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August 10, 2016

VIA MESSENGER

Justices of the Supreme Court of California
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: *Hassell v. Bird*, Case No. S235968: Amicus Curiae Letter of Google Inc.

To The Honorable Justices of the Supreme Court of California:

Pursuant to Rule 8.500(g) of the California Rules of Court, Google Inc. ("Google") submits this amicus curiae letter in support of Yelp Inc.'s ("Yelp") petition for review of the decision of the Court of Appeal.

This case involves an exceptionally important issue to all online service providers, including Google. The Court of Appeal ruled that Yelp, a non-party, could be held in contempt for violating an injunction requiring it to remove a user-created review from its service, despite Yelp having no prior notice of the order—and notwithstanding Yelp's status as an "interactive computer service" expressly immunized under federal law for publishing third party content.

The Court's ruling significantly expands the permissible scope of injunctions against non-parties, contrary to longstanding principles of California law and due process. It also undermines established expectations about when online intermediaries—including publishers of user-submitted content, search engines, and other services that help people access information on the Internet—may be required, on pain of contempt liability, to censor third-party speech. The decision below is wrong and, if left unaddressed, will create serious operational problems for online service providers, profoundly eroding the important protections afforded by Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230. Review should be granted.

This Case Is Very Important To Google And Other Online Service Providers

Google is a leading online service provider that operates one of the world's most popular search engines. Google also offers a range of other products and services (including YouTube and Blogger) that allow users to express themselves and find the world's information. Given its commitment to hosting and providing access to third-party content, Google routinely litigates cases involving the "robust" immunity that Congress gave online service providers under Section 230 of the CDA. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).

Section 230 protects online intermediaries from liability based on information provided by third parties. 47 U.S.C. § 230(c)(1). The statute's aim was to foster a vibrant Internet, one in which intermediaries would not be forced on pain of liability to restrict access to third-party speech. *See*

Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."). In enacting Section 230, Congress struck a balance between protecting the "free exchange of information and ideas over the Internet" and fostering the removal of unlawful content. *Carafano*, 339 F.3d at 1122. "Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect." *Zeran*, 129 F.3d at 331.

To that end, the CDA bars all "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, *withdraw*, postpone or alter content[.]" *Id.* at 330 (emphasis added). "Without § 230, persons who perceive themselves as the objects of unwelcome speech on the internet could threaten litigation against interactive computer service providers, who would then face a choice: remove the content or face litigation costs and potential liability. Immunity shields service providers from this choice." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407-08 (6th Cir. 2014) (citation omitted).

While this immunity is designed to protect intermediaries like Google from being required to remove third-party content, Google routinely receives *ex parte* court orders like the one issued in this case. Those injunctions purport to require Google to remove allegedly unlawful content created by others, even though it is neither a party to the underlying litigation nor been provided with an opportunity to be heard. Google challenges these orders (which often arise from default judgments) by invoking Section 230 and bedrock principles of due process, including the near-universal rule that injunctions can only bind parties to a case and those in "active concert" with the parties. *See, e.g.*, *Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010).

The Court of Appeal's unprecedented ruling in this case dilutes these important constitutional and statutory protections. By allowing Yelp to be held in contempt for failing to remove third party speech in a case where it was not a party, the Court significantly expanded the reach of *ex parte* injunctions and significantly narrowed the protections of the CDA.

The Decision Below Is Wrong And Should Be Corrected

Review is needed here not just because this case is important and involves recurring issues, but because the Court of Appeal's decision is wrong.

First, neither California law nor due process allows a service provider like Yelp to be bound by an injunction requiring it to remove user-submitted content in a case where it is not a party. Due process requires notice and an opportunity to be heard before a person is bound by a court order. Yelp did not learn about the injunction until after it had issued. Beyond that, an injunction can bind only a party or someone actively working with a party to help evade the injunction's terms. *See, e.g.*, *Planned Parenthood Golden Gate v. Garibaldi*, 107 Cal. App. 4th 345, 353 (1st Dist. 2003) ("[A] theory of disobedience of the injunction cannot be predicated on the act of a person not in any way included in its terms or acting in concert with the enjoined party and in support of his claims.") (citation omitted). Nearly a century ago, Judge Learned Hand explained this essential limitation:

> [N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court. Thus, the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. ***This means that the respondent must either abet the defendant, or must be legally identified with him.***

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930) (emphasis added). This standard was not met here. By effectively treating Yelp as an aider and abetter merely based on the ordinary operation of its service—publishing user-submitted reviews and indexing those reviews so that internet users can find them—the Court of Appeal expanded the scope of *ex parte* injunctions beyond what equity allows. Its ruling conflicts with the Seventh Circuit's decision in *Blockowicz, supra*, which held in nearly identical circumstances that a nonparty online intermediary (Ripoff Report) could *not* be bound by an injunction requiring it to remove user-submitted postings.

Second, the Court of Appeal's decision is irreconcilable with Section 230 of the CDA. That provision was specifically "enacted to protect websites against the evil of liability for failure to remove offensive content." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (*en banc*). Here, however, the Court approved an injunction that specifically required Yelp (an "interactive computer service" provider) to remove allegedly defamatory content created by someone else. That is exactly what the CDA was meant to prevent. There is no question that if the plaintiff in this case had named Yelp as a party and sought either damages or injunctive relief from it, Section 230(c) would have barred that result. *See, e.g., Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684 (1st Dist. 2001) (holding that the CDA precludes claims for injunctive relief). Yet the Court of Appeal allowed an identical injunction—with the same penalties for noncompliance—merely because Yelp was *not* named as a defendant in this case. It cannot be that the CDA gives service providers less legal protection when they are strangers to a case than when they are actually sued for violating the law. Whether a court seeks to hold an interactive computer service directly liable as a defendant or to enjoin it as an aider and abettor, Section 230 applies. In suggesting otherwise, the Court of Appeal did precisely what the statute expressly prohibits: treating the provider "as the publisher or speaker of ... information provided by another information content provider." 47 U.S.C. § 230(c)(1).

The Court of Appeal has seriously unsettled the law by requiring Yelp to take action that Congress specifically determined is beyond the power of any court. The decision below is already being used to try to expand the law in dangerous ways. For example, plaintiffs in a pending case in Canada involving Google have cited the decision to try to justify an unprecedented blocking order that would require Google to remove certain search results websites across the entire world. Additionally, by departing from long-established precedent throughout the country, the decision

below will incentivize forum shopping, with parties seeking removal of content from the Internet turning to California courts to achieve through *ex parte* injunctions what the CDA precludes everywhere else.

The Court should grant the petition for review and address the important issues presented in this case. On the merits, Google requests permission to submit an amicus brief explaining more fully why the ruling below should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

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I am employed in the County of Santa Clara, State of California. I am over the age of 18 and am not a party to this action. My business address is Wilson Sonsini Goodrich & Rosati, P.C. ("WSGR"), 650 Page Mill Road, Palo Alto, California 94304.

On August 10, 2016, I served the foregoing **Amicus Curiae Letter of Google 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 each such envelope with postage thereon fully prepaid, for collection and mailing at WSGR's offices in Palo Alto, California. I am readily familiar with WSGR's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 10, 2016 in Palo Alto, California.

Deborah Grubbs

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