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' ANSWER TO YELP'S PETITION FOR REVIEW

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INTRODUCTION

Yelp has invited this Court's assistance in allowing it to host in perpetuity content that has already been adjudicated to be defamatory. Because Yelp's request does not raise any unsettled, important legal questions, this Court should decline the invitation.

This case stems from a private dispute between Plaintiffs/ Respondents The Hassell Law Group and Dawn Hassell (collectively "Hassell") and Defendant Ava Bird, whom the former briefly represented. After Bird posted false factual statements about Hassell in reviews on Yelp's website which she refused to remove or make truthful, Hassell filed suit against Bird and notified Yelp of their intention to seek a removal order against Yelp should Bird refuse to comply. Hassell ultimately obtained a judgment in their favor against Bird on the basis that the statements that she had posted were defamation and trade libel. Hassell also obtained the injunctive relief they sought, and the trial court ordered Bird and non-party Yelp to remove the defamatory remarks.

Yelp was served with the removal order in January 2014, but it refused (and continues to refuse) to comply with its terms, by trying to stand in Bird's shoes to insist instead that the judgment was not based upon sufficient evidence of defamation. Both below, and now to this Court, Yelp has advanced several theories to excuse itself from complying with a valid court order. None presents a compelling legal issue warranting this Court's review.

First, the appellate court applied the well-established and unremarkable line of authority to find that due process does not entitle Yelp to a hearing before a removal order is entered against it. Jurisprudence going back at least as far as 19th Century has consistently rejected such a notion. (*In re Lennon* (1897) 166 U.S. 548, 554-57; *Heller v. New York*

(1973) 413 U.S. 483, 488; *Regal Knitwear Co. v. NLRB* (1945) 324 U.S. 9.) In fact, "Yelp does not cite any authority which confers a constitutional right to a prior hearing…" (Op., 23.) This Court has clearly and repeatedly found that injunctions may run against those "through whom the enjoined party may act." (*Ross v. Superior Court of Sacramento County* (1977) 19 Cal.3d 899, 905-906.) Not only is this general principal confirmed by the cases relied upon by Yelp, but Yelp even concedes that it is "common practice." (Pet., 20.) Yelp's Petition attempts to escape this common practice by analogizing itself to cases where individuals (mostly protesters) who were not named in an injunction, and bore no relation to an enjoined party, were found to be outside the scope of an injunction. Yelp cites no authority to support its position that a named intermediary, through whom an enjoined party acts, is outside the reach of the courts. Nor can Yelp cite such authority, as the law is already well-settled in the other direction.

Second, Yelp suggests the existence of important constitutional issues that simply do not exist on this record. The Court of Appeal's affirmance of the removal order implicates neither due process, nor the First Amendment. In an effort to entice the Court to grant review, Yelp continually glosses over the dispositive fact demonstrating why review is unnecessary: this case arises in the rare context where a party ***has a court judgment finding the statements in issue to be defamatory.*** Thus all of Yelp's policy arguments -- that it must "maintain the integrity of its website" by posting "critical reviews," that this Court's review is required to ensure "the vitality of online speech" and protect the "disparate views and opinions" of its members – are misplaced.

Decades of constitutional jurisprudence confirm that defamatory speech does not enjoy First Amendment protection. What public policies

promote Yelp's intransigence in refusing to remove adjudged defamatory content from its website, particularly where its own terms of service state it will do so? It is hard to envision how "consumers will suffer" from an inability to access defamatory content, and Yelp simply cannot articulate any public policies, let alone principles of law, that are advanced by continued distribution of adjudged defamatory statements because there is none. While Yelp wants to frame this case as implicating important constitutional protections, that framing falls apart when the actual, narrow record is considered: three adjudged defamatory postings that Yelp was ordered to remove.

Finally, Yelp argues that its immunity from tort liability under Section 230 of the Communications Decency Act (CDA) also places it entirely outside the reach of courts. This question is not even a close call, as it is answered squarely by the language of the CDA, which only immunizes websites from "liability." As noted by the Court of Appeal, "Yelp does not cite any authority which addresses the question whether section 230 would immunize Yelp from being sanctioned for contempt." (Op., 31.)

Yelp raises no unsettled legal issues or otherwise novel arguments – each one of its positions must fail based on either deeply-rooted legal principles or the plain statutory text upon which it relies. Nor are the issues in this case particularly important on a larger scale. Plaintiffs' research has revealed that only in extremely rare cases do websites or internet service providers refuse to remove content that a court had already found unlawful.

Far from the "travesty of justice" Yelp claims occurred in this case, the Court of Appeal's careful and thoughtful ruling faithfully applied this Court's jurisprudence as well as federal statutory and constitutional law. While Yelp does a yeoman's job of using histrionic language to attempt to

pique this Court's interest, a close read of the decision below demonstrates that it presents no need for review to secure uniformity of decision or to settle an important question of law.

This Court should accordingly deny Yelp's Petition.

STATEMENT OF THE CASE

I. BACKGROUND.

The relevant background of the case is set forth accurately and in detail in the Court of Appeal's opinion. (Op. at 2-10).[1] The facts most pertinent to the Petition for review are briefly summarized below.

Hassell represented defendant Ava Bird in a personal injury case for less than a month. (AA.V1.T6.00054).[2] After Hassell withdrew from their representation of Bird due to her repeated failures to respond to their requests, Bird posted false statements on Hassell's Yelp page. (AA.V1.T.6.A00055). Hassell contacted Bird, explained that the review contained false statements, and asked her to edit or rescind the review. (AA.V1.T6.00056, 94). Bird responded the next day, refusing to take down the post, threatening to have a friend post another bad review, and using abusive language. (AA.V1.T6.00056, 95-98). Days later, Bird posted another review under the moniker "J.D." (AA.V1.T6.57, 99-101).

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[1] As Yelp did not seek rehearing, this Court should accept the Court of Appeal's statement of the issues and facts, which is more complete and balanced than the statement Yelp offers. See California Rules of Court, rule 8.500(c)(2) ("A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing.")

[2] References to the Appellant's Appendix from the Court of Appeal proceedings are designated by "AA" followed by the volume number, tab number, and page numbers, e.g. AA.V1.T3.1-3.

Because the defamatory reviews had palpably harmed the law firm's business and Bird refused to remove them, Hassell filed suit against Bird on April 10, 2013. (AA.V1.T1.00001-21). Just over a week later, on April 29, 2013, Bird "updated" her original post with a new defamatory posting. (AA.V1.T6.00057, 102-105).

Hassell sent a copy of the Complaint to Yelp's General Counsel and requested that Yelp remove the reviews. (AA.V3.T21.00601-601 (letter), 00617-634 (attached Complaint)). Yelp did not respond. Hassell then proceeded with a default against Bird, and applied for a default judgment. (AA.V1.T3.00023). The trial judge reviewed and heard extensive evidence and argument in a prove-up hearing in support of the default judgment. Hassell' briefing explained that if Bird refused to comply with the Order, the only way to remove the posts would be an injunction ordering Yelp to do so. (AA.V1.T5.50-51). After the hearing, the Court granted most of the relief Hassell sought. It ordered monetary damages against Bird, denied the request for punitive damages, and granted injunctive relief. It also included in its order requiring Yelp to remove the reviews. (AA.V1.T8.00211; AA.V1.T9.00212-216).

Hassell again approached Yelp to remove the reviews. Yelp ignored the judgment and flatly refused. Four months later, Yelp moved in the trial court to vacate the judgment. (AA.V1.T11.00225). After considering briefing and hearing extensive argument (AA.V3.T33.829-854), the trial court denied the motion. (AA.V3.T30.808-810). The Court observed that "injunctions can be applied to non-parties," citing a line of cases allowing an injunction to run against those acting "in concert with or in support of" the enjoined party. (AA.V3.T30.00809, quoting *Ross*, 19 Cal.3d at p. 906).

Yelp appealed the ruling.

II. THE OPINION OF THE COURT OF APPEAL.

The Court of Appeal largely upheld the trial court's decision, soundly rejecting the arguments raised by Yelp in the instant Petition.

First, in resolving standing issues (which Yelp does not raise in its Petition), the Court noted that Yelp's appeal impermissibly attempted to collaterally attack the underlying defamation judgment. The Court found that "Yelp's claimed interest in maintaining [its] Website as it deems appropriate does not include the right to second-guess a final court judgment which establishes that statements by a third party are defamatory and thus unprotected by the First Amendment." (Op., 11.)

Second, the Court of Appeal rejected Yelp's argument that the removal order was barred by due process because the trial court did not afford Yelp notice or a hearing before entering the removal order. The Court noted that there were "two distinct prongs to Yelp's due process theory: first, that the trial court could not order Yelp to implement the injunction because it was not a party in the defamation action; and second, that the prior notice and a hearing were mandatory because the removal order impinged on Yelp's First Amendment right to 'host' Bird's reviews." (Op., 18.)

As to the first prong of Yelp's argument, the Court embraced the "settled principles" permitting an injunction such as the removal order at issue here to run to a non-party. Reviewing cases from this Court and the Courts of Appeal, the Court found it was "common practice to make the injunction run also to classes of persons through whom the enjoined party may act," as stated by this Court in *Ross*, 19 Cal.3d at p. 906. (Op., 19.) The Court concluded that a trial court has "the power to fashion an injunctive decree so that the enjoined party may not nullify it by carrying out the prohibited acts with or through a nonparty to the original

proceeding." (Op., 21.)

As to the second prong of Yelp's argument – that it had a First Amendment right to distribute third-party speech that could not be denied without notice and a hearing – the Court of Appeal found that Yelp's due process argument necessarily failed, because it did not have a First Amendment right to distribute speech that had specifically "been found to be defamatory in a judicial proceeding." (Op., 23.) While Yelp relied, as it does here, on cases where the speech was merely "*suspected* of being unlawful," the Court found that Yelp failed to offer any authority "which confers a constitutional right to a prior hearing before a distributor can be ordered to comply with an injunction that precludes re-publication of specific third party speech that has already been adjudged to be unprotected and tortious." (Id.)

Further, the Court found that even if Yelp could assert a First Amendment right, the law "does not support Yelp's broad notion that a distributor of third party speech has an unqualified due process right to notice and a hearing before distribution of that speech can be enjoined." (Op., 23). Instead, United States Supreme Court has "never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized." (Op., 23 quoting *Heller,* 413 U.S. at 488).

Third, as to Yelp's argument that the removal order also constituted an unconstitutional prior restraint, the Court of Appeal agreed that the order must be limited to the comments adjudged to be defamatory, and that "to the extent the trial court additionally ordered Yelp to remove subsequent comments that Bird or anyone else might post, the removal order is an overbroad prior restraint on speech." (Op., 25.) The Court rejected Yelp's overbroad argument, repeated here, that the removal order in its

entirety impermissibly restrained speech. The appellate court relied on this Court's decision in *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, which held that "an injunction issued following a trial that determined that the defendant defamed the plaintiff, that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment." (*Id.* at p. 1148; Op., 24.) The Court of Appeal also rejected Yelp's contention that a *jury's* determination of defamation was required, finding "nothing in *Balboa Island* supportive of this contention. In fact, the injunction in that case was issued after a bench trial." (Op., 25). As to Yelp's argument that the order was a prior restraint because Hassell failed to actually prove that Bird wrote two of the defamatory reviews, the Court found that, again, Yelp was trying to argue the merits of the underlying defamation and concluded: "the trial court made a final judicial determination that Bird posted those reviews and, for reasons we have already discussed, Yelp does not have standing to challenge that aspect of the judgment." (Id.)

Finally, the court found that any immunity from liability Yelp may enjoy under the CDA was inapplicable to its status as a third-party in this case. Looking to the plain language of the CDA, the court reasoned that "[t]he removal order does not violate section 230 because it does not impose any liability on Yelp. In this defamation action, Hassell filed their complaint against Bird, not Yelp; obtained a default judgment against Bird, not Yelp and was awarded damages and injunctive relief against Bird, not Yelp." (Op., 28.) Yelp cited no "authority that applies section 230 to restrict a court from directing an Internet service provider to comply with a judgment which enjoins the originator of defamatory statements posted on the service provider's Web site." (Id.) It noted that the CDA reserves to the states enforcement of state laws that are "consistent with" section 230.

California law both authorizes an injunction against statements adjudged to be defamatory, and permits injunctions to run to a non-party through whom the enjoined party may act, procedures which are not inconsistent with section 230 "because they do not impose any liability on Yelp, either as a speaker or as a publisher of third party speech." (Op., 29). As a result, the court found that the CDA, which acts as a shield from tort liability, did not excuse Yelp from compliance with court orders. (Op., 31.)

ARGUMENT

I. THERE ARE NO IMPORTANT QUESTIONS FOR THIS COURT TO RESOLVE BY YELP'S UNSUPPORTED DUE PROCESS ARGUMENTS.

Yelp's due process arguments are a moving target. At times it distances itself from the defamatory remarks, while at other times insisting that it has a First Amendment right to host the defamation. In any event, the law is already well-established that due process does not afford Yelp an unqualified right to a hearing before being ordered to remove someone else's defamatory speech from its online platform.

The Court of Appeal's decision does not raise unsettled or important issues of law requiring this Court's review.

A. This Case Raises No First Amendment Issues for Review.

As a threshold matter, Yelp misleadingly and improperly frames the first "issue presented" as involving its First Amendment rights. (Pet., 1.) That is simply not the case, as the only speech at issue here is adjudged defamatory speech by Bird, which Yelp plainly has no First Amendment right to distribute.

Defamatory speech has long been recognized to fall outside the scope of First Amendment protections. (See *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245-246; *Keeton v. Hustler Magazine, Inc*.

(1984) 465 U.S. 770, 776 (false statements have "no constitutional value" because they "harm both the subject of the falsehood and the readers of the statement"); *Balboa Island,* 40 Cal.4th at p. 1147.) Thus, to the extent that Yelp believes that it has a right to perpetuate defamation because it "has a separate First Amendment right to distribute speech" (Pet., 18), it is entirely mistaken.

This mistaken belief that Yelp has the right to distribute defamatory speech infects Yelp's Petition in two fatal ways. First, Yelp argues at length that because of its purported *First Amendment* rights, it has due process rights as the publisher and/or distributor of the defamatory speech, and is therefore entitled to be heard before a removal order is entered. (Pet., 15-18). Because such First Amendment rights do not exist in the context presented by this case, however, they cannot support Yelp's due process claim.

Second, Yelp finds itself talking out of both sides of its mouth. While it asks this Court to review First Amendment protections not at issue here, at the same time it admits, for purposes of its CDA immunity claim, that it played no role in the creation of the defamatory speech. That is, it recognizes that to even make a claim of protection under the CDA, it must distance itself from the speech at issue. This inherent inconsistency was noted by the Court of Appeal. (See Op. 22 ("In order to claim a First Amendment stake in this case, Yelp characterizes itself as a publisher or distributor. But, at other times Yelp portrays itself as more akin to an Internet bulletin board…")).

Whatever moniker it chooses for its role, it is clear that Yelp has no First Amendment right to distribute defamatory speech any more than the speaker has to create the speech in the first instance. This case – involving only statements that have been adjudged to be defamatory -- presents no

occasion to visit the First Amendment in the context of internet publication.

B. The Court of Appeal Faithfully Applied Well-Established Law Permitting Injunctions to Non-Parties Through Whom an Enjoined Party Acts.

The due process issues raised by Yelp were properly treated by the Court of Appeal.

1. Non-Parties Through Whom an Enjoined Party Acts Can Be Similarly Enjoined.

Yelp erroneously believes that, as a non-party, it is broadly entitled to a hearing before any injunction can run against it. But as Yelp concedes, "courts [may] enjoin third parties" under the right set of circumstances. (Pet., 20-21.) Indeed, it has long been established that "[i]n matters of injunction…it has been a common practice to make the injunction run also to classes of persons through whom the enjoined person may act…though not parties to the action, and this practice has always been upheld by the courts." (*Ross*, 19 Cal.3d at pp. 905-906; see also *In re Lennon*, 166 U.S. at pp. 554-57.)

As the Court of Appeal noted, this deeply-rooted practice is not nearly as limited as Yelp suggests. (See Op., 19.) Instead, "this practice is thoroughly settled and approved by the courts." (*People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 766-767.) In fact, each of the cases cited by Yelp further confirms this general rule that injunctions can run against nonparties "with or through whom the enjoined party may act." (*Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 353 (an injunction can run to the persons "with or through whom the enjoined party may act" to prevent an enjoined party from "nullify[ing] an injunctive decree by carrying out prohibited acts with or through nonparties to the original proceeding"); see also *Ross*, 19 Cal.3d at p. 905 ("it has been

a common practice to make the injunction run also to classes of persons through whom the enjoined party may act"); *People v. Conrad* (1997) 55 Cal.App.4th 896, 903 ("we conclude that a nonparty to an injunction is subject to the contempt power of the court when, with knowledge of the injunction, the nonparty violates its terms *with or for* those who are restrained.")).

Yelp's reliance on *Regal Knitwear* is similarly unhelpful to its position. There, the U.S. Supreme Court recognized that injunctions could apply to the conduct of certain nonparties, including "those persons in active concert or participation with [the defendants] who receive actual notice of the order by personal service or otherwise." (324 U.S. at pp. 13-14, quoting Fed. R. Civ. P. 65(d).) Further, the court explained that postjudgment concerns about the applicability of such an injunction to a particular person or behavior could be resolved by "petition[ing] the court granting it for a modification or construction of the order." (*Id*. at 15.) Nothing in the language from *Regal Knitwear* indicates that such nonparties are entitled to a hearing before the injunction ever takes effect.

The few injunctions cited by Yelp that exceeded the scope of this general rule all involved persons who were not specifically named in the injunction, and who had, at best, only an attenuated connection to the enjoined defendant. (See, e.g., *Conrad*, 55 Cal.App.4th at p. 903 (subsequent abortion protesters not subject to injunction because "it must be [their] actual relationship to an enjoined party, and not [just] their convictions about abortion, that make them contemners"); *Planned Parenthood*, 107 Cal.App.4th at p. 353 (protestors may not be subject to injunction where evidence was absent that they acted together with or on behalf of enjoined parties); *Berger v. Superior Court of Sacramento County* (1917) 175 Cal. 719, 720 (subsequent protester who was "absolute

stranger" to enjoined parties could not be bound by injunction); *In re Berry* (1968) 68 Cal.2d 137, 156 (injunction could run to nonparties, but the inclusion of those "in concert among themselves" created "a baffling element of uncertainty as to the application of the order to [unaffiliated] persons"); see also *Gwinn*, 83 Cal.App.4th at pp. 770-771 (injunction against future owners of property improper because the specific cause of action did not allow injunctive relief to run *in rem*)).

By contrast to each of these cases, Yelp was explicitly named in the court's injunction in this case, and the injunction was also narrow and specific about the particular defamatory remarks that were to be removed. Sensing the weakness of this position, Yelp then pivots and claims that the injunction is improper *because* Yelp was named, as that assumed Yelp "had a full opportunity to stand up for its rights as a publisher." (Pet., 23.) But this argument goes to whether Yelp has any First Amendment rights at issue (which it does not, see *infra*), not whether it is appropriate to apply an injunction to a non-party through whom the enjoined party acts (which it plainly is).

Other cases cited by Yelp are also inapposite. For instance, *Fazzi v. Peters* (1968) 68 Cal.2d 590, does not discuss injunctive relief, but instead stands for the uncontroversial idea that a money judgment cannot run to a nonparty. (*Id.* at pp. 597-598.) And Yelp also extrapolates too much from the Illinois case of *Blockowicz v. Williams* (N.D.Ill. 2009) 675 F.Supp.2d 912, *aff'd*, 630 F.3d 563. The *Blockowicz* Court based its decision on federal procedural rules, which are described in more limited terms than California's rules on third-party injunctions. (*Compare id*. at p. 915 (non-party "must be acting in concert or legally identified (i.e. acting in the capacity of an agent, employee, officer, etc.) with the enjoined party"), *with Planned Parenthood*, 107 Cal.App.4th at p. 35 (injunction can run to

non-party "with or through whom the enjoined party may act").) However, even under the federal rules, the *Blockwicz* Court implicitly recognized that it had the authority to enforce its injunction against the non-party, but apparently declined to do so as a discretionary matter. (See *id*. ("the court finds that it should not exercise its authority under the facts in this case").) Needless to say, the fact that the *Blockowicz* Court declined to "exercise its authority" under federal procedural rules says nothing about whether it was proper for the trial court in this case to do so under California law.

In line with decades of authority, the Court of Appeal properly found that Yelp can be ordered to remove defamatory content from its website. There is no unsettled question here warranting review.

2. Due Process Concerns Are Not Implicated Where Speech Is Defamatory and Thus Unprotected by the First Amendment.

Yelp also presses the same issue it did below: a strained claim that it has First Amendment rights as a publisher which are infringed by ordering it to remove content without notice and a hearing. Yelp repeatedly ignores the key fact that resoundingly resolves this issue and also makes this case a particularly poor vehicle for review – there is simply no First Amendment protection where, as here, the statements at issue are statements that have been conclusively adjudged to be defamatory. (See *Bill Johnson's Rests., Inc. v. N.L.R.B*. (1983) 461 U.S. 731, 743 ("[F]alse statements are not immunized by the First Amendment.") In its Petition, as in its briefing below, "Yelp does not cite any authority which confers a constitutional right to a prior hearing before a distributor can be ordered to comply with an injunction that precludes republication of specific third party speech that

has already been adjudged to be unprotected and tortious." (Op., 23.)

As accurately explained by the Court of Appeal, the case of *Marcus v. Search Warrant of Property* (1961) 367 U.S. 717, upon which Yelp struggles to rely, presented an entirely different set of facts, where (1) the material had not yet been adjudicated to be oscene, unlike here, where there is already a court judgment finding the statements defamatory; (2) the distributors themselves had First Amendment rights, which Yelp elsewhere in its brief disclaims; and (3) the *ex parte* pre-seizure proceedings were only one piece of the overall procedural balancing. (Op., 22-23.) Yelp cannot shoehorn this case into the line of cases finding constitutional concerns where there is state action involving speech that was merely *suspected* of being unlawful. That distinction is critical: Yelp's conduct – insisting on continuing to host adjudged defamatory content – has no constitutional protection.

For this same reason, the Court of Appeal's reference to Yelp as an "administrator of the forum" did not "invent[] a role" for Yelp that took it outside of constitutional protection. This argument is a red herring premised on Yelp's broad and inapplicable contention that it "has a separate First Amendment right to distribute speech." (Pet., 18.) This case does not implicate that principle, but instead is limited to the much more narrow issue of whether Yelp has a constitutional right to continue in perpetuity to host defamatory speech. It does not. (*Keeton*, 465 U.S. at p. 776 (false statements have "no constitutional value").)

Further, as the Court of Appeal properly found, the law is clear that even if Yelp could assert a First Amendment right, which it decidedly cannot do on this record, the United States Supreme Court has "never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly

obscene material is seized." (*Heller*, 413 U.S. at p. 488; Op., 23). To the extent Yelp seeks to challenge that conclusion, this record presents no such opportunity.

In short, Yelp's due process arguments do not raise any novel legal questions that need to be settled by this Court. On the contrary, it's positions have already been soundly rejected by long-established precedent.

C. There Is No Issue of Unconstitutional Prior Restraint Warranting Review.

Although poorly articulated, Yelp also seems to renew another argument it raised below, that the removal order also operates as an unconstitutional prior restraint. (See Pet., 25-26 ("The appellate court did not explain why Yelp should receive less protection against a prior restraint," and "*Balboa Island* does not support the prior restraint entered against Yelp here.").)[3]

But as the Court of Appeal found, this Court's decision in *Balboa Island* conclusively resolves that issue against Yelp. There, this Court held that "an injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment." (40 Cal.4th at p. 1148; Op., 24.) Yelp's tortured comparison of *Balboa Island*, that it turned on a "contested trial" rather than a "default judgment…that did not evaluate any of the individual statements to determine if they are false, defamatory, and unprivileged,"

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[3] As noted above, the Court of Appeal remanded the case to the trial court to limit the injunction to the statements adjudged to be defamatory. (See Op., 25 ("to the extent the trial court additionally ordered Yelp to remove subsequent comments that Bird or anyone else might post, the removal order is an overbroad restraint on speech.").) Review of this particular issue is therefore entirely unnecessary.

shows Yelp's true grievance. Yelp is not contesting what was a correct application of the law by the Court of Appeal; instead it wants to challenge the underlying defamation.[4] But as the lower court properly found, Yelp, which has repeatedly disavowed any involvement in the creation of Bird's defamatory statements, has no standing to challenge the finding of defamation. (Op., 25.) Stripped of that argument, Yelp has no argument to resist the straightforward application of this Court's holding in *Balboa Island*, which plainly did not turn on the fact that it was a "contested trial," as opposed to a default judgment. (40 Cal.4th at p. 1156 ("Once specific expressional acts are properly determined to be unprotected by the First Amendment, there can be no objection to their subsequent suppression or prosecution.")).

II. THE COURT OF APPEAL'S STRAIGHTFORWARD APPLICATION OF THE EXPRESS TERMS OF THE CDA DOES NOT PRESENT GROUNDS FOR THIS COURT'S REVIEW.

Yelp also argues that this Court should review the appellate court's decision on CDA immunity. However, this stance is based on the entirely false premise that the case against Bird has somehow held Yelp liable for her defamatory remarks. The plain language in the CDA, and the legislative history creating it, show that no error occurred in this case, and

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4 Yelp's response to Hassell when they asked that the reviews be removed proves the point: Yelp's General Counsel acknowledged that it would remove defamatory statements, but claimed that the defamation here was not "proven" because it was a bench trial and a default judgment. (AA.V3.T27.00734.) Yelp's view of what is and what is not defamation is not entitled to deference in the face of a court judgment. Yelp's repeated characterizations of Bird's statements as merely "critical" are, therefore, a fundamental misrepresentation which it uses to improperly suggest First Amendment concerns which simply do not exist on this record.

no grounds for this Court's review.[5]

Under the plain language of the statute, "[n]o cause of action and no liability may be imposed under any State or local law that is inconsistent with" the CDA. (47 U.S.C. § 230(e)(3).) As succinctly explained by the Court of Appeal, the injunction issued in this case does not violate Section 230 "because it does not impose any liability on Yelp. In this defamation action, Hassell filed their complaint against Bird, not Yelp; obtained a default judgment against Bird, not Yelp; and was awarded damages and injunctive relief against Bird, not Yelp." (Op., 28.) This is not the "superficial" analysis urged by Petitioner (Pet., 29), but a straightforward application of the statute's plain language.

This liability shield in the CDA serves the "dual purposes" of encouraging self-regulation by providers while also advancing free speech more generally. (See *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 51 (citing *Zeran v. Am. Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 333.).) The genesis of the CDA was a New York case where an internet provider was being held liable in a $200 million defamation case based on comments by a third-party user. (See *Stratton Oakmont v. Prodigy Servs. Co*. (N.Y.Sup. Ct. May 24, 1995) INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229.)

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[5] In the Court of Appeal, Respondents argued that Yelp's motion to vacate was untimely. The Court of Appeal agreed Yelp's statutory motion to vacate under Code of Civil Procedure section 663 was untimely, but found Yelp timely filed a motion to vacate the judgment as a "void" judgment. (Op., 15-18.) Yelp's argument that its motion to vacate the judgment should have been granted based on CDA immunity, however, is not a ground to attack the judgment as a "void" judgment. (See *Signal Oil and Gas v. Ashland Oil and Refining Co.* (1958) 49 Cal.2d 764; *Yeung v. Soos*, 119 Cal.App.4th 576, 580.) Accordingly, Yelp's motion to vacate based on the CDA was untimely, which is a further ground for denial of Yelp's Petition.

The *Stratton* Court's rationale was that, because the internet provider exercised some editorial control over third-party content, such as banning nudity and offensive language, it more closely fit the traditional role of publisher, rather than a distributor of material. (*Id*.) Congress recognized that this decision created a "backward" result by punishing an internet provider with massive tort liability from countless users because of its decision to protect children from offensive materials. It also recognized that the scale of such liability would result in overly aggressive censorship, eventually chilling the exercise of free speech. (141 Congressional Record H8469–H8470 (daily ed., June 14, 1995) (statement of Rep. Cox); see also *Barrett*, 40 Cal.4th at p. 51.)

These "dual purposes" of Section 230 are not implicated in this case because, as described above, Yelp is not targeted for any liability whatsoever. Accordingly, Yelp's characterization of the Court of Appeal's decision as conflicting with this Court's decision in *Barrett* is incorrect. There, the Court was not concerned with the narrow issue presented here: a specific removal order aimed at three discrete postings by a specific individual adjudged to be defamatory. This case does not implicate the concerns articulated in *Barrett*, or in the passage of the CDA generally. There is no danger that Yelp will engage in overbroad self-censorship by complying with the order. Nor will Yelp have any burden from investigating whether the comments are defamatory, screening reviews, evaluating whether the reviews are unlawful, or defending against a suit. Indeed, Yelp fails to explain how requiring an internet service provider to comply with a specific court order about a *user's* liability for defamation could chill any speech or impose any undue burden that could affect the robust expression of ideas on the internet. There is no public policy served by protecting the republication of statements that have been conclusively

found by a court of law to be defamatory.

While Yelp requests that this Court use this case as a vehicle "to reconfirm the scope of Section 230" (Pet., 27), the recent jurisprudence from the Courts of Appeal, including this case, is entirely consistent with the language and intent of the CDA. For instance, Yelp argues that the First District Court of Appeal incorrectly decided the case of *Hardin v. PDX, Inc.* (2014) 227 Cal.App.4th 159, because, in Yelp's view, the *Hardin* Court mischaracterized the software provider as "participat[ing] in creating or altering content," and thus falling outside the scope of CDA immunity. (*Id.* at p. 170.) However, Yelp provides no explanation beyond that parenthetical, and it is unclear why Yelp perceives that description as a mischaracterization. In fact, the *Hardin* case involved a software provider who "intentionally modified its software to… [print] abbreviated drug monographs that automatically omitted warnings of serious risks." (*Id.*) Such heavily altered content clearly falls outside the scope of CDA immunity. (See *Barrett*, 40 Cal.4th at p. 60, fn. 19 ("active involvement in the creation of" content would expose the defendant to liability).) In any event, the conclusion in *Hardin* would not be implicated by any review of the CDA in this case, where Yelp expressly disavows having created the defamatory speech at issue.

Nor is the instant decision "contrary to other California decisions" as suggested by Yelp. (Pet., 30.) Crucially, each of these "other California decisions" involves a cause of action asserted directly against the provider. (See *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561 (negligence, gross negligence, and products liability); *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816 (causes of action under Civil Code § 1739.7, negligence, and the Unfair Competition Law); *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684 (Section 1983 claim for injunctive relief); see also

Medytox Solutions, Inc. v. Investorshub.com, Inc. (Fla. Dist. Ct. App., 2014) 152 So.3d 727 (causes of action for declaratory and injunctive relief).) Tellingly, the only "authority" cited by Yelp to support its position that Section 230 empowers it to flout an injunction such as this one is a blog post. (Pet., 26, citing Eric Goldman, *WTF Is Going On With Section 230? – Cross v. Facebook*, Technology & Marketing Blog, June 7, 2016, available at Law Blog, June 7, 2016, available at http://blog.ericgoldman.org/archives/2016/06/wtf-is-going-on-with-section-230-cross-v-facebook.htm.)

Furthermore, the removal order does not "treat[] Yelp as the speaker or publisher of third-party content on its website" in contradiction of Section 230(c)(1). (Pet., 31.) The crucial question under that provision is "whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker,' [and] [i]f it does, section 230(c)(1) precludes liability." (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1102.) However, Hassell have not sought to treat Yelp "as a 'speaker' of the poster's words," (*Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist*, *Inc.* (7th Cir. 2008) 519 F.3d 666, 671), "impose derivative liability on [Yelp] for [Bird's] Internet communications," (*Delfino v. Agilent Technologies, Inc.* (2012) 145 Cal.App.4th 790, 802), or to "imput[e]to it the alleged misinformation." (*Universal Comm'cn Sys., Inc. v. Lycos, Inc.* (1st Cir. 2007) 478 F.3d 413, 422). Instead, Hassell have held the speaker herself, Bird, liable and seek to enforce that injunction against Yelp, as a party with or through whom Bird is acting.

Finally, Yelp issues a misguided warning that the Court of Appeal's decision opens a "gaping hole in Section 230 immunity that inevitably will be exploited to pursue the very actions Congress intended to bar." (Pet.,

29.) This bogeyman is entirely unpersuasive. As described above, Section 230 was intended to protect websites from million-dollar tort judgments by a wide user base, not to allow websites to continue hosting content that had already been adjudicated as defamatory. Nor are there any grounds to assume that countless internet users will use this case as a vehicle to procure fraudulent judgments (after prove-up or other contested hearings) simply to remove unsavory content from websites. Yelp's doomsday forecast ignores that this case involves a judgment supported by proven defamation, based on an extensive evidentiary record, by a named individual.

In the end, Yelp apparently believes that the CDA immunizes it from any and "all court orders." (Pet., 28.) Not so. In fact, this case – a tort action against the speaker of the defamatory words – does not implicate the CDA or Section 230 immunity. At no point have Hassell attempted to hold Yelp liable for Bird's speech. As a result, this case does not present any important or otherwise unsettled legal issues that require this Court's intervention.

CONCLUSION

For the forgoing reasons, the Petition for review should be denied.

Dated: August 8, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, Plaintiffs and Respondents hereby certify that the typeface in the attached brief is proportionally spaced, the type style is roman, the type size is 13 points or more and the word count for the portions subject to the restrictions of Rule 8.204(c)(3) is 6,622.

Dated: August 8, 2016

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PROOF OF SERVICE
Case No. S235968

I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 100 Bush Street, Suite 1800, San Francisco, CA 94104. On August 8, 2016, I served the following document(s):

RESPONDENTS' ANSWER TO THE PETITION FOR REVIEW

as follows:

[√] ELECTRONIC SERVICE (E-MAIL): Based on the California rules, I transmitted by e-mail the document(s) listed above from this e-mail address, monique@dplolaw.com, to:

California Supreme Court

[√] U.S. Mail: I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence is deposited with the United States Postal Service in a sealed envelope or package that same day with first-class postage thereon fully prepaid. I served said document on the parties below by placing said document in a sealed envelope or package with first-class postage thereon fully prepaid, and placed the envelope or package for collection and mailing today with the United States Postal Service at San Francisco, California addressed as set forth below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 8, 2016, at San Francisco, California.

Monique Olivier