Case No. S235968

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

AVA BIRD,
Defendant,

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

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND PROPOSED BRIEF OF *AMICI CURIAE* FIRST AMENDMENT AND INTERNET LAW SCHOLARS IN SUPPORT OF APPELLANT, YELP, INC.

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INTEREST OF THE AMICI CURIAE

The amici First Amendment and Information Law Scholars include:

• Derek Bambauer, Professor of Law, University of Arizona College of Law

• Jane Yakowitz Bambauer, Associate Professor of Law, University of Arizona College of Law

• Eric Goldman, Professor of Law and Co-Director of the High Tech Law Institute, Santa Clara University School of Law

• James Grimmelmann, Professor of Law, Cornell Law School and Cornell Tech

• Edward Lee, Professor of Law, Chicago-Kent College of Law at the Illinois Institute of Technology

• David Levine, Associate Professor of Law, Elon University School of Law

• Yvette Joy Liebesman, Professor of Law, Saint Louis University School of Law

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• Zahr Said, Associate Professor of Law and Director of the Center for Advanced Research and Studies on Innovation Policy, University of Washington School of Law

• David Sorkin, Associate Professor of Law, The John Marshall Law School

• Rebecca Tushnet, Professor of Law, Georgetown University Law Center

These scholars are dedicated to the study of the First Amendment and Internet law, and each has published articles on these subjects. Based on their experience, the amici are concerned that the decision of the Court of Appeal will imperil the protection of speech on the Internet. The amici thus seek to help the Court understand why the decision below should be reversed on statutory and constitutional grounds.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Yelp cannot be treated as a "publisher" of others' unlawful speech for the purposes of civil liability (given 47 U.S.C. §230); Moreover, it enjoys a First Amendment right to publish, host, and protect such third party content on its website. This right exists separately and independently from the First Amendment rights of the authors whose content it hosts. Thus, Yelp is entitled to notice and an opportunity to be heard to vindicate its First Amendment rights and cannot be bound by an injunction based on a judgment in a case to which it was not a party.

ARGUMENT

I. Yelp's editorial judgments about third party speech are guaranteed by a distinct First Amendment right separate from that of Bird

The U.S. Supreme Court has recognized a First Amendment right to edit and distribute speech separate from the right to engage in speech in the first instance. *See Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241; *Reno v. ACLU* (1997) 521 U.S. 844, 868; *Columbia Broadcasting, Inc. v. Democratic Nat'l Comm.* (1973) 42 U.S. 94. In *Tornillo,* the Court found that newspaper publishers' editorial judgments about the choice of material to include were part of a "crucial process," and government regulation of this editorial process was inconsistent with "First Amendment guarantees of a free press." *Miami Hearld Publishing Co.,* 418 U.S. at 258; *See also Hurley v. Irish American Gay, Lesbian, & Bisexual Group* (1995) 515 U.S. 557, 570 (finding that organizers of a parade have First Amendment interests in

[1] Amici thank Mark Verstraete, the Privacy and Free Expression Fellow at the University of Arizona James E. Rogers College of Law, for excellent research and support during the drafting of this brief. No disclosures are required under Rule 8.520 (f), as no party or counsel for any party in this case has contributed to the authoring or financing of this brief.

choosing the participants who express speech, even when the organizer "is rather lenient in admitting participants"); *New York Times v. Sullivan* (1964) 376 U.S. 254, 266 (concluding that the *New York Times* had First Amendment interests in the paid editorial advertisements that it chose to publish); *Arkansas Educational TV v. Forbes* (1998) 523 U.S. 666 (affirming First Amendment protection for broadcasters' editorial discretion).

Yelp performs traditional editorial functions in an effort to create a speech product that is valuable to consumers. It "organizes reviews for display, removes reviews that violate its terms of service, and applies automated software to all reviews posted." *See* Yelp Reply Brief at 19. Yelp even performed editorial functions in regard to the specific speech at the base of this lawsuit by highlighting Bird's post as a "recommended review." *See Hassell v. Bird* (2016) 247 Cal. App.4th 1336, 1346.

In light of Yelp's editorial choices, the Court of Appeal erred in claiming that Yelp lacks First Amendment rights in this case. *See Hassell,* 247 Cal.App.4th at 1357-59. The Court of Appeal struggled to distinguish *Marcus v. Search Warrants,* (1961) 367 U.S. 717, which had recognized the First Amendment interests of book sellers. The Court of Appeal reasoned that Yelp differs from the *Marcus* appellants because the *Marcus* book sellers "personally engaged in protected speech activities by selling books, magazines, and newspapers," while Yelp is merely an "administrator" of a forum. *Hassell* (2016) 247 Cal.App.4th at 1358. But Yelp is clearly more engaged in protected speech than the booksellers in *Marcus.* Yelp's editorial decisions are comparable to a magazine publisher's since Yelp's discretionary decisions help shape the content of the website. *See Bigelow v. Virginia* (1975) 421 U.S. 809 (holding that newspapers are entitled to First Amendment rights as publishers)*; Arkansas Educational Television v. Forbes* (1998) 523 U.S. 666 (finding that a broadcaster's selection and presentation of programming is subject to First Amendment protection).

Moreover, even if Yelp chose to alter or remove very little content, opting to aggregate the content of users in a maximally inclusive way, that choice, which is nevertheless editorial in nature, would make Yelp at least as "personally engaged in protected speech activities" as a magazine retailer. *Hurley v. Irish American Gay, Lesbian, & Bisexual Group* (1995) 515 U.S. 557, 570 ([A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact

message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.") In any event, Yelp actively uses editorial control by routinely removing and promoting content on its site.

Yelp—in editing and curating its website—acted under its own set of First Amendment rights that are additionally protected from liability under Section 230 of the Communications Decency Act. Section 230 only strengthens Yelp's legal position.

A naïve reading of §230 can cause confusion because it instructs lawmakers that "no provider" of a web forum "shall be treated as the publisher or speaker" of content provided by an end user. 47 U.S.C. §230(c)(1). This puts Yelp in an awkward position of insisting that it is a publisher for the purposes of First Amendment coverage, but is not a publisher for the purposes of civil liability. The Court of Appeal seized on this seeming contradiction. "In order to claim a First Amendment stake in this case, Yelp characterizes itself as a publisher or distributor. But, at other times Yelp portrays itself as more akin to an Internet bulletin board — a host to speakers, but in no way a speaker itself." *Hassell,* 247 Cal.App.4th at 1358. This observation helped justify the Court of Appeal's conclusion that Yelp has no First Amendment interests in Bird's posts.

The Court of Appeal misunderstands how §230 interacts with the First Amendment. §230 was not designed to strip web forums like Yelp of their First Amendment rights. Instead, Section 230 was motivated by a desire to give *extra* protection to web publishers so that they could have the freedom to make editorial decisions without accruing the legal risks that traditionally apply to publishers despite their First Amendment rights. *Zeran v. American Online, Inc* (4th Cir. 1997) 129 F.3d 327, 330 ("The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. 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."); *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018; *Barrett v. Rosenthal* (2006) 40 Cal. 4th 33.

One of the policy goals of the statute was to encourage more editorial decision-making by Internet intermediaries without fear that those editing choices would increase the potential for liability by converting a website from a speech distributor to a publisher. *Barrett,* 40 Cal.4th at 69-

70; *Zeran,* 129 F.3d at 331. But web forums like Yelp remain free to use their editorial powers generously or sparingly as they think best. *See* 47 U.S.C. §230 (b) (3) ("It is the policy of the United States… to encourage the development of technologies which *maximize* user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services") (emphasis added). Section 230 did not, and could not, deprive Yelp of its First Amendment rights as a publisher. Instead, it protects Yelp from being *treated* like a publisher for the purpose of imposing civil liability risks.

In short, even though most of the content on Yelp is originally created by users, Yelp has First Amendment rights as the curator and distributor of aggregated, expressive material. The additional statutory protections offered by Section 230 do not strip those First Amendment rights away. They add to them.

II. Ex Parte restrictions on First Amendment activity are almost always invalid

The U.S. Supreme Court has recognized the dangers of *ex parte* restrictions on speech. In *Carrol v. President & Commissioners of Princess Anne* (1968) 393 U.S. 175, the Court held that such orders were almost always invalid, except in rare cases of "burgeoning violence." *Id.* at 180; *Near v. Minnesota* (1931) 283 U.S. 697, 714. Even "temporary restraining orders of short duration," are unconstitutional if they infringe on "basic freedoms guaranteed by the First Amendment," unless "it is impossible to serve or notify the opposing parties and give them an opportunity to participate." *Id.*

Ex parte orders are still unconstitutional when Plaintiffs give notice to one party (such as an author) but fail to give notice to another entity (such as a website operator) whose distinct legal rights are threatened by the proceedings, as is the case here.

The procedural deficiency of this regime is especially acute when the two speakers are in a distant relationship like Yelp and Bird. Yelp has published over 100 million reviews written by millions of distinct users.[2] Yelp cannot be expected to be aware of all actions against

[2] Andrea Rubin, *Yelpers Write 100 million reviews and counting.* YELPBLOG.COM https://www.yelpblog.com/2016/03/yelp-100-million-reviews-and-counting

reviewers that may implicate its distinct First Amendment rights as the publisher of those reviews. This is the nature of the global Internet and part of the wisdom and justification for 47 U.S.C. §230. *See Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 72-73; *Zeran v. American Online Inc.* 129 F.3d 327, 331 (justifying §230 by claiming that it would be impossible for service providers to screen millions of postings for potential tort liability).

Moreover, the opportunity for Bird to vindicate her First Amendment rights cannot substitute or exhaust Yelp's own right to free expression. First, the publisher and the speaker may have different speech-related goals. Yelp is more invested in the value listeners derive from the speech hosted on its website than Bird. Yelp has a strong interest in maintaining the credibility and completeness that its published reviews provide to viewers. Bird, however, may have less concrete or more fleeting concern for future readers. Bird may have written reviews for her own personal interest in self-expression or catharsis. Or she may have concern for listeners, but not the direct and financial interest that a publisher does. Either way, she may not care as much as Yelp if the review is censored and could rationally choose to avoid the expense of vigorously defending her speech even if it's truthful, non-defamatory, and beneficial for listeners. The First Amendment does not and should not merge Yelp's constitutional interests as an editor and publisher with the author's.

The U.S. Supreme Court is rightly concerned about the risks of judicial determinations made *ex parte*. In considering the propriety of these judgments, the Court noted that such proceedings lacked "the fundamental instrument for judicial judgment: an adversary proceeding in which both parties can participate" *Carrol v. Princess Anne,* 393 U.S. at 183. Continuing this line of reasoning, the Court stated that without adversity "there is insufficient assurance of the balanced analysis and careful conclusions, which are essential in the area of First Amendment adjudication." *Id.*

In this case, the restrictions on Yelp's speech interests are based on an *ex parte* order in which Yelp was denied an opportunity to defend its First Amendment rights. Worse still, because the named defendant (Bird) failed to defend the defamation lawsuit, the *ex parte* judgment never evaluated the merits of the claim to determine whether the speech was actually defamatory. Binding Yelp to an uncontested default proceeding in which it did not participate is a particularly grave threat to free speech. *See Lee Art Theatre Inc. v. Virginia* (1968) 392 U.S. 636 (holding that seizure of films failed to provide sensitivity

to freedom of expression); *Quantity of Copies of Books* (1964) 378 U.S. 205 (plurality op.) (finding that not offering an adversarial hearing before infringing First Amendment rights made the procedure constitutionally deficient).

Moreover, the Court of Appeal opinion runs counter to precedents that require judges to use restraint when restricting speech-related activities. *See Carroll v. Princess Anne* (1968) 393 U.S. 175, 183 (holding that "an order issued in the area of First Amendment rights must be couched in the narrowest terms possible"*); United Farm Workers Organizing Comm v. Superior Court* (1971) 4 Cal.3d 556 (holding that the state "may not employ means that broadly stifle fundamental personal liberties [in the area of First Amendment rights] when the end can be achieved more narrowly") (citations omitted).

III. Yelp cannot be bound by a judgment to which it was not a party

Yelp's procedural due process rights have been violated.

Hassell argues "there is simply no First Amendment protection where, as here, the statements at issue are statements that have been conclusively adjudged to be defamatory." Respondents' Answer to Yelp's Petition for Review 14. But a person "is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . This rule is part of our 'deeply rooted historic traditions that everyone should have his own day in court.'" *Richard v. Jefferson County* (1996) 517 U.S. 793, 798 (citations omitted).

By binding Yelp to the default judgment against Bird, the court denies Yelp its "own day in court" to make its own First Amendment arguments, which may be distinct from Bird's, and to defend the published speech from defamation allegations. In this case, the order to remove speech followed bare allegations rather than probative evidence and adversarial argument. The court's decision to bind Yelp as a non-party allows Hassell to sidestep the burden of proof that the statements published on Yelp were actually false and referred to her. *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1042 (finding that the First Amendment requires defamation plaintiffs to prove that a statement is false and refers to her). A default judgment against Bird is insufficient to address Yelp's legal rights and interests in the order.

The Court of Appeal rejected Yelp's due process claim by relying on a narrow exception to the due process requirement that allows courts to enjoin non-parties "through whom the enjoined party may act." *Hasell v. Bird* (2016) 247 Cal.App.4th 1336, 1355. Expanding this exception to reach Yelp in this case runs counter to precedent and threatens the due process protections more generally.

Enjoining non-parties is rarely consistent with due process. *See Zenith Radio Corp v. [HRI]* (1969) 395 U.S. 100 (finding that a parent company could not be bound to an injunction against the subsidiary even when the parent company was aware of litigation and its lawyers participated in it); *Alemite Mfg. Corp v. Staff* (2nd Cir. 1930) 42 F.2d 832, 833 (holding that for an injunction to run against a non-party the non-party must "abet the defendant, or must be legally identified with him").

Here, Yelp is not an agent of Bird. Yelp hosts millions of user-generated reviews composed by individuals with only the loosest connections to Yelp. The relationship between Yelp and Bird is much more attenuated than the relationship between a parent company and a wholly owned subsidiary like in *Zenith*.

It is true that Yelp allows users (including the defendant) to remove their own reviews, and so a court order directed at Bird may lead to the same result—the removal of Bird's review. But this structure does not justify a court order that binds Yelp, rather than Bird, to remove the post. If anything, Yelp's allowance for authors to remove content makes these ex parte orders unnecessary. Orders directed at the defendant rather than Yelp would be executable by the defendant, and would also ensure that the plaintiffs have brought a bona fide claim of defamation against the true author of the content. *See* Amicus Brief of Professor Eugene Volokh.

Even if it were the case that Yelp prohibited the removal of content by its own authors, Yelp would still have distinct and independent legal rights from those authors. *See Blockowicz v. Williams* (7th Cir. 2010) 630 F.3d. 563 (declining to enjoin Rip Off Report, a non-party Internet forum that did not allow users to remove their own posts). Bird's relationship to Yelp is therefore weak and particularly ill-suited to creation of a new due process exception.

VI. Section 230 bars injunctive relief

Finally, if Yelp had been named as a party to the lawsuit, Section 230 of the Communications Decency Act would have provided a complete statutory bar to liability and injunctive relief.

There is well-established precedent that Section 230 bars injunctive relief. For instance, in *Kathleen R. v. City of Liverpool* (2001) 87 Cal. App. 4th 684 (holding that city cannot be ordered to place filters on library computers in order to shield minors from pornography), the Court of Appeal held that injunctions violate § 2300 for the same reason other civil remedies do: "the statute by its terms also precludes other causes of action for other forms of relief [than damages]." *Id.* at 781. Likewise, *Ben Ezra, Weinstein, & Co. v. America Online Inc.* (10th Cir. 2000) 206 F.3d 980, 983-84, held that § 230 preempted plaintiff's request for "injunctive relief" as well as for damages. *Giordano v. Romeo* (Fla. Ct. App. 2011) 76 So.3d 1100, held that web sites "enjoy[] complete immunity" in libel cases under § 230 both from injunctive relief and damages relief. And in *Reit v. Yelp!, Inc.* (Sup Ct. NY County 2010) 907 N.Y.S.2d 411, the court held that an injunction forcing Yelp to remove a review would be barred by Section 230.

The injunction framework created by the Court of Appeal opens the door for schemes that stand in obvious conflict with the plain meaning and goals of Section 230. First, the injunctive relief that the Court of Appeal has ordered clearly treats Yelp as a publisher for the purposes of civil relief by ordering the de-publication of content. Injunctive relief directed at Yelp requires it to remove the post. This is a paradigmatic function of editors and publishers. *See Arkansas Educational Television v. Forbes* (1998) 523 U.S. 666 (finding that a broadcaster's selection and presentation of information is protected by the First Amendment). Thus, the order runs afoul of the core rule established by Section 230.

Second, the ex parte order creates a road map for circumventing Section 230: obtain a default judgment and then seek to apply that judgment to the intermediary (in this case Yelp), the very entity that Section 230 was created to protect from interference and civil intrusion. It creates an end run around §230 with even less process and protection than ordinary civil liability.

Third, injunctive relief conflicts with the purpose of §230 as much, if not more than, monetary damages. As the Ninth Circuit noted

in *Carafano*, one of the core motivations for enacting the Communications Decency Act was to "promote the free exchange of ideas over the Internet." *Carafano v. Metrosplash Inc.* (9th Cir. 2003) 399 F.3d 1119, 1122. Enjoining Yelp to remove disfavored speech interferes with the goals of §230 and could lead to the caution and self-censorship that the Congress sought to avoid. *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 77.

By denying both the First Amendment protections *and* statutory immunities that apply to Internet intermediaries like Yelp, the Court of Appeal decision makes web-based speech forums as helpless against spurious claims as possible. This is wrong. Established precedent has proven that websites like Yelp designed to host a broad range of end-user speech are at the apex of protection, enjoying not only traditional First Amendment rights, but statutory protection even from the narrow civil claims that can apply to publishers in other contexts.

Authors of defamatory content can properly be ordered to pay damages and use whatever removal tools are available to them. But ex parte orders directed at speech intermediaries like Yelp should not issue, and should never be enforced.

Conclusion

Because Yelp's First Amendment, due process, and statutory rights have been violated, the Court should reverse the ruling of the Court of Appeal.

Respectfully submitted,

DATED: April 14, 2017

FIRST AMENDENT AND
INTERNET LAW SCHOLARS

By 

Jane Yakowitz Bambauer
Attorney for Amici Curiae

CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1), I hereby certify that, according to our word processing software, the word count for the attached APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND PROPOSED BRIEF OF *AMICI CURIAE* FIRST AMENDMENT AND INTERNET LAW SCHOLARS IN SUPPORT OF DEFENDANT APPELLANT, YELP, INC.

is 4,179 including footnotes.

Dated: April 14, 2017

Jane Yakowitz Bambauer
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PROOF OF SERVICE
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I, the undersigned, declare that I am over the age of 18 years and not a party to the within action. My business address is 1201 E. Speedway Blvd., Tucson, AZ 85701.

On April 14, 2017, I served the following document(s):

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND PROPOSED BRIEF OF *AMICI CURIAE* FIRST AMENDMENT AND INTERNET LAW SCHOLARS IN SUPPORT OF APPELLANT, YELP, INC.

As follows:

[x] U.S. Mail: On April 14, 2017, I enclosed a true and correct copy of said document in an envelope with postage fully prepaid for deposit in the United States Postal Service.

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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 April 14, 2017, at Tucson, Arizona.

Jane Yakowitz Bambauer

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