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August 18, 2016

Chief Justice Tani Gorre Cantil-Sakauye
The Supreme Court of California
350 McAllister St.
San Francisco, CA 94102-4797

Re: Petition for Review, *Hassell v. Bird*, No. S235968 (filed July 18, 2016)

Dear Chief Justice:

Based on our experience as law professors who are knowledgeable about the application of the First Amendment to Internet law, we urge you (pursuant to Rule 8.500(g)) to accept the Petition for Review in this case.

* * *

The Court of Appeal's decision jeopardizes a vast range of online speech. Many speakers are in precisely the same position as Yelp, because they exercise their own First Amendment rights by displaying others' work for the world to see. Newspapers encourage user comments. Group weblogs let many bloggers submit their contributions. Chatroom operators solicit user posts.

Though these speakers may not be treated as "publishers" of the user contributions for purposes of civil liability (given 47 U.S.C. § 230), their distribution of the aggregate of user posts is protected by the First Amendment. Like the parade organizers in *Hurley v. Irish American Gay, Lesbian, & Bisexual Group,* 515 U.S. 557 (1995), the speakers create speech by inviting others to contribute to the speech—and have their own First Amendment rights to distribute this aggregate speech.

Yet the decision below offers plaintiffs a roadmap for violating these speakers' rights. Say a business dislikes some comment in a newspaper's online discussion section. The business can then sue the commenter, who might not have the money or expertise to fight the lawsuit. It can get a consent judgment (perhaps by threatening the commenter with the prospect of massive liability) or a default judgment. And it can then get a court to order the newspaper to delete the comment, even though the newspaper had no opportunity to challenge the claim, and may not have even heard about the claim until after the judgment was entered. This is directly analogous to what plaintiff Hassell did in this very case.

The U.S. Supreme Court has already recognized the danger posed by *ex parte* restrictions on speech. In *Carroll v. President & Commissioners of Princess Anne*, 393 U.S.

175 (1968), the Court held that such restrictions were almost always impermissible, except perhaps in rare cases of looming violence. Even "temporary restraining orders of short duration," the Court stressed, are unconstitutional if they operate "within the area of basic freedoms guaranteed by the First Amendment," unless "it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Id.* at 180.

And such *ex parte* orders remain unconstitutional even when plaintiff gives notice to one speaker (such as an author) but not to another speaker whose rights are equally implicated (such as a web site operator), especially when the two speakers are in a distant, impersonal relationship with each other. The original author's opportunity to vindicate her rights does not justify denying the web site operator an opportunity to vindicate its own independent First Amendment rights. That is especially so where, as here, the original author may have understandably chosen not to spend the money needed to defend the case, so there was no meaningful adversarial argument about whether the underlying speech is actually libelous.

That is why a newspaper cannot be ordered to take down an allegedly libelous comment, without having notice and an opportunity to be heard. It is why a bookstore cannot be ordered to remove an allegedly obscene book, and an art gallery cannot be ordered to remove an allegedly obscene painting, without an opportunity to challenge the finding of obscenity. *See Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211 (1964) (plurality op.) ("in not first affording [the bookstore] an adversary hearing, the procedure leading to the seizure order was constitutionally deficient").

And it is why Yelp, Amazon, and other such sites cannot be ordered to remove an allegedly libelous post, without an opportunity to themselves dispute this restriction on their own speech rights. The Court of Appeal erred in treating Yelp as essentially lacking First Amendment rights here. *See* Pet. for Review 22 (copy of Court of Appeal opinion) ("Yelp's factual position in this case is unlike that of the . . . appellants [in *Marcus v. Search Warrants*, 367 U.S. 717 (1961)], who personally engaged in protected speech activities by selling books, magazines and newspapers."). A site such as Yelp or Amazon is, if anything, even more engaged in protected speech than a bookstore, and more like a magazine creator than just a magazine seller: It creates a coherent speech product—a Web page that aggregates readers' comments—and distributes it to readers. That 47 U.S.C. § 230 immunizes Yelp from tort liability as a publisher for the material that it reproduces does not strip Yelp of its First Amendment rights as a creator and distributor of the speech aggregating the material.

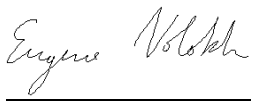
Hassell argues that "there is simply no First Amendment protection where, as here, the statements at issue are statements that have been conclusively adjudged to be defamatory." Respondents' Answer to Yelp's Petition for Review 14. But a person "'. . . is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' . . . This rule is part of our 'deep-

rooted historic tradition that everyone should have his own day in court.'" *Richard v. Jefferson County*, 517 U.S. 793, 798 (1996) (citations omitted).

Yelp never had its "own day in court" to determine whether the material that *it* was choosing to display on its site was defamatory. A default judgment against Bird cannot "conclusively adjud[icate]" Yelp's rights. And while collateral estoppel can bind parties that are in "privity" with a party in an earlier case, *id.,* there is no such privity between Yelp and its millions of commenters, whom Yelp employees generally never meet or even directly correspond with, and who may have their own interests (such as in avoiding paying for litigation) that are very different from Yelp's.

The Court of Appeal's decision also creates a conflict with the precedents that conclude that § 230 applies to injunctive relief. For instance, in *Kathleen R. v. City of Liverpool,* 87 Cal. App. 4th 684 (2001) (holding that city cannot be ordered to place filters on library computers in order to shield minors from pornography), the Court of Appeals held that injunctions are just as barred by § 230 as are other remedies: "the statute by its terms also precludes other causes of action for other forms of relief [than damages]." *Id.* at 781. Likewise, *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983-84 (10th Cir. 2000), held that § 230 preempted plaintiff's request for "injunctive relief" as well as for damages. *Giordano v. Romeo,* 76 So. 3d 1100 (Fla. Ct. App. 2011), held that web sites "enjoy[] complete immunity" in libel cases under § 230 both from injunctive relief and damages relief. And in *Reit v. Yelp!, Inc.,* 907 N.Y.S.2d 411, 414 (Sup. Ct. 2010), the court held that an injunction forcing Yelp to remove a review would be barred by Section 230. If California courts are to depart from this consistent body of law, that is a decision that should be made by this Court.

Sincerely Yours,



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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is UCLA School of Law, 405 Hilgard Ave., Los Angeles, CA 90095.

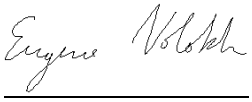
On August 18, 2016, I served true copies of the letter in support of the Petition for Review on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with UCLA's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 18, 2016, at Los Angeles, California.



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