**Case No. S235968**

**IN THE SUPREME COURT 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

# APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF FOR GLASSDOOR, INC. AND TRIPADVISOR LLC IN SUPPORT OF APPELLANT YELP, INC.

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## APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.520(f) of the California Rules of Court, Glassdoor, Inc. ("Glassdoor") and TripAdvisor LLC ("TripAdvisor") request leave to file a joint amicus curiae brief in support of appellant Yelp, Inc. The proposed amicus brief is submitted with this application.

## GLASSDOOR AND TRIPADVISOR

Glassdoor and TripAdvisor (collectively, "*amici*") operate user-based review sites similar to www.yelp.com.

California-based Glassdoor operates www.glassdoor.com, an online jobs and recruiting marketplace in which employers are anonymously rated and reviewed by employees and job seekers on important characteristics like culture, career advancement, work-life balance, the job interview experience and benefits. Glassdoor combines a vast array of user-generated content with available job listings to help people seeking employment make better, more informed decisions about where they work. Since Glassdoor launched in 2008, it has collected tens of millions of user submissions on more than 640,000 companies in 190 countries, and has more than 30 million monthly unique users. Glassdoor makes possible a previously unimagined level of workplace transparency that allows people to get an "inside look" at what it is really like to work somewhere, leading to better matches between job seekers and employers that can help reduce turnover, increase employee satisfaction and ultimately create more stability for people, companies and the economy.

TripAdvisor operates the world's largest travel site at www.tripadvisor.com. It allows people to plan, book and experience the

perfect trip by aggregating, through its travel platform, user reviews and opinions about destinations, accommodations, attractions and restaurants throughout the world so that users have access to trusted advice based on the first-hand experiences of other travelers. Users have posted 465 million reviews and opinions about seven million accommodations, restaurants and attractions, that not only help travelers find the best hotel prices, but offer practical advice and tools to allow them to research and plan trips, and make better decisions about the places they visit, the restaurants they choose to frequent, and the activities in which they participate.

## INTEREST OF AMICI CURIAE

This case presents an issue that will directly impact Glassdoor's and TripAdvisor's ability to provide neutral and open platforms for candid third-party reviews: whether a party may force an interactive computer service provider, under the threat of sanctions, to take down content—and effectively censor lawful, constitutionally protected speech—provided by a third-party user, by obtaining an injunction without fair notice and due process given to the provider. Based on the facts of the pending appeal, even a default judgment, where the plaintiff's allegations regarding the veracity of a third party's statements are untested, can result in the forced removal of information that may be important for the public to know about (such as a review by a customer or employee about a restaurant's poor food safety practices, discriminatory employment practices at a medical facility or a hotel's hygiene standards).

If upheld, the lower appellate court's ruling would allow a business to suppress critical free speech by suing a speaker who does not

have the financial resources to fight in court, and then compel a forum for speech, such as Yelp, Glassdoor or TripAdvisor, to comply with a mandatory injunction to censor that speech, without even affording the platform provider the opportunity to step in on behalf of its users in order to contest the legality of the takedown request. Under this novel rule, an intermediary would be foreclosed from challenging the lawfulness of the order before it is even aware of the court action, which effectively hands editorial control over the content of a website to any affluent party that seeks to stifle criticism—even if legitimate—by suing users who lack the means to mount a legal defense (aided by California courts). This rule not only harms platform providers, but their users and the businesses that have done everything needed to obtain positive reviews on sites such as Glassdoor and TripAdvisor. The public trust placed in the integrity of these sites and the legitimacy of consumer and candidate reviews would be adversely impacted if poorly rated businesses and employers could improve their standing through default judgments, and unchallenged mandatory injunctions implementing those default judgments.

Glassdoor and TripAdvisor are familiar with the issues pending on appeal and believe additional briefing would help the Court resolve this case. Among other issues, the proposed amicus brief addresses the practical consequences and harm to free speech that would occur if online intermediaries like Yelp that provide a public forum for unvarnished consumer feedback are denied the basic right to be heard prior to being subjected to a mandatory injunction sought by a business to squelch consumer criticism. Glassdoor and TripAdvisor have long stood by their users' right to post lawful *opinions* on their respective platforms. Indeed, they have incurred substantial legal expenses to

ensure that this fundamental right remains unimpeded by, among other things, defending against baseless takedown claims. In many cases actually litigated, the speech at issue has been found to be constitutionally protected. *See, e.g.*, *Seaton v. TripAdvisor LLC*, 728 F.3d 592 (6th Cir. 2013) (ruling that TripAdvisor's inclusion of plaintiff's hotel in its list of "2011 Dirtiest Hotels" based on user reviews was not defamatory); *Knievel v. ESPN*, 393 F.3d 1068, 1077-78 (9th Cir. 2005) (holding that a reasonable person would not construe the caption "Evel Knievel proves that you are never too old to be a pimp" under a photo of him with his wife and another woman on ESPN's extreme sports website, EXPN.com, as charging him with being a pimp or that his wife was a prostitute, as required to establish defamation); *Krinsky v. Doe*, 159 Cal. App. 4th 1154, 1159, 1176-77 (2008) (holding that a blog post asserting that plaintiff, the president of a publicly traded company, "'has fat thighs, a fake medical degree, 'queefs' and has poor feminine hygiène,'" was not defamatory, stating that "[t]he language is unquestionably vulgar and insulting, but nothing in this post suggested that the author was imparting knowledge of actual facts to the reader"); *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1020 (2005) ("[I]t is inconceivable that placement on the 'Top Ten Dumb Asses' list [appearing on a website] could be understood to convey any imputation of provable defamatory fact.").

In this case, the mandatory injunction upheld by the lower court required Yelp to remove from its website lawful *opinions* that were critical of the professional services provided by respondents. The appellate decision not only chills free speech, but by upholding the prior restraint, it also violates Yelp's First Amendment and due process rights

by not affording Yelp an opportunity to challenge the "removal order" obtained by respondents in a one-sided default judgment proceeding.

The appellate ruling also runs counter to this Court's decision in *Barrett v. Rosenthal*, 40 Cal. 4th 33, 56 (2006), upholding the "broad immunity" conferred by Congress's mandate under section 230 of the Communications Decency Act ("CDA") that "[n]o 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 "[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), 230(e)(3); *Barrett*, 40 Cal. 4th at 39, 56.

Glassdoor and TripAdvisor respectfully request that the Court permit them the opportunity to speak in this case on these issues of vital importance to their businesses and customers.

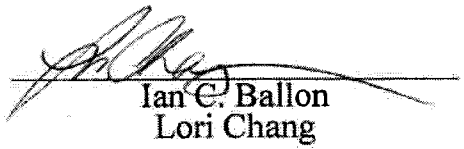
## CERTIFICATION

No party or any counsel for a party in the pending appeal authored the proposed amicus curiae brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the proposed amicus curiae brief.

Dated: April 13, 2017

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: 

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## I. INTRODUCTION

Glassdoor, Inc. ("Glassdoor") and TripAdvisor LLC. ("TripAdvisor") operate popular online platforms that provide a forum for user reviews and feedback. Glassdoor enables users to anonymously post reviews of current and former employers, company salaries and benefits, management practices, and similar information to help job seekers find the best employment match. TripAdvisor allows travelers to read and write user-generated reviews of hotels, restaurants, attractions, and other travel-related material that assist users in making travel plans. Both platforms provide valuable services of enormous utility which benefit the public. They offer a level of transparency that did not exist prior to the Internet by giving consumers and employees the power to voice not only the good but in some instances, the bad. And when companies and business owners are called out for their shortcomings, often the reviews lead to better business practices. Negative feedback also benefits the community by warning other users to avoid terrible choices, like staying at the "dirtiest" hotel rated by consumers, or applying for a job at an employer practicing workplace discrimination.

The facts of this case, and the appellate opinion on appeal, present a fundamental matter of public interest because they directly impact, and potentially *threaten*, the ability of interactive computer service providers to maintain and provide public access to consumer reviews and other material important to the public at large. As set forth in section II(A), *infra*, defendant Bird posted on Yelp comments that were critical of the professional services rendered by respondents, and sought to alert others in need of legal services of her dissatisfaction as a client of this particular law firm. The decision by the court of appeals to uphold a mandatory injunction (dubbed a "removal order") requiring Yelp to

remove Bird's customer reviews without notice, due process, and an opportunity for Yelp to challenge the censorship of Bird's legitimate *opinions*, chills critical consumer speech and should be overturned. There is no more effective way of suppressing speech than to allow an economically powerful company to obtain a default judgment and injunction that forces a publisher to remove negative reviews and opinions of others without a hearing and under the threat of sanctions. By permitting one party to silence critics without proper process, the appellate ruling puts in jeopardy the public's right to post and read online user reviews of business, their practices, services or products—activity that the California legislature and the U.S. Congress have specifically sought to protect against a growing trend of businesses that attempt to squelch negative reviews through legal threats. This action unfairly harms both consumers, who are then presented with a potentially skewed perception of customer feedback, as well as competitors, who work hard for positive reviews and do not seek to censor the negative ones they receive.

The lower court's ruling also infringes upon Yelp's First Amendment right to maintain editorial control over the content posted on its website by affirming a private litigant's ability to force a nonparty website, without notice and due process, to remove user statements found to be defamatory in an uncontested default judgment proceeding. The appellate court's characterization of Yelp as merely a website "administrator" is inconsistent with cases holding that platform providers like Yelp have a constitutionally recognized interest in protecting, maintaining, and distributing user content published on their sites. By denying Yelp an opportunity to challenge the mandatory injunction, the lower court also left intact an overbroad prior restraint (drafted by the

plaintiffs and approved upon default, *see* A00219-223) requiring Yelp to remove *all* comments attributed to defendant Bird, including nonactionable *opinions* that were lawfully published.

Lastly, the lower court's ruling amounts to an end run around the statutory immunity enacted in Section 230 of the Communications Decency Act, 47 U.S.C. § 230, which this Court held in *Barrett v. Rosenthal*, 40 Cal. 4th 33, 56 (2006), broadly prohibits courts from allowing *any* cause of action or imposing *any* liability on service providers for material posted by its users, subject to narrow exceptions not at issue in this appeal.

*Amici* Glassdoor and TripAdvisor respectfully request that the Court reverse the lower court ruling.

## II. ARGUMENT

### A. The Appellate Court's Ruling Threatens Access To Information That Is Important To The Public

#### 1. The *Hassell* decision undermines established law and policy protecting the right of users to post and read lawful reviews that serve a public interest

Review sites like Yelp, Glassdoor and TripAdvisor provide a public benefit by not only giving users access to a forum to express their views about businesses, their practices, services or products, but also to research and learn from other users' personal experiences. The user content made available on sites like Yelp is what draws readers to these sites. For Glassdoor users, truthful and frank employer reviews are helpful in evaluating potential job offers and career opportunities. Not surprisingly, there are employees (current and former) who hold critical opinions of their employers, and consequently there are employers who seek to skew user feedback by expunging bad reviews—even where that

feedback provides helpful information to the public. A review signaling "a high turnover rate," for example, could raise concern for prospective employees looking for long-term stability. But not all reviews that are critical will be valued the same way—that determination depends on the content of the review itself and the individual reader. For example, a review that a company "is great for hands-on experience, very poor for mentoring or professional development," may not deter a prospective employee who values actual training more than professional mentoring. In this real world example, the employer filed a defamation suit in California state court (despite that the employee also gave positive feedback in the same review) and sought to unmask the anonymous poster by compelling Glassdoor to disclose the employee's contact information, which the court denied on the basis that the reviews were nonactionable.

TripAdvisor has also been forced to litigate baseless claims over negative reviews that have helped travelers avoid bad decisions on places to stay. *See, e.g.*, *Seaton v. TripAdvisor LLC*, 728 F.3d 592 (6th Cir. 2013) (affirming dismissal of claims for defamation, trade libel, false light invasion of privacy and tortious interference with prospective business advantage under Tennessee law based on TripAdvisor's inclusion of plaintiff's hotel in its list of "2011 Dirtiest Hotels" because placement on the "list is not capable of being understood as defamatory; it is protected, nonactionable opinion"). Consumer reviews identifying unsanitary lodgings serve a public benefit by alerting others to businesses that have had issues with bed bugs, mildew in pools, or food poisoning scares—examples of the type of information that businesses would never want disclosed, but which are valuable to other travelers. The social utility of candid user reviews cannot be denied.

California, which has enshrined broader constitutional free speech protections for state residents than are available under the U.S. First Amendment,[1] has a strong interest in protecting online speech, both for the speaker *and* for the listener. *See, e.g.*, *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 485 (2000) (the right to freedom of speech is afforded "not only to one who speaks but also to those who listen"); *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 898-99 (2004) (finding online consumer information concerned a matter of public interest); *Wilson v. Superior Court*, 13 Cal. 3d 652, 658 (1975) (finding California Constitution's protections for free speech more "definitive and inclusive" than those of the federal Constitution).

Of particular relevance to this case, the California legislature and the U.S. Congress have enacted laws to provide greater protection to online user comments targeted by businesses that receive negative reviews posted by customers. In 2014, California passed AB2365, commonly referred to as the "Yelp" bill, which prohibits the use of "non-disparagement" clauses in consumer contracts beginning January 1, 2015. The law, codified at California Civil Code § 1670.8, provides that "[a] contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer's right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services." More recently, in December 2016, President Obama signed into law the Consumer Review Fairness Act ("CRFA"), which similarly prohibits

[1] Article I, Section 2 of the state Constitution provides, "every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

businesses from imposing "gag clauses" on consumers in form contracts, for the express purpose of rendering invalid "contracts that impede consumer reviews." *See* 15 U.S.C. § 45b (2016) (rendering unenforceable a form contract that "prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered communication," which is defined as "a written, oral, or pictorial review, performance assessment of, or other similar analysis of, including by electronic means, the goods, services, or conduct of a person by an individual who is party to a form contract with respect to which such person is also a party").

Both the "Yelp" bill and the CRFA were enacted in response to reports of legal threats made against a Utah couple by a weight-loss supplement company for posting negative reviews about its product, where the company sought to enforce a non-disparagement clause in its consumer contract. *See* Matt Gephardt, *After long legal battle for Utah couple, gag-clauses will be outlawed*, KUTV CBS 2, November 29, 2016, http://kutv.com/news/get-gephardt/gag-clauses-will-be-outlawed. The dispute also prompted the Federal Trade Commission to take action against the company for threatening consumers with monetary penalties for posting negative reviews. *See* Federal Trade Commission, *FTC Sues Marketers Who Used "Gag Clauses," Monetary Threats, and Lawsuits to Stop Negative Consumer Reviews for Unproven Weight-Loss Products*, September 28, 2015, https://www.ftc.gov/news-events/press-releases/2015/09/ftc-sues-marketers-who-used-gag-clauses-monetary-threats-lawsuits. In another widely reported case, a company sued a Texas couple for $1 million in damages after the couple posted a negative review accusing the "pet sitting" company of overfeeding their Betta fish. *See* Sarah Mervosh, *Plano couple sued for $1M over one-star*

*Yelp review asks judge to drop suit*, The Dallas Morning News, October 16, 2015, https://www.dallasnews.com/news/news/2016/06/03/plano-couple-hit-with-1m-lawsuit-over-one-star-yelp-review-asks-judge-to-drop-suit. These cases underscore the alarming trend of businesses seeking to use—or misuse—the legal system to suppress protected speech in the form of negative reviews, as in this case.

The lower court's ruling undercuts legislative efforts to protect consumer speech. Tellingly, the appellate court's decision is completely devoid of any discussion of these public interest concerns that are implicated by the facts and holding of *Hassell,* including the constitutional right of California residents to read critical reviews. Many of the comments attributed to Bird were in fact lawful *opinions* expressing her dissatisfaction with the professional services she received from respondents. Specifically, Bird's review criticized Ms. Hassell's "work ethic" and professionalism, and revealed a failure in communication between the attorney and her client. *See* AB00215. The review expressly warned prospective clients to "research" for more "competen[t]" law firms with "long term client satisfaction" that this particular client considered lacking (underscored by the subsequent post alerting readers to the lawsuit filed by respondents). *See id.* Undoubtedly, the quality of professional services and a law firm's willingness to sue former clients for submitting user reviews it regards as defamatory, are matters within the public interest.[2] Bird's reviews were

[2] California courts have long maintained that user material posted on public websites like those operated by Yelp and *amici* involve a matter of public interest, and in certain contexts, have held that websites are public forums. *See Barrett v. Rosenthal*, 40 Cal. 4th 33, 41, 51 Cal. Rptr. 3d 55, 59 (2006) (holding "websites accessible to the public" including newsgroups constitute "public forums" for purposes of the Anti-SLAPP

exactly the type of speech that the state and federal government sought to protect against businesses that attempt to suppress online negative reviews through legal action.

The lower court should have given consideration to these issues and weighed the public interest against the default judgment obtained by respondents. But by failing to engage in any constitutional analysis of the challenged speech itself in upholding the "removal order" (deeming the issue "adjudicated" through a one-sided default judgment

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statute); *Wong v. Jing*, 189 Cal. App. 4th 1354, 1366 (2010) (holding that the Yelp consumer review website constituted a public forum and that the defendant's critical postings about the plaintiff's dental practice was a matter of public interest because "consumer information that goes beyond a particular interaction between the parties and implicates matters of public concern that can affect many people is generally deemed to involve an issue of public interest for purposes of the Anti-SLAPP statute."); *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1576-77 (2005) (holding that "[w]eb sites that are accessible free of charge to any member of the public where members of the public may read the views and information posted, and post their own opinions," meet the definition of a public forum; granting Anti-SLAPP motion against a company and its chairman who sued for defamation over posts critical of them on Yahoo! message board, stating that "[c]ourts have held that Internet postings about corporate activity constitute an issue of public importance"); *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 897–900 (2004) (holding a consumer information website a public forum and that the defendant's "statements were a warning not to use plaintiffs' services. In the context of information ostensibly provided to aid consumers choosing among brokers, the statements, therefore, were directly connected to an issue of public concern," even though their business practices "do not affect a large number of people . . . ."); *see also O'Grady v. Super. Ct.*, 139 Cal. App. 4th 1423, 1448 (2006) (holding that the identities of bloggers who posted alleged trade secrets about a new product were protected from disclosure by California's shield law, finding the news-oriented blog site was "conceptually indistinguishable from publishing a newspaper" for communication to the public).

proceeding), the appellate court adopted a rule that would allow an economically powerful company to use its disproportionate resources to deprive consumers of the ability to obtain other consumer feedback, without balancing those rights by allowing platforms like Yelp and *amici* notice and the opportunity to dispute a takedown order.

2. The lower court erred in disavowing Yelp's First Amendment right to protect, publish, and distribute user reviews

The *Hassell* decision should be reversed because in upholding the removal order against Yelp without prior notice or a hearing, the lower court improperly discounted Yelp's First Amendment and due process rights by diminishing Yelp's involvement as merely an "administrator" of the forum that hosted Bird's reviews, rather than as a publisher or distributor of her reviews (which are licensed to the website through its terms of use).[3] *See Hassell v. Bird*, 247 Cal. App. 4th 1336, 1358 (2016). The lower court's refusal to acknowledge Yelp as a publisher or distributor of online speech (by distinguishing it from a traditional wholesale distributor of books, *see id.* at 1357) is a factually unsupported position that has been rejected by other courts. *See, e.g., Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411, 414 (Sup. Ct. 2010) ("Yelp's selection of the

[3] Users who post reviews on Yelp agree to its Terms of Service which provide that: "You alone are responsible for Your Content, and once published, it cannot always be withdrawn." "We may use Your Content in a number of different ways, including publicly displaying it, [and] reformatting it, incorporating it into advertisements and other works, creating derivative works from it, promoting it, distributing it, and allowing others to do the same . . . . As such, you hereby irrevocably grant us world-wide, perpetual, non-exclusive, royalty-free, assignable, sublicensable, transferable rights to use Your Content for any purpose." *See* https://www.yelp.com/static?country=US&p=tos.

posts it maintains on Yelp.com can be considered the selection of material for publication, an action 'quintessentially related to a publisher's role'" (citation omitted)); *Publius v. Boyer-Vine*, No. 1:16-CV-1152-LJO-SKO, 2017 WL 772146, at *5 (E.D. Cal. Feb. 27, 2017) (holding that the owner of a website "has a First Amendment right to distribute and facilitate protected speech on the site," *citing Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59-61 (1963) (holding book distributors had standing to challenge law restricting the sale of certain books), *Smith v. California*, 361 U.S. 147 (1959) (striking down statute imposing strict liability on a seller of obscene books as violating First Amendment), and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952) (striking down statute prohibiting movie producer's distribution of movie)).[4]

In other circumstances, California courts have recognized that websites have First Amendment interests derived from their users' online speech activities. *See, e.g., Glassdoor, Inc. v. Super. Ct. of Santa Clara Cnty. (Machine Zone, Inc.)*, __Cal. Rptr. 3d__, 2017 WL 944227, at *3-4 (Cal. Ct. App. 2017) (ruling that Glassdoor, as the "*publisher* of the speech at issue," "has a strong interest in protecting the right of its users to speak anonymously," and finding "a substantial preponderance of national authority favors the rule that publishers, including Web site operators, are entitled to assert the First Amendment interests of their

[4] The U.S. Supreme Court has also held that the First Amendment protects publishers and distributors of speech. *See Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-67 (1964) (stating that to "discourage newspapers from carrying 'editorial advertisements' . . . might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities").

anonymous contributors" (italics in original)); *see also In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 258 (D.D.C.) (holding that Verizon, as an Internet service provider, had a "vested interest in vigorously protecting its subscribers' First Amendment rights, because a failure to do so could affect Verizon's ability to maintain and broaden its client base"), *rev'd on other grounds*, *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003). These cases hold that a service provider has standing to assert the free speech rights of its users, recognizing that there may be situations where the actual speaker is unable to assert his or her First Amendment rights directly (such as in the case of speakers who choose to remain anonymous due to "fear of economic or official retaliation"). *See In re Verizon*, 257 F. Supp. at 258-59 (finding that "Verizon's relationship with its client subscribers is the kind of relationship that warrants allowing Verizon to assert a First Amendment challenge on their behalf").

Because respondents had originally sought an overbroad prior restraint to censor both present and future reviews posted by Bird on Yelp, this case presented a compelling reason for allowing a platform provider to come to the defense of its user's online speech, where the individual speaker faced with a suit for damages may not have the financial means to mount a legal defense against a more economically powerful plaintiff. *See Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) ("Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is the possibility that, rather than risk punishment for [bringing such a challenge] . . . he will refrain from engaging further in the protected activity. Society as a whole then would be the loser.").

3. The lower court erred in upholding a mandatory injunction censoring lawful speech and in denying Yelp the right to challenge the injunction obtained against it through an uncontested default proceeding to which Yelp was not a party

The lower court was wrong to hold, on the basis of this Court's decision in *Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal. 4th 1141 (2007), that the mandatory injunction issued against Yelp could not be challenged following a default adjudication finding the challenged speech was defamatory. *See Hassell*, 247 Cal. App. 4th at 1359-60. In *Balboa*, the court issued a permanent injunction enjoining defendant from repeating statements that were found defamatory following a bench trial. *Balboa*, 40 Cal. 4th at 1145-46. *Balboa* held that "*following a trial* at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory." *Id.* at 1156 (italics added). In this case, by contrast, there was only an uncontested prove-up hearing. *See Hassell*, 247 Cal. App. 4th at 1344. Further unlike in *Hassell*, the injunction upheld in *Balboa* did not attach a "removal order" directing that the terms of the injunction be carried out by a nonparty publisher. Rather, this Court held in *Balboa* that the original injunction was invalid because it prohibited speech by third parties and was not limited to the defendant. *See Balboa*, 40 Cal. 4th at 1160 (ruling that the injunction was overbroad in applying not only to defendant but to "'her agents, all persons acting on her behalf or purporting to act on her behalf and all other persons in active concert and participation with her'" and holding that "the injunction, to be valid, must be limited to prohibiting [defendant] personally from repeating her defamatory statements").

Accordingly, *Balboa* does not compel—or even support—the holding in *Hassell* that an injunction censoring online speech can be issued against a nonparty platform provider in a default judgment proceeding, without prior notice or an opportunity to be heard or to challenge a prior restraint.

The appellate court's holding, if affirmed, could lead to a lower effective standard of proof for adjudication of speech in default judgment cases, where the individual user may not have the resources to appear in a California court to defend its exercise of free speech (particularly if the user is a nonresident that targeted a California business).[5] Default judgments may also be obtained through the submission of out-of-court declarations and other documentary evidence. *See* California Rules of Court 3.1800. Neither procedure ensures that a "removal order" (uncontested in a default proceeding) withstands the rigorous constitutional protections that an actual adjudication on the merits would provide. Indeed, in *Hassell*, the original injunction obtained by respondents was an illegal prior restraint. *See Hassell*, 247 Cal. App. 4th at 1360.

The lower court gave undue weight to the default proceeding and as a result, erred in upholding those aspects of the order that required Bird and Yelp to remove *all* posted reviews by usernames "Birdzeye B." and "J.D.," including the *opinions* reflected in the review—which alone requires reversal of the appellate decision. *See Hassell*, 247 Cal. App. 4th at 1360 (finding that the injunction was unconstitutionally overbroad

[5] As noted, such a standard would be used by the rich to stifle the speech of others, and is directly contrary to the policy objectives put in place by California's Anti-SLAPP statute which recognizes the risk of chilled speech between parties with different resources.

only to the extent it required the removal of future posts). Here, the alleged reviews attributed to Bird were arguably protected speech. The post criticized respondents for, among other things, not "even deserv[ing] one star," having "made a bad situation much worse for me," and having "reneged on the case because her mom had a broken leg, or something like that, and that the insurance company was too much for her to handle." A000215. The user also stated in her post that "I have to share my experience so others can be forewarned. [respondents] will probably not do anything for you, except make your situation worse," and advised other readers that "you can find a competent attorney, but this wont [sic] be one of them." *Id.*

Even if there were misstatements about respondents' failure to speak with the insurance company in that case (which respondents alleged were untrue), any reasonable person would know that the overall comments reflected the user's *opinion* of the legal services provided by respondents. "Not only commentators, but courts as well have recognized that online blogs and message boards are places where readers expect to see strongly worded opinions rather than objective facts." *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 697 (2012) (citing *Krinsky v. Doe*, 159 Cal. App. 4th 1154, 1162 (2008)). As another court observed, Internet users can generally discern the difference between *opinions* in consumer reviews and purported statements of fact:

> While chat rooms and blogs certainly still exist, user posted reviews and comments are now *de rigueur* on many of the most popular internet sites. Amazon.com, homedepot.com, bestbuy.com, opentable.com and tripadvisor.com—to name just a few—all allow users to post virtually anonymous reviews covering everything from how shoes fit to the quality of the food or service at a restaurant. Similarly, Glassdoor.com allows users to post reviews so prospective

> job-seekers can get a feel for the company in question and if it is a place where he or she might want to work. The content of the reviews on Glassdoor.com are such that it should be obvious to any reasonable person that the authors (all listed as current or former employees) are using the website as a vehicle to express their personal opinions about the company in question. . . . It is quite evident to the Court that Glassdoor.com is a website where people go to express their personal opinions having worked for a company—not a website where a reasonable person would go looking for objective facts about a company.

*SunEnergy1, LLC v. Brown*, No. N14M-12-028, 2015 WL 7776625, at *4 (Del. Super. Ct. Nov. 30. 2015) (unpublished).

Rather than seek an unlawful prior restraint, respondents could have simply posted a response to the criticism on Yelp to mitigate its impact. Instead, respondents chose to seek judicial assistance to suppress online speech. The U.S. Supreme Court has cautioned against going this route:

> The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. . . . The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

*U.S. v. Alvarez*, 132 S. Ct. 2537, 2550 (2012). The U.S. Supreme Court also stated that the Court "has never endorsed the categorical rule the [petitioner] advances: that false statements receive no First Amendment protection." *Id.* at 2546 ("Even when considering some instances of

defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.").

Moreover, allowing a default judgment to serve as a basis for compelling a service provider to takedown online speech without an opportunity to challenge a removal order is especially inappropriate in a defamation case. This Court acknowledged that "[d]efamation law is complex, requiring consideration of multiple factors." *Barrett*, 40 Cal. 4th at 57. "Any investigation of a potentially defamatory Internet posting is thus a daunting and expensive challenge"—and certainly cannot be adjudicated through a motion for default judgment where there is no party there (neither the service provider nor the accused speaker) to challenge the merits of a defamation claim. *Id.* For those reasons, this Court refused to find that "the difficulty of prevailing on a defamation claim mitigates the deterrent effect of potential liability," and ruled instead that "even when a defamation claim is 'clearly nonmeritorious,' the threat of liability 'ultimately chills the free exercise of expression.'" *Id.* (quoting *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 268 (1986)).

The lower court's decision is much too shortsighted and ignores the significant public interest concerns raised in *Barrett*. If affirmed, the appellate ruling would foster a regime that removes unfavorable content from the Internet without proper adjudication.

## B. The Appellate Court's Ruling Is Inconsistent with Section 230 Of The Communications Decency Act Providing Immunity For Interactive Computer Services For Publishing Or Distributing User Speech

### 1. The *Hassell* decision creates an end-run around Section 230 of the Communications Decency Act

The appellate court's ruling creates a significant and dangerous loophole to the statutory immunity granted to interactive computer service providers in Section 230 of the Communications Decency Act ("CDA"), which Congress enacted to "promote the continued development of the Internet and other interactive computer services" and "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b). To further those goals, Section 230 mandates that:

> No provider or user of an interactive computer service[6] shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1). Section 230 further states that:

> *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.

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[6] An *interactive computer service* is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). An *information content provider* "means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3).

47 U.S.C. § 230(e)(3) (emphasis added).

This Court previously found in *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006), that the "provisions of section 230(c)(1), conferring *broad immunity* on Internet intermediaries, are themselves a strong demonstration of legislative commitment to the value of maintaining a free market for online expression." *Id.* at 56 (italics added). "The statute includes findings welcoming the 'extraordinary advance in the availability of educational and information resources' on the Internet, and applauding the Internet as a 'forum for a true diversity of political discourse' that offers' myriad avenues for intellectual activity' and provides a 'variety of political, educational, cultural, and entertainment services.'" *Id.* (quoting 47 U.S.C. § 230(a)(1), (3), & (5)).

Federal and state courts have uniformly construed the CDA as prohibiting the imposition of liability on websites like Yelp and *amici* for defamation, other torts, and federal civil claims that seek to hold the website liable—directly or indirectly—as the publisher or distributor of content posted by a third-party user.[7] The statutory bar under Section

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[7] *See, e.g., Doe II v. MySpace, Inc.*, 175 Cal. App. 4th 561, 568 (2009) (stating that Congress "intended to extend immunity [under the CDA] to all civil claims"); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 828 (Cal. Ct. App. 2002) ("section 230, by its 'plain language,' created a federal immunity to any cause of action that would make interactive service providers liable for information originating with a third party user of the service") (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)); *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 692 (2001) (holding a city was immune under section 230 from liability under state causes of action for misuse of public funds, nuisance and premises liability for library's acts in providing computers allowing access to pornography); *Evans v. Hewlett-Packard Co.*, No. 13-cv-02477-WHA, 2013 WL 5594717, at *2 (N.D. Cal. Oct. 10, 2013) ("Section 230 of the CDA bars state law claims against internet service providers based on content provided by a third party."); *Nemet*

230 also extends to claims for injunctive relief. *See Blockowicz v. Williams*, 675 F. Supp. 2d 912, 915 (N.D. Ill. 2009) (declining to enforce a permanent injunction ordering the removal of defamatory material against RipoffReport.com based on the CDA immunity), *aff'd on other grounds*, 630 F.3d 563 (7th Cir. 2010); *Noah v. AOL Time Warner*, 261 F. Supp. 2d 532, 540 (E.D. Va. 2003) ("[Section] 230 should not be read to permit claims that request only injunctive relief. After all, in some circumstances injunctive relief will be at least as burdensome to the service provider as damages, and is typically more intrusive."), *aff'd mem.*, 2004 WL 602711 (4th Cir. Mar. 24, 2004).

The appellate court's ruling opened a procedural backdoor to contravene the CDA's statutory prohibition by enabling plaintiffs to obtain a broad injunction against the service provider through a suit filed against only the alleged speaker, and compelling the service provider to remove content under the threat of sanctions. *See Hassell*, 247 Cal. App. 4th at 1364-65. Under the CDA, service providers have no obligation to

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*Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (dismissing plaintiff's claim for defamation based on material posted by a third party); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir.) (affirming judgment on the pleadings for MySpace pursuant to the CDA on claims for negligence and gross negligence for allegedly failing to "implement [safety] measures" to prevent sexual predators from communicating with minors on its social networking website and thereafter assaulting them), *cert. denied,* 129 S. Ct. 600 (2008); *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1054-56 (E.D. Mo. 2011) (rejecting argument that CDA immunity did not apply to civil remedy provisions for personal injuries under 18 U.S.C. § 2255); *Inman v. Technicolor USA, Inc.*, No. 11-cv-666, 2011 WL 5829024, at *8 (W.D. Pa. Nov. 18, 2011) (granting eBay's motion to dismiss and ruling that plaintiff's claims against eBay for strict product liability, negligence and other tort causes of action for the sale of defective products through the eBay website are barred by the CDA).

remove third-party material even if it is adjudged to be defamatory. *See, e.g.*, *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) ("Deciding whether or not to remove content or deciding when to remove content falls squarely within [a search engine's] exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity."). The lower court's decision, however, allows plaintiffs that are otherwise barred under the CDA from suing the provider for an injunction to do indirectly what they cannot do directly, and thereby gutting the broad protections afforded to interactive computer service providers under the CDA.

The contempt liability attached to the removal order also violates the CDA's prohibition against all forms of "liability" that are inconsistent with the CDA's broad grant of immunity. *See* 47 U.S.C. § 230(e)(3). By ordering Yelp to remove Bird's alleged comments from its website, the court was treating Yelp exactly as a "publisher" of content originating from a third party (*see* 47 U.S.C. § 230(c)(1)), and if Yelp made the editorial decision to not delete the review, it would have been held *liable*. There is no principled reason to uphold the distinction the appellate court sought to draw between tort liability and liability flowing from contempt of court. *See Hassell*, 247 Cal. App. 4th at 1365. While liability would be in the form of sanctions for violating a court order or injunction, that does not change the fact that liability would ultimately be rooted in Yelp's failure to remove content originating from a third party—which courts have consistently held is barred by the CDA. *See, e.g.*, *Barrett*, 40 Cal. 4th at 53 ("Congress contemplated self-regulation, rather than regulation compelled at the sword" and "chose to protect even the most active Internet publishers, those who take an aggressive role in republishing third party content."); *Green v. Am. Online, Inc.*, 318

F.3d 465, 471 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003) (holding section 230 barred tort action against AOL for its allegedly negligent failure to remove defamatory material from a chat room on its network; ruling that the CDA immunizes providers against liability for exercising publishers' traditional editorial functions such as "deciding whether to publish, withdraw, or alter content"); *Murawski*, 514 F. Supp. 2d at 591 (ruling that "Nor can Ask.com be held liable for failing to keep any alleged promise to remove [the third party content] from its directory," because "[d]eciding whether or not to remove content or deciding when to remove content falls squarely within Ask.com's exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity"); *see also Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014) ("The protection provided by § 230 has been understood to merit expansion. Congress has extended the protection of § 230 into new areas. . . . And courts have construed the immunity provisions in § 230 broadly.").

2. The appellate court's rejection of Yelp's CDA defense creates a chilling effect on speech and encourages the type of forum shopping that this Court expressly cautioned against in *Barrett*

The Court in *Barrett* made clear that subjecting service providers to "defamation liability" would "chill online speech," and was critical that the court of appeal in that case "gave insufficient consideration to the burden its rule [of expanding liability against distributors] would impose on Internet speech." *Barrett*, 40 Cal. 4th at 56. The Court warned against narrowing the scope of CDA immunity in a manner that would have "deleterious effects." *Id.* at 54. In refusing to hold distributors of third-party speech liable upon notice, the Court found that service

providers would be given "a natural incentive to simply remove [allegedly defamatory] messages upon notification, chilling the freedom of Internet speech." *Id.* at 54-55.[8] Upholding "[n]otice-based liability for service providers would allow complaining parties to impose substantial burdens on the freedom of Internet speech by lodging complaints whenever they were displeased by an online posting." *Id.* at 57; *see also id.* at 55 (allowing distributor liability would incentivize third parties to "manufactur[e] claims, [thereby] imposing on providers 'ceaseless choices of suppressing controversial speech or sustaining prohibitive liability'" (citing *Zeran*, 129 F.3d at 333)). "The volume and range of Internet communications make the 'heckler's veto' a real threat under the Court of Appeal's holding. The United States Supreme Court has cautioned against reading the CDA to confer such a broad power of censorship on those offended by Internet speech." *Id.* (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 880 (1997)).

The appellate court in *Hassell* failed to heed those warnings and instead gave "hecklers" a procedural roadmap for circumventing the protections afforded to interactive computer service providers by the CDA, without notice and a fair opportunity to be heard. Indeed, since the

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[8] Observers following these trends have confirmed the *Barrett* court's concern that providers faced with takedown demands are more likely to engage in self-censorship. *See, e.g.*, Daphne Keller, *Empirical Evidence of "Over-Removal" by Internet Companies under Intermediary Liability Laws*, The CIS Blog (Center for Internet and Society at Stanford Law School), October 12, 2015, http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws (stating "the easiest, cheapest, and most risk-avoidant path for any technical intermediary is simply to process a removal request and not question its validity," and aggregating multiple studies analyzing the impact of removal notices on free expression).

lower court's ruling was published, Glassdoor has begun receiving demand letters citing the opinion as grounds for demanding that Glassdoor remove content and reviews deemed objectionable. *See also* August 10, 2016 Letter to the Court from Google Inc., at 3 ("The decision below is already being used to try to expand the law in dangerous ways. For example, plaintiffs in a pending case in Canada involving Google have cited the decision to try to justify an unprecedented blocking order that would require Google to remove certain search results [from] websites across the entire world.").

The post-*Hassell* threats made by potential litigants against Glassdoor and Google underscore "another practical implication" that the Court in *Barrett* warned of: "Adopting a rule of liability under section 230 that diverges from the rule announced in *Zeran* and followed in all other jurisdictions would be an open invitation to forum shopping by defamation plaintiffs." *Id.* at 58. If the Court affirms the lower court's ruling, litigants who seek to censor what others say about them online will undoubtedly file suit in California (and will be more incentivized to do so where the speaker is a nonresident, to increase the likelihood of obtaining a "removal order" upon a default judgment).

Service providers already are faced with a steady stream of takedown requests. Within the year prior to Yelp's petition for review in this case, Glassdoor received approximately 260 legal demand letters to remove and/or disclose its users' identities. During that time, Glassdoor's users had been the subject of nearly 50 court cases brought by employers. As of June 2016, when the appellate court issued its ruling in this case, there were about 14 active legal cases directed at approximately 83 Glassdoor users. In almost all of these cases, the reviews at issue reflect opinions of current or former employees.

While these statistics reflect cases brought in multiple states, if the lower court's ruling is left to stand it will encourage sophisticated plaintiffs familiar with the *Hassell* case to file a disproportionate number of these takedown suits in California courts to circumvent the laws in other jurisdictions that broadly uphold the statutory immunity against all forms of *liability* provided by Section 230 of the CDA.

## III. CONCLUSION

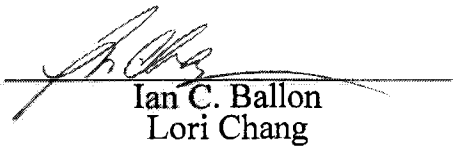
The lower court's ruling, if upheld, would lead to a chilling effect on speech because it deprives platform providers like Yelp and *amici* the ability to challenge a takedown order obtained through a default judgment proceeding where only the speaker is named as a defendant. The ruling not only violates Yelp's First Amendment rights to maintain the content posted on its website, but also due process by subjecting Yelp to a mandatory injunction without prior notice and a hearing. It also runs counter to the broad immunity afforded to interactive computer service providers under section 230 of the CDA by allowing a judicial end run around the CDA's statutory bar against allowing any cause of action or imposing liability on service providers for content posted by users.

For the reasons stated above, *amici* Glassdoor and TripAdvisor respectfully request that the Court reverse the lower court rulings.

Dated: April 13, 2017

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: 

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## CERTIFICATE OF WORD COUNT

I, Lori Chang, hereby certify pursuant to Rule of Court 8.520(d) that this Amicus Curiae Brief For Glassdoor, Inc. And TripAdvisor LLC In Support Of Appellant Yelp, Inc. was produced on a computer, and that it contains 7069 words, including footnotes but excluding the tables, the cover information required by Rule 8.204(b)(1), the signature block, this Certificate, and the proof of service, as calculated by the word count of the computer program used to prepare this brief.

Executed April 13, 2017, at Los Angeles, California.

Lori Chang

## PROOF OF SERVICE

### STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 1840 Century Park East, Suite 1900, Los Angeles, CA, 90067.

On April 13, 2017, I served the **APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF FOR GLASSDOOR, INC. AND TRIPADVISOR LLC IN SUPPORT OF APPELLANT YELP, INC.** on the interested parties in this action by placing the true copy thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

**SEE ATTACHED SERVICE LIST**

☒ **(BY MAIL)**

I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 13, 2017, at Los Angeles, California.

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