

CASE NO. G054358
COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

YELP INC.,

Nonparty Witness and Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA OF ORANGE COUNTY,

Respondent.

Real Parties in Interest,

GREGORY M. MONTAGNA and MONTAGNA & ASSOCIATES, INC.

Appeal From the Superior Court of Orange County
Honorable Andrew Banks, Presiding Judge, Dept. C11
Case No. 30-2016-00848551

**APPLICATION OF AUTOMATTIC INC., DROPBOX, INC.,
FACEBOOK, INC., GOOGLE INC., PINTEREST, INC., REDDIT,
INC., SNAP INC., AND TWITTER, INC. TO FILE BRIEF AS AMICI
CURIAE IN SUPPORT OF PETITIONER YELP INC.**

James G. Snell, Bar No. 173070
JSnell@perkinscoie.com
Christian Lee, Bar No. 301671
CLee@perkinscoie.com
PERKINS COIE LLP
3150 Porter Drive
Palo Alto, CA 94304-1212
Telephone: 650.838.4300
Facsimile: 650.838.4350

Hayley L. Berlin
HBerlin@perkinscoie.com
PERKINS COIE LLP
700 Thirteenth St. NW, Suite 600
Washington, DC 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.9123

Attorneys for Amici Curiae

Pursuant to California Rule of Court 8.200(c), Automattic Inc., Dropbox, Inc., Facebook, Inc., Google Inc., Pinterest, Inc., Reddit, Inc., Snap Inc., and Twitter, Inc. (collectively, “Amici”) respectfully request permission to file the attached brief as amici curiae in support of Petitioner Yelp Inc.¹

Amici are some of America’s leading technology companies, providing services that enable billions of people across the United States and around the world to use the power of the Internet to connect, communicate, debate, discover, and share.

Automattic Inc. is a company with a singular mission: make the web a better place. All of Automattic’s products and services are designed to democratize online publishing so that anyone with a story can tell it. Automattic is best known for WordPress.com. WordPress.com allows anyone, from bloggers, to photographers, plumbers, doctors and restaurant owners, to easily create a website on the web platform that powers more thoughts, musings, and businesses than any other in the world.

Dropbox, Inc. provides file storage, synchronization, and collaboration services. With over 500 million users, people around the

¹ Pursuant to California Rule of Court 8.200(c)(3), undersigned counsel certifies that this brief was not authored, in whole or in part, by any party or any counsel for a party in the pending appeal and that no person or entity other than Amici made any monetary contributions intended to fund the preparation or submission of this brief.

world use Dropbox to work the way they want, on any device, wherever they go.

Facebook, Inc. provides a free Internet-based social media service that enables more than 1.8 billion people to share and make the world more open and connected. People use Facebook to stay connected with friends and family, to discover what is going on in the world, and to express what matters to them.

Google Inc. offers a suite of web-based products and services that include Search, Gmail, Google+, Maps, YouTube, and Blogger.

Pinterest, Inc. is an online platform that allows users to discover, save and share ideas that they love. Pinterest users save images, articles, recipes and other ideas (each known as a “Pin”) from across the Internet and organize them in themed collections called “boards.” As Pinterest’s more than 175 million global monthly-active-users browse the Internet, including the more than 100 billion Pins available on Pinterest, they can add the content they find to their own boards, and they can follow the Pinterest users and boards they find most interesting, useful, or inspiring.

Reddit, Inc. operates the reddit.com platform, which is a collection of thousands of online communities attracting over 260 million monthly unique visitors that create, read, join, discuss, and vote on conversations across a myriad of topics. Reddit is based in San Francisco, California.

Snap Inc. is a camera company whose products empower people to express themselves, live in the moment, learn about the world, and have fun together. Snap Inc. operates the popular Snapchat camera application, which allows users to communicate via ephemeral videos, photos, and text.

Twitter, Inc. operates a global platform for self-expression and communication, with the mission of giving everyone the power to create and share ideas and information instantly. Twitter's more than 300 million active monthly users use the platform to connect with others, express ideas, and discover new information. Hundreds of millions of short messages (known as "Tweets") are posted on Twitter every day. Twitter has headquarters in San Francisco, California.

Amici are based in California, and their services enable people throughout the country and world to express themselves, both privately and publicly. Amici's services have transformed and elevated this country's long tradition of town halls, private assemblies, robust debate, and anonymous complaints by bringing speech online and making it more accessible to people everywhere. As the providers of the online services that people use to exercise their First Amendment right to free speech, Amici are committed to protecting their users from invasions of that fundamental, Constitutional right.

This appeal presents the question of whether service providers like Amici have standing to challenge subpoenas that implicate their users' First

Amendment right to anonymous speech. Guarding its users' privacy and right to engage in lawful, robust, uninhibited speech is at the core of each of Amici's missions. Preservation of this right is critical to free speech across the Internet. Moreover, Amici collectively receive tens of thousands of requests for user information each year, each with the potential to implicate Amici's statutory, contractual, and other obligations to their users. Amici therefore have a strong interest in ensuring their right to seek judicial review before being compelled to produce information about their users.

Amici will assist this Court by discussing the broader legal and policy implications of this case, namely the impact that the trial court's holding, if upheld, would have on individual users' speech, speech across the Internet, and service providers' abilities to maintain their services and exercise their due process rights.

Amici respectfully request that the Court accept the accompanying brief for filing in this case.

DATED: May 1, 2017

Respectfully submitted,

PERKINS COIE LLP

By: 

James G. Snell
JSnell@perkinscoie.com

Attorneys for Amici Curiae

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James G. Snell, Bar No. 173070
JSnell@perkinscoie.com
Christian Lee, Bar No. 301671
CLee@perkinscoie.com
PERKINS COIE LLP
3150 Porter Drive
Palo Alto, CA 94304-1212
Telephone: 650.838.4300
Facsimile: 650.838.4350

Hayley L. Berlin
HBerlin@perkinscoie.com
PERKINS COIE LLP
700 Thirteenth St. NW, Suite 600
Washington, DC 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.9123

Attorneys for Amici Curiae

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I. INTRODUCTION

This case involves the First Amendment right to speak anonymously online, and service providers' standing to assert that constitutional right on behalf of the people who use their services. If the decision below denying Yelp this right is not corrected, it will harm the rights of individual speakers, chill speech across the Internet, and severely impact California-based service providers whose services enable people to speak freely and receive lawful, robust, uninhibited speech—activities that are the bedrock of our democracy. The trial court's decision, left undisturbed, would also deny service providers their fundamental due process right to challenge legal process that affects their statutory, contractual, and business obligations.

The Court should reaffirm that Yelp and similarly-situated service providers like Amici have standing to assert the First Amendment rights of anonymous or pseudonymous speakers on their platforms. Courts in California and across the country have so held, and this Court should do so as well. (See, e.g., *Glassdoor, Inc. v. Superior Court* (Mar. 10, 2017, H042824) __ Cal.Rptr.3d __ [2017 WL 944227 at p. 3] [collecting cases and recognizing that “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 anonymous contributors in maintaining anonymity”].) Failure to correct the trial court's holding will harm individual speakers and diminish public discussion. It will also harm

service providers, whose businesses depend upon providing their customers a forum for robust public debate. The decision should be reversed.

II. ARGUMENT

A. The First Amendment Protects the Right to Anonymous Speech, Including Through the Online Services Provided by Amici.

The First Amendment to the United States Constitution provides that Congress “shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. The Fourteenth Amendment extends that protection to the states. (See *Gitlow v. New York* (1925) 268 U.S. 652, 666 [45 S.Ct. 625, 69 L.Ed. 1138].) The freedom of speech protected by the First Amendment includes the right to speak anonymously. (*Buckley v. Am. Constitutional Law Found., Inc.* (1999) 525 U.S. 182 [119 S.Ct. 636, 142 L.Ed.2d 599]; *McIntyre v. Ohio Elections Comm’n* (1995) 514 U.S. 334 [115 S.Ct. 1511, 131 L.Ed.2d 426]; *Talley v. California* (1960) 362 U.S. 60 [80 S.Ct. 536, 4 L.Ed.2d 559].) As the United States Supreme Court has observed, “[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.” (*McIntyre*, at p. 357.) Indeed, that tradition not only predated the Constitution but also played an important role in its adoption. (See *id.* at p. 342; *id.* at p. 360 (conc. opn. of Thomas, J.) [“The essays in the Federalist Papers, published under the pseudonym of ‘Publius,’ are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution.”].)

In addition, the California Constitution provides that all people have the right to privacy, Cal. Const. art. 1, § 1, a right that this Court has held affords even broader protection to speech than does the First Amendment. (*Digital Music News LLC v. Superior Court* (2014) 226 Cal.App.4th 216, 229 [171 Cal.Rptr.3d 799] [citing *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853–54 [34 Cal.Rptr.2d 358]].) Like the First Amendment, the California right to privacy “protects the speech and privacy rights of individuals who wish to promulgate their information and ideas in a public forum while keeping their identities secret,” and “limits what courts can compel through civil discovery.” (*Id.* [quoting *Rancho Publ’ns v. Superior Court* (1999) 68 Cal.App.4th 1538, 1547–48 [81 Cal.Rptr.2d 274]].)

Protecting anonymous speech is critical to ensuring that public debate is “uninhibited, robust, and wide-open.” (*N.Y. Times Co. v. Sullivan*, (1964) 376 U.S. 254, 270 [84 S.Ct. 710, 11 L.Ed.2d 686].) Anonymity, the United States Supreme Court has explained, “is a shield from the tyranny of the majority,” and it “exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.” (*McIntyre v. Ohio Elections Comm’n*, *supra*, 514 U.S. at p. 357.) The right to anonymity is protected whatever the speaker’s motivation for remaining anonymous may be. (*Id.* at pp. 341–42.) And the right to anonymity is applicable to speech of all sorts—political speech, as well as

speech about economic and commercial affairs. (See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 765 [96 S.Ct. 1817, 48 L.Ed.2d 346] [“So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.”].)

Although Amici’s services differ, they all allow the people who use them to share stories and ideas online through words, photographs, ratings, symbols, and videos, and to convene groups and virtual assemblies. Every day, people across the country use Amici’s services to engage in and consume speech protected by the First Amendment. (See, e.g., *Reno v. ACLU* (1997) 521 U.S. 844, 853, 870 [117 S.Ct. 2329, 138 L.Ed.2d 874] [“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”]; *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1164 [same]; *Bland v. Roberts* (4th Cir. 2013) 730 F.3d 368, 386 [holding that “liking” on Facebook is protected under the First Amendment]; *Stanley v. Georgia* (1969) 394 U.S. 557, 563 [89 S.Ct. 1243, 22 L.Ed.2d 542] [holding that it is “well established that the Constitution protects the right to receive information and ideas,” and that such right is “fundamental to our free society”].) What is more, the right to

speak anonymously is even more important online: there, “[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously.” (*Doe v. 2theMart.com Inc.* (W.D.Wash. 2001) 140 F.Supp.2d 1088, 1093; accord, *Columbia Ins. Co. v. Seescandy.com* (N.D.Cal. 1999) 185 F.R.D. 573, 578.)

The power of the Internet and Amici’s services is that anyone has the platform and tools to exercise their right to speak, publish, and debate without fear of retaliation. Freedom of expression is thus central to the services Amici offer to the public.² Many users depend on the preservation

² WordPress.com’s (operated by Automattic) mission is to “democratize publishing one website at a time.” (WordPress.com, About Us <<https://wordpress.com/about/>> [as of May 1, 2017].) Dropbox, Inc. creates products “built on trust,” and promises its users that “[w]hen people put their files in Dropbox, they can trust they’re secure and their data is their own. Our users’ privacy has always been our first priority, and it always will be.” (Dropbox, About <<https://www.dropbox.com/about>> [as of May 1, 2017].) Facebook’s mission is to “give people the power to share and make the world more open and connected.” (Facebook, About <<https://www.facebook.com/facebook/info>> [as of May 1, 2017].) Google’s mission is to “organize the world’s information and make it universally accessible and useful.” (Google, Our Story <<https://www.google.com/intl/en/about/our-story/>> [as of May 1, 2017].) Pinterest’s mission is to “help people discover the things they love, and inspire them to go do those things in their daily lives.” (Pinterest, About Pinterest <<http://about.pinterest.com/en/press/press>> [as of May 1, 2017].) Reddit’s mission is to “help people discover places where they can be their true selves, and empower our community to flourish.” (Reddit, About <<https://about.reddit.com/>> [as of May 1, 2017].) Snap Inc.’s mission is to “empower people to express themselves, live in the moment, learn about the world, and have fun together.” (Snap Inc. <<https://www.snap.com/en-US/>> [as of May 1, 2017].) Twitter’s mission is to “give everyone the power to create and share ideas and information instantly, without barriers.” (Twitter, About <<https://about.twitter.com/company>> [as of May 1, 2017].)

of their anonymity when engaging in activities on Amici's platforms. Stripping service providers, like Amici, of the right to defend their users from improper unmasking risks rendering the right to anonymous speech online illusory and chilling lawful, anonymous speech across the Internet.

B. Provider Standing Is Critical to Protecting Lawful Online Speech.

As numerous courts have recognized, service providers are often in a better position to defend their users' speech than the users themselves. (See, e.g., *Glassdoor, Inc. v. Superior Court*, *supra*, 2017 WL 944227 at p. 3 [citing cases].) First, users may have no notice of the lawsuit or the subpoena seeking to unmask them. For example, procedural roadblocks such as a judicial order prohibiting service providers from notifying a user can deprive users of notice. Even where service providers attempt to notify a user of such a subpoena, that notice may not be effective if, for example, the email address or other information provided by the user upon account registration is outdated or is for an account that the user does not check regularly. Without notice, users have no knowledge that their anonymity is in peril.³

³ Montagna argues that the obligation to provide notice to anonymous or pseudonymous speakers of unmasking subpoenas should fall upon service providers like Yelp and Amici who, Montagna claims, "keep[] a record of valid email addresses and other contact information, and can easily provide notice of the subpoena." (Resp't Br. at p. 31.) While it is true that each of the Amici collects some form of contact information from its users, Amici have no way of knowing whether that information is current or whether notice actually reaches the user. Montagna thus overstates providers' ability to give users actual notice of subpoenas seeking to unmask them.

Second, even when the user has actual notice of a subpoena seeking to unmask them—indeed, even when the user has made an appearance—the user may not have sufficient time or resources to obtain competent legal counsel or prepare a comprehensive challenge to the subpoena prior to the production deadline. For example, expedited discovery sought by plaintiffs hinder a user’s ability to meaningfully respond. And the cost of challenging a subpoena will be prohibitive to many who otherwise wish to maintain their anonymity. (See, e.g., *Tendler v. www.jewishsurvivors.blogspot.com* (2008) 164 Cal.App.4th 802, 810 [79 Cal.Rptr.3d 407] (conc. opn. of McAdams, J.) [recognizing that it may cost a user “tens of thousands of dollars” to quash a third-party subpoena seeking to reveal the user’s identity].) And for those who do move to quash, an unsuspecting or legally unsophisticated speaker may neglect to assert a First Amendment objection altogether, particularly given the abbreviated timeline for asserting such objections. Personal resources and legal acumen should have no bearing on an individual’s substantive speech rights, or preclude a rigorous assessment of an attempt to infringe those rights.

Third, users who make an appearance to challenge attempts to unmask them face an additional disadvantage: although users in California may challenge subpoenas while maintaining their anonymity, they will nonetheless be unable to physically participate in proceedings, which prejudices their ability to present evidence and otherwise vigorously defend

themselves. (See, e.g., *Glassdoor, Inc. v. Superior Court*, *supra*, 2017 WL 944227 at p. 5.)

Moreover—and perhaps most importantly,—the mere prospect of having to defend against improper unmasking requests will have a significant chilling effect on speech across the Internet. (See, e.g., *id.*) Users will be left to decide whether to engage in speech that has no material reward but carries “a significant risk of substantial pecuniary harm,” (*id.*), as well as other potential harms if their anonymity is stripped away, such as being fired by an employer who disagrees with the speech or being subject to public smear campaigns as retaliation for the unpopular speech. Faced with such risks, “[t]he prudent decision is to refrain” from speaking altogether. (*Id.*) Meanwhile, in the absence of provider standing, those seeking to silence online anonymous speech will face few obstacles. And once a speaker is exposed through a subpoena, litigants can drop their baseless lawsuits—having incurred minimal costs—and seek retaliation against the speaker in other, extrajudicial ways. (See, e.g., *Swiger v. Allegheny Energy, Inc.* (E.D.Pa., May 19, 2006, No. 05-CV-5725) 2006 WL 1409622 [employer filed Doe lawsuit to discover the identity of an employee who criticized it online, fired the employee after obtaining the speaker’s identity, and promptly dismissed the lawsuit]; *Tendler v. www.jewishsurvivors.blogspot.com*, *supra*, 164 Cal.App.4th at p. 812 [recognizing that some requests to service providers to unmask anonymous speakers “will be solely for the purpose of silencing a critic by harassment,

ostracism, or retaliation”]; see also *Glassdoor, Inc. v. Superior Court*, *supra*, 2017 WL 944227 at p. 5 [citing *Tendler* and further recognizing that “some attacks on anonymity may be mounted for their *in terrorem* effect on *potential* critics”].) Such schemes threaten to render the right to anonymous speech illusory and chill free speech by dissuading people from using communications services anonymously.

Nonparty service providers must be allowed to exercise their right to defend their users’ right to lawful anonymous speech for the First Amendment protection of such speech to be given meaningful effect online. The chilling effect of the lower court’s decision is not theoretical. Nor is it nominal. Collectively, Amici receive tens of thousands of requests for user information each year. (See WordPress.com Transparency Report, Information Requests <<https://transparency.automattic.com/information-requests/>> [as of May 1, 2017] [noting that in 2016, WordPress received over 100 requests from governments and law enforcement agencies]; Dropbox, Inc., 2016 Transparency Report <<https://www.dropbox.com/transparency>> [as of May 1, 2017] [noting that Dropbox received over 500 requests from government and law enforcement agencies in the first half of 2016]; Facebook, Government Requests Report <<https://govtrequests.facebook.com/about/>> [as of May 1, 2017] [noting that Facebook received over 23,000 United States governmental requests for user information in the first half of 2016]; Google, User Data Requests <<https://www.google.com/transparencyreport/userdatarequests/countries>>

[as of May 1, 2017] [noting that Google received over 14,000 United States governmental requests for user information in the first half of 2016]; Pinterest, 2016 Transparency Report <<https://help.pinterest.com/en/articles/transparency-report>> [as of May 1, 2017] [noting that Pinterest received at least 70 governmental requests for user information in 2016]; Reddit, Inc., 2016 Transparency Report <<https://www.reddit.com/wiki/transparency/2016>> [as of May 1, 2017] [noting that Reddit received over 150 governmental requests for user information in 2016]; Snap Inc., Transparency Report <<https://www.snap.com/en-US/privacy/transparency/>> [as of May 1, 2017] [noting that Snap Inc. received over 1,000 United States criminal governmental requests in the first half of 2016]; Twitter, Inc., Information Requests <<https://transparency.twitter.com/en/information-requests.html#information-requests-jan-jun-2016>> [as of May 1, 2017] [noting that Twitter received over 2,500 United States governmental requests for user information in the first half of 2016].) The sheer number of such requests highlights the critical role providers play in protecting their users' right to anonymous online speech. If service providers like Amici were unable to defend their users' First Amendment rights, the right to anonymous speech would have little protection online. (Cf. *Tattered Cover, Inc. v. City of Thornton* (Colo. 2002) 44 P.3d 1044, 1060 ["Had it not been for the Tattered Cover's steadfast stance, the zealously of the City would

have led to the disclosure of information that we ultimately conclude is constitutionally protected.”].)

Recognizing the reality that provider involvement is often necessary to vindicate users’ First Amendment rights, courts have repeatedly acknowledged that when a nonparty service provider receives a subpoena that implicates the First Amendment rights of its users, it may object to unmasking on behalf of those users. (See, e.g., *Glassdoor, Inc. v. Superior Court*, *supra*, 2017 WL 944227 at p. 3 [holding that online publisher was entitled to assert First Amendment interests of its contributors]; *Digital Music News LLC v. Superior Court*, *supra*, 226 Cal.App.4th at p. 228 fn. 12 [citing *Rancho Publ’ns v. Superior Court*, *supra*, 68 Cal.App.4th at p. 1541] [holding that an online newsletter publisher had standing to assert commentators’ constitutional rights]; *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.* (D.D.C. 2009) 706 F.Supp.2d 11, 17 fn. 3 [citing *Virginia v. Am. Booksellers Ass’n* (1988) 484 U.S. 383, 392–93 [108 S.Ct. 636, 98 L.Ed.2d 782]] [company had standing to bring First Amendment challenge on behalf of its customers]; *In re Grand Jury Subpoena to Amazon.com Dated Aug. 7, 2006* (W.D.Wis. 2007) 246 F.R.D. 570, 572 [permitting Amazon to move to quash and assert a First Amendment objection to a grand jury subpoena seeking the identity of thousands of book purchasers]; cf. *Tattered Cover, Inc. v. City of Thornton*, *supra*, 44 P.3d at pp. 1047, 1056–58 [citing *In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.* (D.D.C. 1998) 26

Med.L.Rptr. 1599] [holding that an “innocent bookseller [must] be afforded an opportunity for an adversarial hearing prior to execution of a search warrant seeking customer purchase records”].)

Indeed, the Sixth District Court of Appeal reached the same conclusion just two months ago in *Glassdoor, Inc. v. Superior Court*. The case involved a lawsuit filed by Machine Zone, Inc., a software developer, against a former employee who anonymously posted a review of Machine Zone on Glassdoor, a website that allows users to post reviews of past and current employers. (*Glassdoor, Inc. v. Superior Court, supra*, 2017 WL 944227 at p. 1.) Machine Zone sought discovery of the user’s identity from Glassdoor and then moved to compel when Glassdoor refused to comply with the subpoena. (*Id.* at p. 2.) The Court of Appeal flatly rejected Machine Zone’s contention that Glassdoor did not have standing to contest the subpoena on First Amendment grounds. (*Id.*) A publisher, the Court held, “has a strong interest in protecting the right of its users to speak anonymously,” and permitting it to do so is often necessary to protect the First Amendment rights of its users. (*Id.* at p. 4.) It therefore sided with “*a substantial preponderance of national authority* [that] favors the rule that publishers, including Web site operators, are entitled to assert the First Amendment interests of their anonymous contributors in maintaining anonymity.” (*Id.* at p. 3) [emphasis added] [collecting cases]. That principle is fully applicable here, and this Court should adopt the same holding.

C. Withholding Provider Standing Will Harm Yelp, Amici, and Similarly Situated Service Providers.

In addition to harming individual speakers and chilling speech across the Internet, denying service providers standing to assert the First Amendment rights of their users will impose a substantial harm upon the service providers themselves, many of which, like Amici, are residents of California. As noted above, fostering freedom of expression is critical to Amici’s services, and users know that. Stripping providers of their right to vigorously defend their users’ right to anonymous speech will chill user speech and diminish both the quantity and quality of user participation on providers’ platforms. Users will either choose not to speak or self-censor to avoid having to defend against baseless defamation claims. As the *Glassdoor* court recognized, denying service providers standing to assert the First Amendment rights of their users “would serve neither the purposes of prudential standing requirements nor the broader interests of a society devoted to the free flow of ideas and information.” (*Glassdoor, Inc. v. Superior Court, supra*, 2017 WL 944227 at p. 5.)

The risk of improper unmasking will also stifle innovation, to the detriment of millions of people who rely on online communications services and benefit from them. Service providers may be hesitant to implement new features or technologies—particularly those that allow users to engage in robust anonymous speech—if they know they will be exploited by litigants wishing to harass and silence those whose opinions they do not like. Similarly, new technologies will be hindered from entering

the market by their vulnerability to abuse by individuals filing baseless lawsuits.

D. Service Providers Have a Due Process Right to Challenge Unmasking Requests.

Finally, principles of due process require that a nonparty subpoena recipient retain its right to challenge unmasking subpoenas—even when the user has appeared to defend its own rights. This is because every request issued to a service provider carries the potential to affect the provider’s statutory, contractual, and business obligations. For example, federal and state consumer protection laws address representations made to consumers, including regarding the collection and sharing of identifying information. (See, e.g., 15 U.S.C. § 45 [prohibiting “unfair or deceptive acts or practices”].) Additionally, electronic communications service providers are bound by the federal Electronic Communications Privacy Act and its three component statutes, which likewise address disclosure of stored and real-time subscriber communications and identifying information. (See, e.g., 18 U.S.C. §§ 2702(a)(1), (2) [prohibiting electronic communications service providers from disclosing the content of electronic communications]; *Suzlon Energy Ltd. v. Microsoft Corp.* (9th Cir. 2011) 671 F.3d 726, 730 [Section 2702(a) prohibits private parties from using a civil discovery demand to obtain the content of communications from a service provider because that would “invade[] the specific interests that the [law] seeks to

protect.” [Citation]].) Accordingly, providers such as Amici have an independent interest in ensuring their ability to assist on appropriate judicial review of the requests they receive each year for user information. (See *supra* Section II.B.)

Amici and other service providers that receive third-party subpoenas seeking to unmask users may not know whether the parties or the court have had occasion to address any of these concerns. Without the ability to seek judicial review, service providers could face a situation in which action or inaction could give rise to potential liability. Compliance could, for example, subject service providers to litigation based on contractual and statutory obligations, (see, e.g., 18 U.S.C. § 2707 [creating a private right of action for a subscriber to an electronic service provider for knowing or intentional violations of the Stored Communications Act]; 15 U.S.C. § 45 [prohibiting “unfair or deceptive acts or practices”]), while also threatening to diminish consumer trust in the integrity of their services. On the other hand, non-compliance could subject providers to sanctions for failure to comply with discovery. (See, e.g., Code Civ. Proc., § 1987.2, subd. (a), § 2023.030, subd. (a).) Due process therefore requires that service providers have a right to object to unmasking subpoenas and to ask the court to test the sufficiency of a request for user information. (See *Zinermon v. Burch* (1990) 494 U.S. 113, 132 [110 S.Ct. 975, 108 L.Ed.2d 100] [holding that

due process generally requires a pre-deprivation hearing, where feasible, before property is taken].)⁴

III. CONCLUSION

For the foregoing reasons, the trial court's ruling that Yelp did not have standing to assert the First Amendment rights of a pseudonymous speaker on its platform before being compelled by the court to disclose the speaker's identity should be reversed.

DATED: May 1, 2017

Respectfully submitted,

PERKINS COIE LLP

By: 

James G. Snell
JSnell@perkinscoie.com

Attorneys for Amici Curiae

⁴ And where the sufficiency of a subpoena for user information hinges on the sufficiency of the claims alleged and an evidentiary showing in support of those claims, (*Krinsky v. Doe 6, supra*, 159 Cal.App.4th at pp. 1164, 1170–73), it is necessarily proper for the court to test the complaint as well.

CERTIFICATE OF COMPLIANCE

I certify that this brief, exclusive of this certificate and the tables of contents and authorities, contains 5,523 words according to the word count function of the word-processing program used to produce the brief. The number of words in this brief complies with the requirements of Rule 8.204(c)(4) of the California Rules of Court.

DATED: May 1, 2017

PERKINS COIE LLP

By: _____

James G. Snell

Attorneys for Amici Curiae

PROOF OF SERVICE

CASE NO. G054358

**COURT OF APPEAL OF CALIFORNIA FOURTH APPELLATE
DISTRICT DIVISION THREE**

I, James G. Snell, declare:

I am a citizen of the United States and employed in Santa Clara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3150 Porter Drive, Palo Alto, California 94304-1212. On May 1, 2017, I served a copy of the foregoing document on all parties listed below:

Application of Automattic Inc., Dropbox, Inc., Facebook, Inc., Google Inc., Pinterest, Inc., Reddit Inc., Snap Inc., and Twitter, Inc. to File Brief As Amici Curiae in Support of Petitioner Yelp Inc.

BY TRUEFILING: On this day, I caused to have served the foregoing document(s) as required on the parties and/or counsel of record designated for electronic service in this matter on the TrueFiling website.

BY OVERNIGHT MAIL: I deposited with Federal Express, a true and correct copy of the above document as indicated below. Following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date

Steven Krongold
Krongold Law Corp., P.C.
100 Spectrum Center Drive, 9th Floor
Irvine, CA.92618
(949)651-1900
steve@krongoldlaw.com

C.M. Sheedy, Esq.
Calendo Puckett Sheedy LLP
701 N. Brand Blvd., Ste. 300
Glendale, CA 91203-3295
(818) 549-1935
cmsheedy@cpsd.com

*Attorney for Plaintiffs
Via TrueFiling*

*Attorney for Defendant
Via TrueFiling*

Adrianos Facchetti
Law Offices of Adrianos Facchetti, P.C.
301 E. Colorado Blvd., Suite 514
Pasadena, California 91101
(626) 793-8607
adrianos@facchettilaw.com

*Attorneys for Non-Party Witness and
Petitioner, YELP INC.*

Via TrueFiling

Aaron Schur
Connie Sardo
Yelp Inc.
140 New Montgomery Street
San Francisco, CA 9410
(415) 908-3801
aschur@yelp.com
cdsardo@yelp.com

*Attorneys for Non-Party Witness
and Petitioner, YELP INC.*


Via TrueFiling

Judge Andrew Banks
Superior Court of Orange County
700 Civic Center Drive
Santa Ana, CA 92701

Via Overnight Mail

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

Executed on May 1, 2017, at Palo Alto, California.



James G. Snell