

Appellate Case No. H047714

**IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT**

PRAGER UNIVERSITY,

Petitioner and Appellant,

v.

GOOGLE LLC, a Delaware limited liability company, YOUTUBE, LLC, a
Delaware limited liability company,

Defendants and Respondents.

Appeal from the Superior Court for the County of Santa Clara
The Honorable Brian C. Walsh (Ret.)
Case No. 19CV340667

**APPLICATION OF ELECTRONIC FRONTIER FOUNDATION
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT
OF DEFENDANTS AND RESPONDENTS**

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**APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS AND RESPONDENTS¹**

Pursuant to California Rule of Court 8.200(c), the Electronic Frontier Foundation (EFF) respectfully requests permission to file the attached brief as *amicus curiae* in support of Defendants and Respondents.

EFF is a San Francisco-based, donor-supported, non-profit civil liberties organization working to protect and promote fundamental liberties in the digital world. Through direct advocacy, impact litigation, and technological innovation, EFF's team of attorneys, activists, and technologists encourage and challenge industry, government, and courts to support free expression, privacy, and transparency in the information society. On behalf of its more than 38,000 dues-paying members, EFF ensures that users' interests are presented to courts considering crucial online free speech issues.

EFF files this brief on behalf of internet users in the United States and around the world who rely on online intermediaries, including social media, to communicate with each other and to access information online. Many internet users are concerned about the power these intermediaries exercise over online discourse. Some users think social media platforms

¹ Pursuant to California Rule of Court 8.200(c)(3), undersigned counsel certifies that this brief was not authored in whole or in part by any party or any counsel for a party in the pending appeal and that no person or entity other than *amicus* made any monetary contribution intended to fund the preparation or submission of this brief.

should remove speech they consider harmful, while other users think social media companies “moderate” too much speech. But all users benefit from having a diverse range of online platforms available to them.

For the foregoing reasons, *amicus curiae* respectfully requests that the Court accept the accompanying brief on the merits for filing in this case.

Dated: April 27, 2022

Respectfully submitted,

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Amicus curiae Electronic Frontier Foundation (EFF) is a non-profit organization and is not a party to this action. Pursuant to California Rule of Court 8.208, EFF hereby states that no entity or person has an ownership interest of 10% or more in EFF, and EFF knows of no person or entity that has a financial or other interest in the outcome of the proceeding under Rule 8.208.

/s/ Mukund Rathi
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INTRODUCTION

Although some internet users are understandably frustrated and perplexed by how social media companies curate speech on their platforms, users nevertheless benefit the most when the First Amendment protects the companies' rights to make those decisions. These protections ensure that companies can moderate their platforms free from legal mandates, resulting in a diverse array of forums for users, with varied editorial views and community norms.

An overly broad reading of the California Supreme Court's decision in *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d. 899 (1979) ("*Pruneyard (CA)*")—which established a narrow public forum test for privately-owned spaces based on the California Constitution—would force social media companies to abandon their long-standing editorial practices, to the detriment of users.¹

Inconsistent and opaque content moderation by social media companies is a problem for internet users. But self-regulation and encouraging competition are better solutions than legal mandates on speech.

¹ This amicus brief addresses only the application of *Pruneyard (CA)* to social media companies such as YouTube. It does not address the other issues presented in this appeal that have been addressed fully by the parties.

ARGUMENT

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

Internet users are best served under current law, where the First Amendment creates legal space for the emergence of a continuum of content moderation, from highly curated services to those not curated at all.

A. Moderated Platforms Serve the Interests of Users and the Public Generally

YouTube and other social media platforms are not the first online services to moderate—or edit, or curate—the user speech they publish on their sites. Online services, at least from their point of mass adoption, rarely published all legal speech submitted to their sites. For example, most platforms for user speech banned legal, non-obscene sexual content, speech that enjoys First Amendment protection. Large-scale, outsourced content moderation emerged in the early 2000s.²

Many internet users greatly benefit from moderated platforms. Users may want to find or create affinity and niche communities dedicated to certain subject matters or viewpoints and exclude others. Users may prefer environments that shield them from certain kinds of legal speech, including

² Jillian C. York & David Greene, *How to Put COVID-19 Content Moderation Into Context*, Brookings TechStream, May 21, 2020, <https://www.brookings.edu/techstream/how-to-put-covid-19-content-moderation-into-context/>.

hateful rhetoric and harassment. Users may want a service that attempts to filter out misinformation by relying on sources the user trusts. And users uniformly want services to filter out junk content or “spam.”

As a result, every major “general purpose” social media service—those generally open to all users and covering all subject matters—enforces its own content moderation policies.

Gettr, a “social media platform founded on the principles of free speech, independent thought, and rejecting political censorship and ‘cancel culture,’”³ reserves the right to “address” content that attacks any religion or race.⁴

Rumble, a video sharing alternative to YouTube, bars content that “[p]romotes, supports or incites individuals and/or groups which engage in violence or unlawful acts, including but not limited to Antifa groups and persons affiliated with Antifa, the KKK and white supremacist groups and or persons affiliated with these groups.”⁵

This editorial freedom also allows sites to limit user speech in order to appeal to specific interests and set community norms.

Pinterest, a site designed to visually inspire creative projects, has

³ *Gettr*, <https://gettr.com/onboarding> (last viewed April 1, 2022).

⁴ *Terms of Use*, *Gettr*, <https://gettr.com/terms> (last visited April 1, 2022).

⁵ *Website Terms and Conditions of Use and Agency Agreement*, *Rumble*, <https://rumble.com/s/terms> (last visited April 1, 2022).

“community guidelines” that “outline what we do and don’t allow on Pinterest.”⁶ Under these guidelines, Pinterest reserves the right to remove several categories of speech: “Adult content,” “Exploitation,” “Hateful activities,” “Misinformation,” “Harassment and criticism,” “Private information,” “Self-injury and harmful behavior,” “Graphic Violence and Threats,” “Violent actors,” “Dangerous goods and activities,” “Harmful or Deceptive Products & Practices,” and “Impersonation.” Pinterest has special rules for comments users post on other users “Pins,” including a ban on “Irrelevant or non-purposeful material.”⁷ Picsart, another site for creators, has a similar policy.⁸

Roblox, a rapidly growing social network on which users play and build their own games, warns that its Community Standards “prohibit things that certain other online platforms allow.” For example, Roblox prohibits “Singling out a user or group for ridicule or abuse,” “all sexual content or activity of any kind,” “The depiction, support, or glorification of

⁶ *Community Guidelines*, Pinterest, <https://policy.pinterest.com/en/community-guidelines> (last visited Mar. 29, 2022). *Number of Monthly Active Pinterest Users*, <https://www.statista.com/statistics/995071/pinterest-app-mau-region/> (last visited Mar. 29, 2022).

⁷ *Community Guidelines*, Pinterest, <https://policy.pinterest.com/en/community-guidelines> (last visited March 29, 2022).

⁸ Picsart, <https://picsart.com/about-us>; *Community Guidelines*, Picsart, <https://picsart.com/community-guidelines> (last visited March 30, 2022).

war crimes or human rights violations, including torture,” and much political content, including any discussion of political parties or candidates for office.⁹

Strava, a social media platform for athletes, has Community Standards that prohibit the posting of content that is “harassing, abusive, or hateful or that advocates violence.”¹⁰ One of Strava’s main features is for cyclists and runners to share their routes, called “segments,” on Strava; but Strava’s Community Standards allow only “good segments” created with “common sense.”¹¹ The Community Standards also require all users to be “inclusive and anti-racist.”¹²

The internet is full of smaller niche services—from RallyPoint, a social media platform for members of the armed services,¹³ to Ravelry, a social media site focused on knitting.¹⁴

⁹ *Roblox Community Standards*, Roblox, <https://en.help.roblox.com/hc/en-us/articles/203313410-Roblox-Community-Standards> (last visited October 8, 2021)); *Roblox Reports Fourth Quarter And Full Year 2021 Financial Results*, <https://ir.roblox.com/news/news-details/2022/Roblox-Reports-Fourth-Quarter-and-Full-Year-2021-Financial-Results/default.aspx>.

¹⁰ *Strava Terms of Service*, Strava, <https://www.strava.com/legal/terms#conduct> (updated Dec. 15, 2020).

¹¹ *Strava Community Standards*, Strava, <https://www.strava.com/community-standards> (last visited March 30, 2022).

¹² *Id.*

¹³ RallyPoint, <https://www.rallypoint.com/> (last visited March 30, 2022).

¹⁴ Ravelry, <https://www.ravelry.com> (last visited March 30, 2022).

Thus, users can have both ProAmericaOnly, <https://proamericaonly.org>, which promotes itself as “Social Media for Conservatives” and promises “No Censorship | No Shadow Bans | No BS | NO LIBERALS” and The Democratic Hub, <https://www.democratichub.com>, an “online community ... for liberals, progressives, moderates, independent[s] and anyone who has a favorable opinion of Democrats and/or liberal political views or is critical of Republican ideology,” and everything else on the political spectrum.

This editorial freedom extends to all beliefs, not just politics. So, Vegan Forum does not require its users to be “vegan, vegetarian or even have immediate plans to give up animal products”; but since it is a site designed to promote a vegan lifestyle, “we will not tolerate members who promote contrary agendas.”¹⁵ And SmokingMeatsForums.com, a “community of food lovers dedicated to smoking meat,” more generally bans “fighting or excessive arguing” in its user discussion forums.¹⁶

Many sites have special rules prohibiting users from posting false information. On HealthUnlocked, users must agree “to share information that is true and correct to the best of your knowledge and . . . that is

¹⁵ *Membership Rules*, Vegan Forum, <https://www.veganforum.org/help/terms/> (last visited March 30, 2022).

¹⁶ *The Rules*, SmokingMeatForums.com, <https://www.smokingmeatforums.com/help/rules/> (last visited March 30, 2022).

primarily drawn from your personal experience.”¹⁷

Among the numerous content moderation practices is community moderation, with Reddit and Discord among its most popular adopters. Reddit users manage and create thousands of communities, called subreddits. Although Reddit has an overriding content policy, a moderator makes the decisions within each community as guided by Reddit’s “Moderator Guidelines for Healthy Communities.”¹⁸ Discord employs a similar model.¹⁹ Each site thereby empowers some users to remove and down-rank other users’ speech if that speech is against that community’s rules.²⁰ As a result, while a political candidate and their speech may be highlighted in one community, the candidate may be blocked or down-ranked in another.

B. Moderation Means that Some User Content Will be Removed, Downranked, or Otherwise Curated

All of the sites discussed above use editing and curation: they reject, downrank, hide, label, or otherwise moderate some user speech.²¹ And this

¹⁸ *Moderator Guidelines*, Reddit, <https://www.redditinc.com/policies/moderator-guidelines> (effective Apr. 17, 2017).

¹⁹ *Moderating on Discord*, Discord, <https://discord.com/moderation> (last visited March 30, 2022).

²⁰ *See, e.g., Reddiquette*, Reddit, <https://reddit.zendesk.com/hc/en-us/articles/205926439-Reddiquette> (last visited March 30, 2022).

²¹ *See generally* Eric Goldman, *Content Moderation Remedies*, 28 Mich.

often frustrates, angers, or perplexes users.

Sites may moderate speech because the user clearly violated the site’s rules, like those above.

And frequently, sites just make mistakes. Content moderation at scale is impossible to do perfectly, and nearly impossible to do well.²² Even when using a set of precise rules or carefully articulated “community standards,” moderated platforms often struggle to draw workable lines between speech that is and is not permitted. Every online forum for user speech, not just the dominant social media platforms, struggles with this problem.

This is neither a new problem, dating to at least 2007,²³ nor one limited to U.S. conservative politics. Platforms continue to make puzzling decisions on a daily basis. In 2017, users discovered that Twitter had

Tech. L. Rev. 1 (2021) (describing the full taxonomy of actions a platform may take with respect to user posts).

²² See, e.g., Mike Masnick, *Masnick’s Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, Techdirt, Nov. 20, 2019, <https://www.techdirt.com/articles/20191111/23032743367/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well.shtml>.

²³ Jillian C. York, *Silicon Values: The Future of Free Speech Under Surveillance Capitalism* 25-27 (Verso 2021); Kevin Anderson, *YouTube Suspends Egyptian Blog Activist’s Account*, The Guardian, Nov. 28, 2007, <https://www.theguardian.com/news/blog/2007/nov/28/youtubesuspendegyptianblog>.

marked tweets containing the word “queer” as offensive.²⁴ In January 2021, Facebook’s updated policy to remove “harmful conspiracy theories” resulted in it disabling a punk rock band’s page because its name, Adrenochrome, is a chemical that has become a central part of the QAnon conspiracy theory.²⁵ Also in 2021, Instagram removed posts about one of Islam’s holiest mosques, Al-Aqsa, because its name is contained within the name of a designated terrorist organization.²⁶ Sex worker advocates have documented how they are routinely shadow banned across a variety of social media platforms.²⁷

C. In Praise of the (Hypothetical) Unmoderated Platform

Any legal regime must also leave open the possibility of unmoderated platforms, where the operator plays no role in selecting

²⁴ Taylor Wofford, *Twitter Was Flagging Tweets Including the Word “Queer” as Potentially “Offensive Content”*, Mic, June 22, 2017, <https://www.mic.com/articles/180601/twitter-was-flagging-tweets-including-the-word-queer-as-potentially-offensive-content>.

²⁵ *Facebook Treats Punk Rockers Like Crazy Conspiracy Theorists, Kicks Them Offline*, EFF, <https://www.eff.org/takedowns/facebook-treats-punk-rockers-crazy-conspiracy-theorists-kicks-them-offline> (last visited Oct. 7, 2021).

²⁶ Ryan Mac, *Instagram Censored Posts About One of Islam’s Holiest Mosques, Drawing Employee Ire*, BuzzFeed News, May 12, 2021, <https://www.buzzfeednews.com/article/ryanmac/instagram-facebook-censored-al-aqsa-mosque>.

²⁷ See Danielle Blunt et al., *Posting Into The Void*, Hacking//Hustling, Oct. 2020, <https://hackinghustling.org/wp-content/uploads/2020/09/Posting-Into-the-Void.pdf>.

protected content or ordering its presentation. Although unmoderated forums are at present highly rare, they conceivably benefit internet users and the public generally by eliminating corporate editors, inhibiting the creation of silos, and allowing users to engage in free-form discussions and debates of their choosing, and find unexpected sources of ideas and information. Users would not need to fear that their communications are actively screened, nor that they may accidentally run afoul of content rules. Unmoderated platforms can be of special value to political dissidents and others who may be targeted for censorship by governments and private actors. They would provide an accessible forum for speech that is unpopular, disfavored, or inadvertently suppressed.

Unfortunately, there are not any large-scale positive models of unmoderated forums. 8kun,²⁸ formerly 8chan, is probably the most well-known example and it is notoriously rife with hateful speech.

Nevertheless, legal regimes must provide for the possibility of positive models.

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

The law in its current state, where YouTube and other sites have a First Amendment right to curate the user speech that appears on their sites,

²⁸ 8chan, <https://en.wikipedia.org/wiki/8chan> (last visited April 25, 2022).

supports the existence of online platforms all along the moderation continuum. As YouTube correctly argues, the First Amendment shields platforms from being forced to publish any content that they would otherwise choose not to publish.

A. The First Amendment Protects YouTube’s Right to Moderate User Speech

Every court that has considered the issue has rightfully found that private entities that operate online platforms for user speech have a First Amendment right to curate that speech.

The U.S. Supreme Court has long held that private publishers have a First Amendment right to control the content of their publications. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-55 (1974). *Cf. Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (reaffirming that “when a private entity provides a forum for speech,” “[t]he private entity may . . . exercise editorial discretion over the speech and speakers in the forum”). *See also Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (recognizing cable television providers’ First Amendment right to “exercis[e] editorial discretion over which stations or programs to include in its repertoire”). Government or judicial intrusion into the functions of editors is per se unconstitutional even if the compelled publication would not cause additional costs or loss of space for desired content. *Tornillo*, 418 U.S. at

258.

In so holding, the *Tornillo* Court rejected “vigorous[]” arguments that “the government has an obligation to ensure that a wide variety of views reach the public.” *Id.* at 247-48. The state of Florida argued in *Tornillo* that the print news media both dominated public discourse—the state cited a “concentration of control of outlets to inform the public,” that had “become big business,” “noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events,” *Id.* at 248-50,—and were biased and manipulated public discourse:

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. . . . The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires.

Id. at 250.

The *Tornillo* Court did not dispute the validity of these concerns, but nevertheless found that governmental interference with editorial discretion was anathema to the First Amendment and the broader principles of freedom of speech and the press. *Id.* at 254. *See also Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 134 (9th Cir. 1971) (rejecting argument that the Los Angeles Times’ “semimonopoly and quasi-public position” justified order compelling the newspaper to publish certain advertisements).

The remedy for these concerns must be found through “consensual . . . mechanisms” and not by governmental compulsion. *Tornillo*, 418 U.S. at 254.

Tornillo is not limited to newspapers or publishers that actively select the content they publish. It protects any entity that speaks by curating the speech of others, and courts have applied it in a variety of speech contexts, including four times by the U.S. Supreme Court since 2018. *See Manhattan Community Access*, 139 S. Ct. at 1928; *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018); *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring). The U.S. Supreme Court applied *Tornillo*, among other authorities, in holding that the organizers of a parade had a First Amendment right to select its participants even if the parade was perceived as generally open for public participation. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569–70 (1995). As the *Hurley* Court explained, “a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in

the communication.” *Id.*

The First Amendment protects an online platform even if it predominantly publishes others’ content. Numerous courts have applied *Tornillo* to social media platforms that primarily, if not exclusively, publish user-generated content.²⁹ Courts have also rejected the argument that social media platforms are state actors and therefore limited by the First Amendment in their ability to curate user speech.³⁰

B. Social Media Platforms and the Newspapers’ Opinion Pages Addressed in *Tornillo* are Similar Types of Intermediaries

Although *Tornillo* is not limited to newspapers and applies to any exercise of editorial or curatorial discretion, social media platforms are similar to, and should be equally protected as, the opinion pages of a newspaper, the specific forum targeted by the Florida right of reply law

²⁹ See, e.g., *Huber v. Biden*, No. 21-CV-06580-EMC, 2022 WL 827248, at *6 (N.D. Cal. Mar. 18, 2022); *O’Handley v. Padilla*, No. 21-CV-07063-CRB, 2022 WL 93625, at *14 (N.D. Cal. Jan. 10, 2022); *La’Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *American Freedom Defense Initiative v. Lynch*, 217 F. Supp. 3d 100, 106 (D.D.C. 2016); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 436-37 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007); *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-CV-646-FTM-PAM-CM, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017).

³⁰ See, e.g., *Prager Univ. v. Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020); *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 40 (D.D.C. 2019), *aff’d*, 816 F. App’x 497 (D.C. Cir. 2020). See generally Eric Goldman and Jess Miers, *Online Account/Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 Journal of Free Speech Law 191 (August 2021) (collecting cases).

struck down in *Tornillo*.

Like social media platforms, newspapers publish a mix of original content and items created by others: syndicated and wire service articles, advertisements, wedding, engagement, and birth announcements, and comics. The opinion pages in particular are filled with outside content: opinion pieces, letters to the editor, and syndicated editorial cartoons.³¹

The U.S. Supreme Court’s most powerful pronouncement of freedom of the press, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), centered on *The Times* publishing someone else’s content, a paid advertisement.

The Times’s role as an intermediary for the speech of others was critical. As the Court explained, newspapers are “an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of

³¹ See Jack Shafer, *The Op-Ed Page’s Back Pages: A Press Scholar Explains How the New York Times Op-Ed Page Got Started*, Slate, Sept. 27, 2010, <https://slate.com/news-and-politics/2010/09/a-press-scholar-explains-how-the-new-york-times-op-ed-page-got-started.html> (describing how the pages opposite newspapers’ editorial pages became a forum for outside contributors to express views different from those expressed by the paper’s editorial board); Michael J. Socolow, *A Profitable Public Sphere: The Creation of the New York Times Op-Ed Page*, Comm’n & Journalism Fac. Scholarship (2010), https://digitalcommons.library.umaine.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1001&context=cmj_facpub; Op-Ed, Wikipedia, <https://en.wikipedia.org/wiki/Op-ed> (last visited Oct. 7, 2021).

speech even though they are not members of the press.” *Id.* at 266.³² More recently, the Court recognized that social media sites now play that very role by providing “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

Tornillo protects the editor of speech regardless of how selective they are. Both online and offline media have a continuum of selectivity; there is no dichotomy of selective and non-selective intermediary services. Historically, many news publications non-selectively transmitted user speech. For example, Pennysavers have a long and storied history as local newspapers either entirely or primarily composed of classified advertisements, coupons, life milestone announcements, congratulatory messages, recipes, public notices, and the like.³³

In *Tornillo*, the Supreme Court did not hesitate to recognize the First Amendment right of the opinion page editors to endorse candidates and exclude replies from opponents even though the press in 1974 was much different than that of our nation’s Founders. This Court should likewise

³² The *Sullivan* Court also bolstered its actual malice rule by reference to earlier cases dealing with another type of intermediary, booksellers. *Id.* at 278-79 (citing *Smith v. California*, 361 U.S. 147 (1959); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).

³³ See <https://en.wikipedia.org/wiki/Pennysaver> (last visited March 30, 2022)

apply the same rule even if social media sites are not exactly the opinion pages of 1974.

C. *Pruneyard* Does Not Transform Social Media Platforms into Public Forums

With *Tornillo* clearly closing off recourse under federal constitutional law, Prager University (“Prager”) turns to the California Constitution and the California Supreme Court’s decision in *Pruneyard (CA)*, which established a narrow public forum test for privately-owned spaces.

Courts have rightly been cautious of extending *Pruneyard (CA)* to the internet. *See, e.g., hiQ Labs, Inc. v. LinkedIn Corporation*, 273 F. Supp. 3d 1099, 1116 (N.D. Cal. Aug 14, 2017), *aff’d and remanded*, 938 F.3d 985 (9th Cir. 2019), *cert. granted, judgment vacated*, 141 S. Ct. 2752, 210 L. Ed. 2d 902 (2021), *and aff’d*, No. 17-16783, 2022 WL 1132814 (9th Cir. Apr. 18, 2022); *Domen v. Vimeo*, 433 F. Supp. 3d 592, 607 (S.D.N.Y. 2020).

Amicus writes to emphasize that even if *Pruneyard (CA)* could apply to non-physical spaces, it cannot transform YouTube’s curation of Prager’s videos into prohibited censorship for three reasons. First, YouTube and other social media platforms that moderate content are primarily, if not exclusively, expressive venues protected by *Tornillo*. Second, even on its own terms, California’s *Pruneyard (CA)* doctrine does not apply to

platforms that moderate content because they are not functional public forums. Third, even if *Pruneyard* applied and used a balancing test, recognizing the editorial freedom of social media sites advances the public interest.

When the U.S. Supreme Court considered the application of *Pruneyard (CA)* doctrine to a shopping center, it held that *Tornillo* did not apply to the mall because *Tornillo*'s "statute was found to be an 'intrusion into the function of editors'" that "exact[ed] a penalty on the basis of the content of a newspaper" and "These concerns obviously are not present here." *Pruneyard Shopping Ctr. v. Robins*, 447 US. 74, 88 (1980) ("*PruneYard (US)*") (quoting *Tornillo*, 418 U.S. at 258) (bracketed text in original). Unlike YouTube, the PruneYard shopping center had no core editorial function—indeed, its core purpose had nothing to do with speech or information, but was to simply be "a business establishment that is open to the public to come and go as they please." *Id.* at 87. Justice Powell, joined by Justice White, concurred in part and in the judgment and agreed that "[t]he selection of material for publication is not generally a concern of shopping centers." *Id.* at 99 (Powell, J., concurring). However, he emphasized that even this limited application of *Pruneyard (CA)* affected First Amendment interests. *Id.* at 98-99. For example, insofar as a store owner can "disavow the messages" expressed by *Pruneyard*-protected speakers, the owner has still "been forced to speak when he would prefer to

remain silent.” *Id.* at 99.

Unlike the PruneYard shopping center, YouTube has a core editorial function. That core function includes both “the selection of material for publication” and how to present that material to the public. *See id.* at 99. As discussed above, courts have consistently applied *Tornillo* to protect social media platforms’ right to moderate content. Prager’s overly broad reading of *Pruneyard (CA)* is an “intrusion into the function of editors.” *Id.* at 88 (quoting *Tornillo*, 418 U.S. at 258). YouTube’s core function of expression and curation is unlike not only the PruneYard shopping center, but *every* defendant in the *Pruneyard (CA)* progeny cited by the parties. *See, e.g., Fashion Valley Mall LLC v. NLRB*, 42 Cal.4th 850, 863 (2007) (“[T]he intended purpose of the Mall ... is to promote the sale of merchandise and services to the shopping public.”) (internal quotations omitted).

But even setting aside *Tornillo*, *Pruneyard (CA)* would not restrict YouTube and other social media platforms that moderate content because they are not functionally public forums: they are not “open to the public to come and go as they please.” *See PruneYard (U.S.)*, 447 U.S. at 87. *See also Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013, 1033 (2001) (“[T]he actions of a private property owner constitute state action for purposes of California’s free speech clause only if the property is freely and openly accessible to the public.”). As shown by the

many examples above, *supra* § I.A, internet platforms almost always exercise, and have always exercised, editorial discretion as to which users and what content they allow and what content they feature. YouTube’s action against Prager is one of millions of decisions it made and continues to make. YouTube continues to recommend particular content to particular viewers and places other content in “Restricted Mode” to limit its visibility for other audiences. Like the *Golden Gateway* apartment complex, YouTube “restricts the public’s access” and even goes a step further by restricting the public’s experience inside its platform. *See* 26 Cal. 4th at 1033.

And unlike the theme park in *Park Mgmt.* that allowed “animal rights activists to peacefully protest there for at least seven years,” *see Park Mgmt. Corp. v. In Def. of Animals*, 36 Cal. App. 5th 649, 665 (2019), YouTube has, at least since 2007, actively canceled user accounts and prioritized and deprioritized the videos posted by its users. In 2007, YouTube, only two years old at the time, shut down the account of Egyptian human rights activist Wael Abbas, after receiving multiple reports that the account featured graphic videos of police brutality and torture. YouTube’s community standards at the time stated that “Graphic, gratuitous violence is not allowed.” Just one year before, Abbas was the first blogger to receive the Knight International Journalism Award. Abbas’s account was restored only after the U.S. State Department intervened with

YouTube’s new owner, Google.³⁴ More recently, YouTube has removed videos documenting atrocities in Syria and elsewhere under its graphic violence policy,³⁵ and has been accused of restricting and demonetizing LGBTQ+ content.³⁶

Third, even if YouTube were functionally a public forum such that the balancing test of *Trader Joe’s Co. v. Progressive Campaigns*, 73 Cal.App.4th 425, 432 (1999), applied, the balance would weigh in favor of YouTube’s editorial freedom. That test balanced “the interest of the shopping center owner, in maintaining exclusive control over property he has opened to the public, against the societal interest, in utilizing the shopping mall as a public forum for expressive activity.” *Id.* In that case, the Trader Joe’s “open[ed] its property to the public so the public can buy goods” and did not have the “public character” that would strengthen the societal interest in expressive activity. *Id.* at 434.

³⁴ Jillian C. York, *Silicon Values: The Future of Free Speech Under Surveillance Capitalism* 25-27 (Verso 2021); Kevin Anderson, *YouTube Suspends Egyptian Blog Activist’s Account*, *The Guardian* (Nov. 28, 2007), <https://www.theguardian.com/news/blog/2007/nov/28/youtubesuspendsegyptianblog>.

³⁵ Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria*, *N.Y. Times*, Aug. 22, 2017, <https://www.nytimes.com/2017/08/22/world/middleeast/syria-youtube-videos-isis.html>.

³⁶ Megan Farokhmanesh, *YouTube Is Still Restricting and Demonetizing LGBT Videos—and Adding Anti-LGBT Ads to Some*, *The Verge*, June 4, 2018, <https://www.theverge.com/2018/6/4/17424472/youtube-lgbt-domentization-ads-algorithm>.

Here, YouTube has a strong First Amendment interest in its “exclusive control” over expressive activity on its platform. *See id.* at 432. Since an online platform’s editorial vision is often at the core of its business, applying *Pruneyard (CA)* would pose a “significantly greater risk of interfering with normal business operations.” *See Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 55 Cal. 4th 1083, 1092 (2012). Moreover, as explained above, Internet users benefit the most when platforms can curate their platforms and there are “many alternative fora where citizens of many different states can choose to post their [content].” *See Domen*, 433 F. Supp. 3d at 607. Courts should not view these platform and user interests as conflicting with the societal interest in using social media platforms, the “modern public square,” for expressive activity. *Packingham*, 137 S. Ct. at 1737. Like the shopping center in 1979, courts in the digital age are appropriately recognizing “the significance of the growing importance of the [online platform]” that “can provide an essential and invaluable forum for exercising those [expression] rights.” *See Pruneyard (CA)*, 23 Cal. 3d. at 907, 910. Unlike the shopping center, however, *Tornillo* protects these platforms and users benefit from the diverse array of forums that protection allows for.

III. INTERNET USERS ARE BEST SERVED BY VOLUNTARY MEASURES FOR CONTENT MODERATION

Internet users are better served by “consensual . . . mechanisms,” in

the words of the U.S. Supreme Court in *Tornillo*, 418 U.S. at 254, however imperfect they may be.

Both companies and users can look to several models for self-regulation. EFF is among a broad range of civil society groups that has endorsed the Santa Clara Principles.³⁷ UNESCO has published principles focusing on transparency around content moderation decisions that are purposefully high-level, rather than prescriptive, in recognition of the “[v]ast differences in types, sizes, business models and engineering of internet platform companies” that make government mandates inappropriate.³⁸ The Internet Commission’s annual Accountability Report aims to identify best practices scaled to an online service’s maturity.³⁹

From a regulatory perspective, legal measures that do not target the editorial process or are not enacted in retaliation against disfavored editorial policies and decisions may be acceptable.

Amicus EFF supports regulations that benefit users, promotes user choice and control by encouraging competition⁴⁰ and platform

³⁷ Santa Clara Principles, <https://www.santaclaraprinciples.org/>.

³⁸ *Letting the Sun Shine In: Transparency and Accountability in the Digital Age* at 1, UNESCO (2021), <https://unesdoc.unesco.org/ark:/48223/pf0000377231>.

³⁹ *Accountability Report 2.0*, Internet Comm’n (2022), <https://inetco.org/report>.

⁴⁰ *Comment on Evaluating the Competitive Effects of Corporate*

interoperability.⁴¹

CONCLUSION

For the foregoing reasons, EFF respectfully requests that the Court affirm the lower court's dismissal.

Dated: April 27, 2022

Respectfully submitted,

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Acquisitions and Mergers, EFF (August 20, 2018),

<https://www.eff.org/document/eff-comments-ftc-competition-0>.

⁴¹ Bennett Cyphers and Cory Doctorow, *The New ACCESS Act Is a Good Start. Here's How to Make Sure It Delivers*, EFF (June 21, 2021),

<https://www.eff.org/deeplinks/2021/06/new-access-act-good-start-heres-how-make-sure-it-delivers>.

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(d) that this *Amicus Curiae* Brief of Electronic Frontier Foundation is proportionally spaced, has a typeface of 13 points or more, contains 4,936 words, excluding the cover, the tables, the signature block, and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

Dated: April 27, 2022

/s/ Mukund Rathi
Mukund Rathi

Document received by the CA 6th District Court of Appeal.

CERTIFICATE OF SERVICE

I, Victoria Python, declare:

I am a resident of the state of California and over the age of eighteen years and not a party to the within action. My business address is 815 Eddy Street, San Francisco, California 94109.

On April 27, 2022, I served the foregoing documents:

**APPLICATION OF ELECTRONIC FRONTIER FOUNDATION
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT
OF DEFENDANTS AND RESPONDENTS**


**AMICUS BRIEF OF ELECTRONIC FRONTIER FOUNDATION IN
SUPPORT OF DEFENDANTS AND RESPONDENTS**

X BY TRUEFILING: I caused the foregoing documents to be filed and served on parties with the court using the court’s e-filing system, TrueFiling. The parties and/or counsel of record are designated for electronic service in this matter on the TrueFiling website.

X BY FIRST CLASS MAIL: I caused the foregoing documents to be placed in an envelope for collection and mailing following our ordinary business practices. I am readily familiar with this firm’s practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

Superior Court of California
County of Santa Clara
191 N. First Street
San Jose, CA 95113

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



Victoria Python