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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PRAGER UNIVERSITY,

Plaintiff,

vs.

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

Defendants.

Case No. 5:17-cv-06064-LHK

PLAINTIFF PRAGER UNIVERSITY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Judge: Hon. Lucy H. Koh
Date: March 15, 2018
Time: 1:30 p.m.
Crtrm.: 8, Fourth Floor
Robert F. Peckham Federal Courthouse, 280 S. First Street, San Jose, CA 95113

Trial Date: None Set

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STATUTES

OTHER AUTHORITIES

Plaintiff Prager University ("PragerU") respectfully submits this Memorandum of Points and Authorities in Support of its Motion for a Preliminary Injunction (the "PI Motion") against Defendants Google LLC and YouTube, LLC (collectively, "Defendants" or "Google/YouTube").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an issue of profound importance for free speech on the internet: may the owners and operators of the video social media website, YouTube, restrict viewer access to conservative, Judeo-Christian educational videos, based on their content, or the political or religious viewpoint of the speaker, in this case Plaintiff PragerU. Specifically, PragerU contends that Defendants' content- or viewpoint-based access restrictions are unlawful under both federal and California law, facially and as applied to PragerU's educational videos. The preliminary relief that PragerU seeks, however, is modest, narrow and limited: prohibit Defendants from continuing to restrict viewer access to any PragerU videos, absent clear, convincing, and objective evidence that PragerU's videos contain graphic nudity, violence, profanity, obscene material, hate speech expressly advocating violence against persons, or similar content that could be considered to be "objectively" offensive. Based on the extraordinary record in this case, that limited relief is more than justified because Defendants' continued restriction of PragerU videos is an "egregious" and "blatant" unconstitutional restraint on speech, constitutes overt political and religious discrimination, violates the implied covenant of good faith and fair dealing embedded in Defendants' own Restricted Mode criteria, and is a deceptive and unlawful business practice.

First, Defendants are not entitled to immunity under Section 230(c) of the Communications Decency Act of 1996, 47 U.S.C. §§ 230, *et seq*., (the "CDA"). Statutory immunity does not apply to federal constitutional claims because Congress cannot enact a law that abridges a fundamental constitutional right. Furthermore, Defendants cannot satisfy the elements for immunity from state law claims under section 230(c) because their conduct constitutes overt discrimination, was not undertaken in "good faith," and does not meet the "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" content requirements for immunity under section 230(c).

Second, Defendants' viewer access restrictions operate as an unlawful and viewpoint-

based restriction on speech that violates the First Amendment and Liberty of Speech Clause of the U.S. and California Constitutions. Defendants operate and hold YouTube out to the public as the functional equivalent of a "public forum," a place for "freedom of expression" where everyone's voice may be heard. Yet, in direct contravention of those representations, purposes and values, Defendants continue to censor PragerU videos while allowing similar, and in some cases identical, content posted by other speakers with different identities or political viewpoints to go unrestricted, including content that contains profanity and graphic violence. Consequently, Defendants' content-based access restrictions are an "egregious" and "blatant" form of unconstitutional "state action" that violates the First Amendment and Liberty of Speech Clause by restricting speech based on content, and the viewpoint and identity of the speaker.

Third, Defendants' continued censorship of PragerU videos constitutes invidious religious and political discrimination under the Unruh Act, Cal. Civil Code § 51, *et seq*., violates the implied covenant of good faith and fair dealing embedded in Defendants' Terms of Service, and operates as deceptive and unlawful business practice in violation of California Business and Professions Code §§ 17200, *et seq*., (the "Unfair Competition Law" or "UCL").

Fourth, the narrow preliminary relief sought by PragerU is equitable and serves the public interest. Defendants' curtailment of PragerU's speech for even minimal periods of time unquestionably constitutes irreparable injury. And because Defendants' discriminatory restraint of speech is an "egregious" and "blatant" form of unlawful censorship and discrimination, the relief requested would further the public's interest by ensuring that Defendants fulfill their legal obligations to maintain YouTube as a forum for "freedom of expression," while allowing users who wish to use "Restricted Mode" to filter out lewd, lascivious, filthy, excessively violent, harassing, or objectively offensive material.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

Many of the pertinent allegations and facts in support of PragerU's PI Motion are set forth

[1] In order to qualify for preliminary injunctive relief, PragerU must establish: (1) a likelihood of success on the merits; (2) immediate and irreparable harm; (3) equities weighing in favor of issuance of an injunction; and (4) that the relief will further the public interest. Fed. R. Civ. P. 45.

in the Complaint dated and filed on October 23, 2017. (*See* Docket No. 1, the "Complaint" or "Compl."). For convenience and brevity, PragerU sets forth the central undisputed facts on which its request for a preliminary injunction is based, including newly adduced facts and context. With respect to any facts, background context, or legal claims not discussed below, PragerU respectfully refers the Court to the Complaint, the declarations, and evidentiary exhibits submitted in support of the PI Motion.

A. Defendants Hold YouTube Out As A Public Forum

Defendants represent to the public that YouTube is an open forum for speech and communication. Defendants declare that YouTube's goal is to "create a world where everyone can be heard," and to give people the tools to "using your voice and videos to help make the kind of social change you believe in."[2] Defendants characterize YouTube as "a community where everyone's voice can be heard"[3] and "a place to express yourself and show the world what you love."[4] In 2015, YouTube described itself as "one of the largest and most diverse collections of self-expression in history" that, over the preceding ten years, had "given people opportunities to share their voce and talent no matter where they are from or what their age or point of view."[5].

In YouTube's Mission Statement, Defendants claim to operate the website based on "four essential freedoms that define" YouTube:

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

[2] *See* Declaration of Peter Obstler ("Obstler Dec.") filed herewith, ¶3, Ex. B.
[3] Obstler Dec., ¶4, Ex. C.
[4] Obstler Dec.. ¶5, Ex. D.
[5] Obstler Dec.. ¶6, Ex. E.

together around shared interests and passions.[6]

Based on these representations to the public, YouTube has grown into a communications monopoly that Defendants operates as the largest forum open to the public for the posting and viewing of videos in the history of the world. (Compl., ¶38). More than one billion people access YouTube on a monthly basis.[7] Nearly one out of every two people on the Internet visits the site.[8] YouTube's monopoly on video communications particularly affects millennials, who watch two-thirds of all their premium online video content via YouTube, and whose reliance on YouTube continues to grow. (Compl., ¶39). And for video browsing, YouTube is the default and largest video platform that has ever existed. (Comp., ¶40).

B. YouTube's Restricted Mode Criteria and Practices

Defendants restrict viewer access to certain types of content on the YouTube site. At issue in this PI Motion is Defendants' use of one such tool known as "Restricted Mode." Parents and network administrators (including library, school, university, or company IT staff) can turn on Restricted Mode. When Restricted Mode is enabled, all videos that contain any content that Defendants unilaterally deem inappropriate are blocked so that all content and any viewer comments about the video are disabled and hidden from viewers.[9] Restricted Mode sweeps broadly, restricting access to any and all videos that Defendants determine are inappropriate for Restricted Mode audiences, including restricting viewer access to the title or existence of the video making it difficult, if not impossible, to locate restricted videos when a user searches or browses for YouTube videos, whether by particular subject or creator. Consequently, Restricted Mode filtering cannot be applied by a user to filter access to some videos but not others based on the user's view of what is and is not appropriate for Restricted Mode viewing.[10]

While Defendants estimate that between 1.5 and 2 percent of website visitors view videos in Restricted Mode (Compl., ¶41), many viewers do not do so by choice. Specifically, when

[6] Obstler Dec.. ¶2, Ex. A, "four essential freedoms" quoted from "About YouTube" webpage.
[7] Obstler Dec. ¶¶7-8, Exs. F-G.
[8] Obstler Dec.. ¶9, Ex. H.
[9] Obstler Dec.. ¶10, Ex. I.
[10] Obstler Dec.. ¶11, Ex. J.

network administrators at businesses, libraries, and educational institutions turn on Restricted Mode, individual viewers who visit YouTube on that network cannot turn off Restricted Mode or gain access to any YouTube content that is restricted. Individual users, like students or employees, cannot disable Restricted Mode or de-restrict particular videos or channels absent action by network administrators or managers.[11] Furthermore, Defendants' use of "Restricted Mode" and "Age Restrictions" are two entirely different access restriction tools.[12] Consequently, Restricted Mode does not just affect younger children, but disproportionately impacts those using computers on networks they do not control, including high school, college and graduate students who comprise PragerU's target audience. (*See* Declaration of Craig Strazzeri ("Strazzeri Dec."), ¶10, Ex. D).

> Defendants filter and restrict viewer access to videos based on the following criteria:
>
> **Drugs and alcohol:** Talking about drug use or abuse, or drinking alcohol in videos.
>
> **Sexual situations:** Overly detailed conversations about or depictions of sex or sexual activity. Some educational, straightforward content about sexual education, affection, or identity may be included in Restricted Mode, as well as kissing or affection that's not overly sexualized or the focal point of the video.
>
> **Violence:** Graphic descriptions of violence, violent acts, natural disasters and tragedies, or even violence in the news.
>
> **Mature subjects:** Videos that cover specific details about events related to terrorism, war, crime, and political conflicts that resulted in death or serious injury, even if no graphic imagery is shown.
>
> **Profane and mature language:** Inappropriate language, including profanity.
>
> **Incendiary and demeaning content:** Video content that is gratuitously incendiary, inflammatory, or demeaning towards an individual or group.[13]

In addition, Defendants' Terms of Service "specify the Service," including Restricted Mode filtering, "shall be deemed solely based in California" and "shall be governed by the internal substantive laws of the State of California." "Any claim or dispute . . . that arises . . . from the Service [including those related to Restricted Mode] shall be decided exclusively by a court of competent jurisdiction located in Santa Clara County, California. "[14]

[11] Obstler Dec.. ¶12, Ex. K.
[12] Obstler Dec.. ¶¶10e, 21 Ex. I, T.
[13] Obstler Dec.. ¶10d, Ex. I.
[14] Obstler Dec. Ex. O at ¶14.

Although Defendants admit that these restrictions are intended to limit certain types of content, Google/YouTube also concede that they do not apply these content-based restrictions neutrally, consistently, or equally to all speakers. As they are doing to PragerU, rather than just on the content of video, Defendants restrict video content based on the political viewpoint or identity of the speaker, including for example videos posted by the LGBTQ community.[15] And Defendants use Restricted Mode to filter and restrict access to PragerU's video content, while allowing other users to air, without restriction, identical or similar content, including videos that contain profanity, graphic violence, or other offensive material. (Strazzeri Dec. Ex. C). Furthermore, the criteria above are so vague, subjective, and overbroad that, if applied neutrally and literally, would require Defendants to restrict most, if not all, of the video content that runs on YouTube, including currently unrestricted videos about the opioid crisis, historical or current political conflicts, sexual assault, gender orientation or discrimination, or legal decisions by the nation's courts.

C. The Impact Of Restricted Mode On PragerU's Target Audience

Plaintiff PragerU is a nonprofit organization that distills arguments from academics, journalists, and attorneys into five-minute videos with graphs and animation to create persuasive, entertaining, and educational content.[16] PragerU was founded, in part, in response to a perceived and increasingly recognized trend that America's schools are no longer grounds of intellectual diversity. Its goal is to further and promote vigorous and even-sided speech and debate among American citizens by, among other things, providing for its viewers opinions and analysis of current political and historical events from a perspective that is rooted in conservative, Judeo-Christian values. *Id.* PragerU's target audience is comprised of viewers between the ages of 13 and 34, including high school, college, and graduate students. And according to Defendants' analytics information, 64% of all of PragerU's video views come from viewers under the age of 35, and 95 million video views have come from those aged between 13 and 24.[17]

[15] Obstler Dec. ¶18, Ex. Q.
[16] Strazzeri Dec. ¶¶2,3, Ex. A.
[17] Strazzeri Dec. ¶10, Ex. D.

D. Defendants Continue To Restrict PragerU's Videos

For more than a year now, PragerU has communicated with and requested that Defendants permit its educational videos to run in Restricted Mode. In making a good faith effort to resolve the continued restriction of its videos, PragerU has repeatedly sought clear and specific guidance as to why the content is not eligible to be viewed in Restricted Mode. And despite multiple communications between PragerU and Defendants, Defendants continue to restrict PragerU videos and have provided no reasonable explanation for, or guidance about, the restrictions other than to say that the videos mention events that involve genocide, war, or terrorism.[18]

Since the filing of this Complaint, Defendants continue to restrict approximately 30 PragerU videos.[19] As any reasonable person can see, those and other PragerU videos do not contain profanity, graphic violence or nudity, do not advocate violence, and do not contain hate speech that seeks to incite violence, and fully comply with the letter and spirit of all of Defendants' Terms of Service, Community Guidelines, and statements of policy. (Compl. ¶¶7, 12, 58). Furthermore, videos on similar subject matter posted by other speakers, including videos containing profanity, graphic violence, or other content that violate Defendants' Terms of Service, Guidelines, and policies continue to run in Restricted Mode. (Compl. ¶¶8, 72). In some cases, identical video content posted by unauthorized users who copied that content from PragerU videos is not restricted.[20] Indeed, Defendants' bias and animus toward PragerU is so pronounced that YouTube restricts a PragerU interview with Professor Alan Dershowitz about the gay wedding cake case pending before the Supreme Court. (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, Supreme Court Case No. 16-111). Strazzeri Dec. ¶12, Ex. E.

III. PRAGERU HAS A FAIR CHANCE OF SUCCESS ON THE MERITS WITH RESPECT TO EACH OF ITS CLAIMS

To establish a substantial likelihood of success on the merits, the record must indicate that

[18] Strazzeri Dec. ¶5, Ex. B.
[19] Strazzeri Dec. ¶9, Ex. C.
[20] *See* Compl. ¶70 and Strazzeri Dec. ¶11. Two of the previously unrestricted copycat videos are now restricted. Strangely, one of PragerU's original and previously restricted videos is now *un*restricted while the previously unrestricted copycat video is now restricted.

PragerU has at least "'a fair chance of success'" as to one or more of its claims. *In re Focus Media Inc.*, 387 F.3d 1077, 1086 (9th Cir. 2004) (quoting *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc)). In lieu of success on the merits, Plaintiff may also obtain relief when "'serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor.'" *Kimball v. BAC Home Loans Servicing, LP*, 2011 WL 577418, at *1 (N.D. Cal. Feb. 9, 2011) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011)). Given the record in this case, PragerU is entitled to preliminary relief with respect to each of the four claims that form the basis of its PI Motion.

A. Defendants Are Not Entitled To CDA Immunity

In a public response to this lawsuit, Defendants appear to assert that they are absolutely immune from suit under the CDA.[21] Defendants are mistaken. The CDA cannot preempt federal constitutional claims. And to the extent that the CDA governs any of the other claims, Defendants cannot establish that they restrict access and/or filter content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" or acted in "good faith" as required under section 230(c). *See* 47 U.S.C. § 230(c)(2). Finally, the Ninth Circuit has made clear that the CDA cannot be stretched to immunize overt discrimination. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc). Because the CDA provides immunity from suit, not just liability, however, the Court should first decide the scope and reach of Defendants' affirmative CDA defense with respect to ***each*** claim before addressing the merits in this case. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009).

1. Congress Cannot Immunize Federal Constitutional Violations

CDA immunity is a creature of a congressional statute that is untethered to sovereign immunity under the Eleventh Amendment. Consequently, the CDA cannot alter or abridge federal constitutional rights by immunizing constitutional offenders. *See Butz v. Economou*, 438 U.S.

[21] Eriq Gardner, "Google Responds to Lawsuit Accusing YouTube of Censoring Conservatives," *The Hollywood Reporter* (Oct. 28, 2017), Obstler Dec. ¶14, Ex. M.

478, 490–91 (1978) ("since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense"); *see also Schuette v. BAMN*, 572 U.S. ——, 134 S.Ct. 1623, 1636-37 (2014); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (Congress "can no more relieve a [state actor] of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment."). While Congress may determine how best to redress unconstitutional actions, it may not enact laws that effectively make a substantive change or abridgement to the underlying liability arising from the right itself. *City of Boerne*, 521 U.S. at 519; *see also Obergefell v. Hodges*, --- U.S. ---, 135 S.Ct. 2584, 2605 (2015).

This is particularly true with "[l]egislation which alters the meaning of the Free Exercise Clause." *City of Boerne*, 521 U.S. at 519. Such a law "cannot be said to be enforcing the Clause" because "Congress does not enforce a constitutional right by changing what the right is." *Id.* The "idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" *Obergefell*, 135 S.Ct. at 2605-06 (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)). Congress can no more immunize Google/YouTube from "egregious" and "blatant" First Amendment violations "than a similar pronouncement could exempt" the FBI "from the Fourth Amendment" or a state actor from abridging the fundamental constitutional right of same-sex couples to marry. *Lebron*, 513 U.S. at 392; *Schuette*, 134 S.Ct. at 1636-37.

2. Defendants Cannot Meet The Immunity Requirements Governing The Restriction Or Filtering Of Content.

Congress enacted the CDA in response to a New York state court opinion holding an internet service provider liable for a user's defamatory message posted on a message board that the provider operated and monitored. That decision left computer service providers with a conundrum: either monitor one's site and risk being held responsible for defamatory postings, or exercise no control whatsoever over the contents of one's own website and risk liability for failing to act. *See, e.g., Fair Housing*, 521 F.3d at 1163-65 (discussing history of CDA).

To that end, Congress provided for two different forms of civil immunity under section 230: one, under subdivision (c)(1), to immunize providers from defamation or other types of liability that arise from decisions to publish or not, including a provider's passive failure to restrict or filter objectionable content; and a second, under subdivision (c)(2), immunizing providers who affirmatively act to restrict access or filter content. 47 U.S.C. § 230(c); *see also Fair Housing*, 521 F.3d at 1163-64 (citing and quoting *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) and *Doe v. GTE Corp.*, 347 F.3d 655, 659-60 (7th Cir. 2003)). Section 230(c)(1) is concerned with liability arising solely from the information that a provider merely *provided* online while subdivision (c)(2) is directed at actions taken by Internet service providers or users to *restrict* access to online information in "good faith" that is considered to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" under any reasonable standard. *Barrett v. Rosenthal*, 40 Cal. 4th 33, 49 (2006) ("[l]iability for censoring content is not ordinarily associated with the defendant's status as 'publisher' or 'speaker"); *see also Fair Housing*, 521 F.3d at 1163-64; *Doe v. GTE Corp.*, 347 F.3d at 659–60 (discussing the difference between immunity under subdivisions (c)(1) and (c)(2); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (section 230(c)(1) "'blocks civil liability when web hosts and other ISPs *refrain from* filtering or censoring the information that third parties created on their sites.'") (emphasis added); *Almeida v. Amazon, Inc.*, 456 F.3d 1316, 1321, n.3 (11th Cir. 2006) ("the majority of circuits also read subsection (c)(1), though phrased as a definition, to block civil liability when interactive service providers ***refrain from*** filtering or censoring the information on their sites.") (emphasis added) . Without subdivision (c)(2), service providers like Defendants would always invoke 230(c)(1) to circumvent both the "good faith" requirement as well as the specific requirements limiting content-based access restrictions to very specific forms of offensive content listed in the statute, thereby rendering 230(c)(2) meaningless surplusage. *Cf., e-Ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, *3 (M.D. Fla. Feb. 8, 2017) (applying 230(c)(1) to bad faith removal of content would render 230(c)(2)

"superfluous").[22]

With respect to the statutory limits Congress placed on restricting or filtering third party internet content, PragerU's educational videos do not contain any content that reasonably could be considered as "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing." (*Compare* § 230(c)(2) *with* Compl., ¶¶4, 7, 70-72 ; Strazzeri Dec., ¶¶2, 3, Ex. A). Nor can Defendants claim that they consider PragerU's content to be "otherwise objectionable." The term "otherwise objectionable" refers to "offensive material" similar to material that is found to be obscene, lewd, lascivious, filthy, excessively violent, or harassing. *Song fi Inc. v. Google, Inc.*, 108 F. Supp.3d 876, 883–84 (N.D. Cal. 2015) (applying principle *eiusdem generis* to limit catchall language to prevent restricting materials merely because materials might pose a "problem" for YouTube); *Sherman v. Yahoo! Inc.*, 997 F.Supp.2d 1129, 1138 (S.D. Cal. 2014) (declining to "broadly interpret 'otherwise objectionable' material to include any or all information or content"); *Goddard v. Google, Inc.*, 2008 WL 5245490, at *6 (N.D. Cal. Dec. 17, 2008) (finding that information "relat[ing] to business norms of fair play and transparency are ... beyond the scope of § 230(c)(2)"). This catchall term, therefore, does not mean that Defendants can do what they please where, as here, Defendants do not restrict the content of other users that is similar or identical to the PragerU videos, or limit content that violates objective criteria, like profanity and graphic violence. *See Song fi*, 108 F. Supp.3d at 883; (Compl., ¶¶8, 70-72; Strazzeri Dec., ¶¶6-9 and Ex. C).

Nor can Google/YouTube show that they restricted the PragerU videos in "good faith" as

[22] Courts routinely deny CDA immunity where claims do not seek to hold a computer service provider liable for another's content, but for independent misconduct. *See Darnaa LLC v. Google, Inc.*, 2016 WL 6540452, *8 (N.D. Cal. Nov. 2, 2016) (implied covenant claim not entitled to CDA immunity); *Levitt v. Yelp!*, 2011 WL 13153230, *8 (N.D. Cal. March 22, 2011) ("[c]hoosing not to publish content for the purposes of harming a particular business or to coerce that business into purchasing advertising seems quite distinct from the traditional editorial functions of a publisher.") (defendant's manipulation of customer reviews not immunized); *Levitt v. Yelp*, 2011 WL 5079526, *9 (N.D. Cal. Oct. 26, 2011) (misrepresentations and manipulation of user ratings would not be immunized); *Demetriades v. Yelp, Inc.*, 228 Cal.App.4th 294, 313 (Cal. Ct. App. 2014) (misrepresentations about the accuracy of defendant's review filtering software); *Anthony v. Yahoo! Inc.*, 421 F.Supp.2d 1257, 1263 (N.D. Cal. 2006) (Whyte, J.) (misrepresentations accompanying third party content).

required under the CDA. 47 U.S.C. § 230(c)(2). Defendants' discriminatory use of access restrictions to silence PragerU solely because of its viewpoint and identity is an "egregious" and "blatant" form of viewpoint discrimination. *See Spy Phone Labs LLC v. Google, Inc.*, 2016 WL 6025469, *8 (N.D. Cal. Oct. 14, 2016) (denying CDA motion to dismiss where policy supposedly enforced did not exist and was alleged to be pretextual basis for removing applications); *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828–29 (1995). Defendants' selective use of access restrictions to silence Plaintiff is also a breach of the implied covenant of good faith and fair dealing, and constitutes an deceptive and unlawful business practice under California law, done with oppression, fraud, and malice. (Compl. ¶¶83, 94, 99, 107, 113, 119); s*ee Barnes v. Yahoo*, 570 F.3d 1096, 1107 (9th Cir. 2009) (promissory estoppel claim sought to treat Yahoo as a promisor rather than as a publisher); *Darnaa*, 2016 WL 6540452, at *8 (implied covenant claim not subject to CDA immunity); *Demetriades*, 228 Cal.App.4th at 300, 313 (UCL claim for defendant's own statements not preempted by CDA); *Swift v. Zynga Game Network, Inc.*, 2010 WL 4569889 (N.D. Cal. Nov. 3, 2010) (denying CDA immunity to UCL claim based on defendant's alleged participation in fraudulent transactions); *Perkins v. LinkedIn Corp.*, 53 F.Supp.3d 1222 (N.D. Cal. 2014) (denying CDA immunity for UCL claims against defendant's own conduct); *Fraley v. Facebook, Inc.*, 830 F.Supp.2d 785, 801-02 (N.D. Cal. 2011) (denying CDA immunity to UCL for unauthorized use of user likenesses); *CYBERsitter, LLC v. Google, Inc.*, 905 F.Supp.2d 1080, 1086-88 (C.D. Cal. 2012) (denying CDA immunity on UCL claim for defendant's own tortious conduct not reliant on content of third party advertisements); *Anthony v. Yahoo! Inc.*, 421 F.Supp.2d at 1263 (no CDA immunity for Florida unfair competition claim based on misrepresentations accompanying third party content); *Hy Cite Corp. v. badbusinessbureau.com, LLC*, 418 F.Supp.2d 1142, 1147-49, 1152 (D. Ariz. 2005) (denying CDA motion to dismiss Lanham Act unfair competition claim); *Doctor's Associates, Inc. v. QIP Holder LLC*, 2010 WL 669870, *24 (D. Conn. Feb. 19, 2010) (Connecticut Unfair Trade Practice Act claim for false commercial disparagement survived CDA); *Moving and Storage, Inc. v. Panayotov*, 2014 WL 949830, *2 (D. Mass. March 12, 2014) (denying CDA motion to dismiss claims under Massachusetts unfair competition statute for manipulation of consumer reviews).

Finally, 230(c) was never intended to protect overt political and religious viewpoint discrimination. In holding that the CDA is not an unlimited "get-out-of-jail-free card for businesses that publish user content on the internet," providers may not stretch CDA immunity "beyond its narrow language and purpose" to immunize discrimination. *Fair Housing*, 521 F.3d at 1162, n.15 & n.18; *see also Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016). In *Fair Housing*, an en banc panel of the Ninth Circuit expressly rejected the idea that the CDA immunizes invidious discrimination, even under subdivision (c)(1), where the service provider stands accused of merely inducing others to express discriminatory preferences illegal under the Fair Housing Act. 521 F.3d at 1163-65; *see also Airbnb Inc. v. City and County of San Francisco*, 217 F.Supp.3d 1066, 1074 (N.D. Cal. 2016) (CDA "does not provide limitless immunity for online activity or conduct related to it"). Consequently, "[w]hen Congress passed section 230 it didn't intend to prevent the enforcement of all laws online," but only "to encourage interactive computer services that provide users *neutral* tools to post content online." *Fair Housing*, 521 F.3d at 1175 (emphasis in original); *see also eDrop-Off Chicago LLC v. Burke*, 2013 WL 12131186, *24 (C.D. Cal. Aug. 9, 2013) (provision of password protection to some users but not others would not be consistent with providing a "neutral tool"); *Swift v. Zynga*, 2010 WL 4569889 at *4-6 (allegations of deceptive special offers take conduct outside the role of a "neutral" publisher).

Based on this record, Defendants' overt discriminatory conduct is not entitled to CDA immunity.[23] Defendants do not even pretend to use content based access restrictions with respect to PragerU as "*neutral* tools" that "police" content and screen for "offensive material." *Id; see also* Obstler Dec. Ex. 17. Defendants restrict access to PragerU videos that are neither "obscene, lewd, lascivious, filthy, excessively violent, harassing," nor objectively "otherwise objectionable." And Defendants' arbitrary and capricious use of vague restriction criteria was not undertaken in "good faith," because Defendants selectively restrict PragerU's, while allowing other speakers to

[23] With respect to the free speech and viewpoint discrimination claims, the use of a federal immunity statute to permit an otherwise unlawful restraint on speech, would also render the CDA an unenforceable restraint on speech. *See Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (holding criminal enforcement portions of CDA unconstitutional under the First Amendment).

post similar, identical content, as well content that contains profanity, graphic violence, or other offensive material.[24] That is "egregious" and "blatant" discrimination and censorship. *Rosenberger*, 515 U.S. at 828–29 (citations omitted); *Fair Housing*, 521 F.3d at 1163.

B. Defendants' Restriction Of Viewer Access To PragerU's Videos Violates The First Amendment And The Liberty Of Speech Clause

A content-based restriction on free speech and expression in a public forum constitutes an unconstitutional restraint on free speech where, as here, the restrictions are vague and overbroad, or applied as a pretext to restrict speech based not on the content of the speech but the political or religious viewpoint of the speaker and/or the speaker's intended audience. *See Rosenberger*, 515 U.S. at 829; *see also Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2230 (2015); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983) (state regulation of speech unlawful when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction); *Fashion Valley Mall, LLC v. N.L.R.B.* 42 Cal.4th 850, 869 (2007); *Dillon v. Municipal Court*, 4 Cal.3d 860, 869-870 (1971); *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 14 Cal.App.4th 312, 325-27 (1993).

1. YouTube Is The Functional Equivalent Of A "Public Forum"

In order to state a claim for relief under the First Amendment or Liberty of Speech Clause, Defendant's conduct must constitute "state action" or its "functional equivalent." *See Cyber Promotions, Inc. v. American Online, Inc.*, 948 F.Supp. 436, 437 (E.D. Penn. 1996); *hiQ Labs, Inc. v. LinkedIn Corp.*, --- F.Supp.3d ---, 2017 WL 3473663, *10 (N.D. Cal. Aug. 14, 2017). Although Defendants are not public entities, they are "state actors" for the purposes of both the First Amendment and Liberty of Speech claims because they operate and hold YouTube out to the public as the functional equivalent of a public forum, where the general public is invited and solicited to use the platform as place for "freedom of expression" and "freedom of information" where "everyone's voice can be heard." *See* Obstler Dec. ¶2, Ex. A; *Marsh v. Alabama*, 326 U.S. 501, 502-503, 506 (1946); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801

[24] *See also* Obstler Dec., Ex. Q.

(1985) (*cited with approval in Denver Area Educ. Tele Communications Consort., Inc. v. FCC*, 518 U.S. 727, 749-50 (1996) ("assuming public forums may include 'private property dedicated to public use'"); *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 26 Cal.4th 1013, 1022 (2001); *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899, 907–08 (1979), aff'd, 447 U.S. 74 (1980); *Sessions v. Twitter*, --- F.Supp.3d ---, 2017 WL 2876183, *8 (N.D. Cal. July 6, 2017) (Gonzalez Rogers, J.) (social media websites are public fora subject to strict scrutiny under the First Amendment); *see also Barrett* , 40 Cal.4th at 33, n. 4 (newsgroup websites public fora under anti-SLAPP law); *Weinberg v. Feisel*, 110 Cal.App.4th 1122, 1131, n.4 (2003) (meaning "of a Public Forum under section 425.16 was developed in, and has sole reference to, First Amendment cases").

a. Restricting The Public's Access To Speech On Social Media Websites Constitutes "State Action" Under The First Amendment

As early as 1946, the U.S. Supreme Court declared that private property "accessible to and freely used by the public in general [with] nothing to distinguish [it] from any other [property] except the fact that the title to the property belongs to a private corporation" will be treated as a public forum because naked title is not a "reason for depriving people of liberties guaranteed by the First and Fourteenth Amendments." *Marsh*, 326 U.S. at 502-503, 506. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.*; s*ee also Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 324 (1968) (citations omitted), abrogated by *Hudgens v. N. L. R. B.*, 424 U.S. 507 (1976); *Denver Area Educ. Tele. Communications Consort*, 518 U.S. at 749-50 ("assuming public forums may include 'private property dedicated to public use'") (quoting and citing *Cornelius*, 473 U.S. at 801)). Where, as here, private interests are "substituting for and performing customary functions of government, First Amendment freedoms [cannot] be denied where exercised in the customary manner . . . ." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567-570 (1972).

The Supreme Court has yet to definitively rule on the extent to which the First Amendment may govern speech on privately owned websites. In *Packingham v. North Carolina*, 137 S.Ct.

1730 (2017), however, the U.S. Supreme Court declared that "social media users employ [social media] websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" 137 S.Ct. at 1736. And "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." 137 S. Ct. at 1737 (quoting *Reno*, 521 U.S. at 868 ("while, in the past, there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear[,] [i]t is cyberspace—the 'vast democratic forums of the Internet' in general" and "social media in particular"); *see also Sessions*, --- F.Supp.3d _---, 2017 WL 2876183 at *8. Because social media "websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard" and "allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox,'" the U.S. Supreme Court has expressly admonished all courts to "exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." *Id.* at 1736. Defendants' administration of YouTube, the world's largest public forum in history for freedom of expression in video content and viewer interaction, warrants nothing less. *Id*.

b. Large Social Media Sites Open To The Public Are Public Forums Under The Liberty Of Speech Clause

The Liberty of Speech Clause, Article I, section 2, subdivision (a) of the California Constitution provides that: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." The California Constitution gives "[e]very person" an affirmative right to free speech, and the California Supreme Court has construed right to freedom of speech under California law, including the state action requirement, as "more definitive and inclusive than the First Amendment." *Wilson v. Superior Court*, 13 Cal.3d 652, 658 (1975). Specifically, the California Supreme Court has declared that "actions of a private property owner constitute state action for purposes of California's free speech clause" when the property "is freely and openly accessible to the public" and is operated as "the functional equivalent of a traditional public forum," a place where "historically the public's free

speech activity is exercised." *Robins*, 23 Cal.3d at pp. 907–910 & fn. 5; *see also Fashion Valley Mall*, 42 Cal.4th at 869; *Golden Gateway*, 26 Cal.4th at 1032; *Albertson's, Inc. v. Young*, 107 Cal.App.4th 106, 114–15 (2003); *Campbell v. Feld Entm't Inc.*, 2014 WL 1366581, at *8 (N.D. Cal. Apr. 7, 2014) (when "private property owner opens his property to the public such that the property becomes a public forum, the private property owner essentially steps into the shoes of the state and in so doing is subject to the same restrictions as the state"). And, this "more definitive" concept of "state action" has become "embedded" in California's "free speech jurisprudence with no apparent ill effects." *Golden Gateway*, 26 Cal.4th at 1022.

Like the First Amendment, the Liberty of Speech Clause seeks to balance the rights of property owners to use their property as they see fit with the public's right to free speech. *See, e.g.*, *Marsh* at 565; *Pruneyard v. Robins*, 447 U.S. 74 (1980). To that end, the Courts of Appeal in *Albertson's, Inc. v. Young*, 107 Cal.App.4th at 119-122, delineated a four factor test to determine when the use of private property constitutes state action: (i) the nature, purpose and primary use of the property (*id.* at 120); (ii) the extent and nature of the public invitation to use the property (*id.* at 121-22); (iii) the size and physical layout of the business for which the property is used for (*id.*. at 119); and (iv) the relationship between the ideas subject to restriction and the purpose of the property (*id*. at 123).

In addition, "[w]eb sites accessible to the public, where public may post speech are 'public forums' for purposes of the anti-SLAPP statute." *Barrett v. Rosenthal*, 40 Cal.4th 33, n. 4. That is very significant because, contrary to the erroneous belief that California anti-SLAPP statute employs a broader definition of a "public forum" than the Liberty of Speech Clause,[25] the controlling California case law makes clear that the "concept of a Public Forum was developed in,

[25] Notwithstanding court's decision in *hiQ Labs, Inc. v. LinkedIn Corp.*, 2017 WL 3473663, at *10–11 a "public forum" under section 425.16 is not defined anywhere in the anti-SLAPP law but is determined by "sole reference to [] First Amendment cases" and the public function doctrine under *Pruneyard* and progeny. *See Weinberg*, 110 Cal. App. 4th at 1131, n.4; *see also Ralphs Grocery Co. v. Victory Consultants, Inc.*, 17 Cal. App. 5th 245 (Cal. Ct. App. Oct. 24, 2017). The fact that SLAPP protections may extend beyond speech to conduct related to the effectuation of speech does not alter the established rule that a "public forum" under 425.16 is by definition a public forum under *Pruneyard* and the California constitution.

and has sole reference to, First Amendment cases." *Weinberg*, 110 Cal.App.4th at 1131, n.4 (emphasis added)*; Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 1123 (1999); *accord Dowling v. Zimmerman* 85 Cal.App.4th 1400, 1416–1417 (2001) ("clauses (3) and (4) of subdivision (e) of section 425.16 protect conduct involving statements made in public fora (§ 425.16, subd. (e)(3)), and 'other conduct' that implicates First Amendment speech or petition rights (§ 425.16, subd. (e)(4)), but only if such public fora statements are made in connection with, or such 'other conduct' is in furtherance of, a public issue"). Thus, a finding that social media sites are public forums for purposes of section 425.16 is strong evidence, if not dispositive of, the public forum analysis under California as well as federal law. *Id.*; *see also Ralphs Grocery Co.*, 17 Cal. App. 5th at 257–58 (noting that 425.16 requires a threshold finding that moving party owns and operates a public forum under *Pruneyard* and progeny).

c. YouTube Is A Public Forum Under Both Federal And California Law

On this record, YouTube is a public forum whose access restrictions are subject to scrutiny under both the First Amendment and Liberty of Speech Clause. Indeed, Defendants represent and operate YouTube with the full spectrum characteristics and indicia that characterize a public forum for speech under both federal and California law.

First, with respect to the nature, purpose, and primary use of YouTube, Defendants solicit the public to use YouTube by representing that it is a place dedicated to free speech where "everyone deserves to have a voice, and that the world is a better place when we listen, share and build community through our stories." Obstler Dec. ¶2, Ex. A. Specifically, Defendants hold YouTube out to the general public as a place whose "mission is to give everyone a voice and show them the world" based "on four essential freedoms": (1) to "speak freely, share opinions, [and] foster open dialogue," ("Expression"); (2) for "everyone [to] have easy, open access to information," recognizing that video is a "powerful force for education" ("Information"); (3) to give "everyone [] a chance to be discovered" (Opportunity"); (4) and for "everyone [] to find communities of support, break down barriers [] and come together around shared interests." In so doing, Defendants represent that YouTube is defined by four values: (1) "Freedom of Expression"

(2) "Freedom of Information" (3) "Freedom of Opportunity" and (4) "Freedom to Belong" *Id*. *see also Barrett*, 40 Cal.4th at 42, n. 4; *Weinberg*, 110 Cal.App.4th at 1131, n.4.

Second, Defendants solicit and invite the public to visit YouTube by representing it as a public forum that "give[s] everyone a voice." According to Defendants, "[t]his is what happens when you give everyone a voice" because "that is the power of YouTube," a social media website containing "the rawest, purest, most unfiltered portrait of what humans can do."[26] Consequently, YouTube stands in sharp contrast to other forum based state action cases where the public is invited to use the property primarily to purchase goods and services from private business establishments. *Cf., e.g.*, *Amalgamated Food v. Logan Valley*, 391 U.S. at 324; *Golden Gateway*, 26 Cal.4th at 1032; *Albertson's*, 107 Cal.App.4th at 114, *with* Obstler Dec. ¶2 and Ex. A.

Third, the size and reach of YouTube's dominance over the expression and exchange of video based speech is unparalleled. (*See* Compl. ¶¶ 2, 27, 40; Obstler Dec. ¶¶7, 8, 19, Exs. F, G, R). Among others, legal scholars Professors Jeffrey Rosen and Timothy Wu warn that private corporations like Defendants "have more power over free speech and privacy than any president, king, or Supreme Court justice." *Constitution 3.0*, at p. 2 (Obstler Dec. Ex. N). Because the First Amendment is "centered on the problem of wrongful discrimination in communications" these scholars point out that "anyone who wants to understand free speech in the twenty-first century needs to know how the concept has expanded over time" to include the vast and concentrated power over speech wielded by purportedly private internet intermediaries. *Id.* at pp. 85-86. And, with the recent curtailment of net neutrality by the FCC the unprecedented concentration of power over speech by private intermediaries will necessarily be "followed by an effort to crush . . . political opponents and favor . . . political supporters." *Id.*; *see also generally* ACLU Amicus Briefs and NPR *NewsHour* excerpts (Obstler Dec. Exs. P, R, respectively); *Packingham* 137 S. Ct. at 1737; *Reno*, 521 U.S. at 868.

Fourth, the relationship between the ideas sought to be presented and the function or

[26] Obstler Dec. ¶2, Ex. A. These statements were quoted from YouTube's video (rather than the printed words) located on the their *About YouTube* page found at: https://www.youtube.com/yt/about/.

purpose of the property are those of a "public forum," the cyber equivalent of a town square where citizens exchange ideas on matters of public interest or concern. *Packingham* 137 S. Ct. at 1737; *Reno*, 521 U.S. at 868. That is precisely how Defendants characterize YouTube: a web-based community forum where any member of the public is free to express their own ideas and exchange and listen to the ideas of others in their "purest, rawest and most unfiltered" form. (Obstler Dec. ¶¶2-6, Exs. A-E). In such a case, "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship" by the Defendants. *Reno*, 521 U.S. at 885.

2. YouTube's Access Restrictions Are Unlawful Content-Based Restrictions on Speech, On Their Face And As Applied To PragerU

Google YouTube's restriction of viewer access is an unconstitutional content-based restriction that impermissibly burdens speech under the pretext of vague, overbroad, and purely subjective criteria. Defendants' viewer access restrictions, therefore, are unconstitutional, both on their face and as applied, under the First Amendment and California law. *See, e.g.*, *Rosenberger*, 515 U.S. at 828–29; *Sorrell v. IMS Health*, Inc., 564 U.S. 552, 563-67 (2011); *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 96 (1972); *Fashion Valley Mall*, 42 Cal.4th at 869; *Dillon*, 4 Cal.3d at 869-870; *Snatchko v. Westfield LLC*, 187 Cal.App.4th 469, 487 (2010), as modified on denial of reh'g (Sept. 3, 2010); *Long Beach Lesbian & Gay Pride*, 14 Cal.App.4th 312, 325-27.

The meaning of the phrase "content-based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Sorrell, supra*, 564 U.S. at 563-67. And even facially content-neutral laws can be content-based regulations of speech when they cannot be "'justified without reference to the content of the regulated speech,'" or that were adopted "because of disagreement with the message [the speech] conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Any restriction that is justified by reference to the content of the speech is subject to strict scrutiny. *Reed*, 135 S.Ct. at 2226–27.

"It is axiomatic that the government may not regulate speech based on its substantive

content or the message it conveys." *Rosenberger*, 515 U.S. at 828–29; *Mosley*, 408 U.S. at 96. Content-based restrictions are presumptively unconstitutional and may be justified only if the defendant proves that they are narrowly tailored to serve compelling state interests. *Reed*, 135 S.Ct. at 2226; *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991). And the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 537 (1980).

"In the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger*, 515 U.S. at 828–29 (*citing Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). Consequently, when speech is burdened because of the content of the message it "is presumed to be unconstitutional." *Id*. (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641–643 (1994)). And when the state-sponsored censor "targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant" and constitutes an "egregious form of content" and content-based speech restriction. *Id.* (citing *R.A.V.* 505 U.S. at 391). A state actor, therefore, must always "abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. at 46).

Finally, while California's Liberty of Speech clause is broader and more "definitive and inclusive" in scope than its federal counterpart, both provisions subject content-based restrictions to strict scrutiny. *See, e.g., Fashion Valley*, 42 Cal.4th at 869 ("right to free speech in shopping centers that constitute public fora under the California Constitution deserves no less protection") (citing *Turner Broadcasting System*, 512 U.S. at 642). On this unique record, therefore, Defendants' viewer access restrictions cannot pass muster under either the First Amendment or Liberty of Speech Clause. *Id.*; *see also International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 48 Cal.4th 446 (2010); *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 952 (2002); *Robins*, 23 Cal.3d at 907-909; *Snatchko*, 187 Cal.App.4th at 469, 487.

First, Defendants' use of viewer access restrictions to censor PragerU's videos is not only a pure content-based restraint on speech, but Defendants failure to apply them neutrally places the conduct in the "egregious" and "blatant" category that is per se unconstitutional. *Rosenberger*, 515 U.S. at 828–29; *see also* Obstler Dec. Ex. 17. As the record shows, Defendants capriciously use these restrictions to limit viewer access to PragerU videos, while allowing other speakers to post similar or identical content without any restrictions, as well as content that contains profanity and graphic violence. *See* Strazzeri Dec. ¶6-9, Ex. C; Obstler Dec, ¶18, Ex. Q.

Second, in restricting PragerU videos, Defendants rely on broad, subjective, and vague restriction criteria that contain no objective measures and allow Defendants to exercise unfettered discretion to decide what is and is not appropriate for Restricted Mode. The U.S. and California Supreme Courts have consistently struck down permitting schemes that fail to contain objective and definite standards that "provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151–55 (1969), (striking parade ordinance allowing officials to deny access to public forum based officials subjective assessment of the event's potential impact on "public welfare, peace, safety, health decency, good order, morals, or convenience"); *see also Forsyth County v. Nationalist Movement,* 505 U.S. 123, 133 (1992) (finding parade permit statute facially unconstitutional because it lacked both objective standards for setting processing fees and a requirement that the official explain the reasons for a permit denial); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 769-770 (1988) (striking permitting ordinance based on use of a catch-all provision allowing the Mayor to condition permits on "such other terms and conditions deemed necessary and reasonable"); *Dillon,* 4 Cal.3d at 869-870 (striking down parade permitting ordinance that was a "barefaced example of uncontrolled discretion that" conferred virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's street or public ways") (citations omitted); *Long Beach Lesbian & Gay Pride,* 14 Cal.App.4th at 325-27. Consequently,

Third, Defendants' use of such broad and vague criteria violates the First Amendment and Liberty of Speech Clause on its face, as well as applied to PragerU. *Shuttlesworth,* 394 U.S. at

150; *accord Long Beach Lesbian & Gay Pride*, 14 Cal.App.4th at 325-327. Specifically, Defendants may restrict video content that: (i) "cover [] events related to terrorism, war, crime, and political conflicts that resulted in death or serious injury, even if no graphic imagery is shown," (ii) "talk[] about drug use or abuse, or drinking alcohol in videos; or (iii) are "gratuitously incendiary, inflammatory, or demeaning towards an individual or group." (Obstler Dec. ¶10, Ex. I). This permits Defendants to use these meaningless terms as a pretext to censor speech at their whim when they dislike the viewpoint or identity, as they have done to PragerU. And, as the record shows, it makes it impossible for speakers like PragerU to get a meaningful explanation for the non-compliance. *See, e.g., Transp. Alternatives Inc. v. City of New York*, 340 F.3d 72, 78 (2d Cir. 2003). That is the type of "illusory" constraint that renders the free-speech rights of YouTube users "little more than a high-sounding ideal." *City of Lakewood*, 486 U.S. at 769-70. Consequently, Defendants' viewer access restrictions fall "squarely within the ambit of the many decisions of . . . over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Dillon*, 3 Cal.3d at 867 ; *see also Forsyth County*, 505 U.S. at 133; *City of Lakewood*, 486 U.S. at 769-70; *Shuttlesworth*, 394 U.S. 147, 151–55; *Snatchko*, 187 Cal.App.4th at 488; *Long Beach Lesbian & Gay Pride*, 14 Cal.App.4th at 325-27.

Fourth, Defendants' viewer access restrictions are not narrowly tailored to further a compelling state interest. While a state actor unquestionably has a legitimate interest in protecting children from exposure to obscene, sexually explicit, graphically violent material, the restriction must be narrowly drawn to achieve any such purpose. *See Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 119 (1989). Consequently, "it is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.*

With respect to Defendants' purported interest in protecting the safety of younger viewers, Defendants' Restricted Mode criteria does nothing to protect minors other than to deprive viewers of all ages from seeing content from speakers who do not meet Defendants' subjective, vague and overbroad litmus test of what is and is not politically correct speech. Indeed, Defendants utilize

separate "Age Restriction" criteria to restrict video content to protect minors, while Restricted Mode blocks access to content for viewers of all ages. (Obstler Dec. ¶¶10e, 21 Ex. I, T). In addition, Defendants do not bother to restrict viewer access to videos that violate both Restricted Mode and Age Restriction criteria, including objectively dangerous content that contains obscene or profane content. (Compl., ¶¶70-72). Finally, Defendants use of Restricted Mode harms younger audiences by depriving them and their guardians of the opportunity to engage in critical thinking and decide for themselves what video content they agree with and that which they do not, including what is and is not appropriate for their younger children. *See, e.g.*, Compl. ¶¶49-51.

Nor can Defendants justify the use of Restricted Mode's broad, vague, and discriminatory viewer access restrictions based on their private commercial business interests. While a private property owner may "prohibit conduct 'calculated to disrupt normal business operations' or that would result in 'obstruction of or undue interference with normal business operations'" a public forum business interest in ensuring customer convenience and undisturbed comfort in order to prevent loss of customers and maximize profit is not a compelling interest justifying a content-based restriction of speech. *Fashion Valley*, 42 Cal.4th at 864, n.7 ("purpose to maximize the profits of its merchants is not compelling compared to the [speaker's] right to free expression"). If a business owner "cannot prohibit speech advocating a boycott, which by its nature directly seeks to reduce patronage" of the business, Defendants cannot "justify the prohibition or restriction of peaceful, noncommercial speech (here religious expression) because it might result in lost profits if [customers] become annoyed or offended and leave." *Id.*

Finally, Defendants restriction of noncommercial speech between strangers on public matters is not the least restrictive, let alone the best, means of ensuring that content is appropriate for viewers in Restricted Mode. That is particularly true in this case where the content involves educational videos that contain no obscene, graphically violent, profane, or hate speech-based content. *See* Strazzeri Dec. ¶¶2, 3, 6-9, Exs. A, C. To the extent that Google or YouTube disagree with the opinions or views of PragerU, or the reasoning supporting such opinions on issues, they can (and already do) disassociate themselves from the content by simply posting their disagreement and the reasons for it without having to restrict viewer access to the video content

and stigmatize the speaker. *See* Obstler Dec. ¶16, Ex. O at ¶6.F.; *Snatchko*, 187 Cal.App.4th at 491–92.

C. Defendants' Access Restrictions Discriminate Against PragerU in Violation of The Unruh Act

California's Unruh Act, Civil Code Section 51(b), *et seq.*, states that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." The Unruh act also applies to discrimination based on political affiliation as well racial, ethnic, or religious identity. *See, e.g.*, *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721, 726 (1982); *Koebke v. Bernardo Heights Country Club*, 36 Cal.4th 824, 841-43 (2005) (prohibiting discrimination on the basis of "personal beliefs," "self-definition," and "personal values"). And the Unruh Act has been held to apply to a website even without nexus to a physical location. *Nat'l Federation of the Blind v. Target Corp.*, 582 F.Supp.2d 1185, 1197 (N.D. Cal. 2007) (Patel, J.).

Because PragerU has suffered injury caused by Defendants' intentional discrimination, it has standing to bring a claim under the Unruh Act. *Osborne v. Yasmeh*, 1 Cal.App.5th 1118, 1135 (Cal. Ct. App. 2016) ("Standing under the Unruh Act is broad" and "any person aggrieved by the conduct may bring a civil action"). Consequently, "an individual plaintiff has standing under the [Unruh] Act if he or she has been the victim of the defendant's discriminatory act." *Id.* (quoting *Angelucci v. Century Supper Club*, 41 Cal.4th 160, 175 (2007)). Defendants arbitrary and capricious use of Restricted Mode to silence PragerU is precisely the type of conduct that the Unruh act prevents. *See, e.g.*, *Nkwuo v. MetroPCS, Inc.*, 2015 WL 4999978, n.11 (N.D. Cal. Aug. 21, 2015).

D. Defendants Violate The Implied Covenant of Good Faith And Fair Dealing

"The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another" and that "power must be exercised in good faith." *Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal.

4th 342, 372 (1992); *Cal. Lettuce Growers v. Union Sugar Co.*, 161 Cal.App.4th 1240, 1253 (Cal. Ct. App. 2008) ; *McCaffrey Group, Inc. v. Superior Court*, 224 Cal.App.4th 1330, 1352 (Cal. Ct. App. 2014). The implied covenant, therefore, serves as a supplement to the express contractual covenants to prevent a party from engaging in conduct which frustrates another party's rights, even if not technically transgressing or breaching a contract's express covenants. *Thrifty Payless, Inc. v. Americana at Brand, LLC*, 218 Cal.App.4th 1230, 1244 (Cal. Ct. App. 2013).

What is encompassed by the covenant is "not susceptible to firm definition but must be examined on a case-by-case basis," *Carma Developers*, 2 Cal. 4th at 372. The precise nature and extent of the duty imposed will depend on the purposes of the contract. *McCaffrey Group*, 224 Cal.App.4th at 1352. Obviously subterfuges and evasions, like the pretexts here, violate the obligation of good faith, even if the actions are believed to be justified. *R.J. Kuhl Corp. v. Sullivan*, 13 Cal.App.4th 1589, 1602 (Cal. Ct. App. 1993); (Compl., ¶¶ 6, 12, 57, 68, 79). And, evading the spirit of the bargain or abusing a contractual power to specify terms will also violate the implied covenant. *Id.*

Defendants' contractual obligations to its users are no exception. When Defendants promise to provide an open forum of free expression for content creators in order to induce members of the public to use the platform they violate the implied covenant by arbitrarily and capriciously discriminating and restricting speech based on vague, broad, and subjective rules, or because of political or religious animus towards the identify or point of view of the speaker or its audience. And the fact that Defendants have set forth particular criteria (albeit vague and subjective ones) for the restriction of videos negates any claim by Defendants that they intended to eliminate the implied covenant from their contract with Plaintiff. *See, e.g., Darnaa, LLC v. Google, Inc.*, 2015 WL 7753406 at * 6 (N.D. Cal. Dec. 2, 2015) (rejecting Defendants' argument that Terms of Service terms authorized YouTube to relocate or remove videos in its sole unfettered discretion). Even in the case of outright removal of content, YouTube reserves the right to remove content on grounds "such as, but not limited to, pornography, obscenity, or excessive length." *See* YouTube's Terms of Service, Obstler Dec. ¶16, Ex. O, ¶7.B. And to the extent that Defendants have discretion in application of its guidelines, that discretion is still "bounded by

Google's obligation to carry out its responsibilities in good faith." *Woods v. Google, Inc.*, 2011 WL 3501403, *7 (N.D. Cal. Aug. 10, 2011).

E. Defendants' Conduct Is An Unfair Business Practice

The Unfair Business Practices Act defines "unfair competition" as any "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising ...." (Cal. Bus. & Prof. Code § 17200). The Legislature intended this "sweeping language" to include "'anything that can properly be called a business practice and that at the same time is forbidden by law.'" *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266 (1992). Defendants have violated that law in at least two different ways.

First, Defendants' conduct violates the statute's protections for "unlawful" practices. Defendants' use access restrictions to limit viewer access to PragerU videos because of its political viewpoint and conservative and religious identity is overt discrimination that violates the First Amendment and Liberty of Speech provisions of the United States and California constitutions, the Unruh Act, and the implied covenant of good faith and fair dealing. A violation of any of those laws constitutes an "unlawful" business practice under the UCL. *Kasky*, 27 Cal.4th at 949.

Second, Defendants' conduct is "unfair" because it "violates established public policy or if it is immoral, unethical, oppressive, or unscrupulous and causes injury to consumers which outweighs the benefits." *McKell v. Wash. Mut., Inc.*, 142 Cal.App.4th 1457, 1473 (Cal. Ct. App. 2006). A practice that violates a state statute also violates established public policy within the meaning of the UCL. *Fraley v. Facebook*, 830 F.Supp.2d at 813. Here, Defendants induce PragerU and the public at large to use its video platform based on YouTube's commitment to freedom of expression and open access to all, but are in fact engaging in "blatant" and "egregious" censorship as well as viewpoint discrimination against users, like Plaintiff, and then using vague restriction criteria as a pretext to censor whoever they please, when they please, for any reason, including political and religious animus. (Compl., ¶¶49-51, 53-54, 69). Furthermore, Defendants access restrictions stigmatize users like PragerU by indicating to viewers that its videos, and/or its political and religious viewpoint or identity are inappropriate. (Compl., ¶¶28, 104-105, Strazzeri Dec. ¶3; Obstler Dec. ¶20, Ex. S). That is a "fraudulent business practice." *See, e.g., e-ventures*

Worldwide, LLC v. Google, Inc., 188 F.Supp.3d 1265, 1277 (M.D. Fla. May 12, 2016) (allegations that Google removed plaintiff's website for punitive and unfair reasons stated a claim for deceptive or unfair practices under Florida's UCL counterpart and allegations of removal of search engine results were and false or misleading to consumers, and likely to deceive them into believing that plaintiff's websites were removed for violating objective criteria); *see also Fraley v. Facebook*, 830 F.Supp.2d at 813-14 (allegations that misleading or hard-to-find privacy policy statements which led members of the public to join and engage with the platform stated a claim under the "fraudulent" prong of the UCL).

IV. A PRELIMINARY INJUNCTION IS NECESSARY AND APPROPRIATE TO REDRESS DEFENDANTS UNLAWFUL SUPPRESSION OF SPEECH

A preliminary injunction is justified and necessary to protect the rights of PragerU and the public. The harm to both is immediate and irreparable. The balance of the equities tip sharply in favor of PragerU and will advance the public's interest in free speech.

A. Defendants' Suppression Of Speech Works Immediate And Irreparable Harms On PragerU and The Public

In the context of a preliminary injunction, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009); *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) ("Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction").

The harm is particularly irreparable in this case because PragerU seeks, among other things, to engage in political speech about current and historical events, where "'timing is of the essence' in politics' and '[a] delay of even a day or two may be intolerable....'" *Klein* , 584 F.3d at 1207–08 (quoting *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1020 (9th Cir. 2008) and *NAACP v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984)). Consequently, Defendants continuing obstruction of PragerU's right to speak (and the public's corresponding right to listen and speak back) demonstrates a likelihood of irreparable injury in the absence of an injunction. *See Klein*, 584 F.3d at 1208.

B. The Equities and Paramount Public Interest In Free Speech Warrant Preliminary Relief

"A plaintiff seeking injunctive relief must also demonstrate that the injunction is in the public interest." *Harman v. City of Santa Cruz, California*, --- F. Supp. 3d ---, 2017 WL 2864959, *4 (N.D. Cal. 2017) (citing *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008)). To that end, the court weighs the harm likely to be suffered by a defendant if the injunction is granted against the injury that will likely befall the plaintiff if it is not. *Id.* at *13. Determining whether an injunction is in the public interest "addresses impact on nonparties rather than parties." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). In so doing, the Ninth Circuit has consistently "recognized the significant public interest in upholding free speech principles, as the ongoing enforcement of the potentially unconstitutional regulations . . . would infringe not only the free expression interests of [a plaintiff], but also the interests of other people subjected to the same restrictions." *Klein*, 584 F.3d at 1208. And while the public's strong interest in free speech and expression is not absolute, and may give way to a strong showing of other competing public interests, Defendants use of viewer access restrictions to censor speech because of the political viewpoint and identity is an "egregious" and "blatant" violation of speech that tilts the balance strongly in favor of its victims. *United Food & Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118, 1127–28 (D. Ariz. 2011). Thus, courts have "consistently recognized the significant public interest in upholding First Amendment principles," even when the rights at stake are those of the parties and not the general public. *Id.* (quoting *Sammartano,* 303 F.3d at 974). Indeed many members of the public who are not formal parties to this lawsuit "would see their political speech burdened" should Defendants continue their current restriction and filtering practices. *Id*. Consequently, Defendants' interest in protecting the interests of its restricted mode viewers cannot outweigh the public's interests in freedom of speech, ante-discrimination, and adherence to the rule of law. *See, e.g.*, *Harman*, 2017 WL 2864959 *13.

The balancing of equities is even stronger in this case because PragerU is requesting extremely modest and narrow relief that will not interfere with Defendants' ability to restrict truly obscene or offensive speech. *See, e.g., Bristol Univ. v. Accrediting Council for Indep. Colleges &*

Sch., 2016 WL 9223924, at *1 (E.D. Va. Mar. 22, 2016) (finding that plaintiff has made a sufficient showing for the purposes of maintaining the status quo and the narrow relief afforded herein); *Raab Family P'ship v. Borough of Magnolia*, 2009 WL 361135, at *10 (D. N.J. Feb. 13, 2009) (while considerations weigh in favor of granting injunction, relief must be narrower than the broad relief sought). Here, under the narrow relief sought, Defendants may continue to restrict viewer access of video content; they must merely refrain from doing so under the vague criteria and overbroad restrictions currently embedded in Restricted Mode filtering, and instead restrict based on clear and objective evidence that the content contains obscenity, graphic nudity or violence, hate speech, or is objectively offensive regardless of the political view point or identity of the speaker. Because PragerU demonstrates that it is likely to succeed in showing that Defendants' restriction and filtering practices fail to comply with federal and/or California law, the public interest tilts strongly in favor of such a narrowly tailored injunction. *See United Food & Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d at 1128.

V. CONCLUSION

For the reasons set forth, Plaintiff PragerU respectfully requests that the Court enjoin Google/YouTube from continuing to restrict the PragerU videos absent clear objective evidence that the content contains obscenity, graphic nudity or violence, hate speech, or is objectively offensive regardless of the political view point or identity of the speaker.

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