

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

<p>DIVINO GROUP LLC, et al., Plaintiffs, v. GOOGLE LLC, et al., Defendants.</p>	<p>Case No. 19-cv-04749-VKD ORDER GRANTING MOTION TO DISMISS Re: Dkt. No. 25</p>
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Plaintiffs Divino Group LLC d/b/a GlitterBombTV.com, Chris Knight, Celso Dulay, Cameron Stiehl, BriaAndChrissy LLC d/b/a “BriaAndChrissy,” Bria Kam, Chrissy Chambers, Chase Ross, Brett Somers, Lindsey Amer, Stephanie Frosch, Sal Cinquemani, Tamara (Sheri) Johnson, and Greg Scarnici assert the following claims against defendants Google LLC (“Google”) and YouTube, LLC (“YouTube”): (1) violation of plaintiffs’ First Amendment rights under 42 U.S.C. § 1983; (2) violation of Article I, section 2 of the California Constitution; (3) violation of the Unruh Act, California Civil Code § 51, et seq.; (4) unfair competition under California Business and Professions Code §§ 17200, et seq.; (5) breach of the implied covenant of good faith and fair dealing; and (6) false advertising and false association in violation of the Lanham Act, 15 U.S.C. § 1125, et seq. In addition, plaintiffs seek a declaration that Section 230 of the Communications Decency Act (“CDA”), 47 U.S.C. § 230(c), on which plaintiffs expect defendants to rely as an affirmative defense, is unconstitutional. Finally, plaintiffs separately seek a declaration that defendants have violated the rights and obligations pled as the bases for all of defendants’ other claims. Dkt. No. 20.

Defendants move to dismiss all claims in the second amended complaint (“SAC”) for

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1 failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and as barred under Section
2 230 of the CDA. Dkt. No. 25.

3 The Court heard oral argument on defendants’ motion on June 2, 2020. Dkt. No. 58.
4 Having considered the parties’ submissions and the arguments made at the hearing, the Court
5 grants defendants’ motion to dismiss the SAC with limited leave to amend.

6 **I. BACKGROUND¹**

7 **A. YouTube’s Services**

8 A subsidiary of Google, YouTube is the world’s most widely used online video hosting
9 platform. Dkt. No. 20 ¶¶ 46, 50, 53. Content creators may upload videos to the YouTube
10 platform without charge, enabling YouTube’s billions of users to view them, comment on them,
11 and subscribe to their favorite creators’ channels. *Id.* ¶¶ 52-53.

12 Use of YouTube’s services requires agreement to YouTube’s Terms of Service, which
13 incorporate YouTube’s Community Guidelines.² *Id.* ¶¶ 10, 14, 59. The Terms of Service in
14 operation at the time the SAC was filed state that “YouTube reserves the right to discontinue any
15 aspect of the Service at any time” and that “YouTube reserves the right to remove Content without
16 prior notice.”³ Dkt. No. 25-1, Ex. 2 at 2, 3.

17 **B. YouTube’s Restricted Mode**

18 To accommodate sensitive viewers, YouTube offers a feature called Restricted Mode, an
19 optional, opt-in setting that allows viewers to screen out content flagged as age-restricted or
20 “potentially adult.” Dkt. No. 20 ¶¶ 77-79. Defendants employ Restricted Mode to “limit[] viewer
21

22 ¹ Unless otherwise noted, the following factual allegations are taken from the SAC and from
23 documents that are incorporated by reference in the SAC or that are the subject of judicial notice.

24 ² The SAC repeatedly refers to the Terms of Service then in effect and the incorporated
25 Community Guidelines, and these documents serve as the basis for plaintiffs’ claims. *See, e.g.*,
26 Dkt. No. 20 ¶ 331 (“Plaintiffs and Defendants entered into written contracts in which Defendants
27 agreed to provide YouTube platform access, hosting, streaming, and advertising services to
28 Plaintiffs.”). The Court may properly consider these documents even though they are not attached
to the SAC. *See* Section II.A.

³ The version of YouTube’s Terms of Service in operation at the time defendants filed their
motion to dismiss states: “YouTube is under no obligation to host or serve Content.” Dkt. No. 25-
1, Ex. 1 at 2, 3.

1 access by younger, sensitive audiences to video content that contains certain specifically
 2 enumerated ‘mature’ aspects,” including: talking about drug use or abuse or drinking alcohol in
 3 videos; overly detailed conversations about or depictions of sex or sexual activity; graphic
 4 descriptions of violence, violent acts, or natural disasters or tragedies; mature subjects such as
 5 terrorism, war, crime, and political conflicts resulting in death or serious injury, even if no graphic
 6 imagery is shown; profane language; or incendiary and demeaning content directed toward an
 7 individual or group. *Id.* ¶¶ 77, 85. Videos may qualify for Restricted Mode in two ways: (1)
 8 YouTube’s software may automatically designate a video for Restricted Mode based on an
 9 examination of “signals,” such as the video’s metadata, title, and language used in the video, or (2)
 10 a team of human reviewers may deem a video to have violated YouTube’s Community Guidelines
 11 after a viewer “flags” the video as “inappropriate.” *Id.* ¶ 81; *see also* Dkt. No. 25-1, Ex. 12
 12 (YouTube Help website discussing Restricted Mode); *Prager Univ. v. Google LLC (“Prager III”)*,
 13 951 F.3d, 991, 996 (9th Cir. 2020) (describing Restricted Mode). Restricted Mode “operates in
 14 tandem with separate, more stringent ‘Age Based Restriction’ filtering criteria, intended to block
 15 all mature content to viewers under the age of 18,” which focuses on vulgar language (including
 16 sexually explicit language or excessive profanity), violence and disturbing imagery, nudity and
 17 sexually suggestive content, or portrayal of harmful or dangerous activities. Dkt. No. 20 ¶ 82. Of
 18 YouTube’s daily views, 1.5% (or approximately 75 million of the nearly 5 billion daily views) are
 19 from viewers who have activated Restricted Mode. *Id.* ¶ 80.

20 C. YouTube’s Advertising Policies

21 YouTube allows content creators whose channels meet certain minimum viewership
 22 requirements to earn revenue from, or “monetize,” their videos by running advertisements with
 23 them as part of the YouTube Partner Program. To be eligible for monetization, content creators
 24 are required to agree to certain additional terms of service, including YouTube’s Partner Program
 25 Terms and the Google AdSense Terms of Service.⁴ *See* Dkt. No. 20 ¶ 331; Dkt. No. 25-1, Exs. 6,
 26 10. Creators seeking to monetize their videos must also agree to comply with YouTube’s
 27

28 ⁴ These documents are also incorporated by reference into the SAC. *See* Section II.A.

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1 monetization policies, including YouTube’s advertiser-friendly content guidelines. *See* Dkt. No.
2 20 ¶¶ 152, 248, 331; Dkt. No. 25-1, Exs. 5-11. YouTube uses automated software to identify
3 content it deems inappropriate for advertising. Content creators may appeal a decision finding
4 their content inappropriate for advertising and may request further review. *See* Dkt. No. 20 ¶¶ 94-
5 95; Dkt. No. 25-1, Ex. 9 at 1.

6 The YouTube Partner Program Terms provide that “YouTube is not obligated to display
7 any advertisements alongside your videos and may determine the type and format of ads available
8 on the YouTube Service.” Dkt. No. 25-1, Ex. 6 at 1. The AdSense Terms of Service state that
9 Google reserves the rights to “refuse or limit [a content creator’s] access” to advertising services
10 and to “refuse to provide” those services in connection with a creator’s content. *Id.*, Ex. 10 at 1.

11 **D. Summary of Plaintiffs’ Allegations**

12 Plaintiffs are Lesbian, Gay, Bisexual, Transgender, Transsexual or Queer (“LGBTQ+”)
13 content creators who use YouTube’s service. Dkt. No. 20 ¶¶ 1, 35-44. Each plaintiff operates or
14 contributes to at least one YouTube channel that posts content related to LGBTQ+ interests. *Id.*
15 Plaintiffs have collectively uploaded thousands of videos to YouTube. *Id.* ¶¶ 35, 37-41. At least
16 some plaintiffs have sought to monetize their content by participating in defendants’ advertisement
17 programs. *See id.* ¶¶ 55, 89, 122, 132-135, 144, 170, 225, 228, 230, 233.

18 Plaintiffs allege that YouTube “holds itself out as one of the most important and largest
19 public forums for the expression of ideas and exchange of speech available to the public,” and that
20 defendants have represented that “YouTube is, has been and will remain the premier space for
21 freedom of expression in video content on the Internet.” *Id.* ¶¶ 46, 57; *see also id.* ¶ 59
22 (“Google/YouTube claim to be the largest public forum for video-based speech in California, the
23 United States, and the world . . .”). Specifically, plaintiffs point to defendants’ statements that
24 their “mission” is to “give people a voice” in a “place to express yourself” and in a “community
25 where everyone’s voice can be heard,” and to defendants’ promises that “everyone’s voice” will
26 be heard, subject only to neutral, content-based rules and filtering that “apply equally to all”
27 regardless of the viewpoint, identity, or source of the speaker. *Id.* ¶¶ 59-60. Plaintiffs also point
28 to YouTube’s testimony before Congress asserting that it enforces its policies in a neutral manner.

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1 *Id.* ¶ 61.

2 Plaintiffs allege that, despite YouTube’s purported viewpoint neutrality, defendants have
3 discriminated against plaintiffs based on their sexual or gender orientation, identity, and/or
4 viewpoints by censoring or otherwise interfering with certain videos that plaintiffs uploaded to
5 YouTube. *Id.* ¶¶ 3, 7. According to plaintiffs, this censorship takes the form of placing age
6 restrictions on some of plaintiffs’ videos and/or limiting access to their videos through YouTube’s
7 Restricted Mode setting. *Id.* ¶¶ 28, 167, 170, 185, 195-197. Specifically, plaintiffs allege that
8 defendants have restricted access to some of plaintiffs’ videos based on defendants’ discriminatory
9 animus toward plaintiffs’ sexual orientation, gender, or political identities or viewpoints. *Id.*
10 ¶¶ 19-21, 299 (“No compelling, significant, or legitimate reason justifies restricting or
11 demonetizing Plaintiffs’ videos.”). Plaintiffs also allege that defendants have “demonetized” some
12 of their videos—by preventing advertisements from running on those videos—in a viewpoint-
13 discriminatory manner. *See id.* ¶¶ 26.f, 100, 158, 164, 170, 180, 193, 217, 225, 233, 236, 247.
14 Plaintiffs do not allege, however, that YouTube permanently removed any of their videos.
15 Plaintiffs allege only that some of their videos have been demonetized or censored (in the form of
16 an age restriction or exclusion through the Restricted Mode setting) based on defendants’
17 intolerance towards plaintiffs’ gender, sexual orientation, and political viewpoints.

18 In addition to Restricted Mode, age restriction filtering, and demonetization, plaintiffs
19 allege that YouTube has engaged in other discriminatory acts based on their LGBTQ+ identities
20 and viewpoints. These include advertising restrictions, use of discriminatory artificial intelligence
21 and algorithms, demonetizing channels wholesale, “shadow banning” (i.e., not showing videos in
22 search results), deleting LGBTQ+ video thumbnails, preventing subscribers from receiving
23 notifications of plaintiffs’ new videos, excluding LGBTQ+ content from recommended “Up Next”
24 content, recommending anti-LGBTQ+ content in the “Up Next” feature, playing anti-LGBTQ+
25 advertisements immediately before plaintiffs’ videos, and permitting anti-LGBTQ+ comments to
26 appear on plaintiffs’ content. *Id.* ¶¶ 88-118.

27 Plaintiffs also allege that defendants have begun producing and distributing content that
28 competes with plaintiffs’ content and therefore have a financial motivation to behave in

1 anticompetitive ways. *Id.* ¶¶ 69-75. Plaintiffs say these anticompetitive acts include use of
2 filtering through Restricted Mode, age restriction, and use of AI algorithms as described above,
3 restricting monetization or advertising reach, replacing thumbnails, removing or preventing users
4 from subscribing to plaintiffs’ channels, and excluding LGBTQ+ content from the “Up Next”
5 feature—all in a manner that disadvantages plaintiffs and favors defendants’ preferred content.
6 *Id.* ¶¶ 75, 92, 95, 103, 160, 165.

7 **II. LEGAL STANDARD**

8 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
9 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation*
10 *Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d
11 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts
12 as true all well-pled factual allegations and construes them in the light most favorable to the
13 plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). While a
14 complaint need not contain detailed factual allegations, it “must contain sufficient factual matter,
15 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
16 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is
17 facially plausible when it “allows the court to draw the reasonable inference that the defendant is
18 liable for the misconduct alleged.” *Id.*

19 The Court is not required to “‘assume the truth of legal conclusions merely because they
20 are cast in the form of factual allegations.’” *Prager Univ. v. Google LLC (“Prager P”)*, No. 17-
21 CV-06064-LHK, 2018 WL 1471939, at *3 (N.D. Cal. Mar. 26, 2018) (quoting *Fayer v. Vaughn*,
22 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam)). Nor does the Court accept allegations that
23 contradict documents attached to the complaint or incorporated by reference, *Gonzalez v. Planned*
24 *Parenthood of L.A.*, 759 F.3d 1112, 1115 (9th Cir. 2014), or that rest on “allegations that are
25 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead*
26 *Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

27 A court generally may not consider any material beyond the pleadings when ruling on a
28 Rule 12(b)(6) motion. If matters outside the pleadings are considered, “the motion must be treated

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1 as one for summary judgment under Rule 56.” Fed. R. Civ. P. 12(d). However, documents
2 appended to the complaint, incorporated by reference in the complaint, or which properly are the
3 subject of judicial notice may be considered along with the complaint when deciding a Rule
4 12(b)(6) motion. *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 998 (9th Cir. 2018); *see also Hal*
5 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).
6 Likewise, a court may consider matters that are “capable of accurate and ready determination by
7 resort to sources whose accuracy cannot reasonably be questioned.” *Roca v. Wells Fargo Bank,*
8 *N.A.*, No. 15-cv-02147-KAW, 2016 WL 368153, at *3 (N.D. Cal. Feb. 1, 2016) (quoting Fed. R.
9 Evid. 201(b)).

10 **III. DISCUSSION**

11 **A. Request for Judicial Notice**

12 Plaintiffs ask the Court to take judicial notice of an Executive Order issued on May 28,
13 2020 entitled “Preventing Online Censorship.” Dkt. No. 57. Defendants do not object to
14 plaintiffs’ request. Nevertheless, the Court finds the Executive Order has no bearing on
15 defendants’ motion to dismiss, and therefore denies the request. *See infra* Section III.D.

16 **B. Federal Claims**

17 **1. First Amendment claim**

18 Plaintiffs assert a violation of their First Amendment rights under 42 U.S.C. § 1983. Dkt.
19 No. 20 ¶¶ 283-303. To state a claim under § 1983, plaintiffs must plead facts showing that a
20 person acting under color of state law proximately caused a violation of their constitutional or
21 other federal rights. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Defendants argue
22 that plaintiffs’ § 1983 claim necessarily fails because defendants are private entities, not state
23 actors. Dkt. No. 25 at 13–16; Dkt. No. 37 at 3–4.

24 Plaintiffs do not dispute that defendants are private entities. However, they contend that
25 defendants should be considered state actors subject to First Amendment constraints for two
26 reasons. First, plaintiffs argue that defendants have unreservedly “designated” YouTube as a
27 public forum for free expression and have therefore taken on the traditional and exclusive
28 government function of regulating speech in that forum according to the requirements of the First

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1 Amendment. Dkt. No. 36 at 33. Second, plaintiffs say that by invoking the protections of a
2 federal statute—Section 230 of the CDA—to unlawfully discriminate against plaintiffs and/or
3 their content, defendants’ private conduct becomes state action “endorsed” by the federal
4 government. *Id.* at 31.

5 Defendants’ first theory is expressly foreclosed by the Ninth Circuit’s recent decision in
6 *Prager University v. Google LLC* (“*Prager III*”), which held that YouTube’s hosting of speech on
7 a private platform is not a traditional and exclusive government function. 951 F.3d, 991, 997–98
8 (9th Cir. 2020). Observing that its conclusion involved a “straightforward application of the First
9 Amendment,” the Ninth Circuit noted that the Supreme Court has consistently declined to find that
10 private entities engage in state action, except in limited circumstances. *Id.* at 997–99. Most
11 recently, the Supreme Court summarized its relevant precedent as follows:

[W]hen a private entity provides a forum for speech, the private
entity is not ordinarily constrained by the First Amendment because
the private entity is not a state actor. The private entity may thus
exercise editorial discretion over the speech and speakers in the
forum. . . . Providing some kind of forum for speech is not an
activity that only governmental entities have traditionally
performed. Therefore, a private entity who provides a forum for
speech is not transformed by that fact alone into a state actor. After
all, private property owners and private lessees often open their
property for speech. . . . In short, merely hosting speech by others is
not a traditional, exclusive public function and does not alone
transform private entities into state actors subject to First
Amendment constraints.

19 *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019).

20 To the extent plaintiffs suggest that defendants have effectively declared themselves the
21 equivalent of “state actors” and must be treated as such for purposes of the First Amendment,
22 plaintiffs cite no authority for such a radical proposition. *See Prager III*, 951 F.3d at 999
23 (“Whether a property is a public forum is not a matter of election by a private entity.”); *Florer v.*
24 *Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011) (“We start with the
25 presumption that conduct by private actors is not state action. [Plaintiff] bears the burden of
26 establishing that Defendants were state actors.”) (internal citation omitted). The Court notes that
27 the Ninth Circuit in *Prager III* specifically rejected plaintiffs’ arguments, based on *Marsh v.*
28 *Alabama*, 326 U.S. 501 (1946), that the ubiquity of YouTube’s service is analogous to a private

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1 entity assuming the traditional functions of government in operating a company town. *Prager III*,
2 951 F.3d at 998.

3 Plaintiffs’ second theory—that the availability of protections under Section 230 of the
4 CDA amounts to government endorsement of defendants’ alleged discrimination—fails for at least
5 two reasons. First, plaintiffs’ thesis is that, by virtue of this federal statute, the federal government
6 endorses YouTube’s alleged discrimination. However, § 1983 applies only to action taken under
7 color of *state* law—not *federal* law. *See Kali v. Bowen*, 854 F.2d 329, 331 (9th Cir. 1988) (noting
8 that “[f]ederal officials who violate federal rights protected by § 1983 generally do not act under
9 ‘color of state law’”) (internal quotation marks and citation omitted); *Lewis v. Google LLC*, 461 F.
10 Supp. 3d 938, 955 (N.D. Cal. May 20, 2020) (“[E]ven if Plaintiff’s allegations were sufficient to
11 hold [Defendants] liable for conduct by the federal and by foreign governments, such allegations
12 do not allege conduct under color of *state* law.”) (emphasis original). A claim for a federal
13 violation of constitutional rights must be brought as a *Bivens* claim. *See Bivens v. Six Unknown*
14 *Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs do not plead a *Bivens*
15 claim here.

16 Second, while a private entity may be considered a state actor when the government
17 compels the private entity to take a particular action, *Blum v. Yaretsky*, 457 U.S. 991 (1982),
18 plaintiffs fail to plead any such compulsion. In *Skinner v. Railway Labor Executives’ Association*,
19 489 U.S. 602 (1989), on which plaintiffs rely, federal regulations (1) required private railroad
20 companies to administer drug and alcohol tests to railroad employees involved in certain railway
21 accidents and (2) authorized but did not require such tests for employees who violated certain
22 safety rules in other circumstances. 489 U.S. at 606–11. The Supreme Court held that the
23 regulations mandating testing constituted government action within the purview of the Fourth
24 Amendment because a railroad that complies with such regulations does so by “compulsion of
25 sovereign authority” and therefore must be viewed as an instrument or agent of the government.
26 *Id.* at 614. The Supreme Court further held that the regulations allowing but not mandating testing
27 nevertheless established that the government “did more than adopt a passive position toward the
28 underlying private conduct” but had instead “encourage[ed], endors[ed], and participat[ed]” in the

1 testing. *Id.* at 615–16. Here, by contrast, nothing about Section 230 is coercive. As defendants
 2 persuasively argue, Section 230 reflects a deliberate *absence* of government involvement in
 3 regulating online speech: “Section 230 was enacted, in part, to maintain the robust nature of
 4 Internet communication, and accordingly, *to keep government interference in the medium to a*
 5 *minimum.*” *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) (internal quotation marks and
 6 citation omitted) (emphasis added); *see also* 47 U.S.C. § 230(b)(2) (“It is the policy of the United
 7 States . . . to preserve the vibrant and competitive free market that presently exists for the Internet
 8 and other interactive computer services, *unfettered by Federal or State regulation.*”) (emphasis
 9 added). Unlike the regulations in *Skinner*, Section 230 does not require private entities to do
 10 anything, nor does it give the government a right to supervise or obtain information about private
 11 activity. Furthermore, nothing in the SAC suggests that any governmental actor has actively
 12 encouraged, endorsed, or participated in particular conduct by YouTube. Specifically, plaintiffs
 13 do not allege that YouTube applied Restricted Mode designations to some of plaintiffs’ videos or
 14 demonetized them “by compulsion of sovereign authority,” or that the United States “actively
 15 encouraged, endorsed, and participated” in discriminatory decisions to apply Restricted Mode
 16 designations to certain videos or to make them ineligible for monetization.

17 Plaintiffs suggest that the mere availability of Section 230 immunity demonstrates that the
 18 government encourages discrimination. Dkt. No. 36 at 32. In *Moose Lodge No. 107 v. Irvis*, the
 19 Supreme Court expressly rejected a similar theory of state action in the context of an alleged
 20 Fourteenth Amendment violation:

21 The Court has never held, of course, that discrimination by an
 22 otherwise private entity would be violative of the Equal Protection
 23 Clause if the private entity receives any sort of benefit or service at
 24 all from the State, or if it is subject to state regulation in any degree
 25 whatever. Since state-furnished services include such necessities of
 26 life as electricity, water, and police and fire protection, such a
 27 holding would utterly emasculate the distinction between private as
 distinguished from state conduct set forth in *The Civil Rights Cases*,
supra, and adhered to in subsequent decisions. Our holdings
 indicate that where the impetus for the discrimination is private, the
 State must have ‘significantly involved itself with invidious
 discriminations,’ in order for the discriminatory action to fall within
 the ambit of the constitutional prohibition.

28 407 U.S. 163, 172–73 (1972) (internal citation omitted). In that case, the Supreme Court held that

1 a state liquor control board’s issuance of a liquor license to a private club that refused to serve a
 2 Black man because of his race did not constitute the state’s “significant involve[ment] with
 3 invidious discrimination.” *Id.* at 175–77 (internal quotation marks omitted).

4 Citing *Roberts v. AT&T Mobility LLC*, 877 F.3d 833 (9th Cir. 2017) and *Denver Area*
 5 *Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), plaintiffs
 6 nevertheless argue that government action exists where Congress permits selective censorship of
 7 particular speech by a private entity. Dkt. No. 45 at 4–5. This argument is not persuasive. As the
 8 Ninth Circuit has explained, *Denver Area* does not depart from the Supreme Court’s long-standing
 9 state action jurisprudence:

10 We read *Denver Area* very narrowly. The case—its six opinions,
 11 with a majority opinion as to only one issue, plurality opinions as to
 12 others, and separate concurring and dissenting opinions—is “the
 13 epitome of a splintered opinion.” . . . Moreover, the plurality opinion
 14 on which Plaintiffs rely is not binding. Thus, if any controlling state
 15 action analysis emerged from *Denver Area*, it would be the
 “common denominator” of the four-Justice plurality opinion and
 Justice Kennedy’s opinion, joined by Justice Ginsburg—the only
 opinions to explicitly address state action. . . . Justice Kennedy,
 joined by Justice Ginsburg, wrote:

16 In [two of the challenged provision], Congress singles out one
 17 sort of speech for vulnerability to private censorship in a
 18 context where content-based discrimination is not otherwise
 permitted. The plurality at least recognizes this as state action,
 avoiding the mistake made by the Court of Appeals. . . .

19 That is, state action exists when “Congress singles out one sort of
 20 speech for vulnerability to private censorship in a context where
 21 content-based discrimination is not otherwise permitted.” . . . This
 22 narrow reading also accounts for *Denver Area*’s unique context,
 where cable operators were empowered by statute to censor speech
 on public television, and as a result were “unusually involved” with
 the government given their monopolistic-like power over cable
 systems.

23 *Roberts*, 877 F.3d at 840–41 (internal citations and alterations omitted); *see also Prager I*, 2018
 24 WL 1471939, at *8 (finding that *Denver Area* did not address the circumstances in which a private
 25 property owner must be treated as a state actor for constitutional purposes). Unlike the cable
 26 systems operators in *Denver Area*, YouTube is not a government-regulated entity charged with
 27 providing public broadcasting services. And unlike the statute at issue in *Denver Area*, which
 28 permitted cable system operators to ban specific content, Section 230 of the CDA does not single

1 out particular types of speech as suitable for private censorship. At most, Section 230 provides
 2 protection from civil liability for interactive computer service providers who elect to host
 3 information provided by another content provider, or who in good faith act to restrict materials
 4 that the provider or user considers “obscene, lewd, lascivious, filthy, excessively violent,
 5 harassing, or otherwise objectionable,” regardless of whether that material is constitutionally
 6 protected. 28 U.S.C. § 230(c); *see also Roberts*, 877 F.3d at 837 (concluding that a permissive
 7 federal statute giving a private entity the choice to arbitrate does not “encourage” arbitration such
 8 that the private entity’s conduct is attributable to the government).

9 Accordingly, the Court finds that plaintiffs do not state a claim under 42 U.S.C. § 1983 for
 10 violation of the First Amendment because defendants are not state actors.

11 2. Lanham Act claim

12 In the SAC, plaintiffs assert violations of the Lanham Act, 15 U.S.C. § 1125(a)(1), based
 13 on allegations of false association as well as false advertising. Dkt. No. 20 ¶¶ 337-348. In
 14 particular, plaintiffs say that defendants’ improper application of Restricted Mode to their videos
 15 constitutes false advertisement, because it degrades and stigmatizes plaintiffs’ content by falsely
 16 labeling it as or implying that it contains “shocking,” “inappropriate,” “offensive,” “sexually
 17 explicit,” or “obscene” content or is otherwise unfit for minors. *Id.* ¶¶ 344-345. Additionally,
 18 plaintiffs say that defendants’ inclusion of homophobic or hateful content in close proximity to
 19 plaintiffs’ content through video recommendations, playing anti-LGBTQ+ ads on their videos, and
 20 permitting hateful comments on plaintiffs’ videos as described above constitutes false association,
 21 because it misleads viewers as to plaintiffs’ association or connection with the hateful anti-
 22 LGBTQ+ speech or viewpoints. *Id.* ¶¶ 341, 346.

23 At the hearing on defendants’ motion to dismiss, plaintiffs withdrew their claim based on
 24 false association. Dkt. No. 62 at 29:9-13 (“THE COURT: . . . Do the plaintiffs also allege an
 25 1125(a)(1)(A) false association claim or are you limiting your claim under the Lanham Act to
 26 false advertisement? MR. OBSTLER: At this point we’re limiting under false advertising.”). In
 27 addition, plaintiffs appear to have abandoned allegations that defendants violate the Lanham Act
 28 by describing YouTube as a viewpoint-neutral community that values freedom of expression, as

1 they do not oppose defendants' motion to dismiss their claim on this basis. *See* Dkt. No. 25 at 17–
 2 18; Dkt. No. 36 at 24–27.⁵ Accordingly, the Court considers only whether plaintiffs state a claim
 3 for false advertising in violation of the Lanham Act.

4 To establish a claim for false advertising under § 1125(a)(1)(B), plaintiffs must plausibly
 5 allege that defendants made a false or misleading representation of fact in commercial advertising
 6 or promotion about defendants' own or plaintiffs' goods, services, or commercial activities.
 7 *Prager III*, 951 F.3d at 999 (citing *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139
 8 (9th Cir. 1997)). The Ninth Circuit has explained that “commercial advertising or promotion”
 9 within the meaning of § 1125(a)(1)(B) requires the following:

10 (1) commercial speech; (2) by a defendant who is in commercial
 11 competition with plaintiff; (3) for the purpose of influencing
 12 consumers to buy defendant's goods or services. While the
 13 representations need not be made in a “classic advertising
 14 campaign,” but may consist instead of more informal types of
 15 “promotion,” the representations (4) must be disseminated
 16 sufficiently to the relevant purchasing public to constitute
 17 “advertising” or “promotion” within that industry.

18 *Coastal Abstract Serv. Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999).

19 Here, plaintiffs allege that by making their videos inaccessible through application of
 20 Restricted Mode, YouTube falsely implies that the videos contain shocking or inappropriate
 21 content, such as alcohol or drug abuse; detailed descriptions of sex or sexual activity; graphic
 22 descriptions of violence, violent acts, or natural disasters or tragedies; terrorism, war, crime, and
 23 political conflicts resulting in death or serious injury; profane language; or incendiary and
 24 demeaning content directed toward an individual or group. Dkt. No. 20 ¶¶ 342-346. Plaintiffs
 25 claim to have been injured “in the form of diverted views, decreased subscriber numbers, and lost
 26 advertising revenues, and other harm to channel and video reach, distribution, and monetization.”
 27 Dkt. No. 36 at 26.

28 Again, plaintiffs' theory is foreclosed by the Ninth Circuit's decision in *Prager III*.

⁵ Plaintiffs' arguments on this point are limited to a single sentence suggesting a decision regarding the viability of a claim based on such allegations is “premature.” Dkt. No. 36 at 27; *see also* Dkt. No. 62 at 21:81-21 (explaining that “statements about freedom of expression and all” are “not the basis for a Lanham [Act] claim”).

1 Considering precisely the same claim, the Ninth Circuit held that defendants’ statements about
 2 videos being unavailable in Restricted Mode were not actionable as “commercial advertising or
 3 promotion”; they were simply accurate explanations of the application of defendants’ content
 4 review and monitoring procedures. *Prager III*, 951 F.3d at 1000 (“The statements about
 5 Restricted Mode were made to explain a user tool, not for a promotional purpose to ‘penetrate the
 6 relevant market’ of the viewing public.”) (quoting *Fashion Boutique of Short Hills, Inc. v. Fendi*
 7 *USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002)). In addition, the Ninth Circuit explained that
 8 defendants’ decision to make certain videos inaccessible in Restricted Mode did not imply any
 9 specific representation, as the Lanham Act requires:

10 [T]he fact that certain PragerU videos were tagged to be unavailable
 11 under Restricted Mode does not imply any specific representation
 12 about those videos. Although a false advertising claim may be
 13 based on implied statements, those statements must be both specific
 14 and communicated as to deceive a significant portion of the
 15 recipients. The only statement that appears on the platform is that
 16 the video is ‘unavailable with Restricted Mode enabled.’ This
 17 notice does not have a tendency to mislead, confuse or deceive the
 18 public about the nature of PragerU’s videos.

19 *Id.* (internal quotation marks, citations, and alterations omitted).

20 Plaintiffs here attempt to distinguish their claims from those in *Prager III*, arguing that
 21 they have alleged that defendants directly compete with plaintiffs for viewers and advertisers
 22 because they produce and post similar content, and that designating plaintiffs’ videos for
 23 Restricted Mode drives views toward defendants’ content instead. Dkt. No. 45 at 1–2. But even if
 24 plaintiffs’ allegations of competition are true, plaintiffs rely on the same statements as those the
 25 Ninth Circuit considered and rejected in *Prager III*. Plaintiffs do not explain how the purported
 26 competition between plaintiffs and defendants transforms defendants’ explanatory statements into
 27 commercial advertising and promotion or into specific representations of fact about particular
 28 videos.

Accordingly, the Court dismisses plaintiffs’ claim for false advertising under the Lanham Act.

C. State Claims

Plaintiffs’ remaining claims are based on California state law. Specifically, plaintiffs

1 assert claims for: (1) violation of Article I, section 2 of the California Constitution; (2) violation of
2 the Unruh Act, California Civil Code § 51, et seq.; (3) unfair competition under California
3 Business and Professions Code §§ 17200, et seq.; and (4) breach of the implied covenant of good
4 faith and fair dealing.

5 Where a federal court has original jurisdiction over claims based on the existence of a
6 federal question, the court may exercise supplemental jurisdiction over state law claims if those
7 claims meet the requirements of 28 U.S.C. § 1367(a). In this case, it is not clear whether plaintiffs
8 rely on the exercise of supplemental jurisdiction or some other ground with respect to their state
9 law claims. The SAC does not refer to 28 U.S.C. § 1367(a) but instead refers only to 28 U.S.C.
10 §§ 1331 and 1337(a), both of which address jurisdiction of claims arising under federal law. Dkt.
11 No. 20 ¶ 48. Assuming the SAC includes a typographical error and that plaintiffs mean to rely on
12 28 U.S.C. § 1367(a)—and not § 1337(a)—to support an exercise of supplemental jurisdiction over
13 their state law claims, the Court considers whether to do so, given that this order dismisses
14 plaintiffs’ pending federal claims.

15 A court may decline to exercise supplemental jurisdiction where it “has dismissed all
16 claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3); *see also Albingia*
17 *Versicherungs A.G. v. Schenker Int’l, Inc.*, 344 F.3d 931, 937–38 (9th Cir. 2003), *as amended* 350
18 F.3d 916 (9th Cir. 2003) (holding that § 1367(c) grants federal courts the discretion to dismiss
19 state law claims when all federal claims have been dismissed). In considering whether to retain
20 supplemental jurisdiction, a court should consider factors such as “economy, convenience,
21 fairness, and comity.” *Acri v. Varian Assocs.*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc)
22 (citations and internal quotation marks omitted). However, “in the usual case in which all federal-
23 law claims are eliminated before trial, the balance of factors . . . will point toward declining to
24 exercise jurisdiction over the remaining state-law claims.” *Carnegie-Mellon Univ. v. Cohill*, 484
25 U.S. 343, 350 n.7 (1988).

26 Here, the factors of economy, convenience, fairness, and comity support dismissal of
27 plaintiffs’ remaining state law claims. This case is still at the pleading stage, and no discovery has
28 taken place. Dismissing plaintiffs’ state law theories of relief at this stage conserves federal

1 judicial resources. Further, the Court finds that dismissal promotes comity, as it enables
2 California courts to interpret questions of state law. This is an especially important consideration
3 here because plaintiffs assert a claim that demands an analysis of the reach of Article I, section 2
4 of the California Constitution and the Unruh Act in the context of content hosted by private
5 entities on the Internet—an area in the which application of those laws is less well-developed. For
6 these reasons, the Court declines to exercise supplement jurisdiction over plaintiffs’ state law
7 claims.

8 Although neither party raises the issue, it is unclear whether plaintiffs intend also to assert
9 that this Court has independent original jurisdiction over the entire action under the Class Action
10 Fairness Act (“CAFA”), 28 U.S.C. § 1332(d). *Floyd v. Am. Honda Motor Co., Inc.*, 966 F.3d
11 1027, 1035–36 (9th Cir. 2020) (district court erred in focusing only on supplemental jurisdiction
12 under 28 U.S.C. § 1367 and not considering whether plaintiffs’ state law claims met requirements
13 for original jurisdiction under CAFA). Although the SAC contains class action allegations, *see*
14 Dkt. No. 20 ¶¶ 248-257, plaintiffs do not expressly invoke the Court’s CAFA jurisdiction by name
15 or by citation to the statute. *See* Dkt. No. 20 ¶ 48. However, even if plaintiffs had cited § 1332(d),
16 they have not adequately pled CAFA jurisdiction, which requires minimal diversity, 100 or more
17 putative class members, and more than \$5 million in controversy. 28 U.S.C. § 1332(d). Plaintiffs
18 say that they have lost revenue as the result of defendants’ actions, but they do not plead an
19 aggregate amount of damages, and they refer only in a conclusory manner to an amount in
20 controversy exceeding \$5 million. *Id.* ¶¶ 48, 157, 173-175, 190, 211, 217, 234. Because plaintiffs
21 do not expressly invoke CAFA jurisdiction and do not allege facts that plausibly support such
22 jurisdiction, the Court does not exercise jurisdiction over plaintiffs’ state law claims under CAFA
23 at this time.

24 In sum, the Court declines to exercise supplemental jurisdiction under § 1367(a) over
25 plaintiffs’ state law claims and instead dismisses those claims without prejudice. The Court will
26 consider exercising supplemental jurisdiction if and when plaintiffs successfully plead a federal
27 claim for relief. The Court also finds no basis to exercise original jurisdiction under § 1332(d).
28 Plaintiffs may amend their complaint to attempt to plead CAFA jurisdiction under § 1332(d) if

1 they wish.

2 **D. Claim for Declaratory Relief Regarding CDA Section 230 Immunity**

3 Plaintiffs assert a claim seeking a declaration that Section 230 of the CDA is
4 unconstitutional. Dkt. No. 20 ¶¶ 258-282; Dkt. No. 36 at 19–21. Defendants move to dismiss all
5 claims in the SAC as barred under Section 230 of the CDA. Dkt. No. 35 at 7–13. For the reasons
6 explained below, the Court dismisses plaintiffs’ claim for declaratory relief and does not consider
7 defendants’ contention that all of plaintiffs’ claims are barred under Section 203.

8 Section 230 of the CDA “immunizes providers of interactive computer services against
9 liability arising from content created by third parties” *Fair Hous. Council of San Fernando*
10 *Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). “[A]ny activity
11 that can be boiled down to deciding whether to exclude material that third parties seek to post
12 online is perforce immune under section 230.” *Id.* at 1170–71. Immunity under Section 230
13 “protect[s] websites not merely from ultimate liability, but [also] from having to fight costly and
14 protracted legal battles.” *Id.* at 1175. Plaintiffs contend that Section 230 immunizes constitutional
15 violations and that it is, therefore, unconstitutional. Dkt. No. 36 at 20–21.

16 The Court need not reach the question of whether Section 230 immunity applies to bar
17 plaintiffs’ claims or whether the statute is unconstitutional. First, “declaratory relief is not an
18 independent cause of action” but rather only a remedy. *VIA Techs., Inc. v. SONICBlue Claims*
19 *LLC*, No. C 09-2109 PJH, 2010 WL 2486022, at *3 (N.D. Cal. June 16, 2010); *see also Fiedler v.*
20 *Clark*, 714 F.2d 77, 79 (9th Cir. 1983); *Prager I*, 2018 WL 1471939, at *2 n.2; *Spangler v. Selene*
21 *Fin. LP*, No. 16-cv-05103-WHO, 2016 WL 5681311, at *7 (N.D. Cal. Oct. 3, 2016). To the
22 extent plaintiffs’ first claim for declaratory relief depends on defendants’ alleged violation of their
23 First Amendment rights, plaintiffs have failed to state a claim for such a violation in the first
24 instance. *See supra* Section III.B.1. The Court therefore also dismisses plaintiffs’ related claim
25 for declaratory relief. *Prager I*, 2018 WL 1471939, at *9 (granting motion to dismiss claim for
26 First Amendment violation and claim for declaratory relief, to the extent that it is premised on a
27 First Amendment violation); *Lewis*, 461 F. Supp. 3d at 963 (dismissing claim for declaratory relief
28 reliant on federal claims because plaintiff failed to state the federal claims).

1 Second, Section 230 immunity is properly viewed and analyzed as an affirmative defense
2 in the context of this action. Here, plaintiffs appear to have included a claim for declaratory relief
3 in anticipation of defendants’ assertion of Section 230 immunity as an affirmative defense to
4 plaintiffs’ claims. “[U]sing the Declaratory Judgment Act to anticipate an affirmative defense is
5 not ordinarily proper, and numerous courts have refused to grant declaratory relief to a party who
6 has come to court only to assert an anticipatory defense.” *Veoh Networks, Inc. v. UMG*
7 *Recordings, Inc.*, 522 F. Supp. 2d 1265, 1271 (S.D. Cal. 2007); *see also* 10B Fed. Prac. & Proc.
8 Civ. § 2758 (4th ed.) (“[I]t is not the function of the federal declaratory action merely to anticipate
9 a defense that otherwise could be presented in a state action.”). Dismissal of a declaratory relief
10 claim intended to anticipate an affirmative defense is appropriate, particularly where, as here, the
11 Court need not consider the affirmative defense in order to resolve defendants’ motion to dismiss
12 plaintiffs’ other claims. *See Veoh Networks*, 522 F. Supp. 2d at 1272.

13 Finally, the Court bears in mind the doctrine of constitutional avoidance. “If there is one
14 doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that
15 we ought not to pass on questions of constitutionality . . . unless such adjudication is
16 unavoidable.” *Dep’t of Com. v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999) (quoting
17 *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)). Because the Court finds that
18 plaintiffs have not stated a federal claim and declines supplemental jurisdiction over the currently
19 pled state law claims, *see supra* Section III.C, addressing the constitutional question plaintiffs
20 raise is not appropriate at this juncture.

21 **E. Omnibus Claim for Declaratory Relief**

22 Plaintiffs’ eighth claim for declaratory relief is based on all allegations that precede it in
23 the SAC. *See* Dkt. No. 20 ¶ 349. In this claim, plaintiffs ask for a declaration that defendants
24 have violated the U.S. Constitution, the California Constitution, the Unruh Civil Rights, California
25 Business and Professions Code §§ 17200, et seq., the Lanham Act, and the express and implied
26 terms of the parties’ contracts. *Id.* ¶ 350. Putting aside the impropriety of pleading such an
27 omnibus claim for declaratory relief, the Court dismisses plaintiffs’ eighth claim for declaratory
28 relief because plaintiffs have not stated any federal claims over which the Court may exercise

1 jurisdiction, and because the Court declines to exercise supplemental jurisdiction over plaintiffs'
2 state law claims. *See supra* Sections III.B-C.

3 **F. Leave to Amend**

4 While leave to amend generally is granted liberally, the Court has discretion to dismiss a
5 claim without leave to amend if amendment would be futile. *Manzarek v. St. Paul Fire & Marine*
6 *Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008); *Rivera v. BAC Home Loans Servicing, L.P.*, 756 F.
7 Supp. 2d 1193, 1197 (N.D. Cal. 2010) (citing *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996)).
8 Because the Court finds that amendment would be futile as to plaintiffs' § 1983 claim for violation
9 of the First Amendment, that claim is dismissed with prejudice. However, the Court cannot say
10 that amendment would be futile as to plaintiffs' Lanham Act false advertising claim. Accordingly,
11 the Court gives plaintiffs leave to amend their Lanham Act false advertising claim.

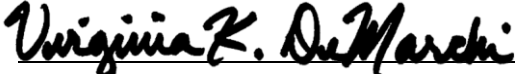
12 Because the Court declines to exercise supplemental jurisdiction over plaintiffs' state law
13 claims, those claims are dismissed without prejudice. If plaintiffs choose to amend their Lanham
14 Act claim as provided in this order, they may also reassert their state law claims at the same time.
15 However, plaintiffs may not assert any new federal or state claims absent leave of Court upon a
16 successful motion for leave to amend.

17 **IV. CONCLUSION**

18 For the foregoing reasons, the Court grants defendants' motion to dismiss. Plaintiffs may
19 file an amended complaint by **January 20, 2021**.

20 **IT IS SO ORDERED.**

21 Dated: January 6, 2021

22
23 
24 VIRGINIA K. DEMARCHI
25 United States Magistrate Judge
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27
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