No. 17-1702

IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, *et al.*,

Petitioners,

v.

DEEDEE HALLECK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION, IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST[1]

Recognizing the Internet's power as a tool of democratization, for more than 25 years, the Electronic Frontier Foundation (EFF) has worked to protect the rights of users to transmit and receive information online. EFF is a non-profit civil liberties organization with more than 37,000 dues-paying members, bound together by a mutual and strong interest in helping the courts ensure that such rights remain protected as technologies change, new digital platforms for speech emerge and reach wide adoption, and the Internet continues to re-shape governments' interactions with their citizens. EFF frequently files *amicus* briefs in courts across the country, including a brief to the Supreme Court in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), that was cited in the majority opinion.

SUMMARY OF THE ARGUMENT

The interaction between the state action and public forum doctrines has far-reaching applications, well beyond the particular contours of public access television. This Court, in reaching whatever decision it does on the particular facts before it in this case, must rule narrowly, and with an eye toward application of its ruling in other contexts.

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1. Pursuant to Supreme Court Rule 37.2(a), *amicus* has provided timely notice to all counsel, and all parties consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* states this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or their counsel made a monetary contribution to fund the preparation or filing of this brief.

Certainly, the mere fact that something is either labeled a "public forum" or operated by a private entity as a space generally open for communication by others does not automatically transform that private entity into a state actor. Nor is the mere fact that the government reaches out to regulate the "forum" a sufficient trigger. Rather, a private entity is not a state actor unless the government has acted to affirmatively delegate its own role in administering a communicative space to that private entity or otherwise exercised significant control over the forum.[2]

Amicus curiae Electronic Frontier Foundation has a special interest in assuring that this Court's ruling does not wreak unintended havoc on the rights of online speakers and the private platforms they use to disseminate their messages. In particular, the private operators of online platforms should remain exactly that, private operators. That this Court has quite accurately characterized the Internet as a "modern public square," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017), and "the most important places for the exchange of views," *id.* at 1735, that enable any person to "become a town crier with a voice that resonates farther than it could from any soapbox," *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997), does not change this result. That a private entity created and/or maintains such a communicative platform does not, without significantly more action from the government itself, transform the private entity into

2. The Second Circuit's opinion is unfortunately unclear as to whether this essential element was sufficiently pleaded in the Complaint so as to justify reversing the granting of Appellant's motion to dismiss. To the extent the Second Circuit did not rely on such a finding, amicus disagrees with the court's reasoning.

a state actor. Amicus urges this Court to take care in crafting its opinion here so as not to compel the opposite result, or provide fodder to lower courts to do so.

Internet users' rights are best served by preserving the constitutional status quo, whereby private parties who operate private speech platforms have a First Amendment right to edit and curate their sites, and thus exclude whatever other private speakers or speech they choose.[3] To reverse the application of the First Amendment—that is, to make online platforms no longer *protected* by the First Amendment but instead *bound* by it as if they were government entities—would undermine Internet users' interests.

First, online platforms would largely be prohibited from moderating content, even though content moderation can be valuable and is supported by many Internet users when carefully implemented.

Second, the emergence of new online platforms would be inhibited by the great legal uncertainty created by the imposition of the multifaceted public forum doctrine on private platforms.

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3. However, this brief should not be read as an encomium for Internet platforms, especially the larger ones that enjoy outsized power to steer public discourse. There is no denying that inconsistent and opaque private content moderation is a problem. Although the First Amendment prevents government from dictating content moderation practices, Internet platforms should voluntarily adopt content moderation practices that follow a human rights framework, as more fully noted below, that maximizes transparency and due process.

We thus urge this Court to rule carefully and narrowly.

ARGUMENT[4]

I. Government Action is a Prerequisite to the Existence of a "Public Forum"; There Can Thus Be No State Action Without Some Significant Governmental Connection to the Operation or Use of the Forum

In deciding this case, this Court must be careful to avoid the logical fallacy of circular reasoning: the private actor is a state actor because it is operating a public forum and only governments operate public forums.

That reasoning is fallacious because it is government action that triggers the public forum doctrine in the first place. *See Southeastern Productions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (invoking the public forum doctrine when the government controlled the use of a privately owned theater). Although the term "public forum" is also used colloquially, it is government action that distinguishes the places open for the exchange of ideas that are subject to the "public forum doctrine" from those places that are not. There can be no "public forum," as that term of art is used with respect to this Court's public forum doctrine, without significant involvement of the government itself.

Indeed, the distinction between governmental and nongovernmental control of the forum is essential to the public forum doctrine as a whole. As this Court has

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4. All Web sites cited in this brief were last visited on Dec. 4, 2018.

explained, the public forum doctrine arose from the fact that the government owned and controlled real property: "the Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).[5] It was thus a recognition of the government's special constitutional obligation to the speakers who used its property as distinct from private property owners who had no such obligations. *Cf. Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (holding that government property owner had right to enforce trespass laws just like private property owner). Generally allowing property to be used by others for communicative purposes was not exclusively a function of the government. Rather, the government differed from private property owners in that only the government allowed certain *government* property to be used by others for communicative purposes.[6]

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5. The quotation has its origins in *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939). In that case the Court declined to follow its earlier decision in *Davis v. Commonwealth of Massachusetts*, 167 U.S. 43, 47 (1897), in which this Court held that "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." In *Hague*, this Court instead defended the rights of people to use public lands, calling it a right of citizens "from ancient times." 307 U.S. at 515.

6. It is unclear what state action test the Second Circuit used in the underlying case; the court noted seven possible situations in which state action might be found, but never clearly indicated which path it followed. *See Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300, 304–05 (2d Cir. 2018) (citing *Brentwood*

The public forum doctrine remains an acknowledgement that while the government and the public often perform the *same* functions as property owners, the government has different constitutional responsibilities to those members of the public who use government property for their own communicative purposes

Thus, with respect to state action, "[c]ertainly, property does not become a public forum simply because a private owner generally opens his property to the public." *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1255 (10th Cir. 2005) (citing *Hudgens v. Nat'l Labor Relations Bd.*, 424 U.S. 507, 519–21 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972)).[7]

Rather, there must be some significant government action in either creating the forum, using the forum itself, or, most typically, delegating the responsibility for maintaining the public use of the forum to the private actor.

Academy v. Tenn. Secondary School Ass'n, 531 U.S. 288, 296 (2001)). To the extent the Second Circuit performed a "public function" analysis, as the concurrence below suggests, *see Halleck*, 882 F.3d at 308 (Lohier, J concurring), that analysis would require that the state delegate a "traditional governmental function" to the private entity. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991). That traditional function is absent here.

7. *Marsh v. Alabama*, 326 U.S. 501 (1945), this Court's seminal state action/First Amendment case, is not inconsistent with this result. As this Court explained in *Hudgens*, 424 U.S. at 516–17, the public function the private actor was performing in *Marsh* was not the mere operation of a public forum: it was the operation of an entire town; the public forum was just one component of that larger enterprise.

Importantly, state action is not a disputed issue in the reverse situation, when the government is challenged for its use of private property as a forum for the speech of others. This Court addressed such a situation in *Southeastern Productions, Ltd. v. Conrad*, 420 U.S. 546 (1975). In that case, the relevant forum was a privately-owned theater under long term lease to the city of Chattanooga. *Id.* at 547. Because the government's use of the theater was the very action challenged, the state action was clear, and this Court's opinion doesn't even mention the issue.

Accordingly, state action is similarly obvious when government uses private social media sites, like Facebook, Twitter, and Instagram for government purposes.[8] When a government so uses a privately owned social media platform, that government is clearly a state actor and the interactive spaces of the social media platforms it uses for governmental business are often public forums. *See, e.g., Knight First Amendment Institute at Columbia University. v. Trump*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018) (finding the interactive spaces created by President Trump's tweets to be designated public forums), *appeal docketed*, No. 18-1691 (2d Cir. June 4, 2018); *Davison v.*

8. Indeed, the use by government agencies and officials of privately owned social media platforms is widespread. Over 10,000 social media profiles for U.S. federal agencies and sub-agencies have been registered with the United States Digital Service. For a searchable database of registered federal government profiles, *see* https://usdigitalregistry.digitalgov.gov/. As for Congress, all 100 senators and the overwhelming majority of representatives use social media. Jacob Straus and Matthew E. Glassman, *Social Media in Congress: The Impact of Electronic Media on Member Communications*, R44509, Cong. Research Serv. (May 26, 2016), https://fas.org/sgp/crs/misc/R44509.pdf.

Plowman, 2017 WL 105984, *4 (E.D. Va. 2017) (finding the comment section on a public official's Facebook page to be a limited public forum), *appeal docketed*, No. 16-00180 (4th Cir. June 27, 2017).

But those uses by governments do not convert the entire platform, governmental and nongovernmental accounts alike, into a public forum; nor does it transform the platform owner into a state actor limited by the First Amendment, rather than protected by it. The situation in which a private party operates a platform generally open to the public, is distinct from the situation in which *the government* uses a privately owned platform for governmental purposes.

The Second Circuit's ambiguous treatment of the state action-public forum interaction lends itself to misinterpretation, and out-of-context citation, and should be clarified. The Second Circuit wrote the following:

> Because facilities or locations deemed to be public forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 265-68 (1981) (regulation issued by state university Board of Curators governing use of university buildings and grounds); *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 169 76 (1976) (order issued by state employment commission

> governing employee speech at public school board meeting).

Halleck v. Manhattan Community Access Corp., 882 F.3d 300, 306–07 (2d Cir. 2018).

This statement, taken alone, is incorrect. And the cases cited in support, each of which dealt with public school administrators, do not support any application to nongovernment actors. The statement appears intended to be descriptive: there is usually a government actor controlling a public forum so usually, as in *Southeastern Productions*, there is no dispute as to state action or need for a court to consider it.

The sentence is somewhat clarified later in the same paragraph: a privately operated forum will not be considered a public forum for First Amendment purposes without a "sufficient connection to governmental authority."

> In the pending case, however, the facilities deemed to be public forums are public access channels operated by a private non-profit corporation. In this situation, whether the First Amendment applies to the individuals who have taken the challenged actions in a public forum *depends on whether they have a sufficient connection to governmental authority to be deemed state actors.*

Id. (emphasis added). But of course, that the first sentence will inevitably be relied upon without the remainder of the paragraph.

As stated, amicus takes no position on whether that "sufficient connection" was adequately pleaded in this case. But this Court, in making that assessment, should define the term carefully.

II. Internet Users are Best Served by the Availability of Both Unmoderated and Moderated Platforms

Preserving the rights of the private operators of online platforms to curate and edit the content of their sites—a result that will not be possible if they are subject to this Court's public forum doctrine—best serves Internet users, by allowing for both moderated and unmoderated platforms for speech.

A. In Praise of Unmoderated Platforms

Unmoderated platforms, where the platform operator plays little to no role in selecting the content, benefit Internet users by inhibiting the creation of silos, and allowing users to engage in free-form discussions, participate in debates of their choosing, and find unexpected sources of ideas and information. Users need not fear that their communications are actively monitored, nor that they may accidentally run afoul of content rules—both of which can inhibit free speech. Unmoderated platforms can be of special value to political dissidents and others who may be targeted for censorship by governments and private actors.

Indeed, the larger online platforms are bad at content moderation and struggle to draw lines between speech that is and is not permitted *according to their very own*

content rules.[9] For example, Facebook decided, in the midst of the #MeToo movement, that the statement "men are scum" and similar statements constituted hate speech according to its policies.[10] The company also removed posts of women sharing the hate speech others directed toward them.[11] Twitter shut down the verified account of a prominent Egyptian journalist and human rights activist.[12] Twitter also marked tweets containing the word "queer" as offensive, regardless of context.[13] YouTube has come under fire for restricting and demonetizing LGBTQ

9. Every year, numerous incidents in which content standards were erroneously or inappropriately applied make the headlines of major news publications—and are tracked by the EFF project Onlinecensorship.org. https://onlinecensorship.org/

10. Samuel Gibbs, *Facebook bans women for posting "men are scum" after harassment scandals*, Guardian (Dec. 5, 2017), https://www.theguardian.com/technology/2017/dec/05/facebook-bans-women-posting-men-are-scum-harassment-scandals-comedian-marcia-belsky-abuse.

11. Tracy Jan and Elizabeth Dwoskin, *A white man called her kids the n-word. Facebook stopped her from sharing it.*, Washington Post (July 31, 2017), https://www.washingtonpost.com/business/economy/for-facebook-erasing-hate-speech-proves-a-daunting-challenge/2017/07/31/922d9bc6-6e3b-11e7-9c15-177740635e83_story.html.

12. Martin Belam, *Twitter under fire after suspending Egyptian journalist Wael Abbas*, Guardian (Dec. 18, 2017), https://www.theguardian.com/media/2017/dec/18/twitter-faces-backlash-after-suspending-egyptian-journalist-wael-abbas.

13. Taylor Wofford, *Twitter was flagging tweets including the word "queer" as potentially "offensive content,"* Mic (June 22, 2017), https://mic.com/articles/180601/twitter-was-flagging-tweets-including-the-word-queer-as-potentially-offensive-content#.kUbwJTI0E.

content.[14] Online platforms have silenced individuals engaging in anti-racist speech[15]; suspended the account of an LGBTQ activist calling out their harasser;[16] disappeared documentation of police brutality,[17] the Syrian war,[18] and the human rights abuses suffered by the Rohingya.[19] A blanket ban on nudity has repeatedly been used to take down a famous Vietnam war photo.[20] In the

14. Megan Farokhmanesh, *YouTube is still restricting and demonetizing LGBT videos—and adding anti-LGBT ads to some*, Verge (June 4, 2018), https://www.theverge.com/2018/6/4/17424472/youtube-lgbt-demonetization-ads-algorithm.

15. Natalie Weiner, *Talib Kweli Calls Out Instagram for Deleting His Anti-Racism Post*, Billboard (July 1, 2015), https://www.billboard.com/articles/columns/the-juice/6613208/talib-kweli-instagram-deleted-post-anti-racism-censorship.

16. Kaitlyn Tiffany, *Twitter criticized for suspending popular LGBTQ academic @meakoopa*, Verge (June 13, 2017), https://www.theverge.com/2017/6/13/15794296/twitter-suspended-meakoopa-anthony-oliveira-controversy.

17. Kevin Anderson, *YouTube suspends Egyptian blog activist's account*, Guardian (Nov. 28, 2007), https://www.theguardian.com/news/blog/2007/nov/28/youtubesuspendsegyptianblog.

18. 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.

19. Betsy Woodruff, *Exclusive: Facebook Silences Rohingya Reports of Ethnic Cleansing*, Daily Beast (Sept. 18, 2017), https://www.thedailybeast.com/exclusive-rohingya-activists-say-facebook-silences-them.

20. Sam Levin, Julia Carrie Wong, Luke Harding, *Facebook backs down from "napalm girl" censorship and reinstates photo*, Guardian (Sept. 9, 2016), https://www.theguardian.com/technology/2016/sep/09/facebook-reinstates-napalm-girl-photo.

aftermath of violent protests in Charlottesville, Virginia, and elsewhere, social media platforms faced increased calls to police content, shut down more accounts, and delete more posts.[21] Paradoxically, marginalized groups have been especially hard hit by this increased policing, hurting their ability to use social media to publicize violence and oppression in their communities.

As explained below, these online platforms should have the legal right to makes these decisions. But they can have significant consequences for online speech—and those users who have been muted by them are rightfully concerned about how content rules are enforced against them. Given the centrality of the Internet to modern communication, a world where unmoderated online platforms cannot exist would be a woefully impoverished one.

B. Moderated Platforms Are Also Valuable

But Internet users are also well-served by the availability of consistently and transparently moderated platforms. Many users may prefer to use online platforms that endeavor to shield them from certain kinds of speech. Moderation allows online platforms to limit content in order to create affinity or niche communities dedicated

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21. Alexis C. Madrigal, *Inside Facebook's Fast-Growing Content-Moderation Effort*, Atlantic (Feb. 7, 2018), https://www.theatlantic.com/technology/archive/2018/02/what-facebook-told-insiders-about-how-it-moderates-posts/552632/.; James Bovard, *Facebook censored me. Criticize your government and it might censor you too.*, USA Today (Oct. 27, 2017), https://www.usatoday.com/story/opinion/2017/10/27/facebook-censored-cross-your-countrys-government-and-they-might-censor-you-too-james-bovard-column/795271001/.

to certain subject matters or viewpoints, or to remove hateful or harassing speech that may hinder the ability of targeted users to engage with the platform.

If general purpose online platforms like YouTube, Facebook, and Twitter are easily deemed designated public forums, *see* Appellant Br. [ECF No. 7] at 33-34, and are thus bound by the First Amendment, they could exclude *only* content that falls outside the protection of the First Amendment.[22] Such platforms, while generally promoting diverse content and views, would *not* be able to remove, for example, non-obscene nudity; non-threatening violent content; false but non-harmful or non-defamatory content; or any content that is contrary to the platform host's or its community's values, but is nevertheless protected by the First Amendment.[23]

But the imposition of the public forum doctrine onto private platforms also threatens the existence of openly moderated platforms, those that do not hold themselves out as "modern public squares."

The public forum doctrine is multifaceted, comprised of varying degrees of government fora, including not only traditional and designated public forums, but also "limited

22. Meaning, the content is deemed to be within a traditionally unprotected category of speech or because a particular moderation decision survives strict scrutiny. *See U.S. v. Alvarez*, 567 U.S. 709, 717, 724 (2012).

23. *See, e.g., Reno*, 521 U.S. at 874 (1997) (non-obscene but indecent sexual content is protected by First Amendment); *Elonis v. U.S.*, 135 S. Ct. 2001, 2012 (2015) (certain threatening speech is protected by First Amendment); *Alvarez*, 567 U.S. at 723 (certain non-harmful false speech is protected by First Amendment).

public forums," limited to certain subjects or speakers, and "nonpublic forums," where the forum operator is highly selective about allowing third-party speech. *See Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469-70 (2009). All government forums are subject to First Amendment restrictions; even nonpublic forums must be free from viewpoint discrimination and unreasonable content restrictions. *See Minn. Voters*, 138 S. Ct. at 1885. Nonpublic forums are thus scrutinized with some rigor: just this past term, this Court struck down a content restriction in a nonpublic forum. *Minn. Voters*, 138 S. Ct. at 1888 ("Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out.").

A court cannot import only one facet of the entire doctrine—the designated public forum—and leave the other facets behind. Thus, private online platforms that are openly and unabashedly moderated might avoid being deemed designated public forums like YouTube or Facebook. But such moderated platforms may necessarily be considered limited or nonpublic forums that would be unable to excise views they deem personally abhorrent or unwanted by the vast majority of their users.

III. The First Amendment Protects Internet Hosts' Right to Curate Their Platforms

Private entities that operate online platforms for speech and that open those platforms for others to speak enjoy a First Amendment right to edit and curate the content they host. These rights will be negated if the operators are found to be state actors.

The Supreme Court has long held that private publishers have a First Amendment right to control the content of their publications. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974). *See also Los Angeles v. Preferred Comms., Inc.*, 476 U.S. 488, 494 (1986) (recognizing cable television providers' First Amendment right to "exercise[e] editorial discretion over which stations or programs to include in its repertoire"); *Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 134 (9th Cir. 1971) (rejecting argument that Los Angeles Times' "semimonopoly and quasi-public position" justified order compelling to publish certain advertisements). This intrusion into the functions of editors is *per se* unconstitutional even if the compelled publication of undesired content would not cause the publisher to bear additional costs or forgo publication of 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 248. The arguments made by the party seeking compelled publication in a print newspaper are strikingly similar to those now raised against Internet platforms. In *Tornillo*, plaintiff argued that the press in 1974 bore little resemblance to the one known to the ratifiers of the First Amendment: because of a "concentration of control of outlets to inform the public," the news media had "become big business," and "noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events." *Id.* at 248–49. Supporters of the compelled publication law argued that:

> The result of these vast changes has been to place in a few hands the power to inform the American people and share public opinion. . . . The abuses of bias and manipulative reportage are, likewise, said to be the result of vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed the public has lost any ability to respond or contribute in a meaningful way to the debate on the issues. . . . The First Amendment interest of the public in being informed is said to be in peril because "marketplace of ideas" is today a monopoly controlled by the owners of the market.

Id. at 250.

The *Tornillo* Court did not dispute the validity of these concerns, but nevertheless found that governmental interference with editorial discretion was so anathema to the First Amendment and the broader principles of freedom of speech and the press that the remedy for these concerns must be found through "consensual mechanisms" and not by governmental compulsion. *Id.* at 254.

Though phrased in terms of traditional print newspaper publishers, *Tornillo* has been applied in a variety of speech contexts, including thrice this past Supreme Court term. *See Janus v. Am. Fed'n of State, Cnty., & Mun. 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). 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, even if the parade was perceived as generally open for public participation. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 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.

Every court that has considered the issue has applied *Tornillo* to social media platforms that primarily, if not exclusively, publish user-generated content. *See, e.g.*, *Robinson v. Hunt County, Texas*, 2017 WL 7669237, *3 (N.D. Tex. 2017), *appeal docketed*, No. 18-10238 (5th Cir. Mar. 2, 2018); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007).

Any decision of this Court that requires that Internet platforms generally open for public communication to include content they want to exclude would run head-first into the editorial rights enshrined in *Tornillo* and *Hurley*.[24]

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24. As this Court referenced in *Tornillo*, 418 U.S. at 254, "consensual mechanisms" remain the best way to address the very

CONCLUSION

This Court, in reaching whatever decision it does on the particular facts before it in this case, must rule narrowly, and with an eye toward application of its ruling in other contexts. The mere fact that something is either labeled "public forum" or operated by a private entity as a space generally open for communication by others does not automatically transform that private entity into a state actor. Nor is the mere fact that the government reaches out to regulate the forum a sufficient trigger. Rather, a private entity is not a state actor unless the government has acted to affirmatively delegate its own role in administering a communicative space to that private entity or otherwise exercised significant control over the forum.

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real human rights implications of the large Internet platforms opaque and seemingly arbitrary content moderation practices. Internet users should thus demand increased accountability, clear and consistent takedown rules, and robust due process that includes a fair and transparent removal process. The Santa Clara Principles, *www.santaclarprinciples.org*, endorsed by a broad range of civil society groups, including *amicus*, offer one such human rights framework. First, companies should publish the number of posts removed and accounts permanently or temporarily suspended, demonetized, or otherwise downgraded, due to violations of their content rules. Second, the companies should provide clear notice to all users about what types of content are prohibited, and clear notice to each affected user about the reason for the limitations placed on their content or account. And third, companies should enable users to engage in a meaningful and timely appeals process for any content removals or account limitations. *See EFF and Coalition Partners Push Tech Companies To Be More Transparent and Accountable About Censoring User Content*, EFF Press Release (May 7, 2018), https://www.eff.org/press/releases/eff-and-coalition-partners-push-tech-companies-be-more-transparent-and-accountable; https://santaclaraprinciples.org/.

Dated: December 11, 2018

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