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Case No. S \_\_\_\_\_

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**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

**Frank A. McGuire Clerk**  
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Deputy

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DAWN HASSELL, *et al.*  
Plaintiffs and Respondents,

vs.

AVA BIRD,  
Defendant,

YELP INC.,  
Appellant.

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After a Decision by the Court of Appeal  
First Appellate District, Division Four, Case No. A143233  
Superior Court of the County of San Francisco  
Case No. CGC-13-530525, The Honorable Ernest H. Goldsmith

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**PETITION FOR REVIEW**

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**TABLE OF CONTENTS**

I. ISSUES PRESENTED ..... 1

II. REASON REVIEW SHOULD BE GRANTED ..... 2

III. STATEMENT OF FACTS AND PROCEDURE ..... 7

    A. Yelp’s Website Publishes Tens of Millions Of Third-Party Consumer Reviews. .... 7

    B. Hassell Obtains An Injunction Against Yelp Without Giving It Any Notice..... 8

        1. Third-Party Users Write Critical Reviews About Hassell Law Group On Yelp. .... 8

        2. Hassell Sues Bird And Obtains A Default Judgment, Which Includes An Injunction Against Yelp. .... 9

    C. The Trial Court Denies Yelp’s Motion To Vacate The Injunction. .... 10

    D. The Court Of Appeal Affirms The Trial Court’s Decision... 11

IV. REVIEW IS NECESSARY TO RESOLVE TWO QUESTIONS VITAL TO WEBSITES THAT PUBLISH THIRD-PARTY CONTENT ..... 14

    A. This Court Should Accept Review To Establish That Website Publishers Are Entitled To Notice And An Opportunity To Be Heard Before They Are Ordered To Remove Content. .... 14

        1. Due Process Requires Notice And An Opportunity To Be Heard Before Being Subject To An Order Affecting Rights. .... 15

        2. The Court Of Appeal Grossly Diminished Fundamental Due Process Protections By Expanding A Narrow Rule Allowing Courts To Enjoin Aiders, Abettors, And Agents Of Parties. .... 19

    B. This Court Should Accept Review To Make Clear That Section 230 Bars Injunctions Against Website Publishers Related To Third-Party Content. .... 26

        1. Congress Enacted Section 230 To Protect Website Publishers From Claims Like Those Asserted Here. .... 28

2. The Court Of Appeal's Superficial Analysis And Failure To Follow Section 230's Plain Terms Create Tremendous Uncertainty in California As To The Scope Of Immunity Under The CDA..... 29

V. CONCLUSION ..... 35

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Balboa Island Village Inn, Inc. v. Lemen</i> (2007) 40 Cal.4th 1141.....	13, 25, 26
<i>Barrett v. Rosenthal</i> (2006) 40 Cal.4th 33.....	<i>passim</i>
<i>Berger v. Superior Court</i> (1917) 175 Cal. 719.....	11, 21
<i>In re Berry</i> (1968) 68 Cal.2d 137.....	22, 23
<i>Blockowicz v. Williams</i> (N.D. Ill. 2009) 675 F.Supp.2d 912, <i>aff'd</i> (7th Cir. 2010) 630 F.3d 563.....	21
<i>Carafano v. Metrosplash.com Inc.</i> (9th Cir. 2003) 339 F.3d 1119.....	28
<i>Doe II v. MySpace Inc.</i> (2009) 175 Cal.App.4th 561.....	27, 31
<i>Edwards v. District of Columbia,</i> 755 F.3d 996 (D.C. Cir. 2014).....	5
<i>Estate of Buchman</i> (1954) 123 Cal.App.2d 546.....	15, 16
<i>Fazzi v. Peters</i> (1968) 68 Cal.2d 590.....	16, 25
<i>Gentry v. eBay, Inc.</i> (2002) 99 Cal.App.4th 816.....	30
<i>Hardin v. PDX, Inc.</i> (2014) 227 Cal.App.4th 159.....	27
<i>Heller v. New York</i> (1973) 413 U.S. 483.....	17, 18

<i>Kathleen R. v. City of Liverpool</i> (2001) 87 Cal.App.4th 684.....	30
<i>In re Lennon</i> (1897) 166 U.S. 548.....	20
<i>M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC</i> (E.D. Mo. 2011) 809 F.Supp.2d 1041 .....	33
<i>Marcus v. Search Warrants</i> (1961) 367 U.S. 717.....	13, 17
<i>Medytox Solutions, Inc. v. Investorshub.com, Inc.,</i> 152 So.3d 727 (Fla. Dist. Ct. App., 2014).....	33
<i>Noah v. AOL Time Warner, Inc.</i> (E.D. Va. 2003) 261 F.Supp.2d 532, <i>aff'd</i> , 2004 WL 602711 (4th Cir. 2004) .....	30
<i>People v. Conrad</i> (1997) 55 Cal.App.4th 896.....	21, 32
<i>People v. Lucas</i> (2014) 60 Cal.4th 153.....	25
<i>People v. Ramirez</i> (1979) 25 Cal.3d 260 .....	16
<i>People v. Romero</i> (2015) 62 Cal.4th 1.....	25
<i>People ex rel. Gallo v. Acuna</i> (1997) 14 Cal.4th 1090.....	22
<i>People ex rel. Gwinn v. Kothari</i> (2000) 83 Cal.App.4th 759.....	20
<i>Planned Parenthood Golden Gate v. Garibaldi</i> (2003) 107 Cal.App.4th 345.....	21, 23
<i>PV Little Italy, LLC v. MetroWork Condominium Ass'n</i> (2012) 210 Cal.App.4th 132.....	12
<i>Regal Knitwear Co. v. N.L.R.B.</i> (1945) 324 U.S. 9.....	16, 20, 24

<i>Ross v. Superior Court</i> (1977) 19 Cal.3d 899 .....	11, 22
<i>Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.</i> (N.D. Cal. Nov. 13, 2015) 144 F.Supp.3d 1088 .....	32
<i>Tokio Marine &amp; Fire Ins. Corp. v. W. Pac. Roofing Corp.</i> (1999) 75 Cal.App.4th 110 .....	25
<b>Statutes</b>	
47 U.S.C.	
§ 230 .....	<i>passim</i>
§ 230(c)(1) .....	<i>passim</i>
§ 230(e)(3) .....	1, 29, 31, 32
<b>Other Authorities</b>	
California Rules of Court, Rule 8.500(b)(1) .....	3, 5
<i>California Appellate Court Decision Forces Yelp to Remove     Defamatory Review, Defamation Removal Law,</i> available at <a href="http://www.defamationremovallaw.com/2016/07/14/california-appellate-court-decision-forces-yelp-remove-defamatory-review/">http://www.defamationremovallaw.com/2016/07/14/california-appellate-court-decision-forces-yelp-remove-defamatory-review/</a> .....	26
Eric Goldman, <i>WTF Is Going On With Section 230?</i> – <i>Cross v. Facebook</i> , Technology & Marketing Law Blog, June 7, 2016, available at <a href="http://blog.ericgoldman.org/archives/2016/06/wtf-is-going-on-with-section-230-cross-v-facebook.htm">http://blog.ericgoldman.org/archives/2016/06/wtf-is-going-on-with-section-230-cross-v-facebook.htm</a> .....	26
Eric Goldman, <i>Yelp Forced to Remove Defamatory     Reviews—Hassell v. Bird</i> , Tech. & Mark. Law Blog, June 8, 2016, available at <a href="http://blog.ericgoldman.org/archives/2016/06/yelp-forced-to-remove-defamatory-reviews-hassell-v-bird.htm">http://blog.ericgoldman.org/archives/2016/06/yelp-forced-to-remove-defamatory-reviews-hassell-v-bird.htm</a> .....	3, 26

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*This Would Make Me Yelp!*, 111 North Hill Street, A Blog of California Civil Procedure, July 10, 2016, available at <http://caccp.blogspot.com/2016/07/this-would-make-me-yelp.html?m=1> .....24



## I. ISSUES PRESENTED

1. This Court has recognized a narrow exception to the requirement that a non-party to litigation receive notice and an opportunity to be heard before an order is entered that may be applied to that non-party, limiting that exception to cases where the non-party is acting in concert with a party, or the party can only act through others (such as a union that can only act through its members).

Can that narrow exception be extended to a non-party without any factual findings to support that extension, thus allowing courts to deprive online publishers of notice and the right to be heard before infringing their First Amendment rights by ordering them to remove online content?

2. 47 U.S.C. § 230(c)(1) and (e)(3) prohibit courts from treating any “provider ... of an interactive computer service ... as the publisher or speaker of any information provided by another content provider,” and, separately, from permitting a “cause of action [to] be brought” or “liability [to] be imposed” if it is “inconsistent with this section.”

Despite Section 230’s statutory immunity, may a court enjoin a website publisher and require it to remove third-party-created content from its website—and impose contempt citations and related liabilities that might flow from a failure to abide by such an injunction—merely because the plaintiff chose not to name the website publisher as a party in the litigation?

## II. REASON REVIEW SHOULD BE GRANTED

Occasionally a legal principle adopted to prevent abuse gets transformed through misinterpretation into a weapon for abuse. When that happens in California, it falls to this Court to step in and correct such misuse. This is such a time.

In a published decision, the Court of Appeal for the First Appellate District, Division Four, affirmed an injunction, entered without notice or an opportunity to be heard, against Yelp. The injunction required Yelp—a non-party in the litigation—to remove reviews from its website Yelp.com (along with Yelp’s related websites and mobile applications, referred to simply as “Yelp”). Without meaningful analysis, and dismissing Yelp’s First Amendment right to control its website, the appellate court invoked a common law principle created to prevent parties from evading an injunction through gamesmanship (*i.e.*, by acting in collusion with non-parties). The court did not find, or even consider whether, Yelp had engaged in such conduct. The appellate Opinion contemplates contempt and sanctions proceedings against Yelp if it refuses to comply, although Yelp has no material connection to the enjoined party and engaged in no wrongful conduct.

This Court’s review of the court of appeal’s due process analysis is “necessary to secure uniformity of decision [and] to settle an important question of law”—whether non-parties are entitled to notice before being

subject to an injunction that infringes *their rights*, including, as here, fundamental First Amendment rights. Cal. R. Ct. 8.500(b)(1). The appellate Opinion drastically expands the narrow exception to due process invoked by the court, applying it to a novel factual scenario without any evidence that the exception should apply—and, indeed, expressly disclaiming the need for any evidence. Op. 21.

In effect—and without analyzing whether these cases should be extended to this very different factual scenario—the court turned a narrow exception into a general rule, which now allows courts across California to expressly name non-parties in injunctions without any factual findings of misconduct. *Cf.* Eric Goldman, *Yelp Forced to Remove Defamatory Reviews—Hassell v. Bird*, Tech. & Mark. Law Blog, June 8, 2016, available at <http://blog.ericgoldman.org/archives/2016/06/yelp-forced-to-remove-defamatory-reviews-hassell-v-bird.htm> (“*Goldman II*”) (“I guess California courts have virtually unlimited discretion to apply injunctions to non-parties as they see fit?”). In doing so, the court rendered meaningless the careful guidelines California courts have adopted to limit the scope of this narrow exception, giving litigants nationwide an incentive to forum shop in California and a roadmap to circumvent due process rights here.

The court of appeal combined its unwarranted *expansion* of this limited common law principle, with an unprecedented *narrowing* of the protection provided by the Communications Decency Act, 47 U.S.C. § 230

(“Section 230”), to deny Yelp the federal immunity it would have received if Hassell had sued it. Addressing this issue for the first time in California, the court exalted the form of the action—namely, the fact that Yelp was tactically not named as a party—over the substance of Section 230 and Congress’ clear intent in enacting it to protect websites from actions that treat them as publishers or distributors of third-party content.

Section 230 immunity plays a vital role in the legal landscape that has allowed the Internet to flourish. As this Court noted a decade ago in its sole decision evaluating Section 230, “[t]he provisions of section 230(c)(1), conferring broad immunity on Internet intermediaries, are [] a strong demonstration of legislative commitment to the value of maintaining a free market for online expression.” *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 56 (“*Barrett*”). In *Barrett*, this Court made clear that Section 230 immunizes website operators from actions by disgruntled businesses hoping to punish them for allowing third-party content—even defamatory content—to remain on their websites. *Id.* at 39-40. The court of appeal followed *Barrett* in name alone. *Op.* at 27. It narrowly interpreted Section 230 to give plaintiffs a means of directly punishing website publishers for displaying third party content. In doing so, it created a clear conflict between its holding and the broad interpretation of Section 230 that this Court recognized in *Barrett*.

The Section 230 ruling is particularly problematic because it is utterly inconsistent with the court's due process ruling. Section 230(c)(1) broadly mandates that "[n]o 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." Yet here, the court affirmed an injunction imposed on Yelp by stretching due process law to conclude that Yelp was acting "*with or for*" Bird (Op. 30-31)—treating Yelp as standing in Bird's shoes solely based on Yelp's role as an online publisher of her alleged content. This contradiction injects confusion into each of these legal principles.

This Court's review in this matter is "necessary to secure uniformity of decision [and] to settle an important question of law"—should California courts continue to adhere to the broad interpretation of Section 230 that this Court approved in *Barrett*? Cal. R. Ct. 8.500(b)(1).

The impact of the court of appeal's due process and Section 230 decisions for the vitality of online speech is immense. Viewed only through the prism of review websites such as Yelp, this is a tremendously important issue because of the high value that easy access to consumer reviews offers to the general public. *E.g., Edwards v. District of Columbia*, 755 F.3d 996, 1006 (D.C. Cir. 2014) ("[f]urther incentivizing a quality consumer experience are the numerous consumer review websites, like Yelp ..., which provide consumers a forum to rate the quality of their

experiences”). If Yelp and entities like it are denied their right to exercise editorial control in publishing consumer reviews—providing businesses an effective tool to remove critical commentary—consumers will suffer.

But the appellate decision reaches far beyond this single area, vast though it may be. A wide array of website publishers display third-party content, including political organizations, media entities, and repositories of creative content such as YouTube, to name only a few. Some of this content entertains or educates, while some simultaneously offends, and much of it walks a line between protected and unprotected speech. The value of such content lies in diversity, and websites benefit from offering these disparate views and opinions to their users.

This does not leave plaintiffs like Hassell without a remedy—although if it did it would not matter because Congress’ intent controls. For twenty years, Congress has insisted that plaintiffs look to the content creator alone for a remedy, through tools such as judgment liens and contempt proceedings—post-judgment options that Hassell never pursued here. During those twenty years, no court has approved Hassell’s stratagem of denying a website publisher its due process rights in order to tactically avoid the immunity Congress established through Section 230. The appellate court’s blessing of the injunction entered against Yelp, following an *uncontested* hearing to prove up the default judgment against Bird

(A00213), is a loophole that future plaintiffs will exploit to escape Section 230's broad immunity.

Yelp and other websites will suffer as a result of this Opinion. But more importantly, members of the public that rely on the wealth of online third-party commentary—to aid decision-making on myriad issues like consumer purchases, politics, and employment— will be harmed as subjects of criticism follow Hassell's example: intentionally sue the commenter alone, perhaps in a manner that maximizes the chance that he or she will be unable or unwilling to defend the lawsuit regardless of its underlying merit, and then after a default judgment present the injunction to the website publisher as an unassailable *fait accompli*.

The issues presented in this case are unresolved in California. Together, the court of appeal's holdings threaten to undermine the validity and efficacy of the information available to consumers, and online speech generally. On each of these questions of first impression in California, the court of appeal reached the wrong result. Yelp requests, therefore, that this Court accept review and resolve the important issues presented.

### **III. STATEMENT OF FACTS AND PROCEDURE**

#### **A. Yelp's Website Publishes Tens of Millions Of Third-Party Consumer Reviews.**

Yelp allows any member of the public to read and write online reviews about local businesses, government services, and other entities.

A00240. Yelp is available to the public at no charge and without any registration requirement. *Id.* Those who register by creating an account may write reviews about businesses and service providers, and thus contribute to a growing body of tens of millions of publicly-available consumer reviews. *Id.* Tens of millions of other users read the reviews on Yelp when making a wide range of consumer and other decisions. *Id.* The businesses listed on Yelp also can create free accounts, which allow them to publicly respond to any review, with such a response appearing next to the original review. *Id.* Reviewers on Yelp can remove their reviews at any time. A00841. As Yelp's website explains, it applies automated software to all reviews posted in an attempt to provide the most helpful reviews to consumers. A00519.

**B. Hassell Obtains An Injunction Against Yelp Without Giving It Any Notice.**

**1. Third-Party Users Write Critical Reviews About Hassell Law Group On Yelp.**

Hassell, a San Francisco attorney, owns The Hassell Law Group, P.C. A00006. According to Hassell's Complaint, Bird suffered a personal injury on June 16, 2012, and retained The Hassell Law Group. A00002-3. After a few months, Hassell ended the attorney-client relationship. *Id.* On January 28, 2013 a user with the screen name "Birdzeye B." posted a one-star review of The Hassell Law Group on Yelp, complaining about Hassell's legal services. A00018. Believing that "Birdzeye B." was Bird,



Hassell sent Bird an email that day, requesting she remove the “factual inaccuracies and defamatory remarks” from Yelp. A00005. Bird replied the next day, complaining about Hassell’s representation. A00348.

**2. Hassell Sues Bird And Obtains A Default Judgment, Which Includes An Injunction Against Yelp.**

On April 10, 2013, Dawn Hassell individually, and the Hassell Law Group P.C., filed a complaint against Bird, but not Yelp, in San Francisco Superior Court. A00002. The suit asserted claims based on two allegedly defamatory reviews—one by Birdzeye B. and another by a reviewer identified as J.D. (A00004-5)<sup>1</sup>—and sought compensatory and punitive damages. It also sought injunctive relief against Bird only. A00013. Although the Birdzeye B. public account profile stated that its creator lived in Los Angeles (A00091), 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. A00026. On July 11, 2013, the court entered a default against Bird. A00023.

On November 1, 2013, Hassell filed a Summary of the Case in Support of Default Judgment and Request for Injunctive Relief. A00033-36. Hassell significantly expanded the relief being sought as described in the Complaint, adding another allegedly defamatory statement to her claim

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<sup>1</sup> Hassell claimed that “J.D.” was Bird based on the review’s use of capitalization, despite the content being at odds with the original challenged statement. A00034, A00099.

(A00036, A00102)<sup>2</sup> and demanding for the first time that the court “make an order compelling Defendant and Yelp to *remove* the defamatory statements, including all entire posts, immediately. If for any reason Defendant does not remove them all by the Court-ordered deadline (which is likely given Defendant’s refusal to answer the complaint), *the Court should order Yelp.com to remove all 3 of them.*” A00051 (emphasis in original).

Plaintiffs’ Request for Judgment went even further, seeking “an Order ordering Yelp.com to remove the reviews and subsequent comments of the reviewer within 7 business days of the date of the court’s Order.” A00051. Hassell intentionally did not serve her application for default judgment on Yelp or otherwise notify Yelp about it. A00243; *see also* A00837. The court granted the requested injunction, including the part directed to non-party Yelp. A00213. The court made no factual findings as to Yelp. *Id.*

**C. The Trial Court Denies Yelp’s Motion To Vacate The Injunction.**

On January 28, 2014, Yelp’s registered agent for service of process received by mail a letter enclosing a notice of entry of judgment or order and threatening Yelp with contempt proceedings if it did not comply with the order. A00537-547. On February 3, 2014, Yelp responded to Hassell

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<sup>2</sup> She added another post from Birdzeye B. that primarily criticized the litigation. A00036, A00102.

by letter, stating that as a non-party which did not receive notice or an opportunity to be heard, Yelp was not bound by the terms of the Judgment. A00548-550. Yelp further explained that Section 230 precludes enforcement of the injunction, or liability as to Yelp. A00549. Hassell did not respond until April 30, 2014. She claimed that her office was “currently setting a motion to enforce the court’s order against Yelp,” but did not respond substantively to Yelp’s position. A00551.

On May 23, 2014, Yelp moved to vacate the Judgment. A00225-470. Hassell opposed Yelp’s Motion to Vacate. A00471-572. On September 29, 2014, the trial court denied Yelp’s Motion. A00808. It quoted from *Ross v. Superior Court* (1977) 19 Cal.3d 899, 906 (“*Ross*”), and *Berger v. Superior Court* (1917) 175 Cal. 719, 721 (“*Berger*”), to hold that injunctions may run to non-parties who are aiding and abetting an enjoined person to violate an injunction, and concluded that Yelp fit within this exception to general due process requirements. A00808-809. It did not address Yelp’s claim to immunity under Section 230.

**D. The Court Of Appeal Affirms The Trial Court’s Decision.**

In a published decision, the court of appeal affirmed the trial court’s conclusion that Yelp was bound by the injunction. Op. 1-2. As relevant here, the court characterized the order requiring Yelp to remove content from its website as a “removal order”—not an injunction (Op. 1)—and treated the “removal order” as if it were separate from the Judgment (*e.g.*,

Op. 10-11 (concluding that Yelp was not aggrieved by the default judgment, but was aggrieved by the removal order)).<sup>3</sup>

After evaluating Yelp's standing to appeal (issues not raised here), the appellate court rejected Yelp's argument that due process barred enforcement of the injunction against it. Op. 18-23. The court noted, first, that "An Injunction Can Run Against a Nonparty." Op. 18. Citing a handful of cases, the court concluded that "settled principles undermine Yelp's theory that the trial court was without any authority to include a provision in the Bird judgment which ordered Yelp to effectuate the injunction against Bird by deleting her defamatory reviews." Op. 19.

The appellate court did not discuss or apply any of the requirements that California courts have enunciated to justify extending an injunction to a non-party. Op. 19-21. Instead, it simply distinguished the cases Yelp cited, concluding that none presented facts similar to those presented here. *Id.* The court made clear that its decision did not turn on the facts of the case, and that the question of whether Yelp was "aiding and abetting" Bird's violation of the injunction "has no bearing on the question whether

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<sup>3</sup> Some of the court's holdings seemed to grow out of this novel characterization of the injunction against Yelp, and its Opinion ultimately turned on its conclusion that Yelp was not subject to an injunction at all. *E.g.*, Op. 29 ("[a]gain though, the party that was enjoined from publishing content in this case was Bird, ...."). But the "removal order" is a classic injunction and the court of appeal created uncertainty in the law by treating it as anything else. *E.g.*, *PV Little Italy, LLC v. MetroWork Condominium Ass'n* (2012) 210 Cal.App.4th 132, 143 n.5.

the trial court was without power to issue the removal order in the first instance.” Op. 21.

The court next rejected Yelp’s argument that the First Amendment protects its right to distribute Bird’s speech. Op. 21-23. The court distinguished a U.S. Supreme Court case holding that book and magazine distributors are entitled to due process in connection with a seizure order. Op. 21-22, citing *Marcus v. Search Warrants* (1961) 367 U.S. 717 (“*Marcus*”). The court explained that “in this context, it appears to us that the removal order does not treat Yelp as a publisher of Bird’s speech, but rather as the administrator of the forum that Bird utilized to publish her defamatory reviews.” *Id.* The court also suggested that the issue was whether a *prior* hearing was required, and that this case differs from *Marcus* because here “specific speech has already been found to be defamatory in a judicial proceeding.” Op. 23.

The court also rejected Yelp’s argument that the injunction is an unconstitutional prior restraint. Op. 23-26. Expanding this Court’s decision in *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141 (“*Balboa Island*”), the court held that “the trial court had the power to make the part of this order requiring Yelp to remove the [statements at issue] because the injunction prohibiting Bird from repeating those statements was issued following a determination at trial that those statements are defamatory.” Op. 25.

Finally, the court held that Section 230 did not protect Yelp from Hassell’s injunction. Op. 26-31. Its decision turned largely on the fact that Hassell intentionally chose not to sue Yelp, or even give it advance notice of her claims, which the court found “distinguish[ed] the present case from Yelp’s authority, all cases in which causes of action or lawsuits against internet service providers were dismissed pursuant to section 230.” Op. 28 (citations omitted); *see also id.* 29-30 (distinguishing cases barring actions for injunctive relief because in each the claim was asserted “against an Internet service provider defendant in a civil lawsuit”); *id.* 30-31 (“[i]f an injunction is itself a form of liability, that liability was imposed on Bird, not Yelp”). The court rejected each of Yelp’s arguments. Op. 29-31.

Yelp did not file a petition for rehearing.

**IV. REVIEW IS NECESSARY TO RESOLVE TWO QUESTIONS VITAL TO WEBSITES THAT PUBLISH THIRD-PARTY CONTENT**

**A. This Court Should Accept Review To Establish That Website Publishers Are Entitled To Notice And An Opportunity To Be Heard Before They Are Ordered To Remove Content.**

The injunction here names Yelp—although it is not a party to this action—and specifically orders Yelp to remove content from its website. Invoking what it described as “settled principles” to reject Yelp’s due process arguments, the court insisted that a non-party may be subject to an injunction if it is “acting in concert with the enjoined party and in support of its claims.” Op. 19 (citations omitted).

But *none* of the cases the court cited touches on the issue presented here: whether a non-party to litigation has a right to challenge an order that *expressly names it* and affects *its own rights*—here, Yelp’s right to maintain *critical* reviews on its website, often in conflict with the desires of businesses that disavow the criticism and aim to remove such commentary from public view.<sup>4</sup> And none allowed an injunction where the non-party has such a remote connection to the party enjoined. The only connection between Yelp and Bird is that Bird, like tens of millions of people, posts reviews on Yelp. The court’s application of an exceedingly narrow exception to fundamental due process requirements grossly expanded that exception beyond its intent and purpose.

**1. Due Process Requires Notice And An Opportunity To Be Heard Before Being Subject To An Order Affecting Rights.**

The requirements of notice and hearing are firmly rooted in the United States and California Constitutions. As the court made clear in *Estate of Buchman* (1954) 123 Cal.App.2d 546, 559, “[t]he fundamental conception of a court of justice is condemnation only after notice and hearing.” Thus, “[t]he power vested in a judge is to hear and determine, not

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<sup>4</sup> If Yelp immediately removed every review a business owner claimed was false or even defamatory, it soon would have no critical reviews on its website. To maintain the integrity of its website—for the benefit of its users—Yelp must challenge claims such as Plaintiffs’ claims here.

to determine without hearing,” and the Constitution requires a fair hearing. *Id.* at 560; *see also People v. Ramirez* (1979) 25 Cal.3d 260, 263-64.

This Court long ago reaffirmed as a “seemingly self-evident proposition that a judgment *in personam* may not be entered against one not a party to the action.” *Fazzi v. Peters* (1968) 68 Cal.2d 590, 591 (“*Fazzi*”). As the U.S. Supreme Court has held, courts “may not 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 (“*Regal Knitwear*”).

Despite this settled constitutional principle, and without giving Yelp any notice, the trial court enjoined speech that Yelp displays and uses to provide an aggregate rating of the Hassell Law Group to consumers looking to hire lawyers. The court of appeal affirmed, declaring without analysis or supporting legal authority that the injunction “does not treat Yelp as a publisher of Bird’s speech, but rather as the administrator of the forum that Bird utilized to publish her defamatory reviews.” Op. 22. This faulty reasoning ignores Yelp’s important role as an online publisher and its strong interest in developing and maintaining a trusted resource that provides helpful consumer reviews to the public, including critical reviews that dissatisfied clients post. Yelp and other online forums like it are not merely the “administrators” of their websites—they are publishers and



editors whose actions to disseminate speech are fully protected by the First Amendment and due process rights. Yelp, for example, has developed automated software designed to enhance users' experiences by showcasing more helpful content over potentially less helpful content (like fake or paid-for reviews). *E.g.*, A00519. And Yelp maintains terms of service and content guidelines that, when violated, lead to the removal of offending content. A00561.

To support its overreach, the court purported to distinguish *Marcus*, 367 U.S. 717, but it overlooked the fundamental point of *Marcus* and the many other cases that protect the right to distribute speech. Op. 22-23, citing *Marcus*; *Heller v. New York* (1973) 413 U.S. 483, 488. The U.S. Supreme Court recognized a First Amendment right to distribute speech, *separate* from the right to make the speech in the first instance, which cannot be infringed without notice and an opportunity to be heard. *See Marcus*, 367 U.S. at 731-732 (wholesale distributor of books and magazines had right to prompt hearing in connection with seized materials); *Heller*, 413 U.S. at 489-490 (seizure without a prior hearing is permissible only if adequate procedural safeguards are followed).

The court of appeal's invocation of *Heller*—which decided whether a party is entitled to an adversarial hearing *before* speech is seized—missed the point. Op. 23. Yelp did not receive *any* hearing; it had no opportunity to challenge the trial court's conclusion—reached *in an uncontested*

hearing following a default judgment—that the speech at issue was defamatory. Because Yelp has a separate First Amendment right to distribute speech, it was entitled to a hearing to oppose entry of the overbroad injunction that restrained speech on its website. *See Heller*, 413 U.S. at 489 (“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” (citations, internal quotes omitted; emphasis in original)). The fiction adopted by the court of appeal—inventing a role it coined “administrator of the forum,” which apparently has none of the constitutional protections granted to publishers—to brush aside Yelp’s clear interest in the integrity of its website led to an unprecedented travesty of justice here. With the court’s approval this shocking new framework to deprive online publishers of due process and First Amendment rights can be repeatedly applied throughout California.

Hassell intentionally sought to abrogate Yelp’s due process rights when she moved for a default judgment; as she put it she “anticipated that Defendant Bird would refuse to remove the Yelp review.” A00482.<sup>5</sup> The court of appeal approved this gambit, holding that Yelp was not entitled to notice. As shown below, however, the line of cases it invoked does not

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<sup>5</sup> Indeed, at the hearing on the motion to vacate, Hassell admitted that she did not name Yelp in her Complaint because Yelp is immune from suit under Section 230. A00837; *see* Section IV.B.1, *infra*.