No. S235968

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

v.

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

RESPONDENTS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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I. INTRODUCTION

The growth of the internet since enactment of the Communications Decency Act (CDA) has indeed been impressive. But that growth has also come with a price, as the internet offers an unprecedented opportunity and forum for those wishing to inflict harm on others. Defamatory comments – especially those that go "viral" – have the capacity to destroy the entire reputation of a business or person. As noted by Dean Erwin Chermerinsky in his *amicus* brief supporting Hassell, the internet has also become home to various forms of stalking, bullying, harassment, and even threats of physical violence. The harm these online torts inflict on victims can be far more powerful than any response or counter speech could remedy alone. It simply cannot be the case, as Yelp's Silicon Valley friends argue, that internet companies themselves should be the ultimate arbiters of these wrongs.

The effect of the rules advocated by Yelp and its *amici* is that victims of online torts cannot receive any true remedy for their online harms. Collectively, they argue that Yelp must be named as a defendant for injunctive relief purposes, but that Section 230 bars it from being named as a defendant. To further deprive victims of any remedy, *amici* also insist that internet companies like Yelp even have the right to prevent users from editing or removing tortious content on their own. In short, the only party who can help prevent further ongoing harm to victims such as Hassell is Yelp.

Although Yelp's *amici* all adopt this aim, they approach it in various ways. Some *amici* attempt to mischaracterize this case as concerning a default judgment that was strategically designed to prevent all parties, even Defendant Bird, from notice. That depiction is controverted by the record, and by the simple fact that Defendant Bird has herself entered this case

before this Court to brief the issues. Other *amici* unpersuasively point to *suspected* fraudulent litigation activity in other states as grounds for this Court to prevent *actual* tort victims from becoming whole. Of course, this purported fraud is a red herring because, to the extent this conduct is a concern, there are better mechanisms for responding to it.

Against this backdrop, many *amici* argue that the below proceedings infringed on Yelp's First Amendment and due process rights. These arguments presume, falsely, that the underlying defamation here was protected by the First Amendment in the first place. The arguments also fail to fully address the ability of a California court to enter orders against nonparties to effectuate judgments against party defendants.
The arguments raised by Yelp's *amici* arguments concerning the CDA fare no better. These arguments attempt to draw from the already generous immunity Congress has provided to internet companies, and apply it in a way that is supported neither by the text nor intent of the CDA. The Court of Appeal properly rejected all of the various forms of these arguments.

II. DEFENDANT BIRD WAS PROPERLY SERVED, HAD NOTICE OF THE LAWSUIT, AND HAS MADE A GENERAL APPEARANCE IN THIS CASE.

As a threshold matter, many of the *amici curiae* briefs attack – directly, or by implication – the method of service on Defendant Bird. Not only is the propriety of service on Defendant Bird not an issue in this appeal, but it is altogether a moot point because the record clearly shows she had notice of the lawsuit by publicly acknowledging it before her answer was due; she then initiated mediation of the lawsuit with the Bar Association; and she has also now appeared before this Court as *amicus curiae*.

Given the extent of *amici*'s arguments, it is important to note that service was not only properly effected against Bird, but it provided actual and timely notice of the lawsuit. The record is clear that Defendant Bird could not be physically located after multiple attempts, and that the address of service was her legal mailing address. (AA.V1.T3.00024-27.) Substitute service to that address, which has never been challenged by evidence or testimony, was therefore proper. (See C.C.P. § 415.200(b).) Further, this method of service did give Bird notice of the lawsuit as roughly one week later, Defendant Bird updated her Yelp review to announce that "Dawn Hassell has filed a lawsuit against me..." (AA.V1.T6.00057, 102-105.) Defendant Bird then initiated mediation of the lawsuit in June 2013 with the Bar Association of San Francisco, before eventually backing out. (AA.V1.T5.00031-32.) Defendant Bird's current protest, that she "never had an opportunity to defend herself," (Bird, 4,) is thus entirely false. Clearly, this unchallenged service on Defendant Bird put her on notice of the pendency of this action, and gave her the opportunity to respond.

Further illustrating Defendant Bird's knowledge of the lawsuit is her bizarre entry into the case before this Court as *amicus curiae*. A party's appearance is considered to be either "general" or "special." (See *Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 8011-801.) There is a clear delineation between the two types of appearances. A "special" appearance is made for the sole purpose of challenging personal jurisdiction. (*Id.*) But if a litigant "seeks relief on any basis other than lack of personal jurisdiction, he or she makes a general appearance." (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal. 4th 1028, 1037.) Appellees can find no prior instances where a defendant has defaulted at the trial court level, but then entered the case on appeal as *amicus curiae*. But, here, it is clear that

Defendant Bird has made a general appearance because her briefing does not seek relief on grounds of personal jurisdiction, but instead attacks the scope of the injunction entered by the trial court. (See e.g., Br. of Ava Bird ("Bird"), 12-13 [formally requesting this Court to "reverse the orders of the trial and appellate courts, and direct those courts to enter an order granting Yelp's Motion to Vacate"].)

To the extent other *amici* try to derive importance from the service of process below, as many do, (see e.g., Br. of ACLU of Northern California et al. ("ACLU"), 16 ["In view of this questionable service, it is particularly inappropriate to rely on the default judgment..."]; IA/CTA, 28 ["a default judgment cannot have preclusive effect unless the defendant 'has been personally served with summons or has actual knowledge of the existence of the litigation.'"],) the record below, coupled with Defendant Bird's current briefing, shows that those points should be disregarded. Defendant Bird's briefing makes clear that she is aware of this litigation – and she always has been – and that she has intentionally disobeyed a court order and continues to refuse to comply with the injunction.

III. *AMICI*'S SUGGESTION THAT THE COURT OF APPEAL'S DECISION ENCOURAGES FRAUD IS MISGUIDED.

Perhaps the most frequent argument appearing in the Silicon Valley *amicus* briefs is a "red herring" suggestion that the Court of Appeal's decision encourages fraud. Supporting this line of reasoning, *amici* cite several cases nationwide where it appears that litigants may have filed outright fraudulent lawsuits in order to obtain injunctions. (See generally, Rev. Br. of Eugene Volokh ("Volokh"); see also Br. of Public Citizen, Inc. et al. ("Public Citizen"), 39-43; Br. of Airbnb, Inc. et al. ("Airbnb"), 34-37 [citing arguments by Volokh and Public Citizen]; Br. of Google Inc.

("Google"), 13 [citing arguments by Volokh and Public Citizen].) As at least one *amicus* has conceded, some of this discussion is entirely "speculative." (Volokh, 35.) This Court should not rule based on such "speculative" theories about entirely different cases in entirely different states. Further, it is "the general rule that issues not raised by the appealing parties but advanced for the first time by *amici* curiae are not considered." (*Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438, 446 n.10.)

First and foremost, the connection between such concerns and this case are, quite frankly, overblown. As conceded by one *amicus*, "[n]one of the fraudulently obtained orders... was entered by a California Court." (Public Citizen, 42; see also Br. of Glassdoor, Inc. et al. ("Glassdoor"), 24.) The majority of the purported fraud raised by *amici* also predates the Court of Appeal's decision. To the extent that *amici* all suggest the Court of Appeal's decision is somehow a catalyst for this fraud, they are clearly mistaken.[1]

Second, to the extent there is even a problem to be addressed, *amici* have chosen the wrong vehicle to do so. Unlike many of the fraudulent cases they cite, this case is against a named individual and not a Doe defendant. (Public Citizen, 31-39; Volokh, 45-47.) Although, as discussed *supra* at 8-10, *amici* repeatedly suggest that service was improper, Defendant Bird has made an appearance in this case without formally challenging service. (Cf. Volokh, 39-43.) As also illustrated by Defendant Bird's appearance, it cannot be said that this case involves a fake defendant. (Cf. Volokh, 16-27.) She has herself acknowledged writing

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[1] The one instance provided by *amici* where a litigant cited the Court of Appeal's decision to support some form of injunction was a case in Canada. (See Google, 15.)

the defamatory reviews, and acknowledged the lawsuit. The injunction in this case does not cover government documents among a laundry list of websites. (Cf. Volokh, 30-35.) The injunction does not target the entire web page in which the defamatory comments appear. (Cf. Volokh, 43-50.) This is not a case of a buried URL amongst a longer list of websites affected by the injunction. (Cf. Volokh, 51-53.) This case does not involve a seedy "reputation management company." (Cf. Volokh, 35-38; Public Citizen, 29-39.) Nor does this case involve forged signatures from a notary, judge, (cf. Volokh, 27-29; 53-57,) or adverse party, (cf. Public Citizen, 39-43 [describing forged consent orders].) Because the facts of this case are so distinguishable from all of these scenarios proposed by *amici*, it simply cannot be said that the Court of Appeal's decision in this case does or will encourage the proliferation of tactics that are not even at issue here. The proposed connection is even more attenuated considering that these cases are mostly occurring before the decision below and outside of California.

This Court should not allow these *possibly* fraudulent cases to deprive *actual* victims of court remedies. "Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine." (*Hoover v. Ronwin* (1984) 466 U.S. 558, 601 [Stevens, J., dissenting].) The applicable legal doctrine here allows victims of defamation to be made whole through injunctive relief. (See *Balboa Island Vill. Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1148.) That injunctive relief would be meaningless indeed if a speaker's adjudicated defamation could live on through third parties like Yelp. California law therefore rightly allows injunctions to be enforced through such intermediaries. (ABM., 26-31.) This Court should not seek to change this legal doctrine based on the bogeyman cited by *amici*.

Indeed, shifting legal doctrine based on these fears would undoubtedly harm the victims of online torts. These victims include small businesses such as Hassell, to whom reputation is priceless. But, as Dean Chermerinsky points out, these victims also include many other groups of individuals, who find themselves targeted by "revenge porn," "doxing," violent threats, and online sexual harassment. (Br. of Erwin Chermerinsky et al. ("Chermerinsky"), 6.) This is no small group. A new Pew survey has found that "[a]round four-in-ten Americans (41%) have been personally subjected to at least one type of online harassment." (Maeve Duggan, *Online Harassment 2017* (July 11, 2017), http://www.pewinternet.org/2017/07/11/online-harassment-2017/.)[2] To many who find themselves included in this latter group of victims, the ability to protect oneself from illegal speech online can be not just about reputation but about personal safety, perhaps even life or death. (*Id.*) To allow the fraud suggested by *amici* to deprive these real victims of any viable remedy to their harassment is a solution that would be unjust in addition to being legally unsound. The actual victims of these online harms may not have as loud of a voice as the stalwarts for the Silicon Valley cause, but they are every bit as worthy of protection.

Last but not least, there are much better mechanisms to address the fraud raised by *amici*. For example, as Defendant Bird recognizes, a fraudulent plaintiff may be subject to substantial attorneys' fees penalties under California's powerful anti-SLAPP law. (See C.C.P. § 425.16; Bird, 8-9 [citing anti-SLAPP awards ranging from $27,000 to $130,506.71].)

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[2] Dean Chermerinsky also cites a Pew study, but it appears that the study has been updated since the filing of his amicus brief. (See Chermerinsky, 6.) The 2017 study indicates that the problem has only gotten worse since the 2014 study.

Yelp is aware of these anti-SLAPP remedies, and is in fact particularly aggressive about pursuing them. (See Order Granting In Part and Denying In Part Defendant's Motion For Attorney's Fees Costs and Ruling on Related Requests, *Rahbar v. Yelp* (San Francisco Superior Court Feb. 5, 2016) No. CGC 10-499227 [awarding Yelp costs and fees of $80,865.20 in anti-SLAPP motion against defamation plaintiff].) Court sanctions can also be issued in an amount "sufficient to deter repetition of [the] conduct or comparable conduct," and these sanctions can also include non-monetary components. (C.C.P. § 128.7(c)-(d).) But these civil penalties pale in comparison to the harsh criminal penalties that fraudsters face. The filing of false or forged instruments with a court is a felony, (Penal Code § 115,) as is the alteration or forging of court records, (Penal Code § 470(c).) Conviction of these crimes can carry penalties of $10,000 and three-years imprisonment per offense. (Penal Code §§ 18, 672.) These are not penalties to be taken lightly. If these penalties are somehow insufficient, then *amici* are welcome to petition the legislature to increase the penalties or even change the standard of proof for default judgments involving injunctions.

In the end, it is not clear that the speculative concerns raised by *amici* are actually a problem in California. To the extent they are, there are better ways of addressing this fraud than depriving innocent tort victims of valid court remedies.

IV. THERE ARE LIMITS ON FIRST AMENDMENT PROTECTIONS WHERE, AS HERE, THE SPEECH AT ISSUE HAS BEEN ADJUDICATED AS DEFAMATORY.

Like Yelp's First Amendment arguments, many similar arguments raised by *amici* arise from the false presumption that the speech at issue is constitutionally protected.

However, it has long been established that "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation..." (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245-246; see also ABM, 14, [cases cited].) Such utterances serve "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Balboa Island*, 40 Cal.4th at 1149 [quoting *Bose Corp. v. Consumer Union of U.S., Inc.* (1984) 466 U.S. 485, 503-504].)

Of course, Defendant Bird herself generally speaking has freedom of speech rights under the First Amendment. Assuming that Yelp has a First Amendment right to administer the forum in which Defendant Bird speaks, (see e.g., Br. of the Reporters Committee for Freedom of the Press et al., 11-12,) ***such rights are necessarily derivative to the underlying legality of Defendant Bird's speech***. In other words, if Defendant Bird's speech is found unlawful (because, for example, it is defamatory, discloses confidential information, or incites violence), she is thus not protected by the First Amendment, and then it necessarily follows that Yelp cannot assert First Amendment protections for displaying her very same words. Otherwise, the absurd result would be that those who disseminate other people's unlawful speech would receive greater First Amendment protections than the original speaker.

Some *amici* overlook this derivative nature of Yelp's rights. For instance, Airbnb remarkably insists that Yelp "is the party best-positioned" to defend these claims, and has "an even stronger incentive to defend speech than the original speaker." (Airbnb, 25.) But Airbnb fails to explain why Yelp has such a strong incentive to defend one of millions of comments on its website made by someone else, compared to the significant money judgment that the original speaker herself faces. Airbnb also fails to explain how exactly such a defense would look, considering that websites are so far removed from the facts of the underlying defamation, and considering Airbnb's simultaneous insistence that CDA prevents the website from mounting such a defense anyway.[3] Other *amici* that seem satisfied with the website coming to the speaker's defense also fail to provide such explanations. (See Bird, 7; Glassdoor, 11.)

Notably, no *amicus* argues that Yelp would have a continued, independent First Amendment right to host the defamatory words after a contested trial between speaker and victim. Instead, *amici* recognize that internet companies are bound by third-party injunctions in these circumstances. (See e.g., Public Citizen, 22-23 [the organization only recognizes injunctions entered after contested trials].)

This concession shows that the true concern raised by *amici* is not that Yelp has rights beyond Defendant Bird's. Instead, the thrust of *amici*'s argument is that it is the nature of Defendant Bird's default that raises constitutional concern. But, as described *infra* at 18-21, no *amicus*

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[3] In this argument, Airbnb also raises a meritless assertion that "[i]f the defendant is not the speaker, the defendant will have no reason to defend the speech." (Airbnb, 25.) Clearly, an improperly named defendant in a defamation suit has plenty of reason to defend a lawsuit and avoid entry of a large money judgment for someone else's conduct.

cites any authority for the proposition that default judgments are entitled to less deference than other forms of judgments. The distinction Yelp and its *amici* thus attempt to draw between a jury's determination and a default judgment after an evidentiary prove up is a false construct. Both render a valid, legal adjudication.

By way of example, in the ACLU's view, "such an injunction entered after a default judgment is unconstitutional." (ACLU, 21.) But the ACLU cites no authority for this statement. Instead, the ACLU arrives at this conclusion through a series of attenuated steps, beginning with its mischaracterization of the entire injunction as a prior restraint. (ACLU, 8-21.)[4] "The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" (*Alexander v. United States*, (1993) 509 U.S. 544, 550 [emphasis added].) The prohibition on prior restraints in American constitutional law originated as a reaction to an English licensing system that meant "no publication was allowed without a government granted license." (*Balboa Island*, 40 Cal.4th at 1149, quoting Chemerinsky, Constitutional Law: Principles and Policies (2d ed. 2002) § 11.1.1, p. 892.)

But, as here, an injunction issued *after* "a determination at trial that the enjoined statements are defamatory, does not constitute a prohibited prior restraint of expression." (*Balboa Island*, 40 Cal.4th at 1156.) *Balboa Island* never held that such a determination must be made by a jury, just as

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[4] The Court of Appeal stripped the injunction of its prohibition on future speech, which was the one feature of the injunction that was arguably a prior restraint. (*Hassell v. Bird*, 247 Cal.App.4th 1336, 1360-61.) Although that part of the injunction is not on appeal, the ACLU seems to go further, and argues that the entire injunction is a prior restraint.

long as a "defendant would [not] be deprived of the right to a jury trial concerning the truth of his or her allegedly defamatory publication." (*Id.* at 1155, quoting *Sid Dillon Chevrolet v. Sullivan* (1997) 251 Neb. 722, 746.) Here, Defendant Bird was not deprived of the right to jury trial,[5] and the court made a "determination" that the remarks were defamatory based upon a review of the robust evidentiary record. No further process is due.

V. THE PROCEDURE BELOW SATISFIED DUE PROCESS.

As with Yelp's arguments, *amici*'s due process arguments ring hollow. California law clearly allows for injunctions to be enforced against third parties without running afoul of due process. Moreover, not only do *amici* fail to describe what alternative process is actually due, they affirmatively insist that Yelp cannot play a role in that process because the CDA prohibits litigants from involving them.

A. Defendant Bird's Default Does Not Raise Due Process Concerns.

Defendant Bird, who has not and will not remove the defamatory material, but has entered the case as *amicus curiae*, defaulted below. At no point has she tried to set aside the default. *Amici* improperly suggest that the default nature of the judgment below infects its validity. Not so.

First, the effect of a default is clear: a party, "by permitting [its] default to be entered, confessed the truth of all the material allegations in the complaint." (*O'Brien v. Appling*, (1955) 133 Cal.App.2d 40, 42.) The resulting "judgment by default is just as conclusive upon the issues tendered by the complaint as if rendered after answer filed and trial on

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[5] She waived that right by failing to appear. (See C.C.P. § 631(f)(1).)

allegations denied by the answer." (*Id.*; see also *In re Circosta* (1963) 219 Cal.App.2d 777, 785-86 [applying that rule to injunctive relief].) This well-established rule makes practical sense because a plaintiff can never force a defendant to appear at a trial and defend the allegations.

But it does not follow that a plaintiff is automatically entitled to a default judgment just because a defaulting defendant has admitted the allegations as true. An action such as this one "requires that any [default] judgment be entered by the court [only] after what is commonly called a prove-up of the allegations of the complaint." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 533-34, citing C.C.P. § 585(b).) These prove-up hearings exist to help bring to light frivolous claims that should not be reduced to judgment. (See *id.* [noting in that case that, if there had been a prove-up hearing, it "would have brought down the procedural stack of cards" on which the plaintiff's claim was based.].) Despite the criticism that these hearings "lack[] key protections provided by a full trial on the merits," (see ACLU, 15; see also Br. of First Amendment and Internet Law Scholars ("FAILS"), 7,) *amici* provide no law supporting the same and no guidance as to what other options remain when a defendant chooses not to challenge a plaintiff's allegations. And because there was such a prove-up hearing in this case below, *amici*'s characterization of the default judgment as a mere rubber stamp is not persuasive. Admissible evidence was presented to the trial court, who accepted it, conducted a hearing, heard testimony, and made a ruling based upon all of it.

Importantly, despite the focus of several *amici* on the default nature of the judgment, not a single one has cited authority for the notion that default judgments can simply be ignored as invalid. In the view of some *amici*, the default judgment here is worthless because there was no "*adversary* proceeding," apparently because the adversary did not appear.

(See Airbnb, 22-23, quoting *Freedman v. Maryland* (1965) 380 U.S. 51, 58 [emphasis added]; Br. of Internet Assoc. and Consumer Technology Assoc. ("IA/CTA"), 20.) But due process in an adversary proceeding only requires notice and an *opportunity* to defend; it does not require that the adversary *actually* opt in to the action and choose to defend. (See *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314.) In fact, as the *Mullane* Court explained, the defendant "can choose for himself whether to appear or default, acquiesce or contest." (*Id.*; see also *Richards v. Jefferson Cty.* (1996) 517 U.S. 793, 799.)

The fact that Defendant Bird had the opportunity to appear and contest the allegations here also undermines the Internet Association's general depiction of default judgments as "the very opposite of 'judicial determinations' in 'adversarial proceedings.'" (See IA/CTA, 28, citing *In re Silva* (B.A.P. 9th Cir. 1995) 190 B.R. 889, 893.)[6] This depiction also pulls the quote from *Silva* out of context. The *Silva* case involved questions of collateral estoppel under federal law. Unlike the federal collateral estoppel doctrine, however, "[i]n California, it is well settled that a default judgment" supports collateral estoppel. (*In re Younie* (B.A.P. 9th Cir. 1997) 211 B.R. 367, 375; see also *Four Star Elec., Inc. v. F& H Constr.* (1992) 7 Cal.App.4th 1375, 1380.) California law therefore fully recognizes the validity of default judgments, and if the judgment was properly obtained – by giving notice and opportunity to the adversary – there is no good reason to afford such judgments lesser treatment.

These arguments advanced by *amici* also present a problematic view

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[6] The IA/CTA brief extrapolates this same line of reasoning to consent decrees. (See IA/CTA, 28.) But, again, *amicus* provides no authority for the radical position that consent decrees lack the full force of a court order after a fully contested hearing.

of the justice system. As much as *amici* try to mischaracterize the Court of Appeal's decision as creating a "roadmap" for sinister behavior, they ignore the roadmap they create to place defendants outside the reach of the courts. In *amici*'s view, a defendant must simply default, and the resulting judgment would lack any value. For example, *amicus* Public Citizen explains how it refuses to follow court orders that arise out of default judgments, and it only recognizes court orders that follow contested hearings. (Public Citizen, 22-23.) If this Court were to adopt this distorted view of judgments – that the public can ignore a court order if it is perceived as not contested hotly enough – then it would render courts effectively powerless to effectuate orders against defendants unless the defendant affirmatively opted to step foot in the courtroom.

B. Due Process Does Not Prevent The Enforcement Of An Injunction Through A Non-Party.

As discussed in the parties' briefing, it is already a deeply rooted legal principle that injunctions may be enforced against third parties without running afoul of due process. (ABM, 22, citing *Ross v. Superior Court of Sacramento County* (1977) 19 Cal.3d 899, 905; *In re Lennon* (1897) 166 U.S. 548.)

Most of *amici*'s arguments against this rule are based on cases that have been discussed in the parties' briefing, or by the Court of Appeal in the decision below. For example, one *amicus* cites the *Richards* case. (FAILS, 7, citing *Richards,* 517 U.S. at 798.) Appellees have already distinguished *Richards* on grounds that it involved pecuniary interests. (See ABM, 25.) The Court of Appeal similarly distinguished some of Yelp's cases on the same basis. (See *Hassell v. Bird*, 247 Cal.App.4th 1336, 1356, citing *Fazzi v. Peters* (1968) 68 Cal.2d 590; *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th

110, 120-121.) But it is noteworthy that even cases involving money judgments can be enforced through third parties, such as by levying bank accounts, (see C.C.P. § 700.140,) or by garnishing wages through an employer, (C.C.P. § 706.010 *et seq.*) Banks and employers are required to comply with the terms of these writs by handing over property of the named defendants in much the same way that Yelp was ordered to respond with regards to the defendant's speech.

The ACLU cites new cases on this point, but greatly exaggerates their holdings. For example, the ACLU insists that "[t]he United States Supreme Court has held that due process prohibits a court from issuing an injunction against a nonparty." (ACLU, 22, citing *Zenith Radio Corp v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 109-112, and *Omni Capital Intern., Ltd. v. Rudolf Wolff & Co.*, Ltd. (1987) 484 U.S. 97, 104.) This argument greatly misstates those cases. Not only is a discussion of due process wholly absent in *Zenith*, but that court recognized that there were indeed occasions when the Federal Rules of Civil Procedure allow injunctions to run against nonparties. (*Zenith*, 395 U.S. at 112, citing Fed.R.Civ.P. 65(d).) Further illustrating the ACLU's overreach is that *Omni* never even mentioned injunctions. (See *Omni*, 484 U.S. at 104.) These cases simply provide no guidance to the issues involved in this appeal.

Google, for its part, attempts to narrow the availability of such injunctions to only those nonparties who meet certain strict criteria proposed by Google. (Google, 17-35.) As the Court of Appeal below described, California law already provides that a nonparty can be ordered to "effectuate [a] judgment" against a defendant on the sole basis that the enjoined defendant is acting "with or through" the nonparty. (*Hassell*, 247 Cal.App.4th at 1355-57.) Clearly, that standard is met here because

Defendant Bird's defamatory words were posted through Yelp's platform. And, because Yelp can legally prevent Defendant Bird from removing this content, only Yelp has the power to stop Defendant Bird's illegal activity. In every sense of the words, Bird is acting "with and through" Yelp to violate the injunction.

The practice of enforcing injunctions through nonparties is also not nearly as "limited" as Google argues. As even Google's own authority recognizes, this Court has recognized this enforcement mechanism as early as 1917. (See Google, 18-19, citing *Berger v. Superior Court* (1917) 175 Cal. 719, 720-21.) Although Google recognizes *Berger* as stating the correct rule for California, Google inexplicitly disregards that rule in favor of the narrower formulation expressed in Fed.R.Civ.P. 65(d)(2), which facially only applies to those in "in active concern or participation" with a defendant or other agent. (See Google, 22-25 [outlining federal cases], 26-28 [urging adoption of "in concert" standards from Fed. R. Civ. P. 65(d)(2)].) Aside from walking through some federal cases,[7] Google provides no compelling reason for this Court to abandon over a century of its own jurisprudence, which recognizes the enforceability of injunctions against those "with or through" whom a defendant acts. There are, however, compelling reasons not to abandon this approach in favor of the language adopted by the Advisory Committee on Rules of Civil Procedure because, as explained throughout this brief, such approach would leave courts powerless to effect some of their judgments, and would leave victims of online torts without any meaningful remedy.

The Court of Appeal properly allowed the enforcement of the Bird

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[7] The state law cases cited by Google, which were also initially cited by Yelp, are all inapposite to this issue. (See ABM, 28-29.)