No. S235968

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

DAWN HASSELL, et al.
Plaintiffs and Respondents,

v.

AVA BIRD,
Defendant,

YELP, INC,
Appellant.

On Review from the Court of Appeal
for the First Appellate District,
Division One, 1st Civil No. A143233
After an Appeal from the
Superior Court for the State of California,
County of San Francisco, Case Number CGC-13-530525,
Hon. Ernest H. Goldsmith

APPLICATION TO FILE AMICI CURIAE BRIEF, AND BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AND FLOOR64, INC., IN SUPPORT OF APPELLANT

Of counsel:

Paul Alan Levy
Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009-1001
(202) 588-1000

JUELSGAARD INTELLECTUAL PROPERTY
AND INNOVATION CLINIC
Mills Legal Clinic at Stanford Law School
Phillip R. Malone (CA Bar No. 163969)
Jef Pearlman (CA Bar No. 254759)
Daniel Chao (CA Bar Student Cert. No. 42461)
Erica Sollazzo (CA Bar Student Cert. No. 40030)
Crown Quadrangle, 559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 724-1900
Facsimile: (650) 725-0253

Attorneys for Amici Curiae

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Attorneys for Amici Curiae

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APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT YELP

Pursuant to California Rule of Court 8.520(f), Public Citizen, Inc., and Floor64, Inc., respectfully seek permission to file the accompanying amici curiae brief in support of appellant Yelp.

Public Citizen, Inc., is a non-profit consumer advocacy organization based in Washington, D.C. with members and supporters nationwide. Since its founding in 1971, Public Citizen has encouraged public participation in civic affairs, and its lawyers have brought and defended numerous cases involving the First Amendment rights of citizens who participate in public debates. Public Citizen, *Internet Free Speech*, http://citizen.org/Page.aspx?pid=396 (last visited Apr. 14, 2017). Its attorneys' experience representing consumers who criticize companies and politicians has persuaded Public Citizen that the broad discretion afforded interactive website operators best preserves consumers' right to criticize; Public Citizen attorneys have represented the operators of several consumer-oriented websites in opposing litigation seeking to circumvent their immunity under § 230 of the Communications Decency Act, 47 U.S.C. § 230.

Public Citizen also hosts blogs, such as *CitizenVox*, http://www.citizenvox.org, that allow viewers to post comments. It has occasionally faced demands to comply with default judgments ruling that comments had been posted in violation of someone's rights. Consequently, Public Citizen has an interest in the case on that basis as well.

Public Citizen's familiarity with the free speech principles at issue, and with § 230 jurisprudence generally, may be of assistance to this Court in determining whether § 230 forbids the injunction issued against Yelp. In particular, this brief explains that § 230 prevents plaintiffs from seeking to enforce an injunction against an interactive computer service (ICS) provider based on its publishing activities and that accepting the plaintiff's theory in this case would undermine congressional objectives in enacting the statute. The brief also explains that accepting plaintiff Hassell's theory would enable plaintiffs to employ various unscrupulous tactics to circumvent the protections of § 230.

Amicus curiae Floor64, Inc., is a corporation that publishes the online news site Techdirt.com, which hosts commentary and

debate on a variety of topics, some of which are contentious. Since its founding in 1997, Techdirt has published over 60,000 articles, which have attracted more than one million comments—third-party speech that advances discovery and discussion of these topics. Techdirt frequently covers issues related to free speech online and writes about attempts to stifle that speech, including discussions of intermediary liability and § 230.

In addition, Techdirt has received numerous demands to have certain comments removed from its forums and discussions. Because robust discussion within its comment section provides a vital outlet for its readers that advances its own analysis, Techdirt depends on strong § 230 protection, and it has regularly pushed back on inappropriate or overzealous attempts to delete criticism or speech someone dislikes. This brief explains how affirmance of the judgement below endangers free speech on sites like Techdirt, and it lays out some ways in which such sites respond to default judgments against their commenters.

No party or counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than

Public Citizen, Floor64, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

In 2013, Hassell and her law firm sued Bird, alleging that Bird posted defamatory reviews on Yelp. Hassell obtained a default judgment against Bird in an uncontested default hearing, but she never tried to enforce the default judgment against Bird; instead, she seeks to force Yelp, a non-party, to remove the content in question with an *ex parte* injunction. In doing so, Hassell attempts to circumvent protection granted by § 230 of the Communications Decency Act, which immunizes Yelp from liability for its users' reviews. Hassell brushes § 230 aside on the dubious theory that Yelp does not face liability as a speaker or publisher of third-party speech.

Hassell's theory vitiates the important protection that § 230 provides for online free speech, and the Court of Appeal's decision is at odds with decisions in other jurisdictions, including the Ninth Circuit. The Court should reverse that ruling.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Amici begin with a brief summary of the facts and proceedings below because their emphasis is different from those of the parties, and the difference in emphasis bears on Amici's legal arguments.

On January 28, 2013, a Yelp user, apparently defendant Ava Bird, posted a critical review on the Yelp page of a Bay Area lawyer, plaintiff Dawn Hassell. Bird complained that Hassell had served her poorly in a potential personal injury case and that Hassell had failed to communicate with her. Two subsequent reviews, allegedly also authored by defendant Bird, also criticized Hassell. On April 10, 2013, Hassell and her law firm sued Bird, alleging that the reviews were defamatory. The complaint was served at the address where Bird lived during the short period when Bird was Hassell's client; however, the proof of service submitted to the trial court suggested that the recipient of the summons indicated that Bird had moved before service was attempted. A026. When Bird did not respond to the complaint, Hassell obtained a default, then moved for a default judgment. That motion was granted on January 14, 2014. The final paragraph of that order purported to compel "Yelp.com" to remove "all reviews posted by AVA BIRD under user names 'Birdzeye B.' and 'J.D.' attached hereto as Exhibit A and any subsequent comments of these reviewers within 7 business days of the date of the court's order."

Hassell admitted below that the original objective of her lawsuit was to force the removal of Bird's derogatory review from Yelp's webpage. A051. After the lawsuit was filed, her counsel notified Yelp of its filing and asked Yelp to remove the review voluntarily. A601-602. However, Hassell did not name Yelp as a defendant in the litigation, nor did she indicate to the court that she would be seeking an order compelling Yelp to take down the reviews. And Hassell did not notify Yelp, in the course of the default judgment proceedings, that she was seeking relief against Yelp. Hassell acknowledged below that she expected Bird to ignore any injunction, and that she sought default relief against Yelp for that reason. A658. She offered no explanation for seeking such relief without notifying Yelp about her motion and without naming it as a defendant.

Hassell caused the default judgment order to be served on Yelp's registered agent on January 28, 2014, the very expiration date of the statute of limitations for suing Yelp on the theory that the January 28, 2013 review was defamatory. On April 30, 2014, Hassell informed Yelp that she planned to ask the court to "enforce" the paragraph of the default judgment order directed to

Yelp. A055. Yelp responded by filing a motion to vacate the order. However, the trial judge held that, by attempting to vacate the order against it, Yelp had improperly allied itself with Bird and hence could properly be ordered to comply as an aider and abettor of Bird's failure to comply with the removal order. The court did not explain how actions Yelp took after it was first enjoined in the January order could have supported its original grant of a default judgment compelling Yelp to take action.

Yelp appealed, arguing that (1) the order compelling Bird to remove the reviews could not be applied to Yelp, a non-party, as a matter of California law; (2) applying the order to Yelp violated both the First Amendment rule against prior restraints (because there had never been an adversary proceeding in which Bird's statements were found to be false and defamatory) and the Due Process Clause (because the only finding of falsity was made against Bird in a default judgment proceeding of which Yelp had no notice and, therefore, in which it had no chance to participate); and (3) issuance of the removal order against Yelp violated § 230 because Yelp is an ICS provider and the injunction effectively treated Yelp as a speaker or publisher of content provided by

another, which § 230 forbids. The Court of Appeals rejected all of these arguments. With respect to § 230, the court held that § 230 does not limit the issuance of injunctive relief against websites that carry content from third parties who have, themselves, been ordered to remove the content.

ARGUMENT

I. Section 230 Immunizes Interactive Computer Service Providers Like Yelp Both from Monetary Damages and from Being Compelled to Remove Content Posted by Their Users.

Section 230 of the Communications Decency Act creates a large sphere of immunity for ICS providers in order to "preserve the vibrant and competitive free market" for ideas that exists on the Internet. 47 U.S.C. § 230(b)(2). Section 230(c)(1) states:

> No 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.

And § 230(e)(3) provides:

> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

These provisions immunize web hosts from tort claims based on materials placed on their sites by third persons. *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003); *Barrett v. Rosenthal*, 146

P.3d 510 (Cal. 2006). Acceptance of this approach has become "near-universal." *Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12, 18-19 (1st Cir. 2016); *Jones v. Dirty World Entm't Recordings*, 755 F.3d 398, 406 (6th Cir. 2014) (citing cases); *Universal Commc'ns Sys. v. Lycos*, 478 F.3d 413 (1st Cir. 2007).

Section 230 precludes injunctive relief as well as damages. Indeed, cases dismissed pursuant to § 230 often involve claims for both injunctive relief and monetary damages. *See, e.g.*, *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 983 (10th Cir. 2000); *Green v. Am. Online*, 318 F.3d 465, 708 (3d Cir. 2003); *Smith v. Intercosmos Media Grp., Inc.*, No. CIV.A. 02-1964, 2002 WL 31844907 (E.D. La. 2002). Courts have recognized that an ICS provider is no less treated as the "publisher . . . of . . . information provided by another," 47 U.S.C. § 230(c)(1), when the plaintiff seeks only injunctive relief. In *Noah v. AOL Time Warner*, 261 F. Supp. 532 (E.D. Va. 2003), for example, the court roundly rejected the plaintiff's argument that § 230 did not apply to claims for injunctive relief. It held that "given that the purpose of § 230 is to shield service providers from legal responsibility from the statements of third parties, § 230 should not be read to

permit claims that request only injunctive relief." *Id.* at 540. The court recognized that an injunction will be "at least as burdensome" to the service provider as damages and is "typically more intrusive." *Id.*

Moreover, § 230(e)(3) forbids a "cause of action" from being "brought" against an ICS provider, making the operator immune from both suit and liability. The United States Court of Appeals for the Ninth Circuit has repeatedly treated § 230 as providing immunity from suit and not just from liability. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003).

Nor does § 230 permit plaintiffs to circumvent its protections by seeking to enforce an injunction directly against an ICS provider, when that injunction could issue only because the provider was not named as a party below. The Court of Appeal suggested that the injunction issued against Yelp does not violate § 230 because "it does not impose any liability on Yelp." Op. 28. But any liability that would flow out of contempt proceedings if Yelp fails to comply with the injunction is still liability premised on Yelp's activities as a "publisher." Distinguishing these two

forms of liability creates an obvious loophole in § 230 that potential plaintiffs are already beginning to exploit. *See Amicus* Letter of Glassdoor, Inc. 2, Aug. 15, 2016 (noting that Glassdoor has already begun receiving demand letters citing the opinion below). Section 230 should not be so easily sidestepped.

II. Section 230 Plays an Important Role in Protecting Online Content Against a Heckler's Veto and Encouraging Self-Regulation.

Section 230 protects critical First Amendment values. This Court has recognized that without § 230, operators of ICS functions could not provide services that enable members of the public to have their say:

> [S]ervice providers who received notification of a defamatory message would be subject to liability only for maintaining the message, not for removing it. This fact, together with the burdens involved in evaluating the defamatory character of a great number of protested messages, would provide a natural incentive to simply remove messages upon notification, chilling the freedom of Internet speech.
>
> *Barrett v. Rosenthal*, 146 P.3d 510 at 523.

See also Carafano v. Metrosplash.com, 339 F.3d 1119, 1123-24 (9th Cir. 2003). The broad reading given to § 230 by this Court, as well as by the United States Court of Appeals for the Ninth Circuit, has enabled many of the leading companies that offer

interactive computer services to maintain their headquarters in California. *See Amicus* Letter of Github, Inc. 2, Aug. 15, 2016. The broad reading of § 230 also creates a hospitable environment for innovative Internet startups and small businesses, which would otherwise incur large monitoring costs and face the constant threat of litigation.

ICS providers like Yelp cannot realistically police content in advance. Even when particular comments are challenged, operators cannot be expected to devote sufficient lawyer time to evaluate challenged statements and decide whether to remove them or leave them posted. The cost of making intelligent assessments of the risks of litigation, not to mention the cost of participating in the litigation, far outstrips what can be earned from hosting challenged comments. *Chicago Lawyers Comm. v. Craigslist*, 519 F.3d 666, 668-69 (7th Cir. 2008).

The costs are no less if only injunctions are sought. If ICS providers could be subjected to the expense of litigation—wholly apart from the risk of facing damages awards—the result would likely be that as soon as any comment were challenged, the operator would remove it rather than risk being dragged into the

litigation. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); *Barrett v. Rosenthal*, 146 P.3d at 524-25. Thus, without the protection of § 230, online speech would be subject to the heckler's veto: speech would likely be removed just because somebody objected to it, regardless of the merits of the objection.

Notably, only critical speech is targeted for such removal. No one threatens suit over overstated online praise or undeserved online compliments. Section 230 thus protects the marketplace of ideas from consistent removal of one side of the debate and consumers from falsely one-sided portrayals of businesses and individuals that may, indeed, merit criticism. As a result, the powerful immunity provided to ICS providers has become a vital aspect of our system of free speech online.[1] By exploiting a default judgment against Bird to obtain an injunction against Yelp, Hassell bypasses these protections.

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[1] This immunity is so central that when Congress banned libel tourism, preventing the enforcement of foreign defamation judgments in the United States that would run afoul of our constitutional protections, it included protection for ICS providers. 28 U.S.C. § 4102(c).

Instead of forcing ICS providers to remove objectionable material, § 230 tells plaintiffs: pursue the speaker, not the host. If the speaker is found liable, then the court can assess damages or, if the jurisdiction allows injunctions against defamatory speech, order the speaker to use her best efforts to remove the false or defamatory statement. Because Yelp permits its users to remove content once posted, Hassell could have enforced the injunction against Bird. Indeed, because Bird could have complied with the injunction issued against her by removing her review, Hassell could have sought the imposition of a coercive fine, incarceration, or other sanction to induce Bird to take down the review. But there is no indication that Hassell tried to compel Bird to obey the injunction, or that the court insisted such steps be taken. Instead, the court chose to burden Yelp with an injunction—an outcome at odds with the purpose of § 230.

Even if Yelp did not allow users to remove or edit their content once posted—and many reputable sites do not—Section 230 affords it discretion on whether to accommodate a user's request to remove content, even if that request is motivated by a court order. This comports with the congressional

purpose in enacting § 230: to "encourage the growth of the Internet by relieving intermediaries from liability for the content posted by third parties while expressly encouraging them to impose their own content controls." Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. Tech. L. & Pol'y 123, 125 (2010). To deprive Yelp of choice is to subvert this very purpose. Such discretion allows Yelp to consider, for example, whether the defendant consented to a judgment, or whether she failed to oppose its entry because she couldn't afford to defend herself and hoped that the plaintiff would not pursue further litigation.

And just as ICS providers respond in a variety of ways when the content they host is challenged, in Public Citizen's experience they respond in various ways when a default judgment is presented as a reason to remove a hosted comment. Public Citizen itself, which hosts user comments on several of its blogs, has refused to remove critical comments subjected to a default judgment, precisely because of the several default judgments it has seen issued without substantial effort to obtain service. It will, however, respond to a judgment that was issued

against a commenter after an adversary hearing. Public Citizen's recent client Myvesta Foundation, which hosts a website about debt relief, provides in its terms of service that it will typically not remove comments just because a judgment has been issued against one of its users; it prefers to preserve the historical record by retaining the comment along with a public retraction or even an explanation from the original commenter that takes responsibility for engaging in defamation. Public Citizen's former client 800Notes, a reverse directory for telephone numbers used by telemarketers, took the opposite approach: it would remove any comment that had been the subject of a default judgment issued by an American state or federal court. And Amici have observed that Google, which hosts material on such services as YouTube and Blogspot, typically removes content in response to any order issued by an American court that appeared to have proper personal jurisdiction over the defendant.

Preserving ICS provider autonomy in responding to these challenges is crucial. If an injunction were to forbid Yelp from maintaining a certain statement on its website, Yelp would risk being cited for contempt if, for example, somebody else

deliberately posted that statement or a very similar statement on another page of its website. Such a contempt proceeding could lead to additional legal expense to defend the contempt proceedings and even to the imposition of monetary contempt sanctions, including attorney fees. Once faced with the prospect of contempt proceedings, Yelp would have to assess its exposure especially carefully when statements that might violate the injunction are posted to its site. In this way, injunctive proceedings could produce the same problem of the heckler's veto as pre-litigation demands. Section 230 was intended to protect ICS providers like Yelp from that consequence.

III. The Lower Court's Ruling Is Especially Troubling in Light of the Recent Rise of Litigation Strategies Aimed at Circumventing § 230.

Because Hassell's legal theory provides a roadmap for unscrupulous litigants to circumvent § 230, this Court should follow the rulings of courts in other jurisdictions that have consistently refused to enjoin ICS providers that host content whose authors have been ordered to remove the content.

Hassell's litigation strategy did not require meritorious claims against Bird. Moreover, the record below provides reason

to worry about how Hassell obtained the default judgment. Bird was served by delivery of the summons and complaint to her last known address, but she had apparently moved. A026.

Similarly, plaintiffs in other jurisdictions have obtained orders that force online hosts to remove content by a variety of nefarious techniques: colluding with their critics; obtaining default judgments for the express purpose of obtaining relief against third-party hosts; obtaining default judgments without providing any due process to the hosts; and even obtaining fictional consent orders by submitting forged papers in which a fictional defendant admits to defamation and consents to an order actually aimed at the host.

A. Orders Entered for the Admitted Purpose of Circumventing § 230.

In the following cases, plaintiffs filed complaints against their critics but primarily sought an injunction against the ICS provider. They promised no personal adverse consequences for the speaker, took a default judgment, and then made a demand on the ICS provider. This technique would succeed regardless of whether the online criticism consisted of true statements of fact

or constitutionally protected opinions. In each case, the court refused to extend injunctive relief to the ICS provider.

In *Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010), the defendant had posted several vicious attacks against the plaintiffs, his former spouse and her parents. When the defendant did not appear to contest the suit, the plaintiffs asked the trial court to enter a default judgment awarding nominal damages as well as an injunction.[2] After the defendant defied the court order by posting additional comments, the plaintiffs asked the judge to extend the injunction to the host Ripoff Report, which—pursuant to its normal policy in such cases—refused to remove the enjoined criticisms. Xcentric Ventures, the owner of Ripoff Report, appeared to oppose the extension of injunctive relief, invoking its § 230 immunity and arguing that it had not acted in concert with the defamers.

The trial judge would not implement the part of the *ex parte* injunction that contemplated relief against the host. It

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[2] The terms of the injunction required third-party hosts to "make reasonable efforts to ensure the false statements are removed." Permanent Inj. 3, *Blockowicz v. Williams*, No. 09-C-3955 (N.D. Ill. June 10, 2009).

recognized that the plaintiffs were trying to evade § 230 but rested solely on the ground that Rule 65 of the Federal Rules of Civil Procedure forbids injunctions to extend to third parties that are merely hosting enjoined content. *Blockowicz v. Williams*, 675 F. Supp. 2d 912, 915-916 (N.D. Ill. 2009). The Court of Appeals for the Seventh Circuit affirmed the trial judge's refusal because hosting content that a speaker has been ordered to remove is not the sort of action in concert with a defendant that warrants a departure from the normal rule that third parties who have not themselves been held liable cannot be subjected to injunctive relief. *Blockowicz v. Williams*, 630 F.3d at 568.

In *Giordano v. Romeo*, 76 So. 3d 1100, 1101 (Fla. App. 2011), the operator of a drug treatment center sued a former patient who complained about abusive treatment. The plaintiff promised the patient that, if he did not oppose entry of an injunction against continued posting of the criticisms, the plaintiff would not seek any monetary relief. After the defendant asked Ripoff Report to take down his critical review, which it refused to do, the plaintiff moved to extend the injunction to this third party. The trial judge initially granted relief, but then

revoked the order on the ground that it was forbidden by § 230. The Florida Court of Appeals affirmed, holding that Ripoff Report "enjoys complete immunity from any action brought against it as a result of the postings of third party users of its website," and that extending the injunction to it was forbidden even if the postings were defamatory. *Id.* at 1102.

In *Small Justice LLC v. Xcentric Ventures LLC*, No. 13-cv-11701, 2014 WL 1214828, at *1 (D. Mass. Mar. 24, 2014), a lawyer who had been accused of criminal activity in a post on Ripoff Report sued his critic in state court and obtained a default judgment compelling removal of the post. In seeking the default judgment, the lawyer reassured the trial judge that the default judgment would not include damages against the non-appearing alleged defamer; it would only be used to seek relief against the site hosting the content. When Ripoff Report refused to remove the post, the lawyer used the default judgment as a basis for executing on the copyright. The lawyer then sued the ICS provider, alleging both copyright infringement and various state torts and arguing that because the ICS provider was holding itself out as owner of the copyright in the challenged posts, it was

taking responsibility for the content and could be compelled to remove the posts despite § 230. *Id.* at *2. The trial court disagreed, ruling that § 230's immunity forbade compelling the provider to remove the review even in these circumstances.[3] *Id.* at *7.

The decision below is at odds with the rulings of these other courts. These courts have refused to allow unhappy targets of online criticism to compel ICS providers to remove the criticism by first obtaining relief from the speakers, and then demanding that the host comply with orders directed to the speakers.

B. Default Judgments Obtained Without Fair Process.

Public Citizen has also encountered cases where a criticized company obtains a default judgment by going through the motions of serving the speaker but directing the more substantial efforts at the host.[4]

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[3] The issue is now pending in the United States Court of Appeals for the First Circuit, Nos. 15-1506, 16-1085, where the case was argued on April 6, 2017.

[4] The proposed amicus curiae brief of Professor Eugene Volokh identifies scores of cases from the California courts and from elsewhere in the nation in which plaintiffs have used questionable or inappropriate tactics to obtain judgments that

An example of this technique came to light during litigation in which Public Citizen attorneys represented Myvesta Foundation, a company that hosts a blog about the debt relief industry called the "Get Out of Debt Guy" website. Myvesta's principal, Steve Rhode, previously worked in the debt relief industry; he used his blog to share information about the various scams that companies in the industry use to the disadvantage of consumers. The blog accepts communications from consumers and posts them with Rhode's own comments, and it also allows members of the public to comment. As described above, Myvesta's policy is to not remove allegedly defamatory content just because the author expresses remorse and asks that they be removed. Instead, Myvesta prefers that the remorseful author post an apology along with an explanation for the original false posting.

Rhode published a series of articles criticizing Rescue One Financial LLC, a debt relief company based in Irvine, and

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could then be used to get published criticisms of the plaintiffs taken offline. This section and the next section of this brief describe in detail what happened in some such cases in which amici or their counsel were involved.

Financial Rescue LLC, a debt relief company based in Milpitas.[5] Both companies hired the same reputation management company, which arranged to file lawsuits that would secure orders declaring that some comments posted to the articles were defamatory.[6] The reputation manager's first ploy was to hire a law firm to file a lawsuit—not against Myvesta but against an anonymous defendant, identified in the complaint only as "John Doe," based on comments placed on the articles in September 2014 within roughly thirty minutes of each other.[7] *Rescue 1*

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[5] Steve Rhode, *Alleged Former Employee Speaks Out About Rescue One Financial Loan Offers* (Aug. 14, 2012), https://getoutofdebt.org/44980/alleged-former-employee-speaks-out-about-rescue-one-financial-loan-offers; Steve Rhode, *Is Rescue One Financial Hiring People to Lie to Google?* (Apr. 5, 2013), https://getoutofdebt.org/51374/is-rescue-one-financial-hiring-people-to-lie-to-google; Steve Rhode, *Reader Raises Concerns About Financial Rescue, LLC and Success Link Processing, LLC by Consumer* (Mar. 10, 2015), https://getoutofdebt.org/86646/reader-raises-concerns-about-financial-rescue-llc-and-success-link-processing-llc-by-consumer; Steve Rhode, *Rescue One Financial Still Sending Mailers for Loans* (Feb. 17, 2014), https://getoutofdebt.org/62316/rescue-one-financial-still-sending-mailers-loans.

[6] The contract between Rescue One Financial and the reputation manager is posted at http://www.citizen.org/documents/RuddieContract.pdf.

[7] The complaint can be found on the Broward County Court's electronic docket; it is also posted on Public Citizen's website. *See*

Financial LLC v. John Doe, No. CACE-14-024286 (Fla. Cir. Ct. 2014).

The plaintiff's theory was that John Doe had commented on articles on Myvesta's website—although Myvesta itself was not mentioned—and that these comments were false and defamatory. The complaint acknowledged that neither the site's host nor search engines like Google could be sued over the hosted comments. But it alleged that the website and Google were unfairly serving as the "public electronic microphone" for the comments, bringing the false comments to public attention in that "Google electronically republishes the defamatory statements . . . every time a Google.com user searches the plaintiff's name." Compl. ¶¶ 22-24, *Rescue 1 Financial LLC v. John Doe*, No. CACE-14-024286 (Fla. Cir. Ct. 2014). Attempting to support this statement, the complaint included as an exhibit a somewhat blurry copy of the search result, showing that links to

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Verified Complaint for Declaratory Judgment, http://www.citizen.org/documents/Rescue1BrowardCounty.pdf. Amici ask this Court to take judicial notice of this judicial record, and others cited in this brief, pursuant to Section 452(d) of the California Evidence Code.

the articles on which the allegedly defamatory comments had been posted appeared prominently among the search results.

The complaint further alleged that, because the comments had been posted anonymously, it was not possible to identify the poster of the comments, *id.* ¶ 13; consequently, the complaint sought leave to serve the anonymous defendant only by publication, *id.* ¶ 17. The complaint attempted to justify personal jurisdiction in Florida on the ground that the website could be viewed in Florida and that the anonymous commenter could be from Broward County, Florida. *Id.* ¶¶ 13-14.

The complaint contained several false and misleading statements. For example, the Google search results shown in the exhibit (page 38 of the complaint) did not show the allegedly defamatory comments to Internet users who input "Rescue One Financial" as a search string. Rather, the search result provided a link to the articles that contain the criticisms of Rescue One, and Rescue One's lawyer later admitted that the articles (and thus, implicitly, not the comments) were the real target of the litigation. The Google search results contained "search snippets" drawn from the articles themselves, not from the comments.

Furthermore, Internet users would have seen the comments alleged to be defamatory only if they clicked on the search result, read the entire article by scrolling down several screens, and read through the various comments posted to the articles.

Second, the plaintiffs in *Rescue 1 Financial v. Doe* had ways to identify the author of the allegedly defamatory comments. There is a standard mechanism for accomplishing that objective, one that is commonly used in Florida, California, and every other state: the plaintiff can sue the Doe defendant and serve a subpoena on the host of the website, demanding the Internet Protocol address (IP address) from which the comment is posted. *Kinda v. Carpenter*, 203 Cal. Rptr. 3d 183, 188 (Ct. App. 2016). Many jurisdictions demand an evidentiary showing that the case has merit before such discovery is allowed (under a standard that Public Citizen has advocated). The leading California case is *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 240 (Ct. App. 2008). The IP address reveals the Internet Service Provider (ISP) whose services were used to post the comment, and a second subpoena can be issued to the ISP to identify the specific customer who was using the ISP's services to connect to the

website when the comment was posted. That customer can then be identified, named as a defendant, and subjected to a final judgment that includes damages.

However, these subtleties escaped the attention of the court in Broward County. Rescue One's counsel made sure the critical details would not be noticed because, as in this case, no notice was given to Myvesta of the pendency of the litigation or of the effort to obtain an order that would shield consumers from Myvesta's criticisms of Rescue One. Instead, the court allowed service to be effected by publication—in the *Broward County Daily Business Review*—even though there was no reason, other than the complaint's self-serving allegation, to believe that the anonymous commenter was located in South Florida. Mot. for Entry of Default J., *Rescue 1 Financial v. Doe,* No. CACE-14-024286 (Fla. Cir. Ct. 2014). The court then entered the default judgment declaring that the entire articles were false and defamatory. Rescue One submitted the order to Google to obtain the delisting.

A comparable situation arose involving amicus Floor 64, Inc., and its well-known Techdirt blog. Techdirt Home Page,

https://www.techdirt.com (last visited Apr. 13, 2017). Techdirt reported on a lawsuit that the Phi Sigma Sigma sorority filed in 2015 in the Superior Court for King County, Washington. The sorority complained that in 2011, a former member had breached her membership contract and improperly disclosed confidential information by describing on the "Penny Arcade" Internet forum certain "secret rituals," such as the form of a handshake and the way in which officers of the sorority sat and were attired while presiding over meetings. Mike Masnick, *Phi Sigma Sigma Sorority Sues Member for Revealing Secret Handshake on Penny Arcade Forum*, Techdirt (May 8, 2015, 8:24 AM), https://www.techdirt.com/articles/20150507/06320030912/phi-sigma-sigma-sorority-sues-member-revealing-secret-handshake-penny-arcade-forum.shtml.

The complaint alleged that although several websites had voluntarily removed the information in response to cease-and-desist letters from the sorority, Penny Arcade had refused to do so. Accordingly, the suit sought damages and injunctive relief against Penny Arcade's anonymous user. Penny Arcade itself was not identified as a defendant, no doubt because the plaintiff

recognized that § 230 provided it with immunity against such a lawsuit.

The suit was filed in Seattle, not because there was any reason to believe that the Doe defendant was located there, nor because the sorority was located there, but only because the Internet forum was hosted in Seattle. The Washington state court case proceeded, and the plaintiff eventually obtained a subpoena ordering Penny Arcade to provide identifying information about its user. Such information was provided, but it consisted only of an email address that did not itself identify the speaker and that was no longer in active use. Moreover, although Penny Arcade furnished an IP address from which the anonymous user had posted the information, the posting was so old that Time Warner (the ISP) no longer had information about which customer was using that specific IP address at that specific time. Indeed, the plaintiff's papers acknowledged that it knew when it served its subpoena that Time Warner would no longer have useful information. Nevertheless, it sent the subpoena for the apparent purpose of saying it had tried.

The sorority then asked the Superior Court to enter a default judgment on the ground that, even though it had not been able to notify the anonymous defendant of the pending lawsuit against her, such judgment should be entered because the sorority had made a genuine effort to provide such notice. Mot. for Default J. 4, *Phi Sigma Sigma v. Doe*, No. 15-2-10390-3 (Wash. Sup. Ct. Sept. 19, 2016). The motion made no bones about the fact that the default judgment was not sought to secure effective relief against the Doe. Instead, the motion explained that the real purpose of obtaining a default judgment was to enable the sorority's counsel to send Penny Arcade a demand for removal. *Id.* at 5. The motion for a default judgment did not acknowledge that the relief sought was based on speech, nor did it justify why the First Amendment might tolerate injunctive relief without proof against Penny Arcade and, indeed, without even notice to Penny Arcade. The default judgment was entered.

At this point, Penny Arcade removed the anonymous posting, apparently concluding that dealing with the sorority's lawyer was too much trouble to make it worth keeping the post up. The sorority's lawyer then communicated with Techdirt,

pointing to the default judgment and saying that every other website hosting the content had complied with the removal demand. Techdirt, however, refused to comply, reasoning that the default judgment against the anonymous user did not provide a sound legal basis for seeking removal under the circumstances.

The sorority has not taken any steps to domesticate the Seattle default judgment in California or to have it enforced against Techdirt. However, if the decision below is affirmed, Techdirt could be exposed to enforcement of that judgment and contempt proceedings if it resists.

C. Cases of Outright Forgery to Obtain Consent Orders.

In addition to cases of collusion directed at ICS providers and default judgments obtained without fair process, there has been a recent, increasing problem of fraudulent consent orders being submitted for judicial signature. Such a brazen scheme was employed by the reputation manager retained by the two California debt relief companies discussed in the previous section. Following the entry of the default judgment in *Rescue 1 Financial v. Doe*, Google was unwilling to delist the pages specified in the

order presented to it, apparently because the judgment had been obtained by default.

Having failed to accomplish his objective, the reputation manager escalated his tactics by having three new complaints filed—in state court in Baltimore, Maryland; in state court in Pinellas County, Florida; and in federal court in Providence, Rhode Island. Each case identified an individual living near the court in question and who was the alleged author of allegedly defamatory comments posted to articles on the blog. In the two state court proceedings, both filed in 2015, *Smith v. Levin*, 24-C-15-004789 (Md. Cir. Ct. 2015) and *Financial Rescue LLC v. Smith*, No. 15-006119-CI (Fla. Cir. Ct. 2015), the complaints were filed by solo practitioners, who submitted a few days later a proposed consent order signed by the identified Doe defendant.[8] The Rhode Island case, *Smith v. Garcia*, CV 16-144 S, 2017 WL 412722 (D.R.I. Jan. 31, 2017), was filed in 2016 as a pro se complaint; the reputation manager hired a California-based

[8] Like those in *Rescue 1 Financial v. Doe*, the complaint and succeeding papers in *Financial Rescue v. Smith* are available for download on an electronic docket, in this case the docket maintained by the Circuit Court for Pinellas County.

process server to deliver a complaint signed by a pro se plaintiff (the co-CEO of Rescue One Financial), along with a pro se consent order. In each case, the trial judge signed the consent order without giving any notice to the ICS provider that orders were being sought about content posted to the site. The signed orders were then furnished to Google, which promptly removed the articles from its database.

In fact, the consent orders were fictional because the defendants who had supposedly signed the consent orders did not exist. No one with those names could be located at the addresses listed on the consent motions and proposed consent orders; in the *Garcia* case, mail sent to the address listed on the orders was returned as undeliverable. And Smith, the supposed pro se plaintiff in *Smith v. Garcia,* indicated through counsel that he had neither signed the pro se papers nor authorized them to be filed on his behalf. 2017 WL 412722, at *1. The Rhode Island federal judge asked the United States Attorney for that district to initiate an investigation, *id.,* and the reputation manager eventually admitted his responsibility for creating fake orders and agreed to get them lifted. Paul Alan Levy, *Richart Ruddie*

Settles Anti-SLAPP Claims, Makes Restitution; but the Guilty Companies Remain Unpunished, Consumer Law & Policy Blog (Mar. 14, 2017, 3:07 PM), http://pubcit.typepad.com/clpblog/2017//03/richart-ruddie-settles-anti-slapp-claims-makes-restitution-but-the-guilty-companies-remain-unpunishe.html.

None of the fraudulently obtained orders described above was entered by a California court. But this Court cannot take comfort from that fact. The Full Faith and Credit Clause requires California courts to honor judgments rendered by courts in other states. U.S. Const. art. IV, § 1. Thus, if this case establishes that California law allows a web host to be held in contempt for refusing to honor a default judgment entered against one of its users, California courts will have to respect the judgments entered in other states, no matter how suspect. *Elkind v. Byck*, 439 P.2d 316, 320 (Cal. 1968).

Moreover, California courts have not been immune to the sort of chicanery found in courts of other jurisdictions: the very first reports about this stratagem discussed the activities of two California lawyers who were caught creating fake orders to suppress critical material on the "Pissed Consumer" website. Tim

Cushing, *The Latest in Reputation Management: Bogus Defamation Suits from Bogus Companies Against Bogus Defendants*, Techdirt (Mar. 31, 2016, 8:31 AM), https://www.techdirt.com/articles/20160322/10260033981/latest-reputation-management-bogus-defamation-suits-bogus-companies-against-bogus-defendants.shtml.

These examples, and the increasing use, of fraudulent consent orders submitted for judicial signature, further highlight some of the harms that may result if the decision below is allowed to stand.

CONCLUSION

For the foregoing reasons, the judgement below should be reversed.

DATED: April 14, 2017

JUELSGAARD INTELLECTUAL
PROPERTY AND
INNOVATION CLINIC
Mills Legal Clinic
at Stanford Law School

By: _____

PHILLIP R. MALONE
JEF PEARLMAN
DANIEL CHAO
ERICA SOLLAZZO
Attorneys for Amici Curiae

Of counsel:
Paul Alan Levy

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court 8.520(c)(1))

The text of this brief consists of 6295 words as counted by the Microsoft Word word-processing program used to generate this brief, including footnotes but excluding the tables, the cover information required by Rule 8.204(b)(10), this certificate, and the signature block.

Dated: April 14, 2017

Phillip R. Malone (SBN 163969)

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On April 14, 2017, I served true copies of the following document(s) described as **APPLICATION TO FILE AMICI CURIAE BRIEF, AND BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AND FLOOR64, INC., IN SUPPORT OF APPELLANT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Mills Legal Clinic at Stanford Law School for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Stanford, California.

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

Executed on April 14, 2017, at Stanford, California.

Phillip R. Malone

SERVICE LIST

Monique Olivier, Esq.
Duckworth Peters
Lebowitz Olivier LLP
100 Bush Street, Suite 1800
San Francisco, CA 94104
Email: Monigue@dplolaw.com

Attorneys for Plaintiffs and Respondents
Dawn Hassell, et al.

Nitoj Singh, Esq.
Dhillon Law Group Inc.
177 Post Street, Suite 700
San Francisco, CA 94108
Email: nsingh@dhillonsmith.com

Thomas R. Burke
Rochelle L. Wilcox
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533

Aaron Schur
Yelp Inc.
140 New Montgomery Street
San Francisco, CA 94105

Attorneys for Non-Party Appellant
YELP Inc.

Hon. Ernest Goldsmith
Dept. 302
San Francisco Superior Court
Civic Center Courthouse
400 McAllister Street
San Francisco, CA 94102-4514

Case No. CGC-13-530525

Court of Appeal
First Appellate District, Div. Four
350 McAllister Street
San Francisco, CA 94102

Case No. A143233