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

ANSWER TO AMICUS BRIEFS

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Yelp Inc.[1] respectfully submits this Answer to the Amicus Briefs filed in this matter. As Yelp demonstrates below, the Amicus Brief of Erwin Chemerinsky, Valencia Corridor Merchants Association, Derik Lewis, Aaron Morris and Henry Karnilowicz (the "Chemerinsky Amicus Brief" of the "Chemerinsky Amici") gives this Court no reason to affirm the appellate Opinion, and in fact further exposes the many fundamental flaws in that Opinion. For the reasons explained in the Briefs on the Merits and below, Yelp respectfully requests that the Court reverse the decision of the Court of Appeal, and remand this matter with instructions to the trial court to grant Yelp's Motion to Vacate the Judgment.[2]

I. INTRODUCTION

The dearth of amicus support for Plaintiffs' arguments attests to the emptiness of those arguments. The key premise underlying the Chemerinsky Amicus Brief, the sole Amicus Brief submitted to support Plaintiffs, is simply wrong—that injunctive relief against Internet publishers is the only remedy available to those who allegedly have been defamed by online speech. *E.g.*, Brief at 1, 2. As this Court recognized in

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[1] Along with Yelp's related websites and mobile applications, Non-Party Appellant Yelp Inc. is referred to simply as "**Yelp**" in this Brief.

Plaintiffs Dawn L. Hassell and the Hassell Law Group are referred to collectively as "**Hassell**" or "**Plaintiffs.**"

[2] The caption page of the Chemerinsky Amicus Brief mistakenly identifies Yelp as the "Defendant and Appellant" in this matter, while omitting reference to the actual Defendant, Ava Bird. Yelp is the non-party Appellant in this matter.

Barrett v. Rosenthal (2006) 40 Cal.4th 33, 63, disgruntled plaintiffs can sue the original speaker directly, as Plaintiffs did here; if they satisfy the constitutional requirements, they can obtain a judgment and injunction against that individual. That injunction then can be enforced against the defendant through the panoply of remedies available under California law. Plaintiffs, however, have *never* tried to enforce their Judgment against Defendant Ava Bird ("Bird"). Thus, even if Section 230 of the Communications Decency Act (47 U.S.C. § 230) ("Section 230") permitted a remedy against Internet publishers in the rare case in which an injunction against the speaker is ineffective—although it does not—speculation by Plaintiffs and the Chemerinsky Amici about untried enforcement attempts against Bird could not possibly meet the test they ask this Court to create out of whole cloth. Section II.A, *infra*.

The Chemerinsky Amici also misconstrue the First Amendment and case law in urging this Court to give its blessing to a prior restraint entered against Yelp without any notice or opportunity to be heard. Indeed, Dean Chemerinsky's prior arguments to this Court and the U.S. Supreme Court regarding the necessary limits on prior restraints demonstrate the fallacy of their claims. As Yelp's merits Briefs explain, this Court's decision in *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, permitted a *narrow* injunction following a contested trial on the merits, against the defendant alone. O.B. 32 and R.B. 23, citing 40 Cal.4th at 1155-56, 1158,

1160. Like Plaintiffs, the Chemerinsky Amici cannot cite a single case supporting their proposed rewrite of the law governing prior restraints, and so they invoke a handful of arguments that Yelp already has refuted. The Chemerinsky Amici cannot defend the prior restraint entered against Yelp, and the appellate Opinion should be reversed. Section II.B, *infra*.

II. THE CHEMERINSKY AMICUS BRIEF OVERLOOKS KEY FACTS AND THE GOVERNING LAW

A. Defamation Plaintiffs Already Have Adequate Remedies For Allegedly Defamatory Internet Speech.

The Chemerinsky Amici insist that this Court must rewrite due process law to permit direct actions against Internet providers—in the guise of "takedown orders"—in order to ensure that Internet defamation plaintiffs have a meaningful remedy. Brief at 1, 2, 8. They warn ominously that "[i]f Yelp's argument were to prevail, the Internet would continue to descend into an *uncontrolled and uncontrollable wasteland* of defamatory content, threats, harassment, and non-consensually posted private sex videos." Brief at 10 (emphasis added). But defamation plaintiffs have many remedies available if they choose to pursue them (which Plaintiffs did not do here).

For example, as discussed in the Opening Brief (at 7) and Reply Brief (at 33), the Chemerinsky Amici's concerns about enforcing a defamation injunction are overblown and speculative. The Chemerinsky Amici speculate that Bird is judgment-proof and will ignore the injunction entered against her (Brief at 8), but they actually have no idea, because

Plaintiffs made no enforcement attempts here. And the Chemerinsky Amici overlook the many enforcement remedies available to Plaintiffs. Judgment debtors can be compelled to respond in writing and by sworn testimony regarding their recoverable assets. Cal. Code Civ. Proc. §§ 708.020, 708.110. If the judgment debtor is employed, his wages may be garnished. *Id.* § 706.020, *et seq.* If he has non-exempt assets, that car, boat or collector's item may be taken and sold. *Id.* § 699.010, *et seq.* And if he is refuses to comply with a lawful order to remove defamatory content—and Yelp allows any user to remove his or her own review (A00841)—he can be held in contempt of court. Cal. Pen. Code § 166.[3]

Importantly, Yelp *also* gives business owners the means to alleviate any harm of a critical review by directly responding to that review (A00240)—allowing Plaintiffs to inform the public that they obtained a defamation judgment and injunction against Bird, or provide any other information they deem salient. California law long has recognized that correction of an allegedly false statement provides a meaningful remedy. *E.g.*, Cal. Civ. Code § 48a (limiting plaintiffs suing media entities to special damages where alleged defamatory statement is retracted, or no retraction is

[3] Yelp does not suggest that Plaintiff now engage in such enforcement actions against Bird, having declined to do so for several years since the trial court entered its judgment. Indeed, Bird's own amicus brief demonstrates several reasons why such enforcement might be unjust here, including her confirmation that she did not author the J.D. review on Yelp, and her assertion that she was never served in the underlying suit.

demanded). *See also U.S. v. Alvarez* (2012) 132 S.Ct. 2537, 2550 ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society.").

In addition, numerous states (including California) have taken steps to combat problems such as revenge porn—a practice not at issue in this case—by criminalizing the publication of nude photos without consent. *E.g.*, Cal. Pen. Code § 647(j)(4); *compare* Brief at 6 (citing Citron & Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 347 (2014)). California law also prohibits stalking, doxing and harassment. Cal. Pen. Code §§ 646.9, 653.2; *compare* Brief at 6-7 (citations omitted).

The Chemerinsky Amici's paternalistic suggestion that Yelp will benefit from a rule allowing injunctions to be entered against it without notice or an opportunity to be heard (Brief at 8-9) also must be flatly rejected. As the Revised Amicus Brief submitted by Prof. Eugene Volokh demonstrates—through careful analysis of dozens of examples of fraud and litigation abuse designed to silence critics—Internet publishers are harmed by judgments like this one, which was entered without protecting the basic due process rights of Yelp (or, arguably, defendant Bird). Volokh Brief, *passim*. Indeed, Prof. Volokh's Amicus Brief demonstrates that courts *must* abide by stringent standards in order to protect Internet speech from unscrupulous businesses determined to find ways around Section 230 and the First Amendment.

Yelp is entitled to decide what is best for its website. Plaintiffs may not interfere in those editorial decisions unless they can meet the demanding constitutional standards to restrain Yelp's First Amendment rights and overcome the broad protection of Section 230—something Plaintiffs did not even attempt here, because they knew they would fail. *E.g.* R.B. at 18-19 & n.3 (discussing constitutional protection for editorial decision-making); *see* A00837. Yelp does not benefit when courts mandate the removal of content without giving online publishers notice or opportunity to be heard, but does benefit when courts reject attempts to obtain such prior restraints.

As the Chemerinsky Amici cannot deny, Yelp benefits from a website that includes positive *and critical* reviews of businesses like Plaintiffs' law firm. Brief at 9. As Amici The Internet Association and the Consumer Technology Association point out, the First Amendment protects both the speaker and the audience, ensuring that consumers receive the information they need to make informed decisions. Internet Ass'n Brief at 17-19. And as Amici Public Citizen, Inc., and Floor64, Inc., explain, because no business asks Yelp to remove positive reviews, Section 230 "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." Public Citizen & Floor64 Amicus Brief at 20. Yelp benefits when consumers know that

business owners cannot force the removal of critical reviews based on nothing more than an uncontested default judgment (A00211) following questionable service attempts on a reviewer (A00026) with no advance notice to Yelp (A00243).

The Chemerinsky Amici's arguments simply ignore the appellate court's decision, which stripped Yelp of the protections that they recognize are fundamental to preserve Yelp's rights. Brief at 13. As the Chemerinsky Amici concede, Yelp should have been afforded "an opportunity to be heard" to challenge the injunction entered against it *on the merits*. *Id.* It was not. The appellate court held that Yelp had no basis for challenging the underlying injunction against Bird. Op. at 16-17.[4] The court expressly found that Yelp was bound by the defamation finding against Bird. *Id.* at 23. It held that "Yelp does not have standing to challenge" the merits of the Judgment against Bird. *Id.* at 26.

Finally, the Chemerinsky Amici's suggestion that a nonstatutory motion to vacate adequately protects Yelp's due process rights (Brief at 13) ignores the fact that it did not protect Yelp's rights here. Yelp brought just

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[4] As Yelp explains in its Reply Brief, the Chemerinsky Amici's suggestion that Yelp's rights are protected because it can file a motion and hope that the court agrees to vacate the injunction after-the-fact flouts due process. R.B. at 30 n.10. The same could be said about any injunction, yet federal and state courts are clear that parties subject to an injunction are entitled to notice and an opportunity to be heard, either before the injunction is entered or promptly afterwards, as a condition to entering the injunction. *E.g.*, O.B. at 19-20; R.B. at 12-13.

such a motion, yet the appellate court refused to hear Yelp's challenge to the underlying Judgment (Op. at 16-17, 23, 26), and the trial court used Yelp's arguments against it, concluding that "the facts indicate that Yelp is acting on behalf of Bird" because those arguments may have benefitted Bird as well as Yelp. A00809. Yelp should not have been placed in this position. This Court should reverse the lower courts' decisions and ensure that Internet publishers like Yelp receive the due process protections that the Constitution guarantees them.

B. The Chemerinsky Amicus Brief Would Turn The First Amendment On Its Head.

The Chemerinsky Amici ask this Court to embrace an unprecedented and indefensible exception to the long-standing prohibition on injunctions enjoining speech. *Compare* O.B. at 30-33 *with* Amicus Brief at 8-10.[5] But in defending a prior restraint issued against a non-party to the litigation, without protecting that non-party's due process rights, the Chemerinsky Amici ignore key constitutional principles. The U.S. Supreme Court has explained that "freedom to speak one's mind is not only an aspect of individual liberty—thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.* (1984) 466 U.S. 485, 503-04

[5] Tellingly, the Chemerinsky Amici cite nothing to support their claim that "[i]t is black letter law" that statements adjudicated to be defamatory can be permanently enjoined as against a *non-party*. Brief at 1-2. *No case* supports this remarkable proposition.

(1984). And as Amici Airbnb, Inc., *et al.*, explain, consumer reviews like those at issue here—comprised largely of opinions that affect day-to-day decision-making about where to spend money—lie at the heart of the First Amendment. Airbnb, Inc., *et al.*, Brief at 26.

Dean Chemerinsky previously has urged the U.S. Supreme Court to hold that the First Amendment prohibits prior restraints as a remedy in a defamation proceeding, without exception, explaining that "[t]his is especially important here where the criticism was targeted ... at lawyers and the legal profession, subject matter about which robust debate should be encouraged." Motion for Judicial Notice ("MJN") Ex. B at 0106-0107. Dean Chemerinsky emphasized there that "[e]ven if, under some limited circumstance, injunctions on future speech about private persons could be considered consistent with the First Amendment ... the paramount importance of an open and free discourse regarding public persons imposes a constitutional bar on their ability to obtain injunctive relief in the defamation context." *Id.* In the end, "[t]he only way to adequately safeguard free expression is to mandate that no kind of civil defamation plaintiff may obtain injunctive relief." *Id.* at 43.

Despite his prescient warnings about the slippery slope risked there, Dean Chemerinsky now urges this Court to go much further, and affirm a prior restraint against a non-party who had no notice that an order enjoining it from publishing speech had been requested. But the Chemerinsky Amici

cannot cite a single case supporting their argument.[6] And they ignore the constitutional mandate, reaffirmed by the U.S. Supreme Court just over a decade ago, that the Constitution forbids any prior restraint that sweeps "more broadly than necessary" and "[a]n 'order' issued in 'the area of First Amendment rights' must be 'precis[e]' and narrowly 'tailored' to achieve the 'pin-pointed objective' of the 'needs of the case.'" *Tory v. Cochran* (2005) 544 U.S. 734, 738-39 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations* (1973) 413 U.S. 376, 390; *Carroll v. President and Comm'rs of Princess Anne* (1968) 393 U.S. 175, 183-84). Thus, limits on speech must "burden no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 765.[7]

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[6] As Yelp demonstrates in its Merits Briefs, *Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 352, actually supports Yelp, not Plaintiffs. O.B. at 23-25; R.B. at 28, 32. *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, also does not support the Chemerinsky Amici's claims. That court made clear that collateral estoppel only applies where "'the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].'" *Id.* at 148 (citation omitted). Plaintiffs cannot meet this requirement, and have never tried. Finally, the Chemerinsky Amici's reliance on 5 B.E. Witkin, *Summary of California Law*, Torts § 537 (10th Ed. 2005), is misplaced because Section 230 immunizes Yelp from any potential liability flowing out of its publication of Bird's consumer review.

[7] *See also* MJN Ex. B at 0108, citing *Board of Airport Commissioners v. Jews for Jesus, Inc.* (1987) 482 U.S. 569, 574-75 (invalidating overbroad regulations prohibiting all "First Amendment activities" at airports in Los Angeles); *City of Houston, Texas v. Hill* (1987) 482 U.S. 451, 481 (declaring unconstitutional an overbroad provision

The Chemerinsky Amici also engage in sleight of hand in discussing the issue before the Court. They argue that "[t]he rules governing default judgments" permit enforcement against Yelp. Amicus Brief at 9. But those rules are irrelevant here. The well-established principle invoked there—that someone who has *received notice* of an action and fully understands the ramifications of a default, but nonetheless has *chosen not to appear*, has foregone their right to challenge the result—does not apply here. *E.g.*, R.B. at 14 (discussing Code of Civil Procedure § 580, which satisfies due process requirements by ensuring that parties receive adequate notice of the relief that will be sought against them in a default judgment).

Contrary to the claims in the Chemerinsky Amicus Brief, and as Dean Chemerinsky has argued to the U.S. Supreme Court, the First Amendment flatly prohibits injunctions on speech that extend to non-parties, without giving those non-parties notice and an opportunity to be heard. *See* MJN Ex. B at 0100. There, Dean Chemerinsky argued:

> Just as it is "always difficult to know in advance what an individual will say," ... it is also difficult to know in advance who will speak. Any injunction designed to restrict speech effectively must encompass others besides the defamation defendant, such as Ruth Craft in this case. *But that inevitably involves stripping persons not before the court of their First Amendment rights without sufficient due process.*

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making it unlawful to interrupt police officers in the course of their duties); *Schad v. Borough of Mt. Ephraim* (1981) 452 U.S. 61, 61-62 (striking as overbroad an ordinance prohibiting all live entertainment); *Gooding v. Wilson* (1972) 405 U.S. 518 (invalidating a fighting words statute).

Id. (citing *Southeastern Promotions v. Conrad* (1975) 420 U.S. 546, 559; *Hansberry v. Lee* (1940) 311 U.S. 32, 40; *Martin v. Wilks* (1989) 490 U.S. 755, 761). Dean Chemerinsky's prediction certainly has proven true in this case. As Amicus XCentric Ventures, LLC points out, Yelp alone currently is bound by the Injunction, although the statements at issue have been repeated many times—including in the court record—evidencing the futility of the lower courts' decisions. XCentric Brief at 6-9. When Plaintiffs chose to litigate this dispute, they injected all of Bird's statements into the public record, which "may thereafter be freely published online, either by courts themselves or by third parties." *Id.* at 9.

The Chemerinsky Amici's unprecedented extension of the narrow injunctive relief allowed in *Balboa Island* finds absolutely no support in California or federal law. It would create havoc—inviting forum-shopping plaintiffs to pursue in California relief that no other court has allowed—by freeing defamation plaintiffs of the constraints mandated by the First Amendment.[8] It cannot become law in this State.

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[8] Yelp has already fully addressed all of the Chemerinsky Amici's arguments related to 47 U.S.C. § 230. Chemerinsky Brief at 13-16; *see* O.B. at 36-39, 43-54; R.B. at 34-42. Thus, while Yelp disputes the Chemerinsky Amici's claims regarding the scope of Section 230, it does not respond here by repeating the arguments from its Opening and Reply Briefs.

III. CONCLUSION

The Chemerinsky Amicus Brief invokes a few examples of abusive behavior on the Internet to argue for a brazen expansion of California courts' injunction power. Even if the problems they discuss needed a novel remedy—and they do not—it would not justify the Chemerinsky Amicus Brief's overreach. The lower courts' decisions flouted Yelp's constitutional and statutory rights. Yelp respectfully requests that those decisions be reversed, and that the trial court be directed to enter its order granting Yelp's motion to vacate the injunction entered against it.

Dated: July 19, 2017

DAVIS WRIGHT TREMAINE LLP
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By: Thomas R. Burke by [signature] SBN 16[illegible]
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court 8.204(c), 8.520(b))

The text of this brief consists of 3,145 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 under rule 8.204(b)(10) and 8.520(b), this certificate, and the signature blocks.

Dated: July 19, 2017

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PROOF OF SERVICE
Case No. S235968

I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 505 Montgomery Street, Suite 800, San Francisco, CA 94111. On July 19, 2017, I served the following document(s):

ANSWER TO AMICUS BRIEFS

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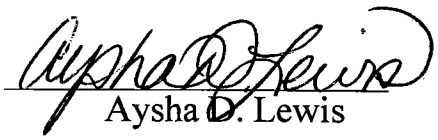

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