

Case No. S235968

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.

SUPREME COURT  
FILED

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Jorge Navarrete Clerk

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Deputy

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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  
Case No. CGC-13-530525, The Honorable Ernest H. Goldsmith

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**AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS, THOMAS JEFFERSON CENTER FOR THE PROTECTION OF  
FREE EXPRESSION, AND 18 MEDIA ORGANIZATIONS IN SUPPORT OF  
APPELLANT**

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## INTRODUCTION

The Internet is a vital forum for free expression, where individuals share their opinions, receive and reflect upon viewpoints different from their own, and connect with other members of their community to discuss matters of public interest and concern. The decision of the Court of Appeal, below, threatens the vibrancy of the public discourse that takes place in Internet discussion forums—discourse that Congress sought to protect and promote by passing Section 230 of the Communications Decency Act, 47 U.S.C. § 230 (2012) (hereinafter, “Section 230”). If the Court of Appeal’s decision is permitted to stand, Internet platforms that provide space for comment and discussion, like many news media websites, will effectively see their First Amendment interests in facilitating the discussions that take place in their forums curtailed without an opportunity to object, undermining the vitality of such forums as a place for the public to come together to debate issues.

*Amici* submit this brief to highlight the value that forums and comment sections on news media websites provide journalists and the public. In addition, *amici* emphasize that the decisions of the trial court and the Court of Appeal, below, undermine the broad, robust protections of Section 230, which Congress drafted to preserve such valuable online discourse on interactive computer services, including news media websites that deliver information to the public.

## ARGUMENT

### **I. Forums and comment sections on news media websites enhance online journalism and benefit the public.**

The Internet affords individuals unparalleled opportunities to interact and engage with others on matters of public concern, and to receive information and viewpoints that may otherwise be inaccessible to them. Such communication fosters a deeper understanding of social, political, and economic issues, and can encourage civic engagement. Forums and comment sections on news media websites that prompt readers to share their opinions about matters of public interest and concern enable readers to learn not only the underlying facts of a news story from reporters, but also how the story and its subject matter affect other members of their community. Thus, by inviting members of the public to comment on an article, a news media website can offer readers additional ideas and perspectives that can enrich their understanding of the article, making the story more personal and meaningful to those who participate in the discussion, and motivating them to return to that website in the future.

#### **A. Forums and comment sections on news media websites can increase the accuracy of journalists' reporting.**

Comment sections and forums for public discussion on news media websites can enhance the quality of reporting by enlisting the help of readers in improving the clarity and accuracy of news reports. According to a 2016 survey conducted by The Coral Project and the University of Texas' Engaging News Project, approximately 81 percent of readers want reporters to "clarif[y] factual

questions in the comment section[.]” a practice that can increase the audience’s understanding of confusing or complex topics.<sup>1</sup> See Natalie Jomini Stroud et al., COMMENT SECTION SURVEY ACROSS 20 NEWS SITES 1, 2 (2017), available at <http://bit.ly/2pqvAvN>. Commenters can also serve as fact checkers themselves. When a comment on a science blog highlighted an error in a scientific paper’s findings, the manager of the blog was prompted to “test the science, which [he] debunked, and the paper was withdrawn.” Mathew Ingram, *If Popular Science cares about science, why not try to fix comments instead of killing them?*, GIGAOM (Sept. 24, 2013, 3:42 PM), <http://bit.ly/1yz5PH1>. Indeed, just knowing that a story is open to readers’ comments makes at least some journalists more committed to meticulous reporting and more likely to review their work for precision. See Jane B. Singer & Ian Ashman, “*Comment Is Free, but Facts Are Sacred*”: User-generated Content and Ethical Constructs at the Guardian, 24 J. OF MASS MEDIA ETHICS 3, 14 (2009). One reporter, for example, routinely “asks herself if what she has written is ‘bullet-proof’” because she “know[s] someone will shoot [her] down if [it isn’t], and obviously that will destroy the credibility of anything else [she] say[s].” *Id.*

While the primary motivation for many commenters is “to express an emotion or opinion,” others seek “to balance the discussion” by providing alternative viewpoints or perspectives on a given story. Stroud, *supra*, at 2, 14–15.

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<sup>1</sup> The survey asked questions of readers across 20 U.S. news outlets and received more than 12,000 responses.

In this way, reader comments can assist journalists by presenting multiple perspectives on their work and by encouraging them to consider different approaches to stories in the future. *See id.*; Singer & Ashman, *supra*, at 16.

**B. Forums and comment sections on news media websites foster valuable relationships between journalists and their readers.**

Online conversations following the publication of an article frequently shape readers' understanding of an event. *See* Amanda Zamora, *Comments are changing. Our commitment to audiences shouldn't*, POYNTER (Aug. 31, 2016), <http://bit.ly/2cey0an>. And, increasingly, such conversations also shape journalists' coverage. Comments not only influence the stories that journalists pursue by signaling the value of a subject to readers, they also provide "potentially good material that [journalists] can publish." *Id.*

Some journalists routinely rely on online engagement with readers to develop stories, crowdsourcing research by looking to readers for "quotes, photographs, and contact details." Neil Thurman, *Forums for citizen journalists? Adoption of user generated content initiatives by online news media*, 10 *NEW MEDIA & SOC'Y* 139, 149 (2008). As Joel Achenbach, a reporter for *The Washington Post*, has said: "The smartest person in the room is the room itself, the audience. The audience knows more than anyone else. So if you can tap into the audience's knowledge, that's a huge resource." Zamora, *supra*.

In addition, some websites incorporate audience comments into their coverage of events. *See* Thurman, *supra*. In the period following the Brexit vote,

the *Financial Times* (“FT”) published a story centered on the “thoughtful reflections” it received from readers on the referendum. See Nausicaa Renner, *As sites abandon comments, The Coral Project aims to turn the tide*, COLUMBIA JOURNALISM REVIEW (Aug. 23, 2016), <http://bit.ly/2bQf6nm>. In it, FT highlighted one particular comment, which soon thereafter went viral on Twitter with almost 30,000 retweets, and inspired yet another story—this time written by the commenter himself—that prompted even more public discussion. See Nicholas Barrett, *Brexit has locked us millennials out of the union we voted for*, FIN. TIMES (June 26, 2016), <http://on.ft.com/2oNk7Df>; George Parker et al., *Britain turns its back on Europe*, FIN. TIMES (June 24, 2016), <http://on.ft.com/2eiGrkW>; @AD7863, TWITTER (June 24, 2016, 3:55 AM), <http://bit.ly/28Wo9n4>. Thus, in addition to providing meaningful content for FT about an issue of global importance, one reader’s comment benefitted other readers by provoking thoughtful debate about the anticipated effects of Brexit. See Barrett, *supra*.

Recognizing the power of reader comments, in January, *The Washington Post* launched a weekly newsletter featuring the best comments on its content, as determined by “reader likes”—specifically, by how other readers responded to the comments and how often a reader posted. See Teddy Amenabar, *Read These Comments: We’re launching a newsletter dedicated to the best reader comments*, WASH. POST (Jan. 11, 2017), <http://wapo.st/2oJGYQ7>. *The New York Times* similarly selects “the most insightful perspectives” from its readers to appear

alongside articles. See Sarah Marshall, *New York Times elevates comments from below the line*, JOURNALISM.CO.UK (July 30, 2013), <http://bit.ly/2o4wpZp>.

*The Washington Post* and other news organizations, including *Politico* and *The Guardian*, also utilize applications like News Genius, which enable readers to easily initiate discussions about an article's content by highlighting parts of the text and responding to it. See, e.g., Chris Cillizza, *Donald Trump is a 'smart person' in case you forgot*, WASH. POST (Dec. 12, 2016), <http://wapo.st/2oE0zny>; Jessica Elgot, *Theresa May calls for 'red, white and blue Brexit'*, THE GUARDIAN (Dec. 6, 2016, 7:25 AM), <http://bit.ly/2nLIG3u>; Gregory Ferenstein, *I Voted for Hillary. And Now I'm Going to Write for Breitbart*, POLITICO (Nov. 29, 2016), <http://bit.ly/2oCP7ZC>. Readers' comments are embedded within the article itself, and other readers can easily access those responses and offer their own input. News Genius can thus facilitate more focused conversation about particular statements in a news report.

In short, now more than ever, the publication of a news story may be only "the beginning of the conversation" between journalists and members of the public. Tyrone Beason, *In online commenting, a community of strangers calls it as they see it*, THE SEATTLE TIMES (May 16, 2011, 12:33 PM), <http://bit.ly/2oE8PSb>. Through forums and comment sections on news media websites, readers are given an opportunity to engage in a dialogue about the issues that affect their lives, and to connect with reporters and other members of their community, all of which, in turn, strengthens the relationship between news media

organizations and the public. See Shan Wang, *Commenters say they want journalists and experts to join them in the comments*, NIEMANLAB (Jan. 12, 2017), <http://bit.ly/2ime2xX>. See also Sara Morrison, *The Future of Comments*, NIEMANREPORTS (Feb. 2, 2017), <http://bit.ly/2k9fGm3> (quoting Mónica Guzmán, co-founder of Seattle newsletter *The Evergrey*, as explaining “I think we’re learning how valuable deeper connections can be and how valuable incorporating [reader] contributions can be. For so long, we were the ones talking and they were the ones listening.”).

**II. The Court of Appeal’s decision threatens public discourse on the Internet by allowing regulation of forums without allowing the operators of those forums to defend their speech interests, which are distinct from the interests of particular litigants.**

Congress enacted Section 230 in recognition of the need to protect and promote the free flow of public discourse online. See 47 U.S.C. § 230(a)–(b) (acknowledging “unique opportunities for cultural development[] and myriad avenues for intellectual activity” online). It is not simply a statute that affects an individual’s remedy for tort claims. Instead, it is designed to allow forum hosts to maintain communities with robust protections for their speech and expression.

Viewed in that light, upholding the Court of Appeal’s decision would fundamentally alter how discussions on the Internet are regulated. Courts will be asked to enforce takedown orders without regard for the separate First Amendment interests that forum operators seek to protect, which are distinct from the interests of forum participants. Operators have an independent interest in the

speech activity on their forums. If a forum operator feels that an important but unprotected voice is being muzzled, and that removing that voice compromises the integrity of the forum, it must have the opportunity to defend the speech in court before being ordered to silence a participant. Holding otherwise would suggest that there is no First Amendment interest in maintaining robust communication within a forum.<sup>2</sup>

The separate speech interest of forum operators in protecting discussion on forums is clear from Section 230 and subsequent case law. Section 230 provides protections for “interactive computer services,” immunizing websites from liability for hosting third-party content. *See id.* § 230(c), (e)(3), (f)(3). Generally speaking, under Section 230, a website may be held liable only for the content it generates; it cannot be penalized for hosting another’s speech. *Id.*; *see also, e.g., Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (finding that, under Section 230, the host of an online forum was immune from liability for an alleged defamatory comment posted by a third-party user); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (emphasizing that Congress enacted Section 230 to “protect websites against the evil of liability for failure to remove offensive content”); *Zeran v. Am. Online*,

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<sup>2</sup> Appellant Yelp has directly addressed the protection of its own speech interests in the forum and how even this Court’s decision in *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007) demonstrates that an injunction against a third party is valid, “if at all, only following a process that fully protects the rights of the party sought to be enjoined.” Brief for Appellant at 32, *Hassell v. Bird* (2016) (No. S235968).

*Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“By its plain language, Section 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”).

Because Section 230 was intended to encourage the free exchange of ideas on the Internet, *Zeran*, 129 F.3d at 330, it requires a “quite robust, . . . relatively expansive definition of ‘interactive computer service’” that goes beyond the traditional Internet service provider; that definition includes news media websites that provide forums and comment sections for the posting of third-party content. *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (finding online dating site an “interactive computer service”); *see Batzel v. Smith*, 333 F.3d 1022, 1030–31 (9th Cir. 2003) (online newsletter considered an “interactive computer service”); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (social networking site qualified as “interactive computer service”). Moreover, Section 230 allows for the exercise of editorial judgment. *Zeran*, 129 F.3d at 330. Interactive computer services like Yelp that provide a forum for public comments are insulated from liability for third-party speech even if they exercise traditional editorial functions, such as determining whether to “publish, withdraw, postpone or alter content[,]” so long as they are not “responsible, in whole or in part, for the creation or development of information provided.” 47 U.S.C. § 230(f)(3); *e.g., Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1166, 1174; *see also Batzel*, 333 F.3d at 1032–33 (minor edits to third-party

content does not affect Section 230 immunity). Only when a website has “directly participate[d] in developing the alleged illegality” is immunity under Section 230 no longer available. *See Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1172, 1174 (finding that a service provider was susceptible to liability because it was “sufficiently involved with the design and operation” of the website at issue, which required users to choose from a narrow set of characteristics that it had developed to find a roommate). Thus, the Court of Appeal’s decision, which affirmed an injunction requiring Yelp to take down a negative review and which contemplates contempt proceedings and sanctions against Yelp if it refuses to comply, is inconsistent with Section 230’s broad grant of immunity for “interactive computer services.”

Yelp’s lack of opportunity to object or defend its own speech interests in this case has troubling implications for websites, including news media websites, that offer forums and comment sections that are open to members of the public. Because of their distinct role in maintaining the vitality of the forums they operate, news media organizations frequently litigate to defend speakers in their comment sections. For example, based in part on arguments presented by the news media, a growing body of law recognizes a heightened standard, first applied in *Dendrite International, Inc. v. Doe No. 3*, 776 A.2d 756 (N.J. Super. Ct. App. Div. 2001), that must be satisfied before courts will order the unmasking of an anonymous online commenter’s identity. *See, e.g., Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184, 194 (N.H. 2010) (reversing trial court’s

order compelling operator of website that reported on mortgage industry to reveal identity of anonymous commenter and remanding “for further proceedings consistent with the *Dendrite* test”); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 419, 456–57 (Md. 2009) (adopting *Dendrite* test and holding that newspaper’s motion for a protective order/motion to quash a subpoena requiring it to identify Internet forum participants should be granted); *In re Indiana Newspapers, Inc.*, 963 N.E.2d 534, 537 (Ind. Ct. App. 2012) (reversing trial court’s order compelling *The Indianapolis Star* to reveal identity of an online commenter on its website and remanding for application of the *Dendrite* test); *but see Maxon v. Ottawa Publ’g Co.*, 929 N.E.2d 666, 669, 675 (Ill. App. Ct. 2010) (rejecting newspaper’s argument that court should apply *Dendrite* test to request for disclosure of identifying information of anonymous commenter on newspaper’s website); *Krinsky v. Doe*, 72 Cal. Rptr. 3d 231, 245 (Cal. Ct. App. 2008) (rejecting argument of anonymous commenter that the court should apply *Dendrite* test to determine motion to quash subpoena to message board host seeking to discover his identity). News media organizations have fought to protect anonymous speakers because they recognize that anonymous speech is often necessary to allow their online forums to flourish. Similarly, members of the news media must be able to participate in other cases with the potential to diminish expression on their forums, such as those ordering the removal of comments, to assert their unique First Amendment interests as forum operators.

If commentary and dialogue on news media websites are curtailed without the opportunity for news media entities to assert their independent speech interests as forum operators, the benefits of such engagement for journalists, news organizations, and the public will be lost. In sum, the Court of Appeal's decision has ramifications for public discourse not only on platforms like Yelp, but on news media websites as well. And the online public discourse threatened by the Court of Appeal's decision in this case is precisely the type of speech that Congress intended to protect and foster when it enacted Section 230.

### CONCLUSION

For all of the foregoing reasons, *amici* respectfully request that this Court reverse and vacate the decision of the Court of Appeal.

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## CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that the attached *amicus curiae* brief was produced using 13-point Roman type, including footnotes, and contains 2,881 words. I have relied on the word count function of the Microsoft Word word-processing program used to prepare this brief.

Dated: April 17, 2017

/s/ Katie Townsend  
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## PROOF OF SERVICE

I, Ariel B. Glickman, do hereby affirm that I am, and was at the time of service mentioned hereafter, at least 18 years of age and not a party to the above-captioned action. My business address is 1156 15th NW, Suite 1250, Washington, D.C 20005. I am a citizen of the United States and am employed in Washington, District of Columbia.

On April 17, 2017, I served the foregoing documents: **Application for Leave to File *Amici Curiae* Brief and *Amici Curiae* Brief of the Reporters Committee for Freedom of the Press, The Thomas Jefferson Center for the Protection of Free Expression, and 18 Media Organizations in Support of Appellant Yelp Inc.**

as follows:

**UNITED STATES MAIL:** On April 17, 2017, I enclosed a true and correct copy of said document in an envelope with postage fully paid for deposit in the United States Postal Service.

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on the 17th of April 2017, at Washington, D.C.

By: /s/ Ariel B. Glickman  
Ariel B. Glickman

## APPENDIX A: DESCRIPTION OF *AMICI*

With some 500 members, **American Society of News Editors (“ASNE”)** is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership, and the credibility of newspapers.

**Association of Alternative Newsmedia (“AAN”)** is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

**BuzzFeed** is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

**The E.W. Scripps Company** serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 34 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the long-time steward of the nation’s largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

**The International Documentary Association (IDA)** is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

**The Investigative Reporting Workshop**, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at [investigativereportingworkshop.org](http://investigativereportingworkshop.org) about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

**The McClatchy Company** is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

**The Media Law Resource Center, Inc. (“MLRC”)** is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

**MPA – The Association of Magazine Media, (“MPA”)** is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly, and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

**The National Press Photographers Association (“NPPA”)** is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing, and distribution. NPPA’s approximately 7,000 members include television and still photographers, editors, students, and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

**The News Media Alliance** is a nonprofit organization representing the interests of online, mobile, and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile, and

non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

**Online News Association (“ONA”)** is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students, and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence, and freedom of expression and access.

**Radio Television Digital News Association (“RTDNA”)** is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators, and students in radio, television, cable, and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

**The Reporters Committee for Freedom of the Press** is an unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

**Reporters Without Borders** has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

**The Seattle Times Company**, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima Herald-Republic*, *Walla Walla Union-Bulletin*, *Sammamish Review*, and *Newcastle-News*, all in Washington state.

**Society of Professional Journalists (“SPJ”)** is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and