

SUPREME COURT COPY

Case No. S235968

IN THE SUPREME COURT OF CALIFORNIA

DAWN HASSELL, et al.

Plaintiffs and Respondents

vs.

AVA BIRD,

Defendant

YELP, INC.,

Appellant.

SUPREME COURT
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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

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF FOR GLASSDOOR, INC. AND TRIPADVISOR LLC IN SUPPORT OF APPELLANT YELP, INC.

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**APPLICATION FOR PERMISSION TO FILE
AMICUS CURIAE BRIEF**

Pursuant to rule 8.520(f) of the California Rules of Court, Glassdoor, Inc. (“Glassdoor”) and TripAdvisor LLC (“TripAdvisor”) request leave to file a joint amicus curiae brief in support of appellant Yelp, Inc. The proposed amicus brief is submitted with this application.

GLASSDOOR AND TRIPADVISOR

Glassdoor and TripAdvisor (collectively, “*amici*”) operate user-based review sites similar to www.yelp.com.

California-based Glassdoor operates www.glassdoor.com, an online jobs and recruiting marketplace in which employers are anonymously rated and reviewed by employees and job seekers on important characteristics like culture, career advancement, work-life balance, the job interview experience and benefits. Glassdoor combines a vast array of user-generated content with available job listings to help people seeking employment make better, more informed decisions about where they work. Since Glassdoor launched in 2008, it has collected tens of millions of user submissions on more than 640,000 companies in 190 countries, and has more than 30 million monthly unique users. Glassdoor makes possible a previously unimagined level of workplace transparency that allows people to get an “inside look” at what it is really like to work somewhere, leading to better matches between job seekers and employers that can help reduce turnover, increase employee satisfaction and ultimately create more stability for people, companies and the economy.

TripAdvisor operates the world’s largest travel site at www.tripadvisor.com. It allows people to plan, book and experience the

perfect trip by aggregating, through its travel platform, user reviews and opinions about destinations, accommodations, attractions and restaurants throughout the world so that users have access to trusted advice based on the first-hand experiences of other travelers. Users have posted 465 million reviews and opinions about seven million accommodations, restaurants and attractions, that not only help travelers find the best hotel prices, but offer practical advice and tools to allow them to research and plan trips, and make better decisions about the places they visit, the restaurants they choose to frequent, and the activities in which they participate.

INTEREST OF AMICI CURIAE

This case presents an issue that will directly impact Glassdoor's and TripAdvisor's ability to provide neutral and open platforms for candid third-party reviews: whether a party may force an interactive computer service provider, under the threat of sanctions, to take down content—and effectively censor lawful, constitutionally protected speech—provided by a third-party user, by obtaining an injunction without fair notice and due process given to the provider. Based on the facts of the pending appeal, even a default judgment, where the plaintiff's allegations regarding the veracity of a third party's statements are untested, can result in the forced removal of information that may be important for the public to know about (such as a review by a customer or employee about a restaurant's poor food safety practices, discriminatory employment practices at a medical facility or a hotel's hygiene standards).

If upheld, the lower appellate court's ruling would allow a business to suppress critical free speech by suing a speaker who does not

have the financial resources to fight in court, and then compel a forum for speech, such as Yelp, Glassdoor or TripAdvisor, to comply with a mandatory injunction to censor that speech, without even affording the platform provider the opportunity to step in on behalf of its users in order to contest the legality of the takedown request. Under this novel rule, an intermediary would be foreclosed from challenging the lawfulness of the order before it is even aware of the court action, which effectively hands editorial control over the content of a website to any affluent party that seeks to stifle criticism—even if legitimate—by suing users who lack the means to mount a legal defense (aided by California courts). This rule not only harms platform providers, but their users and the businesses that have done everything needed to obtain positive reviews on sites such as Glassdoor and TripAdvisor. The public trust placed in the integrity of these sites and the legitimacy of consumer and candidate reviews would be adversely impacted if poorly rated businesses and employers could improve their standing through default judgments, and unchallenged mandatory injunctions implementing those default judgments.

Glassdoor and TripAdvisor are familiar with the issues pending on appeal and believe additional briefing would help the Court resolve this case. Among other issues, the proposed amicus brief addresses the practical consequences and harm to free speech that would occur if online intermediaries like Yelp that provide a public forum for unvarnished consumer feedback are denied the basic right to be heard prior to being subjected to a mandatory injunction sought by a business to squelch consumer criticism. Glassdoor and TripAdvisor have long stood by their users' right to post lawful *opinions* on their respective platforms. Indeed, they have incurred substantial legal expenses to

ensure that this fundamental right remains unimpeded by, among other things, defending against baseless takedown claims. In many cases actually litigated, the speech at issue has been found to be constitutionally protected. *See, e.g., Seaton v. TripAdvisor LLC*, 728 F.3d 592 (6th Cir. 2013) (ruling that TripAdvisor’s inclusion of plaintiff’s hotel in its list of “2011 Dirtiest Hotels” based on user reviews was not defamatory); *Knievel v. ESPN*, 393 F.3d 1068, 1077-78 (9th Cir. 2005) (holding that a reasonable person would not construe the caption “Evel Knievel proves that you are never too old to be a pimp” under a photo of him with his wife and another woman on ESPN’s extreme sports website, EXPN.com, as charging him with being a pimp or that his wife was a prostitute, as required to establish defamation); *Krinsky v. Doe*, 159 Cal. App. 4th 1154, 1159, 1176-77 (2008) (holding that a blog post asserting that plaintiff, the president of a publicly traded company, “has fat thighs, a fake medical degree, ‘queefs’ and has poor feminine hygiene,” was not defamatory, stating that “[t]he language is unquestionably vulgar and insulting, but nothing in this post suggested that the author was imparting knowledge of actual facts to the reader”); *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1020 (2005) (“[I]t is inconceivable that placement on the ‘Top Ten Dumb Asses’ list [appearing on a website] could be understood to convey any imputation of provable defamatory fact.”).

In this case, the mandatory injunction upheld by the lower court required Yelp to remove from its website lawful *opinions* that were critical of the professional services provided by respondents. The appellate decision not only chills free speech, but by upholding the prior restraint, it also violates Yelp’s First Amendment and due process rights

by not affording Yelp an opportunity to challenge the “removal order” obtained by respondents in a one-sided default judgment proceeding.

The appellate ruling also runs counter to this Court’s decision in *Barrett v. Rosenthal*, 40 Cal. 4th 33, 56 (2006), upholding the “broad immunity” conferred by Congress’s mandate under section 230 of the Communications Decency Act (“CDA”) that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” and “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. §§ 230(c)(1), 230(e)(3); *Barrett*, 40 Cal. 4th at 39, 56.

Glassdoor and TripAdvisor respectfully request that the Court permit them the opportunity to speak in this case on these issues of vital importance to their businesses and customers.

CERTIFICATION

No party or any counsel for a party in the pending appeal authored the proposed amicus curiae brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the proposed amicus curiae brief.

Dated: April 13, 2017

Respectfully submitted,
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Yelp review asks judge to drop suit*, The Dallas Morning
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I. INTRODUCTION

Glassdoor, Inc. (“Glassdoor”) and TripAdvisor LLC. (“TripAdvisor”) operate popular online platforms that provide a forum for user reviews and feedback. Glassdoor enables users to anonymously post reviews of current and former employers, company salaries and benefits, management practices, and similar information to help job seekers find the best employment match. TripAdvisor allows travelers to read and write user-generated reviews of hotels, restaurants, attractions, and other travel-related material that assist users in making travel plans. Both platforms provide valuable services of enormous utility which benefit the public. They offer a level of transparency that did not exist prior to the Internet by giving consumers and employees the power to voice not only the good but in some instances, the bad. And when companies and business owners are called out for their shortcomings, often the reviews lead to better business practices. Negative feedback also benefits the community by warning other users to avoid terrible choices, like staying at the “dirtiest” hotel rated by consumers, or applying for a job at an employer practicing workplace discrimination.

The facts of this case, and the appellate opinion on appeal, present a fundamental matter of public interest because they directly impact, and potentially *threaten*, the ability of interactive computer service providers to maintain and provide public access to consumer reviews and other material important to the public at large. As set forth in section II(A), *infra*, defendant Bird posted on Yelp comments that were critical of the professional services rendered by respondents, and sought to alert others in need of legal services of her dissatisfaction as a client of this particular law firm. The decision by the court of appeals to uphold a mandatory injunction (dubbed a “removal order”) requiring Yelp to

remove Bird's customer reviews without notice, due process, and an opportunity for Yelp to challenge the censorship of Bird's legitimate *opinions*, chills critical consumer speech and should be overturned. There is no more effective way of suppressing speech than to allow an economically powerful company to obtain a default judgment and injunction that forces a publisher to remove negative reviews and opinions of others without a hearing and under the threat of sanctions. By permitting one party to silence critics without proper process, the appellate ruling puts in jeopardy the public's right to post and read online user reviews of business, their practices, services or products—activity that the California legislature and the U.S. Congress have specifically sought to protect against a growing trend of businesses that attempt to squelch negative reviews through legal threats. This action unfairly harms both consumers, who are then presented with a potentially skewed perception of customer feedback, as well as competitors, who work hard for positive reviews and do not seek to censor the negative ones they receive.

The lower court's ruling also infringes upon Yelp's First Amendment right to maintain editorial control over the content posted on its website by affirming a private litigant's ability to force a nonparty website, without notice and due process, to remove user statements found to be defamatory in an uncontested default judgment proceeding. The appellate court's characterization of Yelp as merely a website "administrator" is inconsistent with cases holding that platform providers like Yelp have a constitutionally recognized interest in protecting, maintaining, and distributing user content published on their sites. By denying Yelp an opportunity to challenge the mandatory injunction, the lower court also left intact an overbroad prior restraint (drafted by the

plaintiffs and approved upon default, *see* A00219-223) requiring Yelp to remove *all* comments attributed to defendant Bird, including nonactionable *opinions* that were lawfully published.

Lastly, the lower court's ruling amounts to an end run around the statutory immunity enacted in Section 230 of the Communications Decency Act, 47 U.S.C. § 230, which this Court held in *Barrett v. Rosenthal*, 40 Cal. 4th 33, 56 (2006), broadly prohibits courts from allowing *any* cause of action or imposing *any* liability on service providers for material posted by its users, subject to narrow exceptions not at issue in this appeal.

Amici Glassdoor and TripAdvisor respectfully request that the Court reverse the lower court ruling.

II. ARGUMENT

A. The Appellate Court's Ruling Threatens Access To Information That Is Important To The Public

1. The *Hassell* decision undermines established law and policy protecting the right of users to post and read lawful reviews that serve a public interest.

Review sites like Yelp, Glassdoor and TripAdvisor provide a public benefit by not only giving users access to a forum to express their views about businesses, their practices, services or products, but also to research and learn from other users' personal experiences. The user content made available on sites like Yelp is what draws readers to these sites. For Glassdoor users, truthful and frank employer reviews are helpful in evaluating potential job offers and career opportunities. Not surprisingly, there are employees (current and former) who hold critical opinions of their employers, and consequently there are employers who seek to skew user feedback by expunging bad reviews—even where that

feedback provides helpful information to the public. A review signaling “a high turnover rate,” for example, could raise concern for prospective employees looking for long-term stability. But not all reviews that are critical will be valued the same way—that determination depends on the content of the review itself and the individual reader. For example, a review that a company “is great for hands-on experience, very poor for mentoring or professional development,” may not deter a prospective employee who values actual training more than professional mentoring. In this real world example, the employer filed a defamation suit in California state court (despite that the employee also gave positive feedback in the same review) and sought to unmask the anonymous poster by compelling Glassdoor to disclose the employee’s contact information, which the court denied on the basis that the reviews were nonactionable.

TripAdvisor has also been forced to litigate baseless claims over negative reviews that have helped travelers avoid bad decisions on places to stay. *See, e.g., Seaton v. TripAdvisor LLC*, 728 F.3d 592 (6th Cir. 2013) (affirming dismissal of claims for defamation, trade libel, false light invasion of privacy and tortious interference with prospective business advantage under Tennessee law based on TripAdvisor’s inclusion of plaintiff’s hotel in its list of “2011 Dirtiest Hotels” because placement on the “list is not capable of being understood as defamatory; it is protected, nonactionable opinion”). Consumer reviews identifying unsanitary lodgings serve a public benefit by alerting others to businesses that have had issues with bed bugs, mildew in pools, or food poisoning scares—examples of the type of information that businesses would never want disclosed, but which are valuable to other travelers. The social utility of candid user reviews cannot be denied.

California, which has enshrined broader constitutional free speech protections for state residents than are available under the U.S. First Amendment,¹ has a strong interest in protecting online speech, both for the speaker *and* for the listener. *See, e.g., Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 485 (2000) (the right to freedom of speech is afforded “not only to one who speaks but also to those who listen”); *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 898-99 (2004) (finding online consumer information concerned a matter of public interest); *Wilson v. Superior Court*, 13 Cal. 3d 652, 658 (1975) (finding California Constitution’s protections for free speech more “definitive and inclusive” than those of the federal Constitution).

Of particular relevance to this case, the California legislature and the U.S. Congress have enacted laws to provide greater protection to online user comments targeted by businesses that receive negative reviews posted by customers. In 2014, California passed AB2365, commonly referred to as the “Yelp” bill, which prohibits the use of “non-disparagement” clauses in consumer contracts beginning January 1, 2015. The law, codified at California Civil Code § 1670.8, provides that “[a] contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer’s right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.” More recently, in December 2016, President Obama signed into law the Consumer Review Fairness Act (“CRFA”), which similarly prohibits

¹ Article I, Section 2 of the state Constitution provides, “every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”

businesses from imposing “gag clauses” on consumers in form contracts, for the express purpose of rendering invalid “contracts that impede consumer reviews.” See 15 U.S.C. § 45b (2016) (rendering unenforceable a form contract that “prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered communication,” which is defined as “a written, oral, or pictorial review, performance assessment of, or other similar analysis of, including by electronic means, the goods, services, or conduct of a person by an individual who is party to a form contract with respect to which such person is also a party”).

Both the “Yelp” bill and the CRFA were enacted in response to reports of legal threats made against a Utah couple by a weight-loss supplement company for posting negative reviews about its product, where the company sought to enforce a non-disparagement clause in its consumer contract. See Matt Gephardt, *After long legal battle for Utah couple, gag-clauses will be outlawed*, KUTV CBS 2, November 29, 2016, <http://kutv.com/news/get-gephardt/gag-clauses-will-be-outlawed>. The dispute also prompted the Federal Trade Commission to take action against the company for threatening consumers with monetary penalties for posting negative reviews. See Federal Trade Commission, *FTC Sues Marketers Who Used “Gag Clauses,” Monetary Threats, and Lawsuits to Stop Negative Consumer Reviews for Unproven Weight-Loss Products*, September 28, 2015, <https://www.ftc.gov/news-events/press-releases/2015/09/ftc-sues-marketers-who-used-gag-clauses-monetary-threats-lawsuits>. In another widely reported case, a company sued a Texas couple for \$1 million in damages after the couple posted a negative review accusing the “pet sitting” company of overfeeding their Betta fish. See Sarah Mervosh, *Plano couple sued for \$1M over one-star*

Yelp review asks judge to drop suit, The Dallas Morning News, October 16, 2015, <https://www.dallasnews.com/news/news/2016/06/03/plano-couple-hit-with-1m-lawsuit-over-one-star-yelp-review-asks-judge-to-drop-suit>. These cases underscore the alarming trend of businesses seeking to use—or misuse—the legal system to suppress protected speech in the form of negative reviews, as in this case.

The lower court’s ruling undercuts legislative efforts to protect consumer speech. Tellingly, the appellate court’s decision is completely devoid of any discussion of these public interest concerns that are implicated by the facts and holding of *Hassell*, including the constitutional right of California residents to read critical reviews. Many of the comments attributed to Bird were in fact lawful *opinions* expressing her dissatisfaction with the professional services she received from respondents. Specifically, Bird’s review criticized Ms. Hassell’s “work ethic” and professionalism, and revealed a failure in communication between the attorney and her client. *See* AB00215. The review expressly warned prospective clients to “research” for more “competen[t]” law firms with “long term client satisfaction” that this particular client considered lacking (underscored by the subsequent post alerting readers to the lawsuit filed by respondents). *See id.* Undoubtedly, the quality of professional services and a law firm’s willingness to sue former clients for submitting user reviews it regards as defamatory, are matters within the public interest.² Bird’s reviews were

² California courts have long maintained that user material posted on public websites like those operated by Yelp and *amici* involve a matter of public interest, and in certain contexts, have held that websites are public forums. *See Barrett v. Rosenthal*, 40 Cal. 4th 33, 41, 51 Cal. Rptr. 3d 55, 59 (2006) (holding “websites accessible to the public” including newsgroups constitute “public forums” for purposes of the Anti-SLAPP