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The Honorable Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: Petition for Review, *Hassell v. Bird*, Case No. S235968
Amicus Curiae Letter of Airbnb, Inc.

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

Pursuant to Rule 8.500(g) of the California Rules of Court, Airbnb, Inc. ("Airbnb") submits this *amicus curiae* letter in support of the Petition for Review filed by Yelp Inc. ("Yelp") in *Hassell v. Bird*, Case No. S235968.

The Court of Appeal decision in this case threatens all Internet-based businesses that enable (and rely on) third-party users to generate and post content. The Internet has flourished as a platform for free expression and commerce in large part because Section 230 of the Communications Decency Act, 47 U.S.C. § 230 (the "CDA"), has shielded websites from liability based on user-provided content. In providing a "broad grant of webhost immunity," the CDA "gives effect to Congress's stated goals" of "'promot[ing] the continued development of the Internet and other interactive computer services,'" and "'preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.'" (*Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) (en banc) 521 F.3d 1157, 1174–75, 1180 [quoting § 230(b)(1), (2)].)

The Court of Appeal decision here creates a significant gap in that broad grant of immunity by upholding an injunction that requires Yelp to remove certain user-generated content from its platform or face significant contempt sanctions. In doing so, the Court of Appeal decision conflicts with federal law and the overwhelming consensus of courts across the country that have interpreted the CDA. The decision would weaken the critical legal protection that has enabled Internet-based businesses to grow and thrive. To prevent that result and correct the Court of Appeal's erroneous ruling, Airbnb urges this Court to grant review.¹

* * *

¹ For the reasons stated in Yelp's Petition for Review and the other *amici* letters in this case, Airbnb also agrees that the Court of Appeal erred by allowing the injunction to be applied to Yelp despite the fact that Yelp was not a party to the proceeding resulting in the injunction. But this letter focuses on the CDA concerns presented by the Court of Appeal decision.

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Airbnb provides an Internet platform through which guests desiring to book accommodations and hosts listing unique accommodations available for rental can locate each other and enter into direct agreements to reserve and book travel accommodations on a short and long-term basis. Third-party hosts, rather than Airbnb itself, create the listings on the Airbnb platform, and Airbnb does not constantly review or monitor all listings posted to its website. As such, Airbnb has a keen interest in the outcome of this case because its day-to-day business relies heavily on the protection that the CDA provides to publishers of third-party content—protection that the Court of Appeal decision here calls into question.

The Court of Appeal determined that the CDA does not bar enforcement against Yelp of an injunction that requires Yelp to remove certain posts from its platform (and potentially face contempt sanctions for failure to comply). That decision directly conflicts with the CDA. Since its passage in 1996, the CDA has functioned as the bedrock upon which online services of all kinds and sizes have founded and built their operations. As this Court has previously explained, the CDA has “been widely and consistently interpreted to confer broad immunity” for “those who use the Internet to publish information that originated from another source.” (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39.) In doing so, the CDA evinces “a strong demonstration of legislative commitment to the value of maintaining a free market for online expression,” and seeks to prevent “complaining parties [from imposing] substantial burdens on the freedom of Internet speech by lodging complaints whenever they [are] displeased by an online posting.” (*Id.* at pp. 56–57.)

The CDA implements its grant of immunity by providing that no website “shall be treated as the publisher or speaker of any information provided by another information content provider”—*i.e.*, third-party content published on the site. (47 U.S.C. § 230(c)(1).) The CDA immunizes such websites from “liability” under any “inconsistent” state or local law. (*Id.* § 230 (e)(3); see *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1102.) In applying the CDA, courts look to “whether the duty” imposed on a party “derives from the defendant’s status or conduct as a ‘publisher or speaker.’ If it does, section 230(c)(1) precludes liability.” (*Barnes*, *supra*, at pp. 1101–02.)

The Court of Appeal’s decision contravenes the CDA for two main reasons. *First*, the Court of Appeal erroneously concluded that the injunction against Yelp in this case “does not violate section 230 because it does not impose any liability on Yelp.” (Opinion at 28; see also *id.* at 29 [noting that the injunction “direct[s] Yelp to remove only those reviews that are covered by the injunction [and therefore] does not impose any liability on Yelp”].)²

This holding construes the term “liability” too narrowly. Liability encompasses more than merely monetary sanctions; it extends to an order of injunctive relief enforceable through

² The slip opinion is attached to Yelp’s Petition for Review and is cited as “Opinion” throughout.

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contempt sanctions. Black’s Law Dictionary defines liability as the “condition of being legally obligated” or the “legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.” (*Liability*, Black’s Law Dict. (10th ed. 2014).) That broad conception of liability also has been applied in the CDA context. Indeed, one court has explicitly held that the CDA “should not be read to permit claims that request only injunctive relief” because injunctive relief may be “at least as burdensome to the service provider as damages, and is *typically more intrusive*.” (*Noah v. AOL Time Warner, Inc.* (E.D. Va. 2003) 261 F.Supp.2d 532, 540, italics added; see also *Optinrealbig.com, LLC v. Ironport Systems, Inc.* (N.D. Cal. 2004) 323 F.Supp.2d 1037, 1047 [finding defendant “immune from liability” under the CDA and denying request for injunctive relief “[f]or this reason alone,” italics added].)

This understanding of “liability” is part and parcel of the CDA’s broad goal of preventing government efforts to control the “overall design and operation of ... website[s]” and dictate “what content can appear on the website and in what form.” (*Jane Doe No. 1 v. Backpage.com, LLC* (1st Cir. 2016) 817 F.3d 12, 21.) If the Court of Appeal’s ruling were to stand as binding precedent, it would open the door in California to intrusive efforts to control the business operations and editorial decisions of websites (and the circumvention of their own voluntary monitoring efforts) through requests for injunctive relief in cases in which they are not parties. Indeed, the fact that websites like Yelp are not parties to the underlying litigation militates in favor of providing them with greater, not less, protection. (Cf. *People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 769 [“The courts ... may not grant an ... injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.”].)

Second, the Court of Appeal wrongly concluded that even if Yelp might eventually face monetary sanctions under the injunction, those sanctions, too, do not implicate the CDA, because they would not “impose liability on Yelp as a publisher or distributor of third party content.” (Opinion at 31.) But there is no question that imposing contempt sanctions on Yelp for failing to take down certain posts treats Yelp as the publisher of that content, in direct violation of the CDA.

Courts have adopted a “capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party,” in keeping with the “broad construction accorded to section 230 as a whole.” (*Jane Doe No. 1, supra*, 817 F.3d at p. 19.) Courts have emphasized that “publication involves reviewing, editing, and deciding whether to publish *or to withdraw from publication* third-party content.” (*Barnes, supra*, 570 F.3d at p. 1102, italics added; see also *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 829 [same].) “[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove.” (*Barnes, supra*, at p. 1103; see also *Gavra v. Google Inc.* (N.D. Cal. July 17, 2013) 2013 WL 3788241, at *2 [CDA provides immunity where website “refrain[s] from removing objectionable content, despite receiving notice” of it].) Here, any liability that Yelp would face for failing to comply with the injunction would derive directly and straightforwardly from its

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status as the publisher of third-party reviews. If Yelp never published the reviews (or if Yelp chose, in its role as publisher, to remove them), it would not face any contempt liability. Therefore, sanctioning Yelp for a failure to remove reviews treats it as the publisher of information provided by a third-party, in violation of the CDA.

The Court of Appeal's flawed interpretation of the CDA creates a serious concern that CDA protection will be chipped away by injunctions like the one at issue here. As the Ninth Circuit has cautioned, "close cases ... must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites" (*Roommates.com, LLC, supra*, 521 F.3d at p. 1174.) The Court of Appeal decision does just that, allowing the policies underlying the CDA to be circumvented by thousands of individual injunctions that will force Internet-based businesses to remove certain content. Such liability may well lead to platforms removing content proactively to avoid repeated intrusions into their operations and threats of criminal penalties—which is exactly the sort of "obvious chilling effect" on Internet content that the CDA was meant to prevent, and which would undermine the usefulness of online services such as Yelp. (*Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 331; see also *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.* (7th Cir. 2008) 519 F.3d 666, 668–69 ["An online service could hire a staff to vet the postings, but that would be expensive and may well be futile: if postings had to be reviewed before being put online, long delay could make the service much less useful"].) And the risk of such injunctions proliferating and suppressing valuable, protected speech is all too real, as recent experience demonstrates.³

The Court should grant the Petition for Review and correct the Court of Appeal's flawed analysis of the CDA, which contravenes Congress's policy judgment and poses a serious threat to the vitality of speech and commerce on the Internet.

Respectfully submitted,



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³ See Paul Alan Levy, *Georgia Dentist Mitul Patel Takes Phony Litigation Scheme to New Extremes Trying to Suppress Criticism* (Aug. 19, 2016) Consumer Law & Policy Blog, <http://pubcit.typepad.com/clpblog/2016/08/georgia-dentist-mitul-patel-takes-phony-litigation-scheme-to-new-extremes-as-a-way-of-suppressing-cr.html> (discussing "phony litigation scheme" in which dentist allegedly fraudulently obtained injunction to force removal of unflattering Yelp reviews).

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO


I am employed in the County of San Francisco, State of California. I am over the age of 18 and am not a party to this action. My business address is 560 Mission Street, Twenty-Seventh Floor, San Francisco, CA 94105-2907.

On August 26, 2016, I served the foregoing **Amicus Curiae Letter of Airbnb, Inc.** in *Hassell v. Bird*, Case No. S235968 before the Supreme Court of California, on each person in the enclosed Service List.

I served the foregoing document by U.S. Mail, as follows: I placed true copies of the document in a sealed envelope addressed to each interested party in the Service List. I placed the envelope with postage thereon fully prepaid, for collection and mailing at Munger, Tolles and Olson's offices in San Francisco, California. I am readily familiar with Munger, Tolles and Olson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business 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 August 26, 2016, at San Francisco, California.


Maureen Lechwar

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