IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION THREE

YELP INC.

Non-Party Witness and Petitioner

vs.

SUPERIOR COURT OF CALIFORNIA OF ORANGE COUNTY

Respondent

GREGORY M. MONTAGNA and MONTAGNA & ASSOCIATES, INC.

Real Parties in Interest

Appeal from the Superior Court of Orange County,
Honorable Andrew Banks, Presiding Judge, Dept. C11
Telephone No. (657) 622-5211

BRIEF OF FLOOR64, INC. D/B/A THE COPIA INSTITUTE IN SUPPORT OF YELP, INC.'S PETITION FOR WRIT OF MANDATE

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CERTIFICATE OF INTERESTED ENTITES OR PERSONS

Case Name: MONTAGNA, et al. v. SUPERIOR COURT OF ORANGE COUNTY

Please check the applicable box:

[ ] There are no interested parties to list in this Certificate per California Rules of Court, Rule 8.208.

[X] Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
Yelp, Inc.	Non-party petitioner
Gregory M. Montagna	Plaintiff/Real Party in Interest
Montagna & Associates, Inc.	Plaintiff/Real Party in Interest
Sandra Jo Nunis	Defendant

Dated: May 2, 2017

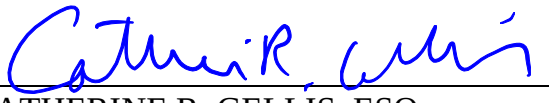
By: 

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This case is not about preventing legitimately aggrieved plaintiffs from seeking judicial redress. Their ability to discover the information they need to pursue their well-founded claims will remain undisturbed if the writ is granted. The issue here is that in forbidding Yelp from asserting the rights of its users – and, worse, sanctioning Yelp for having tried to – the Orange County Superior Court ("Respondent Court") ignored the weight of state and federal law and policy designed to protect the symbiotic relationship between Internet platforms and speakers whose speech they carry, and with it online speech itself.

The undersigned amicus writes because, if the writ is not granted, the Respondent Court's ruling threatens to open the door to unfettered attacks on protected expression and the Internet platforms who intermediate it.

ARGUMENT

I. PROHIBITING PLATFORMS FROM PROTECTING USERS' SPEECH INTERESTS CONTRAVENES STATE AND FEDERAL LAW AND POLICY INTENDED TO PROTECT AND PROMOTE ONLINE SPEECH.

A. The Respondent Court's ruling ignores state and federal provisions intended to protect speech facilitated by platforms.

The importance of protecting speech in general has long been recognized. *See New York Times Co. v. Sullivan* (1964) 376 US 254, 269-70. The right to speak anonymously has also been found to be part and parcel with the core constitutional protection for speech. *See McIntyre v. Ohio Elections Comm'n* (1995) 514 US 334, 357 ("Anonymity is a shield from the tyranny of the majority…It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect

unpopular individuals from retaliation…at the hand of an intolerant society."). Often it is only due to the ability to speak anonymously that people are able to speak at all – or at least with the candor that makes their speech socially valuable. *Digital Music News LLC v. Superior Court* (2014) 226 Cal.App.4th 216, 229.

None of these speech protections are foreign to the California constitution, which complements the United States Constitution with its own provisions designed to advance the privacy protections necessary for encouraging this sort of speech. *Id.* at 228. Online speech is also no less constitutionally protected than traditional off-line speech. *Reno v. American Civil Liberties Union* (1997) 521 US 844, 870. Indeed, policymakers have found online discourse fulfills the promise of free speech principles as well as offline speech. *See* 47 U.S.C. § 230(a) (addressing the findings of Congress that, among other things, "The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens."). But as both state and federal lawmakers have realized, practical protection for online speech is often dependent on how well the platforms that play a critical role in intermediating it are also protected. *See, e.g., Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 56.

To address this concern, Congress passed Section 230 of the Communications Decency Act ("Section 230"), which specifically insulates platforms from legal consequences arising from the speech they intermediate. 47 U.S.C. § 230(c)(1). The statute provides this protection in order to ensure that platforms can remain available as platforms to facilitate online speech and not be unduly pressured to act in a way that

chills or censors the protected speech they would otherwise enable. *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F. 3d 327, 331 ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted."). Even if states like California wanted to, it would be pre-empted from interfering with that protection. 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

But particularly with reference to subpoenas there is no indication that California policy would seek to do anything but be consistent with federal policy to promote online speech. Instead numerous provisions in the California code are designed to ensure that online speech indeed remain protected.

A key provision is the California anti-SLAPP statute, which, while applying to both online and offline speech, stands for the general policy value of protecting speech generally from any attempts to chill it. Cal. Code Civ. Pro. § 426.16(a) ("The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process."). A related provision more specifically tailored for online speech is California Code of Civil Procedure Section 1987.2 ("Section 1987.2"). Like the anti-SLAPP statute, which also does the same to provide a deterring remedy for abusive lawsuits designed to chill discourse, this provision expressly provides for a

mandatory fee award when a subpoena seeking to unmask a platform's[1] user is quashed on First Amendment grounds. Cal. Code. Civ. Pro. § 1987.2(c). It joins the *Krinsky* test in standing for the proposition that unmeritorious efforts to unmask speakers be deterred. *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1172. Moreover, it joins the anti-SLAPP statute in making clear that, rather than using fee shifting to deter the *defense* of speech, as the Respondent Court's sanction of Yelp has done, California policy is instead to use the specter of fee shifting to *promote* the defense of online speech and deter those who would attack it through unfounded judicial process.

B. Because subpoena enforcement is state action against the platform, the Respondent Court's ruling is state action against the speech platforms exist to facilitate.

Although California courts are generally inclined to allow liberal discovery, such permission is not required when justice and public policy preclude it. *See Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 383 (1961). In light of the various statutory protections designed to ensure that online speech be protected, *see supra* Part I.A, it would be odd for California to then prevent platforms from being a partner in that protection, particularly given the consequences to the platforms if users are wrongfully unmasked and their userbase thus chilled. *Glassdoor, Inc. v. Superior Court* (2017) 9 Cal.App.5th 623, 630. Assuming that, even following the Respondent Court's decision, a

[1] Notably this California code provision itself incorporates the definition of platforms found in the federal Section 230 statute.

platform will still be able to resist a subpoena because of any other defect,[2] such as it violating the bar against pre-litigation discovery, there is no reason why the platform should not also be able to resist a subpoena that cannot otherwise meet the *Krinsky* test, particularly when the effects of user unmasking will ultimately be felt so keenly by the platform. *Id.* at 631 ("Anonymous publication thus furnishes not only the medium through which persons like Doe exercise their First Amendment rights, but is also a significant asset in [the platform's] business.").

The bar against pre-litigation discovery is another way California policy protects online speech. Although it applies to both speech and non-speech contexts alike, its purpose is to prevent putative plaintiffs from going on fishing expeditions to find people to sue. Cal. Code. Civ. Pro. § 2035.010(b) ("One shall not employ the procedures of this chapter for purposes of either ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed."). The *Krinsky* test is entirely consistent with the policy choice behind this provision. *Krinsky*, 159 Cal.App.4th at 1173 (applying the prima facie test only to the causes of action properly pleaded and denying discovery altogether on the claims that were not). Thus there is no reason why the platform should not be able to invoke that test. *Id.* at 1171 ("Requiring [a plaintiff to make a prima facie showing that the content in question could support a claim of defamation] ensures that the plaintiff is not merely

[2] To the extent that the Respondent Court's decision creates ambiguity on that point it is another reason why it should be reversed.

seeking to harass or embarrass the speaker or stifle legitimate criticism.").[3] *See also Columbia Insurance Co. v. Seescandy.com et al.* (N.D. Cal. 1999) 185 F.R.D. 573, 579 ("Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection against the misuse of ex parte procedures to invade the privacy of one who has done no wrong. A similar requirement is necessary here to prevent abuse of this extraordinary application of the discovery process and to ensure that [a] plaintiff has standing to pursue an action against [a] defendant.").

Discovery is, after all, state action. *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1071 ("Because discovery orders involve state-compelled disclosure, such disclosure is treated as a product of state action."). A subpoena enforceable by a court creates a compulsion for a platform to act in a certain way, which in cases such as this is adverse to its users. Thus because the rights of users are so inherently bound up in the rights of the platforms, state action against the latter has the effect of being state action against the former. The state should therefore not be able to force the platform to act in a way that violates the protected speech rights of their users. *See Seescandy.com* at 578 ("People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit

[3] There is also no reason a platform should not be able to invoke this test at the meet and confer stage, as Yelp tried to do. Petition for Writ of Mandate at 14-15. A prima facie case that cannot be made at that stage will not be any more possible once put before the court, to the greater expense of all involved. Amicus agrees with Petitioner that the plaintiff has still not met his burden. *Id.* at 28-35.

and thereby gain the power of the court's order to discover their identity.").

Which is not to say that the state can never compel a platform to reveal identifying information about its users: the *Krinsky* test is designed to allow discovery to go forward when the underlying claims are likely to survive judicial scrutiny. *Krinsky*, 159 Cal. App.4th at 1172 ("When there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment."). But when a subpoena is enforced it is enforced against the platform, even though it is the user's speech interests at stake.

As Yelp argued, this intertwining of interests should enable platforms to pass the test articulated in *Matrixx Initiatives, Inc. v. Doe*. Petition for Writ of Mandate at 26-27. The interdependency between the platforms who facilitate speech and the speakers whose speech is facilitated means that the latter's rights will be diminished as the former's ability to protect them also is. But even the *Matrixx* court noted that its test for standing was better for cases without the sorts of speech interests at issue here. *Matrixx Initiatives, Inc. v. Doe* (2006), 138 Cal.App.4th 872, 880-881 (differentiating the case before it from other cases involving subpoenas propounded directly on platforms for their users' information). The *Matrixx* court is not alone: court after court, both in California and elsewhere, have found that the rules for speech need to afford greater protections than the rules for *jus tertii* standing might ordinarily allow. *Glassdoor*, 9 Cal.App.5th at 629 (summarizing cases). Making such exceptions is hardly exceptional: when standard rules fail to adequately protect speech, alternative rules are often made. *See, e.g.*, The Securing the Protection of our Enduring and Established Constitutional Heritage

("SPEECH") Act, 28 U.S.C. § 4102 (superseding the general rule of comity by disallowing the enforcement of foreign judgments related to speech that originated in jurisdictions where speech is less protected than in the United States). Here similar exceptions should be made when default tests are ill-suited for ensuring that vital speech interests can remain protected. *Glassdoor*, 9 Cal.App.5th at 631-633.

II. AS A PRACTICAL MATTER, IF PLATFORMS CANNOT RESIST SUBPOENAS SEEKING TO UNMASK THEIR USERS, PROTECTED SPEECH WILL BE CHILLED.

As a practical matter platforms cannot always resist every attempt to unmask their users. It is a resource-intensive process, and, as this case illustrates, every time a platform resists a subpoena it exposes itself to heightened legal risk. It is often in their interest to seek to protect their speakers whenever feasible, however. *Id.* at 633. This case is about reclaiming their ability to do so.

Of course, if a platform cannot resist a subpoena it does not automatically doom the underlying speech interest. Sometimes users can succeed in quashing subpoenas that targets their protected speech. But there are numerous logistical barriers to defending against them. First, a user must be sophisticated enough to know how to respond to a subpoena demand. Given that Internet speakers are of all ages, all walks of life, and often from all over the world, they may not all know that fighting the subpoena is even an option, let alone how to go about trying to do it. Next, even if they decide to engage counsel to help them, they then need to be able to find qualified local counsel and then somehow fund those services. While the fee shifting provision of Section 1987.2 has made it more financially viable for lawyers to take on these cases, it is not a panacea.

Not only is it limited to situations where the underlying litigation has been filed outside of California,[4] but fee awards are notoriously difficult to collect from judgment-proof plaintiffs, or plaintiffs based in other jurisdictions.

The vulnerability of speakers to forum-shopping libel tourists highlights the problems with the Respondent Court's decision. The reality is that it is quite easy for a libel tourist to begin an action in a foreign jurisdiction less protective of speech than California is, get a foreign discovery order, and bring the order to California where any California-barred attorney, without any judicial oversight, can simply turn it into an enforceable California subpoena. Cal. Code Civ. Pro. § 2029.350(a). Domesticating a discovery demand is a simple process that merely requires filling out a standard subpoena form and propounding it on the platform. Cal. Code Civ. Pro. § 2029.350(b)(5). Yet no matter how casually such subpoenas are issued they will still bear the weight of the court against the platform, regardless of the merits of the underlying claim the subpoena is predicated on or whether such a claim could pass First Amendment scrutiny. The problem with the Respondent Court's decision is that if it is allowed to stand platforms will have no choice but to leave it to its users to defend against any and all of these subpoenas all on their own, regardless of any facial defects, failure to comport with the First Amendment, or any other lack of merit they may reflect. It will be open season on

[4] Section 1987.2 was enacted in order to apply to situations that the anti-SLAPP statute could not reach. See Bill Analysis, A.B. 2433, Assembly Committee on Judiciary (Apr. 8, 2008), available at ftp://www.lhc.ca.gov/pub/07-08/bill/asm/ab_2401-2450/ab_2433_cfa_20080407_111210_asm_comm.html.

the platform's users, with no chance for the platform to keep them from being chilled into silence by people beyond the reach of the California courts' sanction.

CONCLUSION

Because prohibiting platforms from protecting users' speech interests contravenes state and federal law and policy intended to protect and promote online speech, and because barring platforms from quashing subpoenas seeking their users' identities will effectively chill online activity, the writ should be granted and the Respondent Court's order compelling discovery reversed.

Dated: May 2, 2017

RESPECTFULLY SUBMITTED,

By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.204(c), I hereby certify that, including footnotes, the foregoing brief contains 2626 words. This word count excludes the exempted portions of the brief as provided in Rule of Court 8.204(c)(3). As permitted by Rules of Court 8.204(c)(1), the undersigned has relied on the word count feature of Microsoft Word, the computer program used to prepare this brief, in preparing this certificate.

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CERTIFICATE OF SERVICE

I am employed in Sausalito, CA. I am over the age of 18 and not a party to the within action. My business address is 186 Harbor Drive, Sausalito, CA 94966.

On May 2, 2017, I served the foregoing document described as: BRIEF OF FLOOR64, INC. D/B/A THE COPIA INSTITUTE IN SUPPORT OF YELP, INC.'S PETITION FOR WRIT OF MANDATE on the following interested parties in this action by first class mail:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 2, 2017, at Sausalito, CA.