, 2017), https://www.thedailybeast.com/exclusive-rohingya-activists-say-facebook-silences-them.

[13] Sam Levin, Julia Carrie Wong, Luke Harding, *Facebook backs down from “napalm girl” censorship and reinstates photo*, The Guardian (Sept. 9, 2016),

incidents in which content standards were erroneously or inappropriately applied make the headlines of major news publications—and are tracked by the EFF project Onlinecensorship.org.[14]

As explained below, *see infra* Section II.A., these online platforms have the legal right to makes these decisions. But they can have significant consequences for online speech—and Prager University is rightfully concerned about how YouTube enforced its content rules against them. Given the centrality of the Internet to modern communication, a world where unmoderated online platforms cannot exist would be a woefully impoverished one.

B. Moderated Platforms Are Also Valuable

Internet users are also well-served by moderated platforms. Many users may prefer to use online platforms that endeavor to shield them from certain kinds of speech. Moderation allows online platforms to limit content in order to create affinity or niche communities dedicated to certain subject matters or viewpoints, or to remove hateful or harassing speech that may hinder the ability of targeted users to engage with the platform.

If general purpose online platforms like YouTube are easily deemed designated public forums, *see* Appellant Br. [ECF No. 7] at 33-34, and are thus

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https://www.theguardian.com/technology/2016/sep/09/facebook-reinstates-napalm-girl-photo.

[14] *See* https://onlinecensorship.org/

bound by the First Amendment, they could exclude *only* content that falls outside the protection of the First Amendment.[15] Such platforms, while generally promoting diverse content and views, would *not* be able to remove, for example, non-obscene nudity; non-threatening violent content; false but non-harmful or non-defamatory content; or any content that is contrary to the platform host's or its community's values, but is nevertheless protected by the First Amendment.[16]

Additionally, Prager University's desired imposition of the public forum doctrine onto private platforms threatens openly moderated platforms. The public forum doctrine is multifaceted, comprised of varying degrees of government fora, including not only designated public forums—which Prager University asserts YouTube is—but also "limited public forums," limited to certain subjects or speakers, and "nonpublic forums," where the forum operator is highly selective about allowing third-party speech. *See Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 496 (9th Cir. 2015); *Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008). All government forums are subject to First Amendment

[15] Meaning, the content is deemed to be within a traditionally unprotected category of speech or because a particular moderation decision survives strict scrutiny. *See U.S. v. Alvarez*, 567 U.S. 709, 717, 724 (2012).

[16] *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (non-obscene but indecent sexual content is protected by First Amendment); *Elonis v. U.S.*, 135 S. Ct. 2001, 2012 (2015) (certain threatening speech is protected by First Amendment); *Alvarez*, 567 U.S. at 723 (certain non-harmful false speech is protected by First Amendment).

limitations; even nonpublic forums must be free from viewpoint discrimination. *Am. Freedom Defense Initiative v. King County*, 904 F.3d 1126, 1132 (9th Cir. 2018).

A court cannot import only one facet of the entire doctrine—the designated public forum—and leave the other facets behind. Thus, private online platforms that are openly and unabashedly moderated might avoid being deemed designated public forums like YouTube—a result Prager University seems to desire. But such moderated platforms may necessarily be considered limited or nonpublic forums that would be unable to excise views they deem personally abhorrent or unwanted by the vast majority of their users, because they would still be bound by the First Amendment and therefore prohibited from viewpoint discrimination.

II. CURRENT CONSTITUTIONAL AND STATUTORY LAW SUPPORT THE CO-EXISTENCE OF UNMODERATED AND MODERATED PLATFORMS

The law in its current state, without the paradigm-shift urged by Prager University, supports the co-existence of both unmoderated and moderated online platforms. The First Amendment shields platforms from being forced to publish any Internet content they choose not to publish. And Section 230 (47 U.S.C. § 230) provides online platforms with immunity from liability arising from either the user-generated content they publish or from any decision to moderate such content. A ruling that YouTube is a public forum/state actor that must carry virtually all

content, or satisfy strict scrutiny, would undermine Section 230 and upset the careful balance that promotes the existence of unmoderated and moderated platforms.

A. The First Amendment Protects YouTube's Right to Curate Its Website

The law is clear that private entities that operate online platforms for speech and that open those platforms for others to speak enjoy a First Amendment right to edit and curate the content. Controlling such platforms is thus not a "public function" that would support a finding of state action. *See* Appellant Br. [ECF 7] at 35.

The Supreme Court has long held that private publishers have a First Amendment right to control the content of their publications. *Miami Herald Co. v. Tornillo*, 418 U.S. 241, 254-44 (1974). *See also Los Angeles v. Preferred Comms., Inc.*, 476 U.S. 488, 494 (1986) (recognizing cable television providers' First Amendment right to "exercise[e] editorial discretion over which stations or programs to include in its repertoire"); *Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 134 (9th Cir. 1971) (rejecting argument that Los Angeles Times' "semimonopoly and quasi-public position" justified order compelling to publish certain advertisements). This intrusion into the functions of editors is *per se* unconstitutional even if the compelled publication of undesired content would not

cause the publisher to bear additional costs or forgo publication of desired content. *Tornillo*, 418 U.S. at 258.

In so holding, the *Tornillo* Court rejected "vigorous" arguments that "the government has an obligation to ensure that a wide variety of views reach the public." *Id.* at 248. The arguments made by the party seeking compelled publication in a print newspaper are strikingly similar to those now raised against Internet platforms by Prager University and others. In *Tornillo*, plaintiff argued that the press in 1974 bore little resemblance to the one known to the ratifiers of the First Amendment: because of a "concentration of control of outlets to inform the public," the news media had "become big business," and "noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events." *Id.* at 248-49. Supporters of the compelled publication law argued that:

> The result of these vast changes has been to place in a few hands the power to inform the American people and share public opinion. . . . The abuses of bias and manipulative reportage are, likewise, said to be the result of vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed the public has lost any ability to respond or contribute in a meaningful way to the debate on the issues. . . . The First Amendment interest of the public in being informed is said to be in peril because "marketplace of ideas" is today a monopoly controlled by the owners of the market.

Id. at 250.

The *Tornillo* Court did not dispute the validity of these concerns, but nevertheless found that governmental interference with editorial discretion was so anathema to the First Amendment and the broader principles of freedom of speech and the press that the remedy for these concerns must be found through "consensual mechanisms" and not by governmental compulsion. *Id.* at 254.

Though phrased in terms of traditional print newspaper publishers, *Tornillo* has been applied in a variety of speech contexts, including thrice this past Supreme Court term. *See Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S.Ct. 2448, 2463 (2018); *National Inst. of Family Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring). In one noteworthy non-press setting, the Supreme Court applied *Tornillo*, among other authorities, in holding that the organizers of a parade had a First Amendment right to curate its participants, and thus could not be required to include a certain message, even if the parade was perceived as generally open for public participation. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569–70 (1995). As the *Hurley* Court explained, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment

protection require a speaker to generate, as an original matter, each item featured in the communication." *Id.*

Every court that has considered the issue has applied *Tornillo* to social media platforms that primarily, if not exclusively, publish user-generated content. *See, e.g., Robinson Hunt County, Texas*, 2017 WL 7669237, *3 (N.D. Tex. 2017); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007).

It bears emphasis that the situation presented in this appeal, a private party operating a platform generally open to the public, is distinct from the situation in which *the government* uses a privately owned platform for governmental purposes.[17] When the government uses a privately owned social media platform like YouTube, Facebook, or Twitter, the government is clearly a state actor and the interactive spaces of the social media platforms it uses for governmental business are often public forums. *See, e.g., Knight First Amendment Institute at Columbia*

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[17] Indeed, the use by governmental agencies and officials of privately owned social media platforms is widespread. Over 10,000 social media profiles for U.S. federal agencies and sub-agencies have been registered with the United States Digital Service. For a searchable database of registered federal government profiles, *see* https://usdigitalregistry.digitalgov.gov/. As for Congress, all 100 senators and the overwhelming majority of representatives use social media. Jacob Straus and Matthew E. Glassman, *Social Media in Congress: The Impact of Electronic Media on Member Communications*, R44509, Congressional Research Service (May 26, 2016), https://fas.org/sgp/crs/misc/R44509.pdf.

University v. Trump, 320 F. Supp. 2d 541 (S.D.N.Y. 2018) (finding the interactive spaces created by President Trump's tweets to be designated public forums); *Davison v. Plowman*, 2017 WL 105984, *4 (E.D. Va. 2017) (finding the comment section on a public official's Facebook page to be a limited public forum).

But those uses by governments do not convert the entire platform, governmental and nongovernmental accounts alike, into a public forum; nor does it transform the platform owner into a state actor limited by the First Amendment, rather than protected by it.

B. Holding YouTube to Public Forum Standards Undermines Section 230

Designating online platforms as public forums/state actors directly undermines the protections of Section 230, which Congress passed to guarantee Internet intermediaries the right to do exactly what Prager University seeks to prevent YouTube from doing—moderate content unencumbered by possible legal liability for doing so. Prager University's argument that the only way for users to truly benefit from online platforms is to deem those platforms public forums/state actors, thereby holding them to First Amendment content standards like government entities, is thus directly contrary to Congress' express purposes for passing Section 230.

Section 230 is the legal bedrock of the modern Internet[18], which is largely comprised of privately operated platforms and other intermediaries.[19]

Congress enacted two separate but interrelated immunities. Subsection 230(c)(1) provides Internet intermediaries with immunity from liability based on the harm plaintiffs suffered from the publication of user-generated content (e.g., defamation). *See* 47 U.S.C. § 230(c)(1). Subsection 230(c)(2) provides a separate immunity to Internet intermediaries for claims brought by content creators themselves based on the companies having removed or blocked the plaintiffs' content or enabled others to do so. *See* 47 U.S.C. § 230(c)(2).

Prior to the enactment of subsection 230(c)(1), online platforms faced traditional publisher liability for content posted by their users: the liability could be based on notice if the platforms acted as mere passive conduits; but the liability did not require notice if the platforms engaged with user content in any way. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009). In passing section 230, Congress intended specifically to overturn *Stratton Oakmont, Inc. v. Prodigy*

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[18] *See* David Post, *A bit of Internet history, or how two members of Congress helped create a trillion or so dollars of value*, Washington Post (Aug. 27, 2015) ("it is impossible to imagine what the Internet ecosystem would look like today without [Section 230]"), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/.

[19] *See A Brief History of NSF and the Internet*, National Science Foundation (Aug. 13, 2003) (discussing privatization of the Internet in 1990s), https://www.nsf.gov/news/news_summ.jsp?cntn_id=103050.

Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), where the state court found Prodigy liable for a user's defamatory content because the company exercised editorial control over the content of messages posted on its bulletin boards. Also, prior to the enactment of subsection 230(c)(2), online platforms faced tort liability if a user was harmed by their content being taken down, blocked, or otherwise moderated. *See Barnes*, 570 F.3d at 1105; *Batzel v. Smith*, 333 F.3d 1018, 1030 n.14. (9th Cir. 2003).

Thus, prior to Section 230, online platforms had two strong disincentives—at least in some jurisdictions—to moderate or otherwise engage with user-generated content. Congress passed Section 230 to address this concern, where one "important purpose of [Section] 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services" and "to remove the disincentives to self-regulation." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). This includes empowering users to take control of their own Internet experiences—just as YouTube's Restricted Mode allows. *See* 47 U.S.C. § 230(b)(3) and (b)(4).[20] Importantly, this purpose is not limited to allowing online platforms to *only* moderate content that is unprotected by the First

[20] "It is the policy of the United States… (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; [and] (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."

Amendment. To the contrary, both flavors of Section 230 immunity encourage online platforms to moderate content in ways that benefit users, or subsets of users, and that reflect the values of the company—but that may go beyond what the First Amendment would allow.

Prior to Section 230, there was also the concern that Internet companies would severely limit the user-generated content they hosted—or not host such content at all—for fear of liability. *See Zeran*, 129 F.3d at 331 ("The specter of tort liability in an area of such prolific speech would have an obvious chilling effect."). Congress was concerned that a resulting dearth of online platforms for users would ultimately be detrimental to free speech online. Thus, another important purpose of Section 230 was "to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230 (b)(1).

Prager University's contention that YouTube and similar online platforms should be deemed public forums/state actors who may not moderate user content beyond the bounds of the First Amendment cannot be reconciled with Section 230. First, the result Prager University wants here—to impose liability on YouTube for demoting its content—is in direct conflict with the immunity provided by subsection 230 (c)(2). Second, the resulting legal constraints would undermine the policy goals of Section 230: (1) to have online platforms that have a certain

decorum according to users' interests and company values, and (2) to have a plethora of online platforms overall.

The result would be exactly what Congress feared: holding online platforms liable for moderating user-generated content beyond the bounds of what the First Amendment allows would surely lead to certain Internet intermediaries ceasing to exist or being created in the first place. They would not be free to create the online communities they wanted, so they would see no point in operating. This is not the Internet that Congress envisioned when it passed Section 230.

III. INTERNET USERS ARE BEST SERVED BY A VOLUNTARY HUMAN RIGHTS FRAMEWORK FOR CONTENT MODERATION

There is a policy solution to Prager University's grievances that preserves the careful balance created by the law. Rather than having courts deem private online platforms public forums/state actors, Internet users are best served by "consensual mechanisms," in the words of the Supreme Court in *Tornillo*, particularly the voluntary adoption by the large platforms of a human rights framework for content moderation.

The large platforms that currently dominate social media, both in the United States and worldwide, undeniably play an outsize role in what we can and cannot say on the Internet. The content moderation practices in which these companies engage have serious human rights implications, especially in countries where the

platforms are the only effective means of communicating to the public outside the government's control.

YouTube is but one example of an actively moderated large social media platform; its actions against Prager University are in no way uncommon. YouTube is in fact an active "editor" of its website, removing or demonetizing a wide variety of content from around the world. For example, YouTube removed videos showing the marching bands of various chapters of the Red Hand Defenders, a Northern Ireland loyalist paramilitary group that is on the UK's proscribed terrorist organization list.[21] YouTube has also removed countless videos documenting atrocities in Syria under its graphic violence policy[22], and has come under fire for restricting and demonetizing LGBTQ content[23].

Examples abound across the major platforms. In the aftermath of violent protests in Charlottesville, Virginia, and elsewhere, social media platforms faced increased calls to police content, shut down more accounts, and delete more

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[21] *Censorship claim over removed YouTube band videos*, BBC News (June 11, 2018), https://www.bbc.com/news/uk-northern-ireland-44436968.

[22] *See supra* n.11.

[23] Megan Farokhmanesh, *YouTube is still restricting and demonetizing LGBT videos—and adding anti-LGBT ads to some*, The Verge (June 4, 2018), https://www.theverge.com/2018/6/4/17424472/youtube-lgbt-demonetization-ads-algorithm.

posts.[24] But, as noted in Section I.A., in their quest to remove perceived hate speech, in particular, social media platforms have all too often wrongly removed perfectly legal and valuable speech. Paradoxically, marginalized groups have been especially hard hit by this increased policing, hurting their ability to use social media to publicize violence and oppression in their communities. And the processes used by the social media companies are tremendously opaque. These problems are exacerbated when speech is flagged by secret algorithms, without meaningful explanation or due process.

The issue is not that these large, general purpose online platforms moderate their users' content at all; that is undeniable and unlikely to change. The issue is that they do so without proper consideration for human rights.

Internet users should strongly urge the companies owning and maintaining these online platforms to employ "consensual mechanisms" to ensure that content removals or account suspensions follow a framework consistent with human rights. Specifically, Internet users should demand increased accountability, clear and

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[24] Alexis C. Madrigal, *Inside Facebook's Fast-Growing Content-Moderation Effort*, The Atlantic (Feb. 7, 2018), https://www.theatlantic.com/technology/archive/2018/02/what-facebook-told-insiders-about-how-it-moderates-posts/552632/.; James Bovard, *Facebook censored me. Criticize your government and it might censor you too.*, USA Today (Oct. 27, 2017), https://www.usatoday.com/story/opinion/2017/10/27/facebook-censored-cross-your-countrys-government-and-they-might-censor-you-too-james-bovard-column/795271001/.

consistent takedown rules, and robust due process that includes a fair and transparent removal process.

The Santa Clara Principles, endorsed by a broad range of civil society groups, including *amicus*, offer a model.[25]

First, companies should publish the number of posts removed and accounts permanently or temporarily suspended, demonetized, or otherwise downgraded, due to violations of their content rules. At a minimum, this information should include the total number of discrete posts and accounts flagged and the total number of posts and accounts removed or otherwise downgraded. These numbers should be reported by category or term of service violated, by source of the downgrade request (company, government, users, etc.), and by location of the downgrade requester. This data should be reported at least quarterly.

Second, the companies should provide clear notice to all users about what types of content are prohibited, and clear notice to each affected user about the reason for the limitations placed on their content or account. In general, companies should provide detailed guidance to the community about what content is prohibited, including examples of permissible and impermissible content and the

[25] *See EFF and Coalition Partners Push Tech Companies To Be More Transparent and Accountable About Censoring User Content*, EFF Press Release (May 7, 2018), https://www.eff.org/press/releases/eff-and-coalition-partners-push-tech-companies-be-more-transparent-and-accountable; https://santaclaraprinciples.org/.

rules or guidance followed by reviewers. Companies should also provide an explanation of how automated detection is used across each category of content. When providing a user with notice about why her post was removed or why her account was limited, the company should indicate the specific policy violated, how the offending content was detected and flagged, and an explanation of the process by which the user can appeal the action.

Third, companies should enable users to engage in a meaningful and timely appeals process for any content removals or account limitations. At a minimum, an appeals process should include human review by a person or panel of persons that was not involved in the initial decision, an opportunity to present additional information that will be considered in the review, notification of the results of the review, and a statement of the reasoning sufficient to allow the user to understand the final decision.

It is not clear whether YouTube would have made a different decision regarding Prager University had it followed this process. But YouTube should have tried.

CONCLUSION

YouTube is far from perfect when it comes to implementing its content moderation policies. Yet to make online platforms no longer *protected* by the First Amendment but instead *bound* by it as if they were government entities would ultimately undermine Internet users' interests. For the foregoing reasons, *amicus* urges this Court to affirm the dismissal of Prager University's complaint.

Dated: November 7, 2018

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

Pursuant to Fed. R. App. P. 32(A)(7)(C), I certify as follows:

1. This Brief of *Amicus Curiae* Electronic Frontier Foundation In Support of Defendants-Appellees complies with the type-volume limitation, because this brief contains 4,750 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14-point and Times New Roman font.

Dated: November 7, 2018

By: *<u>/s/ David Greene</u>*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 7, 2018.

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

Dated: November 7, 2018

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