Case No. S235968

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

DAWN HASSELL, *et al.*
Plaintiffs and Respondents,

vs.

AVA BIRD,
Defendant,

YELP, INC.,
Appellant.

After a Decision by the Court of Appeal
First Appellate District, Division Four, Case No. A143233
Superior Court of the County of San Francisco
Case No. CGC-13-530525, The Honorable Ernest H. Goldsmith

YELP INC.'S OPENING BRIEF ON THE MERITS

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE *thomasburke@dwt.com* (SB# 141930)
*ROCHELLE L. WILCOX *rochellewilcox@dwt.com* (SB# 197790)
505 Montgomery Street, Suite 800, San Francisco, CA 94111-6533
Tel.: (415) 276-6500 Fax: (415) 276-6599

YELP INC.
AARON SCHUR *aschur@yelp.com* (SB# 229566)
140 New Montgomery Street, San Francisco, California 94105
Tel: (415) 908-3801

Attorneys for Non-Party Appellant YELP INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. ISSUES PRESENTED

1. This Court has recognized a narrow exception to the requirement that a non-party to litigation receive notice and an opportunity to be heard before an order is entered that may be applied to that non-party, limiting that exception to cases where the non-party is acting in concert with a party, or the party can only act through others (such as a union that can only act through its members).

Can that narrow exception be extended to a non-party without any factual findings to support that extension, thus allowing courts to deprive online publishers of notice and the right to be heard before infringing their First Amendment rights by ordering them to remove online content?

2. 47 U.S.C. § 230(c)(1) and (e)(3) prohibit courts from treating any "provider ... of an interactive computer service ... as the publisher or speaker of any information provided by another content provider," and, separately, from permitting a "cause of action [to] be brought" or "liability [to] be imposed" if it is "inconsistent with this section."

Despite Section 230's statutory immunity, may a court enjoin a website publisher and require it to remove third-party created content from its website—and impose contempt citations and related liabilities that might flow from a failure to abide by such an injunction—merely because the plaintiff chose not to name the website publisher as a party in the litigation?

II. SUMMARY OF ARGUMENT

Yelp Inc.[1] learned for the first time that a prior restraint had been entered against it when a copy was delivered to its registered agent for service of process. A00537-547. The default Judgment that included that prior restraint required Yelp—a non-party to the underlying lawsuit—to remove reviews critical of Plaintiffs from its website and to not publish *future* postings from two Yelp accounts. A00213. Although Yelp had been given no advance notice that Plaintiffs were seeking a prior restraint against it, the trial court denied Yelp's motion to vacate the Judgment. A00808-810.

The court of appeal affirmed, invoking a narrow exception to basic due process rights that was created to prevent parties from evading an injunction through gamesmanship. Op. 18-19. On review, the appellate court did not find, or even consider whether, Yelp had engaged in such misconduct, and did not analyze Yelp's connections with the actual defendant. The appellate Opinion contemplates contempt and sanctions

---

[1] Along with Yelp's related websites and mobile applications, Non-Party Appellant Yelp Inc. is referred to simply as "Yelp" in this Brief.

Plaintiffs Dawn L. Hassell and the Hassell Law Group are referred to collectively as "Hassell" or "Plaintiffs."

Citations to the three-volume Appendix filed in the court of appeal are denominated "A00XXX."

Citations to the appellate court's Memorandum Opinion are to "Op."

Citations to the concurrently-filed Request for Judicial Notice are to the "RJN."

proceedings against Yelp if it refuses to comply, although Yelp has no more connection with the enjoined party than it has with the tens of millions of other third-party authors whose reviews it hosts on Yelp, and engaged in no wrongful conduct.

The court of appeal's due process analysis was flawed at virtually every step. Initially, the court misread U.S. Supreme Court authority that unequivocally requires notice and an opportunity to be heard in connection with orders restraining the distribution of speech. The appellate court held that no *prior* hearing was required. Op. 23. And while it may be true that in a narrow category of cases, courts may enjoin speech without a *prior* hearing, the law also is clear that a *prompt* hearing is constitutionally required to give the enjoined party an opportunity to oppose entry of an injunction against it. That did not happen here. Section IV.A, *infra*.

To support its decision, the appellate court grossly expanded a narrow exception to due process, which gives courts leeway to apply injunctions to non-parties who—after the injunction is entered—are proven to have acted in collusion with the enjoined party, such as agents and abettors of that party. Without analyzing whether these cases should be extended to this very different factual scenario involving Internet speech, the court turned this exception into a general rule, which now allows courts to expressly name non-parties in injunctions without any factual findings of

misconduct. In doing so, the court rendered meaningless the careful guidelines California courts have adopted to limit the scope of this narrow exception, giving defamation litigants worldwide an incentive to forum shop in California and a roadmap to circumvent due process rights here. Section IV.B, *infra*.

The court reached its conclusion only by pretending that Yelp is nothing more than the "administrator" of its website, ignoring Yelp's role as a publisher of third-party authored speech and its First Amendment right to control its own website. It also invoked this Court's decision in *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141 ("*Balboa Island*") to support the prior restraint it entered against Yelp, while ignoring the fact that in *Balboa Island* this Court narrowly approved an injunction entered against a *party* following a *contested trial*, and nowhere suggested that courts may permit injunctions against *non-parties* following *default proceedings*. None of the cases cited by the court of appeal support its rejection of Yelp's First Amendment rights here. Section IV.C, *infra*.

The court of appeal combined its unwarranted rejection of Yelp's due process and First Amendment rights, with an unprecedented *narrowing* of the previously robust protection provided by the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"), to deny Yelp the federal immunity it would have received if Hassell had sued it. The court exalted the form of the action—namely, the fact that Yelp was tactically not named

as a party—over the plain language of Section 230 and Congress' clear intent in enacting it to protect websites from actions that treat them as publishers or distributors of third-party content.

Section 230 immunity plays a vital role in the legal landscape that has allowed the Internet to flourish. As this Court noted a decade ago in its sole decision evaluating Section 230, "[t]he provisions of section 230(c)(1), conferring broad immunity on Internet intermediaries, are [] a strong demonstration of legislative commitment to the value of maintaining a free market for online expression." *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 56 ("*Barrett*"). In *Barrett*, this Court made clear that Section 230 immunizes website operators from actions by disgruntled businesses hoping to punish them for allowing third-party content—even defamatory content—to remain on their websites. *Id.* at 39-40. Section V.A, *infra*.

The court of appeal followed *Barrett* in name alone. Op. 27. Yelp established its right to Section 230 immunity by demonstrating that (1) Yelp is a "provider or user of an interactive computer service"; (2) Hassell seeks to treat Yelp as a "publisher or speaker" of the content at issue; and (3) the action is based on "information provided by another information content provider." 47 U.S.C. § 230(c)(1). Courts across the country consistently have held that Section 230 protection precludes injunctive relief. *E.g.*, *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 697-98 ("*Kathleen R.*"). The broad protection the United

States Congress intended when it enacted Section 230 protects Yelp here. Section V.B, *infra*.

The appellate court rejected Yelp's Section 230 defense only by treating Yelp "as the publisher or speaker" of the information provided by Bird, contrary to the plain language of Section 230(c)(1). Specifically, the court affirmed an injunction imposed on Yelp by stretching due process law to conclude that Yelp was acting "*with* or *for*" Bird (Op. 30-31)—treating Yelp as standing in Bird's shoes solely based on Yelp's role as an online publisher of her alleged content. The court's misinterpretation of Section 230 is utterly inconsistent with its due process holding—a contradiction that injects confusion into each of these legal principles. Its decision was flawed at every step, and must be reversed. Section V.C, *infra*.

Viewed only through the prism of review websites such as Yelp, Section 230's broad protection of websites that publish third-party content plainly serves the public interest. *E.g., Edwards v. District of Columbia* (D.C. Cir. 2014) 755 F.3d 996, 1006 ("[f]urther incentivizing a quality consumer experience are the numerous consumer review websites, like Yelp ..., which provide consumers a forum to rate the quality of their experiences"). If Yelp and entities like it are denied their right to exercise editorial control in publishing consumer reviews, this will provide businesses an effective tool to remove critical commentary and consumers will suffer.

But the appellate decision reaches far beyond this single area, vast though it may be. Internet publishers routinely display third-party content, including political organizations, media entities, and repositories of creative content such as YouTube, to name only a few. Some of this content entertains or educates, while some simultaneously offends, and much of it walks a line between protected and unprotected speech. The value of such content lies in the diversity and disparate views and opinions offered online.

This does not leave plaintiffs like Hassell without a remedy—although if it did it would not matter because Congress' intent controls. For twenty years, Congress has insisted that plaintiffs look to the content creator alone for a remedy, through tools such as judgment liens and contempt proceedings—post-judgment options that Hassell never pursued here. During those twenty years, no court has approved Hassell's stratagem of denying a website publisher its due process rights in order to tactically avoid the immunity Congress established through Section 230. The appellate court's blessing of the injunction entered against Yelp, following an *uncontested* hearing to prove up the default judgment against Bird alone (A00213), is a new loophole that this Court should close, lest future plaintiffs exploit it to escape Section 230's broad immunity.

If this Court were to affirm the appellate court's opinion, Yelp and other websites would suffer and the public that relies on the wealth of

online third-party commentary—to aid decision-making on myriad issues like consumer purchases, politics, and employment— would be harmed as subjects of criticism follow Hassell's example: intentionally sue the commenter alone, perhaps in a manner that maximizes the chance that he or she will be unable or unwilling to defend the lawsuit regardless of its underlying merit, and then after a default judgment present the injunction to the website publisher as an unassailable *fait accompli*. As the Amicus letters supporting review explained, people across the world are invoking the appellate decision to demand that website publishers remove content they do not like, or reconfigure their websites to hide that content. *E.g.*, *Amicus* Letter of Google, Inc., dated August 10, 2016, at 3; *Amicus* Letter of Glassdoor, Inc., dated August 15, 2016, at 2. This case is only one of many different attempts to misuse the court system in the hope of stifling speech on the Internet. *E.g.*, RJN Exs. A-C. The court of appeal's decision threatens to undermine the validity and efficacy of the information available to consumers, and online speech generally. Yelp respectfully requests that this Court reverse that decision.

III. STATEMENT OF FACTS AND PROCEDURE

A. Yelp Publishes Tens of Millions of Third-Party Authored Reviews.

Yelp allows any member of the public to read and write online reviews about local businesses, government services, and other entities.

A00240. Yelp is available to the public at no charge and without any registration requirement. *Id.* Those who register by creating an account may write reviews about businesses and service providers, and thus contribute to a growing body of tens of millions of publicly-available consumer reviews. *Id.* Tens of millions of other users read the reviews on Yelp when making a wide range of consumer and other decisions. *Id.* The businesses listed on Yelp also can create free accounts, which allow them to publicly respond to any review, with such a response appearing next to the original review. *Id.* Individuals posting reviews on Yelp can remove them at any time. A00841. As Yelp's website explains, it applies automated software to all reviews posted in an attempt to provide the most helpful reviews to consumers. A00519.

B. Hassell Obtains An Injunction Against Yelp Without Giving It Any Notice.

1. Third-Party Users Write Critical Reviews About Hassell Law Group On Yelp.

Hassell, a San Francisco attorney, owns The Hassell Law Group, P.C. A00006. According to Hassell's Complaint, Bird suffered a personal injury on June 16, 2012, and retained The Hassell Law Group. A00002-3. After a few months, Hassell ended the attorney-client relationship. *Id.* On January 28, 2013 a user with the screen name "Birdzeye B." posted a one-star review of The Hassell Law Group on Yelp, complaining that "dawn hassell made a bad situation much worse for me" and accusing Hassell of

failing to communicate with her and abandoning her as a client, among other things. A00018. Believing that "Birdzeye B." was Bird, Hassell sent Bird an email that day, requesting she remove the "factual inaccuracies and defamatory remarks" from Yelp. A00005. Bird replied the next day, complaining about Hassell's representation. A00348.

2. Hassell Sues Bird And Obtains A Default Judgment, Which Includes An Injunction Against Yelp.

On April 10, 2013, Dawn Hassell individually, and the Hassell Law Group P.C., filed a complaint against Bird, but not Yelp, in San Francisco Superior Court. A00002. The suit asserted claims based on two allegedly defamatory reviews—one by Birdzeye B. and another by a reviewer identified as J.D. (A00004-5)[2]—and sought compensatory and punitive damages. It also sought injunctive relief against Bird only. A00013. Although the Birdzeye B. public account profile stated that its creator lived in Los Angeles (A00091), Bird was served through substitute service on the owner of the Oakland home in which Bird was injured, who told the process server that he had not seen Bird in months. A00026. On July 11, 2013, the court entered a default against Bird. A00023.

[2] The "J.D." review accused Hassell of improperly deducting costs from a settlement. A00020. Hassell claimed that "J.D." was Bird based on the review's use of capitalization, despite the content being at odds with the original challenged statement. A00034, A00099.

On November 1, 2013, Hassell filed a Summary of the Case in Support of Default Judgment and Request for Injunctive Relief. A00033-36. Hassell significantly expanded the relief being sought as described in the Complaint, adding another allegedly defamatory statement to her claim (A00036, A00102)[3] and demanding for the first time that the court "make an order compelling Defendant and Yelp to *remove* the defamatory statements, including all entire posts, immediately. If for any reason Defendant does not remove them all by the Court-ordered deadline (which is likely given Defendant's refusal to answer the complaint), *the Court should order Yelp.com to remove all 3 of them.*" A00051 (emphasis in original).

Plaintiffs' Request for Judgment went further, seeking "an Order ordering Yelp.com to remove the reviews *and subsequent comments of the reviewer* within 7 business days of the date of the court's Order." A00051 (emphasis added). Hassell *intentionally* did not serve her application for default judgment on Yelp or otherwise notify Yelp about it. A00243; *see also* A00837. The court granted the requested injunction, including the part ordering non-party Yelp to remove the existing comments ***and any "subsequent" comments*** posted by "Birdzeye B." or "J.D." A00213. The court made no factual findings as to Yelp. *Id.*

[3] She added another post from Birdzeye B. that accused Hassell of trying to "threaten, bully, intimidate, harrass [sic]" her into removing the reviews. A00036, A00102.

C. The Trial Court Denies Yelp's Motion To Vacate The Injunction.

On January 28, 2014, Yelp's registered agent for service of process received a letter enclosing a Notice of Entry of Judgment and threatening Yelp with contempt proceedings if it did not comply with the Judgment. A00537-547. On February 3, 2014, Yelp responded to Hassell by letter stating that as a non-party that did not receive notice or an opportunity to be heard, Yelp was not bound by the terms of the Judgment. A00548-550. Yelp further explained that Section 230 precludes enforcement of the prior restraint, or liability as to Yelp. A00549. Hassell did not respond until April 30, 2014. She claimed that her office was "currently setting a motion to enforce the court's order against Yelp," but did not respond substantively to Yelp's position. A00551.

On May 23, 2014, Yelp moved to vacate the Judgment. A00225-470. Hassell opposed Yelp's Motion to Vacate. A00471-572. On September 29, 2014, the trial court denied Yelp's Motion. A00808. It quoted from *Ross v. Superior Court* (1977) 19 Cal.3d 899, 906 ("*Ross*"), and *Berger v. Superior Court* (1917) 175 Cal. 719, 721 ("*Berger*"), to hold that injunctions may run to non-parties who are aiding and abetting an enjoined person to violate an injunction, and concluded that Yelp fit within this exception to general due process requirements. A00808-809. It

implicitly rejected Yelp's claim to immunity under Section 230, not even referencing it in its order. *Id.*[4]

D. The Court Of Appeal Affirms The Trial Court's Decision.

In a published decision, the court of appeal affirmed the trial court's conclusion that Yelp was bound by the prior restraint. Op. 1-2. As relevant here, the court characterized the portion of the Judgment requiring Yelp to remove content from its website as a "removal order" (A00212-213)—not an injunction (Op. 1)—and without any explanation, treated the "removal order" as if it were separate from the Judgment. *E.g.*, Op. 10-11 (concluding that Yelp was not aggrieved by the default judgment, but was aggrieved by the removal order).[5]

---

[4] During oral argument on Yelp's motion, the trial court expressed disbelief that the statute could mean what this Court, and uniform federal courts nationwide, have said it means. The trial court complained to Yelp's counsel that "[w]hat you're saying is you can post any kind of defamatory information for the world to see, and you can say, we don't have anything to do with it. We don't care if they say Ms. Hassell shot her mother, or something like that. It doesn't make any difference. I think your position is a very hard one to swallow." A00834:6-11. While this Court expressed similar reservations about the statute, it followed Congress' directive and held that as a matter of law, websites like Yelp cannot be held liable for content posted by third parties, even if the content is defamatory. *Barrett*, 40 Cal.4th at 62-63.

[5] Some of the court's holdings grew out of this novel characterization of the injunction against Yelp, and its Opinion ultimately turned on its conclusion that Yelp was not subject to an injunction at all. *E.g.*, Op. 29 ("[a]gain though, the party that was enjoined from publishing content in this case was Bird, ..."). Title aside, the "removal order" is a classic injunction and the court of appeal plainly erred by treating it as anything else. *See, e.g., PV Little Italy, LLC v. MetroWork Condominium Ass'n* (2012) 210 Cal.App.4th 132, 143 n.5 (order returning control of

After evaluating Yelp's standing to appeal (issues not raised here), the appellate court rejected Yelp's argument that due process barred enforcement of the injunction against it. Op. 18-23. The court noted, first, that "An Injunction Can Run Against a Nonparty." Op. 18. Citing a handful of cases, the court concluded that "settled principles undermine Yelp's theory that the trial court was without any authority to include a provision in the Bird judgment which ordered Yelp to effectuate the injunction against Bird by deleting her defamatory reviews." Op. 19.

The appellate court did not discuss or apply any of the requirements that California courts have enunciated to justify extending an injunction to a non-party. Op. 19-21. Instead, it simply distinguished the cases Yelp cited, concluding that none presented facts similar to those presented here. *Id.* The court made clear that its decision did not turn on the facts of the case, and that the question of whether Yelp was "aiding and abetting" Bird's violation of the injunction "has no bearing on the question whether the trial court was without power to issue the removal order in the first instance." Op. 21.

The court next rejected Yelp's argument that the First Amendment protects its right to distribute Bird's speech. Op. 21-23. The court

---

association to non-parties was properly characterized as injunction); *People v. Brewer* (2015) 235 Cal.App.4th 122, 135 (defining injunction "as a writ or order commanding a person either to perform or to refrain from performing a particular act" (citation omitted)).

distinguished a U.S. Supreme Court case holding that book and magazine distributors are entitled to due process in connection with a seizure order. Op. 21-22 (citing *Marcus v. Search Warrants* (1961) 367 U.S. 717 ("*Marcus*")). The court explained that "in this context, it appears to us that the removal order does not treat Yelp as a publisher of Bird's speech, but rather as the administrator of the forum that Bird utilized to publish her defamatory reviews." *Id.* The court provided no definition of its newly fashioned term "administrator of the forum." The court believed that the issue was whether a *prior* hearing was required, and that this case differs from *Marcus* because here "specific speech has already been found to be defamatory in a judicial proceeding." Op. 23.

The court also rejected Yelp's argument that the injunction is an unconstitutional prior restraint. Op. 23-26. Expanding this Court's decision in *Balboa Island* to apply to non-party Yelp, the court held that "the trial court had the power to make the part of this order requiring Yelp to remove the [statements at issue] because the injunction prohibiting Bird from repeating those statements was issued following a determination at trial that those statements are defamatory." Op. 25. It narrowly reversed only that part of the trial court's order that barred publication of any comments by "Birdzeye B." or "J.D." that might be posted in the future. *Id.*

Finally, the court held that Section 230 did not protect Yelp from Hassell's injunction. Op. 26-31. Its decision turned largely on the fact that Hassell tactically chose not to sue Yelp, or even give it advance notice of her claims, which the court found "distinguish[ed] the present case from Yelp's authority, all cases in which causes of action or lawsuits against internet service providers were dismissed pursuant to section 230." Op. 28 (citations omitted); *see also id.* 29-30. The court reasoned that "[i]f an injunction is itself a form of liability, that liability was imposed on Bird, not Yelp." *Id.* 30-31. The court rejected each of Yelp's arguments. Op. 29-31.

IV. INTERNET PUBLISHERS LIKE YELP ARE ENTITLED TO NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE THEY ARE ORDERED TO REMOVE CONTENT

The injunction here names Yelp—although it is not a party to this action—and specifically orders Yelp to remove third-party authored content from its website. Invoking what it described as "settled principles" to reject Yelp's due process arguments, the court of appeal insisted that a non-party may be subject to an injunction if it might, at some point in the future, be held to have "act[ed] in concert with the enjoined party and in support of its claims." Op. 19 (citations omitted).

But *none* of the cases the court cited touches on the issue presented here: whether a non-party to litigation has a right to challenge an order that *expressly names it* and affects *its own rights*—here, Yelp's right to maintain third-party authored reviews that are critical of others on its website,

sometimes in conflict with the desires of businesses that reject criticism and aim to remove such commentary from public view.[6] And none allowed an injunction where the non-party has such a remote connection to the party enjoined. The only connection between Yelp and Bird is that Bird, like tens of millions of people, posts reviews on Yelp. The court's application of an exceedingly narrow exception to fundamental due process requirements grossly expands that exception beyond its intent and purpose and endangers protections for free speech online.

A. Due Process Requires Notice And An Opportunity To Be Heard Before Being Subject To An Order Affecting Rights.

The requirements of notice and hearing are firmly rooted in the United States and California Constitutions. As the court made clear in *Estate of Buchman* (1954) 123 Cal.App.2d 546, 559, "[t]he fundamental conception of a court of justice is condemnation only after notice and hearing." Thus, "[t]he power vested in a judge is to hear and determine, not to determine without hearing," and the Constitution requires a fair hearing. *Id.* at 560; *see also People v. Ramirez* (1979) 25 Cal.3d 260, 263-64.

This Court long ago reaffirmed as a "seemingly self-evident proposition that a judgment *in personam* may not be entered against one not

[6] If Yelp removed every review a business owner argued was false or even defamatory, it would have few critical reviews on its website. Yelp resisted Plaintiffs' claims here to maintain the integrity of its website, for the benefit of its users.

a party to the action." *Fazzi v. Peters* (1968) 68 Cal.2d 590, 591 ("*Fazzi*"). As the U.S. Supreme Court has held, courts "may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. N.L.R.B.* (1945) 324 U.S. 9, 13 ("*Regal Knitwear*"). That Court elsewhere explained that "it would violate the Due Process Clause ... to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented." *Richards v. Jefferson County* (1996) 517 U.S. 793, 794 (prior adjudication in tax case did not apply to petitioners because they were neither parties nor adequately represented in that case); *see also Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.* (1971) 402 U.S. 313, 329 ("Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position."); *Chase National Bank v. City of Norwalk, Ohio* (1934) 291 U.S. 431, 440-441 (reversing injunction entered against non-party; "[u]nless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights").

Despite these settled constitutional principles, Hassell intentionally sought to abrogate Yelp's due process rights when she moved for a default judgment; as she put it she "anticipated that Defendant Bird would refuse to remove the Yelp review." A00482.[7] The trial court agreed, enjoining speech that Yelp displays and—through automated software applying criteria developed for the benefit of consumers—*may*, in its discretion, use to provide an aggregate rating of the Hassell Law Group to consumers looking to hire lawyers. A00212-213, A00519. The appellate court approved this gambit, holding that Yelp was not entitled to notice. Op. 2, 23. But because Yelp has a separate First Amendment right to distribute the speech of others (Section C, *infra*), it was entitled to a hearing to oppose entry of the overbroad injunction that restrained speech on its website. *See Heller v. New York* (1973) 413 U.S. 483, 489 ("*Heller*") ("because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint" (citations, internal quotes omitted; emphasis in original)).[8]

[7] Indeed, at the hearing on the motion to vacate, Hassell admitted that she did not name Yelp in her Complaint because Yelp is immune from suit under Section 230, although she also made a half-hearted (and incorrect) argument below that Yelp did not qualify for Section 230 immunity. A00837; *compare* footnote 19, *infra*.

[8] *See also Carroll v. President & Commissioners of Princess Anne* (1968) 393 U.S. 175, 180 ("there is no place within the area of basic

The court of appeal's invocation of *Heller*—which decided whether a party is entitled to an adversarial hearing *before* speech is seized—missed the point. Op. 23. Yelp did not receive *any* hearing; it had no opportunity to challenge the trial court's conclusion—reached *in an uncontested hearing* following a default judgment—that the speech at issue was defamatory and must be removed, and that Yelp must not allow *future* speech to be posted by Bird. The appellate court plainly erred in failing to recognize the "seemingly self-evident proposition" (*Fazzi*, 68 Cal.2d at 591) that Yelp was denied its due process right to notice and a hearing before the injunction was entered against it, and in narrowly reversing only the part of the injunction that barred future speech. Op. 25. As shown below, the line of cases it invoked does not support the broad abandonment of due process that occurred here. Section B, *infra*.

---

freedoms guaranteed by the First Amendment" for *ex parte* orders "where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate"); *Lee Art Theatre, Inc. v. Virginia* (1968) 392 U.S. 636, 637 (reversing conviction based on public display of movie alleged to be obscene; seizure warrant "fell short of constitutional requirements demanding necessary sensitivity to freedom of expression" (citations omitted)); *A Quantity of Copies of Books v. Kansas* (1964) 378 U.S. 205, 212-213 ("if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books" (citations omitted)); *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 309 (ordinance allowing seizure of news racks without prior notice violated the First Amendment; "the Constitution does require that any such summary seizure procedure be narrowly drafted so as to minimize interference with First Amendment rights").

B. The Court Of Appeal Diminished Fundamental Due Process Protections By Expanding A Narrow Rule Allowing Courts To Enjoin Aiders, Abettors, And Agents Of Parties.

In rejecting Yelp's due process arguments, the court of appeal invoked what it characterized as "settled principles" of law that in limited circumstances allow an injunction to "run to classes of persons with or through whom the enjoined party may act." Op. 19. This narrow exception to the general due process requirement of notice and an opportunity to be heard allows an injunction to be *enforced* against a non-party who is *not named in the injunction* based on evidence establishing that the enjoined party and the non-party acted together to evade the injunction, or the enjoined party and non-party have a close relationship such as union and member. Op. 19-21. The appellate court held that these cases authorized an injunction that expressly applies to Yelp, without any factual findings or evidence that Yelp engaged in the type of conduct, or had the type of relationship with the enjoined party, that California courts consistently have required. *Id.*

In *Regal Knitwear*, 324 U.S. at 14, the U.S. Supreme Court explained the very narrow purpose of this exception—that successors and assigns may be bound by an injunction if they are "instrumentalities through which defendant seeks to evade an order or [] come within the description of persons in active concert or participation with them in the

violation of an injunction." The Supreme Court did not decide if the non-parties there could be held liable for violating the injunction, although it cautioned that it "depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order." *Id.* at 15; *see also In re Lennon* (1897) 166 U.S. 548, 554-555 (injunction against railroad company could be enforced against one of its employees). As Judge Learned Hand explained nearly a century ago, a court is "is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court." *Alemite Mfg. Corp. v. Staff* (2d Cir. 1930) 42 F.2d 832, 832-833. The court emphasized that "[t]his means that the respondent *must either abet the defendant, or must be legally identified with him.*" *Id.* (emphasis added).

One California court has explained that this "common practice" of "mak[ing] the injunction run also to classes of persons *through whom the enjoined party may act*" means that "enjoined parties may not play jurisdictional shell games; they may not nullify an injunctive decree by carrying out prohibited acts with or through nonparties to the original proceeding." *People v. Kothari* (2000) 83 Cal.App.4th 759, 766-767 (reversing injunction against property owners that also would bind all future owners of the property) (citations omitted; emphasis added). The court elaborated that courts may extend injunctions only to

"'instrumentalities through which [the] defendant *seeks to evade an order* or ... persons in *active* concert or participation with them in the violation of an injunction.'" *Id.* at 770 (citation omitted; emphasis added). Thus, this rule allows courts to enjoin third parties who are acting at the behest and for the benefit of the third party, and not in pursuit of their own rights.

Yelp is aware of only one case presenting similar facts, and that court rejected the argument Hassell makes here. *Blockowicz v. Williams* (N.D. Ill. 2009) 675 F.Supp.2d 912, *aff'd* (7th Cir. 2010) 630 F.3d 563. There, the court refused to enforce an injunction as to a non-party website hosting defamatory content, explaining that the website operator's "only act, entering into a contract with the defendants, occurred long before the injunction was issued. Since the injunction was issued, [the website operator] has simply done nothing, and it has certainly not actively assisted the defendants in violating the injunction." *Id.* at 916.

In contrast, *none* of the cases the court of appeal invoked to support its holding enforced an injunction against a non-party on facts anything like those here. Op. 19. In most, the court refused to enforce an injunction against a non-party, finding that the relationship with the party was not close enough to justify the attempt, or remanding for further consideration of the *evidence* against the non-party. *Berger*, 175 Cal. at 719-720 (injunction against union and members could not be enforced against non-union member); *Planned Parenthood Golden Gate v. Garibaldi* (2003) 107

Cal.App.4th 345, 353 (refusing to enforce injunction against abortion protestors neither named individually nor as class members); *People v. Conrad* (1997) 55 Cal.App.4th 896, 903-904 (injunction against anti-abortion group could not be applied to separate group); *In re Berry* (1968) 68 Cal.2d 137, 155-156 (reversing injunction related to union activity because it enjoined persons acting "in concert among themselves").

The court of appeal cited only one decision affirming enforcement of an injunction against a non-party. Op. 19 (citing *Ross*, 19 Cal.3d at 905).[9] In *Ross*, this Court held that an injunction against a state agency could be enforced against county agencies that served as agents in administering the program at issue. But that holding turned on the relationship between the state and county agencies. *Id.* at 907-908. The Court explained that because the state agency "could comply with the provisions of the ... order ... only through the actions of county welfare departments, it is clear that such counties could not disobey the order with impunity." *Id.* at 909. Here, in contrast, Bird herself could comply with the injunction at any time by removing the review from Yelp; no cooperation by Yelp is required to effectuate the injunction against Bird. A00841. And needless to say, Yelp is not Bird's agent.

[9] In addition, the court separately rejected Yelp's reliance on *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1125, in which this Court affirmed a gang injunction against non-parties because "the gang itself, acting through its membership, [] was responsible for creating and maintaining the public nuisance" at issue.

The court of appeal's opinion skews this line of cases, drastically expanding them beyond their original intent, in three fundamental ways. *First*, in none of the cases cited—and indeed, no case known to Yelp—did the court approve an injunction that required a specifically-named non-party to act, or not act, as ordered. Each evaluated application of an injunction to a non-party not explicitly named. *E.g.*, *In re Berry*, 68 Cal.2d at 155-156 (strikers, who were not members of enjoined union); *Planned Parenthood*, 107 Cal.App.4th at 350-351 (abortion protestors). In explicitly directing the injunction to Yelp, the court treated Yelp as if it had been a party and present in the case all along with full opportunity to stand up for its rights as a publisher, ignoring the reality that Hassell intentionally did not sue Yelp and prevented Yelp from learning about the application for the injunction in the first place. The appellate court's decision does not even mention that the court was applying these cases to a completely different set of facts, or contemplate the implications of its decision to do so. Its perfunctory analysis led to the wrong result.

Second, the court made clear that it did not base its decision on any conduct by Yelp, explaining that the question of whether Yelp aided and abetted Bird's alleged violation of the injunction was "potentially improper" and "has no bearing on the question whether the trial court was

without power to issue the [injunction] in the first instance." Op. 21.[10] Thus, the court affirmed the injunction against Yelp without *any* evidence that Yelp engaged in the type of conduct that courts—including this Court—consistently require to justify applying an injunction to a non-party allegedly colluding with the enjoined party. Op. 19; *e.g.*, *Regal Knitwear*, 324 U.S. at 16 (a decision to enjoin a specific party as a successor or assign would require "a judicial hearing, in which their operation could be determined on a concrete set of facts"); *see also id.* at 15 ("whether a nonparty is bound 'depends on an appraisal of his relations and behavior'").[11] Here, there was no appraisal of Yelp's behavior or conduct

[10] The appellate court contemplated a second hearing, at which the trial court would decide whether Yelp should be held in contempt. Op. 18. But Yelp is faced with an injunction that expressly enjoins it and should not have to decide between complying with an unconstitutional prior restraint and risking contempt sanctions. The procedure the court of appeal endorses—entering an injunction without notice and asking later if the injunction is proper, all while entertaining contempt enforcement—is not and cannot be the law in California. *Cf. In re Berry*, 68 Cal.2d at 148-149 (person affected by injunction may seek "a judicial declaration as to its jurisdictional validity" or violate the order and risk contempt sanctions). Under the court's rationale, no reason exists to give anyone advance notice that an injunction is being sought against them. Op. 21. The enjoined party could just argue afterwards—in opposing contempt proceedings—that no facts support the injunction. But that is not, and should not be, the law in California.

[11] *Accord Lake Shore Asset Mgmt. Ltd. v. Commodity Futures Trading Comm'n* (7th Cir. 2007) 511 F.3d 762, 767 (whether injunction can be applied to non-party "is a decision that may be made *only after the person in question is given notice and an opportunity to be heard*" (emphasis added)).

before Yelp was explicitly named in the injunction and later threatened with contempt proceedings. A00211.

No prior case has gone so far. Moreover, the court reached its decision without any analysis or appreciation of *how* its unfettered expansion of this formerly narrow exception to due process will affect websites like Yelp, which publish tens of millions of third-party submissions, but which have no other relationships with those third parties—much less connections that justify being treated as their agents. If this narrow exception can be applied to Yelp—which is connected to Bird only because she is one of millions of people who post on Yelp—it can be applied to any third party. The exception will have swallowed the rule. A newspaper that refuses to remove a published letter to the editor or a quote from a source in an article, a bookstore that continues to sell a book found to be misleading, and a library that provides Internet access, all are non-parties "with or through whom [an] enjoined party may act." But none has the type of close relationship with the enjoined party that courts consistently have required to hold them bound by an injunction to which they were not a party.

Third, the court ignored Yelp's interests in its own website—permitting California courts to view a non-party's conduct solely through the lens of a plaintiff's unopposed characterizations of the defendant's alleged conduct, without regard to the separate interests of the non-party

(here Yelp, a publisher) in the conduct or speech being enjoined. The court rejected the cases Yelp cited solely because they involved money judgments. Op. 20-21 (citing *Fazzi*, 68 Cal.2d 590; *Tokio Marine & Fire Ins. Corp. v. W. Pac. Roofing Corp.* (1999) 75 Cal.App.4th 110). The appellate court did not explain why Yelp should receive less protection against a prior restraint—which this Court has described as "one of the most extraordinary remedies known to our jurisprudence [which] carr[ies] a heavy burden against constitutional validity" (*People v. Lucas* (2014) 60 Cal.4th 153, 261, *disapproved on other grounds*, *People v. Romero* (2015) 62 Cal.4th 1; citation omitted)—than it would against a mere money judgment. As discussed below, independently, Yelp's First Amendment right to control the content of its website easily transcends the other interests that have been held to be worthy of the protections of the Due Process clause. *See* Section C, *infra*.

C. Yelp Has A First Amendment Right To Publish Reviews On Its Website.

In affirming the trial court's decision, the court of appeal declared without analysis or supporting legal authority that the injunction "does not treat Yelp as a publisher of Bird's speech, but rather as the administrator of the forum that Bird utilized to publish her defamatory reviews." Op. 22. The appellate court's faulty reasoning ignores Yelp's important role as an online publisher and its strong interest in developing and maintaining a

trusted resource that provides helpful consumer reviews to the public, including critical reviews that dissatisfied clients post.

To support its overreach, the court purported to distinguish *Marcus* and *Heller*, but it overlooked the fundamental point of these and the many other cases that protect the right to distribute speech. Op. 22-23. The U.S. Supreme Court has recognized a First Amendment right to distribute speech, *separate* from the right to make the speech in the first instance, which cannot be infringed without notice and an opportunity to be heard. *See, e.g.*, *Marcus*, 367 U.S. at 731-732 (wholesale distributor of books and magazines had right to prompt hearing in connection with seized materials); *Heller*, 413 U.S. at 489-490 (seizure without a prior hearing is permissible only if adequate procedural safeguards are followed).

Yelp and other online forums like it are not merely the "administrators" of their websites, whatever the court of appeal meant by this undefined term. They are publishers and editors whose actions to disseminate speech are fully protected by the First Amendment and due process rights. *E.g.*, *Bigelow v. Virginia* (1975) 421 U.S. 809, 822 (newspaper entitled to protection of First Amendment in publishing birth control advertisement, in part because of the public interest in the information at issue); *Arkansas Educational Television v. Forbes* (1998) 523 U.S. 666, 674 ("[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages

in speech activity... Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts" (citations omitted)); *see also* footnote 8, *supra*.[12] Yelp, for example, has developed automated software designed to enhance users' experiences by showcasing more helpful content over potentially less helpful content (like paid-for reviews). *E.g.*, A00519. And Yelp maintains terms of service and content guidelines that, when violated, can lead to the removal of offending content. A00561. The third-party authored reviews that Yelp hosts also serve as the basis for the aggregate Yelp star rating that each business receives, depending on the criteria developed by Yelp and applied through its automated software. A00519.

The fiction adopted by the court of appeal—inventing a role it coined "administrator of the forum," which apparently has none of the constitutional protections granted to publishers—to brush aside Yelp's clear interest in the integrity of its website was unprecedented and led to the wrong result here. The appellate court invoked *Balboa Island* to support its decision but this too was an unwarranted expansion of existing law. As the U.S. Supreme Court explained in *Nebraska Press Ass'n v. Stuart*:

---

[12] Even the U.S. Supreme Court's landmark decision in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, involved third-party speech—there, an "advertorial" published by the *New York Times* titled "Heed Their Rising Voices," soliciting funds to defend the Rev. Martin Luther King, Jr. against an Alabama perjury indictment, among other things. *Id.* at 256-257.

> [P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

(1976) 427 U.S. 539, 559.

Similarly, in *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 660, this Court rejected a prior restraint that prohibited further publication of a political candidate's newsletter criticizing his opponent. *Id.* at 662. The Court explained that "if publication of the Pentagon Papers did not constitute a sufficiently serious threat to justify creation of an exception to the established principles [against prior restraints] set forth above, the circulation of election campaign charges, even if deemed extravagant or misleading, does not present a danger of sufficient magnitude to warrant a prior restraint." *Id.* at 660; *see also Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1241 (order barring release of private, embarrassing, information is prior restraint and presumptively unconstitutional); *Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1167 ("[p]rior restraints are highly disfavored and presumptively violate the First Amendment" (citation omitted)); *Association for Los Angeles Deputy Sheriffs v. Los Angeles*

Times Comm'n LLC (2015) 239 Cal.App.4th 808, 821-824 (affirming order striking complaint seeking prior restraint).

As this Court intentionally made clear in *Balboa Island*, because prior restraints are disfavored, they can be entered, if at all, only following a process that fully protects the rights of the party sought to be enjoined. 40 Cal.4th at 1155-1156. "'An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' ... In other words, the order must be tailored as precisely as possible to the exact needs of the case." *Id.* at 1159 (quoting *Princess Anne*, 393 U.S. at 183-184). In *Balboa Island*, the Court approved an order enjoining the repetition of a statement *found to be defamatory at a contested trial*, although it also found part to be invalid because it applied to the defendant and "all other persons in active concert and participation with her," but no evidence in the record supported a finding that anyone else made defamatory statements. *Id.* at 1158, 1160.

Here, unlike in *Balboa Island*, the court approved a prior restraint (i) against a non-party that had no notice or opportunity to oppose the prior restraint (ii) following a default judgment, not a contested trial, (iii) based on an Order that did not evaluate any of the individual statements to

determine if they are false, defamatory, and unprivileged. A00211. *Cf. Barrett*, 40 Cal.4th at 57 ("[d]efamation law is complex, requiring consideration of multiple factors"). *Balboa Island* does not support the prior restraint entered against Yelp here, nor should it be expanded beyond its unique application.

Neither this Court nor the U.S. Supreme Court has allowed a prior restraint on speech to stand—even against threats to national security—unless the enjoined party received the full panoply of protections required by the U.S. and California Constitutions. The appellate court's decision approving a prior restraint here, based on nothing more than an *uncontested* default proceeding following no notice to Yelp and questionable notice to defendant (A00026) flies in the face of the federal and state decisions that have uniformly concluded that prior restraints on speech are among the most egregious and least defensible orders that can be entered by a court.

None of the appellate court's reasons for affirming the prior restraint entered against Yelp withstand scrutiny. Its Opinion should be reversed and the trial court should be directed to enter an order granting Yelp the relief it sought—vacating the Judgment to the extent that it ordered Yelp to take any action on the content it publishes on its website. A00237-238.

V. SECTION 230 BARS THE INJUNCTION AGAINST YELP BASED ON COMMENTS POSTED BY "BIRDZEYE B." AND "J.D."

The Internet has effected one of the greatest expansions of free speech and communications in history. It is "a tool for bringing together the small contributions of millions of people and making them matter."[13] Today, nearly *3.5 billion* people use the Internet, submitting and viewing hundreds of millions of posts, comments, photos, videos and other content every day.[14] As the U.S. Supreme Court put it, "the content on the Internet is as diverse as human thought." *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 852 (citation omitted).

This is no accident. In 1996, to promote the free flow of information on the Internet, Congress resolved to protect websites and other online providers from liability for their users' content. Section 230 embodies that command, prohibiting courts from treating such a provider as the "publisher or speaker" of third-party content. 47 U.S.C. § 230(c)(1).

---

[13] Lev Grossman, *You—Yes, You—Are TIME's Person of the Year*, TIME MAGAZINE (Dec. 25, 2006).

[14] "Internet Users," Internet Live Stats, available at http://www.internetlivestats.com/internet-users/ (visited October 31, 2016); *see also* Mary Madden and Kathryn Zickuhr, *65% of online adults use social networking sites* (Aug. 26, 2011), available at http://pewinternet.org/Reports/2011/Social-Networking-Sites.aspx (as of 2011, 65% of online adults used social networking sites); Josh James, *How Much Data Is Created Every Minute?* (June 8, 2012), available at http://www.domo.com/blog/2012/06/how-much-data-is-created-every-minute/?dkw=socf3.

Grounded in core First Amendment principles, Section 230 offers strong protection for innovation and expansion of free speech on the Internet.

A. Section 230 Protects Online Publishers From All Legal Actions Based On Third-Party Content.

Section 230 was adopted 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," and to "encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet." 47 U.S.C. §§ 230(b)(2), (3). To achieve these and other goals, Congress barred any claims against website publishers based on the publication of third-party content—*i.e.*, content not created by the website operator itself, but contributed by an array of authors, photographers, and others that provide a diversity of expression that extends far beyond the resources of any one single online publisher. Section 230 sets forth a straightforward principle: If someone authors injurious content, a plaintiff can pursue the author of that content, but not the entity that displays it on the Internet. *See* 47 U.S.C. § 230(c)(1); *see generally Carafano v. Metrosplash.com Inc.* (9th Cir. 2003) 339 F.3d 1119, 1124 ("*Carafano*") (protecting website where "the selection of the content was left exclusively to the user").

This Court recognized that purpose in its only decision interpreting Section 230, *Barrett v. Rosenthal*, holding that Section 230 "precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, 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 alter content—are barred." 40 Cal.4th at 43-44 (citing *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330 ("*Zeran*")). The Court invoked "*the congressional finding that the Internet has flourished 'with a minimum of government regulation' (§ 230(a)(4)), and the policy statement favoring a free market for interactive computer services 'unfettered by Federal or State regulation*' (§ 230(b)(2))" to support its decision rejecting liability there. *Id.* at 44 (citing *Zeran*, 129 F.3d at 330-331; emphasis added). The Court reiterated that "Congress 'made a policy choice ... not to deter harmful online speech [by] imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.'" *Id.*

As this Court discussed in *Barrett*, Section 230 grew out of cases early in the life of the Internet that attempted to adapt common law tort liability principles to Internet publishers. 40 Cal.4th at 44. In 1995, "a service provider was held liable for defamatory comments posted on one of its bulletin boards, based on a finding that the provider had adopted the role

of 'publisher' by actively screening and editing postings." *Id.* (citing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.* (N.Y. Sup. 1995) 1995 WL 323710, at *4). The Court explained that, "'[f]earing that the specter of liability would ... deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity,' which 'forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.'" *Id.* (citing *Zeran*, 129 F.3d at 331).

Indeed, Congress left few doubts about its intentions. The legislative history expressly stated that Congress intended to overrule *Stratton Oakmont* "and any other similar decisions *which have treated such providers and users as publishers or speakers of content that is not their own* because they have restricted access to objectionable material." *See* S. Conf. Rep. No. 104-230 (1996) (emphasis added).

To accomplish its broad goals, Section 230 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," *and* it separately preempts any state law, including imposition of tort liability that is inconsistent with its protections. 47 U.S.C. §§ 230(c)(1) & (e)(3). Courts reviewing Section 230's legislative history have found that it has two primary goals.

First, "Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Zeran*, 129 F.3d at 331.

Second, Congress designed Section 230 to "encourage service providers to self-regulate the dissemination of offensive material over their services.... In line with this purpose, *§ 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.*" *Id.* (emphasis added); *accord Carafano*, 339 F.3d at 1122-23; *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1027-28 (*"Batzel"*).

To further these two complimentary policy goals, "courts have treated § 230(c) immunity as quite robust," *Carafano*, 339 F.3d at 1123, and federal courts consistently have rejected attempts to hold defendants responsible for third-party content posted on their websites.[15] As the Ninth Circuit explained, "close cases ... must be resolved in favor of immunity,

[15] *See, e.g., Doe v. Backpage.com, LLC* (1st Cir. 2016) 817 F.3d 12, 22; *Universal Commc'n Sys., Inc. v. Lycos, Inc.* (1st Cir. 2007) 478 F.3d 413,.419; *Ricci v. Teamsters Union Local 456* (2d Cir. 2015) 781 F.3d 25, 28; *Green v. America Online, Inc.* (3d Cir. 2003) 318 F.3d 465, 470-72; *Zeran*, 129 F.3d at 330-32; *Doe v. MySpace, Inc.* (5th Cir. 2008) 528 F.3d 413, 418; *Jones v. Dirty World Entm't Recordings LLC* (6th Cir. 2014) 755 F.3d 398, 408; *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.* (7th Cir. 2008) 519 F.3d 666, 671 (*"Chicago Lawyers"*); *Johnson v. Arden* (8th Cir. 2010) 614 F.3d 785, 792; *Carafano*, 339 F.3d at 1125; *Batzel*, 333 F.3d at 1031-32; *Ben Ezra, Weinstein, & Co. v. America Online Inc.* (10th Cir. 2000) 206 F.3d 980, 984-86 (*"Ben Ezra"*); *Almeida v. Amazon.com, Inc.* (11th Cir. 2006) 456 F.3d 1316, 1321; *Klayman v. Zuckerberg* (D.C. Cir. 2014) 753 F.3d 1354, 1358.

lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1174 (*en banc*).

In each of these decisions, the appellate court properly focused on the author of the content—rather than the distributor—no matter how offensive or objectionable the content might be. This is because "Congress made a policy choice ... not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Zeran*, 129 F.3d at 330; *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.Com, Inc.* (4th Cir. 2009) 591 F.3d 250, 254-255 (Section 230 "immunity protects websites not only from ultimate liability, but also from having to fight costly and protracted legal battles" (citations, internal quotes omitted)); *accord Batzel*, 333 F.3d at 1031.

In *Barrett*, relying heavily on federal decisions such as *Zeran*, this Court broadly construed the federal statute to reject both the appellate court's distinction between publishers and distributors for purposes of Section 230 immunity, and the notice-based liability urged by the plaintiff

there.[16] The Court explained that "[b]ecause the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact." *Id.* at 46 (citing *Zeran*, 129 F.3d at 333). The Court agreed with cases that followed *Zeran*, explaining that "Congress contemplated self-regulation, rather than regulation compelled at the sword point of tort liability." *Id.* at 46-47, 53.[17] The Court agreed with the concern noted in *Zeran* that "[n]otice-based liability for service providers would allow complaining parties to impose substantial burdens on the freedom of Internet speech by lodging complaints whenever they were displeased by an online posting," explaining that "[t]he volume and range of Internet communications make the 'heckler's veto' a real threat under the Court of Appeal's holding." *Id.* at 57-58 (citations omitted).

Those same problems would find new life in California if this Court approved the no-notice injunction that the appellate court allowed here.

---

[16] This Court was reviewing the court of appeal's holding that ISPs and users "are exposed to liability if they republish a statement with notice of its defamatory character." 42 Cal.4th at 39.

[17] The Court supported its decision, in part, by the U.S. Congress's express approval of the broad interpretation of Section 230(c) in cases such as *Zeran*, *Ben Ezra* and *Doe v. America Online* (Fla. 2001) 783 So.2d 1010. *Barrett*, 40 Cal.4th at 54 & n.17 (citations omitted). In extending the reach of Section 230 in 2002, Congress stated that "[t]he Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by" the new law. *Id.* (citation omitted).

That is why, in this Court's words, the statute is so broad as to provide "blanket immunity for those who intentionally redistribute defamatory statements on the internet." *Barrett*, 40 Cal.4th at 62-63. It does so "to protect online freedom of expression and to encourage self-regulation, as Congress intended." *Id.* at 63.

B. Yelp Established Its Right To Section 230 Immunity.

As discussed above, under Section 230, "[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," and separately "any state law, ***including*** imposition of tort liability, that is inconsistent with its protections," is preempted. 47 U.S.C. §§ 230(c)(1) & (e)(3) (emphasis added). The statute defines "interactive computer service" as "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. § 230(f)(2), and "Internet content provider" as "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." *Id.* § 230(f)(3). An "access software provider" is "a provider of ... enabling tools that ... pick, choose, analyze or digest content; or transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." *Id.* § 230(f)(4).

Thus, while a plaintiff may pursue remedies against the creator of allegedly unlawful online content, that plaintiff may *not* pursue claims of any form against website publishers who are (1) a "provider or user of an interactive computer service"; (2) where plaintiff seeks to treat the website publisher as a "publisher or speaker"; and (3) the action is based on "information provided by another information content provider." 47 U.S.C. § 230(c)(1); *see Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 830.

Section 230 bars the injunction against Yelp, as well as any liability for failing to comply with the injunction. ***First***, Yelp qualifies as a provider of "an interactive computer service" because it operates a website. *Universal Commc'n Sys.*, 478 F.3d at 419 ("web site operators ... are providers of interactive computer services within the meaning of Section 230"); *Batzel*, 333 F.3d at 1030 n.16.

Second (addressing the third requirement for the statute to apply), "Birdzeye B." and "J.D."—the users who posted comments on Yelp—are "information content providers" because they are wholly responsible for the creation of the content of the comments. *See* 47 U.S.C. § 230(f)(3).[18]

---

[18] *See also, e.g., Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 572-73 (web site, as publisher of third-party content, had immunity, and decision "to restrict or make available certain material is expressly covered by section 230"); *Hupp v. Freedom Commc'ns, Inc.* (2013) 221 Cal.App.4th 398, 400, 405 (Section 230 barred a lawsuit where the plaintiff alleged a newspaper "breached its user agreement with [plaintiff] by failing to remove comments made on their website concerning" him where the comments were written and posted by third parties); *Delfino v. Agilent*

Hassell has never alleged, and cannot, that Yelp played *any* role in the authorship of Birdzeye B. or J.D.'s comments.[19]

Third—and the key issue before this Court—the injunction against Yelp treats it as a publisher or speaker. As the Fourth Circuit explained in *Zeran*, "[p]ublication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party—each alleged by Zeran here under a negligence label—constitute publication." 129 F.3d at 332 (citations

---

Techs., Inc. (2006) 145 Cal.App.4th 790, 807-08 (Section 230 immunity applied to claims brought by recipients of Internet threats against the transmitter of threats and his employer, whose computer system he used); *Shiamili v. Real Estate Group of New York, Inc.* (N.Y. 2011) 17 N.Y.3d 281, 285, 293 (website that "promoted" a user's allegedly defamatory comment to a stand-alone post accompanied by an insulting illustration and some content remained immune from suit under Section 230; the "added headings and illustration do not materially contribute to the defamatory nature of the third-party statements").

[19] In the briefing below, Hassell conceded that Yelp is a provider of interactive computer services, and that she is seeking to treat Yelp as the publisher or speaker of information provided by readers. A00486:27-A00488:13. She argued that Yelp should not be immune because it "is actively participating in promoting the defamation of Plaintiffs." A00486:19-20. While Hassell did not analyze the provisions of Section 230 or rely on any case law, she seemed to be articulating an argument that Yelp was an "information content provider," and was therefore not shielded from liability. The statute defines an information content provider as any party "responsible ... in part" for the "creation or development of information." 47 U.S.C. § 230(f)(3). The court of appeal did not adopt this argument in its Opinion, concluding instead that Section 230 does not apply because the injunction does not impose any liability on Yelp. Op. 28. Because Plaintiff did not seek this Court's review of the appellate court's implicit rejection of these arguments, Yelp will not address them.

omitted). So too here. As discussed below, in concluding otherwise, the court of appeal misread Section 230, drastically altering its application in California. Section C, *infra*.

C. The Appellate Court's Interpretation Ignores And Misconstrues Key Parts Of Section 230.

In holding that Section 230 does not protect Yelp, the appellate court invoked the unique procedural posture of this case—the result of Hassell's tactical decision to deny Yelp the opportunity to defend itself—explaining that "[n]either party cite[d] any authority that applies section 230 to restrict a court from directing an Internet service provider to comply with a judgment which enjoins the originator of defamatory statements posted on the service provider's Web site." Op. 28. This circular reasoning only rewards Hassell's disdain for due process. It ignores the fact that to obtain a *remedy* against Yelp—the injunction that the appellate court approved—Hassell was required to state a *claim* against Yelp. Here, the defamation claim that Hassell asserted in an attempt to obtain that relief was not alleged against Yelp, but regardless, the resulting order against Yelp is barred by Section 230's plain language. Hassell's claims must be rejected because they contravene the mandate of Section 230 that "[n]o provider or user of an interactive computer service shall be treated as [a] publisher or speaker ...." 47 U.S.C. § 230(c)(1).

As this Court explained in *Barrett*, the Court "cannot construe the statute so as to render [language] inoperative." 42 Cal.4th at 59 (citing *Duncan v. Walker* (2001) 533 U.S. 167, 174; *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715-716). There, the Court rejected plaintiff's reading of Section 230 because it "fails to account for the statutory provision at the center of our inquiry: the prohibition in section 230(c)(1) against treating any 'user' as 'the publisher or speaker of any information provided by another information content provider.'" *Id.* at 60. The Court summarized:

> Section 230 has been interpreted literally. ***It does not permit Internet service providers or users to be sued as 'distributors,'*** nor does it expose 'active users' to liability.
>
> Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication. Any further expansion of liability must await congressional action.

Id. at 63 (emphasis added). *See also, e.g., Chicago Lawyers*, 519 F.3d at 671 (reading Subsection (c)(1) literally to bar claims under Fair Housing Act because "only in a capacity as publisher could Craigslist be liable"); *Dart v. Craigslist, Inc.* (N.D. Ill. 2009) 665 F.Supp.2d 961, 969 (rejecting claims against Craigslist based on allegedly illegal adult advertisements because complaint's allegations "plainly treat Craigslist as the publisher or speaker of information created by its users"). "Plaintiffs who contend they were defamed in an Internet posting may *only seek recovery from the original source of the statement*" (*Barrett*, 40 Cal.4th at 40 (emphasis

added)), because "Congress has decided that the parties to be punished and deterred are not the internet service providers but rather are those who created and posted the illegal material" (*M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC* (E.D. Mo. 2011) 809 F.Supp.2d 1041, 1055).

Before the court of appeal rejected Section 230's application in this case, California courts were in accord. "If by imposing liability ... we ultimately hold eBay responsible for content originating from other parties, we would be treating it as the publisher, *viz.*, the original communicator, contrary to Congress's expressed intent ..." *Gentry*, 99 Cal.App.4th at 831 (citations omitted); *see also Doe II*, 175 Cal.App.4th at 563, 572-573 ("appellants want MySpace to regulate what appears on its Web site" and "[t]hat type of activity—to restrict or make available certain material—is expressly covered by section 230"); *Delfino*, 145 Cal.App.4th at 807 (rejecting claims against website publisher that "treated it 'as the publisher or speaker' (§ 230(c)(1)) of Moore's messages" (citations omitted)).[20]

[20] *Accord Murawski v. Pataki* (S.D.N.Y. 2007) 514 F.Supp.2d 577, 591 ("Deciding whether or not to remove content or deciding when to remove content falls squarely within Ask.com's exercise of a publisher's traditional rule and is therefore subject to the CDA's broad immunity" (citations omitted)); *Backpage.com, LLC v. Cooper* (M.D. Tenn. 2013) 939 F.Supp.2d 805, 828-829 (CDA preempted state law that "conflicts with Congress's intent in enacting CDA section 230 because it imposes liability on websites acting as publishers of third-party information and creates a regime that will likely restrict speech and undermine self-policing that already occurs online").

The Ninth Circuit's analysis of Section 230 in *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096 is instructive. There, the court affirmed dismissal of claims for negligent undertaking based on allegations that defendant failed to abide by its promise to remove allegedly illicit content. *Id.* at 1103, 1106. Rejecting plaintiff's argument that her claims did not seek to hold defendant liable for publication, but instead for failing to perform its alleged undertaking, the court explained that "what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.* at 1101-02. Analyzing what a publisher does, the court explained that "one does not merely undertake; one undertakes *to do* something." *Id.* at 1103 (emphasis in original). Thus, "the duty that [plaintiff] claims [defendant] violated derives from [defendant's] conduct as a publisher—the steps it allegedly took, but later supposedly abandoned, to de-publish the offensive profiles. It is because such conduct is publishing conduct that we have insisted that *section 230 protects from liability 'any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.'*" *Id.* at 1103 (citing *Roommates*, 521 F.3d at 1170-71; emphasis added). The Court emphasized that "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." *Id.* at 1105 (emphasis added).

Here, the court of appeal drastically departed from these rulings by misreading subsection (e)(3) of Section 230 and treating it as a limitation on the broad immunity established by subsection (c)(1). The court held that Section 230 did not apply to the prior restraint it imposed on Yelp "because [the court did] not impose any liability on Yelp, either as a speaker or a publisher of third-party speech." Op. 29. But Yelp is named in the injunction *only* for its role as publisher of the third-party reviews at issue, a straightforward contradiction of subsection (c)(1)'s prohibition on treating Yelp as the speaker or publisher of third-party content on its website. Subsection (e)(3) does not limit the broad immunity provided by subsection (c)(1), as the court of appeal implicitly held. It merely affirms the ability of state courts to entertain state law claims that are "consistent" with Section 230, while making clear that "inconsistent" state law claims and liability are barred.[21] The court of appeal's misreading of subsection (e)(3) renders subsection (c)(1) meaningless. *Barrett*, 42 Cal.4th at 59. The court of appeal's decision to treat subsection (e)(3) as establishing the scope of immunity undermines the broad protection that Congress intended for online publishers like Yelp.

[21] Further illustrating the court of appeal's misreading, if section (e) encapsulated Section 230 immunity, then Section 230 would not bar federal civil claims. Plainly, that is not the case. *E.g.*, *Roommates.com*, 521 F.3d at 1170-71 (Section 230 applied to claims under Fair Housing Act); *Chicago Lawyers*, 519 F.3d at 672 (same); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (N.D. Cal. Nov. 13, 2015) 144 F.Supp.3d 1088 (Section 230 barred federal and state claims).

The court's conclusion that "[i]f an injunction is itself a form of liability, that liability was imposed on Bird, not Yelp" (Op. 30)—relying on the fiction that the injunction against Yelp was not actually an injunction against Yelp (*see* footnote 5, *supra*)—exposes another fundamental flaw in its decision. The court of appeal reached its result *only* by violating subsection (c)(1) and treating Yelp as if it was the author (or "speaker") of the reviews at issue. It held that Yelp could be enjoined, without notice or an opportunity to be heard, under a limited legal principle that allows courts to extend injunctions to non-parties *who act on behalf of parties* in violating the injunction. The court concluded that Yelp was acting "*with* or *for*" Bird *as the publisher of the statements at issue*. Op. 30-31 (citing *Conrad*, 55 Cal.App.4th at 903); *see* Section IV.B, *supra*. This is, at its core, treating Yelp as if it, rather than simply Bird, published the allegedly defamatory content. The court's due process and Section 230 holdings are fundamentally at odds with each other, resulting in a confusing and contradictory interpretation of each of these legal principles.

The appellate court also erred in concluding that Section 230 does not apply to requests for injunctive relief. Op. 28. The court held that the injunction "does not violate section 230 because it does not impose any liability on Yelp," elaborating that "Hassell filed their complaint against Bird, not Yelp; obtained a default judgment against Bird, not Yelp; and was awarded damages and injunctive relief against Bird, not Yelp." *Id.* Thus, it

held that the liability that would flow out of contempt proceedings if Yelp fails to abide by the injunction is not within the scope of Section 230 immunity. But this explanation—key to the ultimate decision—is simply incorrect. The relief that Hassell obtained *against Yelp* can only be characterized as an injunction based on Yelp's activities as a publisher. *See* footnote 5, *supra*.

Courts across the nation consistently have concluded that Section 230 bars injunctive relief, as well as tort and contract liability. As one court explained, "[a]n action to force a website to remove content on the sole basis that the content is defamatory is necessarily treating the website as a publisher, and is therefore inconsistent with section 230." *Medytox Solutions, Inc. v. Investorshub.com, Inc.* (Fla. Dist. Ct. App. 2014) 152 So.3d 727, 729, 730-731 (rejecting action for declaratory and injunctive relief based on Section 230).

In the only California case to address the issue, *Kathleen R.*, 87 Cal.App.4th at 697-698, the court held that section 230(c)(1) protected a city from claims based on public access to the Internet at a public library, which included a request for injunctive relief. The court explained that "by its plain language, § 230[(c)(1)] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Id.* at 692, 697-698 (citation, internal quotes omitted; bracketed citation in original). Noting that "claims

for ... injunctive relief are no less causes of action than tort claims for damages," the court held that they *also* "fall squarely within the section 230(e)(3) prohibition." *Id.* at 698. Plaintiff's equitable claims there "contravene[d] section 230's stated purpose of promoting unfettered development of the Internet no less than her damage claims." *Id.*[22]

As the court explained in *Noah v. AOL Time Warner* (E.D. Va. 2003) 261 F.Supp.2d 532, 538-39, *aff'd* (4th Cir. Mar. 24, 2004) 2004 WL 602711, "given that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief. After all, in some circumstances injunctive relief will be at least as burdensome to the service provider as damages, and is typically more intrusive." *Id.* at 540; *see id.* at 538-39 (in seeking to hold defendant liable for refusing to intervene to stop

[22] *See also Ben Ezra*, 206 F.3d at 983, 986 (Section 230 barred claims for damages and injunctive relief); *Hinton v. Amazon.com.dedc, LLC* (S.D. Miss. 2014) 72 F.Supp.3d 685, 687, 692 (claims seeking injunctive relief and damages based on allegedly selling recalled hunting equipment barred by Section 230); *Dart v. Craigslist, Inc.* (N.D. Ill. 2009) 665 F.Supp.2d 961, 963, 969 (rejecting public nuisance claim, including request for injunctive relief); *Smith v. Intercosmos Media Group* (E.D. La. 2002) 2002 U.S. Dist. LEXIS 24251, 2002 WL 31844907, *13-14 (rejecting injunction claim against ISP based on alleged failure to block purportedly fictitious domain registrants (citing *Kathleen R.*, 87 Cal.App.4th at 697-698)); *Giordano v. Romeo* (Fla. Dist. Ct. App. 2011) 76 So.3d 1100, 1102 (rejecting claims for defamation and injunctive relief); *Shiamili*, 17 N.Y.3d at 285, 293 (rejecting defamation claim based on a blog post, seeking damages and injunctive relief); *Reit v. Yelp!* (N.Y. Supr. 2010) 907 N.Y.S.2d 411, 415 (rejecting request for preliminary injunction, and granting Yelp's motion to dismiss complaint).

alleged online harassment and requesting "an injunction requiring [defendant] to adopt 'affirmative measures' to stop such harassment," plaintiff "clearly" is attempting "to 'place' [defendant] 'in a publisher's role,' in violation of § 230" (citing *Zeran*, 129 F.3d at 330)).[23]

Hassell admitted below that there is "vibrant, extensive national jurisprudence on section 230." Respondents' Appeal Brief ("R.A.B.") at 43. Yet, Hassell did not cite a *single case* to support her proposition that the CDA allows interactive computer services to be subject to injunctions to remove third-party content so long as they are not named in an action. Courts across the Nation consistently have rejected liability for the mere hosting of defamatory speech authored by third parties—which is not surprising, given that Section 230(c)(1) flatly prohibits such a result. Plaintiffs also typically satisfy the basic due process requirements that should have protected Yelp here. In the end, Hassell's demand for

[23] Yelp is aware of only two cases to suggest otherwise—both in dicta without any analysis. In *Mainstream Loudoun v. Board of Trustees of Loudoun* (E.D. Va. 1998) 2 F.Supp.2d 783, the court held that Section 230(c)(*2*)—a separate subsection not at issue in this case—does not protect government entities. *Id.* at 790. In dicta, the court said that even if it did, "defendants cite no authority to suggest that the 'tort-based' immunity to 'civil liability' described by § 230 would bar the instant action, which is for declaratory and injunctive relief." *Id.* (citing § 230(a)(2); *Zeran*, 129 F.3d at 330). As the court in *Kathleen R.* later pointed out, *Mainstream Loudoun* is distinguishable because subsection (c)(*2*) contains limiting language that is not applicable to subsection 230(c)(1). 87 Cal.App.4th at 697-698. In *Does v. Franco Prods.* (N.D. Ill. June 22, 2000) 2000 WL 816779, *5, the court merely cited *Mainstream Loudoun* to state in dicta that "Plaintiffs' claims for injunctive relief, although not precluded by the CDA, fail to state a claim."

injunctive relief against Yelp fails because it is entirely based on Hassell's claim that Yelp published defamatory speech, but Section 230 bars all such claims.

Nor is it relevant that many cases applying Section 230 to defamation claims involve "allegations of defamatory conduct by a third party, and not a judicial determination that defamatory statements had, in fact, been made by such third party on the Internet service provider's website." Op. 30. This case was able to proceed to a default judgment only because one of Hassell's targets—the one that had the financial wherewithal to defend against her demand for an injunction—was purposefully not named as a party or served with process in the case, and therefore could not prevent a result that is plainly barred by Section 230. Under basic due process principles, Yelp is not bound by a finding that defendant's statements are defamatory because it was not party to the proceedings that gave rise to that finding. Section IV.A, *supra*. In any event, the court's reasoning ignores the language of the CDA, which *assumes* that the statements are actually defamatory, but provides immunity regardless. *See Barrett*, 40 Cal.4th at 39-40. This is a distinction without a difference, which only serves to inject confusion and ambiguity into Section 230 jurisprudence.

Finally, the court of appeal's conclusion that Section 230(e)(3)'s reference to "liability" does not extend to contempt sanctions also must be

flatly rejected. Op. 31. Section 230(e)(3) prohibits *both* liability *and* "cause[s] of action" against website publishers like Yelp, to protect them "from having to fight costly and protracted legal battles." *Roommates*, 521 F.3d at 1174-75. *See also Nemet* Chevrolet, 591 F.3d at 254-55 (Section 230 provides an "immunity from suit," not merely a "defense to liability"). This goal plainly is not served by a ruling that permits prior restraints to be entered against website publishers like Yelp without any advance notice or opportunity to be heard. Section IV.C, *supra.*

But even if Section 230(e)(3) only barred liability, the appellate court still would be wrong because it ignored the plain meaning of "liability"—"legal responsibility to another or to society, enforceable by civil remedy or criminal punishment." *Liability*, Black's Law Dictionary (10th ed. 2014). *See also Noah*, 261 F.Supp.2d at 540 (injunctive relief "is typically more intrusive" than damage awards). Indeed, American courts long have recognized the uniquely pernicious dangers of prior restraints on speech. *See* Section IV.C, *supra.* The appellate court's conclusion that prior restraints are allowed where liability is barred turns the First Amendment on its head.

The Ninth Circuit recently again rejected gamesmanship that attempts to circumvent Section 230. *Kimzey v. Yelp! Inc.* (9th Cir., Sep. 2, 2016) 836 F.3d 1263, 2016 U.S. LEXIS 16665. There, the court rebuffed plaintiff's attempts "to plead around the CDA," "declin[ing] to open the

door to such artful skirting of the CDA's safe harbor provision," "given congressional recognition that the Internet serves as a 'forum for a true diversity of ... myriad avenues for intellectual activity' and 'ha[s] flourished ... with a minimum of government regulation.'" *Id.* at *4 (citations omitted). As the Court explained, "[i]t cannot be the case that the CDA and its purpose of promoting the 'free exchange of information and ideas over the Internet' could be so casually eviscerated." *Id.* at *11 (citing *Carafano*, 339 F.3d at 1122).

Affirming the appellate court's decision, in contrast, would embolden the kind of abuse that already is happening across the country at the behest of businesses determined to scrub critical reviews from websites like Yelp's. For example, a reputation management company hired by a Georgia dentist unhappy with a negative review fraudulently obtained a judgment and injunction in Maryland, which was then presented to Yelp with a request that Yelp remove the review. RJN Exs. A-B. A lawsuit recently filed in Northern California details the work of such reputation management firms, which allegedly are suing pseudo-defendants to obtain stipulated judgments removing reviews and similar content from websites, then presenting those judgments to websites to demand that the content be removed. RJN Ex. C; *see also* RJN Exs. D-G (discussing similar actions across the country). Efforts to manipulate court systems and scrub critical

reviews from the Internet will thrive—in California in particular—if this Court approves the no-notice injunction entered against Yelp here.

As this Court explained in *Barrett*, "[a]dopting a rule of liability under section 230 that diverges from the rule announced in *Zeran* and followed in all other jurisdictions would be an open invitation to forum shopping by defamation plaintiffs." 40 Cal.4th at 58 & n.18 (citation omitted; emphasis added). Here too, this Court should adhere to the consistent interpretation of federal courts across the Nation, and broadly construe Section 230 to bar the injunctive relief against Yelp that was ordered here.

VI. CONCLUSION

This Court's admonition a decade ago in *Barrett* applies just as forcefully now. "The Court of Appeal gave insufficient consideration to the burden its rule would impose on Internet speech. ... Congress sought to 'promote the continued development of the Internet and other interactive computer services'" by granting broad immunity to "Internet intermediaries" such as Yelp. 40 Cal.4th at 56 (citations omitted).

///

For all of the foregoing reasons, Yelp respectfully requests that the Court reverse the orders of the trial court and appellate court, and direct those courts to enter an order granting Yelp's Motion to Vacate the Judgment.

Dated: November 21, 2016

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke
Rochelle L. Wilcox

By: Rochelle L. Wilcox /DL
Rochelle L. Wilcox

Attorneys for Non-Party Appellant
YELP INC.

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court 8.504(d))

The text of this brief consists of 13,914 words as counted by the Microsoft Word word-processing program used to generate this brief, including footnotes but excluding the tables, the cover information required by Rule 8.204(b)(10), the quotation of issues required by Rule 8.520(b)(2), this certificate, and the signature block.

Dated: November 21, 2016

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke
Rochelle L. Wilcox

By: _____
Dan Laidman

Attorneys for Non-Party Appellant
YELP INC.

DWT 30504686v7 0100262-000003

PROOF OF SERVICE

I, Ellen Duncan, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of Los Angeles, State of California. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of Davis Wright Tremaine LLP, 865 South Figueroa Street, Suite 2400, Los Angeles, CA 90017.

I caused to be served a true and correct copy of **YELP INC.'S OPENING BRIEF ON THE MERITS** on each person on the attached list by the following means:

☒ **On November 18, 2016, I enclosed a true and correct copy of said document in an envelope with postage fully prepaid for deposit in the United States Postal Service.**

I placed such envelope(s) with postage thereon fully prepaid for deposit in the United States Mail in accordance with the office practice of Davis Wright Tremaine LLP, for collecting and processing correspondence for mailing with the United States Postal Service.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on November 18, 2016 at Los Angeles, California.

Ellen Duncan

SERVICE LIST

Monique Olivier, Esq.
Duckworth Peters Lebowitz Olivier LLP
100 Bush Street, Suite 1800
San Francisco, CA 94104
Email: Monique@dplolaw.com

Attorneys for
Plaintiffs and Respondents
Dawn Hassell, et al.

Nitoj Singh, Esq.
Dhillon Law Group Inc.
177 Post Street, Suite 700
San Francisco, CA 94108
Email: nsingh@dhillonsmith.com

Hon. Ernest Goldsmith
Dept. 302
San Francisco Superior Court
Civic Center Courthouse
400 McAllister Street
San Francisco, CA 94102-4514

Case No.: CGC-13-530525

Court of Appeal
First Appellate District, Div. Four
350 McAllister Street
San Francisco, CA 94102

Case No. A143233