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August 10, 2016

Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102

Re: *Hassell v. Bird*, Case No. S235968

Application for Leave to File Letter Brief and Letter Brief of *Amici Curiae* in Support of Yelp Inc.'s Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Reporters Committee for Freedom of the Press and 30 other media organizations described below (hereinafter “*amici*”) respectfully request that this Court grant leave to file this Letter Brief of *Amici Curiae* in Support of Yelp Inc.’s (“Yelp”) Petition for Review. The Court of Appeal’s decision presents an issue that could have serious repercussions for freedom of the press in California by giving courts the ability to issue injunctions requiring a nonparty to remove online speech without notice. The decision also conflicts with the broad immunity from liability afforded interactive service providers regarding third-party content under Section 230 of the Communications Decency Act, 47 U.S.C. § 230 (“Section 230”). By allowing a plaintiff to remedy defamation by forcing a third-party service provider to remove online content it hosts, the Court of Appeal’s decision grants plaintiffs a broad — and troublesome — power to censor online expression.

The decision below, if allowed to stand, would greatly affect online discussion forums. Those who take the time and spend the resources to create and develop a forum for conversation have an interest in its integrity. While they are not the publishers of the content found there, their forums create communities of common or even opposing interests and a platform for the free exchange of thoughts and ideas that merits protection from censorship. The remedy for tortious speech lies in an action against the speaker. An individual commenter may well choose to remove information he or she has posted in an online forum, and may even do so as a settlement of a libel suit. But a court order requiring the forum itself to censor part of the speech it hosts without any opportunity to challenge the order, and without apparent regard for the harms caused by prior restraints of speech, should not be tolerated without careful review by this Court of the free speech interests at stake.

Because this Court's consideration of the Petition for Review could be informed by a discussion of the implications of the Court of Appeal's decision on the news media, *amici* request leave to file this letter brief in support of Yelp's Petition.

No party or counsel for any party, other than counsel for *amici*, has authored this letter in whole or in part or funded the preparation of this letter.

Interest of *Amici*

The Reporters Committee is an unincorporated nonprofit association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and freedom of information litigation since 1970.

In addition to the Reporters Committee, the *amicus* parties are: American Society of News Editors, AOL Inc. - The Huffington Post, Association of Alternative Newsmedia, Association of American Publishers, Inc., BuzzFeed, California Newspaper Publishers Association, Californians Aware, The Center for Investigative Reporting, First Amendment Coalition, First Look Media Works, Inc., Fox News Network LLC, Freedom of the Press Foundation, Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The McClatchy Company, owners of The Sacramento Bee, The Fresno Bee, The Modesto Bee, Merced Sun-Star, and The (San Luis Obispo) Tribune, The Media Institute, Media Law Resource Center, MPA – The Association of Magazine Media, National Press Photographers Association, The New York Times Company, The News Guild - CWA, Newspaper Association of America, Radio Television Digital News Association, Tully Center for Free Speech. Each is described more fully in Appendix A.

***Amici's* Interest in this Petition for Review**

Amici seek leave to file this Letter Brief because of the significant free press issues presented by the Court of Appeal's decision in *Hassell v. Bird*. The Court of Appeal found that Yelp, a nonparty to the original suit, could be subject to an injunction requiring the removal of content posted by one of its users, undermining the constitutional guarantee of due process and the statutory protections of Section 230. However, the consequences of this decision extend beyond Yelp. Online publishers that provide a platform for third-party content, including Internet news websites, have a substantial stake in maintaining vibrant forums for communication without court interference. Members of the public, who regularly make decisions based on information shared through online forums, also have a vested interest in receiving unfiltered information disseminated through online service providers. If courts are allowed to order online intermediaries to remove third-party speech, the diversity of online expression critical to the First Amendment will be reduced, and the ability of *amici* to maintain online forums free of censorship will be curtailed.

Discussion

I. The Court of Appeal failed to recognize that Section 230 immunizes online service providers from injunctions.

The Court of Appeal's decision undercuts the strength of Section 230 and the vibrant nature of the Internet envisioned by Congress. Congress enacted Section 230 "to promote the continued development of the Internet" and "to preserve the vibrant and competitive free market" of the Internet. 47 U.S.C. § 230(b)(1), (2). Section 230 prohibits courts from treating a provider of an "interactive computer service" as the "publisher or speaker of any information provided by another information content provider" and mandates that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(c)(1); 47 U.S.C. § 230(e)(3). Since 1996, courts have understood these provisions to broadly immunize online service providers from tort claims based on third-party content. *See Barrett v. Rosenthal*, 40 Cal.4th 33 (2006); *Kathleen R. v. City of Liverpool*, 87 Cal.App.4th 684 (2001); *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816 (2002); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12 (1st Cir. 2007); *Jones v. Dirty World Entm't Recordings*, 755 F.3d 398 (6th Cir. 2014).

In finding the protections of Section 230 do not apply to Yelp, the Court of Appeal maintained that Yelp does not face "liability" by being subject to an injunction. Op. at 30 ("If an injunction is itself a form of liability, that liability was imposed on Bird, not Yelp"). However, this finding contravenes other courts that have found that an injunction does, indeed, constitute "liability." Courts have determined that Section 230 gives immunity from injunctions requiring the removal of content. *See Kathleen R. v. City of Liverpool*, 87 Cal.App.4th 684, 698 (2001) ("... claims for declaratory and injunctive relief are no less causes of action than tort claims for damages, and thus fall squarely within the section 230(e)(3) prohibition."); *Giodano v. Romeo*, 76 So.3d 1100, 1102 (affirming the dissolution of an injunction against a service provider for the conduct of a third-party user under Section 230); *Medytox Solutions, Inc. v. Investorshub.com, Inc.*, 152 So.3d 727, 731 (Fla. Dist. Ct. App. 2014) ("An action to force a website to remove content on the sole basis that the content is defamatory is necessarily treating the website as a publisher, and is therefore inconsistent with section 230."). These cases demonstrate that an injunction brought against a service provider that is a party to the initial lawsuit will be invalid.

The precise factual circumstances at issue in the present case, however, are different than the above cases. Here, a *nonparty* service provider — rather than a service provider made a party to the initial lawsuit — faced an injunction. The novel nature of the Court of Appeal's order in light of this procedural posture underscores the need for this Court's review.

While this is an issue of first impression in this State, one federal district court has addressed a similar question. In *Blockowicz v. Williams*, 675 F.Supp.2d 912 (N.D. Ill. 2009), *aff'd* 630 F.3d 563 (7th Cir. 2010), the district court applying Section 230 found

that an injunction is also invalid against a nonparty service provider. The district court in *Blockowicz* denied the enforcement of an injunction against Xcentric, a nonparty service provider, after the plaintiff obtained a default judgment, because of the “tenuous connection” between the defendant and Xcentric. *Id.* at 916. The district court rejected the plaintiff’s argument that Xcentric “aided and abetted” the defendant because there was no evidence of contact between Xcentric and the defendant outside of a Terms of Service. *Id.* Here, too, Yelp did not “aid and abet” defendant Bird. Yelp merely hosted Bird’s third-party content. The only contact between Yelp and Bird was a Terms of Service. The decision of the district court in *Blockowicz* highlights the error in the Court of Appeal’s decision below and the need for this Court to review that decision.

II. An injunction restraining speech of a nonparty is an improper remedy for a defamation action.

Permanent injunctions on speech function as prior restraints because they restrict future speech. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) (“ . . . permanent injunctions—i.e. court orders that actually forbid speech activities—are classic examples of prior restraints”). Prior restraints against speech are “the most serious and the least tolerable infringement on First Amendment rights” and any prior restraint comes “bearing a heavy presumption against its constitutional validity.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976); *Bantam Books, Inc v. Sullivan*, 372 U.S. 58, 70 (1963). Injunctions make the publication of particular speech punishable by contempt. *See Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) (“ . . . the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter . . . and further publication is made punishable as a contempt. This is of the essence of censorship.”).

Given these First Amendment considerations, the traditional rule in the defamation context is that “equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages.” *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 606 (7th Cir. 2007); *see also Comm. for Creative Non-Violence v. Pierce*, 814 F.2d 663 (D.C. Cir. 1987); *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991); *Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014). These cases make clear that plaintiffs must use actions for damages, not injunctions, when seeking redress from defamation.

Under the guidance of these cases, the injunction against Yelp rests on constitutionally questionable grounds because Hassell is attempting to forbid future speech instead of merely asking for damages. An injunction against a third-party intermediary bears the hallmarks of a prior restraint — it prohibits future speech and imposes a penalty for contempt for violating that prohibition. Such orders threaten the continued publication of speech online and run counter to the traditional rule, mandated by First Amendment sensitivities, that the appropriate remedy for defamation is damages. Accordingly, this Court should review this case to address the standards for imposing a prior restraint against a nonparty.

III. The lower courts improperly required a content distributor to remove speech before allowing an opportunity to be heard.

In requiring Yelp to remove one of its user's comments without notice, the lower courts failed to provide Yelp, a distributor of online content, an opportunity to object.

This decision is inconsistent with U.S. Supreme Court doctrine requiring an adversarial hearing before the government can, even in the context of obscene materials — which do not have the constitutional protections of traditional speech — demand removal of speech from the marketplace of ideas. The U.S. Supreme Court has determined that distributors of First Amendment content have the right to an adversarial hearing where it can challenge the alleged illegality of the speech *prior* to the government seizing the speech at issue. See *Marcus v. Search Warrants*, 367 U.S. 717, 731 (1961) (finding the seizure of alleged obscene material from a distributor of books and magazines without a judicial determination of the constitutionality of the speech lacked safeguards to ensure due process); *Quantity of Books v. Kansas*, 378 U.S. 205, 210 (1964) (determining that due process required a distributor of books to receive an adversarial hearing before alleged obscene materials were seized); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 637 (1968) (reversing the prosecution of a distributor of alleged obscene films before a proper judicial determination).

These cases, although arising in the context of obscenity rather than defamation, are analogous in some ways to *Hassell*. In the above cases, the U.S. Supreme Court found that the seizure of books and films demanded stringent due process considerations. See *Quantity of Books*, 378 U.S. at 210. The act of seizing books and films takes them out of the marketplace of ideas. The removal order in this case functions similarly. By demanding Yelp erase the posts at issue, the court is essentially seizing the speech from circulation without an opportunity for Yelp to contest the constitutionality of the speech — precisely what the Court warned against in *Marcus*, *Quantity of Books*, and *Lee Art Theatre*. Because of the difficulties in determining protected versus unprotected speech, state regulation of defamation, like regulation of obscenity, must “conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated . . . only by a dim and uncertain line.” *Quantity of Books*, 378 U.S. at 210 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 56, 66 (1963)).

Just as the Court found that book and film distributors deserved an adversarial hearing, Yelp, a distributor of online speech, should have received notice and an opportunity to contest the defamatory nature of the posts at issue. Accordingly, this Court should review this case in order to address the interests a service provider has in managing and defending the content of its forum.

Conclusion

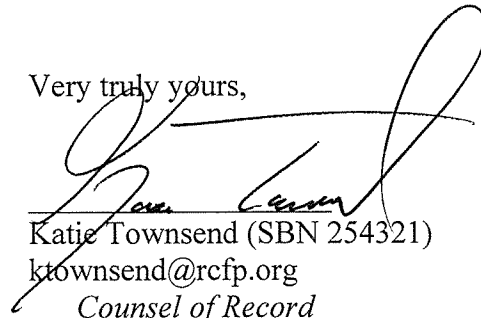
Amici stress the need for this Court to review the opinion of the Court of Appeal because of its potential influence on future litigation and the vigorous nature of Internet speech. The Court of Appeal allowed *Hassell* to sue a user of an Internet forum, obtain a

default judgment, and then enjoin the nonparty host of that forum. In endorsing this strategy, the Court of Appeal sanctioned the evasion of procedural safeguards and established statutory defenses, a decision that will unfairly burden Internet news websites maintaining communications forums.

This Court should review this case because allowing the Court of Appeal's decision to stand would run afoul of constitutional and statutory principles protecting online publishers and would create a dangerous incongruity in the law.

DATED: August 10, 2016

Very truly yours,



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Counsel of Record

Bruce D. Brown*

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Michael J. Lambert*

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**Of counsel*

Appendix A: Description of Amici

With some 500 members, American Society of News Editors (“ASNE”) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

AOL is a media technology company with a mission to connect consumers and creators through open marketplaces. AOL uses data to disrupt content production, distribution and monetization. The company connects publishers with advertisers across its global, programmatic platforms, tapping into Microsoft inventory and original content brands like TechCrunch, The Huffington Post and MAKERS which reach over 500 million monthly global consumers. Within its mobile advertising network alone, AOL has a reach of roughly 800 million users. A subsidiary of Verizon, AOL is shaping the digital future.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The Association of American Publishers, Inc. (“AAP”) is the national trade association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million.

The California Newspaper Publishers Association (“CNPA”) is a nonprofit trade association representing the interests of over 1300 daily, weekly and student newspapers and newspaper websites throughout California.

Californians Aware is a nonpartisan nonprofit corporation organized under the laws of California and eligible for tax exempt contributions as a 501(c)(3) charity pursuant to the Internal Revenue Code. Its mission is to foster the improvement of, compliance with and public understanding and use of, the California Public Records Act and other guarantees

of the public's rights to find out what citizens need to know to be truly self-governing, and to share what they know and believe without fear or loss.

The Center for Investigative Reporting (CIR) believes journalism that moves citizens to action is an essential pillar of democracy. Since 1977, CIR has relentlessly pursued and revealed injustices that otherwise would remain hidden from the public eye. Today, we're upholding this legacy and looking forward, working at the forefront of journalistic innovation to produce important stories that make a difference and engage you, our audience, across the aisle, coast to coast and worldwide.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Fox News Network LLC ("Fox News") owns and operates the Fox News Channel, the top rated 24/7 all news national cable channel, and the Fox Business Network, as well as Foxnews.com, Foxbusiness.com, and the Fox News Radio Network.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

Gannett Co., Inc. is an international news and information company that publishes 108 daily newspapers in the United States and Guam, including USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of more than 8 million readers and the digital and mobile products associated with the company's publications serve online content to more than 100 million unique visitors each month.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

Los Angeles Times Communications LLC publishes the Los Angeles Times, the largest metropolitan daily newspaper in the country. The Los Angeles Times operates the website www.latimes.com, a leading source of national and international news.

The Sacramento Bee, The Fresno Bee, The Modesto Bee, Merced Sun-Star, and The (San Luis Obispo) Tribune are owned by The McClatchy Company. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

The Media Institute is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The Media Law Resource Center, Inc. (“MLRC”) is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

MPA – The Association of Magazine Media, (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York Times Company is the publisher of The New York Times and The International Times, and operates the news website nytimes.com.

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America’s largest communications and media union, representing over 700,000 men and women in both private and public sectors.

Newspaper Association of America (“NAA”) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today’s newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

Radio Television Digital News Association (“RTDNA”) is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University’s S.I. Newhouse School of Public Communications, one of the nation’s premier schools of mass communications.

Proof of Service

I, Katie Townsend, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in Washington, D.C., by the Reporters Committee for Freedom of the Press, at whose direction service was made and from where this mailing occurs. I am over the age of eighteen (18) years and not a party to or interested in the within-entitled action. My business address is 1156 15th St. NW, Suite 1250, Washington, D.C. On August 10, 2016, I served the foregoing document:

Application for Leave to File Amicus Letter Brief and Amicus Letter Brief in Support of Appellant Yelp Inc.'s Petition for Review

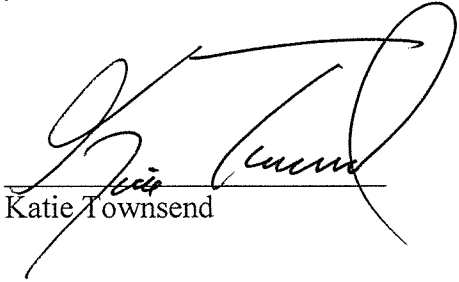
on the interested parties in this action as follows:

Thomas R. Burke Rochelle L. Wilcox Davis Wright Tremaine LLP 505 Montgomery Street, Suite 800 San Francisco, CA 94111-6533 Aaron Schur 140 New Montgomery Street San Francisco, CA 94105	<i>Counsel for Yelp Inc.</i>
Monique Olivier Duckworth Peters Lebowitz Olivier LLP 100 Bush Street, Suite 1800 San Francisco, CA 94104	<i>Counsel for Dawn Hassell, et al.</i>
Clerk, Honorable Ernest Goldsmith Dept. 302 San Francisco Superior Court Civil Center Courthouse 400 McAllister St. San Francisco, CA 94102-4514	<i>Superior Court of San Francisco, Case No. CGC-13-530525</i>
Clerk, Court of Appeal of the State of California First Appellate District, Division Four 350 McAllister St. San Francisco, CA 94102	<i>Court of Appeal of the State of California, Case No. A143233</i>

X **BY UNITED STATES MAIL:** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above. I placed the envelope for collection and mailing, following our ordinary business practices, on August 10, 2016.

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

Executed on the 10th of August 2016, at Washington, D.C.



Katie Townsend