

August 15, 2016

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Honorable Tani Cantil-Sakauye and Honorable Associate Justices
of the Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102-4783

**Re: *Hassell v. Bird*, Cal. Supreme Court Case No. S235968
Letter of Amici Curiae Automattic Inc., Pinterest, Inc., and Reddit, Inc.
in Support of Petition for Review**

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

Amici support Yelp, Inc.'s ("Yelp's") petition for review of the First District Court of Appeal's decision in *Hassell v. Bird*, Case No. A143233. The Court of Appeal's decision threatens free speech on the Internet, disrupts established precedent precluding the application of court judgments against non-parties, violates the free speech rights of online service providers, and eviscerates the immunity from liability that Congress provided to service providers such as Yelp under the Communications Decency Act ("CDA"), 47 U.S.C. § 230.

Supreme Court review is critical to protect the First Amendment rights of online service providers, correct the opinion's legal errors, and settle important questions of law impacting a wide range of parties. *See* Cal. Rules of Court, rule 8.500(b). Accordingly, amici urge this Court to grant Yelp's petition and correct the errors in the Court of Appeal's ruling.

Interest of Amici Curiae Automattic Inc., Pinterest, Inc., and Reddit Inc.

Automattic Inc.'s ("Automattic's") goal is to democratize publishing by building tools that empower anyone with a story to tell it, regardless of income, gender, politics, language, or where they live in the world. Automattic operates a number of popular services including WordPress.com, the most popular online publishing platform, which serves more than 22 billion page views to over 400 million visitors each month.

Pinterest, Inc. ("Pinterest") is an online catalog of ideas. Every month, more than 100 million people around the world use Pinterest to find and save creative ideas and inspiration. Users can create "Pins" or visual bookmarks to other content on the Internet on topics ranging from cooking and parenting, to style and travel.

Reddit, Inc. ("Reddit") is the front page of the Internet. Anyone can create a community on Reddit about any topic and each community is independently moderated by volunteer users. Community members share content including, stories, links, and images. The Reddit

community can comment on content submitted and votes on the submissions and resulting discussions by casting upvotes or downvotes.

Like Yelp, amici are online service providers with an interest in encouraging robust expression in their online communities. Amici are concerned that the Court of Appeal's decision threatens this expression by providing a means for those who disagree with speech to force online service providers to remove that speech, even when that speech doesn't appear to be defamatory.¹ Amici are also concerned that, by forcing a non-party service provider to remove content, the Court of Appeal's decision infringed on Yelp's First Amendment right to develop its own editorial policies and cultivate a community, and did so without giving Yelp an opportunity to be heard.

Why Supreme Court Review is Critical

Here, plaintiff was allowed to obtain an order to force a non-party, online service provider, Yelp, to erase from the Internet speech that the plaintiff did not like. The decision violates Yelp's First Amendment and Due Process rights and the mandate from Congress not to treat service providers like Yelp as publishers or speakers of their users' speech. Even more troubling, the order issued without an adversarial proceeding or participation by parties who might oppose the ordered removal.

People use the Internet to express all manner of viewpoints and perspectives. Amici's platforms, like Yelp's, have helped foster this country's tradition of free speech and robust debate by bringing it online and making it more accessible. Viewpoints expressed online might sometimes be critical or unpopular, but they are still lawful, valuable, and protected by the free speech ideal embodied by the First Amendment. Individuals who express themselves online are exercising important rights guaranteed in our Constitution, even when they say things others might disagree with. In instances where those who disagree with statements online attempt to silence speakers by filing lawsuits, the speakers often do not have the resources to contest defamation claims. Thus, to protect the free speech rights of users, service providers often require that procedural and substantive safeguards to free speech be met before removing content. This practice ensures that complained-of content is actually found unlawful before it is removed, and minimizes the chilling effect on speech that would occur if providers were simply to remove all the content that anyone found objectionable. It is also consistent with the exercise of service providers' own First Amendment rights to distribute and curate content, and to cultivate the editorial policies that best serve their sites and their communities.

¹ Like Yelp, amici each have their own content policies for their services, which prohibit, among other things, illegal content. *See, e.g.*, Pinterest's Acceptable Use Policy (<https://about.pinterest.com/en/acceptable-use-policy>); Reddit's Content Policy (<https://www.reddit.com/help/contentpolicy/>); and WordPress.com's Terms of Service (<https://en.wordpress.com/tos/>).

The Court of Appeal's decision here disrupts this equilibrium and threatens the marketplace for free speech that the Internet is today. Indeed, the Court of Appeal effectively outlined a roadmap for defamation litigation abuse: obtain uncontested default judgments against individuals who may not have the means to defend themselves or who may not realize the implications of the lawsuit, and then enforce those judgments against service providers who may be in a position to protect user's rights but have no means do to so under the Court of Appeal's decision. In doing so, the decision disturbs well-settled law and eviscerates the protections of due process, the First Amendment, and the CDA. The Supreme Court should grant review and reverse this decision to make clear that California law, the constitutional rights of due process and free speech, and federal law prohibit the process that the Court of Appeal sanctioned.

First, allowing the injunction to run against Yelp contravenes long-standing California law precluding the application of a judgment against a non-party. *See Estate of Buchman*, 123 Cal. App. 2d 546, 559 (1954) ("The fundamental conception of a court of justice is condemnation only after notice and hearing."). Although there are exceptions to this rule, they have never been stretched to apply to a non-party website like Yelp, who had no notice and opportunity to be heard and whose only relationship to the controversy was providing the neutral platform where the defendant happened to publish the statements at issue. *See Ross v. Superior Court*, 19 Cal.3d 899, 907 (1977) (holding that an injunction may run only to classes of persons through whom the enjoined person may act such as agents, servants, employees, aiders, and abettors); *see also Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13 (1945). Due process is necessary to ensure that those who might be impacted by a decision are afforded the opportunity to assert their interests in a given controversy, and to provide a court the opportunity to view all sides to a dispute. Here, because Yelp was not a party to the underlying uncontested proceedings but the Court nonetheless found the judgment binding on Yelp, Yelp has no means to exercise its right to challenge the accusations made by plaintiff, or protect its interest in ensuring that critical, truthful reviews and opinions are not squelched by businesses who would prefer that others not see them.

Second, in forcing Yelp to remove content from its website, the Court of Appeal ignored Yelp's First Amendment right to develop its own editorial policies, distribute communications, and curate content. *See Marcus v. Search Warrants*, 367 U.S. 717 (1961). The finding that Yelp was "an administrator of a forum," rather than a distributor of content entitled to First Amendment protection, lacks support. Nor is there precedent for the conclusion that forum administrators are not entitled to free speech protection under the First Amendment. To the contrary, the U.S. Supreme Court has held that transmitting "communications of others" "plainly implicate[s] First Amendment interests," *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986), because it is a "communicative act[]," *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). *See also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (finding "no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet).

Third, in upholding a removal order against Yelp for a user's speech, the Court of Appeal ignored the plain language of the CDA, which Congress enacted to encourage online speech to flourish, and to allow online providers to operate without fear of liability for hosting others' speech. *See Barret v. Rosenthal*, 40 Cal.4th 33, 44 (2006) (citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 331-333 (4th Cir. 1997)). "[B]y its plain language, § 230 creates a federal immunity to *any* cause of action that would make service providers liable for information originating with a third-party user of the service." *Kathleen R. v. City of Liverpool*, 87 Cal. App. 4th 684 (2001). The Court of Appeal, however, used Yelp's non-party status as an end-run on the CDA. It reasoned that because the CDA prohibits only imposing state law "liability," the CDA applies only when a party is sued directly for publishing content. Thus, because Yelp was not a party, it was not subject to "liability," and not entitled to CDA immunity. This is inconsistent with prior authority and, respectfully, wrong. Entities like Yelp may still face contempt proceedings for not complying with removal orders like the one issued here. But the CDA expressly provides that "no liability may be imposed under any State or local law that is inconsistent with" [the CDA]. *See* 47 U.S.C. § 230(e)(3). The decision conflicts with the plain language of the CDA and should be reversed.

Finally, the Court of Appeal's sweeping re-interpretations should be rejected as a matter of policy and practicality. Defamation litigants have a way to remove defamatory content from websites: require the individual who posted it to remove it.² Permitting litigants to directly enjoin service providers from hosting third-party content unduly burdens service providers by exposing them to untold numbers of private disputes. Further, it unfairly tilts the playing field against non-party service providers and their users by allowing plaintiffs to force them to erase online content, including where there is no adversarial procedure to establish that the content is in fact defamatory, or that the individual who the plaintiff says posted the content actually did so.

For these reasons, amici urge this Court to grant Yelp's petition for review and correct the errors in the Court of Appeal's decision to protect the First Amendment and Due Process rights of online service providers such as Yelp, and ensure that the protections Congress granted to service providers in the CDA remain intact.

Very truly yours,



James G. Snell
Perkins Coie LLP
Attorneys for Automattic Inc., Pinterest, Inc., and Reddit, Inc.

² Amici, like Yelp, permit users to take down content they have posted to their sites.

PROOF OF SERVICE

I, Diane G. Lizardo, declare:

I am a citizen of the United States and employed in Santa Clara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3150 Porter Drive, Palo Alto, California 94304-1212. On August 15, 2016, I served a copy of the within document(s):

LETTER OF SUPPORT

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Palo Alto, California addressed as set forth below.

- Based on the California rules, by transmitting via e-mail or electronic transmission the document(s) listed above from this email address, dlizardo@perkinscoie.com.

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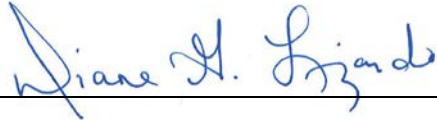
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 15, 2016, at Palo Alto, California.

A handwritten signature in blue ink that reads "Diane G. Lizardo". The signature is written in a cursive style and is positioned above a horizontal line.

Diane G. Lizardo