No. S235968

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DAWN L. HASSELL, *et al*.
Plaintiffs and Respondents,
v.
AVA BIRD,
Defendant,

YELP INC.,
Appellant

Court of Appeal of the State of California
First Appellate District, Case No. A143233
Superior Court of the State of California
County of San Francisco
Civil Case No. CGC 13530525
Honorable Ernest H. Goldsmith

APPLICATION OF THE INTERNET ASSOCIATION AND THE CONSUMER TECHNOLOGY ASSOCIATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF NON-PARTY YELP INC. and *AMICI CURIAE* BRIEF OF THE INTERNET ASSOCIATION AND THE CONSUMER TECHNOLOGY ASSOCIATION IN SUPPORT OF NON-PARTY YELP INC.

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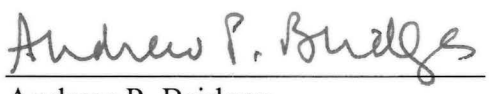
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(California Rules of Court, Rule 8.208)

Amici Curiae the Internet Association and the Consumer Technology Association hereby certify that there are no interested entities or persons to list in this Certificate pursuant to California Rules of Court, rule 8.208(e)(3).

Dated: April 17, 2017

Respectfully submitted,

FENWICK & WEST LLP



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APPLICATION OF THE INTERNET ASSOCIATION AND THE CONSUMER TECHNOLOGY ASSOCIATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF NON-PARTY YELP INC.

The Internet Association and Consumer Technology Association (collectively, *"Amici"*) respectfully move for leave to file a brief as *amici curiae* in support of appellant, non-party Yelp Inc. *Amici* are membership organizations representing a wide variety of online services and technology providers that empower citizens and businesses to communicate, form relationships, and engage in commerce in countless new and important ways. Their role is unique. They have their own views and interests, to be sure. But one of the most important contributions of the businesses who are members of these associations is that they provide forums and tools for the public to engage in a wide variety of activities that the First Amendment protects: they facilitate speech and public discourse, they allow persons to engage in virtual assembly by forming communities and communicating in groups, they allow citizens to air their grievances, and they allow businesses and patrons to discover each other and to transact business with each other. *Amici* share an interest in advocating First Amendment protections for speech on the Internet and the proper application of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, to Internet intermediaries, hosting platforms and other online service providers. *Amici* seek to file a brief in this appeal to ensure that this Court has context about how the decisions of the lower courts threaten these important interests.

The Internet Association represents roughly forty leading technology companies. Its membership includes a broad range of Internet intermediaries, from travel sites and online marketplaces to social networking services and search engines, including Amazon, Google,

Facebook, and Yelp[1], to name a few. The Internet Association advances policies that strengthen and protect Internet freedoms, foster innovation and economic growth, and empower small businesses and the public.

The Consumer Technology Association™ ("CTA") is the trade association representing the $292 billion U.S. consumer technology industry, which supports more than 15 million U.S. jobs. More than 2,200 companies – 80 percent are small businesses and startups; others are among the world's best known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, and standards development. CTA also owns and produces CES® – the leading trade show for all consumer technologies. A complete list of CTA's members is available at http://cta.tech/Membership/Membership-Directory.aspx.

The Internet is perhaps now the single most important forum for public expression and speech. *Amici* have a substantial interest in this proceeding and its potential effects on constitutional rights and freedoms of expression; constitutional due process rights of online service and technology providers; and the proper interpretation of the CDA.

Dated: April 17, 2017

Respectfully submitted,

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[1] Yelp and its counsel neither authored any portion of nor made a monetary contribution intended to fund the preparation or submission of this brief. Only the *amici curiae* funded the preparation and submission of this brief.

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INTERESTS OF *AMICI CURIAE*

The Internet Association and Consumer Technology Association are membership organizations representing a wide variety of online services and technology providers that empower citizens and businesses to communicate, form relationships, and engage in commerce in countless new and important ways.

Their role is unique. They have their own views and interests, to be sure. But one of the most important contributions of the businesses who are members of these associations is that they provide forums and tools for the public to engage in a wide variety of activities that the First Amendment protects: they facilitate speech and public discourse, they allow persons to engage in virtual assembly by forming communities and communicating in groups, they allow citizens to air their grievances, and they allow businesses and patrons to discover each other and to transact business with each other. For these reasons, members of these associations share an interest in advocating First Amendment protections for speech on the Internet and the proper application of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, to Internet intermediaries, hosting platforms and other online service providers.

The Internet Association represents roughly forty leading technology companies. Its membership includes a broad range of Internet intermediaries, from travel sites and online marketplaces to social networking services and search engines, including Amazon, Google, Facebook, and Yelp[2], to name a few. The Internet Association advances public policies that strengthen and protect Internet freedoms, foster

[2] Yelp neither authored any portion of nor made any financial contribution to the preparation of this brief.

innovation and economic growth, and empower small businesses and the public.

The Consumer Technology Association™ ("CTA") is the trade association representing the $292 billion U.S. consumer technology industry, which supports more than 15 million U.S. jobs. More than 2,200 companies – 80 percent are small businesses and startups; others are among the world's best known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, and standards development. CTA also owns and produces CES® – the leading trade show for all consumer technologies. A complete list of the Consumer Technology Association's members is available at http://cta.tech/Membership/Membership-Directory.aspx.

The Internet is perhaps now the single most important forum for public expression and speech. Congress enacted the immunities of Section 230 of the CDA to promote the growth and development of Internet freedom and commerce. Both the Internet Association and the Consumer Technology Association have a substantial interest in this proceeding and its potential effects on (a) U.S. and California constitutional rights and freedoms of free expression; (b) U.S. and California constitutional due process rights of online service and technology providers; and (c) the proper interpretation of the Communications Decency Act immunities for online platforms and marketplaces.

INTRODUCTION

The decisions of the courts below have, through three discrete errors, created a "perfect storm" that both jeopardizes important constitutional protections and imperils the public and those online service and technology providers who serve the public. The lower court decisions failed to accord Yelp due process; they undermined core First Amendment interests; and

they thwarted the statutory immunities of Yelp as an interactive service provider under the CDA, 47 U.S.C. § 230(c)(1).

The underlying case is one of countless instances in which a person or business feels wronged by another by means of some Internet communication. The normal way these disputes play out is between those persons. Imposing direct obligations upon others, including service providers by which those persons communicate, without treating those others as parties entitled to articulate their own interests to a court, violates core principles of due process under both the United States and California constitutions. That due process violation is especially harmful when federal First Amendment and corresponding California constitutional interests are at stake.

The decisions below allowed a plaintiff to threaten a vital online resource of public expression, public information, and commercial connections with a prior restraint and without any opportunity to challenge that restraint. They treated Yelp as a speaker or publisher of its user's expression, in violation of Section 230(c) of the Communications Decency Act, by construing Yelp as in concert with, or participating, in that user's expression. Together these errors have caused grave risks to the public, to online service and technology providers, and to the societal and commercial benefits that flow from the Internet.

If the results below were to prevail, a vast new avenue of litigation abuse and vast new opportunities to suppress First Amendment rights would open up. Plaintiffs could surprise online services and technology providers with "bank-shot injunctions" where the actual targets of the injunctions are not the ostensible aims of the proceedings. Targets of injunctions would have no effective protection or recourse. Instead they would learn about judicial orders at the same moment they face threats of contempt. Responding to those immediate threats and risks without

recourse or an opportunity for a real judicial determination would inevitably lead online service and technology providers to limit their own, and their users', speech; would cause the disappearance of legitimate discourse from online services; and would promote and reward the use of procedural stratagems by litigation bullies. For all these reasons, and because of each individual error of the lower courts, this Court should reverse the judgments of the courts below.

ARGUMENT

I. THE DECISIONS OF THE LOWER COURTS CHILL IMPORTANT PUBLIC EXPRESSION.

A. Online Platforms Facilitate Communications of Public Interest and Commerce.

The First Amendment protects "an open marketplace" in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference. *Knox v. Serv. Empls. Int'l Union, Local 1000* (2012) 132 S. Ct. 2277. Courts have recognized that the fundamental rights articulated in the First Amendment encompass diverse subjects of human interest, spanning religious, political, social, and economic matters. *See Aaron v. Mun. Court of San Jose-Milpitas Judicial Dist.* (1977) 73 Cal.App.3d 596, 606 (recognizing the breadth of First Amendment protections and striking down ordinance as a constitutionally infirm regulation of speech involving charitable solicitation).

Today, the Internet is home to the important activities and expressions protected by the First Amendment. Indeed, the Supreme Court has recognized the centrality of the Internet and the "vast democratic forums" that it offers. *Reno v. Am. Civil Liberties Union* (1997) 521 U.S. 844, 868 (*"Reno"*). Twenty years ago the United States Supreme Court observed that the Internet "enable[s] tens of millions of people to

communicate with one another and to access vast amounts of information from around the world." *Id.* at 850. Further, it is "no exaggeration to conclude that the content on the Internet is as diverse as human thought." *Id.* at 852 (quoting district court). Indeed, the *Reno* Court noted:

> This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."

Id. at 870. That observation recognizes the important role online platforms and technology providers perform in empowering the public to express, and to access, a vast array of opinions, information, and other materials.

Online platforms and technology providers carry out the vital work of giving the public a means of expression through a wide-ranging set of activities including the storage and dissemination of expressions as well as the bringing together of persons and organizations in communities, marketplaces, and networks that facilitate both the exchange of opinions, ideas, and information and the transaction of business. In doing so they have transformed the worlds of both civic and commercial life.

B. Commercial Speech and Consumer Access to Speech Serve Important Purposes.

Courts have explicitly recognized the importance of the public's right to receive or access speech and not just to speak it. In *Griswold v. Connecticut*, the Supreme Court emphasized that without "peripheral rights" such as rights to receive and access speech, the specific rights guaranteed under the First Amendment could not exist: "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive*, the right to read and freedom

of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community." *Griswold v. Connecticut* (1965) 381 U.S. 479, 482 (internal citations omitted, emphasis added; collecting cases). Based on this broad conception of the First Amendment, the *Griswold* Court struck down a statute that it found harmed the free flow of information. *Id.*

The First Amendment protects audiences, not only speakers. The "protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 756 (*"Virginia State")* (collecting cases). The First Amendment right to speak carries with it the right of members of the public to listen. Courts across the United States widely recognize this principle, not just with respect to core political speech but also with commercial speech. Indeed, the "interests of consumers in receiving commercial information, and the interests of society in the free flow of such information, have been the foundation of commercial speech doctrine from its inception." *Bulldog Investors Gen. P'ship v. Sec'y of Commonwealth* (2011) 460 Mass. 647, 679; *see also Am. Meat Inst. v. U.S. Dept. of Agric.* (D.C. Cir. 2014) 760 F.3d 18, 29 (recognizing consumer's interest in the free flow of commercial information as the "longstanding focus" of commercial speech jurisprudence). After all, "[p]rotection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal." *National Elec. Mfrs. Ass'n v. Sorrell* (2d Cir. 2001) 272 F.3d 104, 114.

The wide dissemination of information not only promotes an informed electorate and civic engagement, *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 269-270 (*"New York Times"),* but it also encourages free enterprise and stimulates sound economic decision-making. "So long

as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." *Virginia State*, 425 U.S. at 756. Thus, the free flow of speech, including consumer access to speech that online platforms like Yelp facilitate, serves important and protected political and commercial functions.

C. Courts Must Protect Against Procedural Abuses that Chill Protected First Amendment Expression.

Given the primary importance of First Amendment protections and values to American social, political and commercial activities, courts must guard against devices that undermine First Amendment rights. Indeed, even where expression arguably falls outside the constitutional protections of the First Amendment, such as with obscenity or false advertising, states must still "conform to procedures that will ensure against the curtailment of constitutionally protected expression" and apply laws that "scrupulously embody the most rigorous procedural safeguards." *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 66 (*"Bantam Books"*) (state statute creating commission with power to suppress circulation of publications "containing obscene, indecent or impure language" was unconstitutional prior restraint). As this Court stated in *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1159 (*"Balboa Island"*), affirming the Court of Appeal's partial reversal of an unconstitutionally overbroad injunction in a defamation case, "a court must tread lightly and carefully when issuing an order that prohibits speech . . . ." This admonition is "but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books*, 372 U.S. at 66.

Whether expression is ultimately protectable or not, courts must carefully scrutinize any proposed restrictions on the utterance, posting or circulation of speech.[3] As the United States Supreme Court stated: "The teaching of our cases is that, because *only a judicial determination in an adversary proceeding* ensures the necessary sensitivity to freedom of expression, *only a procedure requiring a judicial determination* suffices to impose a valid final restraint." *Freedman v. State of Md.* (1965) 380 U.S. 51, 58 ("*Freedman*") (collecting cases) (emphasis added).

In this case there has been *no such procedure or judicial determination as to Yelp whatsoever*, and the proceedings with respect to the absent defendant—an uncontested motion for an injunction following a default judgment—have none of the hallmarks of a genuine "judicial determination in an adversary proceeding." *See Freedman*, 380 U.S. at 58.

The burden of proving that particular speech constitutes "unprotected expression must rest on the censor." *Freedman*, 380 U.S. at 58. Yelp has its own, distinct First Amendment interest here apart from the interest of its user. Instead of carrying this burden with respect to Yelp, however, Plaintiffs used a combination of procedural devices—substitute service on the speaker, no service on Yelp, and default judgment—that avoided it altogether. The First Amendment cannot tolerate such tactics,

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[3] This protection also extends to those who disseminate information from third parties, including intermediaries such as Yelp. For instance, in *New York Times*, the Supreme Court held that the First Amendment protects the publication of all statements about public officials, *even false ones appearing in paid advertisements*, absent a showing of actual malice. 376 U.S. at 284. In reaching this result, the Court reasoned that any other conclusion "might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities" and would "shackle the First Amendment in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources." *Id.* at 266 (internal quotations omitted).

which stand to chill protected commercial speech on platforms like Yelp, while depriving intermediaries of any opportunity to challenge the merits of a plaintiff's claims or to assert their own rights. There has been no genuine judicial determination in an adversary proceeding, as *Freedman* requires. On this First Amendment ground alone, this Court should reverse the judgments of the courts below.

II. DUE PROCESS REQUIRES NOTICE AND A HEARING BEFORE APPLYING AN INJUNCTION TO A NON-PARTY LIKE YELP.

At bare minimum, due process requires notice and an opportunity to be heard before a court can deprive a person of rights or property. *E.g.*, *Fuentes v. Shevin* (1972) 407 U.S. 67, 80 (ex parte seizure proceedings violated due process). The opportunity for a hearing "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo* (1965) 380 U.S. 545, 552 (failure to give notice of pending adoption proceedings violated due process).

Specifically, "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co., Inc. v. Shore* (1979) 439 U.S. 322, 327 n.7. And any "judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires." *Hansberry v. Lee* (1940) 311 U.S. 32, 41.

Moreover, it "is well established that injunctions are not effective against the world at large." *People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 765 (*"Kothari"*); *see also Alemite Mfg. Corp. v. Staff* (2d Cir. 1930) 42 F.2d 832, 832 (L. Hand, J.) ("no court can make a decree which will bind any one but a party. . . ."). Nor may a court "grant an enforcement order or injunction so broad as to make punishable the conduct

of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. N.L.R.B.* (1945) 324 U.S. 9, 13; *accord Microsystems Software, Inc. v. Scandinavia Online AB* (1st Cir. 2000) 226 F.3d 35, 43 ("*Microsystems*"). Even if a non-party has notice of an injunction against a litigant (which Yelp in this case did not), it "cannot be held in contempt until shown to be in concert or participation" with the enjoined party. *Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 112.

Plaintiffs have made no showing that Yelp acted in concert or participation with Defendant Bird. Injunctions are "binding only on the parties to an action or those acting in concert with them." *Kothari,* 83 Cal.App.4th at 769. The "existence of such a linkage makes it fair to bind the nonparty, even if she has not had a separate opportunity to contest the original injunction, because her close alliance with the enjoined defendant adequately assures that her interests were sufficiently represented." *Microsystems,* 226 F.3d at 43. Here, Yelp as a non-party had no opportunity to challenge the validity of the injunction, and Plaintiffs do not even argue that Yelp aided and abetted, or acted in concert with, the defaulting defendant. It did not: like most other online intermediaries, Yelp did nothing more than offer a neutral platform. *See Blockowicz v. Williams* (7th Cir. 2010) 630 F.3d 563, 568 (non-party hosting service not subject to injunction compelling removal of defamatory material from its website).

Both Plaintiffs and the courts below ignored these fundamental due process principles and Plaintiffs impermissibly seek to enforce, on pain of contempt, an injunction in an uncontested default judgment proceeding against a non-party service provider, who had no notice of the initial lawsuit or the motion for injunction, no relationship with the defaulting defendant beyond providing a forum on which any member of the public could post a review of any business, and no opportunity for a hearing. Due

process forbids such an extension of a court's equitable powers, and the lower courts erred in applying the injunction in this case to a non-party service provider such as Yelp.

A. The Requirements of Due Process Have Particular Importance in the First Amendment Context.

Due process considerations are especially important where a legal proceeding implicates First Amendment rights. "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights." *Speiser v. Randall* (1958) 357 U.S. 513, 521 (*"Speiser"*) (conditioning tax exemption on loyalty oath violated First Amendment, and enforcement through procedures that placed burdens of proof and persuasion on the taxpayer violated due process). In such cases, it "becomes essential, therefore, to scrutinize the procedures by which [a State] has sought to restrain speech." *Id.*

Heightened scrutiny of procedures implicating a First Amendment interest is necessary because of the weightiness of free speech rights and the chilling effect that the erroneous suppression of lawful speech could have.[4] "First Amendment freedoms need breathing space to survive. . . ." *Keyishian v. Board of Regents of University of State of N. Y.* (1967) 385 U.S. 589, 604. As "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or

[4] As the Supreme Court has consistently found, "the specific dictates of due process generally requires consideration of three distinct factors[.]" *Mathews v. Eldridge* (1976) 424 U.S. 319, 334–35. These factors are: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

punished is finely drawn," the inquiry "calls for more sensitive tools than California has supplied" in this case. *See Speiser*, 357 U.S at 525. "Where the transcendent value of speech is involved, due process certainly requires" those invoking the coercive power of the State to "bear the burden of persuasion" to show that a person engaged in unlawful and unprotected speech. *Id.* at 526. A default judgment resulting in an injunction censoring an unrepresented third party hardly satisfies this standard.

California in particular has expressed strong state interests and policies, both in its Constitution and in statutory law, in guarding against use of the courts to restrict lawful speech. The "California Constitution's guarantee of the right to free speech and press is more protective and inclusive than that contained in the First Amendment to the federal Constitution." *Balboa Island*, 40 Cal.4th at 1169 (Kennard, J., concurring in part and dissenting in part); *accord Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 491 (collecting cases). As further protection against abusive litigation aimed at silencing speech, California's legislature has adopted special procedures to combat "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Code Civ. Proc., § 425.16(a).[5] California's anti-SLAPP statute permits a defendant to bring "a special motion to strike a cause of action arising from constitutionally protected speech or petitioning activity" and, unless the plaintiff can establishing a probability of prevailing, "the court must grant the motion and ordinarily

[5] First enacted in 1992, the "statute is designed to deter such lawsuits—termed 'strategic lawsuits against public participation' or 'SLAPP suits'—in order to 'encourage continued participation in matters of public significance' and to ensure 'that this participation should not be chilled through abuse of the judicial process.'" *Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321.

must also award the defendant its attorney's fees and costs." *Barry v. State Bar of California* (2017) 2 Cal.5th 318, 320 (even a court without subject matter jurisdiction over a claim may grant an anti-SLAPP motion and award fees) (internal quotations omitted). The anti-SLAPP law demonstrates California's specific concern about litigation abuses that chill freedoms of expression and assembly.

Federal law also recognizes the unique relationship between First Amendment rights and due process. In August 2010, Congress adopted the SPEECH Act ("Securing the Protection of our Enduring and Established Constitutional Heritage Act"). 28 U.S.C. §§ 4101–4105. The SPEECH Act was a response to "a perceived increase in the frequency of foreign libel judgments inconsistent with the First Amendment." *Naoko Ohno v. Yuko Yasuma* (9th Cir. 2013) 723 F.3d 984, 1004. The Act requires, among other things, that "the party seeking recognition or enforcement of the foreign judgment" to show that "the exercise of personal jurisdiction by the foreign court comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States." 28 U.S.C. § 4102(b); *accord Trout Point Lodge, Ltd. v. Handshoe* (5th Cir. 2013) 729 F.3d 481, 496. California law also contains a similar provision upholding due process rights in the defense against foreign judgments in defamation actions. *See* Code Civ. Proc., § 1717(c).

These heightened due process concerns apply with full force to injunctions that restrain speech. Injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 764. Here, Plaintiffs seek to enforce an injunction restraining speech not with respect to the party against whom they obtained a default judgment but against a neutral platform that offers an important forum for public expression, public inquiry, and virtual assembly. *See Reno*, 521 U.S. at 868-70. There

is nothing preventing Plaintiffs from seeking to enforce its injunction against Ava Bird, the defendant and real party in interest. Indeed, Plaintiffs do not state that they have taken *any* steps to have the Defendant comply with the injunction and remove the offending posts. One may infer that Plaintiffs have enforced it against non-party Yelp for one simple reason: to use the default judgment injunction mechanism as a tool for avoiding judicial determination, in an adversary proceeding, of their censorship of the Yelp's site, as it relieves Plaintiffs (and others like them) of any material burdens of proof and trammels upon the legitimate due process rights of neutral service providers.

Neither due process nor the First Amendment permits such a subterfuge to suppress the procedural and substantive rights of online service providers. This Court should reverse the judgments below.

B. Injunctions Against Online Service Users Cannot Apply to the Service Providers Based Simply Upon the Provision of the Services.

Online service providers stand in no relationship with their users that would justify interpreting an injunction as normally extending to, and imposing a restraint and contempt potential on, those online services for the speech or conduct of their users. The relationship between a mass platform and any one of its users—who may number in the millions or even billions—is tenuous. Without additional, specific relevant conduct by the service provider, providing a platform for persons to connect with each other, to share information, or to speak to and learn from each other does not and cannot create a partnership between the service and the user, constitute "aiding and abetting" by the service of the user, or otherwise subject the service to liability for acts by any user or customer. As the Court of Appeal observed in *Casey v. United States Bank Nat. Ass'n* (2005) 127 Cal.App.4th 1138, aiding and abetting liability attaches only where the

person (1) knows the other's conduct constitutes a breach of duty *and* gives substantial assistance or encouragement to the other to so act, or (2) gives substantial assistance to the other in accomplishing a tortious result *and* the person's own conduct, separately considered, constitutes a breach of duty to the third person. Similarly, in *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, the Court of Appeal recognized that mere knowledge that a tort is being committed does not constitute aiding and abetting and that, as a general rule, one owes no duty to control the conduct of another. Those important and fundamental principles should apply here.

C. The Application of an Injunction to Non-Parties Like Yelp Creates Significant Risk of Error and Abuse.

Imposition of a speech restraint on an online platform without notice and an opportunity to be heard lends itself to abuses that specifically target online platforms, including not only non-party Yelp but also many others. "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account." *Speiser*, 357 U.S. at 525. Where one party holds "an interest of transcending value," such as speech, courts mitigate the risk of error by "placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial." *Id.* at 525-26. Considerations of which party bears what burdens are central to the due process guarantee of the Fourteenth Amendment. *See id.*

By asking this Court to approve the use of default judgment injunctions to seek relief from non-party service providers, Plaintiffs shirk their burdens and invite exactly the sort of error that due process protections are designed to prevent. Even cases with contested judgments resulting from a hard-fought adversarial proceeding with an individual defendant will often require separate considerations of the equities of an injunction against a defendant and the equities of an injunction against an

online platform or service provider. After all, different equitable considerations apply to the online platform or service provider, which operates at a different scale with different burdens, and has a different relationship to allegedly offending materials with different interests, from those that apply to an individual defendant.

Default judgments like the one at issue here are especially dangerous means of abuse. "Generally, a default judgment, or other case where a court did not have the benefit of deciding the issue in an adversarial context, is not entitled to preclusive effect because there was no actual litigation." *In re Silva* (B.A.P. 9th Cir. 1995) 190 B.R. 889, 893. They are the very opposite of "judicial determinations" in "adversarial proceedings." Under California law, a default judgment cannot have preclusive effect unless the defendant "has been personally served with summons or has actual knowledge of the existence of the litigation" and, even then, only if "the record shows an express finding" on an allegation that was "actually litigated." *In re Williams' Estate* (1950) 36 Cal.2d 289, 292, 297. Many default judgments do not reflect any decisions on the merits but simply a surrender by a defendant owing to disparities of wealth or power of the parties: "In the case of a default judgment, for example, a party may decide that the amount at stake does not justify the expense and vexation of putting up a fight." *In re Gottheiner* (9th Cir. 1983) 703 F.2d 1136, 1140.

Injunctions following even consent judgments are similarly suspect. "The central feature of any consent decree is that it is not an adjudication on the merits." *Ashley v. City of Jackson, Miss.* (1983) 464 U.S. 900, 902 (Rehnquist, J., dissenting from denial of certiorari). While such a device may bind the signatories, it "cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree." *Id.* Rather, non-parties have an "independent right to an adjudication" of conduct they believe is unlawful. *Id.*

Some default or consent judgments may be contrived or even fraudulent. Indeed, last year, Eugene Volokh, a professor at UCLA School of Law, and Paul Alan Levy, an attorney with the Public Citizen Litigation Group, reported on an flurry of court cases with a "suspicious profile": they were all filed by *pro se* plaintiffs in state court using similar boilerplate language; each involved purported defendants that quickly admitted to making defamatory comments and agreed to injunctions; and the purported defendants either did not exist or else could not be found at the putative addresses provided in the pleadings. Eugene Volokh, Editorial, *Dozens of suspicious court cases, with missing defendants, aim at getting web pages taken down or deindexed*, Wash. Post, Oct. 10, 2016, *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/10/dozens-of-suspicious-court-cases-with-missing-defendants-aim-at-getting-web-pages-taken-down-or-deindexed/?utm_term=.2e25b154232f. In one case, a *pro se* plaintiff claimed he was not even aware that someone had filed suit in his name (his lawyer alleged his signature on the complaint was forged), but had enlisted the aid of a brand management company with a "proprietary de-indexing program" for removing "negative posts" for Google search results. *Id.*

The risk of exactly this kind of abuse is manifest even on this scant record. In addition to posts from the Yelp account "Birdzeye B.", which Plaintiffs assert Defendant Bird owns, Plaintiffs also seek to have Yelp remove negative posts from another reviewer identified as "J.D." *See* Respondents' Answering Brief at 6. But Plaintiffs' contention that Defendant made posts from the J.D. profile is based only on Plaintiff Hassell's understanding that she "never represented a client with the initials J.D., and because the February Post was published shortly after the January Post and used similar language." *See id.* Moreover, the parties do not dispute that the two profiles appear to belong to users in different locations:

"the Birdzeye B. public account profile stated that its creator lived in Los Angeles," Appellant's Opening Brief at 10, while the J.D. post was made from Alameda, Respondents' Answering Brief at 6. And Plaintiffs' speculation that Defendant operates the J.D. profile because that is "where Bird was served" (*see id.*) further underscores the deficient nature of the default judgment proceedings here: "Bird was served *through substitute service* on the owner of the Oakland home in which Bird was injured, *who told the process server that he had not seen Bird in months*." Appellant's Opening Brief at 10 (emphases added).

This Court should reject Plaintiffs' attempt to apply a default judgment injunction to a non-party service provider like Yelp. This device violates the fundamental procedural due process rights of online platforms and service providers and constitutes an impermissible end-run around the ability of providers to assert their substantive rights under Section 230 of the CDA, *discussed below*. It also opens the door to significant abuses of the judicial process by litigants seeking to censor speech that individual users post to online platforms.

III. THE DECISIONS BELOW VIOLATE SECTION 230 OF THE COMMUNICATIONS DECENCY ACT.

A. Section 230 Immunizes Online Platforms from Liability for the Conduct of Third Parties.

In articulating an unequivocal immunity, the CDA recognizes the importance of online platforms for society and commerce: "No 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." 47 U.S.C. § 230(c)(1). In enacting Section 230, "Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce." *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1027.

Since the enactment of Section 230 in 1996, this simple directive has furthered Congress's purpose and has allowed Internet-based businesses to flourish. As one prominent legal scholar recently put it, "No other sentence in the U.S. Code, I would assert, has been responsible for the creation of more value than that one . . . ." David Post, Editorial, *A bit of Internet history, or how two members of Congress helped create a trillion or so dollars of value*, Wash. Post, Aug. 27, 2015, *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value.

Online platforms that thrive under the protection of the CDA's immunities facilitate important activities among third-party consumers and businesses including the exchange of information, communications and commercial transactions. They connect customers with other providers of goods, services and information. In the overwhelming majority of cases, a platform does not have any special relationship with providers of information or other users that would give rise to liability under traditional principles: there is no partnership, and no employment or agency relationship; the platform is not itself a party to any particular transaction; and it does not control the actions of parties to a transaction and lacks any practical ability to do so.

The CDA immunities have been critical to the growth and sustainability of these platforms. "The purpose of the CDA is to encourage open, robust, and creative use of the internet." *Jurin v. Google Inc.* (E.D. Cal. 2010) 695 F. Supp. 2d 1117, 1123. "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium." *Zeran v. Am. Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330 ("*Zeran*"). And it "decided not to treat providers of interactive computer services like other information providers such as

newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing" materials prepared by others. *Blumenthal v. Drudge* (D.D.C. 1998) 992 F. Supp. 44, 49. Indeed, at a forum featuring a retrospective analysis of the CDA immunity at Santa Clara University School of Law, one of the legislators who originally proposed Section 230 noted that it "has become such a central part of the way we operate online that I bet few could conceive of what operating a web business, a forum, news site or blog would be like without it." Senator Ron Wyden, Address at the Santa Clara University School of Law: 47 U.S.C. § 230: A 15-Year Retrospective (Mar. 4, 2011), *available at* https://www.wyden.senate.gov/download/ ?id=8e194261-aeb7-47f2-b3db-4697a7c6c17d&download=1.

B. Enforcing the Injunction Against Yelp Treats Yelp As a Speaker or Publisher in Violation of Section 230.

Section 230(c)(1) categorically shields online platforms from liability under any law that treats them as the "publisher or speaker" of information provided by "another information content provider." 47 U.S.C. § 230(c)(1). This subsection bars any claims arising from "publication decisions" that pertain to "content generated entirely by third parties." *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1101. But by extending the injunction directly to Yelp, and along with it, the threat of contempt for not following it, the decisions below treat Yelp as participating in and effectively conducting the speech or publication by Defendant Bird. This treatment contravenes both the letter and spirit of the CDA; would render operation of an online platform impossible; and contradicts accepted notions of the relationship between mass platforms

and their millions of users and those users' billions of posts reflecting widely varied opinions and statements.[6]

Indeed, given their scale, online platforms face a stark business reality: "It would be impossible for service providers to screen each of their millions of postings for possible problems." *Zeran*, 129 F.3d at 331. If "[f]aced 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." *Id.* Thus, in enacting the CDA, Congress sought to "avoid the chilling effect" on speech that would result if state and local government imposed liabilities on "companies that do not create potentially harmful messages but are simply intermediaries for their delivery." *Delfino v. Agilent Techs., Inc.*, (2006) 145 Cal.App.4th 790, 803. This is made clear by interplay of subsections (c)(1) and (c)(2) which together provide that online platforms both (1) are not responsible for the information a third-party provides and (2) are not liable for actions they undertake to filter obscene or objectionable material.

C. Applying the Injunction to Non-Parties Such as Yelp Impermissibly Circumvents the Section 230 Immunity for Interactive Service Providers.

In extending the injunction to Yelp itself, the decisions below effectively annul the immunity of the CDA. By failing to name—or choosing not to name—Yelp as a party to its suit, Plaintiffs deprived Yelp of the ability to assert and fully litigate its entitlement to the CDA's immunities. As a result of this tactic, Plaintiffs obtained relief that they could not have ever received had they sued Yelp directly. *See, e.g.*, *Zeran*, 129 F.3d 327 (AOL not liable for defamatory speech initiated by a third

[6] For example, Yelp calculates that as of December, 2016, it has an average of 65 million monthly mobile web unique visitors and 73 million monthly desktop unique visitors: *see* https://www.yelp.com/factsheet.

party); *Medytox Solutions, Inc. v. Investorshub.com, Inc.* (2014) 152 So.3d 727 (plaintiff could not compel interactive computer service provider to remove allegedly defamatory statements from its website because of the immunity afforded to the service provider under the CDA).

The potential for abuse here is significant. If the decisions below are allowed to stand, the floodgates would open for "bank-shot injunctions"—where the true target is not where the shot appears to aim—to avoid the limitations of the CDA. Aggrieved parties could make feeble efforts to identify the actual speaker and obtain default judgments after conducting only substitute service on the speaker. Even in cases where the plaintiff personally serves the speaker, individual defendants (including those with meritorious defenses) often have negligible means or incentive to defend themselves and may choose to default or submit to a consent judgment rather than bear the costs of litigation. Either way, plaintiffs seeking to avoid the protections that the CDA affords to platforms can obtain injunctions against the platforms through defaults without providing any notice to the platform that is the plaintiff's actual target. This procedural stratagem eviscerates the strong federal substantive policy of the CDA, namely to shield service providers from efforts to hold them liable for deciding whether to publish, withdraw, postpone or alter material posted by third-parties. 47 U.S.C. § 230; *Zeran*, 129 F.3d at 330.

CONCLUSION

For these reasons, the Court should rule that service providers like Yelp cannot be bound by injunctions requiring them to remove third-party material where they had no opportunity to defend against the injunctions and where they have not directly and specifically engaged in or participated in the unlawful conduct that the injunctions seek to restrain.

Dated: April 17, 2017

FENWICK & WEST LLP

By: Andrew P. Bridges
Andrew P. Bridges

Attorneys for *Amici Curiae* Internet Association and Consumer Technology Association

CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULE OF COURT 8.204

Counsel hereby certifies that, pursuant to California Rule of Court 8.204(c), the attached **APPLICATION OF THE INTERNET ASSOCIATION AND THE CONSUMER TECHNOLOGY ASSOCIATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF NON-PARTY YELP INC. and *AMICI CURIAE* BRIEF OF THE INTERNET ASSOCIATION AND THE CONSUMER TECHNOLOGY ASSOCIATION IN SUPPORT OF NON-PARTY YELP INC.** is proportionally spaced, has a typeface of 13 points (Times New Roman) and, according the word count program of Microsoft Word (which was used to prepare this submission), has 6,615 words.

Andrew P. Bridges

CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am a citizen of the United States and employed in San Francisco County, State of California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Fenwick & West LLP, 555 California Street, 12th Floor, San Francisco, California 94104. My electronic service address is abridges@fenwick.com.

On April 17, 2017, I caused to be served the Application to File *Amicus Curiae* Brief of Internet Association and Consumer Technology Association and *Amicus Curiae* Brief of Internet Association and Consumer Technology Association in Support of Non-Party Yelp Inc., Real Parties in Interest upon the following:

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(1 original and 13 copies via hand delivery)

COURT OF APPEAL
First Appellate District
Attn: Clerk of the Court
350 McAllister Street
San Francisco, California 94102
(*1 copy via Federal Express)*

SUPERIOR COURT OF CALIFORNIA
County of San Francisco
Attn: Clerk of the Court
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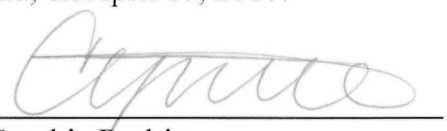
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in San Francisco, California, on April 17, 2017.



Cynthia Rodriguez