S235968

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DAWN L. HASSELL and HASSELL LAW GROUP, P.C.,
Plaintiffs and Respondents,

v.

AVA BIRD,
Defendant;
YELP, INC.,
Appellant.

After a Decision by the Court of Appeal
First Appellate District, Division Four, Case No. A143233
Appeal from the Superior Court of the State of California,
County of San Francisco, Case No. CGC-13-53025,
The Honorable Donald J. Sullivan and the Honorable Ernest H. Goldsmith, presiding

REVISED *AMICUS CURIAE* BRIEF OF EUGENE VOLOKH IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Amicus is unaware of any entity or person who must be listed under Rule 8.208.

DATED: May 18, 2017

Respectfully Submitted,

By: s/ Eugene Volokh
Eugene Volokh
Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Eugene Volokh has taught and written about Internet law and First Amendment law for over 20 years, and has written over 40 law review articles on one or both subjects. Since August 2016, he has been investigating fraud and other misbehavior related to the Internet libel takedown system.

At the petition for review stage, he submitted an *amicus* letter on behalf of several law professors, including himself; that letter focused on traditional doctrinal explanations of why the Court of Appeal erred. With the permission of his colleagues and clients on that letter, he is now submitting this very different brief, solely on his own behalf, to explain how the findings of his recent research bear on the question before the court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Injunctions aimed at removing or deindexing allegedly libelous material are a big practice area, and big business. At least hundreds are entered each year throughout the country.[1] Companies advertise such services, and charge thousands of dollars for them.[2]

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[1] *See* http://lumendatabase.org, which archives such injunctions; at least about 1000, mostly over the past five years, are from the U.S.

[2] *See, e.g.*, Affordable Reputation Management, *Guaranteed Removal Pricing*, http://affordablereputationmanagement.com/removal-pricing ($12,000 for "de-indexing main link" for items on pissedconsumer.com, $5000 for "news sites/blogs," other prices for other sites).

Some such injunctions, like the one in this case, are sent to sites such as Yelp or the blog host WordPress, asking them to remove supposedly defamatory material from their sites. Others are sent to search engines such as Google, asking them to remove links to such material from their indexes. (The injunctions aimed at deindexing by Google appear to be especially common, but procedurally they are analogous to those aimed at direct removal by Yelp and similar sites: Neither Yelp nor Google are parties to the original case, but both could equally be seen as "aiders and abettors" under the Court of Appeal's reasoning.)

But this process appears to be rife with fraud and with other behavior that renders it inaccurate. And this is unsurprising, precisely because many such injunctions are aimed at getting action from third parties (such as Yelp or Google) that did not appear in the original proceedings. The adversarial process usually offers some assurance of accurate factfinding, because the defendant has the opportunity and incentive to point out the plaintiff's misstatements. But many of the injunctions in such cases are gotten through default judgments or stipulations, with no meaningful adversarial participation.

As other briefs in this case point out, basic remedies principles, the Due Process Clause, and the First Amendment should keep such injunctions from being legally binding on companies

such as Yelp or Google.[3] This brief will aim to show why those legal principles make eminent practical sense. Even if the plaintiffs in this case were being completely honest and forthright, many plaintiffs in similar cases appear not to be. And if such injunctions are made legally binding, this will only offer more incentive for shenanigans.

In particular, this brief will discuss:

(1) injunctions gotten in lawsuits brought against apparently fake defendants;

(2) injunctions gotten using fake notarizations;

(3) injunctions gotten in lawsuits brought against defendants who very likely did not author the supposedly defamatory material;

(4) injunctions that seek the deindexing of official and clearly nonlibelous government documents—with no notice to the documents' authors—often listed in the middle of a long list of website addresses submitted to a judge as part of a default judgment;

(5) injunctions that seek the deindexing of otherwise apparently truthful mainstream articles from websites like CNN, based on defamatory comments that the plaintiffs or the plaintiffs' agents may have posted themselves, precisely to have an excuse to deindex the article;

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[3] Yelp Opening Br. on Merits 16–33; *Amicus Curiae* Br. Of Google Inc.; *Amici Curiae* Br. of First Amendment & Internet Law Scholars.

(6) injunctions that seek the deindexing of an entire mainstream media article based on a source's supposedly recanting a quote, with no real determination of whether the source was lying earlier, when the article was written, or is lying now, prompted by the lawsuit;

(7) over 40 "injunctions" sent to online service providers that appear to be outright forgeries.

Online service providers, such as Yelp and Google, that get these orders are the first line of defense against such behavior, so long as they have no legal obligation to comply with such orders issued against third parties. The service providers can exercise their discretion to conclude that some orders appear untrustworthy. They can demand more documentation from people who submit the orders. And if their concerns about their orders are not adequately resolved, they can decline to enforce the orders.

But under Plaintiffs' view, the service providers would be legally required to deindex or remove any material that has been ruled defamatory, even when they have had no chance to participate in the defamation lawsuit. What if Google sees that the order includes an article in the *Davis Enterprise,* the *Ventura County Star*, or *Inc.* magazine (even though those publications were not parties to the case)?[4] It would still have to deindex that article. What if Google sees that the order includes a Web page on the California Department of Real Estate site, or a federal dis-

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[4] For examples of injunctions that people were using to try to deindex material from those publications, see *infra* Parts I and VI.

trict court order hosted on a federal government computer, or a court decision listed on findlaw.com?[5] Google would have to deindex that, too.

Google would only be able to protect online speech against such deindexing by formally intervening in the suspicious lawsuit, and trying to reopen the judgment. But this would be practically infeasible. It would at least require spending large sums of money to hire local counsel across the country to litigate such matters. And such reopening might be procedurally unavailable in many places.

Yelp, the Court of Appeal held, could be required to abide by the injunction in this case because the injunction "was issued following a determination at trial that those statements are defamatory." *Hassell v. Bird* (2016) 247 Cal. App. 4th 1336, 1360. This brief will aim to show that such "determination[s]" are far too vulnerable to manipulation to be trustworthy.

ARGUMENT

I. Stipulated Injunctions Involving Apparently Fake Defendants

Say that a plaintiff wants a critical article about her removed from the Internet. The plaintiff could identify the author, sue the author, and get a judgment stating that the article is false. (That may well be what plaintiffs in this case did.)

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[5] For examples of injunctions that people were using to try to deindex such material from those sites, see *infra* Part III.

But say the plaintiff hires a "reputation management company," especially one that promises "guaranteed removal"[6] (i.e., no payment if the removal does not happen). And say that company is willing to cheat—as is indeed likely if it is to make a "guarantee[]" work as a business model.

Say the company therefore files a libel lawsuit in the plaintiff's name against a *fake* defendant, seeking an injunction, and accompanies the complaint with a stipulation supposedly signed by this defendant (but in reality produced by the company itself). The trial judge sees that the parties agree on the injunction, and therefore signs the injunction without much further scrutiny. And the reputation management company then sends this order to Google or Yelp, asking for deindexing or removal of the material that the order has ostensibly found to be defamatory.

That appears to have been attempted in at least 25 cases across the country. (See Appendix A for a full list.) The cases appear to be connected; they are all ostensibly filed *pro se*, but they share certain unusual legal boilerplate. Most of the 25 cases in-

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[6] *See, e.g.*, Profile Defenders, *Profile Defenders Lawsuit Removal Service Takes Down Defamatory Webpages*, https://pressreleasejet.com/newsreleases/2015/profile-defenders-lawsuit-removal-service-takes-down-defamatory-webpages/ ("A defamation removal law firm and online reputation management company combine. Profile Defenders Lawsuit Removal service honors a guarantee to take down and defamatory or unwanted webpages from search results as long as they meet specific criteria. A guarantee is priced in and year to date out of 375 cases only 1 has not been successful.").

clude the defendant's supposed address,[7] but there appears to be no person with the defendant's name present at that address.[8] While not all of them have been thoroughly investigated in court, in at least two—*Smith v. Garcia* and *Patel v. Chan*—there is solid record evidence of fraud.

A. *Smith v. Garcia*

The clearest example is *Smith v. Garcia*, a Rhode Island federal district court case. Bradley Smith supposedly sued a "Deborah Garcia," alleging that "Garcia" wrote defamatory comments attached to two posts on a consumer advice organization's blog (GetOutOfDebt.org).[9] Smith and "Garcia" supposedly signed a consent motion, and the court issued a stipulated injunction, which included an order that could be submitted to search engines for deindexing.[10]

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[7] See Appendix A.

[8] Eugene Volokh & Paul Alan Levy, *Dozens of Suspicious Court Cases, with Missing Defendants, Aim at Getting Web Pages Taken Down or Deindexed*, The Volokh Conspiracy [Wash. Post] (Oct. 10, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/10/dozens-of-suspicious-court-cases-with-missing-defendants-aim-at-getting-web-pages-taken-down-or-deindexed.

[9] C.A. No. 16-144 S, at 1 (D.R.I. Mar. 23, 2016), http://www.law.ucla.edu/volokh/hassell/FedDRISmithvGarcia.pdf. For convenience, many of the citations to trial-level court documents in this brief include a URL of a copy of the document that *amicus* has placed on the Internet; but all of the documents are also available from court records (except for the documents discussed in Part VII).

[10] *Id.*

It seems likely that the real goal of the lawsuit was to deindex the blog posts, which came from a credible organization (Myvesta, which owns GetOutOfDebt.org), and which sharply criticized a company owned or co-owned by Smith. The comments by "Garcia" were the tail that was used to try to wag the dog.

Several months later, Myvesta learned of the deindexing, and moved to intervene and vacate the injunction. Myvesta had secured the help of lawyer Paul Alan Levy of Public Citizen, a noted public interest law firm.[11]

When Levy tried to contact "Deborah Garcia" by mail at the address listed on the consent motion, the letter was returned as undeliverable.[12] Public records searches revealed no Deborah Garcia associated with that address.[13] Levy did reach Bradley Smith's attorney, who stated that Smith had not authorized the filing of the case in his name, and had not signed the court papers.[14]

Faced with this information, the court allowed Myvesta to intervene, and vacated the original injunction, citing "evidence that the Consent Judgment was procured through fraud on the Court."[15] Myvesta also sought to get sanctions for this alleged fraud, and sought to get discovery of who was behind it. That

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[11] *Smith v. Garcia*, C.A. No. 16-144 S, 2017 WL 412722 (D.R.I. Jan. 31, 2017).

[12] *Id.* at *1.

[13] Volokh & Levy, *supra* note 8.

[14] *Smith v. Garcia*, 2017 WL 412722, at *1.

[15] *Id.*

person appears to have been Richart Ruddie, owner of the reputation management companies SEO Profile Defender Network LLC and RIR1984 LLC.[16]

Ruddie ultimately settled the case in exchange for $71,000, chiefly consisting of Myvesta's legal fees (a good measure of how much it would have cost Google to challenge the injunction, had it had a legal obligation to comply with it).[17] Ruddie also agreed to ask Florida and Maryland courts to vacate three other court orders that called for the deindexing of Myvesta posts related to Smith's companies, *Smith v. Levin*, *Financial Rescue LLC v. Smith*, and *Rescue One Financial LLC v. Doe*.[18] In *Smith v. Lev-*

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[16] Eugene Volokh, *Apparently-Fake-Defendant Libel Lawsuit Watch: Richart Ruddie & SEO Profile Defender Network LLC Paying $71,000 to Settle Claim*, The Volokh Conspiracy [Wash. Post] (Mar. 14, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/14/apparently-fake-defendant-libel-lawsuit-watch-richart-ruddie-seo-profile-defender-network-llc-paying-71000-to-settle-claim/.

[17] *Id.*

[18] Settlement Agreement, *Smith v. Garcia*, C.A. No. 16-144 S, at 1 (D.R.I. Feb. 28, 2017), http://www.law.ucla.edu/volokh/hassell/FedDRISmithvGarcia.pdf; Sanctions Order (Apr. 13, 2017), *id.* *See also* Paul Alan Levy, *Richart Ruddie Settles Anti-SLAPP Claims, Makes Restitution; but the Guilty Companies Remain Unpunished*, Consumer Law & Policy Blog (Mar. 14, 2017), http://pubcit.typepad.com/clpblog/2017/03/richart-ruddie-settles-anti-slapp-claims-makes-restitution-but-the-guilty-companies-remain-unpunishe.html; *Smith v. Levin*, 24-C-15-004789 (Md. Cir. Ct. Baltimore City Oct. 16, 2015), http://www.law.ucla.edu/volokh/hassell/MdBaltimoreSmithvLevin.pdf; *Financial Rescue LLC v. Smith*, No. 15-006119-CI (Fla. Cir. Ct. Pinellas Cnty. Oct 5, 2015), http://www.law.ucla.edu/volokh/hassell/FlPinellasFinancialRescuevSmi

in, court records included Levin's ostensible address (the common practice in Maryland); no-one with that name could be found at that address.[19]

The court also sent information about this apparent fraud to the U.S. Attorney's office for investigation.[20] The investigation appears to still be in progress.

B. *Patel v. Chan*

Another case that fits the same pattern as *Smith v. Garcia*, and shares some of the same legalese, is *Patel v. Chan*. (Indeed, *amicus* learned of *Smith v. Garcia* by searching in Bloomberg Law for dockets that contained similar language to that in *Patel v. Chan*[21]—*Patel* was the first such case brought to *amicus*'s attention.)

Matthew Chan, a Georgia resident, posted critical Yelp reviews of Mitul Patel, a Georgia dentist.[22] A few months later,

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th.pdf; *Rescue One Financial LLC v. Doe*, No. CACE-14-024286 (Fla. 17th Cir. Ct. Broward Cnty. Dec. 22, 2014), http://www.law.ucla.edu/volokh/hassell/FlBrowardRescue1FinancialvDoe.pdf.

[19] Volokh, *supra* note 16.

[20] *Smith v. Garcia*, C.A. No. 16-144 S, 2017 WL 412722, at *1 (D.R.I. Jan. 31, 2017).

[21] This was done using Bloomberg Law searches for phrases that appeared in the *Patel* papers, such as "Consent Motion For Injunction and Final Judgment" and "Dated, so respectfully." Though such phrases could of course appear in unrelated cases, looking through results revealed that many of the orders that use one of the phrases also use several others, and thus appear to come from the same source (even though all are ostensibly *pro se* lawsuits).

[22] Volokh & Levy, *supra* note 8.

Chan received an email from Yelp explaining that Yelp was considering taking down his review because a Maryland court concluded it was defamatory.[23] But Matthew Chan of Georgia was actually never sued.[24] Rather, the defendant in the suit was "Mathew Chan," a supposed Baltimore resident.[25]

The court issued a stipulated judgment between the Baltimore "Mathew Chan" and Mitul Patel, expressly contemplating that the order be sent to Yelp so that it could remove the review.[26] But a private investigator's search through public records found no "Mathew Chan" in Baltimore;[27] and in any event, the actual author of the Yelp review was the Georgia Matthew Chan. After Chan moved to intervene and vacate the injunction, Mitul Patel moved to voluntarily dismiss the case, claiming that the reputation management company he hired had filed the lawsuit without his knowledge or authorization, and had forged his signature.[28]

Following the press coverage of these orders, an injunction in a Philadelphia case that fit the similar pattern was as also vacat-

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Patel v. Chan*, No. 24-C16003573 (Md. Cir. Ct. Baltimore Cnty. July 22, 2016), http://www.law.ucla.edu/volokh/hassell/MdBaltimorePatelvChan.pdf.

[27] Volokh & Levy, *supra* note 8.

[28] Motion to Intervene, Motion to Strike Judgment, and Answer to Defendant Mathew Chan's Motion to Vacate Consent Judgment/Order, *Patel v. Chan*, No. 24-C-16-003573 (Md. Cir. Ct. Baltimore Cnty. Sept. 21, 2016), http://www.law.ucla.edu/volokh/hassell/MdBaltimorePatelvChan.pdf.

ed.[29] In another similar Philadelphia case, the supposedly stipulated motion for an injunction was denied.[30] A similar Florida case, which was pending at the time, was voluntarily dropped the day that the Washington Post blog post about the cases went up.[31]

C. California cases

Several of the cases that fit this pattern have been filed in California; here is one example.[32]

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[29] Order Granting Consent Motion for Injunction and Final Judgment, *Callagy v. Roffman*, No. 160603108 (Ct. Com. Pl. Phila. Cnty. July 1, 2016), http://www.law.ucla.edu/volokh/hassell/PaPhiladelphiaCallagyvRoffman.pdf. The proceedings to vacate the order began a month before the press coverage, likely because *amicus* had informed the Philadelphia Court of Common Pleas of the possible problem.

[30] *Murtagh v. Reynolds*, No. 160901262 (Pa. Phila. Ct. Com. Pl. injunction denied and docket entered Oct. 26, 2016).

[31] Consent Motion for Injunction and Final Judgment, *Carter v. Quinn*, No. 2016-021440-CA-01 (Fla. 11th Cir. Ct. Miami-Dade Cnty. Aug. 23, 2016), http://www.law.ucla.edu/volokh/hassell/FlMiamiDadeCartervQuinn.pdf; *Carter v. Quinn*, No. 2016-021440-CA-01 (Fla. 11th Cir. Ct. Miami-Dade Cnty. Aug. 23, 2016) (order granting consent motion for injunction and final judgment), http://www.law.ucla.edu/volokh/hassell/FlMiamiDadeCartervQuinn.pdf ; Eugene Volokh, *Another of the Suspicious Missing-Defendant Cases Goes Away*, The Volokh Conspiracy [Wash. Post] (Oct. 25, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/25/another-of-the-suspicious-missing-defendant-cases-goes-away/.

[32] Others are *Lyman v. Bernard*, No. LC104275 (Cal. Super. Ct. Los Angeles Cnty. June 6, 2016), http://www.law.ucla.edu/volokh/hassell/CaLosAngelesLymanvBernard.pdf, which led to an injunction that called for the deindexing of an article on the *In-*

In 2013, a *Davis Enterprise* newspaper article reported that a Shasta County parent placed false signatures on a petition asking a school not to change its gifted education program.[33] Two and a half years later, a "Robert Castle" posted a comment underneath the article, accusing the parent of taking bribes.[34]

Within a few months, a person apparently bearing the parent's name purportedly sued "Robert Castle" in Shasta County and sought an injunction to compel him to remove the review.[35] The plaintiff also supposedly filed a consent motion, with a signature purportedly from Castle.[36]

Instead of simply granting the injunction, the court set a hearing on its own motion, noting that there was no proof of service of

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vestment News site; *Serenbetz v. McDonald*, No. BC621992 (Cal. Super. Ct. Los Angeles Cnty. June 6, 2016), http://www.law.ucla.edu/volokh/hassell/CaLosAngelesSerenbetzvMcDonald.pdf, which was aimed at deindexing a copy of a federal court decision posted on http://leagle.com; and *Williams v. Li*, No. L15-03752 (Cal. Super. Ct. Contra Costa Cnty. Dec. 18, 2015), http:// www.law.ucla.edu/volokh/hassell/CaContraCostaWilliamsvLi.pdf, which led to an injunction that called for the deindexing of posts critical of Profile Defenders, a company owned by Richart Ruddie, who seems to be behind these cases.

[33] Volokh & Levy, *supra* note 8.

[34] *Id.*

[35] Complaint, *Glatter v. Castle*, No. 184324 (Cal. Super. Ct. Shasta Cnty. Mar. 3, 2016), http://www.law.ucla.edu/volokh/hassell/CaShastaGlattervCastle.pdf.

[36] Order Setting Hearing Date on Consent Motion, *Glatter v. Castle*, No. 184324 (Cal. Super. Ct. Shasta Cnty. Mar. 8, 2016), http://www.law.ucla.edu/volokh/hassell/CaShastaGlattervCastle.pdf.