Case No. S235968
In the Supreme Court of the State of California

DAWN HASSELL, et al.
Plaintiffs

v.

AVA BIRD
Defendant

and

YELP INC.
Non-Party Appellant

On Appeal of a Decision by the Court of Appeal
First Appellate District, Division Four, Case No. A143233

After a Decision by the Superior Court of the County of San Francisco
The Honorable Ernest H. Goldsmith, Case No. CGC-13-530525

AMICUS CURIAE BRIEF OF GOOGLE INC. IN SUPPORT OF YELP INC.

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE GOOGLE INC. IN SUPPORT OF YELP, INC.

Pursuant to Rule 8.520(f) of the California Rules of Court, Google Inc. applies for leave to file the accompanying amicus curiae brief in support of petitioner Yelp, Inc.

Google is an online service provider that operates one of the world's most popular search engines, along with other widely used online services (including YouTube and Blogger) that help users express themselves and gain access to information. Google hosts user-submitted content of all kinds, and its search engine publishes links to hundreds of billions of webpages that allow its users find what they are looking for across the Internet's vast expanse.

Given how it operates, Google has a substantial interest in the issues raised by this case. Every year, Google receives thousands of demands to remove allegedly defamatory (or other allegedly illegal) third-party material from its services. These demands frequently take the form of court orders like the one issued here—orders that purport to impose obligations directly on Google even though Google was not a party to the underlying case. Google relies on core principles of due process, the longstanding rules governing the scope of nonparty injunctions, and the immunity provided in Section 230 of the Communications Decency Act ("Section 230") to protect itself from such orders.

The rulings in this case fundamentally threaten those protections. In approving the injunction against Yelp, the courts below departed from established law and endorsed a clear end run around Section 230 that imposes greater obligations on online intermediaries as nonparties than they could face as named parties to a lawsuit. As a result, Google now faces the prospect of orders to remove content from its services

without any advance notice or opportunity to be heard, with the threat of contempt looming if it does not comply. The Court of Appeal's ruling already has been cited by litigants seeking to defend a sweeping blocking order, which purports to require Google to censor search results around the world and remove links to websites that have been deemed unlawful only in a single country. *See* Respondents' Factum ¶ 77, *Google Inc. v. Equustek Sols. Inc.*, File No. 36602 (S.C.R. Aug. 8, 2016) (Can.).

Google is familiar with the contents of the parties' briefs and believes its perspective will assist the Court in understanding why the injunction against Yelp in this case cannot stand. Google's brief focuses on the bedrock rules of due process and equity, which for decades have protected nonparties from overbroad court orders. Google submits this brief to explain the continuing importance of these principles for online intermediaries in cases involving information accessible through their services.

Dated: April 14, 2017

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
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BRIEF OF AMICUS CURIAE GOOGLE INC. IN SUPPORT OF YELP, INC.

Introduction & Summary of Argument

This case presents an exceptionally important issue for Google and many other online service providers whose platforms help hundreds of millions of people communicate on the Internet. By binding Yelp, a nonparty to the underlying action, to an injunction requiring it to remove user-created content from its service, the courts below created a dangerous precedent eroding established protections for online intermediaries.

Much of the discussion in other briefs in this case addresses Section 230, which provides broad immunity for service providers who publish or facilitate access to online content. Those protections are vital in ensuring that the Internet continues to be a medium for robust and open speech. Google agrees that Section 230 protects Yelp against the removal order and any finding of contempt liability.

But there is another, even more fundamental problem with the injunction at issue. Compelling Yelp to remove content from its service disregards longstanding rules of equity and due process that limit the circumstances in which court orders can bind nonparties. For over a century, it has been the law in this State that injunctions can apply *only* to the actual parties to a case and their close associates. To be properly bound by an injunction, a third-party must be legally identified with the party (an agent, employee, or servant) or must act "in concert" with the party as an "aider and abettor" of the party's violation of the order.

For good reason, these limitations are stringent. Injunctions are not vehicles for forcing nonparties to take affirmative action when they have only a loose or arm's-length relationship with an alleged

wrongdoer. Instead, only a nonparty that deliberately works "with or for" a party to subvert the injunction can be so bound. *People v. Conrad*, 55 Cal. App. 4th 896, 903 (1997). California's rules mirror those that exist nationwide, are expressly codified in the Federal Rules of Civil Procedure, and have repeatedly been endorsed, including to shield online service providers identically situated to Yelp. *See Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010).

Applying these protections is especially important here. Because of the sheer amount of information that they make accessible, online intermediaries such as Yelp and Google routinely find themselves facing demands to remove third-party material accessible through their services. Preserving the Internet's role as a vital medium for expression requires a careful balancing of the rights of speakers, users, service providers, and those who might be harmed by unlawful material. Congress structured that balance when enacting Section 230, affording broad protection to online service providers from claims arising from what their users post. Longstanding rules of equity and due process that limit injunctions to parties and their close affiliates are equally important to that balance. These principles ensure that *nonparty* intermediaries are not transformed into deputies, required under pain of contempt to censor material created by others.

The ruling below departed from these principles in two ways. First, it was improper to have named Yelp in the injunction in the first place. Before being included in the order, Yelp did not receive notice of the relevant proceedings. Nor were Yelp's interests effectively represented by any of the parties to the underlying litigation. Yelp is not an agent of its users; it is a distinct entity with its own identity and

concerns. Its only relationship to the defendant was as an online host of the defendant's content, the same role Yelp plays for millions of other users. For the court to have enjoined Yelp by name without an opportunity to be heard violates due process.

Second, there was no substantive basis for requiring Yelp to remove user-created material from its service. Because it was not a party to the underlying case or legally identified with one, Yelp could properly have been bound to an order only if, after the injunction issued, it acted "in concert" with the defendant to circumvent the court's order. Yelp did no such thing.

The decision to bind Yelp by the courts below disregarded established law limiting the scope of injunctions, including the Seventh Circuit's decision in *Blockowicz*, which is directly on point. The rulings also create significant operational concerns for online intermediaries, setting the stage for a new wave of nonparty injunctions against Google and other online services in California. This Court should reverse. It should make clear that online intermediaries cannot be enjoined as nonparties merely for hosting, publishing, or linking to third-party content and, similarly, that they do not act "in concert" with their users simply by declining to remove material that a court has found to be defamatory or otherwise unlawful. These holdings will keep California law consistent with its historical foundations, national practice, and constitutional mandates. They will also protect online service providers from being unjustifiably conscripted into censoring the Internet.

Google's Interest In This Case

On a regular basis, Google is presented with injunctions and other court orders like the one issued against Yelp here. Those orders, which

come from state and federal courts around the country, as well as from foreign jurisdictions, typically demand that certain user-generated material hosted on Google's services or accessible through its search engine should be removed.[1] In many cases, these orders identify Google by name or purport to bind it directly, even though Google is not a party in the underlying case and never received prior notice of the proceedings or an opportunity to be heard before the injunction issued. When that happens, Google typically has no insight into the underlying dispute or the means by which the order was procured, though it is not uncommon for Google to receive orders that seem aimed at quashing public commentary or debate.

In some instances, the orders that Google has received have turned out to be fake or fraudulent—while the orders appear real, they have not actually been issued by a court. In other cases, orders have been obtained against fictitious defendants who then quickly "agree" to a removal injunction being issued against them. These orders appear to be a tool to secure the removal of material without ever actually serving or notifying the actual creator of the content. An example of such an order (which was issued and later withdrawn by a federal district court) is attached as Exhibit 1.[2]

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[1] Google publishes information about the court orders and other legal demands it receives in a Transparency Report, accessible here: https://www.google.com/transparencyreport/removals/government/?hl=en.

[2] This scenario has been extensively reported in popular legal blogs. *See, e.g.*, Eugene Volokh & Paul Alan Levy, *Dozens of suspicious court cases, with missing defendants, aim at getting web pages taken down or deindexed*, The Washington Post, Oct. 10, 2016, https://www.washingtonpost.com/

(continued...)

With only narrow exceptions, Section 230 of the CDA immunizes Google from suits for claims involving third-party content that are brought directly against it. Indeed, courts have repeatedly rejected efforts to name Google as a party and seek relief directly against it for third-party material that is linked to from its search results or appears on its content-hosting platforms.[3] In an effort to evade this robust immunity, plaintiffs often resort to tactics like the one used here against Yelp. They seek an injunction—sometimes a preliminary injunction, other times a permanent injunction, sometimes following a default judgment—that purports to compel nonparties, like Yelp or Google, to remove third-party content from their services, even though they could not obtain such relief directly against such providers.

(...continued from previous page)
news/volokh-conspiracy/wp/2016/10/10/dozens-of-suspicious-court-cases-with-missing-defendants-aim-at-getting-web-pages-taken-down-or-deindexed/?utm_term=.3521d2a362ed (discussing a pattern of cases where permanent injunctions to remove content were obtained using apparently fictitious defendants); Tim Cushing, *The Latest In Reputation Management: Bogus Defamation Suits From Bogus Companies Against Bogus Defendants*, Techdirt.com (Mar. 31, 2016, 8:31 AM), https://www.techdirt.com/articles/20160322/10260033981/latest-%20reputation-management-bogus-defamation-suits-bogus-companies-against-bogus-defendants.shtml (discussing multiple cases filed in Contra Costa County Superior Court in which apparently fictitious defendants purportedly "admitted" defamation and agreed to a permanent injunction).

[3] *See, e.g.*, *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016) (applying CDA to defamation claims arising from Google search results); *Obado v. Magedson*, 612 F. App'x 90 (3d Cir. 2015) (same); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010) (dismissing claims based on content of Google's "Sponsored Link" advertisements); *Kabbaj v. Google Inc.*, No. 13-1522-RGA, 2014 U.S. Dist. LEXIS 47425, at *12 (D. Del. Apr. 7, 2014) (dismissing claims premised on Google hosting third-party information), *aff'd*, 592 F. App'x 74 (3d Cir. 2015).

Because Google is seldom given a chance to object to these orders before they issue, courts may not be appraised of the legal limitations on enjoining nonparties, and they will sometimes endorse the plaintiff's *ex parte* demand to include Google and other nonparty intermediaries within the scope of an injunction. Once that happens, the order is then sent to Google as a *fait accompli*, with a threat of contempt if it fails to remove the content at issue.

Such orders come from foreign courts as well. In some instances, the orders are remarkably broad. Foreign courts have, for example, tried to order Google to remove information from its search results on a global basis, so that the ruling of a single court in one nation can operate to censor what people all over the world can see or find. *See, e.g.*, *Equustek Sols. Inc. v. Google Inc.*, 2015 BCCA 265, ¶ 107 (Ct. of App. British Columbia 2015) (Can.) (granting injunction with "worldwide effect"). In defending a worldwide blocking order in the Supreme Court of Canada, the plaintiff is expressly relying on the Court of Appeal's ruling in this case as demonstrating the propriety of Canadian courts extraterritorially enjoining Google (as a nonparty) from making search results available even to users in the United States. Respondents' Factum ¶ 77, *Google Inc. v. Equustek Sols.*, File No. 36602 (S.C.R. Aug. 8, 2016) (Can.).

Google regularly challenges orders that seek to enjoin it even though it is not a party to the underlying suit by invoking principles of equity and due process, as well as its immunity under Section 230. These rules have long made clear that nonparty injunctions purporting to compel Google to remove content posted by its users or accessible through its search engine are improper. By appealing to these principles,

Google has generally been able to effectively defeat efforts to compel the removal of third-party content through overbroad court orders.

Google does, however, have a set of internal policies whereby it may remove material that a court has determined to be unlawful if the order does not purport to bind Google directly. These policies provide a robust mechanism for people harmed by material that may appear on or through Google's services. But U.S. law has always protected Google from being *required* to comply with orders in cases where it is not a party and is not taking active steps to aid and abet an actual party's violation of the injunction. This limitation on the scope of nonparty court orders allows Google to exercise discretion in deciding whether to remove speech from its services, just as Congress intended in Section 230.

The ruling below threatens these protections, with significant consequences for online speech. Allowing injunctions to issue directly against nonparty service providers, and threatening them with contempt for failing to remove content, would make it perilous for intermediaries to resist even the most questionable court orders. Service providers might end up removing postings that were never actually found to be unlawful or where even the creator of the content was never properly notified of the action. Preventing such results is one of the reasons Congress enacted Section 230: "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." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). And it is also what the equitable and due process

limits on enjoining nonparties have longed worked to prevent.

As we now explain, the proper application of those rules protects Yelp, Google, and other online service providers from injunctions like the one issued here.

Argument

I. Equity and Due Process Prohibit Injunctions From Binding Nonparties Not Closely or Actively Affiliated With A Party

A. Historical Rulings Limit The Application of Injunctions To Nonparties

Basic principles of due process limit the power of courts to bind nonparties, those who are, effectively, "strangers to the litigation" (*Philip Morris USA, Inc. v. Williams*, 549 U.S. 346, 353 (2007)). *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one 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."); *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 403 (1917) ("The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard. To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice." (internal citations omitted)).

As this Court has explained: "It is the general rule that a judgment may not be entered either for or against a person who is not a party to the proceeding, and any judgment which does so is void to that extent." *In re Wren*, 48 Cal. 2d 159, 163 (1957); *see also Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 180 (1973) ("'There will be no adjudication of liability against a [non-party] without affording [it] a full opportunity at a hearing, after adequate notice, to present evidence . . . .'" (alteration in

original) (citation omitted)); *Envtl. Coal. of Orange Cty., Inc. v. Local Agency Formation Comm'n*, 110 Cal. App. 3d 164 (1980) ("A judgment cannot be rendered against one who is not a party to an action.").

These principles apply to injunctions. "It is well established that injunctions are not effective against the world at large." *People ex rel. Gwinn v. Kothari*, 83 Cal. App. 4th 759, 765 (2000). In 1897, for example, the U.S. Supreme Court invalidated an injunction "because it enjoins persons not parties to the suit," "we do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented, or to subject them to penalties for contempt in disregarding such an injunction." *Scott v. Donald*, 165 U.S. 107, 117 (1897). In Learned Hand's words:

> [N]o court can make a decree which will bind anyone 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.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930); *accord Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13 (1945) ("The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.").

Equity allows only a very limited exception to this rule. In narrow circumstances, an injunction can run or be enforced against a nonparty. A century ago, this Court described this exception:

> Ordinarily only the parties to an action and their successors are bound by a judgment given in an action *inter partes*. In matters of injunction, however, it has been a common practice to make the injunction run also to classes of

> persons through whom the enjoined party may act, such as agents, servants, employees, aiders, abetters, etc., though not parties to the action, and this practice has always been upheld by the courts, and any of such parties violating its terms with notice thereof are held guilty of contempt for disobedience of the judgment.

Berger v. Superior Court, 175 Cal. 719, 720-21 (1917) (overturning contempt finding against individual who was not affiliated with the defendants and was "not acting in concert with any of them").

Berger approvingly cited the New York Court of Appeal's decision in *Rigas v. Livingston*, 178 N.Y. 20 (1904), which offered a more precise account of when an injunction can extend to nonparties: "persons not parties to the action may be bound by an injunction if they have knowledge of it, provided they are servants or agents of the defendants or act in collusion or combination with them." *Id.* at 24. In other words, "to make a person not a party to the action liable for disobeying an injunction the person should bear such a relation to the defendant *as enables the latter to control his action.*" *Id.* at 25 (emphasis added). In the absence of such collusion or control, a nonparty "is not guilty of of a breach of injunction by exercising a right which belonged to him before the suit." *Id.* (quoting 2 High on Injunctions 1112, § 1435 (3d ed.).

Leading federal authorities from this period echo these same limitations. In *Chase National Bank v. City of Norwalk*, the Supreme Court explained that "persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing a prohibited act *if their relation is that of associate or confederate.*" 291 U.S. 431, 436-37 (1934) (emphasis added). Learned Hand put the point in similar terms:

> [T]he 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, 42 F.2d at 832-33 (emphasis added).

These cases are clear: only nonparties who are either legally identified with a named party (an agent, employee, or servant) or who work in "active concert" with the enjoined party to assist in a violation of a court order may be properly bound by an injunction, or held in contempt for violating it. From being historical accidents, these rules ensure that injunctions remain properly confined by the rules of equity and the overarching mandates of due process. *See id.* at 833. They are why courts consistently reject contempt citations against nonparties who had not actively confederated with the defendant. *See, e.g.*, *Berger*, 175 Cal. at 720 (overturning contempt finding against one who "was an absolute stranger to the proceedings, having no connection, direct or indirect, with any of the parties, and not acting in concert with any of them"); *Scott*, 165 U.S. at 117 ("This is not a case where the defendants named represent those not named. Nor is there alleged any conspiracy between the parties defendant and other unknown parties.").

B. Modern Cases Carry Forward Traditional Limitations On The Scope Of Injunctions Against Nonparties

Courts in this State and around the country have consistently applied these principles in more recent cases, further fleshing out the circumstances under which a nonparty can be deemed to be acting "in concert" with a party such that it can be enjoined or held in contempt. The rules developed in these cases are strict. They make clear that Yelp, and similarly situated online service providers, do not aid and abet

violations of an injunction simply by virtue of providing the platforms for user speech or making third-party content available via the Internet. Such intermediaries cannot properly be bound by nonparty injunctions.

California Cases. Two leading Court of Appeal cases confirm that neither a common purpose nor a routine contractual relationship is enough to bind a nonparty to an injunction.

People v. Conrad involved an injunction that prohibited certain individuals and organizations from picketing in front of an abortion clinic. The injunction also applied to "their agents, representatives, employees and members, and each of them, and each and every person acting at the direction of or in combination or in concert with defendants." *Conrad*, 55 Cal. App. 4th at 899 (citation omitted). Various individuals not expressly named in the injunction, and who were not members of the enjoined organization, were held in contempt after protesting. The Court of Appeal threw out these convictions. It held that "[m]ere 'mutuality of purpose'" between a party and a nonparty "is not enough" to bring the nonparty within the injunction's scope. *Id.* at 903. Instead, the enjoined party must "be demonstrably implicated in the nonparty's activity." *Id.* That means that the nonparty is subject to contempt only "when, with knowledge of the injunction, the nonparty violates its terms *with or for* those who are restrained." *Id.* Under this standard, even though the nonparty protesters knew of the injunction and came to the clinic "specifically to do what the enjoined parties could not," it was improper to hold them in contempt. *Id.* at 903-04; *see also Planned Parenthood Golden Gate v. Garibaldi*, 107 Cal. App. 4th 345, 355 (2003) (affirming the "with or for" standard and invalidating injunction insofar as it applied to anyone with "actual notice").

Similarly, in *People ex rel. Gwinn v. Kothari*, the Court of Appeal held that a public nuisance injunction barring the owners of a motel from allowing certain activities on the premises could not be applied to bind future owners of the property. The court explained that "an injunction is binding only on the parties to an action or those acting in concert with them, and an arm's-length bona fide purchaser is not in this group." 83 Cal. App. 4th at 766-67, 769. In other words, a nonparty who merely engaged in a transaction with a party regarding the property in question is not properly subject to an injunction under established rules of equity and due process. ""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."" *Id.* at 769 (alterations in original) (quoting *Regal Knitwear*, 324 U.S. at 13).

Federal Cases. California law limiting the scope of injunctions against nonparties is entirely consistent with federal law. The Federal Rules of Civil Procedures restrict injunctions to the parties, their officers, agents, servants, employees, and attorneys, and "other persons who are in active concert or participation." Fed. R. Civ. P. 65(d)(2); *accord Conrad*, 55 Cal. App. 4th at 903 (relying on Rule 65 in describing permissible scope of an injunction); *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1124 (1997) (same). Under that standard, a nonparty must have a "close alliance with the enjoined defendant" before it can be bound. *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 43 (1st Cir. 2000).

"The courts have interpreted the language in question . . . as requiring that a person either be 'legally identified with' a party in the case or 'aid and abet' the party to violate a decree." *NBA Props., Inc. v.*