Case No. S235968

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

vs.

AVA BIRD,
Defendant,

YELP, INC.,
Appellant.

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

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

Plaintiffs' arguments boil down to their dubious claim that Yelp enjoys no independent rights as an Internet publisher to select, organize, and display consumer-oriented content on Yelp.com. But Plaintiffs cannot cite a single case supporting their argument that Yelp has neither a First Amendment right to publish and protect third party-authored speech, nor a due process right to notice and a hearing in connection with Plaintiffs' attempt to enjoin its First Amendment rights. They also cannot cite a single case holding, as the appellate court did here, that Section 230(c)(1) does not apply to requests for injunctive relief. The court of appeal's ruling threatens settled due process, First Amendment and Section 230 principles and this Court should reverse for several reasons.

First, Yelp was not a party to the action that found the speech to be defamatory after an uncontested default hearing. Plaintiffs intentionally gave Yelp no notice of this hearing; Yelp had no opportunity to litigate this question. The trial court's holding against Bird is not binding on Yelp, and does not excuse denying Yelp its basic due process rights. *See, e.g., DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 825. Yelp has a First Amendment right to publish consumer reviews on its website, and a due process right to defend itself when its interests are attacked. The narrow exception permitting injunctions against non-parties who act in collusion with parties to evade an injunction does not apply here, because Yelp acted

to advance its own interests and did not act in concert with Bird to violate the injunction. Section II, *infra*.

Second, Plaintiffs' analysis of Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230") is equally flawed. Again, Plaintiffs use the defamation ruling from an uncontested default hearing—that Yelp was not invited to attend—to support their claim that Yelp has no rights worthy of protection. Answering Brief on the Merits ("Answer") 32-33. And they continue to trumpet the appellate court's conclusion that Section 230 can be evaded by the simple expedient of not directly suing a website publisher. Answer 41-42. Plaintiffs plainly do not like Congress' decision to require defamation plaintiffs to look for their remedy against the original speaker, not the Internet publisher. But that does not excuse Plaintiffs' inexplicable choice not to enforce their Judgment against Bird—who indisputably could remove the reviews from Yelp's website—nor overcome the federal policy that those remedies adequately protect defamation plaintiffs like Hassell. Section III, *infra*.

Yelp was Plaintiffs' target from the beginning. A00837. But because Plaintiffs knew that Section 230 barred their claims, they decided to ignore Yelp's due process rights, in the hope of indirectly obtaining the injunction that Plaintiffs could not have obtained directly. *Id.* Their gambit worked in the lower courts, both of which treated Yelp as if it were a mere

bystander, with no interest in the content or the integrity of its website. This Court should remedy this injustice.

II. TRIAL COURTS MAY NOT ENJOIN NON-PARTIES, TAKING AWAY THEIR INDEPENDENT RIGHTS, WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD

Plaintiffs cannot deny that they did not sue Yelp or give it any notice that they intended to ask the trial court to issue an injunction against Yelp. They instead focus on the result, that Yelp did not appear in the action (Answer 7), ignoring that Yelp had no reason to suspect that it needed to intervene to protect its own interests.[1] Plaintiffs' actions flouted Yelp's due process rights, and the appellate Opinion should be reversed for this independent reason.

A. Yelp Has A Due Process Right To Protect Its Website.

In their effort to defend the appellate court's decision, Plaintiffs argue for the first time that Yelp does not have a liberty or property interest in its own website. Answer 23-25. Plaintiffs waived this argument by not raising it below. *See* A00481 (arguing that Yelp's due process rights were satisfied, without suggesting Yelp has no such rights); Court of Appeal Respondent's Brief (3/13/15) at 11-28 (same); Answer to Petition for

[1] Yelp regularly receives correspondence advising it about claims asserted against a user based on a review. It is absurd to suggest that Yelp must hire counsel and move to intervene in each one or risk waiving fundamental rights. Due process principles and statutes such as Code of Civil Procedure § 580 are designed to protect non-parties from such machinations.

Review (8/8/16) at 10. The Court should refuse to consider Plaintiffs' newly-minted argument. *See Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 865 n.4 (argument not raised below or in counterpetition for review is "not cognizable before this court").

Regardless, as discussed below, Plaintiffs are simply wrong. As an Internet publisher, Yelp has a well-recognized First Amendment right to publish the content of others on the website that it has developed and maintains. *E.g.*, *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 849, 853 ("*Reno*"); *see* Section B, *infra*. Plainly, First Amendment rights fall within the broad protection of the due process clause. *E.g.*, *Marcus v. Search Warrant of Property* (1961) 367 U.S. 717, 731-32. Plaintiffs offer no authority holding otherwise.[2]

Plaintiffs continue to simply ignore the fundamental point of the many U.S. Supreme Court cases that require a hearing to enjoin speech. Answer 15-17 & n.6. Their authority focuses on the question of whether state officials must provide a hearing *before* enjoining speech. *Id.*; *see also id.* 1-2; Op. 23. But as Yelp explained, the question is not whether the hearing must always be held *before* the injunction is issued, but instead

[2] The plurality opinion in *Kerry v. Din* (2015) 135 S.Ct. 2128, 2134, does not support Plaintiffs' claim. There, the Court refused to recognize a *new* liberty interest for a woman whose non-resident husband was denied a visa. It did not limit the due process guaranteed to those, like Yelp, whose First Amendment rights are attacked.

whether Yelp was entitled to a prompt hearing to adjudicate its claimed rights, even if that hearing did not *precede* the injunction. O.B. 19-20, citing *Heller v. New York* (1973) 413 U.S. 483, 488; *see also Marcus*, 367 U.S. at 731-32. Contrary to Plaintiffs' claim (Answer 15-16), Yelp is *exactly like* the distributors in *Marcus*. It personally engages in protected speech activities by providing a forum for and publishing different types of third-party speech, which Yelp organizes for display, selects for recommendation or non-recommendation, or removes. A00240, A00495, A00567-00569. Indeed, Yelp regularly applies automated software to all reviews in an attempt to recommend the most helpful information to consumers—an ongoing and inherently editorial function. *Id.* Nonetheless, the appellate court denied Yelp its due process rights by holding that Yelp was entitled to no hearing at all to oppose the injunction against it. Op. 21.

Plaintiffs' argument that Yelp received actual notice of the claim against it, which purportedly satisfies due process, also is wrong. Answer 25. In Plaintiffs' cases, due process was satisfied only because the notice effectively communicated that the party's own interests were implicated. *See Benson v. California Coastal Comm'n* (2006) 139 Cal.App.4th 348, 353-54 (written notice to developer advising it of upcoming hearing satisfied due process); *United States Aid Funds, Inc. v. Espinosa* (2010) 559 U.S. 260, 272 (due process satisfied where creditor "received actual notice of the filing and contents of [debtor's] plan" and rule arguably violated was

procedural); *Oneida Indian Nation v. Madison County* (2d Cir. 2011) 665 F.3d 408, 431-32 (due process satisfied where plaintiffs received actual notice that fully informed them of impending action). Plaintiffs' vague letter advising Yelp that a lawsuit was filed against Bird, but not mentioning any intent to seek an injunction against Yelp, did not provide that notice here. A00601-00602.

This Court's jurisprudence on Code of Civil Procedure § 580 demonstrates why Plaintiffs' arguments are so misplaced. In *Greenup v. Rodman* (1986) 42 Cal.3d 822, the Court explained that Section 580 satisfies due process requirements by ensuring that parties receive adequate notice of the relief that will be sought against them in a default judgment. *Id.* at 826-27 (rejecting plaintiff's argument that trial court acted within its jurisdiction in granting greater relief than originally requested). As this Court explained in *In re Lippel* (1990) 51 Cal.3d 1160, 1166 "[i]t is a fundamental concept of due process that a judgment against a defendant cannot be entered unless he was given proper notice and an opportunity to defend. ... California satisfies these due process requirements in default cases through section 580." (Citations omitted.) *See also Warren v. Warren* (2015) 240 Cal.App.4th 373, 377-79 (reversing judgment in action seeking accounting because defendant did not receive notice of amount at issue).

Plaintiffs' other arguments fare no better. This case does not involve the "indirect" interest at issue in the only case Plaintiffs cite for their argument, *O'Bannon v. Town Court Nursing Center* (1980) 447 U.S. 773. There, the government's action *indirectly* harmed the interests of nursing home patients, who challenged revocation of the home's right to receive Medicaid and Medicare payments. *Id.* at 775. The Court found a "simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally. ..." *Id.* at 788. As the Ninth Circuit explained in *Greene v. Babbitt* (9th Cir. 1995) 64 F.3d 1266, 1272-73, the due process clause protects "individual entitlements," but not the "collective hopes" at issue in *O'Bannon*. Here, Yelp's "individual entitlement" to protect its website is under attack, and it is entitled to defend it.

Yelp is not challenging the ruling *against Bird* that the speech is defamatory, nor must it to assert its rights as a publisher. Yelp is advocating its *own* First Amendment rights, independent of any judgment entered against Bird in a proceeding to which Yelp was not a party. Plaintiffs do not discuss the legal requirements for their proclamation that Yelp is bound by the holding against Bird, perhaps because they know that they cannot possibly satisfy those requirements. Contrary to Plaintiffs' claims (Answer 24-25 & n.10), Yelp's cases directly support its due

process argument by establishing that *in personam* judgments are forbidden without notice and an opportunity to be heard. O.B. 17-18. As *Blonder-Tongue Labs., Inc. v. Univ. of Ill Found.* (1971) 402 U.S. 313, 329, and *Chase Nat'l Bank v. City of Norwalk* (1934) 291 U.S. 431, 440-41, make clear, *only* the parties to prior litigation are bound by any judgment entered in that litigation. "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein *will not affect his legal rights*." *Chase Nat'l Bank,* 291 U.S. at 441 (citations omitted; emphasis added).

Here, that straight-forward rule means that Yelp had no obligation to intervene in the litigation below, in which it was not named and received no notice that its rights were challenged, and it is not bound by the defamation ruling against Bird. *See DKN Holdings*, 61 Cal.4th at 824-25 (claim and issue preclusion are available only *against* parties to litigation); *Dillard v. McKnight* (1949) 34 Cal.2d 209, 215 (adopting the "accepted rule that in no case will a judgment entered after service on less than all the partners be given the effect of a personal judgment against partners not actually served" (citations omitted)); *Patel v. Crown Diamonds, Inc.* (2016) 247 Cal.App.4th 29, 38 (non-parties not bound where "they had no direct interest in the subject matter, nor any right to make a defense, control the proceeding, or appeal from the judgment").

Bird is one of millions of Yelp users. Because Plaintiffs chose *not* to make Yelp a party to this litigation, they cannot enforce the defamation holding against Yelp. The central theme of their Answer crumbles under this clear law.

B. Yelp Has A First Amendment Right To Publish Third Party Speech On Its Website.

The baseless theme at the heart of Plaintiffs' Answer Brief is that Yelp has no First Amendment right to publish, organize, and recommend third-party content on its website. This argument underlies Plaintiffs' theory that Yelp is merely an "online directory" that the court simply treated as the conduit through which its order would be enforced. Answer 31, 42. This led the appellate court to describe Yelp as nothing more than the "administrator of the forum" on which Plaintiffs' speech was posted. Op. 21-22. Plaintiffs cite no case to support this startling claim, nor could they.

Internet publishers like Yelp have a First Amendment right to publish third-party speech as part of their editorial operations. This was the fundamental premise underlying the United States Supreme Court's first discussion of the protections afforded to Internet publishers. *Reno*, 521 U.S. at 849, 853. The Court rejected the federal statute at issue because it "abridges 'the freedom of speech' protected by the First Amendment," including the rights of publishers "from which to address and hear from a

world-wide audience of millions of readers, viewers, researchers, and buyers." *Id.* Indeed, Section 230 specifically was adopted to protect Internet publishers who exercise "a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Zeran v. America Online, Inc.* (4th Cir.1997) 129 F.3d 327, 330.[3] This Court reiterated long ago that traditional editorial functions fall squarely within the First Amendment's protection. *Shulman v. Group W Prods., Inc.* (1998) 18 Cal.4th 200, 224-25. *See also Miami Herald Publ'g Co. v. Tornillo* (1974) 418 U.S. 241, 258 ("[t]he choice of material to go into a newspaper ... constitute the exercise of editorial control and judgment"); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*

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[3] *See also Garcia v. Google, Inc.* (9th Cir. 2015) 786 F.3d 733, 747 (*en banc*) (request to enjoin Google from distributing a film in which plaintiff briefly appeared "gave short shrift to the First Amendment values at stake"); *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.* (7th Cir. 2008) 519 F.3d 666, 668 ("any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment" (citations omitted)). *See generally Jian Zhang v. Baidu.com, Inc.* (S.D.N.Y. 2014) 10 F.Supp.3d 433, 438-30; *Google, Inc. v. Hood* (S.D. Miss. 2015) 96 F.Supp.3d 584, 593-94, *rev'd on procedural grounds*, (5th Cir. 2016) 822 F.3d 212; *Langdon v. Google, Inc.* (D. Del. 2007) 474 F.Supp.2d 622, 629-30. *Cf. Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 300, 301 ("the right to distribute newspapers and other periodicals on the public streets lies at the heart of our constitutional guarantees of freedom of speech and freedom of the press" and this protection extends "to virtually all modes of communication that may be utilized to disseminate ideas and protected expression on the public streets").

(1996) 518 U.S. 727, 753-63 (rejecting statute imposing programming obligations on broadcaster).[4]

Yelp acted on its own behalf—in advancement of *its* First Amendment rights—completely independently of Defendant Bird. Yelp's website includes tens of millions of consumer reviews, written by millions of independent users. A00240. Businesses listed on Yelp can create free accounts, which allow them to publicly respond to any review, with the response appearing next to the original review. *Id.* Yelp organizes reviews for display, removes reviews that violate its terms of service, and applies automated software to all reviews posted in an attempt to recommend the most helpful reviews to consumers. A00240, A00495, A00567-00569. This exercise of traditional editorial functions lies at the heart of the First Amendment.

Plaintiffs also are wrong in proclaiming that purportedly false speech has no First Amendment protection. The Supreme Court long ago recognized that some false speech must be protected in order to give "the freedoms of expression ... the 'breathing space' that they 'need ... to

[4] Plaintiffs attempt to distinguish many of Yelp's cases in a brief footnote. Answer 17 n.6; *see* O.B. 19-20 n.8. Their response to *Carroll v. President & Comm'rs of Princess Anne* (1968) 393 U.S. 175, turns on their debunked claim that the defamation ruling against Bird also binds Yelp. *Lee Art Theater, Inc. v. Virginia* (1968) 392 U.S. 636, 637; *Quantity of Copies of Books v. Kansas* (1964) 378 U.S. 205, 212-13; and *Kash Enterprises*, 19 Cal.3d at 309, all make clear that courts must engage in a careful, searching inquiry when enjoining speech. That did not occur here.

survive'"; thus plaintiffs bear the burden of proving falsity, and public officials and public figures must prove constitutional malice to state a defamation claim. *New York Times v. Sullivan* (1964) 376 U.S. 254, 271-72 (citations omitted); *see Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 776.

Plaintiffs' argument is undisguised bootstrapping and in exploiting this Court's earlier ruling in *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141 (Section C, *infra*), demonstrates the dangers the appellate decision creates. Under their reasoning, *any* judicial ruling that speech is defamatory—even one entered following questionable service (A00026) and an uncontested default hearing (A00211)—would bind third parties who receive no opportunity to contest that ruling. Plaintiffs could get uncontested judgments around the country and use them to deny California citizens their own First Amendment rights—all because a court somewhere entered a default judgment, based solely on a plaintiff's say-so, ruling the speech to be defamatory.[5] But as this Court explained in *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 57, "[d]efamation law is complex, requiring consideration of multiple factors." (Citations omitted.) Despite this Court's admonition that "a court must tread lightly and carefully when

[5] Yelp does not contend that this is notice-based liability, but instead that similar concerns apply here, particularly in light of innovative attempts by plaintiffs to evade Section 230's protection. *E.g.*, RJN Exs. A-G; *see* Section III, *infra*.

issuing an order that prohibits speech" (*Balboa Island*, 40 Cal.4th at 1159 (citation omitted)), the trial court issued, and the appellate court approved, a broad injunction without analyzing the individual statements (A00211). This is not the law.[6]

Nor do Plaintiffs' other cases help them. Answer 2, 14. In *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245-46, the Court addressed restrictions on "virtual child pornography." It stated in passing that freedom of speech does not embrace defamation, but did not apply that observation to the different facts of that case. *Id.* In *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 776, the Court merely recognized the state's interest in preventing false statements of fact, in deciding whether the forum had personal jurisdiction over defendant. And in *Bill Johnson's Rests., Inc. v. N.L.R.B.* (1983) 461 U.S. 731, 743, the Court held that the First Amendment right to petition does not protect sham litigation, "[j]ust

[6] Plaintiffs accuse Yelp of "blatant[ly] misrepresent[ing]" the allegedly defamatory nature of Bird's statements (Answer 13), but cannot deny that the trial court's order following an uncontested default hearing did not evaluate the individual statements or any potential defenses. A00211. Plaintiffs also mischaracterize Yelp's Terms of Service, claiming they require Yelp to remove content deemed defamatory. Answer 47. They do not. A000637. Rather they make clear that Yelp assumes no obligation—and retains sole discretion to decide whether—to remove content that allegedly violates its terms. Thus, while it is Yelp's general practice to remove content adjudicated defamatory against third parties—assuming any appeals have been exhausted and a plausible showing of defamation has been made (A00734)—this almost never occurs, as Yelp users have the ability to remove their reviews at any time.

as false statements are not immunized by the First Amendment right to freedom of speech." *Id.* at 743 (citation omitted).[7]

None of these cases hold—as Plaintiffs insist—that once speech is found to be defamatory in *any* proceeding *anywhere*, that holding is binding on the entire world and everyone loses First Amendment rights related to that speech. To the contrary, the U.S. Supreme Court "has never endorsed the categorical rule [Plaintiffs] advance[]: that false statements receive no First Amendment protection." *U.S. v. Alvarez* (2012) 567 U.S. 709, 132 S.Ct. 2537, 2545 (reversing criminal conviction under Stolen Valor Act; government had no right to criminalize speech at issue, even if false).

Finally, Yelp's arguments are completely consistent. Yelp is entitled to protect its First Amendment right to *publish* speech created by others, *and* to assert its rights as an Internet publisher under Section 230. "The provisions of section 230(c)(1), conferring broad immunity on Internet intermediaries, are themselves a strong demonstration of legislative commitment to the value of maintaining a free market for online

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[7] *See also Herbert v. Lando* (1979) 441 U.S. 153, 171-72 (to ensure protection of First Amendment principles, liability is limited "to instances where some degree of culpability is present"); *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 771 (stating in dicta that false speech generally not protected "for its own sake"; no claim advertisements at issue were false). Plaintiffs' reliance on *Beauharnais v. Illinois* (1952) 343 U.S. 250, 256, is particularly misplaced. That decision preceded *New York Times v. Sullivan* by a dozen years, and no longer reflects controlling law.

expression." *Barrett*, 40 Cal.4th at 56; *see also Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1027-28. Plaintiffs' argument—that only those who create speech have a First Amendment right in that speech—is simply wrong. *See, e.g.*, *Marcus*, 367 U.S. at 731-33; *Heller*, 413 U.S. at 488.

C. The Injunction Is An Unconstitutional Prior Restraint.

Contrary to Plaintiffs' claim that this Court has "conclusively resolve[d] this issue" (Answer 20), in none of Plaintiffs' cases did a court bind a *non-party* that lacked privity with a party to a holding that speech is defamatory. In *Balboa Island*, the Court reversed a prior restraint against defendant to the extent it applied to non-parties, while reserving the question of "whether the scope of the injunction properly could be broader if people other than [defendant] purported to act on her behalf." 40 Cal.4th at 1160 & n.11. It held 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." *Id.* at 1155-56 (emphasis added). Plaintiffs ignore this key difference between *Balboa Island* and this case.

Moreover, Plaintiffs' newly-minted argument that the injunction entered against Yelp is not a prior restraint demonstrates a fundamental misunderstanding of First Amendment jurisprudence. Answer 18-21. While many prior restraints enjoin speech before its initial publication, orders to stop or remove speech *also* are prior restraints and presumptively