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**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

KIMBERLY CARLESTE
NEWMAN, et al.,

Plaintiffs,

vs.

GOOGLE LLC, et al.,

Defendants.

Case No. 5:20-cv-04011-LHK

**MEMORANDUM OF LAW FOR
INTERVENOR UNITED STATES
IN SUPPORT OF THE
CONSTITUTIONALITY OF
47 U.S.C. § 230(c), AND IN RESPONSE
TO DEFENDANTS' MOTION TO
DISMISS**

Action Filed: June 16, 2020
Trial Date: None Set
Rule 5.1 Notice Filed: June 16, 2020

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INTRODUCTION

As part of this action seeking to impose liability for the alleged content moderation decisions of the Internet platform YouTube, Plaintiffs have raised a constitutional challenge to § 230(c) of the Communications Decency Act of 1996 (“CDA”) (Pub. L. No. 104-104, § 509, 110 Stat. 56, 138, codified at 47 U.S.C. § 230(c)). In seeking Rule 12(b)(6) dismissal of the operative complaint, YouTube has invoked the statute as an affirmative defense to Plaintiffs’ claims, and Plaintiffs have responded by arguing, among other things, that the statute violates the First Amendment insofar as it shields YouTube from liability for Plaintiffs’ claims. Plaintiffs also seek a declaratory judgment to that effect.

The United States intervenes today in response to Plaintiffs’ constitutional challenge, as the United States did in the prior action to which this action is related, *Divino Group LLC v. Google LLC*, No. 5:19-cv-04749-VKD (N.D. Cal.) (“*Divino*”). The similarity of the cases is indicated by Plaintiffs’ attachment of the United States’ brief in intervention in *Divino* to the operative complaint in this action as Exhibit C. The United States relies on the arguments in that brief in intervention, and limits its arguments herein only to points necessary to address matters not raised in the *Divino* brief. See Ex. C to Rev. 2d Am. Compl (“SAC”), Doc. 27 at ECF pp. 227-43 (“U.S. *Divino* Br.”).

First, under the doctrine of constitutional avoidance, this Court should start by deciding the statutory and common law arguments raised in the Rule 12(b)(6) motion, because those non-constitutional grounds may obviate the need for decision on any constitutional question. See *Divino*, 2021 WL 51715, at *11 (N.D. Cal. Jan. 6, 2021) (declining to decide constitutional question, including because of avoidance doctrine). Because the United States is intervening here for the limited purpose of defending the constitutionality of § 230(c), it does not take a position on whether Plaintiffs have plausibly alleged any claim for relief, or whether, if plausibly alleged, any claim falls within the liability limitation provided by § 230(c).

1 *Second*, if the Court concludes that it must reach the constitutional question,
2 Plaintiffs' challenge should be rejected on the merits. Section 230(c) does not
3 regulate Plaintiffs' primary conduct. Instead, the statute establishes a rule
4 prohibiting liability for certain conduct by online platforms, including YouTube.
5 Assuming the liability prohibition is at issue in this action, that liability prohibition
6 would not violate the First Amendment because—as *Prager University v. Google*
7 *LLC*, 951 F.3d 991 (9th Cir. 2020) (“*Prager III*”) squarely held—YouTube is not a
8 state actor capable of denying freedom of speech, and § 230(c) thus would not deny
9 Plaintiffs any constitutional claim they otherwise would have. *See U.S. Divino Br.*
10 at ECF pp. 239-43.

11 Somewhat varying from their approach to the constitutional argument in
12 *Divino*, Plaintiffs now rely almost entirely on the plurality opinion in *Denver Area*
13 *Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996),
14 in arguing that § 230(c) is unconstitutional. But the *Denver Area* plurality opinion
15 cannot be read to support an expansion of the state action precedents applied in
16 *Prager III*. *See Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 839-41 (9th Cir.
17 2017). Plaintiffs have not alleged in this case a relationship between YouTube and
18 the government anywhere akin to the unusual relationship at issue in *Denver Area*.
19 So this Court need go no further than to follow *Prager III*, and hold that YouTube
20 is not a state actor constrained by the First Amendment. *See Divino*, 2021 WL
21 51715, at *7 (following *AT&T Mobility* in refusing to extend *Denver Area*
22 plurality).

23 In short, as in *Divino*, if Plaintiffs' constitutional challenge in this action to
24 § 230(c) is reached after deciding all non-constitutional questions, that challenge
25 should be rejected.

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