CASE NO. 18-15712

In the United States Court of Appeals
For the Ninth Circuit

PRAGER UNIVERSITY,
Plaintiff - Appellant,

v.

GOOGLE LLC, FKA GOOGLE, INC.; YOUTUBE, LLC,
Defendants - Appellees.

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

THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION'S MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS - APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae*, The Computer & Communications Industry Association states the following:

The Computer & Communications Industry Association has no parent corporation and there is no publicly held corporation owning 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 29, the Computer & Comunications Industry Association (CCIA) respectfully requests leave from this Court to file a Brief of *Amicus Curiae* in support of Defendants – Appellees. A copy of the proposed Brief of *Amicus Curiae* is submitted as an attachment to this motion. Defendants – Appellees have consented to the filing of this brief; *Plaintiff – Appellant* has not.

The CCIA is an international nonprofit association representing a broad cross-section of computer, communications, and Internet industry firms. Created over four decades ago, the CCIA promotes open markets, open systems, open networks and full, fair and open competition in the computer, telecommunications and Internet industries. When CCIA started in 1972, it believed supporting a climate for innovation was central to economic success as a nation and that our industry was unique and of special importance to society. These beliefs continue to influence and shape CCIA's choices in a global political environment that is increasingly focused on our industry. The CCIA's commitment to vigorous competition, freedom of expression, and openness is a natural product of the understanding of what has helped our industry thrive, and what it needs to continue to do so.

The CCIA's members have an obvious and undeniable interest in whether they are considered state actors for First Amendment purposes. That outcome

would lead to revolutionary change for CCIA members—and the Internet as a whole. Accordingly, the CCIA respectfully submits this Brief of *Amicus Curiae* to encourage this Court to reject Prager University's attempt to impose First Amendment restrictions on Google and YouTube—particularly when they and other Internet platforms have the First Amendment *right* to exercise editorial control over their services.

CONCLUSION

For the reasons set forth above, the Computer & Comunications Industry Association respectfully requests that the Court grant this Motion and grant leave to file the attached Brief of *Amicus Curiae* in support of Defendants - Appellees.

DATED: November 7, 2018 MUNGER, TOLLES & OLSON LLP

By: */s/ Chad Golder*

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CERTIFICATE OF SERVICE

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

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

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BRIEF OF AMICUS CURIAE THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

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INTEREST OF *AMICUS CURIAE*[1]

The Computer & Communications Industry Association (CCIA) is an international nonprofit association representing a broad cross-section of computer, communications, and Internet industry firms. It respectfully submits this Brief of *Amicus Curiae* to encourage this Court to reject Prager University's attempt to impose First Amendment restrictions on Google and YouTube—particularly when they and other Internet platforms have the First Amendment *right* to exercise editorial control over their services.

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), amicus certifies that (1) this brief was authored entirely by counsel for amicus curiae and not by counsel for any party, in whole or part; (2) no party or counsel for any party contributed money to fund preparing or submitting this brief; and (3) apart from amicus curiae and its counsel, no other person contributed money to fund preparing or submitting this brief.

INTRODUCTION

Prager University's ("Prager") argument suffers from a core legal and logical flaw. This error appears in bold text in the title to its brief's argument section: "**Defendants Cannot Have It Both Ways: Hold YouTube Out As [a] Public Forum And Then Restrict Speech In Violation Of The Federal Law Governing Freedom Of Expression**." Appellant's Opening Brief 33 (Aug. 23, 2018), ECF No. 7 ("AOB"). Prager fails to grasp that Internet platforms like YouTube can, indeed, remain fully committed to promoting free expression on their websites *while also* remaining non-state actors for purposes of the First Amendment.

The district court correctly rejected this false choice, which undergirds Prager's radical attempt to transform private services like Google and YouTube into state actors. To begin, contrary to Prager's contention, YouTube is not a "public forum" simply because it touts the value of free expression. Put simply, YouTube is not owned, leased, or otherwise controlled by the government. That fact alone means that it is not a public forum. But if that were not enough, YouTube's Terms of Service and Community Guidelines make pellucidly clear that the free expression YouTube seeks to promote is not unbounded. YouTube retains the right to remove or classify speech on its private platform.

YouTube also does not satisfy the "public function" test for whether a private entity is a state actor. The Supreme Court has been clear that to be considered a state actor, a private actor must "perform[] the full spectrum of municipal powers," *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972), or "take[] on all the attributes" of a government," *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 (1978). Neither of those descriptions fits the facts here. To be sure, services like YouTube play an important role in modern society. But they certainly do not function like "company towns," as in *Marsh v. Alabama*, 326 U.S. 501 (1946), or otherwise have the complete range of municipal responsibilities or authorities of a government. The district court therefore correctly held that *Marsh* does not support Prager's contention that Google and YouTube "should be treated as state actors subject to First Amendment scrutiny merely because they hold out and operate their private property as a forum for expression of diverse points of view." Order Granting Motion to Dismiss, *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018).

Finally, Prager's attempt to subject YouTube to First Amendment limitations would have two serious adverse consequences for platform owners and the Internet as a whole. *First*, rather than being constrained by the First Amendment, YouTube and other Internet platforms enjoy a First Amendment right to make editorial choices on their websites. The Supreme Court has clearly held,

for example, that cable operators and newspapers engage in protected speech when they select materials "originally produced by others." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995). And the Court has been equally explicit that this First Amendment right to edit or limit third-party speech on one's property is not "restricted to the press." *Id*. at 574. Quite the contrary, this right is "enjoyed by business corporations generally." *Id*. at 574. Thus, Prager's attempt to impose supposed First Amendment restrictions on YouTube would itself do great violence to YouTube's legitimate and protected First Amendment rights.

Second, Prager does not appreciate how profoundly its asserted state-action rule would change the Internet. Google, YouTube, and other Internet platforms have designed their platforms—and built successful businesses—secure in their First Amendment right to choose what may *not* appear on their websites. *See Hurley*, 515 U.S. at 573. Yet if subjected to First Amendment limitations, YouTube would not be able to remove a wide range of content that its Community Standards currently prohibit, but which falls outside the limited categories of speech that are not protected by the First Amendment. As a result, YouTube (and other services) would become chock-full of sexually explicit content, violent imagery, hate speech, and expression aimed at demeaning, disturbing, and distressing others. This would be utterly unrecognizable to YouTube's users. This

Court should not impose such transformative change based on such a flimsy state action argument.

ARGUMENT

I. GOOGLE AND YOUTUBE ARE NOT STATE ACTORS.

The First Amendment's "guarantee of free speech is a guarantee only against abridgment by government." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). To state the obvious, Google and YouTube are private entities—not the government. Normally, that would be the end of the matter. As courts have consistently concluded, private companies like Google and YouTube do not qualify as state actors for First Amendment purposes.[2]

[2] *E.g.*, *Nyabwa v. FaceBook*, No. 2:17-CV-24, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018) ("Because the First Amendment governs only governmental restrictions on speech, Nyabwa has not stated a cause of action against FaceBook."); *Shulman v. Facebook.com*, No. CV 17-764 (JMV), 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) ("The Court also notes that efforts to apply the First Amendment to Facebook . . . have consistently failed."); *Forbes v. Facebook, Inc.*, No. 16 CV 404 (AMD), 2016 WL 676396, at *2 (E.D.N.Y. Feb. 18, 2016) ("Facebook is a private corporation, and Mr. Forbes does not allege any facts that could support a claim of a 'close nexus' between Facebook and the state, such that Facebook's actions (or inaction) may be fairly attributable to the state."); *Doe v. Cuomo*, No. 10-CV-1534 (TJM/CFH), 2013 WL 1213174, at *9 (N.D.N.Y. Feb. 25, 2013) (finding that Facebook was not a state actor under joint action test); *Kinderstart.com LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at *14 (N.D. Cal. Mar. 16, 2007) (concluding Google was not state actor); *see also, e.g.*, *Green v. America Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003) ("AOL is a private, for profit company and is not subject to constitutional free speech guarantees. . . . We are unpersuaded by Green's contentions that AOL is transformed into a state actor because AOL provides a connection to the Internet

- In extremely limited circumstances, however, the Supreme Court "has articulated four tests for determining whether a private [party's] actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." *Franklin v. Fox*, 312 F.3d 423, 444-45 (9th Cir. 2002). Prager argues that Google and YouTube satisfy only one of these tests: the "public function" test. AOB 35. Under that test, "the relevant question is not simply whether a private party is serving a 'public function.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). "[T]he question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Id*. (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)). And "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (quoting

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on which government and taxpayer-funded websites are found, and because AOL opens its network to the public whenever an AOL member accesses the Internet and receives email or other messages from non-members of AOL."); *Howard v. America Online Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) (concluding that AOL was not a state actor where plaintiffs had argued that "AOL is a 'quasi-public utility' that 'involv[es] a public trust'").

Jackson, 419 U.S. at 352). The district court rightly concluded that Google and YouTube do not satisfy this strict state action standard.

A. YouTube Is Not A Public Forum.

Prager first contends that Google and YouTube are state actors under the "public function" test because "when a private party regulates speech in a public forum, the party becomes a State actor for purposes of the First Amendment." AOB 36-39. Relying exclusively on this Court's decision in *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002), Prager insists that the "regulation of speech by a private party on property designated as a public forum" is "quintessentially an exclusive and traditional public function." AOB 37 (emphasis omitted). But Prager's argument proceeds from a faulty premise. YouTube is not a public forum. As such, any regulation of speech that occurs on YouTube's *private* platform cannot be a *public* function.[3]

[3] Public forum analysis typically applies only to spaces that are owned and controlled by the government. *E.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010) ("[I]n a progression of cases, this Court has employed forum analysis to determine when a governmental entity, *in regulating property in its charge*, may place limitations on speech." (emphasis added)); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 956 (9th Cir. 2011) ("The Supreme Court has never allowed privately owned venues to substitute for public fora."). In rare circumstances, courts have applied the public forum doctrine to private property that is leased to or from the government. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). But Prager does not (and cannot) argue that Google and YouTube have leased the YouTube platform from the government.

Prager's lone supporting case, *Lee v. Katz*, does not alter this commonsense conclusion. The parties in *Lee* agreed that the property at issue was a "traditional public forum." *Lee*, 276 F.3d at 552; *see id*. at 556 (noting the "reality that the Commons is a public forum"); *id*. at 555 ("The particular public function that the plaintiffs allege the OAC performed was the regulation of free speech within the Commons, *a public forum*." (emphasis added)). Thus, in *Lee*, this Court was able to take as given that the property was a public forum, and the only question was whether the defendant exercised a public function on that *preexisting* public forum. *See id*. at 556.

Here, by contrast, Google and YouTube have not conceded that YouTube is a public forum. And Prager does nothing to demonstrate that You Tube is a public forum. Prager's *only* argument for why YouTube qualifies as a public forum is that YouTube *itself* somehow transformed the platform into a public forum when it declared its desire to make YouTube a site that is open to free expression. AOB 40. As explained below, that argument is foreclosed by Supreme Court precedent (*see infra* at 12-13), overlooks critical factual nuances about YouTube's Terms of Service and Community Guidelines (*see infra* at 13-15), and carries dangerous consequences for the modern Internet (*see infra* at 23-27). Strikingly, Prager cites no case holding that a private entity, like YouTube, can convert its property into public forum. *Lee* certainly does not stand for that proposition.

Instead, having assumed the existence of a public forum, *Lee* was completely "function" focused. *Lee*, 276 F.3d at 556 ("It is the function of the OAC's administration of the Commons that guides and informs our inquiry…. That 'function' is the administration of free speech rules within a public forum."). It stands for the unobjectionable principle that a private actor can become a state actor for First Amendment purposes when the private actor exercises certain functions *in a public forum*. *Lee* in no way holds that a private entity can become a state actor when it exercises certain those same functions on private property, *i.e.*, what the Supreme Court has describe as "not [a] for[um] at all." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678-79 (1998).

In the end, because YouTube is private property that is entirely disconnected from the government, it cannot be considered a public forum. And because it is not a public forum, Google and YouTube do not engage in a "public function" when they moderate speech on their wholly private platform.

B. Google and YouTube Are Not State Actors Under *Marsh v. Alabama*.

Prager next argues that Google and YouTube qualify as state actors under the reasoning of *Marsh v. Alabama*, 326 U.S. 501 (1946). In that case, the Supreme Court held that the First Amendment prohibited a private "company town" from imposing criminal punishment on persons distributing religious literature. The Court explained that the "company town" shared "all the

characteristics of any other American town" and there was "nothing to distinguish [it] from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id*. at 502. Accordingly, even though the town in *Marsh* was privately-owned, the First Amendment applied just as it would to a publicly-owned town or city. *Id*. at 505.

The district court correctly observed that subsequent Supreme Court decisions severely narrowed *Marsh*'s reach. Order Granting Motion to Dismiss, *Prager Univ.*, 2018 WL 1471939, at *8 (explaining that the Supreme Court's post-*Marsh* decisions clarified that *Marsh* "'was never intended to apply' outside 'the very special situation of a company-owned town'" (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 562-63 (1972)). These post-*Marsh* decisions held that private property can "be treated as though it were public" *only where* "that property has taken on *all* the attributes of a town, *i.e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated.'" *Flagg Bros.*, 436 U.S. at 159 (quoting *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting)). In other words, if a private entity does not "perform[] the full spectrum of municipal powers," it is not governed by the First Amendment like the company town in *Marsh*. *Lloyd Corp*., 407 U.S. at 569; *see Fred Meyer, Inc. v.*

Casey, 67 F.3d 1412, 1418 (9th Cir. 1995) (describing *Marsh* as "'company town' case").

Google and YouTube do not share any of the characteristics that could qualify them as state actors under this post-*Marsh* precedent. Platforms like YouTube offer their users a wide array of functions, but they do not "hold elections, govern a town, or serve as an international peacekeeping force." *Brunette v. Humane Soc'y of Ventura Cty.*, 294 F.3d 1205, 1214 (9th Cir. 2002) (internal citations omitted). Put simply, Google and YouTube have not "take[n] on *all* the attributes" of a municipality. *Flagg Bros.*, 436 U.S. at 159 (emphasis added). As such, Prager's reliance on *Marsh* widely misses the mark. *See Snowdon v. Preferred RV Resort Owners Ass'n*, 379 F. App'x 636, 637 (9th Cir. 2010) ("Preferred RV Resort provided an assortment of basic amenities and simple services to its paying members, all within the fenced-in confines of its private property. Plaintiffs failed to show that Preferred RV Resort had 'assum[ed] … all of the attributes of a state-created municipality' and 'exercise[d] … semi-official municipal functions as a delegate of the State.'" (quoting *Hudgens*, 424 U.S. at 519)).

Prager tries to evade this straightforward conclusion mandated by the case law with two novel but fruitless arguments. *First*, Prager contends that the relevant question under the post-*Marsh* "public function" test is not what services the

private property owner performs or whether a private entity effectively takes on the role of a state government. Instead, Prager insists that the relevant factor is how a private entity holds itself out to the public. AOB 44-45. In its view, YouTube can transform itself into a state actor by inviting members of the public onto its service to engage in free speech. *Id*. at 47-48.

But this argument, like Prager's other arguments, is foreclosed by clear post-*Marsh* precedent. The Supreme Court's decision in *Lloyd Corp. v. Tanner* unambiguously held that property does *not* "lose its private character merely because the public is generally invited to use it for designated purposes." 407 U.S. at 569. And the same day that the Court issued *Lloyd Corp.*, it further explained in a separate case:

> Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes. The only fact relied upon for the argument that [the private] parking lots have acquired the characteristics of a public municipal facility is that they are 'open to the public.' Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments.

Central Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972).

In some ways, moreover, Prager's argument that YouTube is a state actor under the "public function" test confuses the analysis with that applicable to whether a forum is a "designated public forum." The former considers what functions a particular actor performs and whether those functions are exclusively reserved to the State. *E.g.*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). The public forum doctrine, by contrast, considers the nature of the space, including whether that space is government property and whether '*the government intentionally* opens [that space] for public discourse.'" *Reza v. Pearce*, 806 F.3d 497, 502-503 (9th Cir. 2015) (quoting *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999) (emphasis added)). Prager appears to mistakenly believe that a platform's self-designation as a place for open expression is sufficient to transform it into a state actor under the *Marsh* line of cases. But this argument fails under both First Amendment doctrines. As noted above, *Lloyd Corp*. rejected Prager's "public-function"-by-self-designation theory in the *Marsh* context. And as noted in Section I.A, whether or not Prager invites users to engage in free expression on its website, "forum doctrine" does not apply to YouTube because YouTube is not a government actor and its platform is not government property.

Just as bad, Prager's argument has no basis in fact. Prager repeatedly emphasizes that YouTube's mission is to promote "four essential freedoms"—

including the "freedom of expression." *E.g.*, AOB 9. But YouTube's Terms of Service make clear that these freedoms are not unbounded. YouTube's policies contain a series of rules explaining what content may not be posted on its platform and what content may be viewable in what it calls "Restricted Mode," *i.e.*, a service that allows users to screen videos that YouTube has decided contain mature content but may not be removable under its policies. *See, e.g.*, YouTube Terms of Service, *at* https://www.youtube.com/t/terms; YouTube Community Guidelines, *at* https://www.youtube.com/yt/about/policies/#community-guidelines. In particular, these rules provide:

- "YouTube may at any time, without prior notice and in its sole discretion, remove such Content and/or terminate a user's account for submitting such material in violation of these Terms of Service." YouTube Terms of Service 7(B), *at* https://www.youtube.com/t/terms;
- "If a YouTube creator's on- and/or off-platform behavior harms our users, community or ecosystem, we may respond based on a number of factors including, but not limited to, the egregiousness of their actions and whether a pattern of harmful behavior exists. Our response will range from suspending a creator's privileges to account termination." YouTube Community Guidelines, *at* https://www.youtube.com/yt/about/policies/#community-guidelines;
- "Restricted Mode is an optional setting that you can use to help screen out potentially mature content that you may prefer not to see or don't want others in your family to see. We use many signals—such as video title, description, metadata, Community Guidelines reviews, and age-restrictions—to identify and filter out potentially mature content." YouTube Help, Disable or enable Restricted Mode, *at* https://support.google.com/youtube/answer/174084?co=GENIE.Platform%3DDesktop&hl=en.

Given these policies and others, the simple fact is that You Tube and Google—like many other private Internet platform owners—retain ultimate control over what third-party content may remain on their platforms. Prager misses this essential fact. As much as YouTube invites its users to freely express themselves on its platform, *see* AOB 10, its invitation is not unconditional or irrevocable. Prager's argument therefore fails even under its own misguided "state-actor-by-invitation" test.

Second, Prager offers the unsupported assertion that "the outcome of the [post-*Marsh*] cases would have been much different" if they involved Internet services rather than "brick-and-mortar shopping centers." AOB 48-49; *see id*. at 46. Prager does not, however, explain how online platforms are meaningfully different from physical shopping centers for the purposes of the "public function" test. Nor does it explain why the Supreme Court would have treated Internet platforms any differently from physical shopping centers.

It is not surprising that Prager has no support for this wild prediction. After all, in considering brick-and-mortar shopping centers in *Lloyd Corp.*, the Court explained:

> The closest decision in theory, *Marsh v. Alabama*, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semiofficial municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case where

> is no comparable assumption or exercise of municipal functions or power.

407 U.S. at 569. Nothing about this analysis turned on whether the spaces in *Lloyd* and *Marsh* were physical or digital realms. And this analysis is completely unconcerned with how a property owner describes itself or what invitations it offers to the public. The only relevant factor is the powers and authorities that private entity exercises. Here, just like the shopping center in *Lloyd Corp*., YouTube does not exercise "municipal functions" or stand "in the shoes of the State." *Id*. Given the Court's reasoning in *Lloyd Corp*. and other post-*March* cases, there is no reason to think that the Supreme Court would have viewed online platforms and shopping centers any differently for state action purposes.

Packingham v. North Carolina does not change this analysis. To be sure, *Packingham* described social media services as "the modern public square" because they provide a space for "users to gain access to information and communicate with one another about it on any subject that might come to mind." *Packingham*, 137 S. Ct. at 1737. But the critical feature of *Packingham* is that it involved a *State* taking action that the First Amendment barred. For all of *Packingham*'s broad language about the Internet and social media platforms, the district court rightly concluded that *Packingham* "did not, and had no occasion to, address whether *private social media corporations* like YouTube are state actors that must regulate the content of their websites according to the strictures of the

First Amendment." Order Granting Motion to Dismiss, *Prager Univ.*, 2018 WL 1471939, at *8.; *see also Packingham*, 137 S. Ct. at 1738 (Alito, J., concurring in the judgment) (noting agreement with the Court's holding but explaining that "I cannot join the opinion of the Court . . . because of its undisciplined dicta"). Instead, the issue in *Packingham* was whether *a North Carolina law* violated the First Amendment because it prohibited sex offenders from *all* forms of social media. *Packingham* in no way suggested that the First Amendment barred a private entity like YouTube from limiting an individual user's unfettered access to its platform. Put simply, *Packingham* did *not* hold that private Internet companies were subject to First Amendment scrutiny as state actors, or that those private Internet companies could not prevent users from accessing their platforms.[4]

In sum, Google and YouTube are *not* state actors for First Amendment purposes, even if they seek to promote free expression on their platform or play a role in modern public discourse. The district court rightly recognized that they

[4] *See Johnson v. Cache Cty. Sch. Dist.*, No. 1:18CV57Dak, 2018 WL 3242298, at *7 (D. Utah July 3, 2018) ("Plaintiff cites to *Packingham v. North Carolina* for the proposition that social media use is constitutionally protected speech. While the Court recognized social media networks as a prime location for First Amendment speech, *Packingham* merely held that a law making it a crime for registered sex offenders to access any social networking sites violated the First Amendment because the restriction was too broad. *Packingham* does not stand for an unfettered, unlimited right to say anything on social media without consequence." (internal citations omitted)).

"are private entities who created their own video-sharing social media website and make decisions about whether and how to regulate content that has been uploaded on that website." Order Granting Motion to Dismiss, *Prager Univ.*, 2018 WL 1471939, at *8. This Court should affirm the district court's accurate understanding of the facts of this case and its well-reasoned conclusion that Google and YouTube are *not* "state actors that must regulate the content on their privately created website in accordance with the strictures of the First Amendment." *Id*.

II. PRAGER'S POSITION WOULD HAVE SERIOUS ADVERSE CONSEQUENCES.

Prager's argument does not just suffer from these fatal legal deficiencies. It also suffers from serious practical defects. Finding Google or YouTube to be state actors would have a range of adverse consequences for those and other Internet platforms. This Court should bear in mind those pragmatic consequences as it considers Prager's request to take the unprecedented step of holding that YouTube is a state actor for First Amendment purposes.

A. Prager's Position Would Violate Google and YouTube's First Amendment Rights.

Prager's misguided attempt to impose First Amendment limitations on Google and YouTube ignores a basic fact: those platforms have *their own* First Amendment rights. Prager should not be permitted to undercut YouTube's First

Amendment rights with its own novel and baseless purported First Amendment claim.

Courts have routinely concluded that online platforms receive First Amendment protection for their editorial choices. *E.g.*, *Robinson v. Hunt Cty., Texas*, No. 3:17-CV-513-K, 2017 WL 7669237, at *3 (N.D. Tex. Dec. 14, 2017) ("Facebook has a right to exercise control over the contents of its platform."); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (Facebook has a "First Amendment right to decide what to publish and what not to publish on its platform"); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1008 (E.D. Cal. 2017) (owner of a website has a "First Amendment right to distribute and facilitate protected speech"); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014) (attempt to hold a platform owner liable for "its editorial judgments . . . cannot be squared with the First Amendment"). This conclusion ineluctably follows from three well-established constitutional principles that the Supreme Court distilled in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). *First*, "since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley*, 515 U.S. at 573 (internal citations and quotation marks omitted). *Second*, "a private speaker does not forfeit constitutional protection simply by

combining multifarious voices." *Id*. at 569. Put a different way, the First Amendment does not "require a speaker to generate, as an original matter, each item featured in the communication." *Id*. at 570. For example, the Supreme Court has recognized that cable operators engage in protected speech "even when they only select programming originally produced by others," and newspapers receive First Amendment protection for their selection of opinion authors and advertisers in their publications. *Id*. *Third*, these bedrock constitutional protections are not "restricted to the press." *Id*. at 574. They are "enjoyed by business corporations generally." *Id*. Given these simple principles, YouTube has a First Amendment right to make editorial choices on its platform.

Prager seeks to sidestep the clear implications of *Hurley* by relying on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *See* AOB 52-53. It contends that *PruneYard* already rejected the argument that a private party has a First Amendment right to regulate speech on its own property, *i.e*., that a website has a right to make editorial choices on its platform. *Id*. But as this Court has recognized, *Hurley* severely cabined *PruneYard*'s reach. *See Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 897-89 (9th Cir. 2008). In particular, *Hurley* explained that *PruneYard* turned on several critical facts, including:

> (1) the shopping center at issue was "'a business establishment that is open to the public to come and go as they please,'" *Hurley*, 515 U.S. at 580 (quoting *PruneYard*, 447 U.S. at 87);

> (2) the proprietors of the shopping center could "'expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand,'" *Hurley*, 515 U.S. at 580 (quoting *PruneYard*, 447 U.S. at 87); and
>
> (3) "*PruneYard* did not involve 'any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets….' The principle of speaker's autonomy was simply not threatened in that case," *Hurley*, 515 U.S. at 580 (quoting *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 12 (1986) (plurality opinion)).

These three facts are directly relevant here. *First*, as explained above (at 13-14), Google and YouTube's Terms of Service make clear that users are *not* free to display content on YouTube's platform "as they please." *PruneYard*, 447 U.S. at 87.

Second, even Prager acknowledges the almost unimaginable volume of content that is posted on YouTube. *See* AOB 7 ("400 hours of videos are uploaded to the service every hour."). Given this enormous scale, YouTube and other online platforms face a stark practical reality: "It would be impossible for service providers [like Google and YouTube] to screen each of their millions of postings for possible problems," let alone craft disavowals for particular messages that appear on their services. *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

Third, unlike in *PruneYard*, YouTube's autonomy *is* threatened here. While YouTube may not "object" to the content of Prager's videos in the sense that it

makes them removable under its policies, it objects enough to classify them as appropriate for a mature audience. Google's and YouTube's filings in this case note that YouTube engaged in "careful evaluation and determination—which included individual human review—"and determined that certain Prager videos included "discussions of sexual situations, violence, and other mature subjects." Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction 6, *Prager Univ. v. Google LLC*, No. 5:17-cv-06064-LHK (Feb. 9, 2018), ECF No. 37. Prager would, however, destroy YouTube's autonomy by preventing YouTube from classifying Prager's mature (and potentially objectionable) content in this way. The facts of this case are thus fundamentally different from those at issue in *PruneYard*.

At bottom, Prager's position would shatter YouTube's First Amendment rights to make editorial choices about speech on its private platform and to decide with which third-party content providers it wishes to associate. As the Supreme Court has recognized, *PruneYard* "does not undercut the proposition that forced associations that burden protected speech are impermissible." *Pacific Gas & Elec. Co.*, 475 U.S. at 12. Prager wants to use the First Amendment as a sword to force YouTube to display its content, when in reality the First Amendment's only application here is as a shield against such editorial interference. This Court should soundly reject Prager's backwards vision of the First Amendment.

B. Prager's Position Would Transform the Modern Internet by Requiring Platforms to Display All Manner of Objectionable Content.

Prager fails to accurately account for what YouTube (or other Internet platforms) would look like if the First Amendment suddenly applied to it. Prager casually implies that it will be easy for private actors like Google and YouTube to survive the heightened scrutiny that courts apply to government regulations of speech. AOB 54-55. Specifically, it contends that a "ruling requiring Google/YouTube to use constitutionally adequate content-based speech regulations in a designated public forum does not mean that YouTube is powerless to regulate non-compliant speech." AOB 55.

Prager's ostensible nonchalance cannot be squared with the realities of First Amendment doctrine. It does not appreciate how difficult it is for any actor to survive heightened scrutiny. But as a result of Prager's rule, one of two things will happen: (1) YouTube and other Internet platforms will face stringent restrictions on their ability to remove a wide range of content, thereby fundamentally altering the Internet as we know it; or (2) existing First Amendment doctrines will necessarily become watered down such that *governments* (which are subject to the same First Amendment rules) will be permitted to silence more and more speech. Both consequences are unwise, untenable, and unnecessary.

"'From 1791 to the present' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas.'" *United States v. Stevens*, 559 U.S. 460 (2010) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992)). Those "'well-defined and narrowly limited'" areas include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id*. at 468-469 (listing cases and quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Outside of this handful of categories, "[i]t is *rare* that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 818 (2000) (emphasis added).

Imagine a world where the First Amendment applies to YouTube. In this alternate universe, YouTube would be unable to classify certain content as "mature" for the purposes of its Restricted Mode. Under blackletter First Amendment law, for example, YouTube would no longer be able to remove or classify as "mature" videos that contain nudity[5], profanity and expletives[6], hate speech[7], or depictions of animal cruelty.[8] It also would not be able to restrict

[5] *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

[6] *Cohen v. California*, 403 U.S. 15, 18 (1971).

[7] *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)

[8] *Stevens*, 559 U.S. at 482.

videos that advocate non-imminent violence or other lawless action[9]; "demean[] on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground,"[10] contain content on matters of public concern that nonetheless "inflict great pain" or emotional distress on others,[11] and engage in cyberbullying.[12]

This is a very different Internet from the one that exists today. It is an Internet where individual platforms like Google and YouTube must be *less* responsive to community norms and consumer demands, and where these individual platforms are forced to be *less* safe for children and families. In vivid contrast, it is also an Internet where individual platforms are required to be *more* protective of hate speech, sexually explicit content, speech that encourages

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[9] *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

[10] *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (opinion of Alito, J.); *see id*. at 1766-67 (opinion of Kennedy, J.) ("The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience. . . . [T]he Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[11] *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (finding the following placards, placed at a military service member's funeral, to be protected by the First Amendment: "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Fags Doom Nations," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys").

[12] *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014); *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016).

violence, and messages that are intended to upset, inflame, or bully other members of the online community. To be sure, the Internet as a whole will always have spaces for this kind of speech, as it provides "relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997). The new Internet that Prager seeks to create, however, will not allow individual business and platform owners to decide whether that kind of speech will appear on *their* services.[13]

Prager downplays these consequences by stating that it asks that Google and YouTube "simply be required to comply with the First Amendment principles to which they have claimed allegiance and from which they are profiting." AOB 55. But Prager's error is its failure to recognize that Internet platforms like Google and YouTube can be committed to promoting free expression *and* keeping their platforms "fun and enjoyable for everyone." YouTube Community Guidelines, *at* https://www.youtube.com/yt/about/policies/#community-guidelines. Both of these goals are achievable. But not if private plaintiffs like Prager can use the First

[13] In fact, because Prager seeks to impose a First Amendment limitation on YouTube's ability to remove certain content, that constitutional right would likely trump Congress' decision to grant it and other interactive computer services immunity under Section 230 of the Communications Decency Act for their publication activity. *See* 47 U.S.C. § 230. That, too, would have titanic consequences for the modern Internet.

Amendment to transform the modern Internet into a Wild West of content that "harms [a website's] users, community or ecosystem." *Id*.

CONCLUSION

For the foregoing reasons, the Computer & Communications Industry Association respectfully submits that this Court should affirm the district court's decision.

DATED: November 7, 2018 MUNGER, TOLLES & OLSON LLP

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