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Chief Justice Tani Cantil-Sakauya
and the Justices of the Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

Re: *Hassell v. Bird, Petition of Yelp Inc.*
No. S235968

Dear Chief Justice Cantil-Sakauya:

On behalf of Public Citizen, Inc., as amicus curiae, I write to urge the Court to grant the petition filed by Yelp Inc., seeking review of the decision by the California Court of Appeal for the First Appellate District in *Hassell v. Bird*, 247 Cal. App.4th 1336.

Public Citizen's Interest

Public Citizen is a consumer advocacy organization based in Washington, D.C. It has hundreds of thousands of members and supporters nationwide, nearly 42,000 of them in California. Since its founding in 1971, Public Citizen has encouraged consumers to participate in civic affairs and speak out about matters of public interest. Public Citizen believes that the broad discretion afforded interactive website operators under the Communications Decency Act, 47 U.S.C. § 230, best preserves consumers' right to speak out about businesses, governments, and political figures; in many cases it has either appeared as amicus curiae or its attorneys have represented operators of consumer-oriented web sites in litigation seeking to circumvent their section 230 immunity. *E.g.*, *Giordano v. Romeo,* 76 So. 3d 1100, 1102 (Fla. App. 2011); *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009) (as amended on rehearing); *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003). Public Citizen also publishes blogs on which third parties can publish comments; hence Public Citizen has had to formulate its own policies about how to respond when plaintiffs obtain default judgments against third parties who have criticized them in comments on amicus's blogs.

Facts and Proceedings Below

On January 28, 2013, a user of Yelp, apparently defendant Ava Bird, posted a critical review on the Yelp page of a Bay Area lawyer, plaintiff Dawn Hassell; Bird complained that Hassell had served her poorly in a potential personal injury case and that Hassell had failed to communicate with her. Two subsequent reviews, allegedly also authored by defendant Bird, also criticized Hassell.

On April 10, 2013, Hassell and her law firm sued Bird alleging that the reviews were defamatory. The complaint was served at the address where Bird lived during the short period of time when Bird was Hassell's client; however, the proof of service submitted to the trial court indicates that the recipient of the summons indicated that Bird had already moved out by the time service was attempted. A026. When Bird did not respond to the complaint, Hassell obtained a default, and then moved for a default judgment. That motion was granted on January 14, 2014. The final paragraph of that order purported to order "Yelp.com" 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."

Hassell admitted below that, from the very beginning of her lawsuit, her objective was to force the removal of Bird's derogatory review from Yelp's web page about her. A051. After the lawsuit was filed, her counsel notified Yelp of its filing and asked Yelp to remove the review voluntarily. A601-602. However, Hassell did not name Yelp as a defendant in the litigation; nor did she indicate that she would be seeking an order compelling Yelp to take down the reviews. And Hassell did not notifyYelp, in the course of the default judgment proceedings, that she was seeking relief against Yelp. Hassell acknowledged below that she expected Bird to ignore any injunction, and that this was why she sought default relief against Yelp, A658; what she did **not** explain was why she sought such relief without notifying Yelp about her motion or naming it as a defendant.

Hassell caused the default judgment order to be served on Yelp's registered agent on January 28, 2014, the very expiration date of the statute of limitations for suing Yelp on the theory that the January 28, 2013 review was defamatory. On April 30, 2014, Hassell wrote to Yelp to inform it that she was preparing to ask the court to "enforce" the paragraph of the default judgment order directed to Yelp. A055. Yelp responded by filing a motion to vacate the order. However, the trial judge held that, by seeking to have the order against it vacated, Yelp had improperly allied itself with Bird and hence could properly be ordered to comply with the order as an aider and abettor of Bird's failure to comply with the removal order. The Court did not explain how actions that Yelp took after it was first enjoined in the January order could have supported its original grant of a default judgment compelling Yelp to take action.

Yelp appealed, arguing that the order compelling Bird to remove the reviews could not be applied to it, a non-party, as a matter of California law; that applying the order to Yelp violated both the First Amendment rule against prior restraints (because there had never been an adversary proceeding in which Bird's statements were found to be false and defamatory) and the Due Process Clause (because the only finding of falsity was made against Bird in a default judgment proceeding of which Yelp had no notice and therefore had no chance to participate); and finally that issuance of the removal order against Yelp violated section 230 of the Communications Decency Act because Yelp is an interactive computer service provider and the injunction effectively treated Yelp as a speaker or publisher of content provided by another, which section 230 forbids. The Court of Appeals rejected all of these arguments. With respect to section 230, the Court held that section 230 does not limit the issuance of injunctive relief against third parties whose web sites carry content from third parties who have, themselves, been ordered to remove the content.

ARGUMENT

THE COURT SHOULD GRANT REVIEW BECAUSE HASSELL'S THEORY WOULD VITIATE THE IMPORTANT PROTECTION THAT SECTION 230 PROVIDES FOR THE SYSTEM OF ONLINE FREE SPEECH, AND THE COURT OF APPEALS' DECISION IS AT ODDS WITH DECISIONS IN OTHER JURISDICTIONS, INCLUDING THE NINTH CIRCUIT.

A. Section 230 Immunizes Defendants Like Yelp from Being Compelled to Remove Content Posted by Their Users.

Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(a)(1), states:

> 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.

Section 230(e)(3) provides:

> 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.

These provisions immunize web hosts from tort claims based on materials placed on their sites by third persons. *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006); *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003). Acceptance of this approach has become "near-universal." *Jane Doe No. 1 v. Backpage.com,* 817 F.3d 12, 18-19 (1st Cir. 2016); *Jones v. Dirty World Entm't Recordings*, 755 F.3d 398, 406 (6th Cir. 2014) (citing cases); *Universal Communications Sys. v. Lycos*, 478 F.3d 413 (1st Cir. 2007).

Section 230 precludes injunctive relief as well as damages. The operator of an interactive computer service ("ICS") is no less being treated as the "publisher . . . of . . . information provided by another," section 230(c)(1), when the action seeks injunctive relief instead of damages. Moreover, section 230(e)(3) forbids a "cause of action" from being "brought" against the operator of an interactive computer service, thus making the operator immune from suit as well as immune from liability. The United States Court of Appeals for the Ninth Circuit has repeatedly treated Section 230 as providing an immunity from suit and not just from liability. *Barnes v. Yahoo!, Inc.* 570 F.3d 1096, 1098 (9th Cir.2009); *Carafano v. Metrosplash.com. Inc.* 339 F.3d 1119, 1125 (9th Cir. 2003).

Moreover, the statute bars "liability" from being "imposed" under any law that is inconsistent with section 230. An injunction is a form of relief against a defendant that has been determined to have been liable for a legal wrong; it cannot issue against "persons who act independently and whose rights have not been adjudged according to law." *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 437 (1934). Indeed, cases dismissed pursuant to section 230 often involve claims for both injunctive

relief and damages. *E.g.*, *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 983 (10th Cir. 2000); *Green v. America Online*, 318 F.3d 465, 708 (3d Cir. 2003).

B. Section 230 Plays an Important Role in Protecting Online Content Against a Heckler's Veto.

This Court has recognized that without section 230, operators of ICS functions could not provide services that enable members of the general public to have their say:

> service providers who received notification of a defamatory message would be subject to liability only for maintaining the message, not for removing it. This fact, together with the burdens involved in evaluating the defamatory character of a great number of protested messages, would provide a natural incentive to simply remove messages upon notification, chilling the freedom of Internet speech.
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> *Barrett v. Rosenthal,* 40 Cal. 4th at 54-55.

See also Carafano v. Metrosplash.com., 339 F.3d 1119, 1123-1124 (9th Cir. 2003). The broad reading given to section 230 by this Court as well as by the United States Court of Appeals for the Ninth Circuit has enabled many of the leading companies that offer interactive computer services to maintain their headquarters in California.

Although Yelp offsets the costs of hosting by selling advertising on the site for pennies per page-view or per click, it cannot realistically police content in advance; even when particular comments are challenged, it is unrealistic to expect operators to devote sufficient lawyer time to evaluate challenged statements and decide whether to remove them or leave them posted. The cost of making intelligent assessments of the risks of litigation, not to speak of the cost of participating in the litigation, far outstrips the money that can be earned from hosting challenged comments. *Chicago Lawyers Committee v. Craigslist*, 519 F.3d 666, 668-669 (7th Cir. 2008).

The costs are no less if only injunctions are sought. If ICS operators could be subjected to the expense of litigation—wholly apart from the risk of facing damages awards—the result would likely be that as soon as any comment were challenged, the operator would remove it rather than take the risk of being dragged into the litigation. *See Zeran v. America Online*, 129 F.3d 327, 331 (4th Cir. 1997); *Barrett v. Rosenthal*, 40 Cal.4th 33, 146 P.3d 510, 524-525 (2006). Thus, without the protection of section 230, online speech would be subject to the heckler's veto: speech would likely be removed just because somebody objected to it, regardless of the merits of the objection.

And only critical speech is targeted for such removal. Nobody threatens to sue over overstated online praise or undeserved online compliments. Section 230 thus protects the marketplace of ideas from consistent removal of one side of the debate, and protects consumers from falsely one-sided portrayals of businesses and others that may, indeed, merit criticism. As a result, the powerful immunity provided to ICS operators has become a vital aspect of our system of free

speech online—so central that when Congress banned libel tourism, preventing the enforcement of foreign defamation judgments in the United States that would run afoul of our constitutional protections, it included protection for ICS operators. 28 U.S.C. § 4102(c).

Moreover, if an injunction were to forbid an ICS operator from allowing a given statement to remain on its website, the operator would risk further exposure given the possibility of being cited for contempt if, for example, somebody else deliberately posted that statement, or a very similar statement, on another page of its website. Such a contempt proceeding could lead to additional legal expense to defend the contempt proceedings and even to the imposition of monetary contempt sanctions, including attorney fees. Once faced with the prospect of contempt proceedings, ICS operators would have to assess their exposure especially carefully when future statements that might violate the injunction are posted to their sites. In this way, injunctive proceedings could produce the same problems of the heckler's veto as pre-litigation demands. Section 230 was intended to protect ICS operators from that consequence.

Instead of subjecting ICS operators to suit over the removal of objectionable material, section 230 tells plaintiffs: sue the speaker, not the host. In that way, the litigation is filed against the party who is best situated to evaluate the circumstances about which she was speaking, and who has the greatest interest in defending her right to make the statements. If the speaker is found liable, then the court can assess damages against the wrongdoer. Additionally, if the jurisdiction allows injunctions against defamatory speech, the court can order the speaker to use her best efforts to remove the statement found to have been false and defamatory. But if the ICS operator does not provide a means for users to remove or edit their own content once posted — and many reputable sites do not — then section 230 leaves it to the discretion of the ICS operator whether to accommodate a request by the user to remove content, even if that request is motivated by a court order. For example, such discretion allows a host to consider whether defendant consented to a judgment, or failed to oppose its entry, because she couldn't afford to defend herself and hoped that the plaintiff would not pursue further litigation at that point.[1]

C. Because Hassell's Legal Theory Provides a Roadmap for Unscrupulous Litigants to Circumvent Section 230, California Courts Should Follow Courts in Other Jurisdictions That Have Consistently Refused to Enjoin Web Site Providers That Host Content Whose Authors Have Been Ordered to Remove the Content.

Hassell's litigation strategy did not depend on having meritorious claims against Bird.

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[1]"Reputation management" firms have been known to employ unscrupulous techniques to secure court orders for their clients. *See* Cushing, *The Latest In Reputation Management: Bogus Defamation Suits From Bogus Companies Against Bogus Defendants* Techdirt (March 31, 2016), https://www.techdirt.com/articles/20160322/10260033981/latest- reputation-management-bogus-defamation -suits- bogus-companies-against-bogus-defendants.shtml. Section 230's discretion allows ICS hosts to respond appropriately.

Considering Bird's statements about Hassell, and reviewing the evidence in the record, Bird's accusations may well have included false and malicious statements. At the same time, however, the record below provides some reason to worry about the means by which Hassell obtained the default judgment in this case. Bird was served by delivery of the summons and complaint to her last known address, but she had apparently already moved away. A026. There is, however, some reason to believe that Bird was aware of the litigation pending against her. A507, A534.

Indeed, in several cases in other jurisdictions, plaintiffs have obtained default judgments by seeking only an injunction, promising the speaker no personal adverse consequences, taking a default judgment, then making a demand on the ICS operator. That technique would succeed regardless of whether the online criticism consisted of true statements of fact or constitutionally protected opinions. But in each such case, courts have refused to extend injunctive relief to the ICS operator.

First, in *Blockowicz v. Williams,* 630 F.3d 563 (7th Cir. 2010), after a divorce the defendant posted a number of vicious attacks against the plaintiffs, his former spouse and her parents; when the husband did not appear to contest the suit, the trial court entered a default judgment awarding nominal damages as well as an injunction. After the defendant posted online comments defying the court order, plaintiffs asked the judge to extend the default injunction to the host Ripoff Report which, pursuant to its normal policy in such cases, refused to remove enjoined criticisms. The Court of Appeals for the Seventh Circuit upheld the trial judge's refusal because hosting content that a speaker has been ordered to remove is not the sort of action in concert with the defendant that warrants a departure from the normal rule that third parties who have not themselves been held liable for violating the law cannot be subjected to injunctive relief.

In *Giordano v. Romeo,* 76 So. 3d 1100, 1102 (Fla. App. 2011), the operator of a drug treatment center sued a former patient who complained about abusive treatment. The plaintiff promised the patient that, if he did not oppose entry of an injunction against continued posting of the criticisms, the plaintiff would not seek any monetary relief; after the defendant asked Ripoff Report to take down his critical review, which it refused to do, plaintiff then moved to have the injunction extended to this third party. The trial judge initially granted relief, but then revoked its original order on the ground that it was forbidden by section 230. The Florida Court of Appeals affirmed, holding that Ripoff Report "enjoys complete immunity from any action brought against it as a result of the postings of third party users of its website," and even a motion to extend an injunction to it represented a forbidden action.

Most recently, in *Small Justice v. Xcentric Ventures,* 2014 WL 1214828 (D. Mass. Mar. 24, 2014), and 99 F. Supp. 3d 190, 200 (D. Mass. 2015), *amended*, 2015 WL 5737135 (D. Mass. Sept. 30, 2015), *appeal pending*, No. 15-1506 (1st Cir.), a lawyer who had been accused of criminal activity in a posting on Ripoff Report by a former litigation adversary sued his critic in state court and obtained a default judgment compelling removal of the post. When the host of the review site refused to remove the report, the lawyer used the default judgment as a basis for executing on the reviewer's copyright, then sued alleging both copyright infringement and breach of various state common law and statutory torts, arguing that because the defendant was asserting its own rights in

the challenged posts, it was taking responsibility for the content and could be compelled to remove the critical review despite section 230. The trial court ruled that section 230's immunity forbade compelling the host company to removed the review even in these circumstances.

The decision below is at odds with the rulings of these other courts which have refused to allow unhappy targets of online criticism to achieve their objective of compelling the hosts of interactive web sites to remove the criticism by obtaining relief first from the speakers, and then demanding that the host comply with orders directed to the speakers. The Court should grant review to bring California's jurisprudence into line with courts elsewhere.

Respectfully yours,

Paul Alan Levy

cc: Thomas Burke, Esquire
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