20-616

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs–Appellants

vs.

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

Defendant-Appellee.

APPELLANTS' REPLY BRIEF

Appeal from the Judgment of the United States District Court
for the Southern District of New York
D.C. No. 1:19-cv-08418-AT

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PRELIMINARY STATEMENT

This case is not about self-regulation of online companies. It is not about protecting website users from objectionable or obscene content. It is also not about a corporation's editorial choices in communicating its own message. This case is about whether discrimination, which is unconscionable in any other business or consumer context, is allowed when committed by an interactive computer service.

The heart of Church United and James Domen's appeal is whether the Communications Decency Act provides a free ticket for interactive computer services to discriminate against its paid users intentionally and unlawfully. Contrary to Vimeo's assertions, Section 230(c)(1) does not provide carte blanche immunity to discriminate based on sexual orientation or religion. The label of "publisher" does not place an interactive computer service above the law. The CDA "was not meant to create a lawless no-man's-land on the internet," where conduct that is illegal offline could now be legal online. *Fair Housing Council of San Fernando Valley v. Roommates.com*, *LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008) (en banc).

Section 230(c)(1) provides immunity where a plaintiff attempts to hold an interactive computer service liable for content of a third-party. Section 230(c)(2) is the relevant immunity provision when an interactive computer service is being sued by a user for policing said user's content. Vimeo incorrectly asserts that in this case, both sections cover the exact same deletion of content: (c)(1) protects Vimeo's deletion of any content even when Vimeo acts in bad faith, and (c)(2) also protects Vimeo's deletion of content if Vimeo acted in good faith. (Vimeo Br. 8). Vimeo incorrectly conflates the two sections, but also attempts to justify a reason for the two distinct sections by offering hypothetical, irrelevant "scenarios in which § 230(c)(2) applies where § 230(c)(1) might not." (Vimeo Br. 14). However, neither

their hypotheticals, the law, logic, nor canons of statutory construction support this argument.

CDA immunity has various and distinct applications - and this appeal asks the Second Circuit to clarify those distinctions. 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." *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (citations and internal quotation marks omitted). Here, the second element is not met because the claim is not based on information provided by a third-party; it is based on Vimeo's discriminatory ban of Church United and Domen. Likewise, the third element is not met because Domen and Church United are not attempting to treat Vimeo as the publisher or speaker of any content.

Where an interactive computer service is not being sued based on third-party content, but rather based on policing the plaintiff's content, Section (c)(2) is the relevant immunity provision. However, Vimeo is not entitled to (c)(2) immunity at the motion to dismiss stage because Domen and Church United alleged Vimeo acted in bad faith by banning them based on unlawful sexual orientation and religious discrimination. Vimeo was not self-policing for obscenity and inappropriate material. Rather, Vimeo targeted Church United and Domen's videos when it cancelled their account. There is a complete absence of good faith when a website deletes an entire account because of the user's unpopular sexual orientation and sincerely held religious belief.

In a final attempt to shield itself from liability, Vimeo argues that it has a First Amendment right to engage in discriminatory conduct and forcing it to provide equal access to its platform would amount to compelled speech. The main problem with this compelled speech claim is that Vimeo is not engaged in protected speech under

the First Amendment. *See Hurley*, 515 U.S. at 568–70, 115 S.Ct. 2338 (examining whether, as a threshold matter, a parade involves protected speech); *see also Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.* (*FAIR*), 547 U.S. 47, 64, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (determining, as an initial matter, that access to law school interview rooms did not involve protected speech). Vimeo does not seek to convey or otherwise express a message through the content hosted on its website by independent content creators. As the Complaint states, "Vimeo's website boasts that it is home to more than 90,000,000 video creators worldwide." (A-50 ¶ 27). The website exists to provide an avenue for content creator's ideas, rather than to speak itself. "Vimeo expressly invites the general public to use its website as a platform for individuals to express their creative work and personal moments from their lives." (A-50 ¶ 25). Vimeo itself is not engaged in protected speech.

The Unruh Act and New York's Sexual Orientation Non-Discrimination Act both provide a remedy for the discrimination perpetrated by Vimeo. Church United and Domen sufficiently pled their causes of action, and neither the Communications Decency Act nor the First Amendment will allow Vimeo to operate its business in a discriminatory manner.

ARGUMENT

I. Vimeo is not Entitled to Immunity Under Section 230(c)(1) Because it is Liable for its own Unlawful Discrimination, not for Publishing the Content of a Third-Party.

Based on both the plain language of the CDA and the legislative history outlined in Domen and Church United's opening brief, immunity under Section 230(c)(1) is only applicable where a plaintiff seeks to hold the interactive computer service liable as a speaker or publisher and for content of a third-party. It is not applicable where the interactive computer service removes a plaintiff's content based on discriminatory animus. 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 (emphasis added). Vimeo ignores both the legislative history and plain language of the statute to argue that Section 230(c)(1) applies when Vimeo is not treated as the speaker of information *and* when it is not being held liable for content provided by another.

To contravene the plain language and legislative history of Section 230(c)(1), Vimeo relies on two unpublished cases from the Ninth Circuit: *Fyk v. Facebook*, 808 F. App'x 597, 598 (9th Cir. 2020); and *Riggs v. MySpace, Inc.*, 444 F. App'x 986, 987 (9th Cir. 2011). In *Fyk v. Facebook*, the plaintiff was attempting to hold Facebook liable based on Facebook "de-publishing pages that [the plaintiff] created and then re-publishing them for another third-party." 808 F. App'x at 598. The plaintiff was suing Facebook based on its unlawful use of the content owned by the plaintiff that Facebook allowed on a third party's page. *Id*. It was not disputed that the plaintiff attempted to treat Facebook as publisher or speaker of the information in question. *Id*. Here, that fact is disputed because Domen and Church United are holding Vimeo liable for Vimeo's own discriminatory actions, not for being the speaker or publisher of content that is on a third-party's page. Although *Fyk* has a few sentences supporting Vimeo's contention that "content provided by another" includes content provided by a plaintiff, the context is distinguishable: the plaintiff's content in *Fyk* was provided by the plaintiff but published by another third-party. *Id*. Here, Church United and Domen seek to hold Vimeo liable for denying a service based on sexual orientation and religion.

The next unpublished Ninth Circuit case Vimeo relies on, *Riggs v. Myspace*, devotes only a single sentence to the Communications Decency Act. 444 F. App'x at 987. The conclusory sentence does not carry the day for Vimeo. Likewise, *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1093-94 (N.D. Cal.

2015), *aff'd sub nom. Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) does not analyze or even mention Section 230(c)(2). There is no need for this Court to rely on unpublished or irrelevant Ninth Circuit decisions for instruction on the applicability of Section 230(c)(1).

This Court correctly applied Section 230(c)(1) in *Force v. Facebook*, 934 F.3d 53 (2d Cir. 2019) where a plaintiff was attempting to treat a website as speakers or publishers, and the claims were based on third-party content. *Force*, 934 F.3d at 67 (victims of Hamas terrorist attacks sued Facebook for third-party Hamas' content). This Court also correctly denied immunity under Section 230(c)(1) in *FTC v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016) where the plaintiff's theory of liability was based on the interactive computer service's "own deceptive acts or practices" rather than for publishing content created by another. *Id*. at 177.

For example, if John Doe was suing Vimeo because it found Church United or Domen's content hosted on Vimeo's website objectionable, then immunity under (c)(1) would potentially be available to Vimeo. The immunity available under (c)(1) is not applicable to this case. Here, liability is based on Vimeo refusing to provide service to plaintiffs, who published content on Vimeo's platform, because Vimeo does not agree with Church United or Domen's content. Vimeo engaged in intentional sexual orientation and religious discrimination. Where an interactive computer service is not being sued based on third-party content, but rather based on policing the plaintiff's content, (c)(2) is the relevant immunity provision.

II. Vimeo is not Entitled to Immunity Under Section 230(c)(2)(A) Because it Acted in Bad Faith.

Vimeo is not entitled to § 230(c)(2)(A) immunity at the motion to dismiss stage because Domen and Church United sufficiently alleged Vimeo acted in bad faith by banning them based on unlawful discrimination. Nothing about Vimeo's deletion of Church United and Domen's account was in "good faith." This is not a

situation where Church United and Domen are trying to hold Vimeo accountable for not allowing objectionable content on its platform. Vimeo did not target the content of five videos, but rather Domen's sexual orientation and religion, which resulted in Vimeo permanently banning Domen and Church United.

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).

There are no facts in the record to support Vimeo's claim that it "warned Plaintiffs that if they failed to take remedial action," their videos and/or account may be removed by a Vimeo moderator. (Vimeo Br. 6). Vimeo did not give Church United and Domen an opportunity to delete the five videos in question, but instead banned Church United and Domen from its platform, evidencing discrimination based on Domen's sexual orientation and religion. (A-52 ¶ 39; A-60). Vimeo's initial notice to Church United and Domen stated "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." (A-60). Vimeo removed Church United and Domen's entire library of eighty-nine videos and permanently prevented Church United and Domen from ever using Vimeo's business services in the future. (A-52 ¶ 39; A-98). The content was not targeted; the users were.

The Complaint alleges that none of Church United and Domen's videos contained obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable material. (A-53 ¶ 43). The five videos flagged by Vimeo as problematic centered on Domen's sexual orientation as a former homosexual and his religion. (A-52 ¶ 40). Plaintiffs are not promoters of conversion therapy banned in cases such as *Pickup v. Brown*, 740 F.3d 1208, 1232 (9th Cir. 2014) which prohibits

licensed mental health providers from administering conversion therapies to minors that the legislature has deemed harmful. The five videos primarily discuss James Domen's decision to identify as a former homosexual based on his religious views. (A-52 ¶ 40-44).

Moreover, 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 Church United and Domen. (A-53 ¶¶ 44-46). Vimeo failed to provide "an explanation for the distinction between Church United and Domen's videos relating to sexual orientation" and religion. (A-53 ¶ 46). Based on the allegations of discrimination, Vimeo should not be entitled to immunity at the motion to dismiss stage before further evidence of their discriminatory intent could be uncovered in discovery.

Immunity has its bounds, ending when an interactive computer service bans a user based on their sexual orientation and religion. Therefore, Vimeo does not qualify for 230(c)(2) immunity.

III. First Amendment

In a Hail Mary attempt to shield itself from liability, Vimeo argues that it has a First Amendment right to engage in discriminatory conduct and forcing it to provide equal access to its platform would amount to compelled speech. This argument is without merit because Vimeo itself is not engaged in protected speech through the content hosted on its website by independent content creators.

To prevail on their compelled speech claim, Vimeo first must show that it is engaged in protected speech under the First Amendment. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568-570 (1995) (examining whether, as a threshold matter, a parade involves protected speech); *see also Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 64 (2006) (determining, as an initial matter, that access to law school interview rooms

did not involve protected speech). Vimeo has not identified any personal expression or speech intimately connected with providing a video hosting website for content creators to share their creations with the public. *See Hurley*, 515 U.S. at 576 (holding that protected speech exists when the speaker is "intimately connected with the communication advanced*"); see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 76–78 (1980) (rejecting compelled speech claim where the owner of a shopping center failed to identify any personal expression intimately connected with the shopping center and the challenged law merely required him to open his property to speakers without forcing him to speak).

Vimeo is engaged in the non-expressive business activity, and there is no free speech protection for non-expressive business activities. *See Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139–40 (1969) (holding that there is no First Amendment protection for newspaper publishing companies that engage in specific monopolistic commercial practices that violate antitrust laws); *See Also Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 192–93 (1946) (holding that the Fair Labor Standards Act applies to all business and that there is no First Amendment exemption from the Act for newspaper publishing and distribution companies). Vimeo is a website designed to host the speech and expression of other people. Vimeo does not seek to convey or otherwise express a message through the content hosted on its website by independent content creators. (A-50 ¶¶ 24-27).

Vimeo relies on *Miami Herald Pub. Co., Div of Knight Newspaper, Inc. v. Tornillo* to argue it has a right to "editorial autonomy." (Vimeo Br. 25). However, in that case, a state sought to compel a newspaper to publish responses from political candidates. *Tornillo*, 418 U.S. 241, 258 (1974).) The Supreme Court in *Tornillo* held that based on freedom of press, newspapers should be free from government interference. *Id*. The Court rationalized its holding by stating "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising." *Id.* at 258.

The *Tornillo* case did not address anti-discrimination statute, nor did it involve business establishments that are not involved in news reporting. Tornillo involved a newspaper company that was engaged in speech, specifically in publishing its own "broad range of opinions to readers." *Id*. at 248. Vimeo, on the other hand, is a passive receptacle for content creators to utilize for the user's own creative expressions. (A-50 ¶¶ 24-27). It is not engaged in the press or publishing its own content or opinions.

Vimeo also relies on *Hurley v. Irish-American Gay* wherein the Supreme Court extended the holding of *Tornillo* beyond newspapers to invalidate a Massachusetts law requiring parade organizers to include a group of individuals advocating a message that the organizers did not agree with or wish to convey. *Hurley*, 515 U.S. 557 (1995). Similar to *Tornillo*, the court focused on the speaker's autonomy to choose the content of its message, reasoning that the law violated a "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. The Supreme Court found that the organizer of the parade in *Hurley* was an expressive organization carrying on an expressive activity. *Id.* The Court made clear, however, that anti-discrimination laws do not, as a general matter, violate the First Amendment, because such laws generally do not "target speech" but rather prohibit "the act of discriminating." (*Id.* at 572; *see also Roberts v. U.S. Jaycees,* 468 U.S. 609, 623-24 (1984) (statutes prohibiting discrimination in public -accommodation do not violate the First Amendment because they are not aimed at suppression of speech).

The instant matter is distinguishable from *Tornillo* and *Hurley* as Vimeo is not a newspaper that exercises editorial discretion in interpreting and selecting facts for purposes of publication, nor is it a parade organizer. Vimeo does not exist for the purpose of expressing its own message, nor does it claim that it is engaged in speech. It is unreasonable for Vimeo to infer that anyone would believe that user

content on its website is an intimate expression of Vimeo. The user content hosted on Vimeo, like Facebook and Youtube, is an expression of the specific user that posts the content, not the website itself.

Moreover, even if Vimeo were deemed to have some expressive component, Vimeo still cannot prevail in their First Amendment argument. Under the test set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), a governmental regulation that places a burden on expressive activity is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial governmental interest, and if the incidental restrictions on alleged First Amendment freedoms are no greater than is essential to the furtherance of that interest. *Id.* at 377, 88 S.Ct. 1673. In this case, California and New York have the constitutional authority to bar discrimination based on sexual orientation in public accommodations. The interest in combating discrimination based on sexual orientation is compelling, and anti-discrimination statutes prohibit such discrimination to eliminate the harms caused by the discriminatory conduct, not to silence particular viewpoints.

Accordingly, the First Amendment arguments raised by Vimeo do not apply to immunize Vimeo's unlawful discrimination.

IV. Domen and Church United Alleged Sufficient Facts to State Cognizable Claims for Legal Relief under California Unruh Act and New York State Human Rights Law.

The Complaint alleges that Vimeo acted intentionally and discriminated against Church United and Domen when it deleted their entire library of videos and canceled their account. (A-52 ¶ 39; A-53 ¶ 44). Church United and Domen's opening brief outlined facts supporting, at the very least, the required "minimal plausible inference of discriminatory intent." *Doe v. Columbia Univ.*, 831 F.3d 46, 55 (2d Cir. 2016).

Vimeo argues that "the most plausible reading of the pleadings is that Vimeo removed Plaintiffs' videos and account because of the content of their speech—and not based upon their identities." (Vimeo Br. 24). However, at the pleading stage, a plaintiff is not required to present or negate the "most plausible" explanation for discrimination. This preponderance of evidence standard set forth by Vimeo is not the law for pleading a legally cognizable discrimination claim. A plaintiff 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").

The Complaint alleges that Vimeo acted intentionally and discriminated against Church United and Domen when it deleted their entire library of videos and canceled their account. (A-52 ¶ 39; A-53 ¶ 44). By 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. (A-53 ¶¶ 43-47). The Complaint also alleges disparate treatment and lists similar videos about sexual orientation and religion posted by other users that were not deleted, further evidencing Vimeo's discrimination. (A-53 ¶¶ 44-46). Vimeo failed to provide an explanation for the distinction between Church United and Domen's videos relating to sexual orientation and religion and similar videos by other users on its platform. (A-53 ¶ 46).

Church United and Domen have set forth more than sufficient facts to establish a plausible inference that Church United and Domen are the victims of unlawful discrimination pursuant to California's Unruh Act and New York's Sexual Orientation Non-Discrimination Act. At the very least, Church United and Domen

should be given the opportunity to amend their Complaint should this Court find that additional facts supporting their claims are necessary.

CONCLUSION

For the reasons set forth above, the District Court judgment granting Vimeo the right to deny access to individuals based on their sexual orientation and religion should be reversed and remanded for further proceedings.

DATED: August 24, 2020 TYLER & BURSCH, LLP

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (New Times Roman) of 14 points, and contains 4,256 words (excluding, as permitted by Fed. R. App. P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

Dated: August 21, 2020

s/ Robert H. Tyler
Robert H. Tyler, Esq.

CERTIFICATE OF SERVICE

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 25026 Las Brisas Road, Murrieta, California 92562.

☒ I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on August 21 2020.

APPELLANTS' OPENING BRIEF

Executed on August 21, 2020, at Murrieta, California.

☒ (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

s/ Robert H. Tyler

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