No. S235968

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DAWN L. HASSELL and HASSELL LAW GROUP, P.C.,
Plaintiffs and Respondents

v.

YELP, INC.
Appellant.

After a Decision by the Court of Appeal
First Appellate District, Division Four, Case No. A143233

Appeal from the Superior Court of the State of California,
County of San Francisco, Case No. CGC-13-53025,
The Honorable Donald J. Sullivan and the Honorable Ernest H. Goldsmith,
presiding

RESPONDENTS' ANSWERING BRIEF ON THE MERITS

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I. ISSUES PRESENTED

1. Does Yelp, an internet company that sells advertising to businesses and also permits third parties to post anonymous, unvetted and unedited reviews of those businesses, have a First Amendment right to post, in perpetuity, other people's statements that have been judicially determined to be defamatory? (No.)

2. Did the Court of Appeal err in adhering to this Court's precedent and holding that Yelp was not deprived of due process by the trial court's issuance of a removal order requiring Yelp to take down three postings that had been judicially determined to be defamatory? (No.)

3. Did the Court of Appeal err in finding that the Communications Decency Act, 47 United States Code section 230 *et seq.*, does not prevent the court from enforcing a valid order against a named individual through Yelp? (No.)

II. SUMMARY OF ARGUMENT

Despite Yelp's overblown rhetoric, the issue before the Court is an exceedingly narrow one: May Yelp, an internet company that sells advertising to businesses and also allows third parties to post anonymous, unvetted and unedited reviews of those businesses, republish, in perpetuity, three postings that have been judicially determined to be defamatory? No reasonable reading of the law permits the answer to be yes.

Yelp invokes the First Amendment, the Due Process clause, and the federal Communications Decency Act. None of these law allows Yelp to ignore a court order preventing the republication of libel.

This case is not a First Amendment case involving merely critical reviews. Indeed, below its surface arguments, Yelp (1) acknowledges that the defamation judgment is against Bird, not Yelp; and (2) does not dispute

that it has no standing to challenge the underlying defamation judgment against Bird. (OBM, 14).[1] As this Court and the U.S. Supreme Court have held repeatedly, defamatory speech has long been recognized to fall outside the scope of First Amendment protections. (See *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245-246; *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 776 [false statements have "no constitutional value" because they "harm both the subject of the falsehood and the readers of the statement"]; *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1147). Yelp has no First Amendment right to distribute defamatory speech any more than the speaker has to create the speech in the first instance. Thus, to the extent that Yelp believes that it has a right to perpetuate defamation because it has a separate First Amendment right to distribute speech, it is entirely mistaken. There is no constitutional purpose in protecting the publication of proven lies.

Yelp admits that its due process arguments are largely based on the false premise that it has a First Amendment right to post proven libel. (OBM, 19). Without the protective cover of the First Amendment, Yelp's due process argument withers. Yelp must, and cannot, identify any other protected interest that would trigger due process considerations. (*Bd. of Regents v. Roth* (1972) 408 U.S. 564, 570). Further, Yelp cannot escape the well-established rule that an injunction may run to classes of persons through whom the enjoined party may act. (*People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 766-767).

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[1] References to Yelp's Opening Brief on the Merits are designated "OBM." References to the Court of Appeal's opinion are designated "Op." References to Appellate Record are designated by "AA" followed by the volume number, tab number, and page numbers, e.g. AA.V1.T3.1-3.

Yelp's brief is also marred by a fundamental and irreconcilable inconsistency. For purposes of its constitutional arguments Yelp insists that it is a publisher, but for purposes of its argument that the Communications Decency Act shields it from liability, it distances itself from the speech at issue, emphasizing that it played no role in the creation of the defamatory speech. The CDA was never intended to permit freewheeling defamation on the internet. Simply put, the CDA does not grant Yelp license to republish judicially determined libel in perpetuity.

Imagine an advertisement on the New York Times website falsely proclaiming that a person is a rapist or a serial killer. Under Yelp's reasoning, the website can never be compelled to remove the advertisement, even if the statements contained therein are proven in a court of law to be false. Yelp ascribes to Hassell a nefarious plan to undermine free speech and flout the law when in fact its own conduct must be scrutinized. Hassell simply followed the law. Indeed, she tried to resolve the matter out of court with both Bird and Yelp. Only after being met with outright refusal from both did she seek relief to which she is lawfully entitled.

III. STATEMENT OF FACTS AND PROCEDURE.[2]

A. Yelp Is A Business That Permits Third Parties to Post Anonymous, Unvetted Comments Online.

Yelp hosts an online directory of businesses that permits users to post comments and rank businesses on a scale of one to five stars. Yelp

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[2] The relevant background of the case is set forth accurately and in detail in the Court of Appeal's opinion. (Op., 2-10). As Yelp did not seek rehearing, this Court should accept the Court of Appeal's statement of the issues and facts, which is more complete and balanced than the statement Yelp offers. (See Cal. Rules of Court, rule 8.500(c)(2)).

sells paid advertising to businesses that runs alongside the user comments. Businesses cannot opt out of being listed on Yelp. (See *Levitt v. Yelp! Inc.* (9th Cir. 2014) 765 F.3d 1123, 1126).[3]

Yelp's online directory is akin to a neighborhood bulletin board: Yelp permits third parties to post anonymous, unvetted, and unedited comments to the directory. Comments can be removed by the reviewer. In addition, Yelp states that it may remove reviews for violating its Terms of Service or Content Guidelines such as "writing a fake or defamatory review." (AA.V3.T27.00748; see also AA.V3.T27.00757).[4] In addition, Yelp uses an undisclosed algorithm to highlight or hide certain reviews. (AA.V3.T33.00838; see *Levitt*, 765 F.3d at 1126).

B. Bird Posts Defamatory Comments On Yelp.

Plaintiffs and Respondents Hassell Law Group and its principal, attorney Dawn Hassell (collectively "Hassell" or "Plaintiffs"), represented Defendant Ava Bird in a personal injury case for less than a month in the summer of 2012. During that time, Hassell had at least two communications with Allstate Insurance Company about Bird's injury claim and notified Bird about those communications via e-mail. Hassell also had dozens of direct communications with Bird by e-mail and phone and at least one in-person meeting.

Bird, however, was largely nonresponsive to these communications. She failed to return promptly a signed insurance authorization, and did not respond to repeated attempts to set up a phone conference to discuss her

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[3] "How do I add a business to Yelp?", Yelp, available at https://www.yelp-support.com/article/How-do-I-add-a-business-to-Yelp?l=en_US (last visited Jan. 23, 2017).

[4] Yelp's Terms of Service, available at https://www.yelp.com/static?p=tos (last visited Jan. 23, 2017).

case. (AA.V1.T6.00054-55, 74-86; AA.V1.T7.00144-145, 168-183). After these communication difficulties, Hassell withdrew from representation on September 13, 2012. At the time, Bird had 21 months before the expiration of the statute of limitations on her personal injury claim, and had not lost any rights or claims relating to her injury. (AA.V1.T6.00055).

In response, Ava Bird wrote a defamatory post on Yelp that seriously and measurably harmed Hassell's business. (AA.V1.T.6.A00055 [the "January Post"]). The post, under the moniker "Birdzeye B.," gave Plaintiff one star of an available five stars, and contained malicious and false statements such as "dawn hassell made a bad situation much worse for me," "the hassell group didn't speak to the insurance company either," and that Hassell indicated "the insurance company was too much for her to handle." (AA.V1.T1. 00018).

Hassell attempted to contact Bird by phone to discuss the posting, but she failed to return the call, so the firm sent her an email "requesting she remove the factual inaccuracies and defamatory remarks from her Yelp.com written statement." (AA.V1.T6.00056, 94). Bird responded by email the next day, stating, among other things, that "you deserve the review I have given you on yelp," and "you will have to accept the permanent" review. (AA.V1.T6.00056, 95). Even though in her Yelp post, Bird had stated that Hassell had not communicated with her or with the insurance company, Bird's email to Hassell admitted that there were multiple email communications with Hassell and that Hassell had contacted the insurance company multiple times. (AA.V1.T6.00095-98). Bird also refused to remove the post stating that she posted it to "be a lesson to you," threatened to have a friend post another bad review, and stated that she

"giggled at the thought" of a defamation suit and would "be happy to present the evidence to the judge…" She concluded the email "FUCK YOU DAWN HASSELL, A CALLOUS, HEARTLESS, NO-GOOD ATTORNEY." (*Id*.). Hassell did not respond.

Days later, Bird posted another review under the moniker "J.D." (AA.V1.T6.57, 99-101[the "February Post"]). Hassell understood that Bird was "J.D." because Hassell never represented a client with the initials J.D., and because the February Post was published shortly after the January Post and used similar language. (*Id*.). In addition, the posting was from Alameda, where Bird was served, and it was a first-time posting for that user. (*Id*.).

C. After Bird Refuses To Remove The Review, And Writes A Second One, Hassell Institutes An Action Against Bird For Defamation And Asks Yelp To Remove The Reviews.

Because the defamatory postings had palpably harmed the law firm's business and Bird refused to remove them, Hassell filed suit against Bird on April 10, 2013. (AA.V1.T1.00001-21). The Complaint alleged four causes of action for damages relating to the "Birdzeye B." and "J.D." posts, (*id.* at 6-13), and a fifth cause of action for injunctive relief based on the continued irreparable harm to their business resulting from Bird's defamatory posts. (*Id.* at 13). The prayer sought to enjoin Bird from continuing to defame Hassell, and requiring her to remove every defamatory review, from Yelp.com and elsewhere. (*Id.*). The Complaint attached the Yelp postings at issue. (AA.V1.T1.00015-20).

Over the next week, after Hassell made many attempts to serve Bird personally, they finally effected substitute service on April 17, 2013. (AA.V1.T3.00024-27). Just over a week later, on April 29, 2013, Bird "updated" her original post with a new post, stating that "Dawn Hassell has

filed a lawsuit against me over this review." "She has tried to threaten, bully, intimidate, harrass [sic] me into removing the review!" (AA.V1.T6.00057, 102-105[the "April Post"]).

Not long after Bird was served, Yelp received actual notice of the litigation. On May 13, 2013, only one month after the Complaint was filed, Hassell's attorney sent Yelp's General Counsel (and its support page) a letter enclosing the file-stamped Complaint and explaining that Hassell expected Yelp "will cause these two utterly false and unprivileged reviews to be removed as soon as possible." (AA.V3.T21.00601-601, 00617-634). The Complaint and letter plainly raised both the demand and practical reality that if Ms. Bird refused to take down the reviews, some affirmative conduct by Yelp would be the only way to stop the ongoing defamation. (*Id.*; see also AA.V3.T33.00837:13-15).

D. The Trial Court Enters A Default And Conducts An Evidentiary Hearing.

Neither Bird nor Yelp appeared in the action. On June 20, 2013, Hassell filed a Request for Entry of Default, and served the same upon Bird. (AA.V1.T3, T5.00031). On June 28, 2013, Plaintiffs received a letter from the Bar Association of San Francisco stating that Bird had expressed interest in mediating the dispute. Hassell conveyed an offer to Bird through the mediator to dismiss the lawsuit in exchange for Bird's removal of her defamatory reviews on Yelp or her agreement not to publish any further defamatory reviews. Bird never responded to the proposal, and mediation efforts quickly ceased. (AA.V1.T5.00031-32).

Plaintiffs' requested default was entered on July 11, 2013. (AA.V1.T3.00023). Hassell then moved for a default judgment. A hearing on the application for default judgment and request for injunctive

relief was set for January 14, 2014. (AA.V1.T4.00028-29).

The trial court reviewed and heard extensive evidence and argument in support of Hassell's claims, ranging from Bird's email admitting she had posted the review to teach Ms. Hassell "a lesson," (AA.V1.T6.00096), to Plaintiffs' efforts to serve Bird (AA.V1.T3.00024-26, AA.V1.T6.00124-140), to Bird's affirmative refusal to mediate the lawsuit, (AA.V1.T5.31-32), to detailed explanations why each of the reviews was demonstrably false, (AA.V1.T6-7), as well as thorough briefing on the merits of each claim, (AA.V1.T5.00036-51). Plaintiffs' briefing explained that if Bird refused to comply with the requested injunction, the only way to remove the posts would be a court order requiring Yelp to do so. (AA.V1.T5.50-51). Hassell also produced substantial documentation proving that Bird's statements were untrue.

E. The Trial Court Enters A Money Judgment And Injunction, Enforceable Through Yelp, Against Bird.

After the evidentiary hearing, the Court granted most of the relief Hassell sought. (AA.V1.T8.00211; AA.V1.T9.00212-216). It ordered $557,918.85 in damages against Bird, denied the request for punitive damages, and granted injunctive relief. (*Id.*). The Judgment and Order provided:

> …Defendant AVA BIRD is ordered to remove each and every defamatory review published or caused to be published by her about plaintiffs HASSELL LAW GROUP and DAWN HASSELL from Yelp.com and from anywhere else they appear on the internet within 5 business day of the date of the court's order.
>
> Defendant AVA BIRD, her agents, officers, employees or representatives, or anyone acting on her behalf, are further enjoined

from publishing or causing to be published any written reviews, commentary, or descriptions of DAWN HASSELL or the HASSELL LAW GROUP on Yelp.com or any other internet location or website.

Yelp.com is ordered to remove all reviews posted by AVA BIRD under user names "Birdzeye B." and "J.D." attached hereto as Exhibit A and any subsequent comments of these reviewers within 7 business days of the date of the court's order.

(AA.V1.T9.00213). Exhibit A attached the January Post, the February Post and the April Post. (*Id*. at 00212-215).

F. Hassell Give Yelp Notice, And Yelp Refuses To Intervene And Refuses To Remove The Adjudicated Defamatory Statements.

Plaintiffs hand-delivered the Judgment and Order, with a letter requesting that Yelp remove the posts, on January 15, 2014. (AA.V3.T27.00704-718; AA.V3.T28.00798-799). Plaintiffs then personally served Yelp's agent for service of process with the Order on January 29, 2014, along with a letter again requesting that Yelp remove the three posts. (AA.V3.T27.00720-730).

Yelp ignored the judgment and flatly refused to remove the libelous posts. Yelp's Senior Director of Litigation Aaron Schur responded by letter dated February 3, 2014, claiming that Yelp was not subject to the injunction, that the default was improper, and that Plaintiffs had not adequately proved that Bird posted the reviews or that the reviews were defamatory. (AA.V3.T27.00732-734). He wrote:

> [T]he judgment and order are rife with deficiencies and Yelp sees no reason at this time to remove the reviews at issue. Of course, Yelp has no desire to display defamatory content on its site, but the

> defamation must be proven. A default judgment through a bench trial in a lawsuit in which it does not appear the defendant was ever served is an insufficient basis for Yelp to consider the review of Birdzeye B. to be defamatory – much less the review of J.D. Yelp would revisit its decision if the facts change, for example, if it receives evidence that the defendant is actually served, fails to defend herself, and is responsible for both reviews.

(AA.V3.T27.00734). In other words, Yelp chose to credit its own disingenuous[5] analysis over the court's judgment after a default prove-up hearing.

Four months later, Yelp moved to vacate the entire judgment. (AA.V1.T11.00225). After considering briefing and hearing extensive argument (AA.V3.T33.829-854), the trial court denied the motion. (AA.V3.T30.808-810). The trial court observed that "injunctions can be applied to non-parties," citing a line of cases allowing an injunction to run against those acting "in concert with or in support of" the enjoined party. (AA.V3.T30.00809, quoting *Ross v. Superior Court* (1977) 19 Cal.3d 899, 906). The court also noted evidence demonstrating that Yelp aided and abetted Bird in maintaining the false statements. (*Id*.).

Yelp appealed the ruling.

G. The Court of Appeal Affirms The Trial Court's Removal Order.

The Court of Appeal largely upheld the trial court's decision, soundly rejecting the arguments Yelp reiterates here.

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[5] Yelp, of course, has the records it faults Plaintiffs for not subpoenaing (AA.V1.T12.00228) and can check who posted the comments.

First, in resolving standing issues (which Yelp does not contest, see OBM, 14), the court noted that Yelp's appeal impermissibly attempted to mount a collateral attack on the underlying defamation judgment. "Yelp's claimed interest in maintaining [its] Website as it deems appropriate does not include the right to second-guess a final court judgment which establishes that statements by a third party are defamatory and thus unprotected by the First Amendment." (Op., 11).

Second, the Court of Appeal rejected Yelp's argument that the removal order was barred by due process. The court embraced the "settled principles" and "common practice" of permitting an injunction, such as the removal order at issue here, to run to a non-party. (Op., 19). The court also rejected Yelp's contention that it had a First Amendment right to distribute third-party speech that could not be denied without notice and a hearing, holding that Yelp did not have a First Amendment right to distribute speech that had specifically "been found to be defamatory in a judicial proceeding." (Op., 23). Yelp failed, as it does here, to offer any authority "which confers a constitutional right to a prior hearing before a distributor can be ordered to comply with an injunction that precludes re-publication of specific third party speech that has already been adjudged to be unprotected and tortious." (*Id*.). Further, the court noted that the United States Supreme Court has "never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing" whenever any alleged unprotected materials is seized or impacted. (Op., 23 quoting *Heller v. New York* (1973) 413 U.S. 483, 488).

Third, the Court of Appeal rejected Yelp's overbroad prior restraint argument. The appellate court, held, as this Court did in *Balboa Island*, 40 Cal.4th 1141, that "an injunction issued following a trial that determined

that the defendant defamed the plaintiff, that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment." (*Id.* at 1148; Op., 24). The court did trim the removal order to remove subsequent comments that Bird or anyone else might post as an "overbroad prior restraint on speech." (Op., 25).

Finally, the court found that any immunity from liability Yelp may enjoy under the CDA was inapplicable to its status as a third-party in this case. Looking to the plain language of the statute, the court reasoned that "[t]he removal order does not violate section 230 because it does not impose any liability on Yelp. In this defamation action, 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." (Op., 28). Yelp did not cite 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." (*Id.*). It noted that California law both authorizes an injunction against statements adjudged to be defamatory, and permits injunctions to run to a non-party through whom the enjoined party may act, procedures which are not inconsistent with section 230 "because they do not impose any liability on Yelp, either as a speaker or as a publisher of third party speech." (Op., 29). As a result, the court found that the CDA, which acts as a shield from tort liability, did not excuse Yelp from compliance with court orders. (Op., 31).

Yelp petitioned the Court for review. Bird's libelous statements remain online to this day.

IV. THE COURT OF APPEAL PROPERLY AFFIRMED A NARROW ORDER REQUIRING YELP TO REMOVE THREE POSTINGS THAT WERE JUDICIALLY DETERMINED TO BE DEFAMATORY.

A. This Case Does Not Involve A Challenge To The Underlying Defamation Finding And Injunction Against Bird.

In an effort to transform this case into a First Amendment case, Yelp repeatedly refers to Bird's statements as merely "critical," and otherwise seeks to have this Court question the validity of the trial court's finding of defamation. (See, e.g., OBM, 9, 16). This attempt to blur the lines between protected and unprotected speech is a blatant misrepresentation of the record and is beyond the scope of the issues properly before this Court upon review.

The Court of Appeal found – a finding not challenged by Yelp in its petition to this Court – that Yelp did not have standing to challenge the judgment, and thus the underlying finding of defamation, against Bird. (Op. 10-11 ["Yelp has endeavored to blur the distinction between the judgment entered against Bird which awarded Hassell damages and injunctive relief, and the removal order in the judgment which directs Yelp to effectuate the injunction against Bird."], 17-18 ["Yelp cannot bootstrap its collateral attack of an allegedly void order into a substantive appeal of the default judgment itself. The question whether the trial court should have granted an injunction against Bird is outside the scope of this appeal."]).

Yelp acknowledges this ruling, but Yelp's refusal to honor it permeates its brief.

B. Yelp Does Not Have A First Amendment Right To Post Defamatory Content.

Yelp's insistence that its due process rights were violated largely

rests on its false contention that it has a First Amendment right to post Bird's defamatory statements. But it is axiomatic that there is no First Amendment protection where, as here, the statements at issue are statements that have been conclusively adjudged to be defamatory. (See *Bill Johnson's Rests. v. NLRB* (1983) 461 U.S. 731, 743 ["[F]alse statements are not immunized by the First Amendment."]; *Herbert v. Lando* (1979) 441 U.S. 153, 171 ["Spreading false information in and of itself carries no First Amendment credentials."]; *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 771 ["Untruthful speech, commercial or otherwise, has never been protected for its own sake."]; *Beauharnais v. Illinois* (1952) 343 U.S. 250, 256 ["the prevention and punishment" of libel has "never been thought to raise any Constitutional problem"]).

To avoid this correct conclusion here, Yelp makes two unpersuasive arguments. First, it claims that it has independent First Amendment rights as a publisher to post defamatory material. Second, it claims that the Court of Appeal permitted the trial court to engage in a prior restraint. Neither argument has merit.

1. Yelp Offers No Authority Supporting Its Novel Claim To A First Amendment Right To Publish Libelous Statements.

Although it disavows any role in creating Bird's defamatory statements at issue, Yelp insists that it has a First Amendment right to post those statements. This issue is without nuance. Yelp has no First Amendment right to publish proven defamatory speech. Once this false premise is stripped away, it is evident that Yelp cannot base its due process claim on its free speech rights because, as to Bird's libel – which is the only

speech at issue -- it has none. As the Court of Appeal found, and as continues to be true now, "Yelp does not cite any authority which confers a constitutional right to a prior hearing before a distributor can be ordered to comply with an injunction that precludes republication of specific third party speech that has already been adjudged to be unprotected and tortious." (Op., 23).

Yelp relies primarily on *Marcus v. Search Warrant of Property* (1961) 367 U.S. 717. The Court of Appeal carefully and correctly analyzed *Marcus*. (See Op., 21-23). There, the Supreme Court found the procedure to be constitutionally inadequate because no judicial officer had reviewed the allegedly obscene materials before seizure, and they were seized at the discretion of individual police officers without standards to follow and without a requirement that the court determine whether the materials are actually obscene within any particular time. (367 U.S. at 731-732, 737).

Marcus is inapposite for three reasons. First, the distributors in *Marcus* "personally engaged in protected speech activities by selling books, magazines and newspapers," while Yelp disavowed any role in Bird's speech and, more importantly, "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." (Op., 22).

Second, even if Yelp's "operation of an interactive website is construed as constitutionally protected speech by a distributor, *Marcus* does not support Yelp's broad notion that a distributor of third party speech has an unqualified due process right to notice and a hearing before distribution of that speech can be enjoined." (Op., 23). As the Court of Appeal here noted, a litany of problems led the Court in *Marcus* to conclude that

appellants' due process rights were violated. (*Id*.). The court also noted that the Supreme Court clarified in *Heller* – another case cited by Yelp that does not aid it -- that "[t]his Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. [Citations.]" (Op., 23, citing *Heller*, 413 U.S. at 488).

Third, and as the Court of Appeal here found, "crucially," "the due process problems explored in *Marcus*, *supra*, 367 U.S. 717, and its progeny pertain to attempts to suppress speech that is only *suspected* of being unlawful. Here, we address the very different situation in which specific speech has already been found to be defamatory in a judicial proceeding." (Op., 23). Unlike *Marcus,* then, a court here actually reviewed the material at issue in this case, and gave the original author of it an opportunity to appear at a hearing, before entering its order. Yelp attempts to gloss over this distinction, but it makes all the difference.

None of the other cases cited by Yelp rally to its aid. For example, in *Bigelow v. Virginia* (1975) 421 U.S. 809, the Supreme Court addressed a challenge to a statute as constitutionally overbroad where it resulted in a newspaper editor being convicted for publishing an advertisement that provided information about abortion services. (*Id*. at 817-19). The Court rejected the Virginia Supreme Court's conclusion that the speech at issue was unprotected because it had commercial aspects. (*Id*.). However, in so holding, the Court specifically distinguished other categories of speech, "such as fighting words…or ***libel***…or incitement…[that] ***have been held unprotected***, [as] no contention has been made that the particular speech embraced in the advertisement in question is within any of these categories." (Id. at 819 [emphasis added]). Similarly, Yelp cites to *Ark.*

Educ. Tv Comm'n v. Forbes (1998) 523 U.S. 666, 674 for the unremarkable proposition that publishers may be entitled in certain contexts to assert First Amendment rights to their programming. That case has no bearing on the free speech rights of consumer review websites such as Yelp, to say nothing of free speech rights as they relate to the republication of libel. (See, e.g., *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-283 [knowingly false statements not entitled to constitutional protection, even in heightened context of public interest]).[6]

Yelp offers no case, because indeed there is none, that grants Yelp a constitutional right to a prior hearing before being ordered to remove third party speech that has been judicially determined to be defamatory. Instead, Yelp cites to a couple of cases to support its vague and undeveloped assertion that as a website, Yelp is entitled to the same First Amendment and due process protection as publishers and editors. Even if this were true, Yelp cites no case that permits a publisher or an editor to

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[6] Yelp also dumps several inapposite cases into a footnote. *Carroll v. President & Comm'rs of Princess Anne* (1968) 393 U.S. 175, 180, holding that ex parte orders against protected speech cannot issue where defending parties had no opportunity to appear, does not apply to this context where Bird's libelous speech was adjudicated after notice and a hearing. *Lee Art Theatre, Inc. v. Virginia* (1968) 392 U.S. 636, 637, finding a due process violation where alleged obscenity was seized based upon "conclusory assertions" of a police officer "without any inquiry by the justice of the peace into the factual basis for the officer's conclusions," has no bearing on the facts or issues in this case. (See also *A Quantity of Copies of Books v. Kansas* (1964) 378 U.S. 205, 212-213 [same].) And *Kash Enterprises, Inc. v. Los Angeles* (1977) 19 Cal.3d 294, addressed a city ordinance that permitted seizure of news racks violating location and size requirements. Neither the reasoning nor the holding of any of these cases advances Yelp's position.

republish an adjudicated defamatory statement in perpetuity.[7] Yelp cannot shoehorn this case into the line of cases finding constitutional concerns where there is state action involving speech that was merely *suspected* of being unlawful. That distinction is critical: Yelp's conduct – insisting on continuing to host adjudged defamatory content – has no constitutional protection.

2. Yelp's Constant Refrain That A Prior Restraint Exists Here Is Entirely Unsupported By The Factual And Legal Record.

Sensing the weakness of its contention that it has a First Amendment right to distribute proven defamatory speech, Yelp then pivots to claim that the removal order constitutes a prior restraint. It does not. As this Court has held, "once a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited 'prior restraint' of speech. [Citation.]" (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 140). Yelp's argument is yet another distortion of the record and the law.

As an initial matter, Yelp plays fast and loose with the term "prior restraint." In the first paragraph of its Summary of Argument (OBM, 2), for example, Yelp uses the term three times, each time without clearly articulating what it believes the prior restraint to be. To be clear, "[o]rders which restrict or preclude a citizen from speaking ***in advance*** are known as 'prior restraints.'" (*Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1241).

To the extent that Yelp faults the lower courts for including in the

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7 Yelp faults the Court of Appeal for labeling it as an "administrator of a forum" rather than a publisher. Again, however, Yelp fails to acknowledge that the removal order does not treat Yelp as a publisher and, even if it did, no constitutional right exists to post libel.

removal order any "subsequent comments" posted by Bird, the Court of Appeal directed the trial court to excise that portion of the order. (See Op., 25).[8] Hassell have not appealed that part of the decision. That issue is, therefore, not before this Court.

To the extent that Yelp attempts to argue that the portion of the trial court's order ***directed at Bird*** constitutes a prior restraint on speech, that issue is also not before this Court. As the lower court found, Yelp is an "aggrieved party" entitled to appeal the removal order issued against it. It has no standing to argue separately that the judgment against Bird is erroneous. (Op., 10-11).

As to Yelp's poorly articulated argument that the removal order *otherwise* acts as a prior restraint on speech, both the facts and well-established law bar that claim. As modified by the Court of Appeal, the removal order before this Court directs Yelp "to remove all reviews posted by AVA BIRD under user names "Birdzeye B." and "J.D." attached hereto as Exhibit A ~~and any subsequent comments of these reviewers~~ within 7 business days of the date of the court's order." (AA.V1.T9.000212-215). Yelp admits that the removal order has been stripped of any obligation to "bar publication of any comments by [Bird] that might be posted in the

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[8] It is possible that the "subsequent comments" language in the trial court's removal order was not directed at future speech at all. The evidence demonstrated that after the complaint was filed, Bird posted an "update" below her initial defamatory post, stating that Hassell "has tried to threaten, bully, intimidate, harrass [sic] me into removing the review!" (See AA.V1.T6.00057, 000102-105). That "update," which may have been characterized by the trial court as a "subsequent comment" was also specifically found to be defamatory. (See AA.V1.T6.00057, 000102-105; AA.V1.T9.00212-216). In any event, neither party contests that portion of the Court of Appeal's decision.

future." (OBM, 15). As a factual matter, then, the removal order ***does not bar any future speech***; it simply requires Yelp to remove three specific posts – past speech -- that were judicially determined to be libel.

This Court's decision in *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141 conclusively resolves the issue. There, the Court stated:

> [A]n injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment…. Prohibiting a person from making a statement or publishing a writing *before* that statement is spoken or the writing is published is far different from prohibiting a defendant from *repeating* a statement or *republishing* a writing that has been determined at trial to be defamatory and, thus, unlawful. This distinction is hardly novel.

(*Id.* at 1148, 1150 [emphasis added]; see Op., 24). Yelp demands a different result here, because *Balboa Island* involved a "contested trial" rather than a "default judgment…that did not evaluate any of the individual statements to determine if they are false, defamatory, and unprivileged." (OBM, 32). But this argument simply shows Yelp's true grievance. Yelp is not contesting what was a correct application of the law by the Court of Appeal; instead it wants to challenge the underlying defamation.[9] As the lower court properly found, Yelp, which has repeatedly disavowed any

[9] Yelp's response to Hassell when they asked that the posts be removed proves the point: Yelp's General Counsel acknowledged that it would remove defamatory statements, but claimed that the defamation here was not "proven" because it was a bench trial and a default judgment. (AA.V3.T27.00734).

involvement in the creation of Bird's defamatory statements, has no standing to challenge the finding of defamation. (Op., 25). Stripped of that argument, Yelp has no argument to resist the this Court's holding in *Balboa Island*, which plainly did not turn on the fact that it was a "contested trial," as opposed to a default judgment. (40 Cal.4th at 1156 ["Once specific expressional acts are properly determined to be unprotected by the First Amendment, there can be no objection to their subsequent suppression or prosecution."]). Furthermore, the trial court here did not merely rubber stamp Hassell's allegations of defamation, but heard extensive evidence in support of her claims.

The other cases offered by Yelp simply underscore the lack of any prior restraint at play here. Several of these cases contain prohibitions on future speech. (See *Neb. Press Ass'n v. Stuart* (1976) 427 U.S. 539; *Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1169; *Assn. for Los Angeles Deputy Sheriffs v. Los Angeles Times Comm'n LLC* (2015) 239 Cal.App.4th 808.) In *Wilson v. Superior Court of L.A. Cty.* (1975) 13 Cal.3d 652, 659, in permitting the republication of possibly false or misleading statements involving public officials, this Court specifically distinguished cases – like this one – holding that libel is not entitled to First Amendment protection, from cases involving public official that are subject to a higher standard. And the *Hurvitz* court rejected arguments in favor of an order restraining speech on the basis of medical privilege and privacy. (84 Cal.App. 4th at 1245-47.)

Yelp has not been compelled to act, in any way, with respect any *future* speech. There is no prior restraint.

C. Yelp Was Not Deprived Of Due Process.

The thrust of Yelp's constitutional due process argument is that it

was deprived of an opportunity to defend itself because it was not named as a defendant in this action. "The United States Supreme Court faced and explicitly rejected an almost identical due process contention over [] a century ago." (*Ross*, 19 Cal.3d at 905, citing *In re Lennon* (1897) 166 U.S. 548). As in *Ross* and *Lennon*, Yelp's due process arguments must fail.

Yelp does not assert any protected rights that were affected by the purported due process violation, and the removal order was entirely consistent with well-established law.

1. Yelp Has No Protected Interest Here Guaranteed By The Due Process Clause, And It Received Actual Notice In Any Event.

"[T]he range of interests protected by procedural due process is not infinite." (*Roth*, 408 U.S. at 570). Thus, "[a]lthough the amount and quality of process… recognized as 'due' under the Clause has changed considerably since the founding, it remains the case that *no* process is due if one is not deprived of 'life, liberty, or property.'" (*Kerry v. Din* (2015) 135 S. Ct. 2128, 2132 [emphasis in original] [internal citations omitted]). Because Yelp's due process is not based on its own protected interest, its constitutional argument is fundamentally flawed.

The sorts of interests protected by the due process clause are classified as either "liberty" or "property" interests. (See *Roth*, 408 U.S. at 571-572). In order for a "liberty" to be protected, there must be both "a careful description of the asserted fundamental liberty interest, as well as a demonstration that the interest is objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it was sacrificed." (*Din*, 135 S.Ct. at 2134, quoting *Washington v. Glucksberg* (1997) 521 U.S. 702, 720-

721; see also *Roth*, 408 U.S. at 573-575 [right to continued state employment not protected liberty]). The due process clause's "protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." (*Roth*, 408 U.S. at 576). A protected property interest must be based on "more than abstract need or desire;" it must be based on "legitimate claim of entitlement." (*Id*. at 577).

Courts are traditionally skeptical of finding either liberty or property interests in the context of third party claims to due process. There is, after all, a "simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally." (*O'Bannon v. Town Court Nursing Ctr.* (1980) 447 U.S. 773, 788). In *O'Bannon*, a state agency sought to revoke a nursing home's operating authority. Approximately 180 of the home's elderly residents argued that they had due process rights to a hearing before the revocation. While conceding the obvious "adverse impact" the decertification would have on some residents, the Court reasoned that the impact was "indirect" and "incidental" to the real action (the decertification), and therefore "does not amount to a deprivation of any interest in life, liberty, or property." (*Id*. at 787).

In its constitutional challenge, Yelp does not recognize any of these fundamental concepts to due process, and instead relies upon nebulous assertions that it has some right to be heard on the Bird injunction. This argument is first based on a repeated assertion that the required "interest" is found in its "separate First Amendment right to distribute the speech of others." (OBM, 19). However, as described in detail above, Yelp has no

First Amendment right to "distribute" defamatory remarks made by other people.

Yelp also attempts to carve a protected interest from its desire "to maintain the integrity of its website, for the benefit of its users." (OBM, 17 n. 6). In Yelp's view, if it "removed every review a business owner argued was false or even defamatory, it would have few critical reviews on its website." (OBM, 17 n. 6). Again, Yelp cites no authority to support its bald proposition that its website's integrity rises to the level of becoming a constitutionally protected interest. But just assuming *arguendo* that it does have such protection, that interest is not remotely implicated in this case. This case is not about merely critical reviews, or "argued" defamation. Hassell sued Bird, and obtained a judgment based on substantial evidence about the defamation, including email admissions by Bird. Simply put, as the Court of Appeal stated, "Yelp's claimed interest in maintaining its Web site as it deems appropriate does not include the right to second-guess a final court judgment that establishes that statements by a third party are defamatory." (Op., 11).

Even if the injunction affected a recognized interest of Yelp's – which it does not – that effect is more akin to the "indirect" or "incidental" impact that did not merit its own set of due process protections in *O'Bannon*. Just as the real issue in *O'Bannon* was the certification matter between the State and the nursing home (not the patients), the real issue in this case is the defamation claim between Hassell and Bird (not Yelp). And there is certainly no stronger link between the Bird judgment and Yelp than between the *O'Bannon* decertification and the nursing home evictees. This parallel, combined with Yelp's dubious interest in Bird's defamation, highlights important distinctions between this case and the cases cited by

Yelp to establish its due process framework, which largely involve cases where a party's recognized interests were directly at stake. (See e.g., *Richards v. Jefferson County* (1996) 517 U.S. 793, 794 [pecuniary interest in tax liabilities]; *People v. Ramirez* (1979) 25 Cal.3d 260, 272-74 [termination of drug treatment resources received as alternative to criminal sentencing]; *Fazzi v. Peters* (1968) 68 Cal.2d 590 [money judgment against an individual]; *Estate of Buchman* (1954) 123 Cal.App.2d 546, 559 [removal of executor of probate estate]).[10]

Furthermore, Yelp's due process argument fails on the facts of this case because it is also well established that "[a]ctual notice satisfies due process." (*Benson v. Cal. Coastal Com.* (2006) 139 Cal.App.4th 348, 353, citing *In re Pence* (7th Cir. 1990) 905 F.2d 1107, 1109; see also *United States Aid Funds, Inc. v. Espinosa* (2010) 559 U.S. 260, 272 ["United received actual notice… [t]his more than satisfied United's due process rights."]; *Oneida Indian Nation v. Madison Cty.* (2d Cir. 2011) 665 F.3d 408, 429 [same]). Yelp has been provided extensive notice of the developments in this case, and the relief sought, throughout litigation. Most notably, Yelp had notice of this lawsuit and the requested injunctive relief soon after it was filed, and specifically chose not to intervene. (See

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[10] Yelp cites two other cases in this string that are either unhelpful to its position, or entirely unrelated to the matter at hand. In *Blonder-Tongue Labs v. University of Illinois Found*. (1971) 402 U.S. 313, 350, the Supreme Court allowed an estoppel defense that essentially blocked patent plaintiffs from filing subsequent lawsuits against different defendants after a court had already ruled the patent invalid. Also, the case of *Chase National Bank v. City of Norwalk, Ohio* (1934) 291 U.S. 431, 440-441, is not about due process, but instead stands for the uncontroversial and unrelated proposition that a mortgagee's rights were unaffected by the city's ouster action against the mortgagor.

AA.V3.T21.00601-601, 00617-634). Yelp's disingenuous protest to this Court that it was deprived of "notice" lacks any factual support from the record.

In the end, without any constitutionally protected interest at stake, Yelp's due process rights could not have been undermined. Its argument fails on those grounds alone.

2. It Is Well Established That Injunctions Can Be Enforced Against Non-Parties "With or Through" Whom an Enjoined Party Acts.

Yelp recognizes that it is "common practice" for an injunction to "run also to classes of persons through whom the enjoined party may act." (OBM, 22, quoting *Kothari*, 83 Cal.App.4th at 766-767). While admitting the ubiquity and firm legal foundation for this practice, Yelp paradoxically views the practice as a "narrow" one. This Court should reject this meritless argument.

As the Court of Appeal noted, this deeply-rooted practice is not nearly as limited as Yelp suggests. (See Op., 19). Instead, "this practice is thoroughly settled and approved by the courts." (*Kothari*, 83 Cal.App.4th at 766-767; see also *Ross*, 19 Cal.3d at 905-906 ["this practice has always been upheld by the courts"]). Illustrating how firmly established this principle is, it has been upheld by this Court as early as 1917, (see *Berger v. Superior Court of Sacramento County* (1917) 175 Cal. 719,) and by the U.S. Supreme Court as early as 1897, (see *Lennon*, 166 U.S. at 554). "[T]he the whole effect of this is simply to make the injunction effectual against all through whom the enjoined party may act… and there is a fair foundation for a conclusion that persons so co-operating with the enjoined party are guilty of a disobedience of the injunction."

(*Berger*, 175 Cal. at 721). Simply put, the rule ensures that an enjoined defendant does not "avoid the force of an injunction" by acting through others. (*Ross*, 19 Cal.3d at 909).

Each of the cases cited by Yelp confirms this general rule. For example, Yelp first cites to *Regal Knitwear v. NLRB* (1945) 324 U.S. 9 – a case that actually supports Hassell. (OBM, 21). There, the U.S. Supreme Court reaffirmed the principle that injunctions could apply to the conduct of certain nonparties, including "those persons in active concert or participation with [the defendants] who receive actual notice of the order by personal service or otherwise." (324 U.S. at 13-14, quoting Fed. R. Civ. P. 65(d)). As the court explained, consistent with the above authority, this practice helps protect the court's ability to administer justice by ensuring compliance with its orders. (See *id*. at 14 ["defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors"]; see also *United States v. Paccione* (2d Cir. 1992) 964 F.2d 1269, 1274-1275 ["A court may bind non-parties to the terms of an injunction or restraining order to preserve its ability to render a judgment"]). Similarly, the Learned Hand decision cited by Yelp "agree[s] a person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt. This is well settled law." (*Alemite Mfg. Corp. v. Staff* (2d Cir. 1930) 42 F.2d 832).[11] This trend continues in

[11] The end result in *Alemite*, that the appellant was not bound by the injunction in that case, is beside the point for purposes of this case. The *Alemite* appellant was acting on his own behalf, completely independent from the enjoined defendants. (*Alemite*, 42 F.2d at 833.) Obviously, while an injunction can run to parties through whom a defendant acts, no injunction can prevent unnamed parties elsewhere in the universe from their own independent actions that are unrelated to the enjoined defendant. (See *id*. at 832 [injunctions are not against "the world at large."].)

the line of California cases discussed by Yelp. (See *Ross*, 19 Cal.3d at 905 ["it has been a common practice to make the injunction run also to classes of persons through whom the enjoined party may act"]; *Kothari*, 83 Cal.App.4th at 766-767).

In fact, each of the cases cited by Yelp further confirms this general rule that injunctions can run against nonparties "with or through whom the enjoined party may act." (*Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 353 [an injunction can run to the persons "with or through whom the enjoined party may act" to prevent an enjoined party from "nullify[ing] an injunctive decree by carrying out prohibited acts with or through nonparties to the original proceeding"]; see also *Ross*, 19 Cal.3d at 905 ["it has been a common practice to make the injunction run also to classes of persons through whom the enjoined party may act"]; *People v. Conrad* (1997) 55 Cal.App.4th 896, 903 ["we conclude that a nonparty to an injunction is subject to the contempt power of the court when, with knowledge of the injunction, the nonparty violates its terms with or for those who are restrained."]).

The cases pointed out by Yelp where the scope of the injunction exceeded the boundaries of this rule largely involved persons who were not specifically named in the injunction, and who had, at best, only an attenuated connection to the enjoined defendant. (See, e.g., *Conrad*, 55 Cal.App.4th at 903 [subsequent abortion protesters not subject to injunction because "it must be [their] actual relationship to an enjoined party, and not [just] their convictions about abortion, that make them contemners"]; *Planned Parenthood*, 107 Cal.App.4th at 353 [protestors may not be subject to injunction where evidence was absent that they acted together with or on behalf of enjoined parties]; *Berger*, 175 Cal. at 720 [subsequent

protester who was "absolute stranger" to enjoined parties could not be bound by injunction]; *In re Berry* (1968) 68 Cal.2d 137, 156 (injunction could run to nonparties, but inclusion of those "in concert among themselves" created "a baffling element of uncertainty as to the application of the order to [unaffiliated] persons"]; see also *Kothari*, 83 Cal.App.4th at 770-771 [injunction against future owners of property improper because specific cause of action did not allow injunctive relief to run *in rem*]).

Yelp also extrapolates too much from the Illinois case of *Blockowicz v. Williams* (N.D. Ill. 2009) 675 F.Supp.2d 912, a*ff'd,* 630 F.3d 563. The *Blockowicz* Court based its decision on federal procedural rules, which are described in more limited terms than California's rules on third-party injunctions. (*Compare id*. at 915 [non-party "must be acting in concert or legally identified (i.e. acting in the capacity of an agent, employee, officer, etc.) with the enjoined party"], *with Planned Parenthood*, 107 Cal.App.4th at 35 [injunction can run to non-party "with or through whom the enjoined party may act"]). However, even under the federal rules, the *Blockwicz* Court implicitly recognized that it had the authority to enforce its injunction against the non-party, but apparently declined to do so only as a matter of discretion. (See *id*. ["the court finds that it should not exercise its authority under the facts in this case"]). Needless to say, the fact that the *Blockowicz* Court declined to "exercise its authority" under federal procedural rules says nothing about whether it was proper for the trial court in this case to do so under California law.

Yelp's brief largely reaffirms the above settled principles before it attempts to escape them in a three-point argument. Yelp's first distinction – that the above authority only enjoined unnamed parties – defies logic. (See OBM, 25). If due process permits an injunction to be enforced

against unnamed individuals, then *a fortiori* a more specific injunction would pass muster. That makes sense in this case, where the adjudication below was limited to three specific statements posted on Yelp. Under Yelp's strained view of due process, the removal order would have been required to cover broadly all "websites" through whom Bird posts defamatory content – an impossible result – instead of honing in on Yelp and the specific remarks that were adjudicated. Even after more than 120 years of jurisprudence on this issue, Yelp does not cite any authority for its backwards proposal that more broadly worded injunctions carry more force than specifically targeted ones. Injunctions targeting named nonparties, however, have been upheld. (See, e.g., *United States v. Hall* (5th Cir. 1972) 472 F.2d 261, 263-264 [upholding injunction that court ordered to serve "on seven named persons, *including Eric Hall*. Hall was neither a party plaintiff nor a party defendant."]; *Paccione*, 964 F.2d at 1274-1275 [upholding cease and desist order naming specific nonparty]).

Rather than relying on legal authority for this proposed distinction between named and unnamed nonparties, Yelp relies on a false premise. In Yelp's view, because the injunction specifically identified it as a party "with or through" whom Bird acts, it "treated Yelp as if it had… [a] full opportunity to stand up for its rights as a publisher." (OBM, 25). However, this argument assumes that Yelp has a First Amendment right as a publisher of defamation in the first instance, which as described above, it does not. The argument is also void of any legal analysis to explain to the Court and Hassell why injunctions involving named nonparties violate due process, while injunctions that cannot or do not specifically name the bound nonparty are permissible.

Second, Yelp misrepresents that "the court affirmed the injunction

against Yelp without any evidence" as to Yelp's relationship to Bird. Even before the injunction was entered, the trial court considered voluminous evidence and argument concerning Bird's conduct and her actions through Yelp. (See e.g., AA.V1.T6.00096, AA.V1.T6-7).[12] Yelp cannot credibly dispute that Bird was acting through its online directory. Bird's statements were and still are posted on Yelp's website with Yelp's permission and, but for Yelp's online space, Bird's libel would not be published.

Yelp's third point brings together several of its false legal presumptions to argue that the Court of Appeal "ignored Yelp's interests in its own website." However, the Court of Appeal did not "ignore[] Yelp's interests;" it simply and correctly rejected Yelp's proposed interest in this matter. As explained by the Court, "Yelp's claimed interest in maintaining its Web site as it deems appropriate does not include the right to second-guess a final court judgment that establishes that statements by a third party are defamatory." (Op., 11). Yelp also attacks the Court of Appeal for the way it distinguished cases involving money judgments – an obvious distinction considering that Hassell is aware of no authority allowing money judgments to run to a nonparty. (OBM, 28, citing *Fazzi*, 68 Cal.2d 590; *Tokio Marine & Fire Ins. Corp. v. W. Pac. Roofing Corp.* (1999) 75 Cal.App.4th 110). This attack hypocritically states that the court did not explain why that distinction mattered, but then Yelp fails to provide its own explanation as to why this distinction is unimportant.

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[12] Yelp also faults the Court of Appeal's decision for not containing "any analysis or appreciation of how its [opinion]… will affect websites like Yelp." (OBM, 27). As described in Part VI below, these concerns are overblown.

V. THE CDA DOES NOT PREVENT THE COURT FROM ISSUING A REMOVAL ORDER TO EFFECTUATE ITS VALID JUDGMENT.

Yelp's brief twists CDA immunity well beyond its purpose of shielding internet companies from destructive tort liability. Nothing in the CDA itself, or in the legislative history enacting it, suggests that Congress sought to place websites outside the reach of the court system for purposes of enforcing valid judgments against named tortfeasors. Nor does Yelp cite any legal precedent to support this strained interpretation of the CDA.

A. The Plain Language Of The CDA Does Not Prevent A Court From Enforcing A Valid Judgment.

Hassell have asserted no cause of action and have sought no liability against Yelp. Nevertheless, Yelp insists that CDA immunity prevents the court from enforcing its ruling. Not so.

1. A Court's Enforcement of A Judgment Against An Original Speaker Is Consistent With The CDA.

As a threshold matter, it cannot be disputed that the judgment obtained against Bird is entirely consistent with the CDA. It is uniformly recognized that "Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 63; see also *Green Grp. Holdings, LLC v. Schaeffer* (S.D. Ala. Oct. 13, 2016) 2016 U.S. Dist. LEXIS 142654, at *27 ["a plaintiff defamed on the internet can sue the original speaker."], quoting *Ricci v. Teamsters Union Local 456* (2d Cir. 2015) 781 F.3d 25, 28; *Zeran v. Am. Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330-31 [CDA immunity does not mean "that the original culpable party who posts defamatory messages would escape accountability"]). Yelp's brief also recognizes this uncontroversial proposition. (OBM, 35 ["If someone authors injurious

content, a plaintiff can pursue the author of that content"]). This lawsuit, from the filing of the complaint, all the way through the money judgment and injunction, was structured to do just that – hold Bird accountable for spreading falsehoods online.

When Bird nevertheless escaped accountability, and refused to comply with the valid court judgment entered against her, Hassell needed an enforcement mechanism to ensure the administration of justice. (See C.C.P. § 128(a)(4) ["Every court shall have the power to… compel obedience to its judgments, orders, and process"]; see also *Gompers v. Bucks Stove & Range Co.* (1911) 221 U.S. 418, 450 [court's ability to enforce orders is "absolutely essential" and prevents the judicial branch from becoming "a mere mockery."]). The court's removal order provided that enforcement, and directs Yelp, as a party through whom Bird acts, to put an end to her illegal activity.

"Nothing in [section 230] shall be construed to prevent any State from enforcing any State law [e.g., a valid state court judgment] that is consistent with this section." (47 U.S.C. § 230(e)(3)). Despite this express command in the CDA, Yelp seeks to extend its CDA immunity to protect Bird's own contemptuous conduct, and ultimately prevent the court from ensuring enforcement of its valid judgment against her.

2. Yelp's Responsibility To Comply With Enforcement Does Not Arise From Its Duties As A Publisher Or Speaker.

The plain language of Section 230 immunity, although broad, does not extend as far as Yelp claims. Yelp's purported immunity derives from

the relationship of two subsections, (c)(1) and (e)(3),[13] which provide:

> **(c) Protection for "Good Samaritan" blocking and screening of offensive material**
>
> **(1) Treatment of publisher or speaker**
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> …
>
> **(e) Effect on other laws**
>
> …
>
> **(3) State law**
>
> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(47 U.S.C. § 230(c)(1), (e)(3)).[14] This section "as a whole cannot be

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[13] At times, Yelp attempts to argue that these two subsections create distinct liability shields. (See OBM, 48). This reading of the CDA is not supported by the statutory text, which courts read together. After all, "subsection (c)(1) precludes liability only by means of a definition… Subsection (e)(3) makes explicit the relevance of this definition." (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1100). In a footnote, Yelp tries to support its claim for separate Section 230(c)(1) immunity by pointing out that federal causes of action have been read into the CDA. (OBM, 48 n. 21). However, the implied inclusion of federal causes of action under the CDA, which was not based on statutory text, says nothing about how this straightforward text should be applied to state law causes of action. (See *Barnes*, 570 F.3d at 1100 n. 4 [declining to decide how this parsing of the statute would be different under a federal claim]).

[14] Yelp quotes Section 230(e)(3) as stating, "any state law, *including* imposition of tort liability, that is inconsistent with its protections," (OBM

understood as granting blanket immunity to [a] provider from any civil cause of action that [merely] involves content posted on or transmitted over the Internet by a third party." (*Lansing v. Southwest Airlines Co.* (Ill. Ct. App. 2012) 2012 IL App (1st) 101164, ¶ 40, *citing Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008)). "The correct test, then, is not whether a challenged activity merely bears some connection to online content." (*Airbnb, Inc. v. City & Cnty. of S.F.* (N.D. Cal. Nov. 8, 2016) 2016 U.S. Dist. LEXIS 155039, at *15). Instead, parsing those two subsections, the CDA proscribes specific legal actions under State or local law (either a "cause of action" or the imposition of "liability"), but *only if* that legal action is "inconsistent" with subsection (c)(1) – in other words, *only if* the legal action itself treats the provider defendant "as the publisher or speaker of any information provided by" others.

These requirements for CDA immunity are unmet here. The instant legal action against Bird neither treats Yelp as the publisher,[15] nor sought to impose any liability on Yelp whatsoever.

First, CDA immunity only applies when a plaintiff's cause of action itself is premised on a provider acting as a publisher or speaker of third-party content. The test as to whether this treatment exists is "when the

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41), but that exact language does not appear in the statute, and the origin of the quoted text is not clear.

[15] Yelp attempts to claim that "[i]n the briefing below, Hassell conceded… that she is seeking to treat Yelp as the publisher or speaker of information provided by readers." (OBM, 43.) However, the citations provided by Yelp do not include such a concession. On the contrary, Hassell argued vehemently below that this was not a case like those Yelp cited which tried to impose liability, rather than simply enforcing a remedy. (AA.V3.T26.00663-665).

duty the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker." (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1107). In other words, the gravamen of the plaintiff's complaint drives whether the provider is impermissibly held accountable as a publisher.

CDA immunity is thus consistently denied in cases involving duties other than a provider's general duty as a would-be publisher, even if the legal action is related to third-party content. For example, the *Barnes* Court itself entertained a promissory estoppel claim against Yahoo, after it "promised [and failed] to take down third-party content from its website." Even though the Ninth Circuit found that taking down third-party content is "quintessential publisher conduct," it refused to apply CDA immunity because the plaintiff did "not seek to hold Yahoo liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached." In other words, "[c]ontract liability [] would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication." (*Id*. at 1107). As Yelp concedes, the *Barnes* Court's approach to CDA immunity is "instructive." (OBM, 47).[16]

Barnes is far from an outlier, as many other courts have fashioned similar rationales as to duties that are inherently distinct from general publishing duties. (See e.g., *Doe v. Internet Brands, Inc.* (9th Cir. 2016)

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[16] *Barnes* also involved a claim for negligent undertaking, which was subject to CDA immunity under the same test because, for that claim, "the duty that Barnes claims Yahoo violated derives from Yahoo's conduct as a publisher." (*Barnes*, 570 F.3d at 1103).

824 F.3d 846, 851 [en banc] [failure to warn user of dangers of third-parties not barred by CDA]; *Fair Hous. Council v. Roommates.com, LLC*, (9th Cir. 2008) 521 F.3d 1157, 1164 [website's duty not to discriminate as a housing broker held it responsible for prohibited third-party information]; *City of Chi. v. StubHub!, Inc.* (7th Cir. 2010) 624 F.3d 363, 366 [CDA did not shield website from its duty to collect municipal taxes on transactions occurring between third party users]; *Airbnb*, 2016 U.S. Dist. LEXIS 155039, at *11-12 [no immunity for website against municipal ordinance prohibiting it from collecting fees from certain postings by third-parties]; *Anthony v. Yahoo!, Inc.* (N.D.Cal. 2006) 421 F.Supp.2d 1257, 1262-63 [CDA does not apply to website's misrepresentations concerning third-party content.]; *J.S. v. Vill. Voice Media Holdings, LLC* (2015) 184 Wash. 2d 95, 102-03 [website not immune from tort claim of inducing prostitution, despite the prostitution conduct coming from third parties]; *Hardin v. PDX, Inc.* (2014) 227 Cal.App.4th 159 [duties related to software provider's own participation in creating content]; *Lansing*, 2012 IL App (1st) 101164, [duties of employer to supervise employees' conduct, including electronic communications, distinctly different from any duties of a publisher]).

By contrast, cases that found CDA immunity to be appropriate all involve causes of action against the provider directly, that fully hinge on whether the provider breached a duty as publisher or speaker. (See e.g., *Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1120 [dating website not "legally responsible for false content in a dating profile provided by someone posing as another person."]; *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1023 [defamation claim against website]; *Zeran*, 129 F.3d 327 [defamation lawsuit against provider after its delayed removal of

third-party content]; *Lancaster v. Alphabet Inc.* (N.D. Cal. July 8, 2016) 2016 U.S. Dist. LEXIS 88908, at *6-7 ["the plaintiff's claim [itself must] seek[] to hold the defendant liable as 'the publisher or speaker' of that information."]; *Dart v. Craigslist, Inc.* (N.D. Ill. 2009) 665 F.Supp.2d 961, 967-69 [nuisance tort against website for third-party content]; *Barrett*, 40 Cal.4th at 62-63 [plaintiffs could not sue website operator for libel under theory of notice-based liability]; *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 574 [question is "whether appellants seek to hold MySpace liable for failing to exercise a publisher's traditional editorial functions"]; *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 806-07 [various tort claims against ISP]; *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 831 [seeking damages against eBay for its "dissemination of representations made by the individual defendants, or the posting of compilations of information generated by those defendants and other third parties."]; *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 698 [language of Section 230(e)(3) bars causes of action asserted directly against internet companies for third-party content]).

The removal order in this case falls squarely in the *Barnes* line of authority because Yelp's duty to comply does not arise from its status as a publisher or speaker, but as a party through whom the court must enforce its order. The court's enforcement of its own orders could take many shapes. For instance, if Yelp owed money to Bird for some reason, Yelp could be compelled as a third-party to pay those funds over to Hassell to satisfy the monetary judgment. (See, e.g., C.C.P. § 708.510). Yelp could also be required to respond to a third-party subpoena in the course of post-judgment discovery. (See ,e.g., *Macaluso v. Super. Ct.* (2013) 219 Cal.App.4th 1042). Here, the removal order simply prohibits Yelp from

continuing to be the conduit through which Bird violates her injunction – an uncontroversial way for a court to enforce its orders. As the promissory estoppel claim in *Barnes*, Yelp's duty "here would come not from [its] publishing conduct, but from" a valid court order that "legally obligated [it] to do something, which [just] happens to be removal of material from publication." (*Barnes*, 570 F.3d at 1107). The Court of Appeal properly understood this distinction, when it concluded that violations of "[v]iolating the injunction or the removal order associated with it could potentially trigger a different type of liability that implicates the contempt power of the court." (Op., 30).

Yelp spends considerable energy in its brief cataloging the *Zeran* line of cases, including this Court's *Barrett* decision, but Yelp does not explain why that line of authority is controlling, let alone persuasive, in this context. In fact, there is nothing inconsistent with those cases and the Court of Appeal's decision in this case. In the current case, Yelp is neither "cast in the same position as the party who originally posted the offensive messages," (*Zeran*, 129 F.3d at 333,) nor sought to be held accountable for its own editorial decisions of "whether to publish, withdraw, postpone or alter [such] content," (*Barrett*, 40 Cal.4th at 43, quoting *Zeran*, 129 F.3d at 330). Hassell have not sought to "punish[] and deter[]" Yelp in any way for Bird's conduct. (See *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC* (E.D. Mo. 2011) 809 F.Supp.2d 1041, 1055). Instead, as instructed by both *Zeran* and *Barrett*, Hassell have pursued the original poster of the defamation, resulting in a judgment against her.

Nor is this removal order properly characterized as notice-based liability, as asserted by Yelp. (See OBM, 40). Nothing in the legal theory in this case, or in the Court of Appeal's decision, places Yelp "at risk for

liability each time it received notice of a potentially defamatory statement in any Internet message, requiring an investigation of the circumstances, a legal judgment about the defamatory character of the information, and an editorial decision on whether to continue the publication." (*Barrett*, 40 Cal.4th at 45). Yelp need not investigate or decide anything. On the contrary, it can host all the content it wants without facing liability for its own editorial decisions. But if a court must reach out to Yelp for enforcement, then it must respond to that order just as any party would be required to do – publisher or not.

The injunctive relief cases cited by Yelp do not suggest any different result. (See OBM, 50-52). First, Yelp cites only one case that deals exclusively with injunctive relief, as opposed to cases seeking injunctive relief side-by-side with money damages. (See *id*. at 50, citing *Medytox*, 152 So.3d at 730-731). The injunction sought in *Medytox* was premised on a claim for declaratory relief. Yet the court found that the declaratory/injunctive relief claims could not move forward because, regardless of whether an injunction was a form of liability, the express terms of Section 230(e)(3) still barred any "cause of action." (*Medytox*, 152 So.3d at 731). Citing *Barnes*, the court even suggested that its outcome would be different if the cause of action "does not derive from the provider's status as a publisher or speaker." (*Id*. at 731 n. 1).

The other two cases cited by Yelp involved injunctions that were part of claims asserted directly against the "provider," which would similarly be barred by Section 230's ban on causes of action. (See OBM, 50-54, citing *Kathleen R.*, 87 Cal.App.4th at 697-698 [injunctive relief as part of a claim under Section 1983]; *Noah v. AOL Time Warner* (E.D. Va. 2003) 261 F.Supp.2d 532, 538-539 [injunctive relief as part of a

discrimination claim arising out of third-party comments in an AOL chat room]).[17] This is not the situation here.

3. No Liability Is Sought Or Imposed Against Yelp.

Finally, much of the above analysis still assumes that the removal order in this case was a form of liability against Yelp, which it was not. As succinctly explained by the Court of Appeal, the removal order issued in this case does not violate Section 230 "because it does not impose any liability on Yelp. In this defamation action, 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." (Op., 28). In other words, being the subject of an enforcement order from the court that seeks to enforce an order against someone else is not tantamount to being subject to liability. For example, in the context of postjudgment collection of a money judgment, a garnishee bank is not liable to a judgment creditor even though it may be compelled to act in aid of enforcement of that judgment.

Yelp's argument that the removal order creates a form of liability barred by the CDA results from its misunderstanding of the Court of Appeal's decision. Yelp misrepresents that decision as broadly "concluding that Section 230 does not apply to requests for injunctive relief." (OBM, 49, citing Op., 28). Nowhere did the court suggest such a broad rule. Instead, the cited part of the opinion correctly distinguishes Yelp's authority, and concludes more narrowly that Section 230 does not "restrict a court from directing an Internet service provider to comply with

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[17] In a footnote, Yelp also advances a string cite of cases that are all similarly distinguishable. (See OBM, 51 n. 22).

a judgment which enjoins the originator of defamatory statements posted on the service provider's Web site." (Op., 28).

Yelp similarly mischaracterizes the court's "conclu[sion] that Yelp was acting '*with* or *for*' Bird *as the publisher of the statements at issue*." (OBM, at 49, citing Op., 30-31). The court upheld the removal order not because Yelp was acting as the "publisher of the statements at issue," but because Yelp is an entity with a general duty of obedience to the court, through whom Bird is flouting a court order. (See Op., at 30-31 ["sanctioning Yelp for violating a court order… would not impose liability on Yelp as a publisher or distributor of third party content."]). As described in the above discussion from the *Barnes* case, this is a significant distinction.

Remarkably, Yelp argues that it cannot face this contempt power of the court because Section 230 bars "'cause[s] of action' against website publishers like Yelp." (OBM, 54, quoting *Roommates.com*, 521 F.3d at 1174-75). However, Yelp cites no authority for its proposition that contempt sanctions constitute a "cause of action." Given the wide variety of acts that may constitute "contempt," many of which do not require a party to be a named defendant, it appears that California law treats contempt as a remedy, not a cause of action. (See C.C.P. § 1209(a)). Further, as the Court of Appeal noted, a "contempt proceeding is not a civil action." (Op., 31, quoting *Freeman v. Superior Court* (1955) 44 Cal.2d 533, 536).

In short, this case against Bird does not implicate the CDA immunity. Nothing in the language of the CDA prevents the court from enforcing its own judgments through a third party, even if that third party happens to be a website.

B. CDA Immunity Was Designed To Protect Internet Companies From Tort Damages.

"The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." (*Roommates.com*,521 F.3d at 1164). Instead, as Yelp emphasizes throughout its brief, CDA immunity was designed as a shield from tort liability. This legislative background only reinforces Hassell's reading of the statutory text, which allows them to enforce their valid judgment against Bird.

Long before the electronic age, traditional defamation law imparted various forms of liability to "[e]veryone who takes part in the publication, as in the case of the owner, editor, printer, vendor, or even carrier of a newspaper is charged with publication." (*Barnes*, 570 F.3d at 1104). The standard of liability on these participants largely depended on their role. "Primary publishers [such as newspapers and magazines] were held to a strict liability standard, whereas secondary publishers [such as news vendors and booksellers] were only liable for publishing defamation with actual or constructive knowledge of its defamatory character." (*Id.*). Thus, the more control exercised over the defamatory remarks, through editing, the more liability faced by the publisher. (See *Barrett*, 40 Cal.4th at 44-45 [describing historical distinction].)

These traditional delineations did not mesh well with the development of the internet. For example, in 1991, CompuServe, a formerly popular internet service provider, escaped liability in a defamation case regarding statements made on its online forum. (See *Cubby, Inc. v. Compuserve, Inc.* (S.D.N.Y. 1991) 776 F.Supp. 135, 141). The *Cubby* Court reasoned that it would be impractical for CompuServe, like a library, to be held accountable for all of the content it stored, when it is impossible

to familiarize itself with such a vast amount of information. The victory was a narrow one, however, as the court held that CompuServe could still be held liable if it was on notice of the defamatory character of the statements. (See *id*. at 140-41). The Court therefore left open liability on an internet company as a secondary publisher.

The next major defamation case against an internet company raised the stakes considerably. It was a $200 million defamation case brought by an investment brokerage house against Prodigy based on statements posted by an unidentified third-party in one of its online bulletin boards. However, Prodigy operated its forums differently than CompuServe. Attempting to protect its users from potentially offensive content, such as nudity, Prodigy had a policy of manually reviewing all its users' messages prior to posting. The court held that Prodigy's heavy hand in screening material for offensive content elevated it to the status of a primary publisher, leaving it strictly liable for all its content. (See *Stratton Oakmont v. Prodigy Servs. Co*. (N.Y. Sup. Ct. May 24, 1995) INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229).

Congressional reaction to the *Stratton Oakmont* decision was swift. Later that summer, Congress was already debating whether internet companies should receive immunity from such suits. As reasoned by Rep. Cox, the *Stratton Oakmont* decision "is backward. We want to encourage people like Prodigy… to do everything possible for us, the customer, to help us control… what comes in and what our children see." (141 Congressional Record H8469–H8470 (daily ed., June 14, 1995) [statement of Rep. Cox]). While removing disincentives for internet companies to engage in self-censorship of offensive material, the proposed CDA immunity also had the effect of furthering free speech. Otherwise, "[t]he

specter of tort liability in an area of such prolific speech would have an obvious chilling effect" on speech. (*Zeran*, 129 F.3d at 331). These goals have often been described as the "dual purposes" of the CDA immunity shield. (See *Barrett*, 40 Cal.4th at 51 (citing *Zeran*, 129 F.3d at 333; see also OBM, 38).

Devoting considerable space in its brief to this point, Yelp concedes that "Section 230 grew out of cases… that attempted to adapt common law *tort liability* principles to Internet publishers." (OBM, 36 [emphasis added], citing *Barrett*, 40 Cal.4th at 44).[18] Indeed, court decisions consistently recognize that the CDA was designed to defeat the potentially destructive effects of tort damages. (*Zeran*, 129 F.3d at 330 ["The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that *tort*-based lawsuits pose to freedom of speech…" [emphasis added]]; *Barrett*, 40 Cal.4th at 57 ["Congress intended to create a blanket immunity from tort liability for online republication of third party content."]). Of course, "Congress could have written the statute [even] more broadly, but it did not." (*Internet Brands*, 824 F.3d at 853). Courts have therefore been "careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability." (*Roommates.com*, 521 F.3d at 1164 n.15).

The legislative background of the CDA demonstrates that this case does not offend its terms. Unlike *Stratton Oakmont*, this case does not

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[18] Yelp even adds special emphasis to this history to drive the point home. (See OBM, 41 [CDA precludes "any state law, ***including*** imposition of tort liability…"], 45 [Plaintiffs "may *only seek recovery from the original source of the statement*"]; 40, quoting *Barrett*, 40 Cal.4th at 46-47, 53 [Congress sought to avoid "the sword point of tort liability"]).

seek tort liability against Yelp on any legal theory, much less a theory that it faces publisher liability as one who reviews and edits third-party content. It does not even attempt to rope Yelp into a "costly and protracted legal battle[]." (See OBM, 39, quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.* (4th Cir. 2009) 591 F.3d 250, 254-255). Nor could this case have a chilling effect on speech because, outside of these three postings – which were judicially determined to be defamation-- Yelp is welcome to maintain its third-party content.

In one final swipe at the removal order, Yelp seeks to knock down the court's decision as part of simple "gamesmanship that attempts to circumvent Section 230." (OBM, 54, citing *Kimzey v. Yelp! Inc.* (9th Cir. 2016) 836 F.3d 1263). However, the *Kimzey* case, as all cases cited by Yelp, involves a plaintiff who attempted to sue Yelp directly, seeking monetary damages on the "cryptic" theory that Yelp "in effect created and developed" the reviews at issue. (*Kimzey*, 836 F.3d at 1265-1266). In other words, it was the plaintiff's inappropriate attempt to pin the obvious third-party content on Yelp that doomed its case. Such "gamesmanship" is clearly not at play here, as Hassell have sought merely to give meaning to the court judgment they obtained against a named tortfeasor.

VI. THE PUBLIC GOOD IS NOT SERVED BY PERMITTING YELP TO PERPETUATE ADJUDICATED LIBEL.

Finally, Yelp presents this Court with a sky-is-falling alert, arguing that the instant decision will result in a flood of fraudulent lawsuits against fake defendants. (OBM, 55). Not only are these hypothetical concerns overblown, but they should not supplant the palpable harm already inflicted on tort victims such as Hassell.

First and foremost, although Yelp makes multiple attempts to disparage Hassell in its brief, its concerns about fraudulent litigation conduct are not before the Court in this case. Hassell filed a defamation case lawsuit against a named defendant, providing substantial notice and opportunity for her to defend herself (as well as actual notice to Yelp). During a prove-up hearing, the trial court received voluminous evidence, and determined that Bird had indeed defamed Hassell through her Yelp postings. The court awarded monetary damages in favor of Hassell in the amount of $557,918.85, along with injunctive relief against Bird. This case is indeed far from the fraudulent scheme presented by Yelp; Hassell did everything correctly. Under Yelp's own Content Guidelines and Terms of Service, which forbid "false or defamatory" posts, it even claims it will – and has – removed such posts. (AA.V.3.T27.00756). This evidences Yelp's gamesmanship, not Hassell's.

Furthermore, there are procedural safeguards that protect the judiciary from Yelp's phantom fraud claim. After all, a plaintiff like Hassell who sues for defamation must still prove defamation and damages at an evidentiary hearing, even if the defendant has defaulted. (Code Civ. Proc. § 585). This prove-up requirement prevents people from obtaining redress against reviews that, in Yelp's words, are merely "critical," because critical opinions without false statements of fact are *not* defamatory and would not pass judicial scrutiny. And a plaintiff who fraudulently engages in this process subjects itself to a number of harsh consequences, including civil liability under anti-SLAPP laws (as was threatened by Yelp here) or malicious prosecution torts, criminal liability for perjury, and a host of other court sanctions. (See, e.g., Code Civ. Proc. § 425.17 *et seq.*). With all of these safeguards, it is difficult to extrapolate very much from the one

Maryland example cited by Yelp where a reputation management company apparently filed a fraudulent suit against a defendant, without informing either the plaintiff or the defendant. (See OBM, 55; RJN, Ex. A-B).

Finally, there are stronger countervailing policy concerns that support the Court of Appeal's decision. After all, a person's right to petition the court for a redress of grievances is one of the most precious of rights. (*BE&K Constr. Co. v. NLRB* (2002) 536 U.S. 516, 524-25). That fundamental right is meaningless if the court system is unable to issue judgments that it can actually enforce. This relief is especially important in the context of defamation because "[f]alse statements of fact… cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective." (See, e.g., *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46, 52).

Even though Yelp touts itself as a champion for constitutional rights, it takes the absurd position that this Court should limit an individual's ability to remedy injurious defamation in order to provide increased protections for defamatory remarks. What if Bird cannot comply with the injunction because, for instance, she can no longer log in to Yelp's website? What if she is incapacitated, or deceased? Hassell are doomed to remain victims, and endure unending harm. Yelp's proposed result is backward.

VII. CONCLUSION

For the forgoing reasons, the opinion of the Court of Appeal should be affirmed in its entirety.

Dated: January 24, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, Plaintiffs and Respondents hereby certify that the typeface in the attached brief is proportionally spaced, the type style is roman, the type size is 13 points or more and the word count for the portions subject to the restrictions of Rule 8.204(c)(3) is 13, 931.

Dated: January 24, 2017

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Case No. S235968

I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 100 Bush Street, Suite 1800, San Francisco, CA 94104. On January 24, 2017, I served the following document(s):

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 24, 2017, at San Francisco, California.

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