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IN THE SUPREME COURT OF CALIFORNIA

DAWN HASSELL et al.,
Plaintiffs and Respondents,

v.

AVA BIRD,
Defendant.

YELP INC.
Appellant.

SUPREME COURT
FILED
MAY 1 2017
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Deputy

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR
CASE NO. A143233

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF ACLU OF NORTHERN CALIFORNIA, ACLU OF SAN DIEGO & IMPERIAL COUNTIES, ACLU OF SOUTHERN CALIFORNIA, AVVO, CALIFORNIA ANTI-SLAPP PROJECT, ELECTRONIC FRONTIER FOUNDATION, FIRST AMENDMENT COALITION, AND PUBLIC PARTICIPATION PROJECT, IN SUPPORT OF APPELLANT AND PETITIONER YELP INC.

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APPLICATION TO FILE AMICI CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.200, amici curiae ACLU of Northern California, ACLU of San Diego & Imperial Counties, ACLU of Southern California, Avvo, California Anti-SLAPP Project, Electronic Frontier Foundation, First Amendment Coalition, and Public Participation Project respectfully request permission to file the accompanying amici curiae brief in support of appellant Yelp Inc.[1]

The American Civil Liberties Union of Northern California (ACLU-NC) is a nonprofit, nonpartisan civil liberties organization with more than 150,000 members dedicated to the principles of liberty and equality embodied in both the United States and California Constitutions. For more than 75 years, the ACLU-NC has worked to protect the free speech and due process rights of Californians through litigation and other advocacy.

The American Civil Liberties Union of San Diego & Imperial Counties (ACLU-SDIC) is a nonprofit, nonpartisan civil liberties organization with approximately 16,000 members dedicated to the protection of fundamental rights and freedoms under the United

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[1] No party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).) Amici certify that no person or entity other than amici and their counsel authored or made any monetary contribution intended to fund the preparation or submission of the proposed brief.

States and California Constitutions. ACLU-SDIC has regularly appeared in this Court and other California courts in defense of freedom of speech and due process.

The American Civil Liberties Union of Southern California (ACLU So Cal) is a nonprofit, nonpartisan civil liberties organization with more than 100,000 members. Founded by Upton Sinclair in 1923 after he was arrested for reading the Bill of Rights at a rally in support of striking workers, ACLU So Cal has regularly appeared as a party or amicus, or represented parties, in cases in this Court to advance the free speech and due process rights of Californians.

Avvo is an online legal service marketplace that provides attorney referrals and a database of legal information, including a searchable collection of 10 million legal questions and answers by attorneys. One of Avvo's integral features is attorney ratings. Its attorney directory includes ratings of lawyers in all 50 states and the District of Columbia, comprising about 97 percent of all registered attorneys in the United States. Although many plaintiffs have filed lawsuits against Avvo based on its attorney ratings, courts have protected Avvo's rating system under the First Amendment. If the Court of Appeal's decision is affirmed, Avvo may be exposed to new legal threats despite the protection of the First Amendment.

The California Anti-SLAPP Project (CASP) is a public interest law firm and policy organization dedicated to fighting SLAPPs in California. It also operates a website dedicated to educating the legal profession and the public on SLAPP issues. CASP led the

statewide coalition that secured the enactment and amendment of California's anti-SLAPP laws, and has continued its legislative advocacy. In particular, CASP co-sponsored influential legislation facilitating SLAPPback suits and protecting the rights of Internet speakers. CASP also represented the prevailing defendant in *Barrett v. Rosenthal* (2006) 40 Cal.4th 33 (*Barrett*), in which this Court reaffirmed the broad immunity conferred by 47 U.S.C. § 230 (section 230). The lower court's decision here jeopardizes CASP's efforts in ensuring free speech in California and on the Internet.

The Electronic Frontier Foundation (EFF) is a nonprofit, member-supported civil liberties organization with roughly 36,000 active donors and dues-paying members nationwide, working to protect consumer interests, innovation, and free expression in the digital world. EFF is particularly interested in the First Amendment rights of Internet users and views the protections provided by the First Amendment as vital to the promotion of a democratic society.

The First Amendment Coalition (FAC) is a nonprofit advocacy organization based in San Rafael, California, which is dedicated to freedom of speech and government transparency and accountability. FAC's members include news media outlets, both national and California-based, traditional media and digital, together with law firms, journalists, community activists, and ordinary citizens.

The Public Participation Project (PPP) is a nonprofit organization working to pass federal anti-SLAPP legislation in Congress. Its coalition of supporters currently includes numerous organizations and businesses, as well as prominent individuals,

each of whom is dedicated to protecting the right of free speech and petition. PPP also assists individuals and organizations working to pass anti-SLAPP legislation in the states. An important part of its work includes educating the public regarding SLAPPs and the consequences of these types of destructive lawsuits. As part of its nationwide educational efforts, the PPP seeks to advance generally the principles of free speech and petition as embodied in the First Amendment. The Court of Appeal's opinion here threatens those principles for the reasons expressed in the body of this amici brief.

The accompanying amici curiae brief by ACLU-NC, ACLU-SDIC, ACLU So Cal, Avvo, CASP, EFF, FAC, and PPP argues that the injunction issued against Yelp violates the First Amendment as an unconstitutional prior restraint, violates Yelp's due process rights by enforcing an injunction against a nonparty, and violates section 230 by treating Yelp as the publisher of user-created content. Amici believe this Court would benefit from additional briefing on these issues. Accordingly, amici request that this Court accept and file the attached amici curiae brief.

April 14, 2017

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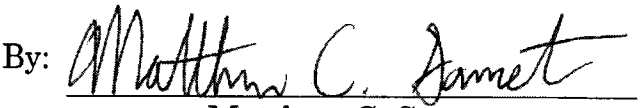
By: 
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AMICI CURIAE BRIEF

INTRODUCTION

The First Amendment generally prohibits prior restraints on even allegedly actionable speech because they suppress communication before an adequate judicial determination can be made that the challenged speech lacks constitutional protection. Due process also generally bars courts from issuing injunctions against nonparties to lawsuits because they have not had the opportunity to defend themselves. Similarly, 47 U.S.C. § 230 broadly immunizes interactive computer services from lawsuits challenging postings made by third parties using their platforms. Without such immunity, interactive computer services would effectively be required to remove any third-party content upon a mere claim that it is defamatory, thereby inevitably removing protected speech from the marketplace of ideas. This statutory protection, coupled with the First Amendment and general notions of due process, has permitted the Internet to flourish as the greatest information platform in the history of our civilization.

Here, the Court of Appeal approved a prior restraint—specifically, an injunction ordering nonparty Yelp to remove third-party content from its website—with only minimal substantive consideration, let alone a full trial on the merits to determine whether the challenged speech was in fact defamatory, as required by the First Amendment. In doing so, the Court of Appeal ignored not only long-established precedent prohibiting such prior

restraints, but also precedent barring the issuance of injunctions against nonparties and providing immunity to interactive computer services under section 230 in similar circumstances. This error was particularly egregious in the context of this case, where Yelp was also denied the protections that are afforded by a full and complete trial, and the challenged judgment resulted from cursory default judgment procedures. Furthermore, the injunction violated Yelp's due process rights because no court made a judicial determination that Yelp had aided or abetted Bird.

In short, the injunction was riddled with deficiencies, violating the First Amendment, due process, and section 230. By allowing this improper injunction to stand, the Court of Appeal's opinion opens the Internet to a new wave of litigation that threatens its continued existence.

This Court should reverse the decision below and direct the trial court to grant Yelp's motion to vacate the judgment. To the extent the Court of Appeal properly interpreted this Court's precedent in reaching its speech-restricting conclusion, such precedent should be overruled.

ARGUMENT

I. THE INJUNCTION IN THIS CASE VIOLATES THE FIRST AMENDMENT.

A. Prior restraints on speech are presumptively unconstitutional.

Prior restraints are " 'administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur' " (*Alexander v. U.S.* (1993) 509 U.S. 544, 550 [113 S.Ct. 2766, 125 L.Ed.2d 441], emphasis omitted), or in advance of a " 'judicial determination that specific speech is defamatory' " (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1154 (*Balboa Island*) [" 'Once speech has judicially been found libelous . . . an injunction for restraint of continued publication of that *same* speech may be proper' "]).

The First Amendment generally prohibits prior restraints on speech. (*Balboa Island, supra*, 40 Cal.4th at p. 1159.) Prior restraints are "the most serious and the least tolerable infringement on First Amendment rights" because they carry an "immediate and irreversible sanction." (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 559 [96 S.Ct. 2791, 49 L.Ed.2d 683].) "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." (*Pittsburgh Press Co. v. Pittsburgh Commission on*

Human Relations (1973) 413 U.S. 376, 390 [93 S.Ct. 2553, 37 L.Ed.2d 669] (*Pittsburgh Press*).)

Thus, prior restraints are presumptively unconstitutional. (See, e.g., *CBS, Inc. v. Davis* (1994) 510 U.S. 1315, 1317 [114 S.Ct. 912, 127 L.Ed.2d 358] ["For many years it has been clearly established that any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity" (internal quotation marks omitted)]; *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 70 [83 S.Ct. 639, 9 L.Ed.2d 584].)

B. Injunctions against speech are permitted against parties to a lawsuit only after a full and fair trial on the merits and should not be permitted against nonparties.

In *Balboa Island*, this Court recognized a limited exception to the general rule barring speech injunctions, holding that "following a *trial* at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory." (*Balboa Island, supra,* 40 Cal.4th at pp. 1155-1156, emphasis added; see also *id.* at p. 1148 ["an injunction issued following a trial . . . is not a[n unconstitutional] prior restraint"]; *id.* at p. 1158 ["it is crucial to distinguish requests for preventive relief prior to trial and post-trial remedies to prevent repetition of statements judicially determined to be defamatory"]; *id.* at p. 1155 ["we hold that, following a trial at which it is determined that the

defendant defamed the plaintiff, the court may issue an injunction"].)

The opinion in *Balboa Island* extended no further than injunctions against repeating specific speech, issued after a full trial on the merits.[2] Indeed, the cases cited by this Court in its opinion each involved speech "judicially determined to be unlawful" after such a full and complete trial. (*Balboa Island, supra*, 40 Cal.4th at

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[2] Indeed, *Balboa Island* departs from the traditional common law rule that injunctions may not be issued against defamatory speech, even after a trial. (*Oakley, Inc. v. McWilliams* (C.D.Cal. 2012) 879 F.Supp.2d 1087, 1089-1090 ["Indeed, injunctions against speech were not permissible in defamation cases under early English and American common law, and the [United States] Supreme Court has never departed from this precedent"]; *Kramer v. Thompson* (3d Cir. 1991) 947 F.2d 666, 677 ["the maxim that equity will not enjoin a libel has enjoyed nearly two centuries of widespread acceptance at common law"].) Numerous courts have denied prior restraints of defamatory speech on this basis. (See, e.g., *Tilton v. Capital Cities/ABC Inc.* (N.D.Okla. 1993) 827 F.Supp. 674, 681 ["The fundamental law of libel in both Oklahoma and Texas is that monetary damages are an adequate and appropriate remedy and that injunctive relief is not available"]; *New Era Publications Intern., ApS v. Henry Holt and Co., Inc.* (S.D.N.Y. 1988) 695 F.Supp. 1493, 1525 ["we accept as black letter that an injunction is not available to suppress defamatory speech"]; *Demby v. English* (Fla.Dist.Ct.App. 1995) 667 So.2d 350, 355 ["It is a 'well established rule that equity will not enjoin either an actual or a threatened defamation' "]; *Prucha v. Weiss* (1964) 233 Md. 479, 484 [197 A.2d 253, 256] ["We agree with the prevailing concept in other jurisdictions that a person allegedly injured by a libelous publication has no right to seek injunctive relief in equity"]; *Kwass v. Kersey* (1954) 139 W.Va. 497, 511 [81 S.E.2d 237, 245] ["equity has no jurisdiction to enjoin publication of defamatory matter"].) If this Court does not reconsider *Balboa Island*, it should certainly go no further in approving speech-restricting injunctions than the narrow exception recognized in *Balboa Island*.

pp. 1151-1153, citing *Kingsley Books, Inc. v. Brown* (1957) 354 U.S. 436, 437 [77 S.Ct. 1325, 1 L.Ed.2d 1469] [upholding state law prohibiting the sale of written material found obscene after "due trial"], *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, 55 [93 S.Ct. 2628, 37 L.Ed.2d 446] [upholding statute banning exhibition of obscene material only after a full adversarial proceeding and a final judicial determination by the state supreme court that the material was unprotected], *Pittsburgh Press*, *supra*, 413 U.S. at p. 390 [holding order forbidding help-wanted advertisements in gender-designated columns did not constitute a prior restraint on speech because the order would not take effect until after a final determination that the advertisements were unprotected].)

Furthermore, *Balboa Island*'s limited authorization of speech-restricting injunctions applies only to injunctions issued against *parties* found liable at trial (in contrast to third parties with no involvement in the trial proceedings). The opinion carefully permitted injunctions "issued following a trial that determined that the *defendant* defamed the plaintiff that does no more than prohibit the *defendant* from repeating the defamation." (*Balboa Island*, *supra*, 40 Cal.4th at p. 1148, emphases added; see also *id.* at pp. 1155-1156 [injunction after trial prohibits *defendant* "from repeating the statements determined to be defamatory"].)

Indeed, this Court explicitly "express[ed] no view regarding whether the scope of the injunction properly could be broader if people other than [defendant] purported to act on her behalf." (*Balboa Island*, *supra*, 40 Cal.4th at p. 1160, fn. 11.) The Court was correct to not decide that post-judgment injunctions can be directed

to nonparties because in "cases evaluating injunctions restricting speech," a "more stringent application of general First Amendment principles" is required. (*Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 765 [114 S.Ct. 2516, 129 L.Ed.2d 593] (*Madsen*).) Considering the general First Amendment prohibition of prior restraints of speech, *Balboa Island* should not be extended to justify injunctions against nonparties after a default judgment.

C. The injunction against Yelp is an unconstitutional prior restraint.

The injunction in this case ordered Yelp to " 'remove all reviews posted by [Bird] . . . and any subsequent comments' " posted by Bird because they were supposedly defamatory. (*Hassell v. Bird* (2016) 247 Cal.App.4th 1336, 1345 (*Hassell*), emphasis omitted.) However, these reviews were determined to be libelous at a default prove-up hearing, at which Bird did not appear and Yelp did not attend because plaintiff did not name it as a party. (See *ibid.*) Yet, plaintiff then delivered the default judgment to Yelp, expecting it to comply with the judgment. (*Id.* at p. 1346.) However, Yelp did not know how the court determined that the reviews were defamatory because Yelp was not present to assess any of the evidence or testimony proffered by plaintiff and unchallenged by Bird. (See *id.* at p. 1344.) Even today, because "a transcript of that hearing is not in the appellate record" (*ibid.*), it is still unclear to Yelp, or to any reviewing court, how the trial court determined the speech was defamatory.

Thus, the injunction against Yelp operates as a prior restraint of speech. It mandates removal of speech *before* a trial on the merits and without a complete and full judicial determination that the speech is libelous. (See *Balboa Island, supra,* 40 Cal.4th at pp. 1155-1156; Nunziato, *The Beginning of the End of Internet Freedom* (2014) 45 Geo. J. Int'l L. 383, 387 ["prior restraints on speech [are] restrictions on speech imposed prior to a judicial determination of the speech's illegality" (emphasis omitted)].) The injunction compels Yelp, a nonparty to the original proceeding, to remove speech that it had no opportunity to contest at a trial on the merits (see *Balboa Island*, at pp. 1148, 1155-1156, 1178, fn. 11), or even at the default judgment stage (see pp. 14-15, *post*).

To the extent the injunction affects speech after its initial utterance, this does not change the injunction's character as a prior restraint of speech. (Nunziato, *supra,* 45 Geo. J. Int'l L. at p. 401 ["prior restraints can also be imposed *midstream, after initial circulation* but sometime *before a judicial determination* that the speech is illegal has been made" (emphases added)].) Furthermore, although Bird's alleged reviews have already been posted, the act of removing those posts is effectively a prior restraint of the "*perpetuation, or continuation* of that practice." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 140, emphasis added.)

D. A default judgment does not provide a sufficient factual basis to justify a speech-restricting injunction.

In general, it "is the policy of the law to favor . . . a hearing on the merits." (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854-855 ["appellate courts are much more disposed to affirm an order where the result is to compel a trial upon the merits than they are when the judgment by default is allowed to stand"]; see *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 685 (*Fasuyi*); *Au-Yang v. Barton* (1999) 21 Cal.4th 958, 963.) In particular, the law "looks with disfavor upon a party, who, regardless of the merits . . . attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary" by obtaining a default judgment, which might have occurred in this case. (*Weitz*, at p. 855.)

To be sure, state law permits default judgments in certain circumstances. In appropriate cases, default judgments are necessary to prevent a defendant from "avoid[ing] responsibility for his actions by the irresistible expedient of ignoring the plaintiff's claims." (*Carol Gilbert, Inc. v. Haller* (2009) 179 Cal.App.4th 852, 865 (*Carol Gilbert*).) Default judgment procedures also " 'clear the court's calendar and files of those cases which have no adversarial quality,' " such as those where the defendant does not respond to the complaint. (*Lopez v. Fancelli* (1990) 221 Cal.App.3d 1305, 1309-1310.)

But default judgment procedures carry inherent risks. To obtain a default judgment, a plaintiff need only prove damages at a

prove-up hearing, which lacks key protections provided by a full trial on the merits. (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 884 (*Carlsen*).) As long as the complaint's well-pleaded allegations adequately state a cause of action, a plaintiff is entitled to default judgment if the plaintiff can prove damages. (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 392.) Otherwise, "*no further proof of liability is required*," including no requirement to introduce evidence to support the allegations in the complaint. (*Carlsen*, at p. 883, citing *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 281-282.)[3]

Entry of default cuts off a defendant's right to appear at a prove-up hearing until the default is set aside or judgment is rendered (see *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-386), and the defendant is not entitled to rebut the plaintiff's proffered claims and evidence at the hearing. (See *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303.) Default judgment procedure thus "possesses the most summary, indeed perfunctory character our law knows." (*Carol Gilbert, supra*, 179 Cal.App.4th at p. 865.)

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[3] Plaintiffs claim that at a default judgment prove-up hearing, "a plaintiff like Hassell who sues for defamation must still prove defamation." (ABOM 47.) Not so. So long as the complaint states a claim for defamation, plaintiff need only prove damages from the challenged statements. (*Carlsen, supra*, 227 Cal.App.4th at p. 884.) There are many situations where a plaintiff could suffer damage from a statement but not have a cognizable defamation claim because of the numerous constitutional and statutory requirements necessary to prove a defamation claim.