NO. 22-15443

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLLEEN HUBER,

PLAINTIFF-APPELLANT

v.

JOSEPH R. BIDEN, in his official capacity as President of the United States of America; TWITTER, INC.; JACK DORSEY, in his official capacity as Chief Executive Officer of Twitter and in his individual capacity,

DEFENDANTS-APPELLEES

On Appeal from the United States District Court
for the Northern District of California, San Francisco
No. 3:21-cv-06580-EMC
The Honorable Edward M. Chen, Presiding

BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLEES TWITTER, INC. AND JACK DORSEY, IN HIS OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER OF TWITTER AND IN HIS INDIVIDUAL CAPACITY AND AFFIRMANCE

Mukund Rathi
Counsel of Record
David Greene
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Fax: (415) 436-9993
Email: mukund@eff.org, davidg@eff.org

Counsel for Amicus Curiae
Electronic Frontier Foundation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus states that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: August 3, 2022

By: /s/ Mukund Rathi
Mukund Rathi

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF INTEREST OF AMICUS[1]

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit civil liberties organization that has worked for over 30 years to protect free speech, privacy, security, and innovation in the digital world. EFF, with over 35,000 members, represents the interests of technology users in court cases and broader policy debates surrounding the application of law to the Internet and other technologies.

INTRODUCTION

Although government co-option of the content moderation systems of social media companies is a serious threat to freedom of speech, the social media companies' own First Amendment rights to edit and curate their sites require that liability *against them* be limited to narrow and exceptional circumstances—circumstances not present in this case.

To ensure that the state action doctrine does not nullify platforms' First Amendment rights, this Court should set out a well-defined, though very limited, means for a user to hold a private speech intermediary liable when it cedes its

[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), amicus certifies that no person or entity, other than amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. Because amicus curiae does not have the consent of all parties to file this brief, a motion for leave has also been filed.

editorial control and serves as the vehicle for government censorship of users' speech.

Amicus proposes that in the context of speech intermediaries, a finding of state action be limited to the situations in which, at a minimum: first, the government replaces the intermediary's editorial policy with its own, second, the intermediary willingly cedes its editorial implementation of that policy to the government regarding the specific user speech, and third, the censored party has no possible remedy against the government.

None of these conditions are met in this case. First, the government at most advised Twitter on its editorial policy on COVID-19, but did not replace it. As alleged, Twitter, the White House, and President Biden made various statements about the harm of COVID-19 and that they were working together to address it. Second, Huber does not allege that the government ever talked to Twitter about or even read her tweet at issue. Rather, Huber alleges at most that Twitter suspended and then banned her, which suggests that the platform implemented its own editorial policy in response to that tweet. Third, Huber has brought a claim against the government and there is no sovereign immunity or similar governmental privilege to that claim, so there is a possible remedy. This Court should affirm the district court's dismissal of the claims against Twitter and Jack Dorsey.

ARGUMENT

I. APPLYING STATE ACTION THEORY TOO BROADLY WOULD UNDERMINE EDITORIAL FREEDOM

Although government involvement in content moderation is a serious issue around the world, Huber's theory of state action sweeps too broadly and infringes on platforms' constitutionally protected editorial decision-making. *See Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019) ("Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise."). A censored user has a remedy against the platform only if the government replaces the platform's editorial policy with its own, the platform willingly relinquishes the ultimate publication decision to the government, and the user lacks a remedy against the government.

That this case addresses the use of the state action doctrine to place liability on the private publisher, in addition to the government, is critical. State action analysis is used in two ways: (1) to find that *the government* is liable because an act performed by a private entity is functionally "state action" attributable to it; and (2) to find that *a private entity* may be liable because it is functionally a "state actor." Both situations are presented in this case. The latter situation, seeking to hold Twitter liable because the government sought to communicate with it, directly threatens Twitter's First Amendment rights, ultimately to the disadvantage of its

users.

A. A COURT MUST CONSIDER THE DEFENDANT'S FIRST AMENDMENT RIGHTS REGARDLESS OF THE STATE ACTION THEORY PROPOSED

Although Huber relies on the joint action-conspiracy test for state action, *see* Op. Br. at 19-20, this amicus brief proposes a test that pertains to any state action argument based on a private online intermediary's cooperation with the government, regardless of how the plaintiff labels it. *See Ohno v. Yasuma*, 723 F.3d 984, 995 n.13 (9th Cir. 2013) (analyzing all four state action tests under the joint action and public function rubrics).

B. A PRIVATE SOCIAL MEDIA SERVICE CANNOT BEAR LIABILITY AS A STATE ACTOR UNLESS IT HAS WILLINGLY CEDED ITS EDITORIAL DECISION-MAKING TO THE GOVERNMENT

Although courts often discuss state action in this context in terms of a "close collaboration" or a "meeting of the minds" between the government and the private actor, *see, e.g.*, *Janny v. Gamez*, 8 F.4th 883, 920 (10th Cir. 2021), the doctrine is quite limited, even in the absence of countervailing First Amendment concerns. It requires "a symbiotic relationship" that "denotes a functional intertwining" of operations. *Frazier v. Bd. of Trustees of Nw. Mississippi Reg'l Med. Ctr.*, 765 F.2d 1278, 1286, 1287-88 (5th Cir. 1985), *amended,* 777 F.2d 329 (5th Cir. 1985). But those phrases tend to be conclusions rather than specific points of analysis, and can have widely variant meanings in different contexts. As a result, and not

surprisingly, this Court has said that "there is no specific formula for defining state action." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 836 (9th Cir. 1999).

The First Amendment, however, requires fixed and definitive standards: the typical fluidity in the state-action-by-collaboration analysis is unacceptable where, as here, a plaintiff seeks to hold a publisher liable as a state actor based on its otherwise constitutionally protected editorial decisions. "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas are clearly marked." *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quotation marks, ellipsis omitted). *See also United States v. Stevens*, 559 U.S. 460, 470 (2010) (warning against a "free-floating test for First Amendment coverage"); *California State Teachers Ass'n v. State Bd. of Education*, 271 F.3d 1141, 1150 (9th Cir. 2001) (discussing the First Amendment's heightened vagueness standard).

Moreover, defendant publishers must be able to challenge a plaintiff's claims on a motion to dismiss, lest the threat of extensive discovery and prolonged litigation further chill freedom of expression. A defined test assists with this early sorting of meritorious from non-meritorious claims.

Amicus thus proposes that a court must make three findings before holding a social media service liable as a state actor because of its collaboration with the

government in content moderation decisions.

First, this Court must find that the government has replaced the social media platform's editorial policy with its own.

Second, this Court must find that the social media service willingly relinquished to the government its control over the ultimate publication decision regarding the plaintiff's speech.

Third, the plaintiff must be legally barred from seeking an adequate remedy against the government.

These findings are necessary, but not per se sufficient to establish the social media service as a state actor; there may always be "some countervailing reason against attributing activity to the government." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001).

This test is consistent with the analyses applied by this and other courts.

State action requires more than the private actor seeking government input or being influenced by government experts or politicians. *See German v. Fox*, 267 F. App'x 231, 235 (4th Cir. 2008). There is no state action when the private actor and the government collaborate on a general position but do not agree on specific action against a particular plaintiff. *See Patrick v. Floyd Med. Ctr.*, 201 F.3d 1313, 1315-16 (11th Cir. 2000). Nor is it state action when the government merely approves of the private actor's decision. *Sutton*, 192 F.3d at 843.

A key finding in all cases, and *the* critical finding when the purported state actor is a publisher, is whether the private actor has ceased to exercise its own independent judgment. *See Kolinske v. Lubbers*, 712 F.2d 471, 480 (D.C. Cir. 1983) (finding no state action where there is "the interposition of the independent judgment of a private party between the act that allegedly resulted in a constitutional deprivation and the decision of the state"); *Rundus v. City of Dallas*, 634 F.3d 309 (5th Cir. 2011). Thus, even a private actor who exercises authority granted by the government, but does so by adopting and applying its own internal rules, is not a state actor. *See Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 299 (4th Cir. 1991).[2]

As discussed below, the First Amendment protects editorial decision-making: a publisher does not forfeit those free speech rights so long as it itself makes the editorial decisions. *See Miami Herald Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Thus, in *Sinn v. The Daily Nebraskan*, the court found that a public university newspaper was not a state actor when it refused to publish certain classified advertisements submitted to it because the evidence that the university controlled the editorial decision regarding the plaintiffs' ads was attenuated and

[2] These factors are consistent with those considered in an analogous context, agency law. Courts analyzing the principal-agent relationship look to whether the agent acts on the principal's behalf, subject to the principal's control. *See Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1054 (9th Cir. 2017).

speculative. 829 F.2d 662, 664-66 (8th Cir. 1987) (citing *Associates & Aldrich Co. v. Times Mirror Co.,* 440 F.2d 133 (9th Cir. 1971)).

The first two parts of amicus's proposed test reflect that a social media service cannot be liable as a state actor unless the government seizes control of each step of the editorial process. As discussed in greater detail below, for social media services, like other publishers, that process involves both the development of an editorial policy and then the enforcement of that policy as to specific content. As the Eleventh Circuit recently wrote, platforms "publish terms of service or community standards specifying the type of content that it will (and won't) allow on its site." *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1204 (11th Cir. 2022). Then, they "exercise[] editorial judgment" by "remov[ing] posts that violate its terms of service or community standards—for instance, those containing hate speech, pornography, or violent content" and "arrang[ing] available content by choosing how to prioritize and display posts—effectively selecting which users' speech the viewer will see, and in what order, during any given visit to the site." *Id*.

Lastly, a court considering whether a private social media service bears liability as a state actor for cooperating with the government in its content moderation decisions must also find that an aggrieved plaintiff lacks an adequate remedy against the government actor. This factor comes into play when an

otherwise meritorious claim is blocked by the existence of some special governmental privilege or immunity.

Emphasizing these factors, courts have correctly dismissed lawsuits alleging state action between social media platforms and the government based on communication about problematic content. *See, e.g.*, *Children's Health Def. v. Facebook Inc.*, 546 F. Supp. 3d 909, 930 (N.D. Cal. 2021) ("None of the general statements or questions in Representative Schiff's letter can be interpreted as providing a specific standard of decision that mandated the particular actions that Facebook took with regard to CHD's Facebook page.") *O'Handley v. Padilla*, No. 21-CV-07063-CRB, 2022 WL 93625, at *9-10 (N.D. Cal. Jan. 10, 2022) (finding no state action where Twitter made the ultimate decision to remove tweet after tip from election security office).[3]

[3] To date, courts have uniformly rejected the argument that social media platforms, by moderating content, are state actors under any state action theory. *See, e.g.*, *Prager University v Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020) (rejecting characterization of YouTube as a state actor under the public function test); *Wilson v. Twitter*, No. 20-CV-00054, 2020 WL 3410349, at *1, *4-5 (S.D.W. Va. May 1, 2020) ("While Twitter no doubt provides a valuable public forum . . . this alone is insufficient to establish that Twitter is a state actor."); *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 40 (D.D.C. 2019) ("Facebook and Twitter . . . are private businesses that do not become 'state actors' based solely on the provision of their social media networks to the public."), *affirmed*, 816 Fed. App'x 497 (D.C. Cir. 2019); *Green v. YouTube, LLC*, 2019 WL 1428890, at *4 (D.N.H. Mar. 13, 2019) (there is no "state action giving rise to the alleged violations of [plaintiff's] First Amendment rights" by YouTube and other platforms that are "all private companies"); *Nyabwa v. FaceBook*, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26,

C. A CENSORED USER MAY HOLD THE GOVERNMENT LIABLE FOR FIRST AMENDMENT VIOLATIONS EVEN IN THE ABSENCE OF PRIVATE "STATE ACTION"

Huber's claims against Twitter must be analyzed on different terms than her claims against President Biden. There is no need for symmetry in this situation.

When the government exhorts private publishers to censor, the censored party's first and favored recourse is against the government. And the narrow path to holding private publishers liable as state actors proposed above in no way limits a plaintiff's ability to hold *governments* liable for their role in pressuring social media companies to censor user speech. Obviously, governments themselves are always state actors, and must always act constitutionally.

In First Amendment cases, there is a lower threshold for suits *against government agencies and officials* that coerce private censorship: the government may violate speakers' First Amendment rights with "system[s] of informal

---

2018) ("Because the First Amendment governs only governmental restrictions on speech, [plaintiff] has not stated a cause of action against FaceBook."); *Shulman v. Facebook.com*, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (Facebook is not a state actor); *Forbes v. Facebook, Inc*., 2016 WL 676396, at *2 (E.D.N.Y. Feb. 18, 2016) ("Facebook is a private corporation" whose actions may not "be fairly attributable to the state"); *Doe v. Cuomo*, 2013 WL 1213174, at *9 (N.D.N.Y. Feb. 25, 2013) (Facebook is not a state actor under the joint action test); *Tulsi Now, Inc. v. Google, LLC*, No. 19-CV-06444, 2020 WL 4353686 at *1 (C.D. Cal. Mar. 3, 2020) ("Google is not now, nor . . . has it ever been, an arm of the United States government."); *Perez v. LinkedIn Corp.*, No. 20-CV-07238, 2021 WL 519379 at *1, *4 (N.D. Cal. Feb. 5, 2021) ("Courts across the country have found social media companies are private, not state actors.").

censorship" aimed at speech intermediaries. *Bantam Books v. Sullivan*, 372 U.S. 58, 61, 71 (1963).

In *Bantam Books*, the Supreme Court found that "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" against book distributors were enough to violate the book publishers' First Amendment rights. *Id*. at 67. A state commission issued notices to book distributors that "certain designated books," published by plaintiffs, were "objectionable for sale," and that it was the commission's "duty to recommend to the Attorney General prosecution of purveyors of obscenity." *Id.* at 62. The commission also circulated the notices to local police, who usually visited the distributor "to learn what action he had taken." *Id*. at 62-63. Predictably, the distributor stopped selling the effectively banned books. *Id*. at 64. The publishers had standing and a First Amendment remedy against the state commission, even though it was the distributor's action that directly harmed the publishers' sales, and the government did not actually seize any books or prosecute anyone. *Id*. at 64 n.6.

More recently, in *Backpage.com v. Dart*, the Seventh Circuit stopped "a [government] campaign intended to crush [the website] Backpage's adult section ... by demanding that firms such as Visa and MasterCard prohibit the use of their credit cards to purchase any ads on Backpage." 807 F.3d 229, 230 (7th Cir. 2015). On official letterhead, the defendant sheriff requested that the credit card

companies "cease and desist" allowing payments for Backpage ads, citing the federal money-laundering statute. *Id*. at 231-32. According to the Seventh Circuit, the sheriff's letter, "in the absence of any threatening language[,] would have been a permissible attempt at mere persuasion." *Id*. at 238. But there was a threat, "Visa and MasterCard got the message[,] and cut all their ties to Backpage." *Id*. at 232. Thus, the court found that Backpage had a First Amendment remedy against the ongoing government coercion of credit card and financial services companies. *Id*. at 239. *See also Novak v. City of Parma*, 932 F.3d 421, 433 (6th Cir. 2019) (citing *Bantam Books*, 372 U.S. at 70) (reversing the dismissal of a claim that a police officer's letter and email to Facebook requesting that comments be removed were "administrative orders that constituted a prior restraint").

D. A NARROW PATH IS NECESSARY TO ACCOMMODATE THE LEGITIMATE CONCERNS FOR GOVERNMENT CO-OPTION OF CONTENT MODERATION SYSTEMS WITHIN THE FIRST AMENDMENT RIGHTS OF PUBLISHERS

1. Social media platforms have a First Amendment right to consult outside resources, including the government, in making editorial decisions

As explained in greater detail below, content moderation is a difficult and often fraught process that even the largest and best resourced social media companies struggle with, often to the frustration of users.

To even hope for fairness and consistency in their decisions, social media companies need to have breathing room to draw on outside resources. Indeed, the

First Amendment protects this information gathering part of their editorial process. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Applying state action theory too broadly would restrain and chill conversations about content moderation—not only between platforms and government experts, but also between platforms and users, and platforms and civil society. *Cf. Children's Health Def.*, 546 F. Supp. 3d at 916, 928 (dismissing state action claim against fact-checking service that contracted with Facebook).

Platforms seek feedback from users in a number of ways.

Reddit and Discord rely on certain users to moderate content through the practice of "community moderation." 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."[4] Discord employs a similar model.[5] Each site thereby empowers some users to remove and down-rank other users' speech if that speech is against the community's rules.[6] Platforms also

[4] *Moderator Guidelines*, Reddit, https://www.redditinc.com/policies/moderator-guidelines (effective Apr. 17, 2017).

[5] *Moderating on Discord*, Discord, https://discord.com/moderation (last visited June 2, 2022).

[6] *See, e.g., Reddiquette*, Reddit, https://reddit.zendesk.com/hc/en-us/articles/205926439-Reddiquette (last visited June 2, 2022).

commonly rely on users to report content that violates the law or the platform's policies.[7]

YouTube also relies heavily on others flagging content on its site as violating its rules. From January to March of this year, YouTube removed over 350,000 videos due to user complaints.[8]

Platforms also seek input from civil society groups, activists, and other stakeholders who are not necessarily their users. For example, amicus has joined efforts pressuring Facebook to end its ban on pictures of female nipples, which can harm users exploring gender and identity. In response, Facebook now allows some of these images, such as pictures of breastfeeding.[9] YouTube also has a "Trusted Flagger" program that prioritizes complaints from certain entities, including individuals and NGOs, that are "particularly effective" at notifying YouTube of violative content. From January to March of this year, the platform removed over

---

[7] *See, e.g., How to Report Things*, Facebook, https://www.facebook.com/help/181495968648557?rdrhc (last visited June 2, 2022).

[8] *YouTube Community Guidelines enforcement*, YouTube, https://transparencyreport.google.com/youtube-policy/removals (last visited June 2, 2022).

[9] Kari Paul, *Naked protesters condemn nipple censorship at Facebook headquarters*, The Guardian (June 3, 2019), https://www.theguardian.com/technology/2019/jun/03/facebook-nude-nipple-protest-wethenipple.

115,000 videos due to these complaints.[10] Twitter itself maintains a Trust and Safety Council, a group of independent organizations from around the world, that advises Twitter on its rules.[11]

Platforms also seek input from governments. Although concerning, this is appropriate where the government is uniquely situated to verify information—such as the location of polling places, a list of street closures, or a synopsis of the CDC's current COVID policies.

2. Nevertheless, a narrow path to platform liability must be preserved because of the special risks of government manipulation of content moderation

Amicus proposes a narrow, defined path to holding social media platforms liable as state actors; but it is a viable path in the correct case.

It is important to preserve a possible path because government involvement in private companies' content moderation processes raises human rights concerns not raised by the companies' consultations with other experts. The newly revised Santa Clara Principles, of which amicus curiae is a co-author, specifically scrutinize "State Involvement in Content Moderation." As set forth in the

---

[10] *YouTube Community Guidelines enforcement, supra* n. 9; *About the YouTube Trusted Flagger program*, YouTube, https://support.google.com/youtube/answer/7554338 (last visited June 2, 2022).

[11] *Advisory groups help us improve the health of the public conversation,* Twitter, https://about.twitter.com/en/our-priorities/healthy-conversations/trust-and-safety-council.

Principles:

> Companies should recognise the particular risks to users' rights that result from state involvement in content moderation processes. This includes a state's involvement in the development and enforcement of the company's rules and policies, either to comply with local law or serve other state interests. Special concerns are raised by demands and requests from state actors (including government bodies, regulatory authorities, law enforcement agencies and courts) for the removal of content or the suspension of accounts.[12]

The governmental manipulation of the already fraught content moderation systems to control public dialogue and silence disfavored voices raises classic First Amendment concerns; indeed, the platforms too must be able to sue the government in the proper circumstances.

And in the exceptional case when the criteria set forth above are met, including a legal bar to a remedy against the government, and there are no countervailing interests, *see Brentwood Acad.,* 531 U.S. at 295-96, relief may also be sought against the private actor.

II. INTERNET USERS ARE BEST SERVED WHEN SOCIAL MEDIA PLATFORMS CAN EXERCISE THEIR FIRST AMENDMENT-PROTECTED EDITORIAL FREEDOM

The "content moderation" undertaken by Twitter and practically every other social media site is not only constitutionally protected—it is the omnipresent and historic norm.

[12] The Santa Clara Principles, https://santaclaraprinciples.org/ (last visited June 2, 2022).

A. MODERATED PLATFORMS ARE THE HISTORIC NORM AND SERVE THE INTERESTS OF USERS AND THE PUBLIC GENERALLY

Twitter is not the first online service to moderate—or edit, or curate—the user speech it publishes. Online services, at least from their point of mass adoption, have all moderated user speech and have rarely published all legal speech submitted to their sites. From the beginning, they made editorial decisions about what they wanted communicated on their services and set rules for their online communities. For example, most platforms banned users from posting non-obscene sexual content, even though such speech is legal and enjoys First Amendment protection. Large-scale, outsourced content moderation emerged in the early 2000s.[13]

Internet users benefit from moderated platforms. Users may prefer environments that shield them from certain kinds of legal speech, including hateful rhetoric and harassment. Users may want a service that attempts to filter out misinformation by relying on sources they trust. And users uniformly want services to filter out junk content.

As a result, every major general-purpose social media service—those

[13] 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/.

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,'"[14] reserves the right to "address" content that attacks any religion or race.[15]

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."[16]

This First Amendment-protected editorial freedom also allows sites, from very large to very small ones, to limit user speech in order to appeal to specific interests.

Pinterest, a site designed to visually inspire creative projects, has "community guidelines" that "outline what we do and don't allow on Pinterest."[17]

---

[14] *Gettr*, https://gettr.com/onboarding (last visited June 2, 2022).

[15] *Terms of Use,* Gettr, https://gettr.com/terms (last visited June 2, 2022).

[16] *Website Terms and Conditions of Use and Agency Agreement*, Rumble, https://rumble.com/s/terms (last visited June 2, 2022).

[17] *Community Guidelines*, Pinterest, https://policy.pinterest.com/en/community-guidelines (last visited June 2, 2022).

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."[18]

Roblox, a rapidly growing social network where users build and play their own games, warns that its Community Standards "prohibit things that certain other online platforms allow."[19] 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 war crimes or human rights violations, including torture," and much political content, including any discussion of political parties or candidates for office.[20]

Strava, a social media platform for athletes, has Community Standards that prohibit posting content that is "harassing, abusive, or hateful or that advocates

---

[18] *Id*.

[19] *Roblox Community Standards*, Roblox, https://en.help.roblox.com/hc/en-us/articles/203313410-Roblox-Community-Standards (last visited June 2, 2022).

[20] *Id*.

violence."[21] One of Strava's main features is for cyclists and runners to share their routes, called "segments," on the platform; but Strava's Community Standards allow only "good segments" created with "common sense."[22] The Community Standards also require all users to be "inclusive and anti-racist."[23]

The Internet is also full of smaller specialized services with unique editorial viewpoints—from RallyPoint, a social media platform for members of the armed services,[24] to Ravelry, a social media site focused on knitting.[25] Users can choose between ProAmericaOnly, which promotes itself as "Social Media for Conservatives" and promises "No Censorship | No Shadow Bans | No BS | NO LIBERALS"[26] and The Democratic Hub, 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,"[27] and everything else on the political spectrum. And we can choose between Vegan

---

[21] *Strava Terms of Service*, Strava, https://www.strava.com/legal/terms#conduct (updated Dec. 15, 2020).

[22] *Strava Community Standards*, Strava, https://www.strava.com/community-standards (last visited June 2, 2022).

[23] *Id.*

[24] RallyPoint, https://www.rallypoint.com/ (last visited June 2, 2022).

[25] Ravelry, https://www.ravelry.com (last visited June 2, 2022).

[26] ProAmericaOnly, https://proamericaonly.org (last visited June 2, 2022).

[27] The Democratic Hub, https://www.democratichub.com (last visited June 2, 2022).

Forum, which does not require its users to be vegan, but since it is a site designed to promote a vegan lifestyle, "will not tolerate members who promote contrary agendas,"[28] and SmokingMeatsForums.com, a "community of food lovers dedicated to smoking meat," which more generally bans "fighting or excessive arguing" in its user discussion forums.[29]

1. Moderation Means that Some User Content Will Be Removed, Downranked, or Otherwise Moderated

All of the sites discussed above use editing and curation: they reject, downrank, hide, label, or otherwise moderate user speech.[30] And this sometimes frustrates, angers, or perplexes both the users who posted it and the users who expected to see it.

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

But frequently, sites just make mistakes. Content moderation at scale is impossible to do perfectly, and nearly impossible to do well.[31] Even when using a

---

[28] *Membership Rules*, Vegan Forum, https://www.veganforum.org/help/terms/ (last visited June 2, 2022).

[29] *The Rules*, SmokingMeatForums.com, https://www.smokingmeatforums.com/help/rules/ (last visited June 2, 2022).

[30] Eric Goldman, *Content Moderation Remedies*, 28 Mich. Tech. L. Rev. 1 (2021).

[31] *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.

set of precise rules or carefully articulated "community standards," moderated platforms often struggle to draw workable lines between permitted and forbidden speech. Every online forum for user speech, not just the dominant social media platforms, struggles with this problem.

This is neither a new problem, nor one limited to U.S. conservative politics. 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 became the first blogger to receive the Knight International Journalism Award.[32]

And government's attempts to influence content moderation dates back just as far: Abbas's account was restored only after the U.S. State Department communicated with YouTube's new owner, Google.[33]

Platforms continue to make a variety of contentious and erroneous decisions every day. In January 2021, Facebook's updated policy to remove "harmful

---

[32] 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.

[33] *Id.*

conspiracy theories" resulted in it disabling a punk rock band's page because its name, Adrenochrome, is a chemical that was a central part of the QAnon conspiracy theory.[34] 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.[35] Sex worker advocates have documented how they are routinely shadow-banned across a variety of social media platforms.[36] YouTube has removed videos documenting atrocities in Syria and elsewhere under its graphic violence policy.[37] YouTube has also been accused of restricting and demonetizing LGBTQ+ content.[38]

---

[34] *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 June 2, 2022).

[35] 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.

[36] *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.

[37] 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; Kevin Anderson, *YouTube Suspends Egyptian Blog Activist's Account*, The Guardian, Nov. 28, 2007, https://www.theguardian.com/news/blog/2007/nov/28/youtubesuspendsegyptianblog.

[38] Megan Farokhmanesh, *YouTube Is Still Restricting and Demonetizing LGBT Videos—and Adding Anti-LGBT Ads to Some*, The Verge, June 4, 2018,

Twitter is thus just one example of an actively curated, large social media platform that makes controversial moderation decisions on content from around the world; its actions against Huber are in no way uncommon. For example, Twitter has been repeatedly criticized for moderating pro-Palestinian tweets, including removing those reporting on the events in Sheikh Jarrah in 2021[39] and blocking accounts associated with a major Palestinian news publication.[40] In 2017, users protested that Twitter had marked tweets containing the word "queer" as offensive.[41]

2. In Praise of the (Hypothetical) Unmoderated Platform

A legal regime of editorial freedom also leaves open the possibility of unmoderated platforms, where the operator plays no role in selecting content or ordering its presentation. Although unmoderated forums are at present highly rare, they conceivably benefit internet users and the public generally: they eliminate

---

https://www.theverge.com/2018/6/4/17424472/youtube-lgbt-domentization-ads-alogrithm.

[39] Article 19, *Sheikh Jarrah: Facebook and Twitter silencing protestors, deleting evidence*, May 10, 2021, https://www.article19.org/resources/sheikh-jarrah-facebook-and-twitter-silencing-protests-deleting-evidence/

[40] Al Jazeera, *Twitter suspends accounts of Palestinian Quds News Network*, Nov. 2, 2019, https://www.aljazeera.com/news/2019/11/2/twitter-suspends-accounts-of-palestinian-quds-news-network

[41] 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.

corporate editors, inhibiting the creation of silos, and allow users to engage in free-form discussions and debates of their choosing and find unexpected sources of ideas and information. Users need not be concerned that their communications are actively screened, nor that they may accidentally run afoul of content rules. Unmoderated platforms can be especially valuable 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 no large-scale positive models of unmoderated forums. 8kun,[42] formerly 8chan, is probably the most well-known example and it is notoriously rife with hateful speech.

Nevertheless, liability regimes must allow for the possibility of positive models.

B. HUBER'S STATE ACTION THEORIES WOULD VIOLATE ONLINE PLATFORMS' FIRST AMENDMENT RIGHTS

This Court must account for Twitter's considerable First Amendment interests in applying any state action theory.

Contrary to Huber's argument, every court that has ruled on the issue has rightfully found that private entities that operate online platforms for speech and

[42] 8chan, https://en.wikipedia.org/wiki/8chan (last visited June 2, 2022).

that open those platforms for others to speak enjoy a First Amendment right to edit and curate that speech.

The Supreme Court has long held that private publishers have a First Amendment right to control the content of their publications. *Miami Herald Co. v. Tornillo*, 418 U.S. 241, 254 (1974); *see also Los Angeles v. Preferred Comms., 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"); *cf. Manhattan Community Access Corp.*, 139 S. Ct. at 1930 (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").

Though phrased in terms of traditional print newspaper publishers, *Tornillo* has been applied in a variety of speech contexts, including once in the 2019 and thrice in the 2018 Supreme Court terms. *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); *National Inst. of Family Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring). In one noteworthy non-press setting, the Supreme Court applied *Tornillo*, among other authorities, in holding that the organizers of a parade had a

First Amendment right to curate its participants, and thus could not be required to include a certain message. *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 Eleventh Circuit recently joined the many other federal courts that have applied *Tornillo* to protect the right of social media companies to moderate their users' posts. The court regarded *Tornillo* as "the pathmarking case" on editorial judgment and upheld an injunction against a Florida law that would have required online platforms to publish speech from and about political candidates and from "journalistic enterprises" as defined by the law. *NetChoice*, 34 F.4th at 1213. "Platforms employ editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups." *Id*. Users like Huber may feel that platforms like Twitter have treated them unfairly, but "private actors have a First Amendment right to be 'unfair'—which is to say, a right to have and express their own points of view." *Id*. at 1228 (citing *Tornillo*, 418 U.S. at 258).

Moreover, this Court has specifically rejected the argument that a social media platform is a public forum that loses its editorial freedom and must remain open to all as a government-controlled forum would be. *See Prager University v Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020).

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

Rather than having courts deem private online platforms state actors, thus mandating publication, Internet users are best served by "consensual . . . mechanisms," in the words of the Supreme Court in *Tornillo*, 418 U.S. at 254, particularly the voluntary adoption of a human rights framework for content moderation.

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 aforementioned Santa Clara Principles.[43] 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

[43] Santa Clara Principles, https://www.santaclaraprinciples.org/. Relevant to the issues raised in this case, the Santa Clara Principles establish a standard whereby companies voluntarily disclose to users when a government has requested action on that user's posts, and other transparency measures regarding interactions with governments regarding content moderation.

companies" that make government mandates inappropriate.[44] And the Internet Commission's annual Accountability Report aims to identify best practices scaled to an online service's maturity.[45]

CONCLUSION

For the foregoing reasons, amicus respectfully requests that the Court affirm district court's dismissal of Twitter and Jack Dorsey from this matter.

Dated: August 3, 2022

By: /s/ Mukund Rathi

Mukund Rathi
David Greene
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel.: (415) 436-9333
Email: mukund@eff.org, davidg@eff.org

Counsel for Amicus Curiae Electronic Frontier Foundation

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

[45] *Accountability Report 2.0*, Internet Comm'n (2022), https://inetco.org/report.

CERTIFICATE OF COMPLIANCE

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

1. This Brief of Amicus Curiae Electronic Frontier Foundation in Support of Defendants-Appellees Twitter, Inc. and Jack Dorsey, in his official capacity as Chief Executive Officer of Twitter and in his individual capacity and Affirmance complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,222 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: August 3, 2022

By: /s/ Mukund Rathi
Mukund Rathi

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 3, 2022.

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

Dated: August 3, 2022

By: /s/ Mukund Rathi
Mukund Rathi