No. 21-_____

In The

Supreme Court of the United States

JAMES DOMEN, an individual, CHURCH UNITED, a California not-for-profit corporation,

Petitioner,

v.

VIMEO, INC., a Delaware for-profit corporation,

Respondent(s).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Section 230(c)(1) of the Communications Decency Act (CDA) preempt classification-based discrimination claims by a customer against an interactive computer service for its own misconduct, as opposed to misconduct of a third party?

2. Does Section 230(c)(2)(A) of the CDA preempt claims where the plaintiff alleges the interactive computer service acted in bad faith?

3. Should Petitioner be afforded an opportunity to amend the complaint where the district court denied leave to amend as futile based on CDA immunity, but on appeal the Second Circuit sustained dismissal based only on its holding that Petitioners failed to allege sufficient facts of discrimination without even addressing CDA immunity?

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Church United is a California not-for-profit religious corporation. Church United operates under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and, as it has no stock, no publicly held company owns 10% or more of its stock.

LIST OF PROCEEDINGS

United States Court of Appeals
For the Second Circuit

No. 20-616

James Domen, and Church United,
Plaintiffs-Appellants

Vimeo, Inc., *Defendant-Appellee*

Date of Final Opinion: September 24, 2021

Date of Rehearing Denial: November 15, 2021

United States District Court
for the Southern District of New York

No. 1:19-cv-08418-AT

James Domen, and Church United, *Plaintiffs*

Vimeo, Inc., *Defendant*

Date of Final Order: January 15, 2020

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OPINIONS BELOW

The order of the Southern District of New York, dated January 15, 2020, granting Vimeo's motion to dismiss is reported at 433 F. Supp. 3d 592. Pet. App. 47a-76a.

The opinions and orders of the Second Circuit are as follows:

(i) On March 11, 2021, the Second Circuit issued an initial opinion: 991 F.3d 66. Pet. App. 33a-46a.

(ii) On July 15, 2021, the Second Circuit granted panel rehearing and vacated its initial opinion: 2 F.4th 1002.

(iii) On July 21, 2021, the Second Circuit issued an amended opinion on panel rehearing: 6 F.4th 245. Pet. App. 14a-32a.

(iv) On September 23, 2021, the Second Circuit withdrew its amended opinion: No. 20-616-CV, 2021 WL 4399692.

(v) On September 24, 2021, the Second Circuit issued its final opinion: No. 20-616-CV, 2021 WL 4352312. Pet. App. 1a-13a.

(vi) On November 15, 2021, the Second Circuit denied rehearing en banc. Pet. App. 79a-80a.

(vii) On November 16, 2021, the Second Circuit denied two additional requests for

rehearing en banc that followed each of the two amended opinions. Pet. App. 77a-78a.

JURISDICTION

On September 24, 2021, the Second Circuit issued its final order affirming the district court's decision in favor of Vimeo. Pet. App. 1a-13a. James Domen and Church United sought rehearing en banc on three occasions following each of the three opinions issued by the Second Circuit. The first petition was denied on November 15, 2021, and the other two were both denied on November 16, 2021. Pet. App. 77a-80a. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the texts of the following statutory provisions are reproduced in the appendix.

- Communications Decency Act, 47 U.S.C. § 230, set forth at Pet. App. 83a-89a.
- New York State Human Rights Law, N.Y. Executive Law § 296, et seq., set forth at Pet. App. 101a-145a.
- Unruh Civil Rights Act, section 51, et seq. of the California Civil Code, set forth at Pet. App. 146a-149a.

INTRODUCTION

At the heart of this case is an issue of exceptional importance, namely the scope and breadth of the immunity conferred by Section 230 of

the Communications Decency Act (CDA). The executive branch and numerous legislators have expressed concern about the breadth of the CDA, but the CDA has never been addressed by this Court. An urgent need exists for this Court's review. Supreme Court Justice Thomas recently signaled that the High Court should take up the issue in an appropriate case. *Malwarebytes, Inc. v Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 18 (2020) ("it behooves" the Court to review a case involving "the correct interpretation of § 230").

Petitioners James Domen (Pastor Domen) and Church United allege that Respondent Vimeo, Inc., an interactive computer service provider, engaged in unlawful discrimination. Church United also alleged that Vimeo acted in bad faith by banning Church United from its platform due to Pastor Domen's sexual orientation and religion. The district court found that Vimeo was immune against state law nondiscrimination claims under Section 230(c)(1) of the CDA irrespective of Vimeo's alleged bad faith motives, and alternatively, Vimeo was immune under Section 230(c)(2)(A) of the CDA because it acted in good faith. Pet. App. 61a-68a. The district court granted Vimeo's motion to dismiss and denied leave to amend based on the CDA. Notably, before any discovery was permitted, the district court found the CDA preempts any claim for class-based discrimination, and there was no way for Church United to reformulate its claims in a way that would not be preempted by the CDA. Therefore, the district court reasoned that any attempt at re-pleading would be futile. Pet. App. 75a.

The Second Circuit initially upheld the district court's ruling and affirmed dismissal without leave to amend based on the CDA. However, the Second Circuit panel later amended its opinion twice, each time narrowing its prior rulings. In its final opinion, the Second Circuit avoided the CDA entirely, but it denied leave to amend, presumably because of the CDA. After all, the CDA was the underlying reason for the district's court's denial of leave to amend.

Therefore, this Court should settle the applicability of the CDA and whether Petitioners should be afforded an opportunity to amend the complaint if indeed Petitioners failed to allege sufficient facts of discrimination.

The panel's ruling does injustice not only to Pastor Domen and Church United but also to the vast public at large who rely on technology companies, cellphone applications, and all other interactive computer service providers every day of their lives.

The outcome of this case will determine whether interactive computer service providers have blanket immunity to discriminate against customers, including outright banning customers from their website based on race, sexual orientation, religion, and other protected classes. Under the district court's ruling which was effectively upheld by the Second Circuit, discrimination that is unconscionable in any other business or consumer context is allowed if it is perpetrated by an interactive computer service.

Questions about Section 230's scope are exceptionally and indisputably important, especially given that the prevailing interpretation of Section 230

has strayed far from its origins and text. Clarification from this Court is long overdue and warranted. This case presents an ideal vehicle for the Court to clarify the scope of CDA immunity.

STATEMENT OF CASE

FACTUAL BACKGROUND

Church United is a California not-for-profit religious corporation. Pet. App. 4a. James Domen is an ordained minister, a California resident, and the founder and president of Church United. *Id*. Church United's mission is to equip faith leaders to positively impact the political and moral culture in their communities. *Id*. "Church United and its affiliated pastors desire to positively impact the State of California and the nation with hope and to preserve their individual rights as pastors to exercise their faith without unlawful infringement." *Id*. at 50a.

For three years, Pastor Domen was a homosexual. *Id*. at 4a. However, because of his decision to pursue religion as a Christian, he began to self-identify as a "former homosexual." *Id*. In July 2009, Pastor Domen married his wife. Together, they have three biological children. It may be an unpopular and minority belief that one can transition from homosexuality to heterosexuality, but that is the reality in Pastor Domen's personal experience with his sexual orientation.

Vimeo is an online forum that "allows users to upload, view, share, and comment on videos." *Id*. at 5a. Vimeo expressly invites the public to use its website as a platform to express themselves, and it

holds itself out as a safe place for users to disagree and provide critical feedback to other users. More than 90,000,000 video creators use Vimeo's website.

In October 2016, Church United and Pastor Domen obtained a joint account with Vimeo for the purpose of hosting various videos, including videos addressing sexual orientation and religion. *Id.* at 5a. From October 2016 to November 2018, Church United and Pastor Domen used Vimeo's video hosting service to publish approximately eighty-nine (89) videos. *Id.* at 6a.

On November 23, 2018, Vimeo sent an email to Church United citing five of those videos and explaining that "Vimeo does not allow videos that promote Sexual Orientation Change Efforts (SOCE)." *Id.* at 6a. The five videos flagged by Vimeo as problematic were centered on Pastor Domen's sexual orientation as a former homosexual and his religion. *Id.* at 6a-7a. The five videos include the following:

> 1) A video wherein Pastor Domen briefly explained his life story, his preferred sexual orientation, the discrimination he faced, and his religion.
>
> 2) A promotional video for Freedom March Los Angeles. Freedom March is a nationwide event where individuals like Pastor Domen, who identify as former homosexuals, former lesbians, former transgenders, and former bisexuals, assemble with other likeminded individuals.

> 3) An interview of Pastor Domen included in an NBC produced documentary segment titled, Left Field, which documented and addressed SOCE.
>
> 4) A press conference with Andrew Comiskey, the founder of Desert Stream, relating to his religion and sexual orientation.
>
> 5) An interview with Luis Ruiz, a survivor of the horrific attack at the Pulse Nightclub in Florida in March 2018. In the video, Luis Ruiz shares his background as a former homosexual and his experience as a survivor of the attack.

On December 6, 2018, Vimeo sent an email to Church United informing it that Church United and Pastor Domen's account had been removed by Vimeo staff for violating Vimeo's "Guidelines." *Id.* at 7a. Not only were the five videos banned, but Church United and Pastor Domen were banned from re-registering with Vimeo in the future. *Id.* at 11a. The email states as the reason for removal: "Dear Church United, . . . Vimeo does not allow videos that harass, incite hatred, or include discriminatory or defamatory speech." *Id.* at 7a. Vimeo's Terms of Service prohibit, among other things, content that "[c]ontains hateful, defamatory, or discriminatory content or incites hatred against any individual or group." *Id.* at 5a.

None of Church United and Pastor Domen's 89 videos, harass, incite hatred, or include discriminatory or defamatory speech. Vimeo may classify Pastor Domen's journey from homosexuality to heterosexuality as violative of this standard;

however, none of the videos or any statements made by Church United, or Pastor Domen illustrated harassment, hatred, discrimination, or defamation.

Church United and Pastor Domen allege that Vimeo denied Church United and Pastor Domen equal accommodations, advantages, privileges, and services because of Pastor Domen's sexual orientation and religion. *Id*. at 69a-70a. Vimeo did not merely delete the five flagged videos allegedly based on Sexual Orientation Change Efforts, it cancelled Church United and Pastor Domen's entire account, deleted all 89 videos, and permanently banned them from using its service. *Id*. at 70a. The Complaint alleges that Church United and Pastor Domen's videos were restricted and deleted whereas videos on similar subjects, were not, further evidencing Vimeo's intentional discrimination based on sexual orientation and religion. *Id*. at 7a.

PROCEDURAL BACKGROUND

Pastor Domen and Church United's complaint alleges that Vimeo terminated their account and banned them from using its services based on discriminatory animus in violation of the Unruh Civil Rights Act, Section 51, et seq. of the California Civil Code and a "Sexual Orientation Non-Discrimination Act" claim under New York Executive Law § 296.

On October 11, 2019, Vimeo filed a motion to dismiss. United States Magistrate Judge Stewart D. Aaron granted Vimeo's motion and ordered that this case be dismissed with prejudice. Pet. App. 47a-76a. Judgment dismissing this case was entered on January 17, 2020. Pet. App. 2a.

The district court found that Vimeo was immune against state law nondiscrimination claims under Section 230(c)(1) of the CDA irrespective of Vimeo's alleged bad faith motives, and alternatively, Vimeo was immune under Section 230(c)(2)(A) of the CDA because it acted in good faith. Pet. App. 47a-76a. The district also found that, in the alternative, Church United did not sufficiently plead allegations of intentional discrimination. The district court granted Vimeo's motion to dismiss and denied leave to amend based on the CDA. Notably, the district court found the CDA preempts any claim for class-based discrimination, and there was no way for Church United to reformulate its claims in a way that is not preempted by the CDA. Therefore, the district court reasoned that any attempt at re-pleading would be futile. Pet. App. 47a-76a.

The first opinion issued by the Second Circuit three-judge panel (Judges Pooler, Wesley, and Carney), decided March 11, 2021, upheld the district court decision granting CDA immunity to Vimeo. Pet. App. 33a-46a.

Church United filed its first petition for panel rehearing and rehearing en banc on March 25, 2021. The petition for panel rehearing was granted on July 15, 2021, and six days later, the three-judge panel issued its second opinion. Pet. App. 14a-32a. In this second opinion, the panel again found that the CDA immunizes Vimeo from Church United's lawsuit for classification-based discrimination. In addition to Vimeo's CDA immunity, the panel opined that Church United's claims must be dismissed for the "separate and independent" reason that they fail to state a claim

for religious or sexual orientation-based discrimination. *Id*. at 32a. The Second Circuit did not issue an order denying the request for rehearing en banc until several months later on November 15, 2021. *Id*. at 79a.

After the second opinion, Church United filed an amended petition for rehearing en banc but the three-judge panel intervened again and sua sponte issued a third opinion on September 24, 2021. *Id*. at 1a-13a. In the third opinion, the panel did not provide any analysis as to the application of the CDA, even though the CDA was the basis for the district court's denial of leave to amend. The third opinion explained as follows: "Because Appellants' complaint fails to plausibly plead a claim for discrimination under the state statutes there is no need to consider Vimeo's defense that such claims are pre-empted under Section 230." *Id*. at 9a.

Although—in its third opinion—the panel avoided addressing the CDA, even after its first two opinions did so, this appeal has always been about the CDA. No amount of rewriting can change that. Simply stated, the district court erroneously used the CDA to deny Petitioners a right to amend their complaint, and the panel attempted to avoid correcting this error by stating the CDA is irrelevant and dismissing the case on 12(b)(6) grounds, which is also an erroneous ruling. The miscarriage of justice that results from these two ruling cannot be allowed to stand.

The panel presumably understood the importance of the CDA's applicability to this case and the potential that this Court may review the decision.

Perhaps to preclude Church United from seeking relief from this Court, the panel issued three separate opinions, each one vacating the panel's own previous opinions. However, in upholding the district court's ruling granting the motion to dismiss without leave to amend, the Second Circuit impliedly granted Vimeo immunity from suit because the district court's ruling was based on the CDA.

But even assuming the CDA was not relevant to the panel's last opinion, the panel should have at least permitted Church United and Pastor Domen to amend their complaint or rule that sufficient facts were alleged to state a cause of action for discrimination under state law.

Rule 10 of the United States Supreme Court rules explains "the character of the reasons the Court considers" in granting a writ of certiorari, which includes review of an important issue decided by a federal appellate court. This writ is not the typical request for review of a final opinion of a court of appeals because the Second Circuit avoided the substance of this case. However, Rule 10 explicitly states that the typical reasons the Court grants review are "neither controlling nor fully measuring the Court's discretion." Sup. Ct. R. 10(c). Therefore, this Court's discretion to grant certiorari is not limited by the Second Circuit panel's gamesmanship in failing to address the CDA in its final opinion.

REASONS FOR GRANTING THE WRIT

This Court should grant writ of certiorari because federal courts have convoluted CDA immunity, effectively allowing the technology

industry to operate outside the law when Section 230 governs. Currently, an extraordinarily broad understanding of Section 230, divorced from its actual text, prevails in the lower courts.

Justice Thomas recently highlighted the discrepancy between Section 230's text and the current state of the law applying the statute. In a statement respecting the denial of certiorari, Justice Thomas noted that "many courts have construed [Section 230] broadly to confer sweeping immunity on some of the largest companies in the world." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14-15 (2020). Justice Thomas observed that those courts have "emphasized non-textual arguments" concerning the "purpose and policy" of Section 230 in applying the provision, "leaving questionable precedent in their wake." *Id*. at 13-14.

Justice Thomas encouraged the Court to take up the interpretation of Section 230 in an appropriate case to "consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms." *Id*. As Justice Thomas' statement suggests, there is a disconnect between the statute's plain text and the prevailing judicial interpretation that warrants this Court's review.

This case is the appropriate vehicle for the Court to do so because it involves both sections of CDA immunity that were identified by Thomas as warranting review, and it involves the important issue of class-based discrimination.

The first issue is whether Section 230(c)(1) of the CDA preempts claims against a defendant for its "own misconduct," or only claims against a defendant "as the publisher or speaker" of third-party content. *Id.* at 18. The answer to this question determines whether tech companies have a free ticket to discriminate against customers, including outright banning customers from their platform based on race, sexual orientation, religion, and other protected classes.

The second and interrelated issue is whether Section 230(c)(2)(A) governs situations where, as here, a plaintiff alleges a defendant acted in bad faith in removing the plaintiff's content. *Id.* at 16. If section 230(c)(2)(A) governs, then tech companies may not subjectively and freely ban customers and content from their platforms as their decisions must be made in good faith.

DOES SECTION 230(c)(1) OF THE CDA PREEMPT CLAIMS BY A CUSTOMER AGAINST AN INTERACTIVE COMPUTER SERVICE FOR ITS OWN MISCONDUCT?

Properly construed, based on the plain language of the text and its purpose, Section 230(c)(1) does not immunize interactive computer service providers from suit where, as here, claims arise from the platform's own participation in illegal or wrongful conduct. Federal courts have held otherwise, and that must be corrected because of the dangerous consequences of allowing these companies to operate outside of the law.

A. BACKGROUND OF SECTION 230(c)(1)

Section 230(c)(1) states the following: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. Section 230(c)(1). The term "interactive computer service provider" is broadly defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." *Id.*

This section was intended to prevent chatrooms (the earliest of social media platforms) from being held liable for defamatory statements written online against one user by another third-party user. *See Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003) (In the absence of the protection afforded by section 230(c)(1), one who published or distributed speech online "could be held liable for defamation even if he or she was not the author of the defamatory text, and ... at least with regard to publishers, even if unaware of the statement").

Section 230 was Congress' response to two court cases decided in New York in the early 1990's that had conflicting results. *FTC v. Leadclick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (explaining that Section 230 "assuaged Congressional concern regarding the outcome of two inconsistent judicial decisions," *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), both of which "appl[ied] traditional defamation law to internet providers").

Cubby, Inc. involved CompuServe, which in the early days of the Internet hosted "an online general information service" through which subscribers could access thousands of outside sites and around 150 special-interest forums. 776 F. Supp. at 137. When a columnist for one of the special-interest forums posted defamatory comments about a competitor, the competitor sued CompuServe for libel. *Id.* The court found CompuServe could not be held liable as the columnist's distributor because CompuServe did not review any of the content on the forums before it was posted. *Id*. at 140. Without knowledge of the libel, CompuServe could not be held responsible for it. *Id.*

However, *Stratton Oakmont* took a different approach and imposed liability where a service provider filtered its content to block obscene material. 1995 WL 323710. Defendant Prodigy was a web services company with two million subscribers that hosted online bulletin boards. *Id*. Because Prodigy moderated its online message boards and deleted some messages for "offensiveness and 'bad taste,'" the court found that it had become akin to a publisher with responsibility for defamatory postings that made it onto the site. *Id*. To avoid liability, the company would have to give up moderating altogether and simply act as a blind host, like CompuServe. *Id*.

Several legislators in Congress reacted to the *Stratton Oakmont* decision with alarm. 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995 (statement of Rep. Cox)). The prospect of liability for other users' posts would have a chilling effect on internet companies, resulting in severe restrictions on what and where internet users could post. *LeadClick Media, LLC*, 838

F.3d at 173. Congress then amended the CDA to make sure that "providers of an interactive computer service" would not be treated as publishers of third-party content. *Id*. Unlike newspapers that are accountable for the content they print; online computer services would be relieved of this liability under certain circumstances.

Immunity under Section 230(c)(1) was intended to apply if the defendant meets the following criteria: "(1) is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information." *Leadclick Media, LLC*, 838 F.3d at 173 (citations and internal quotation marks omitted).

B. FEDERAL COURTS ARE INCONSISTENT IN THEIR APPLICATION OF SECTION 230(c)(1)

Federal courts across the country have been inconsistent in their application of Section 230(c)(1) for many years. This includes the district court in this case, which incorrectly immunized defendants from liability for (1) claims that involve the defendant's own misconduct and not the misconduct of "another information content provider," and (2) claims that do not seek to treat the defendant as a publisher of information.

The holdings that deviate from the plain meaning of the text and the legislative purpose are based on case law that expands Section 230(c)(1) immunity to any activity that involves "exercise of a

publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content," despite illegal, bad faith, and discriminatory intent. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). For example, the Ninth Circuit found that there are no limits on an internet company's discretion to take down material, even if the company racially discriminated in removing content. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed.Appx. 526 (9th Cir. 2017), *aff'g* 144 F.Supp.3d 1088, 1094 (N.D. Cal. 2015) (concluding that "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune" under § 230(c)(1)).

Decisions that broadly interpret § 230(c)(1) to protect traditional publisher functions depart from both the natural reading of the Act and its purpose, which is to shield defendants from liability for publishing the content of a third-party. The immunity available under (c)(1) is distinct, specific, narrow, and clear. It is not applicable to this case, where Church United and Pastor Domen seek to impose liability on Vimeo for refusing to allow them to use Vimeo's services based on sexual orientation and religious discrimination. This case does not involve information from a third-party content provider, nor does it seek to hold Vimeo liable for publisher-based defamation. Instead, this case seeks to hold Vimeo to the same standard of nondiscrimination required of all businesses operating in New York and California.

Justice Thomas' statement in *Malwarebytes* identified a few courts that have interpreted CDA immunity correctly within certain contexts; e.g., *Fair*

Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008), *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.* 946 F.3d 1040 (9th Cir. 2019), and *e-ventures Worldwide, LLC v. Google, Inc.*, 214CV646FTMPAM CM, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017). Each of these cases denied immunity because the claims were based on the illegal acts of the defendant.

This writ should be granted for this Court to clarify the correct application of Section 230(c)(1) immunity. Namely, that it does not apply to claims against a defendant for intentional, class-based discrimination. Justice Thomas was rightly concerned about the "serious consequences" of extending Section 230(c)(1) immunity "beyond the natural reading of the text" where a plaintiff is not trying to hold the defendants liable "as the publisher or speaker" of third-party content. *Malwarebytes,* 141 S. Ct. at 18. Unless this issue of exceptional importance is addressed, the district court opinion granting Vimeo a free ticket to discriminate against a customer based on religion and sexual orientation will remain the legal principle in the Second and Ninth Circuits.

Therefore, in the Second and Ninth Circuits, interactive computer services can have blanket immunity to discriminate against customers, including *outright* banning customers from their platform based on race, sexual orientation, religion, and other protected classes. Under the expansive definition of "interactive computer services," this license to discriminate is not limited to social media services, but extends to include online sellers, service providers, and other varieties of companies like

Amazon,[1] eBay,[2] YouTube,[3] AOL,[4] Yelp,[5] Google, Yahoo,[6] and more.

It is imperative for this Court to clarify whether Section 230(c)(1) immunizes internet platforms from suit where a claim arises from the platform's own participation in wrongful conduct.

DOES SECTION 230(c)(2)(A) OF THE CDA PREEMPT CLAIMS WHERE THE PLAINTIFF ALLEGES THE INTERACTIVE COMPUTER SERVICE ACTED IN BAD FAITH?

This case also presents an opportunity for this Court to distinguish the differences between sections 230(c)(1) and 230(c)(2)(A). As Justice Thomas explained, "The decisions that broadly interpret § 230(c)(1) to protect traditional publisher functions also eviscerated the narrower liability shield Congress included in the statute" under 230(c)(2)(A). *Malwarebytes, 141 S. Ct.* at 16. Here, the district court holding and the cases it relied on did just that –

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[1] *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136 (2019) (en banc granted, opinion pending).

[2] *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (Cal. Ct. App. 2002).

[3] *Song fi Inc. v. Google, Inc.*, 108 F. Supp.3d 876, 883–84 (N.D. Cal. 2015).

[4] *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

[5] *Levitt v. Yelp!, Inc.*, Nos., 2011 U.S. Dist. LEXIS 124082, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011).

[6] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

they eviscerated the distinctions between the two immunity provisions of the CDA.

A. BACKGROUND OF SECTION 230(c)(2)(A)

In contrast to Section 230 (c)(1), the purpose of section 230(c)(2)(A) was "to encourage interactive computer services and users of such services to self-police the internet for obscenity and other offensive material, so as to aid parents in limiting their children's access to such material." *Batzel*, 333 F.3d at 1028 (citing 141 Cong. Rec. H8469–70 (Statements of Representatives Cox, Wyden, and Barton)).

Section 230(c)(2)(A) of the CDA provides in relevant part that "[n]o provider . . . of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . .." 47 U.S.C. Section 230(c)(2)(A) (emphasis added).

Good faith is a requirement for any attempt to invoke the immunity extended under Section 230(c)(2)(A). *See generally Perez-Guzman v. Lynch*, 835 F.3d 1066, 1074 (9th Cir. 2016), cert. denied sub nom. *Perez-Guzman v. Sessions*, 138 S. Ct. 737 (2018). It is beyond question that Congress did not intend to recognize an entity acting in bad faith as a "Good Samaritan," let alone to confer immunity on bad faith conduct. *See Fair Housing*, 521 F.3d at 1157.

Section 230(c)(2)(A) immunity is not available to restrict appropriate content simply because the provider has a motive to designate that material "otherwise objectionable" or "harassing" for purely discriminatory goals. Indeed, the CDA was not intended to and should not extend immunity to a party that "abuse[s] the immunity" by unilaterally "block[ing] content for anticompetitive purposes or merely at its malicious whim, under the cover of considering such material 'otherwise objectionable.'" *Zango, Inc. v. Kaspersky Lab, Inc.,* 568 F.3d 1169, 1178 (9th Cir. 2009). If anticompetitive conduct can be considered bad faith conduct, invidious class-based discrimination should be deemed bad faith" all the more.

Moreover, Section 230(c)(2)(A) immunity does not exist for a state law discrimination claim, given that Section 230 states that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C. § 230(e)(3). Enforcing state public accommodations laws to prevent discrimination does nothing to inhibit the intent behind the CDA, especially when the title of 230(c) reads "Protection for 'Good Samaritan' blocking and screening of offensive material." 47 U.S.C. § 230(c).

B. FEDERAL COURTS HAVE EVISCERATED THE DISTINCTION BETWEEN SECTION 230(C)(1) AND SECTION 230(C)(2)(A)

Where an interactive computer service is not being sued based on third-party content but rather for policing the plaintiff's content, Section (c)(2)(A) is the

relevant immunity provision. As Justice Thomas described, "In short, the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)." *Malwarebytes,* 141 S. Ct. at 3-4; *See also Doe v. GTE Corp*., 347 F.3d 655, 662 (7th Cir. 2003) (explaining Section 230(c)(2)(A) applies when a service provider "does filter out offensive material," while Section 230(c)(1) applies when providers "refrain from filtering or censoring the information on their sites").

Section 230(c)(2)(A) grants immunity only for actions "taken in good faith," while Section 230(c)(1) contains no similar requirement. 47 U.S.C. Section 230(c)(2)(A). In this sense, Section 230(c)(2)(A) immunity is narrower than Section 230(c)(1). If an internet provider were immune under (c)(1) for refusing to provide a business service to a customer based on the customer's protected class, then (c)(2)(A) requiring good faith for the same action would be meaningless.

Here, the district court's opinion effectively rendered the good faith requirement meaningless, and therefore, an interactive computer service may delete a plaintiff's entire account under Section 230(c)(1) for any reason whatsoever. Pet. App. 62a-66a. This is exactly the misapplication that Justice Thomas warned about:

> [B]y construing § 230(c)(1) to protect any decision to edit or remove content, *Barnes v. Yahoo!, Inc*., 570 F.3d 1096, 1105 (CA9 2009), courts have curtailed the limits Congress

> placed on decisions to remove content, *see eventures Worldwide, LLC v. Google*, Inc., 2017 WL 2210029, *3 (M.D. Fla. Feb. 8, 2017) (rejecting the interpretation that § 230(c)(1) protects removal decisions because it would 'swallow the more specific immunity in (c) (2)"). With no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content. . . .

Id. at 7 (some internal citations omitted).

The district court attempted to address and minimize the distinctions between Sections 230 (c)(1) and (c)(2)(A), by explaining that "there are situations where (c)(2)'s good faith requirement applies, such that the requirement is not surplusage." Pet. App. 65a. It then gave the hypothetical from *Barnes* 570 F.3d at 1096, wherein an interactive computer service could not take advantage of subsection (c)(1) if it developed the content at issue. *Id*. Because (c)(1) only applies to third-party content, this is an accurate application of (c)(1). Likewise, an interactive computer service that chooses to delete a customer's videos and bans them from using the service, is not immune under (c)(1) because they are not being sued for a third party's content. Nonetheless, the district court still conflated (c)(1) and (c)(2)(A) and ignored the good faith requirement of (c)(2)(A). If Vimeo's conduct is irrelevant and it is always immunized by (c)(1) for deleting a customer's account, then (c)(2)(A) would be superfluous.

The evisceration of the distinctions between the two provisions was explained clearly in *e-Ventures*

Worldwide, LLC v. Google, Inc., 188 F. Supp.3 d 1265 (M.D. Fla. 2016) and 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017). There, the court rejected Google's motion to dismiss as well as a motion for summary judgment, based on allegations (and, later, circumstantial evidence) that Google removed plaintiff's websites from its search results for anticompetitive reasons. *Id.* at 1265, 1277. In so doing, the court also expressly rejected the defendant's insistence that its intent, no matter how maliciously or unlawfully motivated, was irrelevant under Section 230(c)(1):

> Interpreting the CDA this way results in the general immunity in (c)(1) swallowing the more specific immunity in (c)(2). Subsection (c)(2) immunizes only an interactive computer service's 'actions taken in good faith.' If the publisher's motives are irrelevant and always immunized by (c)(1), then (c)(2)(A) is unnecessary. The court is unwilling to read the statute in a way that renders the good-faith requirement superfluous.

2017 WL 2210029 at *3; *see also Fair Housing,* 521 F.3d at 1165 ("The CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate's own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus Section 230 of the CDA does not apply to them.").

This Court should grant this writ to clarify the clear distinction between the two immunity provisions: if a company unknowingly leaves up illegal

third-party content, it is protected from publisher liability by § 230(c)(1), and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A). Here, Vimeo restricted access and availability of Church United and Pastor Domen's videos when it cancelled their account. Therefore, (c)(2)(A) is expressly applicable as opposed to (c)(1).

However, Vimeo is not entitled to immunity under section § 230(c)(2)(A) because Pastor Domen and Church United properly plead a complete absence of good faith on behalf of Vimeo. Church United's Complaint specifically alleges that Vimeo acted in bad faith by cancelling Church United's entire library of videos. Pet. App. at 6a-7a. Vimeo did not just censor certain videos, but instead banned Church United from its platform, evidencing discrimination based on Pastor Domen's sexual orientation and religion, as opposed to mere speech. *Id*. The Complaint also alleges disparate treatment and lists similar videos about sexual orientation and religion that were not deleted, further evidencing Vimeo's discrimination against Pastor Domen and Church United. *Id*. Vimeo failed to provide "an explanation for the distinction between Church United and Pastor Domen's videos relating to sexual orientation" and religion. *Id*. at 12a. None of Church United's videos contained obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable material. The five videos flagged by Vimeo as problematic centered on Pastor Domen's sexual orientation as a former homosexual and his religion. *Id*. at 6a-7a.

Based on the allegations of discrimination in the complaint, Vimeo should not be entitled to

immunity under the applicable Section 230(c)(2)(A) provision at the motion to dismiss stage, prior to an opportunity to uncover facts through discovery that further negate its good faith defense. As Justice Thomas observed, "[p]aring back the sweeping immunity courts have read into §1254 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place." *Malwarebytes*, 141 S. Ct. at 18. A plaintiff still must prove the merits of their case. Vimeo may not merely claim subjective good faith at the motion to dismiss stage before further evidence of their discriminatory intent could be uncovered in discovery. Church United should have the opportunity to prove Vimeo's actions were based on unlawful discrimination.

SHOULD CHURCH UNITED BE AFFORDED THE OPPORTUNITY TO AMEND THE COMPLAINT?

Church United and Pastor Domen have set forth sufficient facts to establish a plausible inference that Church United and Pastor Domen are the victims of unlawful discrimination pursuant to California's Unruh Act and New York's Sexual Orientation Non-Discrimination Act. But, at the very least, Church United and Pastor Domen should be given a chance to amend the Complaint as necessary, especially when the panel's last opinion did not decide whether CDA immunity applies.

At the pleading stage, Church United and Pastor Domen need only show a minimal inference of discrimination. *Menaker v. Hofstra Univ.*, 935 F.3d 20, 30 (2d Cir. 2019) (explaining that "it is often difficult

to obtain direct evidence of discriminatory intent" to determine "the elusive factual question of intentional discrimination"). Accordingly, to survive a motion to dismiss, "allegation of facts supporting a minimal plausible inference of discriminatory intent suffices as to this element of the claim." *Doe v. Columbia Univ.*, 831 F.3d 46, 55 (2d Cir. 2016). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 556 U.S. 544, 570 (2007)

Church United's Complaint contains specific factual allegations supporting an inference of sexual orientation and religious discrimination. The Complaint alleges that Vimeo acted intentionally and discriminated against Church United and Pastor Domen when it deleted their entire library of videos and canceled their account. Pet. App. at 6a-7a. By permanently banning Church United and Pastor Domen from its platform, as opposed to censoring the five videos, it is evident that Vimeo discriminated not merely against a message, but against Church United and Pastor Domen based on sexual orientation and religion. *Id*. The Complaint also alleges disparate treatment by identifying similar videos about sexual orientation and religion posted by other users that were not deleted, further evidencing Vimeo's discrimination. *Id*.

Vimeo failed to provide an explanation for the distinction between Church United and Pastor Domen's videos relating to sexual orientation and religion and similar videos by other users on its platform. *Id*. If Pastor Domen were a heterosexual

turned homosexual would Vimeo have banned Church United's account? Based on the allegations in the Complaint, the answer is a resounding "no," indicating discriminatory intent. Vimeo did not approve that Pastor Domen is a former homosexual and Christian.

To the extent the Second Circuit found that "allegations suggesting Vimeo acted in bad faith were too conclusory to 'nudge their claims across the line from conceivable to plausible,'" Church United should have been granted leave to amend its Complaint to allege the religious and sexual orientation-based discrimination to satisfy the applicable pleading standard. Leave to amend should be freely given where justice so requires. *See* Fed. R. Civ. P. 15(a)(2). The district court explained that there is no way for Church United to reformulate its claims in a way that is not preempted by the CDA, and, therefore, any attempt at re-pleading would be futile. However, since the panel's last amended opinion did not consider the applicability of the CDA, Church United should have been given leave to amend.

Leave to amend will allow Church United to address any pleading deficiencies. In fact, the Second Circuit opinion engages in a lengthy discussion regarding the additional allegations that could have been pled to make Church United's claims meet the pleading standard and survive a 12(b)(6) motion. Pet. App. at 11a-13a. The Second Circuit provided a roadmap for Church United to follow to satisfy its view of the applicable pleading standard. And especially without an analysis of the CDA, leave to amend is not futile. Therefore, this Court should grant

certiorari, at the very least, to correct this miscarriage of justice and grant leave to amend.

CONCLUSION

This case is an ideal vehicle for this Court to clarify the correct application and scope of CDA immunity, for the first time in the CDA's approximate twenty-six-year history. Alternatively, this Court should remand this case to allow Petitioners the opportunity to amend its complaint for the first time to avoid the miscarriage of justice.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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February 14, 2022

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED SEPTEMBER 24, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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 24th day of September, two thousand twenty-one.

Appendix A

No. 20-616-cv

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

PRESENT:

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

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.[1] 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.[2] 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.

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

2. Because Domen is the president and founder of Church United and his claims are coextensive with those of Church United, we generally refer to Domen and Church United together as "Church United," "Appellants," or "Plaintiffs."

Appendix A

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.

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 U.S. Dist. LEXIS 177650, 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 homosexuals under the civil rights laws, focusing only on Vimeo's application of the Guidelines to Appellants' content and account.[3]

The district court granted Vimeo's motion to dismiss pursuant to Federal Rule 12(b)(6). *See Domen*, 433 F. Supp. 3d at 607-08. In doing so, the court concluded that all of Appellants' claims were preempted by subsections (c)(1) and (c)(2) of Section 230 of the CDA. The district court first concluded that Vimeo was acting as a "publisher" rather than a speaker, triggering protection from suit under subsection (c)(1). *Id.* at 601-03. The district court acknowledged that the Second Circuit had not ruled on precisely this situation—where plaintiffs sought to hold a defendant liable for removing content as opposed to permitting content to exist on its platform—but used the reasoning of other courts to conclude that this did not change the outcome. *Id.* at 602. The district court also concluded subsection (c)(2) required dismissal. *Id.* at 604. It reasoned that the videos promoted SOCE, violating Vimeo's content policy against SOCE, and Appellants' allegations suggesting Vimeo acted in bad faith were too conclusory to "nudge their claims across the line from conceivable to plausible." *Id.* at 604 (alteration omitted).

3. Appellants also do not contend that Vimeo's actions constituted a breach of the Terms of Service or that Vimeo breached its agreement with them as to when and how content may be removed from Vimeo's website.

The district court further decided that because Section 230 preempts state statutory claims and the California state constitutional claim, the entire case was statutorily barred. *Id.* at 604-06.

The district court also concluded that, even if the CDA did not bar all of Appellants' claims, Appellants failed to state a claim. *Id.* at 606-07. As for the discrimination claims, there were no plausible allegations supporting the claim that Vimeo intentionally discriminated against Appellants on the basis of their sexuality or religion, a necessary element of a claim under both state statutes. *Id.* at 606. The district court also concluded that Vimeo was not a state actor, so its actions did not implicate Appellants' free speech rights, requiring dismissal of the California constitutional claim. *Id.* at 606-07. Lastly, the district court denied leave to amend as futile. *Id.* at 607.

On appeal, Appellants argue that Section 230 of the CDA does not protect Vimeo's actions from suit and that they stated a claim under state statutory discrimination law. Because Appellants' complaint fails to plausibly plead a claim for discrimination under the state statutes there is no need to consider Vimeo's defense that such claims are pre-empted under Section 230. Appellants' claims fail because they have not plausibly pled that Vimeo's acts were done with discriminatory intent or purpose. Furthermore, Appellants do not make any arguments regarding their state constitutional free speech claim in their opening brief and have therefore waived the ability to challenge its dismissal in this appeal. *See Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009).

Appendix A

DISCUSSION

We review a district court's grant of a motion to dismiss de novo, *Hernandez v. United States*, 939 F.3d 191, 198 (2d Cir. 2019), and denials of leave to amend for abuse of discretion, *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hernandez*, 939 F.3d at 198 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

Appellants' complaint fails to state a claim on which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). The district court found that Plaintiffs failed to state a claim under both the New York Human Rights Law (incorporating the Sexual Orientation Non-Discrimination Act) and the California Unruh Act, because they did not "plausibly allege[] that Vimeo's conduct was animated by discriminatory intent against Domen." *Domen*, 433 F. Supp. 3d at 606. In order to state a discrimination claim under either statute, a plaintiff must allege facts sufficient to create an inference of discriminatory intent on account of the plaintiff's membership in a protected class. *See Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 425 (9th Cir. 2014) ("[T]he Unruh Act contemplates willful, affirmative misconduct on the part of those who violate the Act . . .." (internal quotation omitted)); *Smith v. City of New York*, 385 F. Supp. 3d 323, 332 (S.D.N.Y. 2019) (stating that one element of a claim under the New York Human Rights

Law is that the "adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent").

Appellants have not met that standard. Instead, they simply allege that their content was removed for espousing pro-SOCE views and because of Domen's sexual orientation and religion. *See* App'x at 51, 52, 55 (Amended Complaint). They make only conclusory allegations suggesting that Vimeo removed their content for reasons other than violation of the Terms of Service. *Smith*, 385 F. Supp. 3d 323 at 332 ("[B]are-bones, conclusory allegations of supposedly 'similarly situated' comparators . . . fail to raise an inference of discriminatory intent.").

On appeal, Appellants argue that the amended complaint sufficiently alleged discriminatory intent by identifying "similar videos about sexual orientation and religion posted by other users that were not deleted." Appellants' Br. at 25. They further argue, without pointing to any factual basis, that "[b]y permanently banning Church United and Domen from its platform, as opposed to censoring the five videos, it is evident that Vimeo discriminated not merely against a message, but against Church United and Domen based on sexual orientation and religion." *Id.*

An inference of discriminatory intent may be shown through a comparison to similarly situated persons not sharing a plaintiff's protected characteristic who were treated preferentially. *See, e.g.*, *Stucky v. Wal-Mart Stores, Inc.*, No. 02-CV-6613 CJS(P), 2005 U.S. Dist.

LEXIS 20845, 2005 WL 2008493, at *6 (W.D.N.Y. Aug. 22, 2005). However, the allegations about these "similar videos" in the amended complaint are vanishingly thin and lack the substance required to support an inference of discriminatory intent. *See* Appellants' Br. at 25. The amended complaint merely alleges, on information and belief, that other videos containing references to LGBTQ sexual orientations and gender identities were permitted to remain on the site. *See* App'x at 51. That is not enough. *See, e.g.*, *Henry v. NYC Health & Hosp. Corp.*, 18 F. Supp. 3d 396, 408 (S.D.N.Y. 2014) (aside from allegations that comparators and plaintiff had the same hair color, the complaint "fail[ed] to describe who these people are, what their responsibilities were, how their workplace conduct compared to [plaintiff's], or how they were treated," and therefore failed to state a claim for discrimination); *Morris v. Yale Univ. Sch. of Med.*, 477 F. Supp. 2d 450, 460 n.2 (D. Conn. 2007) ("To be 'similarly situated,' the individuals with whom plaintiff attempts to compare himself must be similarly situated in all material respects." (citation and alterations omitted)); *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000) ("[T]he standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases . . .."). Furthermore, we have difficulty understanding what inference in support of their claim can reasonably be drawn from Plaintiffs' allegation that Vimeo continued to host a video entitled "The Gay Dad," or "LGBTQ barber in NYC." App'x at 51. They highlight, apparently as evidence of discriminatory intent, that "Vimeo did not provide Plaintiffs with an explanation for the distinction between Plaintiffs' videos

relating to sexual orientation, testimonials, events relating to sexual orientation, and the thousands of similar videos related to LGBTQ and sexual orientation." App'x at 51. But Vimeo cited its terms of service to Plaintiffs when it closed the account; the absence of an additional explanation from the platform provider does not save Plaintiffs' complaint.

Appellants' claims must be dismissed because they fail to state a claim for religious or sexual orientation-based discrimination. Although the parties raised additional arguments, we do not reach them here.

CONCLUSION

We conclude that Appellants have failed to state a claim for discrimination, and that the district court properly dismissed Appellants' claims. Accordingly, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court
/s/ Catherine O'Hagan Wolfe

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JULY 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2020
Docket No. 20-616

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Argued: December 10, 2020
Decided: July 21, 2021,

Before: POOLER, WESLEY, and CARNEY, *Circuit Judges.*

Appeal from the judgment of the United States District Court for the Southern District of New York (Stewart D. Aaron, *M.J.*) dismissing plaintiffs' claims alleging discrimination based on sexual orientation and

religion under federal and state law. Having vacated our previous opinion, dated March 11, 2021, we file this amended opinion in its place. James Domen and Church United allege that Vimeo, Inc., unlawfully discriminated against them by deleting Church United's account from its online video hosting platform. We agree with the district court that Section 230(c)(2) of the Communications Decency Act protects Vimeo, Inc., from this suit and that Appellants have failed to state a claim for relief. Therefore, we AFFIRM the judgment of the district court.

POOLER, *Circuit Judge*:

Plaintiffs-Appellants James Domen and Church United allege that Vimeo, we issue this amended opinion in its place. 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). It 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 an opinion dated March 11, 2021. Having vacated that decision,

Section 230 figures prominently in the current discourse regarding the intersection of law and social media.[1] While lively debate on whether and how best to regulate interactive computer service platforms is ongoing, and experts, consumers, and businesses continue to propose a variety of solutions, Section 230 remains the governing statute. Its impact on this case is clear. Pursuant to Section 230(c)(2), Vimeo is protected against the civil rights claims articulated by Appellants' amended complaint. Appellants argue that Vimeo demonstrated bad faith by discriminating against them based on their religion and sexual orientation, which they term "former" homosexuality; deleting Church United's entire account, as opposed to only the videos at issue; and 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 bad faith sufficient to survive a motion to dismiss. Appellants have also failed to state a claim under either the New York Sexual Orientation Non-Discrimination Act

1. *See generally, e.g.*, Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017); Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 HARV. J. ON LEGIS. 141 (2019); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

or the California Unruh Act.[2] 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.[3] 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.

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2. We do not reach the district court's conclusions regarding Section 230(c)(1).

3. 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" or "Appellants."

Appendix B

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.

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 U.S. Dist. LEXIS 177650, 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. They 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 under the civil rights laws, focusing only on Vimeo's application of the Guidelines to Appellants' content and account.

The district court granted Vimeo's motion to dismiss pursuant to Federal Rule 12(b)(6). *See Domen*, 433 F. Supp. 3d at 607-08. In doing so, the court concluded that all of Appellants' claims were preempted by subsections (c)(1) and (c)(2) of Section 230 of the CDA.[4] The district court first concluded that Vimeo was acting as a "publisher" rather than a speaker, triggering protection from suit under subsection (c)(1). *Id.* at 601-03. The district court acknowledged that the Second Circuit had not ruled on precisely this situation—where the plaintiffs sought to hold the defendant liable for removing content as opposed to permitting content to exist on its platform—but used the reasoning of other courts to conclude that this did not change the outcome. *Id.* at 602. The district court also concluded subsection (c)(2) required dismissal. *Id.* at 604. It reasoned that the videos promoted SOCE, violating Vimeo's legitimate content policy against SOCE, and Appellants' allegations suggesting Vimeo acted in bad faith were too conclusory to "nudge their claims across the line from conceivable to plausible." *Id.* at 604 (alteration omitted). The district court further decided that because

4. Section 230(e)(3) expressly preempts state law causes of action in the event of an "inconsisten[cy]" between such actions and Section 230. 47 U.S.C. § 230(e)(3); *see also Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1131 (E.D. Va. 1997), *aff'd*, 129 F.3d 327 (4th Cir. 1997).

Section 230 preempts state statutory claims and the California state constitutional claim, the entire case was statutorily barred. *Id.* at 604-06.

Next, the district court concluded that, even if the CDA did not bar all of Appellants' claims, Appellants failed to state a claim. *Id.* at 606-07. As for the discrimination claims, there were no plausible allegations supporting the claim that Vimeo intentionally discriminated against Appellants on the basis of their sexuality or religion, a necessary element of a claim under both state statutes. *Id.* at 606. The district court also concluded that Vimeo was not a state actor, so its actions did not implicate Appellants' free speech rights, requiring dismissal of the California constitutional claim. *Id.* at 606-07. Lastly, the district court denied leave to amend as futile. *Id.* at 607.

On appeal, Appellants argue that Section 230 of the CDA does not protect Vimeo's actions from suit and that they stated a claim under state statutory discrimination law. They do not make any arguments regarding their state constitutional free speech claim in their opening brief and have therefore waived the ability to challenge it in this appeal. *See Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009).

DISCUSSION

We review a district court's grant of a motion to dismiss de novo, *Hernandez v. United States*, 939 F.3d 191, 198 (2d Cir. 2019), and denials of leave to amend for abuse of discretion, *Ruffolo v. Oppenheimer & Co.*,

987 F.2d 129, 131 (2d Cir. 1993). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hernandez*, 939 F.3d at 198 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

I. Section 230(c)(2) of the Communications Decency Act

Congress enacted the CDA in the face of growing and widespread use of the internet. "[T]he primary purpose of the CDA was to protect children from sexually explicit internet content." *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (footnote omitted). Section 230 is an amendment to the original law, enacted to "provide immunity for interactive computer services that make 'good faith' efforts to block and screen offensive content." *Id.* (citation, alteration, and some internal quotation marks omitted). Changes in the use of internet platforms now far outpace a law enacted before the invention of the smartphone.

Section 230 has two relevant subsections. The first provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C § 230(c)(1). The second governs "[c]ivil liability" and states that no provider or user of an interactive computer service shall be held liable for:

> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to [the] material described . . . .

Id. § (c)(2). "In applying the statute, courts have broken it down into three component parts[.]" *LeadClick*, 838 F.3d at 173 (brackets and internal quotation marks omitted). The statute shields conduct if the defendant "(1) is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat the defendant as the publisher or speaker of that information." *Id.* (alterations and internal quotation marks omitted). A "publisher's traditional editorial functions" include "deciding whether to publish, withdraw, postpone or alter content." *Id.* at 174 (internal quotation marks omitted).

Appellants argue neither subsection of Section 230(c) applies. They contend that subsection (c)(1) is inapplicable because this lawsuit seeks to hold Vimeo liable for the enforcement of its own content policies, not for hosting user-generated content. They also argue that subsection

(c)(2) is inapplicable because, in their view, Vimeo did not act in good faith. Vimeo argues that subsection (c)(1)'s protection from suit applies because the action involves content that it did not create, i.e., Appellants' videos regarding SOCE, and that, in any event, its enforcement of its policy regarding SOCE qualifies for good faith protection from suit under subsection (c)(2). It further argues that any allegations of bad faith are too conclusory to support rejection of its defense under subsection (c)(2). Regardless of whether a separate analysis might lead to the conclusion that subsection (c)(1) covers Vimeo in the circumstances alleged, we affirm the district court's dismissal because subsection (c)(2) protects Vimeo from suit.

Subsection (c)(2) protects interactive computer service providers from liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." 47 U.S.C § 230(c)(2). Notably, the provision explicitly provides protection from suit for restricting access to content that providers "*consider*[] . . . otherwise objectionable," even if the material would otherwise be constitutionally protected, granting some degree of subjective discretion to service providers who restrict the availability of content in good faith. *Id.* (emphasis added). For our purposes, we need not define the outer reaches of the phrase "otherwise objectionable," since we conclude that Vimeo's removal of Appellants' videos and account for posting pro-SOCE content in

violation of the Terms of Service is well within the scope of Section 230(c)(2)'s protection from suit.

Vimeo determined that pro-SOCE material is "harassing"—one of the categories expressly enumerated in Section 230(c)(2). *See Domen*, 433 F. Supp. 3d at 599. The prohibition on pro-SOCE content is contained within a section of the Guidelines entitled "How does Vimeo define hateful, ***harassing***, defamatory, and discriminatory content?" *See id.* (quoting Vimeo's Guidelines) (emphasis added). That Vimeo "considers" the removed content "harassing," and by implication "objectionable," as those terms are used in Section 230(c)(2), is clear on the face of the record. *See* 47 U.S.C § 230(c)(2).

Moreover, the statute does not require providers to use any particular form of restriction to avail themselves of its protections. Although Appellants object to Vimeo's deletion of Church United's entire account as opposed to deleting only those videos promoting SOCE, nothing in the statute or related case law suggests that this difference takes Vimeo's actions outside of the scope of subsection (c)(2)'s protection from suit. Indeed, Vimeo warned Church United that its entire account could be removed if it ignored the warning. Church United received the warning and did not take the videos down or otherwise allay Vimeo's concerns. Vimeo was entitled to enforce its internal content policy regarding SOCE and delete Church United's account without incurring liability.

We also agree with the district court that Appellants' allegations that Vimeo acted in bad faith are too

conclusory to survive a motion to dismiss under Rule 12(b)(6). Appellants' bases for arguing that Vimeo acted in bad faith are not commensurate with how courts interpret bad faith in this context, and their cited cases do not satisfy their position. In *Zango, Inc. v. Kaspersky Lab, Inc.*, the Ninth Circuit considered whether the defendant's software—a filter blocking potentially malicious software from users' computers—qualified for Section 230 protection from suit in the same manner as platforms like YouTube or Facebook. 568 F.3d 1169, 1173-78 (9th Cir. 2009). The Ninth Circuit held that it did. *Id.* at 1178. In *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, the Ninth Circuit limited the scope of *Zango*, clarifying that Section 230 "immunity . . . does not extend to anticompetitive conduct." 946 F.3d 1040, 1054 (9th Cir. 2019). There, the court reinstated the plaintiff's Lanham Act claim, which alleged that the defendant's firewall program improperly filtered out the plaintiff's rival firewall program, even though the plaintiff's program posed no actual security threat to users' computers. *Id.* at 1047-48. The plaintiff alleged that the defendant made "false and misleading statements to deceive consumers into choosing [the defendant's] security software over [the plaintiff's]." *Id.* at 1048. Vimeo's deletion of Appellants' account was not anti-competitive or self-serving behavior done in the name of content regulation. Instead, it was a straightforward consequence of Vimeo's content policies, which Vimeo communicated to Church United prior to deleting its account. Indeed, the policy was communicated to Church United before it even joined the platform.

Appellants argue that bad faith is apparent from the fact that other videos relating to homosexuality exist on

Vimeo's website. In support of this, Appellants point to titles of videos that allegedly remain on Vimeo's website: "Gay to Straight," "Homosexuality is NOT ALLOWED in the QURAN," "The Gay Dad," and "Happy Pride! LGBTQ Pride Month 2016." App'x at 51. However, the mere fact that Appellants' account was deleted while other videos and accounts discussing sexual orientation remained available does not imply bad faith.[5] One purpose of Section 230 is to provide interactive computer services with protection from suit for removing "some—but not all—offensive material from their websites," as Vimeo has done here. *Bennett v. Google, LLC*, 882 F.3d 1163, 1166, 434 U.S. App. D.C. 311 (D.C. Cir. 2018). Given the massive amount of user-generated content available on interactive platforms, imperfect exercise of content-policing discretion does not, without more, suggest that enforcement of content policies was not done in good faith. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 2017) (explaining that "[t]he amount of information communicated via interactive computer services is . . . staggering" and that Congress passed Section 230 expressly to "remove disincentives for the development and utilization of blocking and filtering technologies") (internal quotation marks omitted). Moreover, these comparators are insufficiently detailed

5. Notably, Church United nowhere alleges that Vimeo subjected it to any harassment, warnings, or other forms of restrictions during approximately two years of posting videos about its religion and message. By Appellants' own account, Vimeo only took action after Church United ignored a warning about posting SOCE content in violation of the Guidelines. This further undermines Appellants' position that Vimeo was acting in bad faith or with discriminatory intent.

in the amended complaint to support an inference of intentional discrimination, as discussed below.

Ultimately, "Section 230(c)(2) protects from liability providers and users of interactive computer service who voluntarily make good faith efforts to restrict access to material they consider to be objectionable . . . ." *Green v. Am. Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003). Here, Vimeo did just that: it removed Appellants' account for expressing pro-SOCE views which it in good faith considers objectionable. Appellants implicitly acknowledge that their content violated the Vimeo's Terms of Service. They nevertheless ignored Vimeo's notice of their violation, and, as a result, Vimeo deleted their account. By suing Vimeo, Appellants run headfirst into Section 230, which "allows computer service providers to establish standards of decency without risking liability for doing so." *Bennett*, 882 F.3d at 1168 (brackets and internal quotation marks omitted).

Our decision should not be read to confer immunity on providers acting in circumstances far afield from the facts of this case. Courts have rejected Section 230 defenses against claims for false advertising, deceptive trade practices, and tortious interference. *See, e.g.*, *E-Ventures Worldwide, LLC v. Google, Inc.*, 188 F. Supp. 3d 1265 (M.D. Fla. 2016); *Nat'l Numismatic Certification, LLC v. eBay, Inc.*, No. 6:08-cv-42-Orl-19GJK, 2008 U.S. Dist. LEXIS 109793, 2008 WL 2704404 at *24 (M.D. Fla. July 8, 2008). Judges, commentators, and the executive branch alike have expressed concern about Section 230's potential to protect companies engaging in anti-competitive conduct.

See, e.g., *Zango*, 568 F.3d at 1178 (Fisher, J., concurring); Berin Szoka & Ashkhen Kazaryan, *Section 230: An Introduction for Antitrust & Consumer Protection Practitioners*, Glob. Antitrust Inst. Rep. on Digit. Econ. 29 (2020); U.S. Dep't. of Just., Department of Justice's Review of Section 230 of the Communications Decency Act of 1996 (2020). Certain claims sounding in contract or tort may be beyond the reach of Section 230(c)(2)'s protection from suit. Our decision applies to the limited circumstances of this case and analogous claims.

II. Failure to State a Claim

Appellants also fail to state a claim on which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). The district court found that plaintiffs failed to state a claim under both the New York Human Rights Law (incorporating the Sexual Orientation Non-Discrimination Act) and the California Unruh Act because they did not "plausibly allege[] that Vimeo's conduct was animated by discriminatory intent against Domen." *Domen*, 433 F. Supp. 3d at 606. In order to state a discrimination claim under either statute, a plaintiff must allege facts sufficient to create an inference of intentional discrimination on account of the plaintiff's membership in a protected class. *See Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 425 (9th Cir. 2014); *Smith v. City of New York*, 385 F. Supp. 3d 323, 332 (S.D.N.Y. 2019).

Appellants have not met that standard. Instead, they simply allege that their content was removed for espousing pro-SOCE views. *See* App'x at 51 (Amended Complaint)

("Vimeo restricted and censored Plaintiffs' videos because those videos were based on a viewpoint regarding sexual orientation and religion with which Vimeo disagrees."). They make no allegation suggesting that Vimeo removed their content for any reason other than this violation of the Terms of Service.

On appeal, Appellants argue that the amended complaint alleged discriminatory intent by identifying "similar videos about sexual orientation and religion posted by other users that were not deleted." Appellants' Br. At 25. An inference of discrimination may be shown through a comparison to similarly situated persons not sharing a plaintiff's protected characteristic who were treated preferentially. *See, e.g.*, *Stucky v. Wal-Mart Stores, Inc.*, 2005 U.S. Dist. LEXIS 20845, 2005 WL 2008493, No. 02-CV-6613 CJS(P), at *6 (W.D.N.Y. Aug. 22, 2005). However, the allegations about these "similar videos" in the amended complaint are vanishingly thin and lack the substance required to support an inference of discriminatory intent. *See* Appellants' Br. at 25. The amended complaint merely alleges, on information and belief, that other videos containing references to LGBTQ sexual orientations and gender identities were permitted to remain on the site. *See* App'x at 51. That is not enough. Only one "similar video" identified by the Plaintiffs could plausibly be understood to promote SOCE, and it is identified only as "Gay to Straight," with no further explanation about its content, when it was uploaded, how long it remained on the site, or the characteristics of the user who uploaded it. *See* App'x at 51; Appellant's Br. at 25; *see also Henry v. NYC Health & Hosp. Corp.*, 18 F.

Supp. 3d 396, 408 (S.D.N.Y. 2014) (aside from allegations that comparators and plaintiff had the same hair color, the complaint "fail[ed] to describe who these people are, what their responsibilities were, how their workplace conduct compared to [plaintiff's], or how they were treated," and therefore failed to state a claim for discrimination); *Morris v. Yale Univ. Sch. of Med.*, 477 F. Supp. 2d 450, 460 n.2 (D. Conn. 2007) ("To be 'similarly situated,' the individuals with whom plaintiff attempts to compare himself must be similarly situated in all material respects." (citation and alterations omitted)).

Appellants' claims must be dismissed for the separate and independent reason that they fail to state a claim for religious or sexual orientation-based discrimination. Although the parties raised additional arguments, there is no need to reach them.

CONCLUSION

We conclude that CDA Section 230(c)(2) protects Vimeo from this lawsuit, that Appellants have failed to state a claim for discrimination, and that the district court properly dismissed Appellants' claims. Accordingly, the judgment of the district court is **AFFIRMED.**

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 11, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

December 10, 2020, Argued;
March 11, 2021, Decided

Docket No. 20-616

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.[1]

Before: POOLER, WESLEY, and CARNEY, *Circuit Judges.*

POOLER, *Circuit Judge*:

1. The Clerk of Court is directed to change the caption to the above.

Appendix C

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 ground that Section 230 of the Communications Decency Act ("CDA") immunizes Vimeo from this suit. The district court concluded that Vimeo deleted Church United's account because of Church United's violation of one of Vimeo's content policies barring the promotion of sexual orientation change efforts ("SOCE") on its platform. This policy, in turn, fell within the confines of the good-faith content policing immunity that the CDA provides to interactive computer services.

Section 230 figures prominently in the current discourse regarding the intersection of law and social media.[2] While lively debate on whether and how best to regulate interactive computer service platforms is ongoing, and experts, consumers, and businesses continue to propose a variety of solutions, Section 230 remains the governing statute. Moreover, its impact on this case is clear. Pursuant to Section 230(c)(2), Vimeo is free to restrict access to material that, in good faith, it finds objectionable.

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2. *See generally, e.g.*, Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017); Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 HARV. J. ON LEGIS. 141 (2019); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

Appellants argue that Vimeo demonstrated bad faith by discriminating against them on the basis of their religion and sexual orientation, which they term "former" homosexuality; deleting Church United's entire account, as opposed to only the videos at issue; and permitting other videos with titles referring to homosexuality to remain on the website. However, Appellants' conclusory allegations of bad faith do not survive the pleadings stage, especially when examined in the context of Section 230(c)(2). Section 230(c)(2) does not require interactive service providers to use a particular method of content restriction, nor does it mandate perfect enforcement of a platform's content policies. Indeed, the fundamental purpose of Section 230(c)(2) is to provide platforms like Vimeo with the discretion to identify and remove what they consider objectionable content from their platforms without incurring liability for each decision. Therefore, we AFFIRM the judgment of the district court.

BACKGROUND

These facts are taken from plaintiffs' amended complaint and are assumed true for this appeal.

James Domen is the president and founder of the non-profit organization Church United.[3] Domen alleges that he "was a homosexual" for three years but then, "because of his desire to pursue his faith in Christianity,

3. Because Domen is the president and founder of Church United and his claims are co-extensive with those of Church United, we refer to Domen and Church United together as "Church United" or "Appellants."

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.

In October 2016, Church United created a Vimeo account to upload a variety of videos promoting the organization, including "videos addressing sexual orientation as it relates to religion." App'x at 49. They 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 the event 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, 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.

- 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 allege 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.

Appendix C

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 this is "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 aimed at barring business establishments 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.

The district court granted Vimeo's motion to dismiss pursuant to Federal Rule 12(b)(6). *See Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 607-08 (S.D.N.Y. 2020). In doing so, the court concluded that all of Appellants' claims were preempted under both subsections (c)(1) and (c)(2) of Section 230 of the CDA.[4] The district court first

4. Although the word "immunity" is not found in the statute, many courts refer to Section 230 as providing immunity from any suit in which the plaintiff seeks to treat an interactive computer service as the publisher or speaker of information provided by another information content provider. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009). Section 230(e)(3) also

concluded that Vimeo was acting as a "publisher" rather than a speaker, triggering immunity under subsection (c)(1). *Id.* at 601-03. The district court acknowledged that the Second Circuit had not ruled on precisely this situation—where the plaintiffs sought to hold the defendant liable for removing content as opposed to permitting content to exist on its platform—but used the reasoning of other courts to conclude that this did not change the outcome. *Id.* at 602. The district court also concluded subsection (c)(2) required dismissal. *Id.* at 604. It reasoned that the videos promoted SOCE, violating Vimeo's legitimate content policy against SOCE, and Appellants' allegations suggesting Vimeo acted in bad faith were too conclusory to "nudge their claims across the line from conceivable to plausible." *Id.* at 604 (alteration omitted). The district court further decided that because Section 230 preempts state statutory claims and the California state constitutional claim, the entire case was statutorily barred. *Id.* at 604-06.

Next, the district court concluded that, even if the CDA did not bar all of Appellants' claims, Appellants failed to state any plausible legal claim. *Id.* at 606-07. As for the discrimination claims, there were no plausible allegations supporting the claim that Vimeo intentionally

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expressly preempts state-law causes of action in the event of an "inconsisten[cy]" between such actions and Section 230. 47 U.S.C. § 230(e)(3); *see also Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1131 (E.D. Va. 1997), *aff'd*, 129 F.3d 327 (4th Cir. 1997). Since Section 230 establishes that "[n]o cause of action" that is "inconsistent" with the section's provisions may be brought, 47 U.S.C. § 230(e)(3), we refer to Section 230's protections as both effecting immunity from suit and preemption of certain state law actions.

discriminated against Appellants on the basis of their sexuality or religion. *Id.* at 606. The district court also concluded that Vimeo was not a state actor, so its actions did not implicate Appellants' free speech rights, requiring dismissal of the California constitutional claim. *Id.* at 606-07. Lastly, the district court denied leave to amend as futile. *Id.* at 607.

On appeal, Appellants argue that Section 230 of the CDA does not protect Vimeo's actions and that they stated a claim under state statutory discrimination law. They do not make any arguments regarding their state constitutional free speech claim in their opening brief and have therefore waived the ability to challenge it in this appeal. *See Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009).

DISCUSSION

We review a district court's grant of a motion to dismiss de novo, *Hernandez v. United States*, 939 F.3d 191, 198 (2d Cir. 2019), and denials of leave to amend for abuse of discretion, *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hernandez*, 939 F.3d at 198 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

Congress enacted the CDA in the face of growing and widespread use of the internet. "[T]he primary purpose of the CDA was to protect children from sexually explicit

internet content." *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (footnote omitted). Section 230 is an amendment to the original law, enacted to "provide immunity for interactive computer services that make 'good faith' efforts to block and screen offensive content." *Id.* (citation, alteration, and some internal quotation marks omitted). Although "[w]e have had limited opportunity to interpret Section 230," our Circuit and others note "that Section 230 immunity is broad." *Id.*

Section 230 has two relevant subsections. The first provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C § 230(c)(1). The second governs "[c]ivil liability" and states that no provider or user of an interactive computer service shall be held liable for:

> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to [the] material described . . . .

Id. § (c)(2). "In applying the statute, courts have broken it down into three component parts[.]" *LeadClick*, 838 F.3d at 173 (brackets and internal quotation marks omitted). The statute shields conduct if the defendant "(1) is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat the defendant as the publisher or speaker of that information." *Id.* (alterations and internal quotation marks omitted). A "publisher's traditional editorial functions" include "deciding whether to publish, withdraw, postpone or alter content." *Id.* at 174 (internal quotation marks omitted).

Appellants argue neither subsection of Section 230(c) applies. They contend that subsection (c)(1) is inapplicable because this lawsuit seeks to hold Vimeo liable for the enforcement of its own content policies, not for hosting user-generated content. They also argue that subsection (c)(2) is inapplicable because, in their view, Vimeo did not act in good faith. Vimeo argues that subsection (c)(1) immunity applies because the action involves content that it did not create, i.e., Appellants' videos regarding SOCE, and that, in any event, its enforcement of its policy regarding SOCE qualifies for good faith protection under subsection (c)(2). It further argues that any allegations of bad faith are too conclusory to support rejection of its defense under subsection (c)(2). Regardless of whether a separate analysis might lead to the conclusion that subsection (c)(1) covers Vimeo in the circumstances alleged, we affirm the district court's dismissal on the ground that subsection (c)(2) immunizes Vimeo from suit.

Appendix C

A broad provision, subsection (c)(2) immunizes interactive computer service providers from liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." 47 U.S.C § 230(c)(2). Notably, the provision explicitly provides protection for restricting access to content that providers "*consider*[] . . . objectionable," even if the material would otherwise be constitutionally protected, granting significant subjective discretion. *Id.* (emphasis added). Therefore, Vimeo is statutorily entitled to consider SOCE content objectionable and may restrict access to that content as it sees fit.

Moreover, the statute does not require providers to use any particular form of restriction. Although Appellants take issue with Vimeo's deletion of Church United's entire account as opposed to deleting only those videos promoting SOCE, nothing within the statute or related case law suggests that this took Vimeo's actions outside of the scope of subsection (c)(2) immunity. Indeed, Vimeo warned Church United that removal of the entire account was exactly what might happen if they ignored the warning. Church United received the warning and did not take the videos down or otherwise allay Vimeo's concerns. Vimeo was entitled to enforce its internal content policy regarding SOCE and delete Church United's account without incurring liability.

We also agree with the district court that Appellants' allegations that Vimeo acted in bad faith are too conclusory to survive a motion to dismiss under Rule 12(b)(6). Appellants' bases for arguing that Vimeo acted in bad faith are not commensurate with how courts interpret bad faith in this context. Appellants' cited cases do not satisfy their position. In *Zango, Inc. v. Kaspersky Lab, Inc.*, the Ninth Circuit considered whether the defendant's software—a filter blocking potentially malicious software from users' computers—qualified for Section 230 immunity in the same manner as platforms like YouTube or Facebook. 568 F.3d 1169, 1173-78 (9th Cir. 2009). The Ninth Circuit held that it did. *Id* at 1178. In *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, the Ninth Circuit limited the scope of *Zango*, clarifying that Section 230 "immunity . . . does not extend to anticompetitive conduct." 946 F.3d 1040, 1054 (9th Cir. 2019). There, the court reinstated the plaintiff's Lanham Act claim, which alleged that the defendant's firewall program improperly filtered out the plaintiff's rival firewall program, even though the plaintiff's program posed no actual security threat to users' computers. *Id.* at 1047-48. The plaintiff alleged that the defendant made "false and misleading statements to deceive consumers into choosing [the defendant's] security software over [the plaintiff's]." *Id.* at 1048. Vimeo's deletion of Appellants' account was not anti-competitive conduct or self-serving behavior in the name of content regulation. Instead, it was a straightforward consequence of Vimeo's content policies, which Vimeo communicated to Church United prior to deleting its account.

Appellants argue that bad faith is apparent from the fact that other videos relating to homosexuality exist on Vimeo's website. In support of this, Appellants point to titles of videos that allegedly remain on Vimeo's website: "Gay to Straight," "Homosexuality is NOT ALLOWED in the QURAN," "The Gay Dad," and "Happy Pride! LGBTQ Pride Month 2016." App'x at 51. However, the mere fact that Appellants' account was deleted while other videos and accounts discussing sexual orientation remain available does not mean that Vimeo's actions were not taken in good faith. It is unclear from only the titles that these videos or their creators promoted SOCE. Moreover, one purpose of Section 230 is to provide interactive computer services with immunity for removing "some—but not all—offensive material from their websites." *Bennett v. Google, LLC*, 882 F.3d 1163, 1166, 434 U.S. App. D.C. 311 (D.C. Cir. 2018). Given the massive amount of user-generated content available on interactive platforms, imperfect exercise of content-policing discretion does not, without more, suggest that enforcement of content policies was not done in good faith. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 2017) (explaining that "[t]he amount of information communicated via interactive computer services is . . . staggering" and that Congress passed Section 230 expressly to "remove disincentives for the development and utilization of blocking and filtering technologies" (internal quotation marks omitted)).

Ultimately, "Section 230(c)(2) immunizes from liability providers and users of interactive computer service who voluntarily make good faith efforts to restrict access to material they consider to be objectionable . . . ." *Green v.*

Am. Online (AOL), 318 F.3d 465, 472 (3d Cir. 2003). Here, Vimeo has done just that. Appellants chose to ignore Vimeo's notice of their violation of Vimeo's content policy, and, as a result, Vimeo deleted their account. By suing Vimeo for this, Appellants run headfirst into the CDA's immunity provision, which "allows computer service providers to establish standards of decency without risking liability for doing so." *Bennett*, 882 F.3d at 1168 (brackets and internal quotation marks omitted).

Moreover, the district court properly dismissed Appellants' claims at the pleadings stage. "Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process[,] . . . [and] immunity is an immunity from suit rather than a mere defense to liability[;] it is effectively lost if a case is erroneously permitted to go to trial." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (italics and internal quotation marks omitted). Although the parties raised additional arguments, there is no need to reach them.

CONCLUSION

We conclude that CDA Section 230(c)(2) immunizes Vimeo from this lawsuit, and the district court properly dismissed Appellants' claims.

Accordingly, the judgment of the district court is **AFFIRMED**.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JANUARY 15, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

1:19-cv-08418 (SDA)

JAMES DOMEN *et al.*,

Plaintiffs,

-against-

VIMEO, INC. *et al.*,

Defendants.

January 14, 2020, Decided
January 15, 2020, Filed

STEWART D. AARON, United States Magistrate Judge.

OPINION AND ORDER

Pending before the Court is a motion by Defendant Vimeo, Inc. ("Defendant" or "Vimeo"), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the First Amended Complaint filed by Plaintiffs James Domen ("Domen") and Church United (collectively, the

"Plaintiffs"). (10/11/19 Not. of Mot., ECF No. 42.)[1] For the following reasons, Defendant's motion is GRANTED.

PROCEDURAL HISTORY

This case was commenced by the filing of a Complaint on June 25, 2019 in the U.S. District Court for the Central District of California. (Compl., ECF No. 1.) The case arose out of the termination of Church United's account on Vimeo's video-sharing website, which account displayed (among others) videos of Domen, a "former homosexual" who now "identif[ies] as heterosexual." (*See* Compl. ¶¶ 16, 18, 25, 38.) The account was terminated because certain videos "allegedly violated the following Vimeo guideline: 'Vimeo does not allow videos that harass, incite hatred, or include discriminatory or defamatory speech.'" (*Id.* ¶ 38.) In their Complaint, Plaintiffs asserted "that Defendant violated California law by restraining Plaintiffs' speech and expression in violation of Article One, Section 2 of the California Constitution . . . and by discriminating against Plaintiffs based on religious, sexual orientation, or other discriminatory animus in violation of the *Unruh Civil Rights Act*, section 51, et seq. of the *California Civil Code* (the 'Unruh Act')." (*Id.* at pp. 1-2 (italics in original).)

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1. In deciding this motion, the Court has considered Defendant's Memorandum of Law (Def. Mem., ECF No. 43), the Declaration of Michael A. Cheah, together with its exhibits (Cheah Decl., ECF No. 44), Plaintiffs' Opposition (Pl. Opp., ECF No. 45), the videos hyperlinked to Plaintiffs' Request for Judicial Notice (Jud. Not. Req., ECF No. 46), Defendant's Reply Memorandum (Reply, ECF No. 47) and the Reply Declaration of John Fogleman. (Fogleman Decl., ECF No. 48.)

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Plaintiffs also asserted a "Free Speech Claim" under the First Amendment to the U.S. Constitution. (*See id.*, Second Cause of Action.)

Defendant moved to dismiss this case for improper venue under Fed. R. Civ. P. 12(b)(3) or 28 U.S.C. § 1406(a), or in the alternative to transfer to this Court, pursuant to 28 U.S.C. § 1404(a). (7/19/19 Motion, ECF No. 12.) Defendant argued that Plaintiffs were bound by the forum-selection clause in the Vimeo Terms of Service to which they assented upon creation of their video-sharing account and again upon upgrading their subscription, which called for any action arising out of or relating to "use of the Vimeo Service" to "be commenced in the state or federal courts located in New York County, New York." (*Id.* at 4-13; Terms of Service, ECF No. 12-1, at 30.)

District Judge Wilson granted Defendant's motion to transfer to this Court, and denied the motion to dismiss for improper venue. *Domen v. Vimeo, Inc.*, No. 19-CV-01278 (SVW) (AFM), 2019 U.S. Dist. LEXIS 177650, 2019 WL 4998782, at *3 (C.D. Cal. Sept. 4, 2019). Judge Wilson added the following in a footnote to his Order: "Because this Court determined that venue transfer is appropriate under 1404(a), it notes but refrains from analyzing the substantive problems Plaintiffs may encounter in arguing that private actors ought to be liable for First Amendment violations." 2019 U.S. Dist. LEXIS 177650, [WL] at *1.

Upon transfer to this Court, this case was assigned to District Judge Torres. On October 1, 2019, the parties consented to conducting all proceedings in this case before

me. (Consent, ECF No. 31.) On October 4, 2019, Plaintiffs filed a First Amended Complaint ("FAC"). (FAC, ECF No. 35.) Plaintiffs did not assert a First Amendment claim in the FAC, but added a "Sexual Orientation Non-Discrimination Act" claim under New York Executive Law § 296. (FAC, Second Cause of Action.)

On October 11, 2019, Defendant filed the instant motion to dismiss. (10/11/19 Not. of Mot.) Plaintiffs filed their opposition on November 1, 2019 (Pl. Opp.) and Defendant filed its reply on November 15, 2019. (Reply.) Oral argument was held on January 13, 2020.

RELEVANT FACTS[2]

I. Parties

Church United, which was founded in 1994, is a "California non-profit Religious Corporation." (FAC ¶¶ 6-7.) "Church United aids pastors in advocating for public policy based on a biblical worldview." (*Id.* ¶ 11.) "Church United and its affiliated pastors desire to positively impact the State of California and the nation with hope and to preserve their individual rights as pastors to exercise their faith without unlawful infringement." (*Id.* ¶ 12.)

2. For purposes of this motion to dismiss, the Court assumes that the well-pleaded allegations of the FAC are true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (when "well-pleaded factual allegations" are present, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.").

Domen, a California resident who is a pastor and has a "masters of divinity degree," is the President and Founder of Church United. (FAC ¶¶ 2, 13.) "For three years, James Domen was a homosexual[; h]owever, because of his desire to pursue his faith in Christianity, he began to identify as a former homosexual." (*Id.* ¶ 15.) Domen "is like many others in California who were formerly homosexual but now identify as heterosexual." (*Id.* ¶ 17.)

Vimeo is a Delaware corporation with a principal place of business in New York. (FAC ¶ 21-22.) Vimeo is an online forum that "allows users to upload, view, share, and comment on videos." (*Id.* ¶ 24.)

The FAC also names as Defendants "Does 1 through 25" (FAC ¶ 28), but contains no substantive allegations against them. During oral argument, Plaintiffs explained that Does 1 through 25 were named as place-holders for potential, yet unknown, parties, in accordance with counsel's normal practice in California courts. (1/13/2020 Tr., ECF No. 54, at 23.) Plaintiffs also acknowledged that no additional parties had been identified. (1/13/2020 Tr. 23-24.)

II. Plaintiffs' Vimeo Account And Videos

In or about October 2016, Plaintiffs created a Vimeo account "for the purpose of hosting various videos, including videos addressing sexual orientation as it relates to religion." (FAC ¶ 29.) Plaintiffs initially had created their account with a free basic membership, but later "upgraded to a Pro Account." (*Id.* ¶ 31.) Plaintiffs used

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Vimeo's video hosting service to publish about 89 videos. (*Id.* ¶ 30.)

On November 23, 2018, Vimeo sent an email to Church United (addressed to jim@churchunited.com) stating:

> Hello Church United,
>
> A Vimeo moderator marked your account for review for the following reason:
>
> Vimeo does not allow videos that promote Sexual Orientation Change Efforts (SOCE)
>
> You need to take the following action as soon as possible:
>
> Please download your videos within the next 24 hours, as this will assure that you will be able to keep them upon closure of your account.
>
> After 24 hours, we will review your account again to make sure this action has been taken. If not, your videos and/or your account may be removed by a Vimeo moderator.
>
> For more information on our content and community policies, please visit https://vimeo.com/help/guidelines
>
> lf you have questions or believe you received this warning in error, please respond to this

> message and a Vimeo Community Manager will get back to you.

(FAC, Ex. A, ECF No. 35-1.)

Plaintiffs allege that the foregoing email "cited five (5) videos 'that espouse this theory,'" presumably referring to SOCE, and that these five videos were "flagged for review." (*See* FAC ¶¶ 33-38.)[3] The five videos, which Plaintiffs allege "involved an effort by Church United to challenge California Assembly Bill 2943 . . ., which aimed to expand California's existing prohibition on SOCE to apply to talk therapy and pastoral counseling" (*id.* ¶ 41), are as follows:

1) Video "wherein [Domen] briefly explained his life story, his preferred sexual orientation, the discrimination he faced, and his religion." (FAC ¶ 34; *see also* Jud. Not. Req. at 2 (containing embedded link to video).)

2) A "promotional video for Freedom March Los Angeles. Freedom March is a nationwide event where individuals like [Domen], who identify as former homosexuals, former lesbians, former transgenders, and former bisexuals, assemble with other likeminded individuals." (FAC ¶ 35 *see also* Jud. Not. Req. at 2 (containing embedded link to video).)

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3. The Court notes that the email attached as Exhibit A to the FAC does not reference any particular videos. However, Defendant does not challenge that the five referenced videos were among those at issue. (*See* Def. Mem. at 4.)

3) An "NBC produced documentary segment titled, Left Field, which documented and addressed SOCE." (FAC ¶ 36; *see also* Jud. Not. Req. at 2 (containing embedded link to video entitled, "One Man[']s quest to Ban Conversion Therapy NBC Left Field").)

4) A "press conference with Andrew Comiskey, the founder of Desert Stream, relating to his religion and sexual orientation." (FAC ¶ 37; *see also* Jud. Not. Req. at 2 (containing embedded link to video in which Comiskey "ask[s] that [California Assembly Bill 2943] would be struck down before it comes into law" (6:29-6:33)).)

5) An "interview with Luis Ruiz, a survivor of the horrific attack at the Pulse Nightclub in Florida in March 2018. In the video, Luis Ruiz shares his background as a former homosexual and his experience as a survivor of the attack." (FAC ¶ 38; *see also* Jud. Not. Req. at 2 (containing embedded link to video).)

On December 6, 2018, Vimeo sent an email to Church United advising that Plaintiffs' account had been removed by the Vimeo staff for violating Vimeo's "Guidelines." (FAC, Ex. B, ECF No. 35-2.)[4] The email states as the reason for removal: "Dear Church United, . . . Vimeo does not allow videos that harass, incite hatred, or include discriminatory or defamatory speech." (*Id.*) Although

4. Paragraph 39 of the FAC alleges that the "Vimeo guideline" is attached to the FAC as Exhibit B. However, Exhibit B is a copy of the December 6, 2018 email referenced above.

the email does not refer to the five videos above, the FAC alleges that Vimeo found that these videos violated the foregoing "Vimeo guideline." (FAC ¶ 39.) Plaintiffs challenge the decision by Vimeo to remove their account, alleging that "Vimeo restricted and censored Plaintiffs' videos because those videos were based on a viewpoint regarding sexual orientation and religion with which Vimeo disagrees." (FAC ¶ 47.)

III. Vimeo's Terms of Service And Guidelines

Vimeo's Terms of Service, which are referenced in the FAC (FAC ¶ 3), prohibit, among other things, content that "[c]ontains hateful, defamatory, or discriminatory content or incites hatred against any individual or group." (Cheah Decl., Ex. A, ECF No. 44-1, ¶ 7.) The terms of service incorporate by reference Vimeo's Guidelines. (*Id.* ("All videos you submit must also comply with the Vimeo Guidelines, which are incorporated into this Agreement.").)

In a section of the Guidelines entitled, "How does Vimeo define hateful, harassing, defamatory, and discriminatory content?," the Guidelines state that Vimeo moderators will "generally remove" videos that:

- Make derogatory or inflammatory statements about individuals or groups of people
- Are intended to harm someone's reputation
- Are malicious

- Include someone's image or voice without their consent (Exception! Public figures and/or political officials are generally fair game.)

  We also forbid content that displays a demeaning attitude toward specific groups, including:

- Videos that offer seduction training or teach Pickup Artist (PUA) techniques

- Videos that promote Sexual Orientation Change Efforts (SOCE)

- Videos that use coded or veiled language to attack a particular group like an ethnic or religious minority

(Cheah Decl., Ex. B, ECF No. 44-2, at 5-6.)

DISCUSSION

As explained below, the Court finds that Plaintiffs' claims are preempted by Section 230 of the Communications Decency Act ("CDA"). Thus, the Court grants Vimeo's motion to dismiss in its entirety.

I. Rule 12(b)(6) Legal Standards

When ruling on a motion to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, district courts are required to accept as true all factual allegations in the complaint and to draw all reasonable inferences in plaintiff's favor. *See Walker v. Schult*, 717 F.3d 119, 124 (2d Cir. 2013). However, this requirement does not

apply to legal conclusions, bare assertions or conclusory allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681, 686, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A plaintiff is required to support its claims with sufficient factual allegations to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the plaintiff has not "nudged [its] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *In re Express Scripts Holding Co. Secs. Litig.*, No. 16-CV-03338 (ER), 2018 U.S. Dist. LEXIS 85873, 2018 WL 2324065, *6 (S.D.N.Y. May 22, 2018) (quoting *Twombly*, 550 U.S. at 570).

"In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). "Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint 'relies heavily upon its terms and effect,' which renders the document 'integral' to the complaint." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (citation omitted).

II. Preemption Of Plaintiffs' Claims Under Federal Communications Decency Act of 1996

Vimeo argues that Plaintiffs' claims are preempted by Section 230 of the CDA. (Def. Mem. at 10-18; Reply at 4-9.) As discussed below, the Court agrees.

Appendix D

A. Legal Standards

There are two types of immunity provided under Section 230 of the CDA—*i.e.*, "publisher" immunity under Section 230(c)(1)[5] and immunity to "police content" under Section 230(c)(2).[6] The Court finds that Plaintiffs' claims are preempted under both (c)(1) and (c)(2). The Second Circuit[7] recently described the purpose behind Section 230 of the CDA, as follows:

> The primary purpose of the proposed legislation that ultimately resulted in the [CDA] "was to

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5. Section 230(c)(1) "provides immunity to [a defendant] as a publisher or speaker of information originating from another information content provider." *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003).

6. Section 230(c)(2) "expressly provides [interactive computer services] with immunity" to "police content." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358, 410 U.S. App. D.C. 187 (D.C. Cir. 2014).

7. Since the CDA is a federal statute, "the decisions of the Second Circuit are controlling." *Cohen v. KIND L.L.C.*, 207 F. Supp. 3d 269, 271 (S.D.N.Y. 2016) (citing *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir.1993) ("[A] transferee federal court should apply its interpretations of federal law, not the constructions of the transferor circuit."). However, case law from other Circuits may provide persuasive authority. *See Thypin Steel Co. v. Certain Bills of Lading Issues For A Cargo of 3017 Metric Tons, More Or Less, Of Hot Rolled Steel Plate Laden On Bd. The M/V GEROI PANFILOVSKY, in rem.*, 96-CV-02166 (RPP); *see also Lang v. Elm City Constr. Co.*, 217 F. Supp. 873, 877 (D. Conn. 1963) ("While the decision of the Third Circuit in *Corabi* is not controlling on this Court, it is persuasive and will be followed, absent a decision on the question by the Supreme Court or the Second Circuit.").

protect children from sexually explicit internet content." *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (citing 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon)). Section 230, though—added as an amendment to the CDA bill, *id.*—was enacted "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum," *Ricci* [*v. Teamsters Union Local 456*], 781 F.3d [25,] 28 [(2d Cir. 2015)] (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). Indeed, Congress stated in Section 230 that "[i]t is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(1)-(2).

. . .

The addition of Section 230 to the proposed CDA also "assuaged Congressional concern regarding the outcome of two inconsistent judicial decisions," *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), both

of which "appl[ied] traditional defamation law to internet providers," *LeadClick*, 838 F.3d at 173. As we noted in *LeadClick*, "[t]he first [decision] held that an interactive computer service provider could not be liable for a third party's defamatory statement . . . but the second imposed liability where a service provider filtered its content in an effort to block obscene material." *Id.* (citations omitted) (citing 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995 (statement of Rep. Cox))).

To "overrule *Stratton*," *id.*, and to accomplish its other objectives, Section 230(c)(1) provides that "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[] 47 U.S.C. § 230(c)(1).

. . .

Section 230(c)(2), which, like Section 230(c)(1), is contained under the subheading "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material," 47 U.S.C. § 230(c), responds to *Stratton* even more directly. It provides that "[n]o provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be

> obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in [Section 230(c)(1)]." *Id.* § 230(c)(2).

Force v. Facebook, Inc., 934 F.3d 53, 64 & n.16 (2d Cir. 2019), *petition for cert. pending*, No. 19-859 (filed Jan. 9, 2020).

B. Application

1. Immunities Under Section 230 Of The CDA

The Court first considers "publisher" immunity under Section 230(c)(1) and then considers immunity to "police content" under Section 230(c)(2). For the reasons set forth below, the Court finds that Vimeo is entitled to immunity under either (c)(1) or (c)(2).

a. "Publisher" Immunity Under Section 230(c)(1)

"In light of Congress's objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity." *Force*, 934 F.3d at 64. Section 230(c)(1) provides that "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by

another information content provider." 47 U.S.C. § 230(c)(1). Thus, the CDA's grant of immunity under Section 230(c)(1) applies to a defendant if the defendant "(1) is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information." *LeadClick Media, LLC*, 838 F.3d at 173 (citations and internal quotation marks omitted). Plaintiffs do not dispute the first two prongs, *i.e.*, that Vimeo is an interactive computer service[8] and that the information was from another content provider (*i.e.*, Plaintiffs). (*See* Pl. Opp. at 11-12.) However, as to the third prong, Plaintiffs contend that they are not seeking "to impose liability on Vimeo as a publisher of Plaintiffs' videos." (*Id.* at 12.) Plaintiffs allege that Vimeo deleted Plaintiffs' account "because of Vimeo's discriminatory and unlawful conduct." (*Id.*) Despite Plaintiffs' characterization of their allegations, Plaintiffs' claims are based upon the deletion of their content.

In this case, Vimeo plainly was acting as a "publisher" when it deleted (or, in other words, withdrew) Plaintiffs' content on the Vimeo website. As the Second Circuit explained in *LeadClick*, Section 230 "bars lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, **withdraw**, postpone or

8. "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . .." 47 U.S.C.A. § 230(f)(2).

alter **content**." *LeadClick Media, LLC*, 838 F.3d at 174 (emphasis supplied; citations and internal quotation marks omitted); *see also Force*, 934 F.3d at 67 (publishing covers "the decision to host third-party content in the first place"). And, as the Ninth Circuit explained in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2019), "publication involves reviewing, editing, and deciding whether to publish or to **withdraw from publication third-party content**." *Id.* at 1102 (emphasis supplied); *see also Ebeid v. Facebook, Inc.*, No. 18-CV-07030 (PJH), 2019 U.S. Dist. LEXIS 78876, 2019 WL 2059662, at *5 (N.D. Cal. May 9, 2019) ("defendant's decision to remove plaintiff's posts undoubtedly falls under 'publisher' conduct").

The parties do not cite, and the Court has been unable to locate, any cases in the Second Circuit construing Section 230(c)(1) in the same factual context as the present case. In the typical case, plaintiffs seek to hold the interactive computer service liable for publishing the content of a third party (or failing to delete content of that party), and immunity from liability under (c)(1) is found in that context. *See*, *e.g.*, *Force*, 934 F.3d at 65 (plaintiffs' claims implicated Facebook as a "publisher" of information from third party Hamas). In the present case, Plaintiffs are seeking to hold Vimeo liable for removing Plaintiffs' own content. There are cases from other Circuits, however, that arise in a similar factual context which the Court finds persuasive.

For example, in *Riggs v. MySpace, Inc.*, 444 F. App'x 986 (9th Cir. 2011), the Ninth Circuit found that Section 230(c)(1) immunity applied where the interactive computer

service (*i.e.*, MySpace) decided "to delete [plaintiff's] user profiles on its social networking website yet not delete other profiles [plaintiff] alleged were created by celebrity imposters." *Id.* at 987. Moreover, in *Ebeid*, the Northern District of California applied (c)(1) immunity to Facebook's "decision to remove plaintiff's posts" and "Facebook's on-and-off again restriction of plaintiff's use of and ability to post on the Facebook platform." *Ebeid*, 2019 U.S. Dist. LEXIS 78876, 2019 WL 2059662, at *5. So, too, in *Lancaster v. Alphabet Inc.*, No. 15-CV-05299 (HSG), 2016 U.S. Dist. LEXIS 88908, 2016 WL 3648608 (N.D. Cal. July 8, 2016), the Northern District of California applied (c)(1) immunity to the decision by YouTube, LLC, to remove plaintiff's YouTube videos. 2016 U.S. Dist. LEXIS 88908, [WL] at *3. *See also Mezey v. Twitter, Inc.*, No. 18-CV-21069 (KMM), 2018 U.S. Dist. LEXIS 121775, 2018 WL 5306769, at *2 (S.D. Fla. July 19, 2018) (dismissing lawsuit claiming that Twitter "unlawfully suspended [Plaintiff's] Twitter account" on grounds of Section 230(c)(1) immunity).

The Court is cognizant of the decision in *e-ventures Worldwide, LLC v. Google, Inc.*, No. 14-CV-00646 (PAM) (CM), 2017 U.S. Dist. LEXIS 88650, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017), which declined to apply Section 230(c)(1) to a publisher's action in removing content since, according to that court, "interpreting the CDA this way results in the general immunity in (c)(1) swallowing the more specific immunity in (c)(2), [which] immunizes only an interactive computer service's 'actions taken in good faith,'" and as such "the good-faith requirement [would be rendered] superfluous." 2017 U.S. Dist. LEXIS

88650, [WL] at *3. The Court does not find *e-ventures* persuasive since Section 230(c)(2)'s grant of immunity, while "overlapping" with that of Section 230(c)(1), *see Force*, 934 F.3d at 79 (Katzmann, C.J., concurring), also applies to situations not covered by Section 230(c)(1). Thus, there are situations where (c)(2)'s good faith requirement applies, such that the requirement is not surplusage.

For example, as the Ninth Circuit explained in *Barnes*:

> Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. Subsection (c)(2), for its part, provides an additional shield from liability, but only for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene . . . or otherwise objectionable." § 230(c)(2)(A). Crucially, the persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. See § 230(c)(2). Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue . . . can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable.

Barnes, 570 F.3d at 1105 (emphasis in original).

The Court finds that Plaintiffs are seeking to hold Vimeo liable for actions it took as a "publisher," and therefore that Vimeo is entitled to immunity under Section 230(c)(1) of the CDA. Even assuming, *arguendo*, that (c)(1) immunity did not apply, the Court finds that Vimeo is entitled to immunity under (c)(2), as discussed below.

b. Immunity To "Police Content" Under Section 230(c)(2)

Section 230(c)(2) provides in relevant part that "[n]o provider . . . of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . .." 47 U.S.C. § 230(c)(2)(A). This statute applies to this case. Here, Plaintiffs are seeking to hold Vimeo liable for the actions voluntarily taken by Vimeo to restrict access to Plaintiffs' materials that Vimeo finds to be objectionable. *See Dipp-Paz v. Facebook*, No. 18-CV-09037 (LLS), 2019 U.S. Dist. LEXIS 118394, 2019 WL 3205842, at *3 (S.D.N.Y. July 12, 2019) ("Defendant's actions to which Plaintiff objects [*i.e.*, blocking Plaintiff's Facebook account] fall squarely within [ ] CDA [Section 230(c)(2)(A)]'s exclusion from liability.").

Section 230(c)(2) is focused upon the provider's subjective intent of what is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2). That section "does not require that the material actually be objectionable; rather, it affords protection for blocking material 'that the

provider or user considers to be' objectionable." *Zango, Inc. v. Kaspersky Lab, Inc.*, No. 07-CV-00807 (JCC), 2007 U.S. Dist. LEXIS 97332, 2007 WL 5189857, at *4 (W.D. Wash. Aug. 28, 2007), *aff'd*, 568 F.3d 1169 (9th Cir. 2009). Vimeo's subjective intent is apparent based upon the allegations in the FAC and the documents incorporated by reference therein. Vimeo's Guidelines state under a section entitled "How does Vimeo define hateful, harassing, defamatory, and discriminatory content?" that "[v]ideos that promote Sexual Orientation Change Efforts (SOCE)" are forbidden. (*See* Cheah Decl., Ex. B, at 5-6.) The email that Vimeo sent to Plaintiffs regarding the subject videos warned them that "Vimeo does not allow videos that promote [SOCE]." (FAC, Ex. A.)

Based upon the allegations in the FAC, it is plain that Plaintiffs' videos in fact promoted SOCE. Plaintiffs themselves allege that "the videos involved an effort by [Plaintiff] Church United to challenge California Assembly Bill 2943 . . ., which aimed to expand California's existing prohibition on SOCE to apply to talk therapy and pastoral counseling." (FAC ¶ 41.) Obviously, challenging a statute that expands a prohibition on SOCE is equivalent to promoting SOCE.

The only remaining question, then, is whether Vimeo acted in "good faith" in removing Plaintiffs' videos, as the statute requires. Plaintiffs allege that Vimeo "failed to act in good faith" (FAC ¶¶ 53, 61; Pl. Opp. at 11), but set forth no facts to support this allegation.[9] Such a

9. During oral argument, in support of Plaintiffs' allegations regarding Vimeo's lack of good faith, Plaintiffs' counsel pointed to the fact that, although Vimeo removed Plaintiffs' videos, Vimeo

conclusory allegation is not sufficient. *See e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 609 (N.D. Ill. 2008)). *Accord Manza v. Newhard*, 470 F. App'x 6, 9 (2d Cir. 2012) (upholding dismissal of a 1983 case based in part upon a bad faith "claim [that] cannot be deemed plausible when, as here, conclusory pleadings are unsupported by factual content."). Based upon the allegations of the FAC, what occurred here is that Vimeo applied its Guidelines to remove Plaintiffs' videos, since such videos violated the Guidelines. Plaintiffs do not include sufficient factual allegations regarding Vimeo's alleged bad faith to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Thus, the Court finds that (c)(2) immunity applies here.

2. Preemption Under CDA Section 230

Having found that immunity applies under Section 230, the Court now turns to whether Section 230 preempts

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did not remove other videos (examples of which are set forth in paragraph 45 of the FAC) "relating to [individuals'] sexual orientation." (1/13/2020 Tr. at 41-42.) These allegations cannot plausibly establish a lack of good faith on the part of Vimeo since the purpose of Section 230 was to insulate interactive computer services from liability for removing some content, but not other content. *See Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) ("Deciding whether or not to remove content or deciding when to remove content falls squarely within [Defendant's] exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity."). There simply are no substantive allegations to support the notion that Vimeo somehow was targeting Domen because he is a "former homosexual," as Plaintiffs posit. (*See* 1/13/2020 Tr. at 43.)

Plaintiffs' claims. "Preemption [under Section 230] is express." *Ricci*, 781 F.3d at 27. "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). Although "[p]reemption under the Communications Decency Act is an affirmative defense, . . . it can still support a motion to dismiss if the statute's barrier to suit is evident from the face of the complaint." *Ricci*, 781 F.3d at 28 (citing *Klayman*, 753 F.3d at 1357).

a. Preemption Of State Statutory Claims

In Plaintiffs' First and Second Causes of Action, Plaintiffs assert that Vimeo discriminated against them pursuant to the California Unruh Act, Cal. Civil Code § 51, *et seq.*[10] and the New York State Human Rights Law, N.Y. Executive Law § 269, *et seq.*[11] (FAC ¶¶ 49-63.) Specifically,

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10. The Unruh Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b).

11. The New York State Human Rights Law provides that "(a) It shall be an unlawful discriminatory practice for . . . any place of public accommodation, . . . because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of

Plaintiffs allege that Vimeo deleted their account and censored their speech due to discrimination based upon Plaintiffs' sexual orientation and religion. (FAC ¶¶ 50, 51, 58, 59.)

The issue here is whether the California Unruh Act or the New York State Human Rights Law are "inconsistent" with the CDA such that the CDA may immunize Defendant for the state statutory claims asserted herein. *See* 47 U.S.C. § 230(e)(3). Section 230(e) of the CDA enumerates specific claims which cannot be preempted by the CDA, namely, criminal law, intellectual property law, communications privacy law, sex trafficking laws or state laws that are consistent with the CDA. 47 U.S.C. § 230(e). State antidiscrimination laws, however, are not exempted from the reach of the CDA. *See Nat'l Ass'n of the Deaf v. Harvard Univ.*, 377 F. Supp. 3d 49, 66 (D. Mass. 2019) ("The CDA exempts certain laws from its reach. Federal and state antidiscrimination statutes are not exempted."); *Ebeid*, 2019 U.S. Dist. LEXIS 78876, at *5 (applying CDA immunity and dismissing state law discrimination claims). Thus, First and Second Causes of Action are preempted by CDA Section 230.

b. Preemption Of California Constitution Claim

In Plaintiffs' Third Cause of Action, they allege a Free Speech Claim under the California Constitution.

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the accommodations, advantages, facilities or privileges thereof . . . ." N.Y. Exec. Law § 296(2)(a).

(FAC ¶¶ 64-80.) As Plaintiffs concede, if Section 230 immunity is found, then their claim under the California Constitution must be dismissed. (*See* 1/13/20 Tr. at 32-33.) This is because federal law preempts conflicting State Constitutions under the Supremacy Clause, which provides, as follows: "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const., Art. VI, cl. 2. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716, 104 S. Ct. 2694, 81 L. Ed. 2d 580 (1984) (Oklahoma Constitution's ban on advertising alcoholic beverages preempted by federal regulations implementing Communications Act); *Parkridge 6 LLC v. U.S. Dep't of Transp.*, No. 09-CV-01312 (LMB) (IDD), 2010 U.S. Dist. LEXIS 34182, 2010 WL 1404421, at *6 (E.D. Va. Apr. 6, 2010) ("[A]ny Virginia law or provision of the Virginia Constitution that conflicts with [the] authority [of a federal airport construction project] is preempted under the Supremacy Clause of the United States Constitution."). Plaintiffs allege that Vimeo's "deletion of Plaintiffs' Vimeo account amounts to a violation of Plaintiffs' rights to free speech under the California Constitution." (FAC ¶ 77.) If Plaintiff are correct (which they are not, *see* Discussion Section IV, *infra*), then there is a direct conflict between the California Constitution and the federally enacted CDA, which as discussed above permitted the deletion of Plaintiffs' content. Thus, the Third Cause of Action also is preempted by CDA Section 230.

III. In the Alternative, Plaintiffs Have Not Stated A Claim Under the California Unruh Act Or The New York State Human Rights Law (First and Second Causes Of Action)

Even assuming, *arguendo*, that the CDA does not preempt the First and Second Causes of Action, they would be dismissed. Plaintiffs' First and Second Causes of Action allege that Vimeo discriminated against Domen because of his sexual orientation and religion. (*See* FAC ¶¶ 44, 50-53, 58-61.) Both the California Unruh Act and the New York Human Rights Law require that Plaintiffs show discriminatory intent. *See Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 425 (9th Cir. 2014); *Smith v. City of New York*, 385 F. Supp. 3d 323, 332 (S.D.N.Y. 2019). Here, Plaintiffs have not plausibly alleged that Vimeo's conduct was animated by discriminatory intent against Domen. Vimeo's emails that are attached to the FAC (FAC, Exs. A & B) reflect that Vimeo removed Plaintiffs' account because of the content of Plaintiffs' videos, not based upon Domen's sexuality or religion. Thus, the First and Second Causes of Action are subject to dismissal on this ground as well.

IV. In The Alternative, Plaintiffs Have Not Stated A Free Speech Claim Under The California Constitution (Third Cause Of Action)

Even assuming, *arguendo*, that the CDA does not preempt the Third Cause of Action, it also would be dismissed. Plaintiffs allege that Vimeo is a "public forum" or "the equivalent of a public forum," such that it is "akin to a state actor[]" for purposes of the California Constitution. (*See* FAC¶¶ 66, 72.) Article I, section 2, subdivision (a) of

the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. Art. I, § 2(a). This provision of the California Constitution grants broader rights to free expression than the First Amendment to the U.S. Constitution, and applies beyond state actors to private actors in certain limited circumstances.[12] *See Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980). In *Pruneyard*, the California Supreme Court held that the California Constitution "protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned," due to the similarity of such centers to traditional town squares or business districts. *Id.* The California Supreme Court in a 2001 plurality decision narrowly construed *Pruneyard*, finding: "the actions of a private property owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible to the public." *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013, 1033, 111 Cal. Rptr. 2d 336, 29 P.3d 797 (2001).

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12. Private actors cannot be liable for First Amendment violations. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 569, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972). This presumably is why Plaintiffs dropped their First Amendment claim when they filed their FAC. However, California has the authority "to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (citation omitted).

Plaintiffs seek to have this Court plow new ground and hold that *Pruneyard* extends beyond California real property owners to website owners like Vimeo. However, "[n]o court has expressly extended *Pruneyard* to the Internet generally." *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1116 (N.D. Cal. 2017), *aff'd and remanded on other grounds*, 938 F.3d 985 (9th Cir. 2019). Like the court in *hiQ Labs, Inc.*, this Court "has doubts about whether *Pruneyard* may be extended wholesale into the digital realm of the Internet," given the "reach and potentially sweeping consequences of such a holding," *id.* at 1116, and in particular the differences between the U.S. and California Constitutions regarding their treatment of private actors in the free speech context.

The Court finds that Vimeo, a private video-sharing service operator, is not a state actor such that its actions implicate the California's free speech clause. The Vimeo website is not the equivalent of a California-based shopping center where "large groups of citizens congregate." *Pruneyard Shopping Ctr.*, 23 Cal. 3d at 910. Rather, it is one of many alternative fora where citizens of many different states can choose to post their videos, so long as they abide by Vimeo's Terms of Service. There are adequate alternative avenues of communication that Plaintiffs may use and in fact are using to exercise their free speech rights. Thus, Plaintiffs do not state a claim under the California Constitution.[13]

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13. Vimeo also argues that Plaintiffs' claims are barred by the First Amendment. (Def. Mem. at 6-9; Reply at 1-4.) Specifically, Vimeo asserts that Plaintiffs' claims infringe on Vimeo's free speech rights "because they seek to force Vimeo to publish, host, and stream videos containing ideological messages 'with which

V. Leave To Amend

Plaintiffs request leave to amend "to cure any pleading defects." (Pl. Opp. at 21.) Rule 15's liberal standard instructs that leave to amend should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). However, leave to amend should be denied where, as here, it would be "futile" and where the "plaintiff cannot cure the deficiencies in his pleadings to allege facts sufficient to support his claim." *Onibokun v. Chandler*, 749 F. App'x 65, 67 (2d Cir. 2019). Because there is no way for Plaintiffs to reformulate their claims in a way that is not preempted, any attempt at re-pleading would be futile. *See Myrieckes v. Woods*, No. 08-CV-04297, 2009 U.S. Dist. LEXIS 27397, 2009 WL 884561 at *7 (S.D.N.Y. Mar. 31, 2009) (denying leave to amend because re-pleading preempted claim is futile). Thus, Plaintiffs are denied leave to amend.

Vimeo disagrees.'" (Def. Mem. at 6 (citing FAC ¶ 47).) The Court does not need to reach this constitutional issue since, as set forth above, it is dismissing all three causes of action contained in the FAC on other grounds. It is well settled that courts "avoid reaching constitutional questions when they are unnecessary to the disposition of a case." *Anobile v. Pelligrino*, 303 F.3d 107, 123 (2d Cir. 2002); *see also Hutchinson v. Proxmire*, 443 U.S. 111, 122, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979) ("Our practice is to avoid reaching constitutional questions if a dispositive nonconstitutional ground is available.").

Appendix D

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED and this case is dismissed with prejudice. The Clerk of Court is directed to enter judgment and close this case.

SO ORDERED.

Dated: New York, New York
January 14, 2020

/s/ Stewart D. Aaron
STEWART D. AARON
United States Magistrate Judge

APPENDIX E — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED NOVEMBER 16, 2021

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 16th day of November, two thousand twenty-one.

Docket No. 20-616

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

Plaintiffs - Appellants,

v.

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

Defendant - Appellee.

ORDER

IT IS HEREBY ORDERED that the Appellants' petitions for panel rehearing or rehearing *en banc* (docket entries 120 and 146) are DENIED as moot in light of the Court's order dated November 15, 2021.

Appendix E

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX F — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 15, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 20-616

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 15th day of November, two thousand twenty-one.

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

ORDER

Appellants, James Domen and Church United, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal

has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/_____

APPENDIX G — ORDER GRANTING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JULY 15, 2021

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 15th day of July, two thousand twenty-one.

20-616-cv

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

PRESENT:

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

Appendix G

The petition for rehearing is GRANTED. The panel hereby VACATES its previous opinion. Accordingly, the decision of the district court remains in place until further notice from the panel.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

APPENDIX H — RELEVANT STATUTES AND OTHER AUTHORITIES

47 U.S.C.A. § 230

§ 230. Protection for private blocking and screening of offensive material

Effective: April 11, 2018

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

Appendix H

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). 1

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in

a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.

No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

Appendix H

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

Appendix H

EXECUTIVE ORDER NO. 13925

May 28, 2020, 85 F.R. 34079

Preventing Online Censorship

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people.

In a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet. This practice is fundamentally un-American and antidemocratic. When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. They cease functioning a s passive bulletin boards, and ought to be viewed and treated as content creators.

The growth of online platforms in recent years raises important questions about applying the ideals of the First Amendment to modern communications technology. Today, many Americans follow the news, stay in touch with friends and family, and share their views on current events through social media and other online platforms.

As a result, these platforms function in many ways as a 21st century equivalent of the public square.

Twitter, Facebook, Instagram, and YouTube wield immense, if not unprecedented, power to shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see.

As President, I have made clear my commitment to free and open debate on the internet. Such debate is just as important online as it is in our universities, our town halls, and our homes. It is essential to sustaining our democracy.

Online platforms are engaging in selective censorship that is harming our national discourse. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms "flagging" content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse.

Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not

flag those tweets. Unsurprisingly, its officer in charge of so-called "Site Integrity" has flaunted his political bias in his own tweets.

At the same time online platforms are invoking inconsistent, irrational, and groundless justifications to censor or otherwise restrict Americans' speech here at home, several online platforms are profiting from and promoting the aggression and disinformation spread by foreign governments like China. One United States company, for example, created a search engine for the Chinese Communist Party that would have blacklisted searches for "human rights," hid data unfavorable to the Chinese Communist Party, and tracked users determined appropriate for surveillance. It also established research partnerships in China that provide direct benefits to the Chinese military. Other companies have accepted advertisements paid for by the Chinese government that spread false information about China's mass imprisonment of religious minorities, thereby enabling these abuses of human rights. They have also amplified China's propaganda abroad, including by allowing Chinese government officials to use their platforms to spread misinformation regarding the origins of the COVID-19 pandemic, and to undermine pro-democracy protests in Hong Kong.

As a Nation, we must foster and protect diverse viewpoints in today's digital communications environment where all Americans can and should have a voice. We must seek transparency and accountability from online platforms, and encourage standards and tools to protect and preserve

the integrity and openness of American discourse and freedom of expression.

Sec. 2. Protections Against Online Censorship. (a) It is the policy of the United States to foster clear ground rules promoting free and open debate on the internet. Prominent among the ground rules governing that debate is the immunity from liability created by section 230(c) of the Communications Decency Act (section 230(c)). 47 U.S.C. 230(c). It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.

Section 230(c) was designed to address early court decisions holding that, if an online platform restricted access to some content posted by others, it would thereby become a "publisher" of all the content posted on its site for purposes of torts such as defamation. As the title of section 230(c) makes clear, the provision provides limited liability "protection" to a provider of an interactive computer service (such as an online platform) that engages in "|LSQUOOEGood Samaritan' blocking" of harmful content. In particular, the Congress sought to provide protections for online platforms that attempted to protect minors from harmful content and intended to ensure that such providers would not be discouraged from taking down harmful material. The provision was also

intended to further the express vision of the Congress that the internet is a "forum for a true diversity of political discourse." 47 U.S.C. 230(a)(3). The limited protections provided by the statute should be construed with these purposes in mind.

In particular, subparagraph (c)(2) expressly addresses protections from "civil liability" and specifies that an interactive computer service provider may not be made liable "on account of" its decision in "good faith" to restrict access to content that it considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable." It is the policy of the United States to ensure that, to the maximum extent permissible under the law, this provision is not distorted to provide liability protection for online platforms that--far from acting in "good faith" to remove objectionable content --instead engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree. Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.

(b) To advance the policy described in subsection (a) of this section, all executive departments and agencies should ensure that their application of section 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard. In addition, within 60 days of the date of this order, the Secretary of Commerce (Secretary), in consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA), shall file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify:

(i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its own editorial decisions;

(ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are:

(A) deceptive, pretextual, or inconsistent with a provider's terms of service; or

(B) taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard; and

(iii) any other proposed regulations that the NTIA concludes may be appropriate to advance the policy described in subsection (a) of this section.

Sec. 3. Protecting Federal Taxpayer Dollars from Financing Online Platforms That Restrict Free Speech. (a) The head of each executive department and agency (agency) shall review its agency's Federal spending on advertising and marketing paid to online platforms. Such review shall include the amount of money spent, the online platforms that receive Federal dollars, and the statutory authorities available to restrict their receipt of advertising dollars.

(b) Within 30 days of the date of this order, the head of each agency shall report its findings to the Director of the Office of Management and Budget.

(c) The Department of Justice shall review the viewpoint-based speech restrictions imposed by each online platform identified in the report described in subsection (b) of this section and assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.

Sec. 4. Federal Review of Unfair or Deceptive Acts or Practices. (a) It is the policy of the United States that

large online platforms, such as Twitter and Facebook, as the critical means of promoting the free flow of speech and ideas today, should not restrict protected speech. The Supreme Court has noted that social media sites, as the modern public square, "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017). Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. Cf. PruneYard Shopping Center v. Robins, 447 U.S. 74, 85-89 (1980).

(b) In May of 2019, the White House launched a Tech Bias Reporting tool to allow Americans to report incidents of online censorship. In just weeks, the White House received over 16,000 complaints of online platforms censoring or otherwise taking action against users based on their political viewpoints. The White House will submit such complaints received to the Department of Justice and the Federal Trade Commission (FTC).

(c) The FTC shall consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices in or affecting commerce, pursuant to section 45 of title 15, United States Code. Such unfair or deceptive acts or practice may include practices by entities covered by section 230 that restrict speech in ways that do not align with those entities' public representations about those practices.

(d) For large online platforms that are vast arenas for public debate, including the social media platform Twitter, the FTC shall also, consistent with its legal authority, consider whether complaints allege violations of law that implicate the policies set forth in section 4(a) of this order. The FTC shall consider developing a report describing such complaints and making the report publicly available, consistent with applicable law.

Sec. 5. State Review of Unfair or Deceptive Acts or Practices and Anti-Discrimination Laws. (a) The Attorney General shall establish a working group regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group shall also develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group shall invite State Attorneys General for discussion and consultation, as appropriate and consistent with applicable law.

(b) Complaints described in section 4(b) of this order will be shared with the working group, consistent with applicable law. The working group shall also collect publicly available information regarding the following:

(i) increased scrutiny of users based on the other users they choose to follow, or their interactions with other users;

(ii) algorithms to suppress content or users based on indications of political alignment or viewpoint;

(iii) differential policies allowing for otherwise impermissible behavior, when committed by accounts associated with the Chinese Communist Party or other anti-democratic associations or governments;

(iv) reliance on third-party entities, including contractors, media organizations, and individuals, with indicia of bias to review content; and

(v) acts that limit the ability of users with particular viewpoints to earn money on the platform compared with other users similarly situated.

Sec. 6. Legislation. The Attorney General shall develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order.

Sec. 7. Definition. For purposes of this order, the term "online platform" means any website or application that allows users to create and share content or engage in social networking, or any general search engine.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

Appendix H

Executive Law § 296

Unlawful discriminatory practices

Effective: July 16, 2021

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

(c) For a labor organization, because of the age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status of any individual, to exclude or to expel from

its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service examinations concerning any of the aforementioned characteristics, other than sexual orientation, for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sexual orientation or gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(f) Nothing in this subdivision shall affect any restrictions upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

(g) For an employer to compel an employee who is pregnant to take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

(h) For an employer, licensing agency, employment agency or labor organization to subject any individual to harassment because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, or because the individual has opposed any practices forbidden under this article or because the individual has filed a complaint, testified or assisted in any proceeding under this article, regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims. Such harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions

or privileges of employment because of the individual's membership in one or more of these protected categories. The fact that such individual did not make a complaint about the harassment to such employer, licensing agency, employment agency or labor organization shall not be determinative of whether such employer, licensing agency, employment agency or labor organization shall be liable. Nothing in this section shall imply that an employee must demonstrate the existence of an individual to whom the employee's treatment must be compared. It shall be an affirmative defense to liability under this subdivision that the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences.

1-a. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs:

(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review;

(b) To deny to or withhold from any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status, or marital status, the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, executive

training program, or other occupational training or retraining program;

(c) To discriminate against any person in his or her pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status or marital status;

(d) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status or marital status, or any intention to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

2. (a) It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or,

directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status, or that the patronage or custom thereat of any person of or purporting to be of any particular race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited.

(b) Nothing in this subdivision shall be construed to prevent the barring of any person, because of the sex of such person, from places of public accommodation, resort or amusement if the division grants an exemption based on bona fide considerations of public policy; nor shall this subdivision apply to the rental of rooms in a housing accommodation which restricts such rental to individuals of one sex.

(c) For the purposes of paragraph (a) of this subdivision, "discriminatory practice" includes:

(i) a refusal to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford facilities, privileges, advantages or accommodations to individuals with disabilities, unless such person can demonstrate that making such

modifications would fundamentally alter the nature of such facilities, privileges, advantages or accommodations;

(ii) a refusal to take such steps as may be necessary to ensure that no individual with a disability is excluded or denied services because of the absence of auxiliary aids and services, unless such person can demonstrate that taking such steps would fundamentally alter the nature of the facility, privilege, advantage or accommodation being offered or would result in an undue burden;

(iii) a refusal to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable;

(iv) where such person is a local or state government entity, a refusal to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal does not constitute an undue burden; except as set forth in paragraph (e) of this subdivision; nothing in this section would require a public entity to: necessarily make each of its existing

facilities accessible to and usable by individuals with disabilities; take any action that would threaten or destroy the historical significance of an historic property; or to make structural changes in existing facilities where other methods are effective in achieving compliance with this section; and

(v) where such person can demonstrate that the removal of a barrier under subparagraph (iii) of this paragraph is not readily achievable, a failure to make such facilities, privileges, advantages or accommodations available through alternative methods if such methods are readily achievable.

(d) For the purposes of this subdivision:

(i) "Readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include:

(A) the nature and cost of the action needed under this subdivision;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the place of public accommodation, resort or amusement; the overall size of

the business of such a place with respect to the number of its employees; the number, type and location of its facilities; and

(D) the type of operation or operations of the place of public accommodation, resort or amusement, including the composition, structure and functions of the workforce of such place; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to such place.

(ii) "Auxiliary aids and services" include:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(iii) "Undue burden" means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered shall include:

(A) The nature and cost of the action needed under this article;

(B) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;

(C) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

(D) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

(E) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

(iv) "Reasonable modifications in policies, practices, procedures" includes modification to permit the use of a service animal by a person with a disability, consistent with federal regulations implementing the Americans with Disabilities Act, Title III, at 28 CFR 36.302(c).

(e) Paragraphs (c) and (d) of this subdivision do not apply to any air carrier, the National Railroad Passenger Corporation, or public transportation facilities, vehicles or services owned, leased or operated by the state, a

county, city, town or village, or any agency thereof, or by any public benefit corporation or authority.

2-a. It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of publicly-assisted housing accommodations or other person having the right of ownership or possession of or the right to rent or lease such accommodations:

(a) To refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodations because of the race, creed, color, disability, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.

(b) To discriminate against any person because of his or her race, creed, color, disability, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status, lawful source of income or familial status in the terms, conditions or privileges of any publicly-assisted housing accommodations or in the furnishing of facilities or services in connection therewith.

(c) To cause to be made any written or oral inquiry or record concerning the race, creed, color, disability, national origin, sexual orientation, gender identity or expression, membership in the reserve armed forces of the United States or in the organized militia of the state,

age, sex, marital status, lawful source of income or familial status of a person seeking to rent or lease any publicly-assisted housing accommodation; provided, however, that nothing in this subdivision shall prohibit a member of the reserve armed forces of the United States or in the organized militia of the state from voluntarily disclosing such membership.

(c-1) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status, or any intent to make any such limitation, specification or discrimination.

(d)(1) To refuse to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by the said person, if the modifications may be necessary to afford the said person full enjoyment of the premises, in conformity with the provisions of the New York state uniform fire prevention and building code, except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the

condition that existed before the modification, reasonable wear and tear excepted.

(2) To refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling, including the use of an animal as a reasonable accommodation to alleviate symptoms or effects of a disability, and including reasonable modification to common use portions of the dwelling, or

(3) In connection with the design and construction of covered multi-family dwellings for first occupancy after March thirteenth, nineteen hundred ninety-one, a failure to design and construct dwellings in accordance with the accessibility requirements of the New York state uniform fire prevention and building code, to provide that:

(i) The public use and common use portions of the dwellings are readily accessible to and usable by disabled persons with disabilities;

(ii) All the doors are designed in accordance with the New York state uniform fire prevention and building code to allow passage into and within all premises and are sufficiently wide to allow passage by persons in wheelchairs; and

(iii) All premises within covered multi-family dwelling units contain an accessible route into and through the dwelling; light switches, electrical outlets, thermostats,

and other environmental controls are in accessible locations; there are reinforcements in the bathroom walls to allow later installation of grab bars; and there are usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space, in conformity with the New York state uniform fire prevention and building code.

(e) Nothing in this subdivision shall restrict the consideration of age in the rental of publicly-assisted housing accommodations if the division grants an exemption based on bona fide considerations of public policy for the purpose of providing for the special needs of a particular age group without the intent of prejudicing other age groups.

(f) Nothing in this subdivision shall be deemed to restrict the rental of rooms in school or college dormitories to individuals of the same sex.

2-b. Repealed by L.2021, c. 82, § 1, eff. March 2, 2021.

3. (a) It shall be an unlawful discriminatory practice for an employer, licensing agency, employment agency or labor organization to refuse to provide reasonable accommodations to the known disabilities, or pregnancy-related conditions, of an employee, prospective employee or member in connection with a job or occupation sought or held or participation in a training program.

(b) Nothing contained in this subdivision shall be construed to require provision of accommodations which

can be demonstrated to impose an undue hardship on the operation of an employer's, licensing agency's, employment agency's or labor organization's business, program or enterprise.

In making such a demonstration with regard to undue hardship the factors to be considered include:

(i) The overall size of the business, program or enterprise with respect to the number of employees, number and type of facilities, and size of budget;

(ii) The type of operation which the business, program or enterprise is engaged in, including the composition and structure of the workforce; and (iii) The nature and cost of the accommodation needed.

(c) [As added by L.2015, c. 365, § 2. Another par. (c) was added by a different law.] Nothing in this subdivision regarding "reasonable accommodation" or in the chapter of the laws of two thousand fifteen which added this paragraph shall alter, diminish, increase, or create new or additional requirements to accommodate protected classes pursuant to this article other than the additional requirements as explicitly set forth in such chapter of the laws of two thousand fifteen.

(c) [As added by L.2015, c. 369, § 2. Another par. (c) was added by a different law.] The employee must cooperate in providing medical or other information that is necessary to verify the existence of the disability or pregnancy-related condition, or that is necessary for consideration

of the accommodation. The employee has a right to have such medical information kept confidential.

3-a. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency to refuse to hire or employ or license or to bar or to terminate from employment an individual eighteen years of age or older, or to discriminate against such individual in promotion, compensation or in terms, conditions, or privileges of employment, because of such individual's age.

(b) For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination on account of age respecting individuals eighteen years of age or older, or any intent to make any such limitation, specification, or discrimination.

(c) For any employer, licensing agency or employment agency to discharge or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(d) Notwithstanding any other provision of law, no employee shall be subject to termination or retirement

from employment on the basis of age, except where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business, where the differentiation is based on reasonable factors other than age, or as otherwise specified in paragraphs (e) and (f) of this subdivision or in article fourteen-A of the retirement and social security law.

(e) Nothing contained in this subdivision or in subdivision one of this section shall be construed to prevent the compulsory retirement of any employee who has attained sixty-five years of age, and who, for a two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least forty-four thousand dollars; provided that for the purposes of this paragraph only, the term "employer" includes any employer as otherwise defined in this article but does not include (i) the state of New York, (ii) a county, city, town, village or any other political subdivision or civil division of the state, (iii) a school district or any other governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission or public benefit corporation, or (vi) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state. In applying the retirement benefit test of this paragraph, if any such retirement benefit is in

a form other than a straight life annuity with no ancillary benefits, or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with rules and regulations promulgated by the division, after an opportunity for public hearing, so that the benefit is the equivalent of a straight life annuity with no ancillary benefits under a plan to which employees do not contribute and under which no rollover contributions are made.

(f) Nothing contained in this subdivision, in subdivision one of this section or in article fourteen-A of the retirement and social security law shall be construed to prevent the compulsory retirement of any employee who has attained seventy years of age and is serving under a contract for unlimited tenure, or a similar arrangement providing for unlimited tenure, at a nonpublic institution of higher education. For purposes of such subdivisions or article, the term "institution of higher education" means an educational institution which (i) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, (ii) is lawfully authorized to provide a program of education beyond secondary education, and (iii) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree.

(g) In the event of a conflict between the provisions of this subdivision and the provisions of article fourteen-A of the retirement and social security law, the provisions of article fourteen-A of such law shall be controlling.

But nothing contained in this subdivision, in subdivision one of this section or in article fourteen-A of the retirement and social security law shall be construed to prevent the termination of the employment of any person who, even upon the provision of reasonable accommodations, is physically unable to perform his or her duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of said subdivisions or said article; nor shall anything in such subdivisions or such article be deemed to preclude the varying of insurance coverages according to an employee's age.

The provisions of this subdivision shall not affect any restriction upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

3-b. It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof or any other individual, corporation, partnership or organization for the purpose of inducing a real estate transaction from which any such person or any of its stockholders or members may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, marital status, or familial status of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in

the block, neighborhood or area in which the real property is located, including but not limited to the lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other facilities.

4. It shall be an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, gender identity or expression, military status, sex, age or marital status, except that any such institution which establishes or maintains a policy of educating persons of one sex exclusively may admit students of only one sex.

5. (a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.

(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status, or any intent to make any such limitation, specification or discrimination.

(4)(i) The provisions of subparagraphs one and two of this paragraph shall not apply (1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other, if the owner resides in one of such housing accommodations, (2) to the restriction of the rental of all rooms in a housing accommodation to individuals of the same sex or (3) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner resides in such

housing accommodation or (4) solely with respect to age and familial status to the restriction of the sale, rental or lease of housing accommodations exclusively to persons sixty-two years of age or older and the spouse of any such person, or for housing intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b) (2) (c) (42 U.S.C. 3607 (b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply. However, such rental property shall no longer be exempt from the provisions of subparagraphs one and two of this paragraph if there is unlawful discriminatory conduct pursuant to subparagraph three of this paragraph.

(ii) The provisions of subparagraphs one, two, and three of this paragraph shall not apply (1) to the restriction of the rental of all rooms in a housing accommodation to individuals of the same sex, (2) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner resides in such housing accommodation, or (3) solely with respect to age and familial status to the restriction of the sale, rental or lease of housing accommodations exclusively to persons sixty-two years of age or older and the spouse of any such person, or for housing intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b) (2) (c) (42 U.S.C. 3607 (b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(b) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, land or commercial space:

(1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons land or commercial space because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available;

(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, or familial status in the terms, conditions or privileges of the sale, rental or lease of any such land or commercial space; or in the furnishing of facilities or services in connection therewith;

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of such land or commercial space which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or

expression, military status, sex, age, disability, marital status, or familial status; or any intent to make any such limitation, specification or discrimination.

(4) With respect to age and familial status, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of land or commercial space exclusively to persons fifty-five years of age or older and the spouse of any such person, or to the restriction of the sale, rental or lease of land to be used for the construction, or location of housing accommodations exclusively for persons sixty-two years of age or older, or intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b) (2) (c) (42 U.S.C. 3607(b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(c) It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof:

(1) To refuse to sell, rent or lease any housing accommodation, land or commercial space to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space to any person or group of persons because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons, or to represent

that any housing accommodation, land or commercial space is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any housing accommodation, land or commercial space or any facilities of any housing accommodation, land or commercial space from any person or group of persons because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation, land or commercial space which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status; or any intent to make any such limitation, specification or discrimination.

(3) With respect to age and familial status, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of any housing accommodation, land or commercial space exclusively to persons fifty-five years of age or older and the spouse of any such person, or to the restriction of the sale, rental or lease of any housing

accommodation or land to be used for the construction or location of housing accommodations for persons sixty-two years of age or older, or intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807 (b) (2) (c) (42 U.S.C. 3607 (b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(d) It shall be an unlawful discriminatory practice for any real estate board, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, age, sex, disability, marital status, lawful source of income or familial status of any individual who is otherwise qualified for membership, to exclude or expel such individual from membership, or to discriminate against such individual in the terms, conditions and privileges of membership in such board.

(e) It shall be an unlawful discriminatory practice for the owner, proprietor or managing agent of, or other person having the right to provide care and services in, a private proprietary nursing home, convalescent home, or home for adults, or an intermediate care facility, as defined in section two of the social services law, heretofore constructed, or to be constructed, or any agent or employee thereof, to refuse to provide services and care in such home or facility to any individual or to discriminate against any individual in the terms, conditions, and privileges of such services and care solely because such individual is a blind person. For purposes of this paragraph, a "blind person" shall

mean a person who is registered as a blind person with the commission for the visually handicapped and who meets the definition of a "blind person" pursuant to section three of chapter four hundred fifteen of the laws of nineteen hundred thirteen[1] entitled "An act to establish a state commission for improving the condition of the blind of the state of New York, and making an appropriation therefor".

(f) The provisions of this subdivision, as they relate to age, shall not apply to persons under the age of eighteen years.

(g) It shall be an unlawful discriminatory practice for any person offering or providing housing accommodations, land or commercial space as described in paragraphs (a), (b), and (c) of this subdivision to make or cause to be made any written or oral inquiry or record concerning membership of any person in the state organized militia in relation to the purchase, rental or lease of such housing accommodation, land, or commercial space, provided, however, that nothing in this subdivision shall prohibit a member of the state organized militia from voluntarily disclosing such membership.

6. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.

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1. McK. Unconsol. Laws § 8704. McKinney's Executive Law § 296, NY EXEC § 296. Current through L.2021, chapters 1 to 833 and L.2022, chapters 1 to 12. Some statute sections may be more current, see credits for details.

7. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

8. It shall be an unlawful discriminatory practice for any party to a conciliation agreement made pursuant to section two hundred ninety-seven of this article to violate the terms of such agreement.

9. (a) It shall be an unlawful discriminatory practice for any fire department or fire company therein, through any member or members thereof, officers, board of fire commissioners or other body or office having power of appointment of volunteer firefighters, directly or indirectly, by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, to deny to any individual membership in any volunteer fire department or fire company therein, or to expel or discriminate against any volunteer member of a fire department or fire company therein, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or familial status, of such individual.

(b) Upon a complaint to the division, as provided for under subdivision one of section two hundred ninety-seven of this article, and in the event the commissioner finds that an unlawful discriminatory practice has been engaged in, the board of fire commissioners or other body or office

having power of appointment of volunteer firefighters shall be served with any order required, under subdivision four of section two hundred ninety-seven of this article, to be served on any or all respondents requiring such respondent or respondents to cease and desist from such unlawful discriminatory practice and to take affirmative action. Such board shall have the duty and power to appoint as a volunteer firefighter, notwithstanding any other statute or provision of law or by-law of any volunteer fire company, any individual whom the commissioner has determined to be the subject of an unlawful discriminatory practice under this subdivision. Unless such board has been found to have engaged in an unlawful discriminatory practice, service upon such board of such order shall not constitute such board or its members as a respondent nor constitute a finding of an unlawful discriminatory practice against such board or its members.

10. (a) It shall be an unlawful discriminatory practice for any employer, or an employee or agent thereof, to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his or her religion or the wearing of any attire, clothing, or facial hair in accordance with the requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably

accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business. Notwithstanding any other provision of law to the contrary, an employee shall not be entitled to premium wages or premium benefits for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if the employee is working during such hours only as an accommodation to his or her sincerely held religious requirements. Nothing in this paragraph or paragraph (b) of this subdivision shall alter or abridge the rights granted to an employee concerning the payment of wages or privileges of seniority accruing to that employee.

(b) Except where it would cause an employer to incur an undue hardship, no person shall be required to remain at his or her place of employment during any day or days or portion thereof that, as a requirement of his or her religion, he or she observes as his or her sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his or her place of employment and his or her home, provided however, that any such absence from work shall, wherever practicable in the reasonable judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

(c) It shall be an unlawful discriminatory practice for an employer to refuse to permit an employee to utilize leave, as provided in paragraph (b) of this subdivision, solely because the leave will be used for absence from work to accommodate the employee's sincerely held religious observance or practice.

(d) As used in this subdivision: (1) "undue hardship" shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship if it will result in the

inability of an employee to perform the essential functions of the position in which he or she is employed.

(2) "premium wages" shall include overtime pay and compensatory time off, and additional remuneration for night, weekend or holiday work, or for standby or irregular duty.

(3) "premium benefit" shall mean an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, or an educational or pension benefit that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee.

In the case of any employer other than the state, any of its political subdivisions or any school district, this subdivision shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer. In any proceeding in which the applicability of this subdivision is in issue, the burden of proof shall be upon the employer. If any question shall arise whether a particular position or class of positions is excepted from this subdivision by this paragraph, such question may be referred in writing by any party claimed to be aggrieved, in the case of any position of employment by the state or any of its political subdivisions, except by any school district, to the civil service commission, in the case of any position of employment by any school district, to the commissioner of education, who shall determine such

question and in the case of any other employer, a party claiming to be aggrieved may file a complaint with the division pursuant to this article. Any such determination by the civil service commission shall be reviewable in the manner provided by article seventy-eight of the civil practice law and rules and any such determination by the commissioner of education shall be reviewable in the manner and to the same extent as other determinations of the commissioner under section three hundred ten of the education law.

11. Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.

12. Notwithstanding the provisions of subdivisions one, one-a and three-a of this section, it shall not be an unlawful discriminatory practice for an employer, employment agency, labor organization or joint labor-management committee to carry out a plan, approved by the division, to increase the employment of members of a minority group (as may be defined pursuant to the regulations of the division) which has a state-wide unemployment rate that is disproportionately high in comparison with the state-

wide unemployment rate of the general population. Any plan approved under this subdivision shall be in writing and the division's approval thereof shall be for a limited period and may be rescinded at any time by the division.

13. It shall be an unlawful discriminatory practice (i) for any person to boycott or blacklist, or to refuse to buy from, sell to or trade with, or otherwise discriminate against any person, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, or familial status, of such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person wilfully to do any act or refrain from doing any act which enables any such person to take such action. This subdivision shall not apply to:

(a) Boycotts connected with labor disputes; or

(b) Boycotts to protest unlawful discriminatory practices.

14. In addition to reasonable modifications in policies, practices, or procedures, including those defined in subparagraph (iv) of paragraph (d) of subdivision two of this section or reasonable accommodations for persons with disabilities as otherwise provided in this section, including the use of an animal as a reasonable accommodation, it shall be an unlawful discriminatory practice for any person engaged in any activity covered by this section to deny access or otherwise to discriminate against a blind person, a person who is deaf or hard of

hearing or a person with another disability because he or she is accompanied by a dog that has been trained to work or perform specific tasks for the benefit of such person by a professional guide dog, hearing dog or service dog training center or professional guide dog, hearing dog or service dog trainer, or to discriminate against such professional guide dog, hearing dog or service dog trainer engaged in such training of a dog for use by a person with a disability, whether or not accompanied by the person for whom the dog is being trained.

15. It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-A of the correction law. Further, there shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after learning about an applicant or employee's past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55, 170.56, 210.46, 210.47, or 215.10 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.59 or 160.58 of the criminal procedure law, in connection with the licensing, housing, employment, including volunteer positions, or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law, or by a

youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law. An individual required or requested to provide information in violation of this subdivision may respond as if the arrest, criminal accusation, or disposition of such arrest or criminal accusation did not occur. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law. For purposes of this subdivision, an action which has been adjourned in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law, shall not be considered a pending action, unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution.

17. Nothing in this section shall prohibit the offer and acceptance of a discount to a person sixty-five years of age or older for housing accommodations.

18. It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right of ownership of or possession of or the right to rent or lease housing accommodations:

(1) To refuse to permit, at the expense of a person with a disability, reasonable modifications of existing premises occupied or to be occupied by the said person, if the modifications may be necessary to afford the said person full enjoyment of the premises, in conformity with the provisions of the New York state uniform fire prevention and building code except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(2) To refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling, including the use of an animal as a reasonable accommodation to alleviate symptoms or effects of a disability, and including reasonable modification to common use portions of the dwelling, or

(3) In connection with the design and construction of covered multi-family dwellings for first occupancy after March thirteenth, nineteen hundred ninety-one, a failure to design and construct dwellings in accordance with the accessibility requirements for multi-family dwellings found in the New York state uniform fire prevention and building code to provide that:

(i) The public use and common use portions of the dwellings are readily accessible to and usable by persons with disabilities;

(ii) All the doors are designed in accordance with the New York state uniform fire prevention and building code to allow passage into and within all premises and are sufficiently wide to allow passage by persons in wheelchairs; and

(iii) All premises within covered multi-family dwelling units contain an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations; there are reinforcements in the bathroom walls to allow later installation of grab bars; and there are usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space, in conformity with the New York state uniform fire prevention and building code.

18-a. Repealed by L.2021, c. 82, § 2, eff. March 2, 2021.

19. (a) Except as provided in paragraph (b) of this subdivision, it shall be an unlawful discriminatory practice

of any employer, labor organization, employment agency, licensing agency, or its employees, agents, or members:

(1) to directly or indirectly solicit, require, or administer a genetic test to a person, or solicit or require information from which a predisposing genetic characteristic can be inferred as a condition of employment, preemployment application, labor organization membership, or licensure; or

(2) to buy or otherwise acquire the results or interpretation of an individual's genetic test results or information from which a predisposing genetic characteristic can be inferred or to make an agreement with an individual to take a genetic test or provide genetic test results or such information.

(b) An employer may require a specified genetic test as a condition of employment where such a test is shown to be directly related to the occupational environment, such that the employee or applicant with a particular genetic anomaly might be at an increased risk of disease as a result of working in said environment.

(c) Nothing in this section shall prohibit the genetic testing of an employee who requests a genetic test and who provides written and informed consent to taking a genetic test for any of the following purposes:

(1) pursuant to a workers' compensation claim;

(2) pursuant to civil litigation; or

(3) to determine the employee's susceptibility to potentially carcinogenic, toxic, or otherwise hazardous chemicals or substances found in the workplace environment only if the employer does not terminate the employee or take any other action that adversely affects any term, condition or privilege of employment pursuant to the genetic test results.

(d) If an employee consents to genetic testing for any of the aforementioned allowable reasons, he or she must be given and sign an authorization of consent form which explicitly states the specific purpose, uses and limitations of the genetic tests and the specific traits or characteristics to be tested.

20. Repealed by L.2010, c. 565, § 2, eff. Oct. 31, 2010.

21. Nothing in this section shall prohibit the offer and acceptance of a discount for housing accommodations to a person with a disability, as defined in subdivision twenty-one of section two hundred ninety-two of this article.

22. (a) It shall be an unlawful discriminatory practice for an employer or licensing agency, because of any individual's status as a victim of domestic violence, to refuse to hire or employ or license or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) It shall be an unlawful discriminatory practice for an employer or employment agency to print or circulate

or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment which expresses, directly or indirectly, any limitation, specification or discrimination as to status as a victim of domestic violence, or any intent to make any such limitation, specification or discrimination; provided, however, that no provision of this subdivision shall be construed to prohibit the employer from making any inquiry or obtaining information for the purpose of providing assistance to, or a reasonable accommodation in accordance with the provisions of this subdivision to, a victim of domestic violence.

(c)(1) It shall be an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation to an employee who is known by the employer to be a victim of domestic violence, limited to those accommodations set forth in subparagraph two of this paragraph, when such employee must be absent from work for a reasonable time, unless such absence would cause an undue hardship to the employer as set forth in subparagraph three of this paragraph, provided, however that the employer may require an employee to charge any time off pursuant to this section against any leave with pay ordinarily granted, where available, unless otherwise provided for in a collective bargaining agreement or existing employee handbook or policy, and any such absence that cannot be charged may be treated as leave without pay. An employee who must be absent from work in accordance with subparagraph two of this paragraph shall be entitled to the continuation of any health insurance

coverage provided by the employer, to which the employee is otherwise entitled during any such absence.

(2) An employer is required to provide a reasonable accommodation to an employee who is a victim of domestic violence who must be absent from work for a reasonable time, in accordance with the provisions of subparagraph one of this paragraph, limited to the following:

(i) Seeking medical attention for injuries caused by domestic violence including for a child who is a victim of domestic violence, provided that the employee is not the perpetrator of the domestic violence against the child; or

(ii) Obtaining services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence; or

(iii) Obtaining psychological counseling related to an incident or incidents of domestic violence, including for a child who is a victim of domestic violence, provided that the employee is not the perpetrator of the domestic violence against the child; or

(iv) Participating in safety planning and taking other actions to increase safety from future incidents of domestic violence, including temporary or permanent relocation; or

(v) Obtaining legal services, assisting in the prosecution of the offense, or appearing in court in relation to the incident or incidents of domestic violence.

(3) An employer is required to provide a reasonable accommodation for an employee's absence in accordance with the provisions of subparagraphs one and two of this paragraph unless the employer can demonstrate that the employee's absence would constitute an undue hardship to the employer. A determination of whether such an absence will constitute an undue hardship shall include consideration of factors such as:

(i) The overall size of the business, program or enterprise with respect to the number of employees, number and type of facilities, and size of budget; and

(ii) The type of operation in which the business, program or enterprise is engaged, including the composition and structure of the workforce.

(4) An employee who must be absent from work in accordance with the provisions of subparagraph one of this paragraph shall provide the employer with reasonable advance notice of the employee's absence, unless such advance notice is not feasible.

(5) An employee who must be absent from work in accordance with the provisions of subparagraph one of this paragraph and who cannot feasibly give reasonable advance notice of the absence in accordance with subparagraph four of this paragraph must, within a reasonable time after the absence, provide a certification to the employer when requested by the employer.

Such certification shall be in the form of:

(i) A police report indicating that the employee or his or her child was a victim of domestic violence;

(ii) A court order protecting or separating the employee or his or her child from the perpetrator of an act of domestic violence;

(iii) Other evidence from the court or prosecuting attorney that the employee appeared in court; or

(iv) Documentation from a medical professional, domestic violence advocate, health care provider, or counselor that the employee or his or her child was undergoing counseling or treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence.

(6) Where an employee has a physical or mental disability resulting from an incident or series of incidents of domestic violence, such employee shall be treated in the same manner as an employee with any other disability, pursuant to the provisions of this section which provide that discrimination and refusal to provide reasonable accommodation of disability are unlawful discriminatory practices.

(d) To the extent allowed by law, employers shall maintain the confidentiality of any information regarding an employee's status as a victim of domestic violence.

Appendix H

West's Ann.Cal.Civ.Code § 51

§ 51. Unruh Civil Rights Act; equal rights; business establishments; violations of federal Americans with Disabilities Act

Effective: January 1, 2016

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, or immigration status, or to persons regardless of their genetic information.

(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is

otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(e) For purposes of this section:

(1) "Disability" means any mental or physical disability as defined in Sections 12926 and 12926.1 of the Government Code.

(2)(A) "Genetic information" means, with respect to any individual, information about any of the following:

(i) The individual's genetic tests.

(ii) The genetic tests of family members of the individual.

(iii) The manifestation of a disease or disorder in family members of the individual.

(B) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(C) "Genetic information" does not include information about the sex or age of any individual.

(3) "Medical condition" has the same meaning as defined in subdivision (i) of Section 12926 of the Government Code.

(4) "Religion" includes all aspects of religious belief, observance, and practice.

(5) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(6) "Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status" includes a perception that the person has any particular characteristic or characteristics within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.

(7) "Sexual orientation" has the same meaning as defined in subdivision (s) of Section 12926 of the Government Code.

(f) A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public

Law 101-336)[1] shall also constitute a violation of this section.

(g) Verification of immigration status and any discrimination based upon verified immigration status, where required by federal law, shall not constitute a violation of this section.

(h) Nothing in this section shall be construed to require the provision of services or documents in a language other than English, beyond that which is otherwise required by other provisions of federal, state, or local law, including Section 1632.

1. For public law sections classified to the U.S.C.A., see USCA-Tables.