**Case No. S235968**

**IN THE SUPREME COURT**

**OF THE STATE OF CALIFORNIA**

---

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

vs.

AVA BIRD,
Defendant,

YELP, INC.,
Appellant.

---

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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# MOTION FOR JUDICIAL NOTICE; DECLARATION OF ROCHELLE L. WILCOX WITH EXHIBITS A-C; [PROPOSED] ORDER

---

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## I. SUMMARY OF ARGUMENT

Pursuant to Evidence Code §§ 452(d) and (h) and § 459, Petitioner Yelp Inc. ("Yelp") respectfully requests that the Court take judicial notice of the court records that are submitted with this Request for Judicial Notice as **Exhibits A** through **C** to the Declaration of Rochelle L. Wilcox ("Wilcox Decl."). As Yelp establishes below, this Court is authorized to take judicial notice of these court records, and it should do so because they are relevant to a key issue in this appeal—the standards for entering prior restraints, particularly as those standards are applied to a non-party who received no notice or opportunity to be heard in conjunction with the entry of that prior restraint.[1]

## II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE ATTACHED COURT RECORDS AND ARTICLES

California Evidence Code § 459(a) provides in part that "[t]he reviewing court *shall* take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452." California Evidence Code § 452(d) authorizes a court to take judicial notice of "[r]ecords of

[1] This Court may take judicial notice of the documents submitted with this Request, although no similar request was made to the lower courts. *Taliaferro v. County of Contra Costa* (1960) 182 Cal.App.2d 587, 592; *Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125 (citing *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378, 384).

(1) any court of this state or (2) any court of record of the United States or of any state of the United States." California Evidence Code § 453, in turn, provides that "[t]he trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and: (a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter."

Under Section 452(d), California courts regularly take judicial notice of the existence of court records (although they may not judicially notice the truth of the matters contained in those records). *E.g.*, *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1561-62; *County of San Diego v. Sierra* (1990) 217 Cal.App.3d 126, 128 n.2; *Magnolia Square Homeowners Ass'n v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1056-57; *Artucovich v. Arizmendiz* (1967) 256 Cal.App.2d 130, 133-34; *Goldstein v. Hoffman* (1963) 213 Cal.App.2d 803, 814. Thus, this Court may take judicial notice of the existence of each document in a court file, including **Exhibits A** through **C**, as requested here. *Day v. Sharp* (1975) 50 Cal.App.3d 904.

Yelp asks the Court to take judicial notice of the following court records, attached as **Exhibits A** through **C**, which address the standards for entering prior restraints, particularly as those standards are applied to a

non-party who received no notice or opportunity to be heard in conjunction with the entry of that prior restraint:

**Exhibit A**: "Answer Brief on the Merits" filed September 21, 2005, in the matter of *Balboa Island Village Inn, Inc. v. Lemen,* Cal. Supreme Court Case No. S127904.

**Exhibit B**: "Petitioners' Brief on the Merits," filed November 12, 2004, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488.

**Exhibit C**: "Petitioners' Reply Brief on the Merits," filed January 20, 2005, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488.

As Yelp's merits briefs address, prior restraints are heavily disfavored under federal and California law, and they may be entered, if at all, only in the most extreme circumstances. The attached Briefs, which were submitted by Dean Chemerinsky in the primary United States and California Supreme Court cases to address this issue in recent years, persuasively demonstrate why a prior restraint may not be entered against a non-party such as Yelp unless that non-party is given notice and an opportunity to be heard. They are highly relevant to the Court's evaluation of this issue and Yelp therefore respectfully requests that the Court take judicial notice of the Briefs attached as **Exhibits A** through **C**.

Pursuant to California Rule of Court 8.252(a)(2), Yelp advises the Court that **Exhibits A** through **C** were not presented to the trial court in this matter.

## III. CONCLUSION

As addressed above, the documents submitted with this Request for Judicial Notice establish important facts for this Court's consideration. Therefore, for the foregoing reasons, Yelp respectfully requests that the Court take judicial notice of the court records attached to this Request as **Exhibits A** through **C**.

Dated: July ~~19~~ 18, 2017

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke
Rochelle L. Wilcox

By: _____
Rochelle L. Wilcox

Attorneys for Non-Party Appellant
YELP INC.

## DECLARATION OF ROCHELLE L. WILCOX

I, Rochelle L. Wilcox, declare:

1. I am an attorney admitted to practice before all the courts of the State of California and before this Court. I am a partner in the law firm Davis Wright Tremaine LLP ("DWT") and I am one of the attorneys for Petitioner Yelp Inc. ("Yelp"). I have personal knowledge of the following facts and, if called upon to testify, I could and would competently testify to these facts.

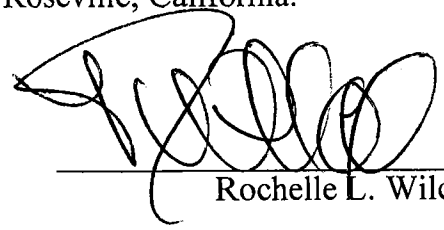
2. Attached as **Exhibit A** is a true and correct copy of an "Answer Brief on the Merits" filed September 21, 2005, in the matter of *Balboa Island Village Inn, Inc. v. Lemen,* California Supreme Court Case No. S127904. I received the attached Exhibit A from one of the attorneys of record in *Balboa Island* around the time that Exhibit A was filed.

3. Attached as **Exhibit B** is a true and correct copy of "Petitioners' Brief on the Merits," filed November 12, 2004, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488. I received the attached Exhibit B approximately three months ago from one of the attorneys who filed an Amicus Brief in the *Tory v. Cochran* matter.

4. Attached as **Exhibit C** is a true and correct copy of the : "Petitioners' Reply Brief on the Merits," filed January 20, 2005, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488. I received the attached Exhibit C approximately three months ago from one of the attorneys who

filed an Amicus Brief in the *Tory v. Cochran* matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was signed on July 18, 2017 at Roseville, California.



Rochelle L. Wilcox

## [PROPOSED] ORDER

This Court, having considered the Motion For Judicial Notice of Petitioner Yelp Inc., and good cause having been shown therefore,

**IT IS ORDERED** that the Court takes judicial notice of the following documents:

**Exhibit A**: "Answer Brief on the Merits," filed September 21, 2005, in the matter of *Balboa Island Village Inn, Inc. v. Lemen,* California Supreme Court Case No. S127904.

**Exhibit B**: "Petitioners' Brief on the Merits," filed November 12, 2004, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488.

**Exhibit C**: "Petitioners' Reply Brief on the Merits," filed January 20, 2005, in *Tory v. Cochran*, U.S. Supreme Court Case No. 03-1488.

Dated: _____

By: _____
Honorable Tani Gorre Cantil-Sakauye
Chief Justice of the State of California

# EXHIBIT A

**S127904**

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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BALBOA ISLAND VILLAGE INN, INC.,
*Plaintiff and Respondent,*

v.

ANNE LEMEN,
*Defendant and Appellant.*

---

*On Review from the Court of Appeal,*
*Fourth Appellate District, Division Three, Case No. G031636*

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*After an Appeal from the Superior Court of Orange County,*
*Honorable Gerald G. Johnston, Case No. 01CC13243*

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## ANSWER BRIEF ON THE MERITS

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**TREATISES**

## ISSUES PRESENTED

1. Whether a permanent injunction as a remedy in a defamation action violates the First Amendment.

2. Whether a permanent injunction violates the First Amendment when it is not narrowly tailored in its prohibition of all speech, in any place, at any time, about a matter of public concern, and when it is imposed without a finding that there was actual malice.

3. Whether the Court of Appeal erred in denying attorneys' fees when a party successfully vindicated the First Amendment by having an unconstitutional injunction, restricting speech on a matter of public concern, overturned.

## STATEMENT OF FACTS

This case involves a long running conflict between a bar that served alcohol to young adults on a quaint island and a neighbor, Anne Lemen. There were news articles relating to the noise involving the Balboa Island Village Inn ("BIVI") that go back at least to 1989, the year Lemen purchased her property just across a small alley from BIVI. *Balboa Island Village Inn, Inc. v. Lemen*, 17 Cal. Rptr. 3d 352,

356 (2004) ("*BIVI*").[1]

Aric Toll purchased BIVI in 2000. *Id.* Soon afterwards, he submitted an application to the City of Newport Beach Planning Department for an expansion of the entertainment permit for BIVI, which included adding percussion.[2] Lemen was opposed. She felt BIVI was loud enough, as she could not sleep due to the rowdy patrons leaving BIVI during the early morning hours. The Court of Appeal described the situation: "Departing patrons often are inebriated and boisterous. Noise, disturbances, and public urination are not uncommon." *BIVI*, 17 Cal. Rptr. 3d at 356. Lemen had previously complained to the police and city officials. *Id.* She unsuccessfully tried to sell her house. *Id.*

Lemen started a petition drive and eventually got the signatures of approximately 400 of the 1,100 residents of Balboa Island. *Id.*[3]

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[1] *See also* Clerk's Transcript ("CT"): Ex. 1 (Feb. 20, 1998 *Orange County Register* article), Ex. 2 (Apr. 17, 1989 *Daily Pilot* article); Reporter's Transcript ("RT") (Aug. 19, 2002) at 3:22-4:3.

[2] *See* CT: Ex. 9 (Apr. 6, 2002 Petition opposing use permit for additions to live entertainment), Ex. 14 (June 20, 2002 Report to Newport Beach Planning Comm'n); RT (Aug. 19, 2002) at 25:9-26:23; RT (Aug. 26, 2002) at 30:23-31:8.

[3] *See also* RT (Aug. 19, 2002) at 6:5-10; RT (Aug. 20, 2002) at 76:12-23; RT (Aug. 26, 2002) at 84:13-17.

Thus, the speech which was the basis for this action involved a clear matter of public concern: those who signed the petitions were in opposition to the expansion of the entertainment permit for BIVI. This was an issue put into the public domain by BIVI and the city planners welcomed input from the surrounding community.[4] Given the problem Lemen had in getting people to take her seriously, she took a series of videotapes and photographs of what she felt was inappropriate conduct and violations of various laws in order to document wrongdoing at BIVI. *Id.* The videos provide compelling support for Lemen's concerns about BIVI. *See* CT: Exs. 68 (A), (B), (C) (videos).

BIVI sued Lemen for nuisance, defamation, and interference with business, seeking only injunctive relief. *BIVI*, 17 Cal. Rptr. 3d at 357. After a bench trial, the trial court found in BIVI's favor and issued a permanent injunction prohibiting Lemen from (1) initiating contact with persons known by Lemen to be BIVI employees, (2) making certain identified defamatory statements about BIVI to third persons, and (3) filming (whether by video camera or still

[4] As discussed below, since this was, in fact, a public issue, then the truth or falsity of the statements made should not have been the subject of a lawsuit.

photography) within 25 feet of BIVI's premises, unless on her own property, and except to document an immediate disturbance or damage to her property. *Id.*

The California Court of Appeal reversed. *Id.* at 355, 368. It declared: "We hold an injunction absolutely enjoining defendant Anne Lemen from making certain statements adjudicated to be defamatory under common law causes of action for libel and slander constitutes a content-based prior restraint on speech in violation of the First Amendment to the United States Constitution and article I, section 2, subdivision (a) of the California Constitution." *Id.* at 355. Specifically, the Court of Appeal stated that "the portions of the injunction prohibiting Lemen from making the identified defamatory statements and from initiating contact with Village Inn employees constitute impermissible prior restraints on speech and are overly broad." *Id.* But, the Court of Appeal upheld the portion of the injunction prohibiting Lemen from filming within 25 feet of BIVI's premises and also denied Lemen's request for attorneys' fees under Code of Civil Procedure § 1021.5. *Id.*

## SUMMARY OF ARGUMENT

Never in the 214 year history of the First Amendment has the United States Supreme Court approved an injunction as a remedy in a defamation action. In its landmark ruling in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), the Court held that a permanent injunction is a prior restraint; that prior restraints are allowed in only the most limited and compelling circumstances; and that courts may not enjoin future speech even when they find that defamation has occurred.

The Court of Appeal properly overturned an injunction issued by the Superior Court as violating both the United States Constitution and the California Constitution. First, the Court of Appeal properly ruled that a permanent injunction is a prior restraint and that such injunctions are not a permissible remedy in defamation actions. Centuries of precedent, dating back to English law before the existence of the United States, establish that equitable relief is not available in defamation cases. *See, e.g.*, Rodney Smolla, *Law of Defamation*, § 9:85 (2d ed. 2004); Michael Meyerson, *The Neglected History of the Prior Restraint Doctrine*, 34 Ind. L. Rev. 295, 308-311, 324-330 (2001); 43A C.J.S. *Injunctions* § 255 (2004); W.E. Shipley,

*Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715 (1956). Indeed, throughout American history, the United States Supreme Court has held that damages, not injunctions, are the appropriate remedy in defamation actions. *See, e.g., Pennekamp v. Florida*, 328 U.S. 331, 346-471 (1946); *Near,* 283 U.S. at 718-19; *Francis v. Flinn,* 118 U.S. 385, 389 (1886).

Second, the Court of Appeal properly held that even if injunctions are permissible, the injunction in this case is unconstitutionally overbroad. Earlier this year, in *Tory v. Cochran*, 125 S.Ct. 2108, 2111 (2005), the United States Supreme Court held that injunctions in defamation cases are prior restraints, which must be narrowly tailored if they are to exist at all. But, as the Court of Appeal concluded, the injunction in this case is anything but narrowly tailored: it prohibits Lemen from saying anything about BIVI to anyone, anywhere in the world. Indeed, this injunction is even broader than the one overturned by the Court in *Tory v. Cochran*, which only enjoined speech in public forums.

Finally, the Court of Appeal erred in denying Lemen a recovery of attorneys' fees after it upheld her free speech claim and overturned the injunction issued by the Superior Court. California Code of Civil

Procedure § 1021.5 permits a court to award attorney fees to a successful party in "any action which has resulted in the enforcement of an important right affecting the public interest." The law is clear that free speech rights are included among those "recognized as 'important rights[s] affecting the public interest.'" *Family Planning Specialists Medical Group, Inc. v. Powers*, 39 Cal. App. 4th 1561, 1568 (1995).

## ARGUMENT

### I. THE INJUNCTION IN THIS CASE WAS A PRIOR RESTRAINT ON SPEECH OF PUBLIC CONCERN

#### A. Court Orders Permanently Enjoining Speech Are Prior Restraints.

BIVI contends that a permanent injunction issued after a trial is not a prior restraint. Pet. Br. at 12-13. But the United States Supreme Court has clearly and unequivocally held that a court order permanently enjoining speech is a prior restraint, even if it follows a judicial proceeding. Anne Lemen cannot speak about Balboa Island Village Inn without getting permission from a court. This is the very essence of a prior restraint.

The Supreme Court has expressly declared that "permanent injunctions ... that actually forbid speech activities are classic

examples of prior restraints" because they impose a "true restraint on future speech." *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see also Id.* at 572 (Kennedy, J., dissenting) (the prior restraint doctrine "encompasses injunctive systems which threaten or bar future speech based on some past infraction"). In *Alexander*, the Court discussed three prior decisions holding that permanent injunctions on speech are inconsistent with the First and Fourteenth Amendments to the United States Constitution. *Id.* at 550. These cases clearly hold that a permanent injunction on speech, such as the injunction in this case, is a prior restraint.

The seminal case concerning prior restraints is *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In *Near*, a newspaper appealed from a permanent injunction issued after a case "came on for trial." *Id.* at 705-06. The injunction in that case "perpetually" prevented the defendants from publishing again because, in the preceding trial, the lower court determined that the defendant's newspaper was "'chiefly devoted to malicious, scandalous and defamatory articles.'" *Id.* at 706. As the Court in *Alexander* explained, "*Near*, therefore, involved a true restraint on future speech – a permanent injunction." *Alexander*, 509 U.S. at 550. The *Near*

Court held that such an injunction on future speech, even if preceded by the publication of defamatory material, was unconstitutional. 283 U.S. at 721.

The Court in *Alexander* also discussed *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), in which a group of picketers and pamphleteers were enjoined from protesting a real estate developer's business practices. *Alexander*, 509 U.S. at 550. Although the Court noted that the injunction in *Keefe* was labeled "temporary" by the trial court, it was treated as permanent since its label was "little more than a formality," it had been in effect for years, it had been issued after an "adversary hearing," and it "already had [a] marked impact on petitioners' First Amendment rights." *Keefe*, 402 U.S. at 417-18 & n.1. The Court struck down the injunction in *Keefe* as "an impermissible restraint on First Amendment rights." *Id.* at 418. In words that are particularly apt for this case, the Court held that the "claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment." *Id.* at 418-419. The Court stressed that "[n]o prior decisions support the claim that the interest of an individual in