Catherine R. Gellis, Esq.
PO Box 2477
Sausalito, CA 94966
202-642-2849
cathy@cgcounsel.com

January 22, 2018

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: The Copia Institute letter in support of Yelp's request for partial depublication of Yelp v. Superior Court, No. S246424

Dear Chief Justice Cantil-Sakauye and the Associate Justices of the Court:

Pursuant to Rule 8.1125(b) of the California Rules of Court, Floor64, Inc. d/b/a The Copia Institute ("The Copia Institute") submits this letter in support of Yelp's request for depublication of Part II of the Court of Appeal's decision in Yelp, Inc. v. Superior Court, 17 Cal. App. 5th 1, 224 Cal. Rptr. 3d 887 (Cal. Ct. App. 2017) ("Request"). If allowed to remain published precedent it will chill protected speech, in contravention of established California policy and precedent, by undermining the right to speak anonymously.

I. Interest of the Copia Institute

The Copia Institute is a business that regularly advises and educates innovative technology startups on issues pertinent to their efforts, including the regulatory terrain relating to Internet platforms and the important speech they facilitate. Its online publication, Techdirt.com, has also published over 60,000 posts commenting on these subjects, and its principle, Michael Masnick, has provided expert testimony on the nature of online speech.[1] The Techdirt site itself regularly receives more than two million views to its pages per month, and its posts have also attracted more than one million comments, comments which frequently advance discovery and discussion around these topics. Many of the voices participating on the site rely on the protection anonymity affords in order to contribute to the discussion.

As with any platform itself hosting – and benefiting from – online discourse, including that arising from anonymous user speech, and as a regular commentator on issues pertaining to the protection of online speech, the Copia Institute has an interest in the protections this public

[1] *See U.S. v. Wexler*, No. SACR 15-00122-JLS (C.D. Cal. Aug. 12, 2016) (order allowing expert testimony); Mike Masnick, *How I Taught A Jury About Trolls, Memes, And 4Chan*, Techdirt.com (Sep. 29, 2016), https://tdrt.io/fPJ.

discourse depends on remaining robust. This interest extends to ensuring that speech depending on anonymity not be vulnerable to unfounded attempts to unmask the speakers behind it. The Copia Institute therefore submitted an amicus brief to the Court of Appeal in support of Yelp's original petition for a writ of mandate because it recognized the structural threat to protected speech posed by the trial court's original decision. If, as the trial court had found, platforms like Yelp could not assert the First Amendment rights of their users to prevent them from being unjustly unmasked, it would make speakers increasingly vulnerable to unjust unmasking attempts because it would remove a significant barrier preventing these attempts from succeeding. The loss of this protection would thus chill the speech of those who depend on their right to speak anonymously in order to speak at all by making this right effectively illusory.

Unfortunately, while in Part I of decision the Court of Appeal abated the structural threat to online speech presented if platforms could never attempt to quash subpoenas seeking to unmask their users themselves—and as precedent this portion of the decision should be preserved—Part II of the decision introduced a new threat by making it easier for unmasking attempts, including ones targeting protected speech, to succeed. Because such a decision will have the same sort of chilling effect on anonymous speech as the initial issue redressed by Part I, the Copia Institute urges this Court to remove the precedential effect of this latter portion of the decision in order to ameliorate this harm.

II. Depublication of Part II of the decision is necessary and appropriate.

A. The Court of Appeal decision affects protected anonymous speech more broadly than the analysis contemplated.

In Part II of its decision the Court of Appeal analyzed the specific details of this particular case, and its conclusions were necessarily informed by them. But leaving the case published as precedent means that its analysis will necessarily apply to cases with substantially different details, including those where the reason, and, indeed, the need, to quash an unmasking subpoena may be more apparent and yet, as a result of this decision, now more difficult to effect.

These cases involving anonymous speakers are not all cases of disgruntled clients, who may or may not be justified in their disgruntlement.[2] They may arise from jurisdictions from all

[2] Techdirt itself has received demands to reveal the identity of commenters discussing current events. *See, e.g.*, Mike Masnick, *Sorry, But We Don't Just Hand Out Information About Our Commenters*, Techdirt.com (Sep. 23, 2010), https://tdrt.io/axi. *See also* Mike Masnick, *Homeland Security Wants To Subpoena Us Over A Clearly Hyperbolic Techdirt Comment* (May 6, 2016), https://tdrt.io/fwW.

over the world,[3] including those where freedom of speech is vastly less protected than it is in the United States and California.[4] They may involve all sorts of critical expression, including about all sorts of alleged malfeasance.[5] Cases attempting to sue over expressed opinion, including opinion protected by the First Amendment, may be little more than attempts to abuse the courts to silence critics.[6] Unfortunately the Court of Appeal's decision opens the door to these litigants by allowing discovery before there is certainty that such discovery would be warranted.

And that invitation threatens to make any protection the speech might have meaningless, because even if speech might ultimately be found not to be actionable, often it is simply being identified at all that presents the most significant cost to the speaker. Judicial redress is not the only form of retribution that an unmasking subpoena enables; simply knowing who spoke critically of them is all plaintiffs need to avenge that criticism. This risk of extra-judicial consequences, even for speech that should be legally protected, is why the right to speak anonymously is protected at all. *McIntyre v. Ohio Elections Comm'n*, 514 US 334 (1995) ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."). It is not enough to be able to escape monetary judgments when that is not the only price a speaker risks paying by speaking.

For speech to not be chilled, speakers need to be confident in their ability to avoid all these costs. Unfortunately the Court of Appeal's decision, as long as it has precedential effect, undermines that confidence. The Copia Institute had weighed in at the Court of Appeal because it feared the structural risk to critical public discourse that the trial court's decision, limiting the ability to quash unjust subpoenas, had posed to the ability of speakers to have any sort of realistic expectation that they could maintain their right speak anonymously. It thus focused its efforts on that threshold issue, because if Yelp could not push back on the subpoena then it would not matter the basis by which the subpoena could potentially be pushed back. But with the standing issue resolved, the fear has shifted to the structural risk to speaker confidence that the published Court of Appeal decision itself now poses by having its specific analysis function as a general precedent.

---

[3] Pursuant to the Uniform Interstate Depositions and Discovery Act, Calif. Code of Civ. Pro. ("CCP") § 2029.700, any California-licensed attorney may give a foreign subpoena the force of California law my re-serving it with a standard California subpoena form. CCP § 2029.350.
[4] *See* S. Rep. No. 111-224 (2010).
[5] *See, e.g.*, *Glassdoor, Inc. v. Superior Court*, 9 Cal.App.5th 623 (2017) (raising allegations of poor employment and marketing practices by a business in another case where the Court of Appeal in a different district allowed a platform to quash a subpoena on behalf of a user).
[6] *See, e.g.*, Mike Masnick, *Florida City Ignores All Legal Precedent As It Attempts To Silence & Identify Mild Critic*, Techdirt.com (Aug. 14, 2017), https://tdrt.io/gmv.

Depublication is therefore warranted because the courts should have a greater opportunity than the proceedings of this case afforded to fully consider the impact to all speech an appellate decision might have before creating a precedent with as substantial an effect as this one has.

B. The decision is out-of-step with other California policy and precedent that protects anonymous speech.

In recent years both the California courts and state legislature have been developing policy and precedent to protect public discourse from the chilling effects caused by the abuse of judicial process against speakers. The Court of Appeal's decision, which rather than imposing procedural obstacles instead greases the skids to enable further abuse, runs counter to this judicial and legislative trend.

The California legislature has long recognized the harm that misuse of judicial process can have on speech and sought to deter this abuse through a potent anti-SLAPP statute. *See* CCP § 425.6. The anti-SLAPP statute necessarily only applies to lawsuits brought in California courts to suppress public participation on matters of public interest. *Tendler v. www.jewishsurvivors.blogspot.com*, 164 Cal. App. 4th 802, 809 (2008). The legislature recognized, however, that subpoenas themselves could be vehicles for abuse designed to chill speakers, and so it codified a fee recovery provision, echoing that the anti-SLAPP provision, to deter this behavior. CCP § 1987.2. It thus abrogates all this legislative intent to create precedent that instead further enables this abuse of the courts as a means to suppress speakers and their speech.

The legislature has also declared pre-litigation discovery to be contrary to California policy. *See* CCP § 2035.010(b).[7] Would-be plaintiffs are not permitted to use the discovery process for a fishing expedition to find sufficient facts to support a pleading; they must first have

[7] The reasons for this rule are significant. As a federal court observed in an analogous situation, "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." *Columbia Insurance Co. v. Seescandy.com et al.*, 185 F.R.D. 573, 579 (N.D. Cal. 1999). Although the court in that case was considering pre-service discovery, the same concern arises when pre-litigation discovery is at issue. The rationale is also equally applicable in this case, particularly given that enforcement of subpoenas is state action. *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864 (Cal. Ct. App. 2000). Before the state imposes a consequence on a speaker, including the deprivation of their right to speak anonymously, it must be sure there is adequate justification.

a sufficient pleading to then engage in further discovery. But the Court of Appeal's decision invites discovery prior to a claim having been sufficiently made, and it is discovery that can upend the life of a speaker by stripping them of their constitutionally-protected anonymity, even when the plaintiff ultimately may have no right to the information this discovery will reveal.

Such a decision further runs counter to other California judicial precedent. The Court of Appeal in *Krinsky v. Doe 6* was clear that a claim had to be well-pled before it would even consider whether unmasking is proper. 72 Cal.Rptr.3d 231, 246 (2008) ("We will refrain from ruling on the adequacy of a cause of action that was never pleaded."). The upshot of the *Krinsky* test is that a demand to unmask a user ultimately requires a well-pled claim plus something more that would be sufficient to make out a prima facie case. *Id.* at 245. This Court of Appeal decision, however, would allow unmasking with something *less* by permitting the unmasking before fully testing whether a prima facie case had been made. If allowed to remain published, Part II of the decision would represent a significant shift in California precedent. For this reason, and because it is contrary to other California policy with respect to speech protection, it should not be permitted to stand as precedent.

III. Conclusion

It may be a high bar for a plaintiff to succeed in unmasking a speaker, but this difficulty is a necessary feature, not a procedural failing. Making it easier for any particular plaintiff, even a worthy one, to unmask a speaker makes it easier for any unworthy one as well. The Court should therefore grant Yelp's request to partically depublish the decision to ensure that it cannot be used to fuel attempts to use the courts as a means to suppress otherwise protectable speech.

Very truly yours,

/s/ Catherine R. Gellis

Catherine R. Gellis, Esq.
California Bar #251927

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 January 22, 2018, I served the foregoing document described as: LETTER BRIEF OF FLOOR64, INC. D/B/A THE COPIA INSTITUTE IN SUPPORT OF YELP'S REQUEST FOR PARTIAL DEPUBLICATION OF YELP V. SUPERIOR COURT on the following interested parties in this action, either via TrueFiling or by placing said documents in a facility regularly maintained by the United States Postal Service on the same day, in a sealed envelope, with postage paid, addressed to the below listed person(s) on whom it is being served, as noted:

Honorable Tani Cantil-Sakauye, Chief Justice and the Associate Justices California Supreme Court 350 McAllister Street San Francisco, CA 94102-4797 *(via US mail)*	California Court of Appeal Fourth Appellate Dist. Court, Div. Three 601 W. Santa Ana Blvd. Santa Ana, CA 92701 *(via US mail)* Superior Court of Orange County 700 Civic Center Drive Santa Ana, CA 92701 *(via US mail)*
Attorney for Plaintiffs GREGORY M. MONTAGNA, SR. and MONTAGNA & ASSOCIATES, INC. Steven Krongold Krongold Law Corp. P.C. 100 Spectrum Center Drive, 9th Floor Irvine, CA 92618 *(via TrueFiling)*	**Attorney for Petitioner** YELP, INC. Adrianos Facchetti Law Office of Adrianos Facchetti, P.C. 301 E. Colorado Blvd., Ste. 514 Pasadena, CA 91101 *(via TrueFiling)*

Attorney for Amicus Curiae	**Attorney for Amicus Curiae**
James G. Snell Perkins Coie, LLP 3150 Porter Drive Palo Alto, CA 94304-1212 *(via TrueFiling)*	Andrew Crocker, Aaron Mackey, and David Greene Electronic Frontier Foundation 815 Eddy St. San Francisco, CA 94109 *(via TrueFiling)*

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 22, 2018, at Sausalito, CA.

/s/ Catherine R. Gellis