

No. S235968

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

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

v.

AVA BIRD,  
Defendant,

YELP INC.,  
Appellant

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SUPREME COURT  
**FILED**

MAY 01 2017

Jorge Navarrete Clerk

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Deputy

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Court of Appeal of the State of California  
First Appellate District, Case No. A143233  
Superior Court of the State of California  
County of San Francisco  
Civil Case No. CGC 13530525  
Honorable Ernest H. Goldsmith

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**APPLICATION OF THE INTERNET ASSOCIATION AND  
THE CONSUMER TECHNOLOGY ASSOCIATION FOR  
PERMISSION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT  
OF NON-PARTY YELP INC. and *AMICI CURIAE* BRIEF OF  
THE INTERNET ASSOCIATION AND THE CONSUMER  
TECHNOLOGY ASSOCIATION IN SUPPORT OF NON-PARTY  
YELP INC.**

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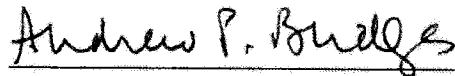
**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS  
(California Rules of Court, Rule 8.208)**

*Amici Curiae* the Internet Association and the Consumer Technology Association hereby certify that there are no interested entities or persons to list in this Certificate pursuant to California Rules of Court, rule 8.208(e)(3).

Dated: April 17, 2017

Respectfully submitted,

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**APPLICATION OF THE INTERNET ASSOCIATION AND  
THE CONSUMER TECHNOLOGY ASSOCIATION FOR  
PERMISSION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF  
NON-PARTY YELP INC.**

The Internet Association and Consumer Technology Association (collectively, “*Amici*”) respectfully move for leave to file a brief as *amici curiae* in support of appellant, non-party Yelp Inc. *Amici* are membership organizations representing a wide variety of online services and technology providers that empower citizens and businesses to communicate, form relationships, and engage in commerce in countless new and important ways. Their role is unique. They have their own views and interests, to be sure. But one of the most important contributions of the businesses who are members of these associations is that they provide forums and tools for the public to engage in a wide variety of activities that the First Amendment protects: they facilitate speech and public discourse, they allow persons to engage in virtual assembly by forming communities and communicating in groups, they allow citizens to air their grievances, and they allow businesses and patrons to discover each other and to transact business with each other. *Amici* share an interest in advocating First Amendment protections for speech on the Internet and the proper application of the Communications Decency Act (“CDA”), 47 U.S.C. § 230, to Internet intermediaries, hosting platforms and other online service providers. *Amici* seek to file a brief in this appeal to ensure that this Court has context about how the decisions of the lower courts threaten these important interests.

***The Internet Association*** represents roughly forty leading technology companies. Its membership includes a broad range of Internet intermediaries, from travel sites and online marketplaces to social networking services and search engines, including Amazon, Google,

Facebook, and Yelp<sup>1</sup>, to name a few. The Internet Association advances policies that strengthen and protect Internet freedoms, foster innovation and economic growth, and empower small businesses and the public.

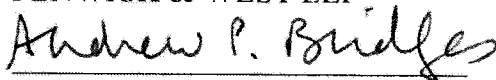
*The Consumer Technology Association*<sup>TM</sup> (“CTA”) is the trade association representing the \$292 billion U.S. consumer technology industry, which supports more than 15 million U.S. jobs. More than 2,200 companies – 80 percent are small businesses and startups; others are among the world’s best known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, and standards development. CTA also owns and produces CES® – the leading trade show for all consumer technologies. A complete list of CTA’s members is available at <http://cta.tech/Membership/Membership-Directory.aspx>.

The Internet is perhaps now the single most important forum for public expression and speech. *Amici* have a substantial interest in this proceeding and its potential effects on constitutional rights and freedoms of expression; constitutional due process rights of online service and technology providers; and the proper interpretation of the CDA.

Dated: April 17, 2017

Respectfully submitted,

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<sup>1</sup> Yelp and its counsel neither authored any portion of nor made a monetary contribution intended to fund the preparation or submission of this brief. Only the *amici curiae* funded the preparation and submission of this brief.

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## INTERESTS OF *AMICI CURIAE*

The Internet Association and Consumer Technology Association are membership organizations representing a wide variety of online services and technology providers that empower citizens and businesses to communicate, form relationships, and engage in commerce in countless new and important ways.

Their role is unique. They have their own views and interests, to be sure. But one of the most important contributions of the businesses who are members of these associations is that they provide forums and tools for the public to engage in a wide variety of activities that the First Amendment protects: they facilitate speech and public discourse, they allow persons to engage in virtual assembly by forming communities and communicating in groups, they allow citizens to air their grievances, and they allow businesses and patrons to discover each other and to transact business with each other. For these reasons, members of these associations share an interest in advocating First Amendment protections for speech on the Internet and the proper application of the Communications Decency Act (“CDA”), 47 U.S.C. § 230, to Internet intermediaries, hosting platforms and other online service providers.

*The Internet Association* represents roughly forty leading technology companies. Its membership includes a broad range of Internet intermediaries, from travel sites and online marketplaces to social networking services and search engines, including Amazon, Google, Facebook, and Yelp<sup>2</sup>, to name a few. The Internet Association advances public policies that strengthen and protect Internet freedoms, foster

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<sup>2</sup> Yelp neither authored any portion of nor made any financial contribution to the preparation of this brief.

innovation and economic growth, and empower small businesses and the public.

*The Consumer Technology Association*<sup>™</sup> (“CTA”) is the trade association representing the \$292 billion U.S. consumer technology industry, which supports more than 15 million U.S. jobs. More than 2,200 companies – 80 percent are small businesses and startups; others are among the world’s best known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, and standards development. CTA also owns and produces CES® – the leading trade show for all consumer technologies. A complete list of the Consumer Technology Association’s members is available at <http://cta.tech/Membership/Membership-Directory.aspx>.

The Internet is perhaps now the single most important forum for public expression and speech. Congress enacted the immunities of Section 230 of the CDA to promote the growth and development of Internet freedom and commerce. Both the Internet Association and the Consumer Technology Association have a substantial interest in this proceeding and its potential effects on (a) U.S. and California constitutional rights and freedoms of free expression; (b) U.S. and California constitutional due process rights of online service and technology providers; and (c) the proper interpretation of the Communications Decency Act immunities for online platforms and marketplaces.

## **INTRODUCTION**

The decisions of the courts below have, through three discrete errors, created a “perfect storm” that both jeopardizes important constitutional protections and imperils the public and those online service and technology providers who serve the public. The lower court decisions failed to accord Yelp due process; they undermined core First Amendment interests; and

they thwarted the statutory immunities of Yelp as an interactive service provider under the CDA, 47 U.S.C. § 230(c)(1).

The underlying case is one of countless instances in which a person or business feels wronged by another by means of some Internet communication. The normal way these disputes play out is between those persons. Imposing direct obligations upon others, including service providers by which those persons communicate, without treating those others as parties entitled to articulate their own interests to a court, violates core principles of due process under both the United States and California constitutions. That due process violation is especially harmful when federal First Amendment and corresponding California constitutional interests are at stake.

The decisions below allowed a plaintiff to threaten a vital online resource of public expression, public information, and commercial connections with a prior restraint and without any opportunity to challenge that restraint. They treated Yelp as a speaker or publisher of its user's expression, in violation of Section 230(c) of the Communications Decency Act, by construing Yelp as in concert with, or participating, in that user's expression. Together these errors have caused grave risks to the public, to online service and technology providers, and to the societal and commercial benefits that flow from the Internet.

If the results below were to prevail, a vast new avenue of litigation abuse and vast new opportunities to suppress First Amendment rights would open up. Plaintiffs could surprise online services and technology providers with "bank-shot injunctions" where the actual targets of the injunctions are not the ostensible aims of the proceedings. Targets of injunctions would have no effective protection or recourse. Instead they would learn about judicial orders at the same moment they face threats of contempt. Responding to those immediate threats and risks without



recourse or an opportunity for a real judicial determination would inevitably lead online service and technology providers to limit their own, and their users', speech; would cause the disappearance of legitimate discourse from online services; and would promote and reward the use of procedural stratagems by litigation bullies. For all these reasons, and because of each individual error of the lower courts, this Court should reverse the judgments of the courts below.

## **ARGUMENT**

### **I. THE DECISIONS OF THE LOWER COURTS CHILL IMPORTANT PUBLIC EXPRESSION.**

#### **A. Online Platforms Facilitate Communications of Public Interest and Commerce.**

The First Amendment protects “an open marketplace” in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference. *Knox v. Serv. Empls. Int’l Union, Local 1000* (2012) 132 S. Ct. 2277. Courts have recognized that the fundamental rights articulated in the First Amendment encompass diverse subjects of human interest, spanning religious, political, social, and economic matters. *See Aaron v. Mun. Court of San Jose-Milpitas Judicial Dist.* (1977) 73 Cal.App.3d 596, 606 (recognizing the breadth of First Amendment protections and striking down ordinance as a constitutionally infirm regulation of speech involving charitable solicitation).

Today, the Internet is home to the important activities and expressions protected by the First Amendment. Indeed, the Supreme Court has recognized the centrality of the Internet and the “vast democratic forums” that it offers. *Reno v. Am. Civil Liberties Union* (1997) 521 U.S. 844, 868 (“*Reno*”). Twenty years ago the United States Supreme Court observed that the Internet “enable[s] tens of millions of people to

communicate with one another and to access vast amounts of information from around the world.” *Id.* at 850. Further, it is “no exaggeration to conclude that the content on the Internet is as diverse as human thought.” *Id.* at 852 (quoting district court). Indeed, the *Reno* Court noted:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”

*Id.* at 870. That observation recognizes the important role online platforms and technology providers perform in empowering the public to express, and to access, a vast array of opinions, information, and other materials.

Online platforms and technology providers carry out the vital work of giving the public a means of expression through a wide-ranging set of activities including the storage and dissemination of expressions as well as the bringing together of persons and organizations in communities, marketplaces, and networks that facilitate both the exchange of opinions, ideas, and information and the transaction of business. In doing so they have transformed the worlds of both civic and commercial life.

**B. Commercial Speech and Consumer Access to Speech Serve Important Purposes.**

Courts have explicitly recognized the importance of the public’s right to receive or access speech and not just to speak it. In *Griswold v. Connecticut*, the Supreme Court emphasized that without “peripheral rights” such as rights to receive and access speech, the specific rights guaranteed under the First Amendment could not exist: “The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive*, the right to read and freedom

of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community.” *Griswold v. Connecticut* (1965) 381 U.S. 479, 482 (internal citations omitted, emphasis added; collecting cases). Based on this broad conception of the First Amendment, the *Griswold* Court struck down a statute that it found harmed the free flow of information. *Id.*

The First Amendment protects audiences, not only speakers. The “protection afforded is to the communication, to its source and to its recipients both.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 756 (“*Virginia State*”) (collecting cases). The First Amendment right to speak carries with it the right of members of the public to listen. Courts across the United States widely recognize this principle, not just with respect to core political speech but also with commercial speech. Indeed, the “interests of consumers in receiving commercial information, and the interests of society in the free flow of such information, have been the foundation of commercial speech doctrine from its inception.” *Bulldog Investors Gen. P’ship v. Sec’y of Commonwealth* (2011) 460 Mass. 647, 679; *see also Am. Meat Inst. v. U.S. Dept. of Agric.* (D.C. Cir. 2014) 760 F.3d 18, 29 (recognizing consumer’s interest in the free flow of commercial information as the “longstanding focus” of commercial speech jurisprudence). After all, “[p]rotection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.” *National Elec. Mfrs. Ass’n v. Sorrell* (2d Cir. 2001) 272 F.3d 104, 114.

The wide dissemination of information not only promotes an informed electorate and civic engagement, *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 269-270 (“*New York Times*”), but it also encourages free enterprise and stimulates sound economic decision-making. “So long

as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.” *Virginia State*, 425 U.S. at 756. Thus, the free flow of speech, including consumer access to speech that online platforms like Yelp facilitate, serves important and protected political and commercial functions.

**C. Courts Must Protect Against Procedural Abuses that Chill Protected First Amendment Expression.**

Given the primary importance of First Amendment protections and values to American social, political and commercial activities, courts must guard against devices that undermine First Amendment rights. Indeed, even where expression arguably falls outside the constitutional protections of the First Amendment, such as with obscenity or false advertising, states must still “conform to procedures that will ensure against the curtailment of constitutionally protected expression” and apply laws that “scrupulously embody the most rigorous procedural safeguards.” *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 66 (“*Bantam Books*”) (state statute creating commission with power to suppress circulation of publications “containing obscene, indecent or impure language” was unconstitutional prior restraint). As this Court stated in *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1159 (“*Balboa Island*”), affirming the Court of Appeal’s partial reversal of an unconstitutionally overbroad injunction in a defamation case, “a court must tread lightly and carefully when issuing an order that prohibits speech . . . .” This admonition is “but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.” *Bantam Books*, 372 U.S. at 66.

Whether expression is ultimately protectable or not, courts must carefully scrutinize any proposed restrictions on the utterance, posting or circulation of speech.<sup>3</sup> As the United States Supreme Court stated: “The teaching of our cases is that, because *only a judicial determination in an adversary proceeding* ensures the necessary sensitivity to freedom of expression, *only a procedure requiring a judicial determination* suffices to impose a valid final restraint.” *Freedman v. State of Md.* (1965) 380 U.S. 51, 58 (“*Freedman*”) (collecting cases) (emphasis added).

In this case there has been *no such procedure or judicial determination as to Yelp whatsoever*, and the proceedings with respect to the absent defendant—an uncontested motion for an injunction following a default judgment—have none of the hallmarks of a genuine “judicial determination in an adversary proceeding.” *See Freedman*, 380 U.S. at 58.

The burden of proving that particular speech constitutes “unprotected expression must rest on the censor.” *Freedman*, 380 U.S. at 58. Yelp has its own, distinct First Amendment interest here apart from the interest of its user. Instead of carrying this burden with respect to Yelp, however, Plaintiffs used a combination of procedural devices—substitute service on the speaker, no service on Yelp, and default judgment—that avoided it altogether. The First Amendment cannot tolerate such tactics,

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<sup>3</sup> This protection also extends to those who disseminate information from third parties, including intermediaries such as Yelp. For instance, in *New York Times*, the Supreme Court held that the First Amendment protects the publication of all statements about public officials, *even false ones appearing in paid advertisements*, absent a showing of actual malice. 376 U.S. at 284. In reaching this result, the Court reasoned that any other conclusion “might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities” and would “shackle the First Amendment in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources.” *Id.* at 266 (internal quotations omitted).

which stand to chill protected commercial speech on platforms like Yelp, while depriving intermediaries of any opportunity to challenge the merits of a plaintiff's claims or to assert their own rights. There has been no genuine judicial determination in an adversary proceeding, as *Freedman* requires. On this First Amendment ground alone, this Court should reverse the judgments of the courts below.

**II. DUE PROCESS REQUIRES NOTICE AND A HEARING BEFORE APPLYING AN INJUNCTION TO A NON-PARTY LIKE YELP.**

At bare minimum, due process requires notice and an opportunity to be heard before a court can deprive a person of rights or property. *E.g.*, *Fuentes v. Shevin* (1972) 407 U.S. 67, 80 (ex parte seizure proceedings violated due process). The opportunity for a hearing “must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo* (1965) 380 U.S. 545, 552 (failure to give notice of pending adoption proceedings violated due process).

Specifically, “[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.” *Parklane Hosiery Co., Inc. v. Shore* (1979) 439 U.S. 322, 327 n.7. And any “judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires.” *Hansberry v. Lee* (1940) 311 U.S. 32, 41.

Moreover, it “is well established that injunctions are not effective against the world at large.” *People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 765 (“*Kothari*”); see also *Alemite Mfg. Corp. v. Staff* (2d Cir. 1930) 42 F.2d 832, 832 (L. Hand, J.) (“no court can make a decree which will bind any one but a party. . . .”). Nor may a court “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.” *Regal Knitwear Co. v. N.L.R.B.* (1945) 324 U.S. 9, 13; accord *Microsystems Software, Inc. v. Scandinavia Online AB* (1st Cir. 2000) 226 F.3d 35, 43 (“*Microsystems*”). Even if a non-party has notice of an injunction against a litigant (which Yelp in this case did not), it “cannot be held in contempt until shown to be in concert or participation” with the enjoined party. *Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 112.

Plaintiffs have made no showing that Yelp acted in concert or participation with Defendant Bird. Injunctions are “binding only on the parties to an action or those acting in concert with them.” *Kothari*, 83 Cal.App.4th at 769. The “existence of such a linkage makes it fair to bind the nonparty, even if she has not had a separate opportunity to contest the original injunction, because her close alliance with the enjoined defendant adequately assures that her interests were sufficiently represented.” *Microsystems*, 226 F.3d at 43. Here, Yelp as a non-party had no opportunity to challenge the validity of the injunction, and Plaintiffs do not even argue that Yelp aided and abetted, or acted in concert with, the defaulting defendant. It did not: like most other online intermediaries, Yelp did nothing more than offer a neutral platform. See *Blockowicz v. Williams* (7th Cir. 2010) 630 F.3d 563, 568 (non-party hosting service not subject to injunction compelling removal of defamatory material from its website).

Both Plaintiffs and the courts below ignored these fundamental due process principles and Plaintiffs impermissibly seek to enforce, on pain of contempt, an injunction in an uncontested default judgment proceeding against a non-party service provider, who had no notice of the initial lawsuit or the motion for injunction, no relationship with the defaulting defendant beyond providing a forum on which any member of the public could post a review of any business, and no opportunity for a hearing. Due