

No. S235968

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IN THE  
**SUPREME COURT**  
OF THE STATE OF CALIFORNIA

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

v.

AVA BIRD,  
*Defendant,*

YELP, INC.,  
*Appellant.*

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

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**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE*  
BRIEF; *AMICUS CURIAE* BRIEF OF AVA BIRD,  
DEFENDANT, IN SUPPORT OF APPELLANT YELP, INC.**

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**Certificate of Interested Entities or Persons**

Pursuant to California Rules of Court, rule 8.208, the undersigned, counsel for Defendant Ava Bird, certifies that there are no disclosures to be made.

Dated: 04/13/2017

By:   
EVELINA GENTRY

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**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE*  
BRIEF IN SUPPORT OF NON-PARTY APPELLANT YELP,  
INC.**

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Pursuant to rule 8.520(f) of the California Rules of Court, Defendant Ava Bird (“Ms. Bird”) hereby requests leave to file the attached *amicus curiae* brief in support of Non-Party Appellant Yelp Inc. (“Yelp”). There are no persons or entities to be identified under Rule 8.520(f) of the California Rules of Court.

**I. INTEREST OF *AMICUS CURIAE* APPLICANT**

Ms. Bird is the original defendant in this action. Ms. Bird posted a single critical review on Yelp.com of her former attorney, Dawn Hassell (“Ms. Hassell”). Ms. Hassell and her law firm sued Ms. Bird

for defamation. Even though Ms. Hassell did not serve Ms. Bird with the complaint, the trial court entered default judgment against Ms. Bird, awarded Ms. Hassell monetary damages, and granted injunctive relief against both Ms. Bird and Yelp.com, which hosted her review.

Ms. Bird has a direct interest in this case and in the specific issue before the Court. The trial court's default judgment injunction against non-party Yelp.com succeeded in removing her free speech from the internet. Ms. Bird, like everyone who uses the internet, has an interest in being able to use an internet forum like Yelp.com without her speech being suppressed through a default injunction enforced against a service provider.

## **II. HOW THE PROPOSED *AMICUS CURIAE* BRIEF CAN HELP**

Ms. Bird's brief offers a concrete example of the substantial harms threatened by the ruling of the Court of Appeals.

Ms. Bird's brief illustrates how she was not served with the defamation complaint filed by Ms. Hassell. Thus, she was not given notice and opportunity to be heard and to defend the lawsuit on the merits. Even if she had been presented with the opportunity she – like most Americans – would likely not have been able to afford an

attorney to defend her in the defamation action, given the crippling costs of modern litigation. As a result, Ms. Hassell was able to obtain a default judgment and an injunction ordering Yelp.com to remove Ms. Bird's speech from the internet without any evaluation of whether it was defamatory.

But not only Ms. Bird's speech was threatened. In her complaint, Ms. Hassell asserted – falsely – that another comment by a writer using the name “J.D.” was actually authored by Ms. Bird. That is untrue – Ms. Bird did not write the “J.D.” comment, and does not know who “J.D.” is. Because she was not served, and because the court below issued an injunction ordering Yelp.com to take down the posts, some other person's speech was also silenced through the injunction.

Ms. Bird's unique perspective illustrates how the legal system can be abused to produce injunctions like the one at issue here, and how that abuse – allowed to continue – will silence the online speech of Americans without anything resembling due process. In other words, Ms. Bird's brief illustrates how such injunctions threaten everyone who speaks on the internet, not just service providers like Yelp.com.

### III. CONCLUSION


For the foregoing reasons, Ms. Bird respectfully requests that the Court accept and file the attached *amicus curiae* brief.

Dated: April 13, 2017

Respectfully submitted,

BROWN WHITE & OSBORN LLP

By

  
KENNETH F. WHITE  
EVELINA GENTRY  
Attorneys for Defendant  
Ava Bird



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***AMICUS CURIAE BRIEF OF DEFENDANT AVA BIRD***

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**I. INTRODUCTION**

Amicus Ava Bird (“Ms. Bird”), who offered a sincere review of her former lawyer, was silenced by default judgment. Ms. Bird expressed her views of attorney Dawn Hassell’s services on the overwhelmingly popular review site Yelp.com. Like many consumers, she appreciated it as a forum to voice her opinion of how she was treated. But Ms. Hassell sued her, accused her of defamation, and bundled her comment together with a comment made by someone else. After purported “substitute service” – achieved by giving the

complaint to someone who admitted they had not seen Ms. Bird in months – Ms. Hassell sought and received default judgment. The trial court did not merely award her \$557,918.55 and a prior restraint order directing Ms. Bird to take down both her own comment and the comment written by some unknown third party going by the handle “J.D.” The trial court also ordered Yelp.com itself – not a party to the suit – to remove the posts, silencing them.

The issue before this Court is what *Yelp.com* can be compelled to do, not what *Ms. Bird* can be compelled to do. Nevertheless, the matter manifestly impacts Ms. Bird’s First Amendment rights and the rights of everyone who wishes to speak on the internet. This Court has defended First Amendment rights by recognizing substantial procedural safeguards before a court can impose prior restraint upon speech based on a defamation claim. (*See, e.g., Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4<sup>th</sup> 1141.) But those procedural safeguards are in vain if a sophisticated plaintiff – like Ms. Hassell, an attorney – can evade them by using default judgments to force a service provider like Yelp.com to remove disfavored speech from the internet. The decisions of the courts below provide an incentive for litigious parties unhappy with speech to sue without regard to merit –

not to recover money from impecunious or absent defendants, but to cleanse the internet of criticism they don't like.

## II. FACTS

In January 2013, Ms. Bird posted a single critical review on Yelp.com regarding her former lawyer, Ms. Hassell. She posted that review under the username "Birdzeye B." Ms. Bird did so to express her honest opinion about her disappointment with the legal services Ms. Hassell provided. She did not comment under the username "J.D.," though another person posted a Yelp.com review under that name critical of Ms. Hassell. Ms. Bird does not know the identity of "J.D."

On April 10, 2013, Ms. Hassell and her law firm, the Hassell Law Group ("Hassell Firm"), sued Ms. Bird for defamation. She asserted that Ms. Bird wrote *two* reviews of the Hassell Firm -- one as "Birdzeye B." and another one as "J.D." -- and that they were defamatory. Ms. Hassell never served Ms. Bird with the complaint. Rather -- as the Court of Appeals noted -- she purported to serve Ms. Bird by *substitute* service, which Ms. Bird did not receive. The trial court accepted that substitute service even though the person served told the process server he had not seen Ms. Bird for months.

(A00026.) On July 11, 2013, the trial Court entered default judgment against Ms. Bird. (A00023.)

Ms. Bird therefore never had an opportunity to defend herself. For instance, she did not have an opportunity to file a motion under California Code of Civil Procedure § 425.16 to force Ms. Hassell to produce admissible evidence supporting her claims that Ms. Bird's review was false and defamatory. She did not have an opportunity to establish that the review was couched as an opinion about Ms. Hassell's services, and therefore not a provable statement of fact susceptible to defamation analysis. She did not have an opportunity to establish that she did not, in fact, write the "J.D." comment, or to attempt to provide "J.D." with notice (perhaps through Yelp.com) to speak for himself or herself.

Even if Ms. Bird had been served with the complaint, she would not have been able to afford the tens of thousands of dollars required to hire an attorney to defend a defamation suit filed by an attorney plaintiff.<sup>1</sup> Even with notice, she might have had no choice but to default. Ms. Hassell was aware of this, arguing to Yelp.com

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<sup>1</sup> Counsel for Ms. Bird serve pro bono.

that Ms. Bird “was judgment proof because the award against her was uncollectable.” (*Hassell v. Bird* (2016) 247 Cal.App.4th 1336, 1346.)

On January 14, 2014, following a default prove-up hearing attended only by Ms. Hassell and her attorney, the trial court entered default judgment against Ms. Bird (“Default Judgment”). The trial court ordered Ms. Bird to remove both reviews (including the “J.D.” review that she did not write) and to pay \$557,918.55 in damages to Ms. Hassell. The trial court’s order also required Yelp.com – which was not a party to the case – to remove the reviews posted under the names “Birdzeye B.” and “J.D.”

Ms. Hassell, without making any effort to enforce the Default Judgment against Mr. Bird, served it upon Yelp.com. Yelp.com’s motion, appeal, and this petition followed.

### **III. ARGUMENT**

Yelp.com’s petition to this Court seeks to vindicate its own due process rights and its own rights under Section 230. But Yelp.com’s position also protects consumers like Ms. Bird. The free speech rights of consumers like Ms. Bird depend upon the rights of online platforms like Yelp.com. Yelp.com’s right to fight injunctions against it – and Section 230’s prohibition of injunctions like the one below – serve to

protect consumers' ability to publish their views free from censorship by ruinously expensive litigation. The rule below, which allows litigants like Ms. Hassell to use default judgments to silence online speech without any input by service providers, encourages vexatious and censorious litigation, and permits abuse of a strained legal system.

This Court has placed strict restrictions on prior restraint of speech. (*Balboa Island Village Inn, Inc.*, *supra*, 40 Cal.4th 1141.) Ms. Hassell and the courts below proceeded on the premise that a default judgment satisfies those restrictions because it represents a defendant who has deliberately given up the right to defend their speech. As Ms. Bird's case illustrates, this is not true. Ms. Bird was never served with Ms. Hassell's complaint, and the trial court entered default judgment upon her based upon purported substitute service on someone who by his own admission had not seen her in months. (A00026.) Ms. Bird therefore never had the opportunity to challenge Ms. Hassell's claims or defend her speech, and there was no contested inquiry into whether the speech was truly defamatory.

Yelp.com and online service providers like it routinely notify users when they receive legal process like a subpoena or application for an injunction. (*See, e.g., Krinsky v. Doe 6* (2008) 159 Cal.App.4<sup>th</sup>

1154 [describing service provider’s notification of anonymous users upon receipt of subpoena].) Had Yelp.com received process here, it might have contacted Ms. Bird and informed her timely of Ms. Hassell’s lawsuit. It did not, because Ms. Hassell did not give Yelp.com notice until the trial court had already issued the default judgment and injunction. Yelp.com might also have challenged the scope of the injunction by pointing out that the suit attacked both statements of opinion and statements of fact, or by forcing Ms. Hassell to provide evidence that the statements were false and defamatory, or by questioning the false premise that “J.D.” was the same person as Ms. Bird. Yelp.com’s willingness to engage in such litigation helps protect the free speech rights of its users. But Yelp.com could not do so, because it was not given a timely opportunity, and the courts below sanctioned that result.

Ms. Bird’s free speech was therefore ordered removed from Yelp.com without any opportunity for her arguments – or arguments on behalf of online consumers in general – to be heard. Her speech was not the only target. The trial court’s order also encompassed the speech of “J.D.,” whose identity and interests are unknown. “J.D.” had no opportunity to be heard or defend his or her words because the

trial court, based on purported substitute service, issued a default judgment misidentifying “J.D.” as Ms. Bird without notice to “J.D.” or to Yelp.com. Had the courts below upheld the correct interpretation of Section 230 urged by Yelp.com, Ms. Hassell could not have silenced Ms. Bird or “J.D.” in this manner. Had the courts below recognized Yelp.com’s due process right to contest an injunction that requires it to remove speech from its own platform, the result could have been different. At the very least, the result could have been based on an adversarial process in which speakers’ arguments were heard. Instead, the trial court ordered both Yelp.com and Ms. Bird to take down the “J.D.” comment – even though Ms. Bird literally cannot, since she has no control over that account.

Even if Ms. Bird had been served, she probably would not have been able to afford to defend the case. Ms. Hassell *knew that when she sued Ms. Bird. (Hassell v. Bird, supra, 247 Cal.App.4th 1336, 1346 [Ms. Hassell described Ms. Bird as “judgment proof because the award against her was uncollectable.”].)* A brief review of anti-SLAPP jurisprudence in California reveals that defending even the *preliminary stages* of a defamation case routinely costs tens of thousands of dollars. (*See, e.g., Tuchscher Development Enterprises,*



*Inc. v. San Diego Unified Port District* (2003) 106 Cal.App.4<sup>th</sup> 1219 [approving a \$55,900 award]; *Macias v. Hartwell* (1997) 55 Cal. App. 4<sup>th</sup> 669, 676 [approved an award of \$44,445]; *Church of Scientology v. Wollersheim* (1996) 42 Cal. App. 4<sup>th</sup> 628, 658 [approved an award of \$130,506.71]; *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4<sup>th</sup> 328, 346 [awarding \$32,032.50]; *Dove Audio v. Rosenfeld* (1996) 47 Cal. App. 4<sup>th</sup> 777, 785 [approved an award of \$27,000].) Ms. Bird can't afford that – nor can most Americans.

While the anti-SLAPP statute may allow litigants to recover those fees once they've expended them, it offers no help to litigants who can't afford the fees up front in the first place. Default is the probable result, and – under the lower courts' rule – elimination of online speech that offends anyone with enough money to hire a lawyer.

Both Section 230 and service providers' due process right to contest injunctions – properly construed – prevent the affluent from silencing the poor through vexatious litigation. But the ruling below will inspire a dramatic increase in defamation litigation aimed at online expression without regard to merit. Under the settled view of due process and Section 230, litigants have little incentive to sue people without money over insults, criticism, opinion, or truthful

statements. Many Americans have no money that a judgment could touch, service providers like Yelp.com often litigate vigorously to defend the rights of their users, and Section 230 – properly read – prevents prior restraint by litigation tactic, including the tactic used here. Moreover, under that correct interpretation, plaintiffs have no incentive to rely on slipshod methods of service, nor to falsely attribute the words of one commenter to another commenter. Section 230’s prohibition of orders against service providers concerning the speech of others, and service providers’ due process right to contest injunctions impacting them, makes this type of litigation tactic fruitless.

But under the rule articulated by the courts below, every aggrieved target of online criticism has a strong incentive to pay a lawyer to sue. They can anticipate that many – if not most – consumers who use sites like Yelp.com cannot afford the cost of defending a defamation case. They therefore have an incentive to sue in order to obtain a default and silence speech without any meaningful evaluation of whether the speech is actually defamatory. They have an incentive to employ sloppy or dishonest methods of service to promote a default judgment, since a default judgment is effective in

silencing speech. They have an incentive to speculate about the identity of anonymous commenters and seek defaults based on that speculation, since doing so will be effective in depriving those commenters of notice or an opportunity to be heard. In short, the ruling below is a roadmap for vexatious litigation and abuse.

Litigants are prepared to follow that road, to the detriment of free speech and the integrity of the legal system. (*See, e.g., Volokh, Court finds evidence of 'fraud on the Court' in one of the missing-defendant libel takedown cases* (February 9, 2017)

<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/09/court-finds-evidence-of-fraud-on-the-court-in-one-of-the-missing-defendant-libel-takedown-cases/> (as of April 11, 2017) [describing scheme to remove online content through judgments against straw defendants].)

These circumstances, and the surge of defamation actions that will result, will inevitably chill speech. Under a correct reading of Section 230 and service providers' right to due process, online speakers know that aggrieved targets of criticism have little incentive to bring meritless cases, because even a default judgment won't remove the speech from the internet if it is merely conclusory and

does not provide the service provider with a basis for concluding that the speech is actually defamatory and violates their terms of service. This lack of incentive is a bulwark against frivolous litigation. But under the rule announced below, targets of criticism suddenly have every incentive to sue, knowing that even if their target lacks resources they can obtain default judgments to remove speech that offends them, even if it is clearly not defamatory. Online speakers everywhere, seeing this, will become more reluctant to speak freely. On Yelp.com, consumers will be more reluctant to provide forthright negative reviews, however honest, for fear of ruinous litigation.

Though the matter before this Court is on its face about Yelp.com's rights, it has significant consequences for everyone who wishes to speak freely online. The Court should adopt the arguments urged by Yelp.com, which serve to protect not just Yelp, but everyone who wants to speak and argue and review products online without censorship through litigation abuse.

#### **IV. CONCLUSION**

For the foregoing reasons, Ava Bird respectfully requests that the Court reverse the orders of the trial and appellate courts, and direct

those courts to enter an order granting Yelp's Motion to Vacate


Judgment.

Dated: April 13, 2017

Respectfully submitted,

BROWN WHITE & OSBORN LLP

By

  
\_\_\_\_\_  
KENNETH P. WHITE  
EVELINA GENTRY  
Attorneys for Defendant  
Ava Bird

**CERTIFICATE OF WORD COUNT**

(Cal. Rules of Court 8.520(c))


The text of this brief consists of 2,316 words as counted by the Microsoft Word word-processing computer application used to generate the brief.

Dated: April 13, 2017

Respectfully submitted,

BROWN WHITE & OSBORN LLP

By

  
KENNETH P. WHITE  
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**DECLARATION OF SERVICE BY MAIL**

I, the undersigned, declare:

I am a resident of or employed in the County of Los Angeles; I am over the age of 18 years and not a party to the within action. My business address is 333 South Hope Street, 40<sup>th</sup> Floor, Los Angeles, CA 90071. On April 13, 2017, I served a copy of the within, **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; *AMICUS CURIAE* BRIEF OF AVA BIRD, DEFENDANT, IN SUPPORT OF APPELLANT YELP, INC.** on the following, by placing a copy of same in postage prepaid envelopes addressed as follows:

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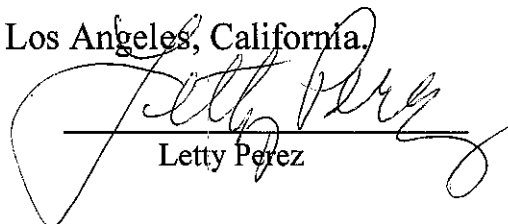
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Each envelope was sealed and deposited in a United States mailbox in Los Angeles, California.

I declare the foregoing to be true and correct under penalty of perjury.

Executed on April 13, 2017, at Los Angeles, California.

  
\_\_\_\_\_  
Letty Perez