No. 18-15712

IN THE

United States Court of Appeals for the Ninth Circuit

PRAGER UNIVERSITY,

Plaintiff-Appellant,

v.

GOOGLE LLC and YOUTUBE, LLC,

Defendants-Appellees.

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

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES GOOGLE LLC AND YOUTUBE, LLC AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel certifies that the Chamber of Commerce of the United States of America is not a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

Dated: November 7, 2018

/s/ *Colleen E. Roh Sinzdak*
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No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases raising issues of concern to the nation's business community. This is one of those cases. Because businesses across industries open their private property up as forums for speech, the Chamber's members have an interest in seeing that this Court properly applies the First Amendment. Moreover, the Chamber's members stand to lose their customers, their revenues, and their reputations if the First Amendment restricts them from regulating objectionable content on their own property. Pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-2(a), the Chamber

submits this brief without an accompanying motion for leave to file or leave of court because all parties have consented to its filing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

There is nothing novel about a business offering space for speech by members of the public. Since well before the dawn of the internet, grocery stores have provided bulletin boards for community members to post announcements; cafes have offered open mic nights for customers to present their poetry or their music; and magazines and newspapers have sold or given away space to customers that wish to advertise a product or celebrate a marriage, to name just a few examples.

What *is* novel is the suggestion that these businesses may be subject to liability under the First Amendment when they offer their privately owned space for public speech. That proposition is at odds with the plain text of the First Amendment and decades of precedent, which dictate that the First Amendment has "no part to play" when a private company regulates speech in spaces it opens to the public. *Hudgens* v. *NLRB*, 424 U.S. 507, 521 (1976).

Appellant attempts to evade this difficulty by shoehorning the current case into the exceedingly narrow exception that treats a private entity as a state actor when it is fulfilling a role that has been "traditionally exclusively" performed by government actors. *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 352 (1974). But

Appellant's effort to fit Google's video sharing website, YouTube, into that exception fails. It is unclear that the state has *ever* operated a video sharing service, and it certainly hasn't done so traditionally or exclusively. Applying First Amendment scrutiny to YouTube would therefore blow open the public function exception, broadly exposing private entities to constitutional limitations that are appropriate for the government alone. And rewriting the First Amendment to govern private entities like Google would require courts to invent new doctrine: How, for example, does one apply a strict scrutiny analysis centered on the strength of the government's interest in regulating speech when it isn't the government that is doing the regulating?

The consequences of such a holding would be devastating for the companies and the public as a whole. If the First Amendment applies to private businesses that sponsor speech, an entity will be limited in its ability to regulate objectionable content, resulting in financial and reputational harm for the company. And the public will see fewer opportunities to consume and share speech, as companies inevitably close or limit spaces open to public speech to avoid First Amendment liability.

None of this is necessary: Unlike the government, private entities face market forces that naturally push them towards tolerance for a greater variety of viewpoints and a wider audience. If they do not, other companies will. There is

therefore no need to distort the First Amendment to force companies to facilitate speech against their will.

In short, the district court got it right: YouTube and Google are not subject to constitutional scrutiny. This Court should affirm.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT APPLY TO PRIVATE COMPANIES.

"It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by *government*, federal or state." *Hudgens*, 424 U.S. at 513 (emphasis added); *see also, e.g.*, *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 566 (1995) ("[T]he guarantee[ ] of free speech * * * guard[s] only against encroachment by the *government* and erect[s] no shield against merely private conduct" (emphasis added) (internal quotation marks and alteration omitted)). The First Amendment was created by Framers who feared "silence coerced by law" and "the occasional tyrannies of governing majorities" that might be tempted to "discourage thought" through "fear of punishment." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (quoting *Whitney* v. *California*, 274 U.S. 357, 375–376 (1927) (Brandeis, J., concurring)). They therefore drafted a constitutional amendment that would make free speech a "fundamental principle of the American government." *Id.*

They did not, however, draft the First Amendment to restrict the conduct of

private entities. *See* U.S. CONST. amend. I ("*Congress* shall make no law * * * abridging the freedom of speech" (emphasis added)). After all, companies lack the government's incentive to "discourage thought" in order to protect political power, and they lack the government's ability to back up their regulations through "fear of punishment" by imprisonment or civil fines. *Sullivan*, 376 U.S. at 270. Indeed, far from being regulated by the First Amendment, companies enjoy its protection from improper government regulation: The Supreme Court has recognized, for example, that the First Amendment dictates that "[f]or corporations, as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas and Elec. Co.* v. *Pub. Utils. Comm'n of California*, 475 U.S. 1, 16 (1986).

Flouting the uniform message of this text, history, and precedent, Appellant contends that the First Amendment limits Google's ability to regulate the videos it hosts on its privately owned website, YouTube. *See, e.g.*, Appellant Br. 34. Appellant argues that this follows from state-action doctrine, which permits a court to apply constitutional provisions to private actors when those actors are so closely aligned with the government that they may properly be considered the "State." *See id.* Specifically, Appellant contends that Google falls within the state-action requirement's "public function" exception, under which a private company may face First Amendment scrutiny if it exercises "powers traditionally exclusively

reserved to the State," like running elections or municipal parks. *Jackson*, 419 U.S. at 352 (citing *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Evans* v. *Newton*, 382 U.S. 296 (1966)).

To recite this argument is essentially to refute it. YouTube is a website where users upload and view videos. Running an online video sharing platform is not a "power[ ] traditionally exclusively reserved to the State"—indeed, it is not something Appellant alleges the state has ever done, much less exclusively. *Id.* Without completely taking on any powers traditionally reserved to the government, YouTube is not saddled with the accompanying responsibilities. It may therefore regulate speech on its private platform without being subject to constitutional scrutiny.

The case law Appellant uses to support its contrary position only demonstrates how far afield it has strayed: Appellant relies on *Marsh* v. *Alabama*, 326 U.S. 501 (1946), a case that held that a business may be subject to First Amendment scrutiny when it engages in the quintessential governmental task of running a town. Facilitating video sharing on the internet is about as far from running a company town as one could imagine, and even if there were some similarities, that would not be sufficient to justify applying the First Amendment in this case: The Supreme Court has made very clear that *Marsh* cannot be applied where a company undertakes a task *similar* to running a town. *See Lloyd Corp.* v.

Tanner, 407 U.S. 551, 553, 569 (1972) (rejecting the contention that running a mall spanning fifty acres and including private sidewalks, gardens, and an auditorium was "comparable" to running a company town). The task must be virtually identical. *See id.*

Appellant also relies on this Court's decision in *Lee* v. *Katz*, 276 F.3d 550 (9th Cir. 2002). *See* Appellant Br. 37. But in *Lee*, the government had actually delegated the task of running a municipal park to a company. 276 F.3d at 552. Running a park is a quintessentially governmental task, *see Jackson*, 419 U.S. at 352 (citing *Evans*, 382 U.S. 296), very different from running a video sharing site. But even then, the *Lee* Court declined to rest exclusively on the fact that the private party was performing this traditional governmental function; the court also relied heavily on the fact that the government "delegated" this responsibility. 276 F.3d at 556. That delegation demonstrated that the *Lee* defendant—unlike Google—was standing squarely in the shoes of the government. *Id.*

In truth, *no* precedent of this Court or any other supports the novel proposition that Appellant advances. Private entities simply are not subject to First Amendment constraints merely because they open up a space for public expression.

Moreover, expanding the concept of "public function" in the way Appellant advocates would require changing the way courts balance interests in First

Amendment cases involving private parties. Currently, the public function exception is so narrow that it only applies when a state has essentially "delegated" authority to a private actor. *Id.*; *see also Hudgens*, 424 U.S. at 519. In those cases, district courts have no problem applying the standard First Amendment balancing tests and asking whether there is a sufficiently important "*government* interest" to justify the speech restriction at stake. *See, e.g.*, *Lee* v. *Katz*, No. CV 00-310-PA, 2004 WL 1211921, at *7 (D. Or. June 2, 2004) (emphasis added) (citing *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The district court's opinion on remand in *Lee* is a good example. *See id.* There, the district court upheld the private company's speech restrictions, concluding that regulation of the public park served a substantial governmental interest in "ensuring public safety on the Commons." *See id.* The court noted that asking whether the regulation served a "significant government interest" was appropriate, even though the regulations were made by a private company, because the company "is regarded as a 'state actor' under the Ninth Circuit's prior decision." *Id.*

If this Court were to expand the public function exception to make it apply to private companies such as YouTube that open their spaces up as forums for expression, the current doctrine would fall apart. How would a district court determine whether there was a significant *government* interest in regulating the

speech at issue when the activities in question—like video sharing—are largely foreign to governments? And what basis would a court have to insist that a private company run its business in accordance with an interest of the government? Moreover, when it is the state that is being regulated under the First Amendment, multiple doctrines determine the level of scrutiny that will be applied based on the nature of the forum and whether the state is involved in "government speech." *See, e.g.*, *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009). Courts would have to find new ways to apply these complex doctrines to a corporate setting that is very different from the government context for which they were designed. Applying the current conception of the public function test avoids these intractable problems.

Nor may courts avoid these difficulties by analyzing the strength of the *corporate* interest involved, rather than the governmental interest. The current tests insist on a significant *government* interest for good reason: The First Amendment itself addresses the government. Fashioning a new balancing test to incorporate some kind of compelling private-interest test would stray from the text and history of the amendment. It would also be a practical nightmare: Courts are ill equipped to scrutinize business interests or to make the necessarily subjective determination as to whether a particular company action is best suited to address the company's goals. *See, e.g.*, *United Copper Sec. Co.* v. *Amalgamated Copper*

Co., 244 U.S. 261, 263–264 (1917) (explaining that "business questions" are "left to the discretion of the directors" and courts "seldom" interfere with those decisions absent misconduct or a conflict of interest); *see also Auerbach* v. *Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979) ("[C]ourts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments. * * * [B]y definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility."). Appellant has offered no good reason why this Court should adopt a rule that would force courts down this uncharted road.

II. APPLYING THE FIRST AMENDMENT TO PRIVATE ENTITIES WOULD HAVE DISASTROUS CONSEQUENCES.

Holding that the First Amendment applies to private companies that operate forums would lead to a raft of harmful consequences. It would hurt companies by forcing them to align with views that they or their customers find objectionable. And it would hurt the public by providing fewer opportunities for speech, not more.

A. Subjecting Companies To First Amendment Scrutiny Will Inflict Financial And Reputational Costs On Affected Businesses.

Subjecting private companies to constitutional restraint under the First Amendment would unfairly restrict their ability to control what goes on in the

spaces they own and operate. When the First Amendment applies, an entity is generally barred from imposing viewpoint-based restrictions on content. *See, e.g.*, *Hudgens*, 424 U.S. at 520 (citing *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975)). Applying such a limit to a private company would severely curtail the company's capacity to police speech it finds objectionable, a result that is both unlawful and deeply unfair to the affected businesses.

It is unlawful because it will give users, not companies, the final say over what occurs in the company's space. That is flatly inconsistent with the Supreme Court's insistence that business owners have property rights that "must be respected and protected" alongside the First Amendment rights of all citizens. *Lloyd*, 407 U.S. at 570; *Hudgens*, 424 U.S. at 517 (explaining that prohibiting a private shopping mall from excluding picketers would allow "the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it" (internal quotation marks omitted)). Moreover, a rule that impairs companies' capacity to monitor content shared in their privately owned spaces deprives businesses of the ability to decide which ideas they want to associate with. The Supreme Court has recognized that a corporation's First Amendment rights are violated where it is forced "to be publicly identified or associated with another's message." *See Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470–471 (1997).

It is deeply unfair because a company's forced association with views to which it objects will lead to financial and reputational harms. For example, a company that has built a reputation on civility and decency may be forced to allow users to post content that is vulgar or offensive. A business that caters to all ages may be required to permit user-content that is unsuitable for young viewers. And, more generally, any company might be forced to host material that undermines its mission or values.

The compelled association with these objectionable views will drive off audiences and thereby decrease a company's customer base and resulting revenues. More subtly, the forced association with objectionable material may alter the host company's reputation, a particularly grave result given that companies rely on their reputations to draw in new customers and retain old ones. *See* DELOITTE, GLOBAL SURVEY ON REPUTATION RISK 2 (2015), *available at* https://www2.deloitte.com/content/dam/Deloitte/za/Documents/risk/NEWReputationRiskSurveyReport_25FEB.pdf (stating that more than twenty five percent of a company's market value can be attributed to its reputation). Loyal customers who chose a company because of its values will take their business elsewhere when they see those values impugned by material in a company-sponsored space. That may lead to tarnished brands, lost revenue, and, for publicly traded companies, lowered stock prices. *See id.* at 7. In short, companies' reputations—and in turn

their bottom lines—will suffer if they are forced to put their weight behind all speakers, regardless of their viewpoint.

B. Appellant's Rule Will Lead To Fewer Outlets For Speech.

Adopting Appellant's rule will also harm the public. Subjecting private companies to constitutional scrutiny will make companies hesitant to allow users to post content and will ultimately lead to "less speech, not more," a result at odds with the First Amendment. *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 680 (1998); *see also Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of New York*, 447 U.S. 557, 592 (1980) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market * * * ." (quoting *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting)).

Many companies will stop operating forums where users post content if they cannot retain some control over what appears on them. Likewise, businesses will be deterred from opening new forums for sharing content because of the costs associated with potential First Amendment challenges. Ultimately, this will lead to a decrease in privately sponsored forums for speech. *See Arkansas Educ. Television Comm'n*, 523 U.S. at 681 ("Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other," a company may decide that "the safe course is to avoid controversy,' and by so

doing diminish the free flow of information and ideas." (internal quotation marks and ellipses omitted)). And it is not only the internet that will be affected. Grocery stores may take down their announcement boards, and cafes may cancel their open mic nights if they fear that these activities will open them to First Amendment litigation.

Further, businesses that do keep open their spaces for public speech may paradoxically take a ruling against YouTube as encouragement to engage in *more* censorship. After all, Appellants claim that YouTube may be subject to First Amendment liability precisely because YouTube allows members of the public to present a broad range of content similar to what one might see in a state-operated public forum. *See, e.g.*, Appellant Br. 29. The message, therefore, is that a website or other business may avoid First Amendment scrutiny by more tightly limiting the views it allows—by, for example, screening out those on one side of the political aisle. *Cf.* Eric Goldman, *Speech Showdowns at the Virtual Corral*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 845, 851 (2005) ("Converting private virtual world providers into state actors could, paradoxically, limit speech rather than increase it."). That cannot possibly serve "the marketplace of ideas" the First Amendment is designed to protect. *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017).

C. Inflicting These Harms Is Unnecessary Because Market Forces Will Lead To More Openness By Themselves.

Appellant cannot justify the harms its rule would inflict on companies and the public based on any real need to impose First Amendment liability on private entities like YouTube. To the contrary, there are important differences between public and private actors that make it appropriate to apply First Amendment scrutiny to the former but not the latter.

As noted, public officials have incentives to squash speech, particularly critical speech, in order to entrench their own power. *See, e.g.*, Richard Klein, *The Empire Strikes Back: Britain's Use of the Law to Suppress Political Dissent in Hong Kong*, 15 B.U. INT'L L.J. 1 (1997). By contrast, private companies have market incentives to keep their forums as open as possible. Creating an expansive library of content will typically increase a company's customer base and improve a company's economic wellbeing. For example, a website that has a wide range of content appealing to a variety of viewers will typically enjoy a larger market share and, in turn, a higher potential to profit from selling advertisements. *See, e.g.*, Robert D. Buzzell et al., *Market Share—a Key to Profitability*, HARV. BUS. REV., Jan. 1975; Masoud Nosrati et al., *Internet Marketing or Modern Advertising! How?*, 2 INT'L J. ECON. MGMT. & SOC. SCIS. 56, 56 (2013) ("Most web sites, with the exception of transaction ones such as eBay, generate the preponderance of their revenues from the sale of advertising inventory * * * ."); INTERNET ADVERTISING

BUREAU, IAB INTERNET ADVERTISING REVENUE REPORT, FULL YEAR 2017 AND Q4 2017, at 5 (May 10, 2018), *available at* https://www.iab.com/wp-content/uploads/2018/05/FY-2017-IAB-Internet-Advertising-Revenue-IAB-Webinar-Presentation-05-10-2018.pdf (noting that digital ad revenue increased by 21 percent to $88 billion in 2017). At the same time, companies that do not permit content from certain types of viewers may soon get competition from other websites that will cater to those who have been excluded.

In other words, the market will often do precisely what the First Amendment must accomplish with respect to state actors: It will prompt companies to open spaces that welcome a broad range of views, while encouraging new businesses to open fora for speakers that may previously have been silenced. Accordingly, there is no reason for this Court to rewrite the First Amendment to make it apply to private companies like YouTube.

CONCLUSION

For the forgoing reasons, the Court should affirm the decision below.

November 7, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,620 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

/s/ *Colleen E. Roh Sinzdak*
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 7, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Colleen E. Roh Sinzdak*
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