

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24<sup>th</sup> day of September, two thousand twenty-one.

PRESENT:

ROSEMARY S. POOLER,  
RICHARD C. WESLEY,  
SUSAN L. CARNEY,  
*Circuit Judges.*

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JAMES DOMEN, AN INDIVIDUAL, CHURCH UNITED, A  
CALIFORNIA NOT-FOR-PROFIT CORPORATION,

*Plaintiffs-Appellants,*

v.

No. 20-616-cv

VIMEO, INC., A DELAWARE FOR-PROFIT CORPORATION,

*Defendant-Appellee.*

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FOR APPELLANTS:

NADA N. HIGUERA, Tyler & Bursch,  
LLP (Robert H. Tyler, *on the brief*),  
Murrieta, CA.

FOR APPELLEE:

MICHAEL A. CHEAH, General Counsel,  
Vimeo, Inc., New York, NY (Jean-Paul

Jassy, Kevin L. Vick, Elizabeth H. Baldrige, Jassy Vick Carolan LLP, Los Angeles, CA, *on the brief*).

Samuel C. Leifer, Patrick J. Carome, Ari Holtzblatt, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, MA, and Washington, DC, for The Internet Association, *Amicus Curiae in support of Defendant-Appellee*.

Appeal from a judgment of the United States District Court for the Southern District of New York (Stewart D. Aaron, *M.J.*).

**UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment entered on January 17, 2020, is **AFFIRMED**.

Plaintiffs-Appellants James Domen and Church United allege that Vimeo, Inc., discriminated against them on the basis of their religion and sexual orientation by deleting Church United’s account from Vimeo’s online video hosting platform. The district court granted Vimeo’s motion to dismiss on the grounds that Section 230 of the Communications Decency Act (“CDA”) protects Vimeo from this suit and that Appellants failed to state a claim. The district court concluded that Vimeo deleted Church United’s account because of Church United’s violation of Vimeo’s published content policy barring the promotion of sexual orientation change efforts (“SOCE”) on its platform. Vimeo’s enforcement of this policy, in turn, fell within the confines of the publisher immunity provided by Section 230(c)(1) and the immunity to police content created by Section 230(c)(2). The district court also found that Appellants failed to state a claim on any of the counts listed in the amended complaint. We previously affirmed the judgment of the district court in opinions dated March 11, 2021 and July 21, 2021. Having vacated those decisions, we issue this summary order in their place.

Appellants argue that Vimeo discriminated against them based on their religion and sexual orientation, which they term “former” homosexuality: by deleting Church United’s

entire account, as opposed to only the videos at issue, and by permitting other videos with titles referring to homosexuality to remain on the website. However, Appellants' conclusory allegations are insufficient to raise a plausible inference of discrimination and they have failed to state a claim under either the New York Sexual Orientation Non-Discrimination Act or the California Unruh Act.<sup>1</sup> Therefore, we AFFIRM the judgment of the district court.

## BACKGROUND

These facts are taken from Plaintiffs' amended complaint and are assumed to be true for the purposes of this appeal.

James Domen is the president and founder of the non-profit organization Church United.<sup>2</sup> Domen alleges that he "was a homosexual" for three years but then, "because of his desire to pursue his faith in Christianity, he began to identify as a former homosexual." App'x at 47. Domen shares his story through Church United to connect with others in California who have had similar experiences. Church United was founded in 1994 and is a California non-profit religious corporation. It seeks to "equip pastors to positively impact the political and moral culture in their communities," and it has over 750 affiliated pastors. App'x at 47. The organization claims to "focus on the spiritual heritage of the United States" by attempting to connect with "nationally-known speakers, including elected officials . . . who vote to support a biblical worldview." App'x at 47.

Vimeo is a Delaware for-profit corporation headquartered in New York. Founded in 2004, it provides an online forum that allows users to upload, view, and comment on videos. Videos hosted on Vimeo include music videos, documentaries, live streams, and others.

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<sup>1</sup> We do not reach the district court's conclusions regarding Section 230(c).

<sup>2</sup> Because Domen is the president and founder of Church United and his claims are co-extensive with those of Church United, we generally refer to Domen and Church United together as "Church United," "Appellants," or "Plaintiffs."

Vimeo's Terms of Service expressly prohibit content supportive of SOCE. They proscribe content which "[c]ontains hateful, defamatory, or discriminatory content or incites hatred against any individual or group." *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 599 (S.D.N.Y. 2020). They also incorporate Vimeo's Guidelines. *See id.* (quoting the Terms of Service: "[a]ll videos you submit must also comply with the Vimeo Guidelines, which are incorporated into this Agreement."). The Guidelines include a section entitled, "How does Vimeo define hateful, harassing, defamatory, and discriminatory content?," which states that Vimeo will "generally remove" several categories of videos, including those that "promote Sexual Orientation Change Efforts (SOCE)." *Id.* To upload a video to Vimeo's platform, all users must accept Vimeo's Terms of Service agreement. *See Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 84 (2d Cir. 2016) ("All Vimeo users must accept its Terms of Service."). Appellants agreed to the Terms of Services and Guidelines by creating an account and uploading videos to the website. *Domen v. Vimeo, Inc.*, No. 8:19-cv-01278-SVW-AFM, 2019 WL 4998782, at \*2-3 (C.D. Cal. Sept. 4, 2019) (applying the Terms of Service agreement's forum selection clause to Appellants' claims).

In October 2016, Church United created a Vimeo account to upload videos promoting the organization, including "videos addressing sexual orientation as it relates to religion." App'x at 49. Church United allegedly uploaded 89 videos over the following two years. At some point, Church United upgraded to a professional account, which requires a monthly fee in exchange for access to more features and bandwidth.

On November 23, 2018, Vimeo e-mailed Domen, informing him that a moderator had marked the Church United account for review. The e-mail explained, "Vimeo does not allow videos that promote [SOCE]." App'x at 58. Vimeo instructed Church United to remove the videos and warned that if Church United did not do so within 24 hours, Vimeo might remove the videos or the entire account. It also instructed Church United to download the videos as soon as possible to ensure that the organization could keep them in case Vimeo deleted the account. Church United claims that five of its videos were flagged as violating Vimeo's policies:

- Video One: a two-minute video where Domen explained “his life story, his preferred sexual orientation, the discrimination he faced, and his religion.” App’x at 49.
- Video Two: a promotion video for “Freedom March Los Angeles,” allegedly an event where “former homosexuals” gather. App’x at 50.
- Video Three: an NBC-produced documentary segment about SOCE. App’x at 50.
- Video Four: a press conference with “the founder of Desert Stream” relating to his religion and sexuality. App’x at 50.
- Video Five: an interview with a survivor of the attack on Pulse Nightclub in Florida in March 2018 and his background as a “former homosexual.” App’x at 50.

Appellants state that the videos were part of an effort by Church United to challenge a California Assembly bill proposing to expand the state’s ban on SOCE to talk therapy and pastoral counseling.

On December 6, 2018, Vimeo deleted Church United’s account, explaining: “Vimeo does not allow videos that harass, incite hatred, or include discriminatory or defamatory speech.” App’x at 60. Appellants allege that Vimeo’s action constitutes “censorship,” App’x at 52, insofar as it barred Domen from speaking about his preferred sexual orientation and religious beliefs. They also allege that Vimeo allows similar videos to remain on its website with titles such as “Gay to Straight,” “Homosexuality is NOT ALLOWED in the QURAN,” “The Gay Dad,” and “Happy Pride! LGBTQ Pride Month 2016.” App’x at 51.

Based on these allegations, Appellants claim that Vimeo violated the Unruh Act, a California law barring businesses from intentionally discriminating on the basis of, inter alia, sexual orientation and religion; New York’s Sexual Orientation Non-Discrimination Act; and Article 1, Section 2 of the California Constitution, which “mandates viewpoint neutral regulation of speech in public and quasi-public fora.” App’x at 54. Appellants do not challenge the Guidelines’ prohibition on pro-SOCE content as facially discriminatory against

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