No. A167205

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION THREE

YELP INC.,
Defendant and Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA,
SAN FRANCISCO COUNTY,
Respondent.

ERIC GRUBER, *et al.*, individually and on behalf of all others similarly situated,
Real Parties in Interest.

ON PETITION FOR WRIT OF MANDATE FROM THE SAN FRANCISCO COUNTY SUPERIOR COURT
ANDREW Y.S. CHENG, JUDGE | CASE NO. CGC 16-554784

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF ADVANCE PUBLICATIONS, INC., THE CENTER FOR INVESTIGATIVE REPORTING, E.W. SCRIPPS COMPANY, THE FIRST AMENDMENT COALITION, THE NEWS/MEDIA ALLIANCE, AND WP COMPANY LLC IN SUPPORT OF PETITIONER

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Advance Publications, Inc. does not have any parent corporation. Nor does any publicly held corporation own more than 10% of its stock.

The Center for Investigative Reporting (d/b/a Reveal) is a non-profit corporation that has no parent company and no stock.

E.W. Scripps Company (Scripps) is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

The First Amendment Coalition (FAC) is a non-profit corporation that has no parent company and no stock.

The News/Media Alliance is a non-profit corporation that has no parent company and no stock.

WP Company LLC (d/b/a The Washington Post) is a wholly-owned subsidiary of Nash Holdings LLP, which is owned by Jeffrey P. Bezos.

There are no other interested entities or persons that must be listed in this certificate under California Rule of Court 8.208(e).

Dated: February 24, 2023 Respectfully submitted,

BALLARD SPAHR LLP

By: _____
Matthew S.L. Cate

Counsel for Amici Curiae

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION 3:

Pursuant to California Rule of Court 8.487(e), and the Comments thereto, *amici curiae* Advance Publications, Inc., The Center for Investigative Reporting (d/b/a Reveal), E.W. Scripps Company, the First Amendment Coalition, the News/Media Alliance, and WP Company LLC (d/b/a The Washington Post) (collectively, the "Media Coalition") respectfully request leave to file the attached *amici curiae* brief in support of the Petition for a Writ of Mandate of Yelp, Inc. ("Yelp") in the above-captioned matter.[1]

As described below, the Media Coalition consists of news organizations and professional organizations that support and advocate on behalf of journalists and free expression. The interest of the members of the coalition in this case arises from their concern that the Superior Court order from which Yelp seeks writ relief will, if permitted to stand, have significant

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[1] No party or counsel for any party authored this brief, participated in the drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief. *See* Cal. Rule of Court 8.200(c)(3). Undersigned counsel further certifies that no person or entity other than the members of the Media Coalition and their counsel authored or made any monetary contribution intended to fund the preparation or submission of the proposed brief.

consequences for journalists, media organizations, and the First Amendment right to record.

The Superior Court held that class-wide relief could be sought against Yelp based on alleged violations of the California Invasion of Privacy Act ("CIPA"), Cal. Pen. Code, § 632.7, involving the "one-sided" recordings of sales calls between Yelp employees and potential customers – that is, recordings that only capture Yelp's side of the conversation. The Media Coalition has two specific concerns about that ruling, which are articulated in the attached *amici curiae* brief.

First, the Media Coalition believes that the Superior Court's holding that the consent-to-record issue in this case is amenable to class treatment could pave the way for class action lawsuits against news organizations. It would do so by lowering the bar for when the issue of consent can be addressed on a class-wide basis. Such lawsuits would make the essential work that news organizations do more difficult and more expensive.

Second, the Media Coalition believes that the Superior Court's holding that any First Amendment challenge to the application of CIPA to the subject recordings is a class-wide merits issue, which does not depend on the individual details of any recording, undermines the First Amendment right to record. It does so because it permits the government to restrict the right to record even where there is no cognizable privacy interest at stake, such as when a conversation that conveyed no private information is subject to a one-sided recording.

The members of the Media Coalition are:

Advance Publications, Inc. is a diversified privately held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Condé Nast's global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

The Center for Investigative Reporting (d/b/a Reveal) founded in 1977, is the nation's oldest nonprofit newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, its national public radio show "Reveal" that airs on 560+ stations across the country as well as its podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

E.W. Scripps Company (Scripps) is one of the nation's largest local TV broadcasters, operating 61 stations serving 41 communities across the country with quality, objective local journalism. It reaches nearly every American through its national networks business, including news outlets Court TV and Scripps News and entertainment brands ION, Bounce, Grit, Laff and ION Mystery. Scripps also is the longtime steward of the Scripps National Spelling Bee. Founded in 1878, Scripps has held for decades to the motto, "Give light and the people will find their own way."

The First Amendment Coalition (FAC) is a nonprofit, public interest organization committed to freedom of speech, more open and accountable government, and public participation in civic affairs. Founded in 1988, FAC's activities include free legal consultations on First Amendment issues, educational programs, legislative oversight of bills in California affecting access to government and free speech, and public advocacy, including extensive litigation and appellate work. FAC's members are news organizations, law firms, libraries, civic organizations, academics, freelance journalists, bloggers, community activists, and ordinary persons.

The News/Media Alliance represents news and media publishers, including nearly 2,000 diverse news and magazine publishers in the United States—from the largest news publishers and international outlets to hyperlocal news sources, from digital-only and digital-first to print news. Alliance members account for nearly 90% of the daily newspaper's circulation in the United States. Since 2022, the Alliance is also the industry association for magazine media. It represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands, on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The Alliance diligently advocates for news organizations and magazine publishers on issues that affect them today.

WP Company LLC (d/b/a The Washington Post) is a news organization based in Washington, D.C. It publishes *The*

Washington Post, a daily print newspaper, as well as the website https://www.washingtonpost.com/, which reaches an audience of more than 70 million unique visitors per month. The Post's journalism has been recognized with 65 Pulitzer Prizes as of 2022.

The Media Coalition respectfully requests permission to file the attached *amici curiae* brief pursuant to California Rule of Court 8.487(e), in which it urges this Court to grant Yelp's Petition and vacate the Superior Court's order permitting class certification.

Dated: February 24, 2023

Respectfully submitted,

BALLARD SPAHR LLP

By: _____
Matthew S.L. Cate

Counsel for Amici Curiae

AMICI CURIAE BRIEF

INTRODUCTION

Advance Publications, Inc., The Center for Investigative Reporting (d/b/a Reveal), E.W. Scripps Company, the First Amendment Coalition, the News/Media Alliance, and WP Company LLC (d/b/a the Washington Post) (collectively, the "Media Coalition") (collectively, the "Media Coalition") submit this *amici curiae* brief in support of the Petition for a Writ of Mandate (the "Petition") filed by Yelp, Inc. ("Yelp") in this matter. The Media Coalition urges this Court to grant the Petition and vacate the Superior Court's order permitting class certification.

The Media Coalition submits this Brief out of concern about the potential consequences of the Superior Court's order for journalists, media organizations, and the First Amendment right to record. The Superior Court held that class-wide relief could be sought against Yelp based on alleged violations of the California Invasion of Privacy Act ("CIPA"), Cal. Pen. Code, § 632.7, involving the "one-sided" recordings of sales calls between Yelp employees and potential customers – that is, recordings that only capture Yelp's side of the conversation. This Brief is directed at two specific aspects of the Superior Court's ruling, both of which have highly concerning potential spill-over effects for journalists, media organizations, and First Amendment rights.

First, the Superior Court held that class treatment is appropriate on the threshold question of whether the at-issue recordings were consented to, notwithstanding Yelp's argument

that the consent determination necessarily requires an individualized inquiry into the interactions between the Yelp employee and the non-recorded party to the phone call, including whether there were interactions preceding the call that supplied adequate notice of recording.

The Media Coalition is concerned that that particular ruling, if permitted to stand, could pave the way for class action lawsuits against news organizations. It would do so by allowing people who provide information to journalists to aggregate individual grievances – for example, over consent to publish information, or to be recorded – without examination of the individual facts and circumstances. To be clear, such lawsuits would not be meritorious, as news organizations are most certainly not in the practice of breaking promises to sources or recording them without their consent. The concern, however, is that the ruling substantially lowers the bar for pursuing non-meritorious class action lawsuits against media organizations by holding that courts can address the consent issue on a class-wide basis, even where there is individual variation in the underlying circumstances.

As detailed more fully below, in the current environment, news organizations find themselves faced with systematic efforts to use the legal system to punish or hobble them for reporting information in the public interest. The Media Coalition is, therefore, concerned about novel rulings like this one that could expand the arsenal of tactics for those seeking to use the legal system to pursue anti-media agendas.

Second, the Superior Court held that any First Amendment challenge to the application of CIPA to the subject recordings was a class-wide merits issue, which did not pose any obstacle to class certification. As explained below, that amounts to a very expansive view of the government's power to restrict recording, one dramatically at odds with the emerging recognition that the right to record is an important First Amendment right, which requires a strong countervailing privacy interest to overcome.

The First Amendment issue in this case is only a class-wide issue if the First Amendment permits liability based on one-sided recordings regardless of the specific information captured in the recording. While the Media Coalition has serious questions as to whether the First Amendment would ever permit liability based on a one-sided recording, given the absence of any privacy interest in not having someone else's voice recorded, at a minimum, liability based on a one-sided recording requires that the recording capture private information about the non-recorded party. Otherwise, there is no even conceivable infringement on that party's privacy. The Superior Court's contrary conclusion in this case essentially unmoors the government's power to restrict recording from the protection of any cognizable privacy interests. That undermines the First Amendment right to record.

For each of those reasons, the Media Coalition urges this Court to grant Yelp's Petition and to vacate the Superior Court class-certification order.

ARGUMENT

I. THE SUPERIOR COURT'S RULING THAT THE CONSENT ISSUE WAS AMENABLE TO CLASS TREATMENT DRAMATICALLY LOWERS THE BAR FOR SEEKING CLASS RELIEF IN A WAY THAT THREATENS NEWS ORGANIZATIONS.

The Superior Court's ruling that the consent issue in this case can be litigated on a class-wide basis could expose news organizations to a proliferation of meritless class action lawsuits.

In proceedings below, Yelp argued that the threshold CIPA liability issue of whether the challenged recordings were consented to could not be addressed on a class basis because the consent analysis requires an individualized inquiry into the circumstances of each one-sided recording. In particular, Yelp noted that many of the sales calls subject to one-sided recording were preceded by interactions, such as prior conversations or emails, that are highly relevant to determining whether any individual plaintiff proceeded under the assumption that the subsequent call would be recorded. App.4434. The Superior Court rejected Yelp's argument, holding that the potential need for such inquiries was not a barrier to class certification. App.4434-35.

The Superior Court's approach is in stark contrast to how other California courts have addressed the consent-to-record issue in the class-certification context. Those courts have generally held that class treatment is not appropriate where the consent issue hinges on the specific details of the individual class members' interactions with the defendant. *See, e.g.*, *Kight v. CashCall, Inc.* (2014) 231 Cal App. 4th 112, 130-32 (consent issue

under Section 632 of CIPA was not amenable to class treatment where "the plaintiffs had a continuing ongoing business relationship with the defendant, during which many plaintiffs may have heard a monitoring disclosure statement at least once"); *Hataishi v. First Am. Home Buyers Protection Corp.* (2014) 223 Cal. App. 4th 1454, 1467-68 (consent issue under Section 632 of CIPA was not amenable to class treatment because "the determination whether an individual plaintiff had an objectively reasonable belief that his or her conversation . . . would not be recorded will require individualized proof of, among other things, the length of the customer-business relationships and the plaintiff's prior experience with business communications" (cleaned up)).

The Media Coalition's specific concern here is that the Superior Court's contrary and novel treatment of the consent issue could pave the way for class action lawsuits against news organizations. An essential part of the work of journalism involves agreements between reporters and sources. These agreements often concern such matters as the ground rules for the interactions between the reporter and the source—*i.e.*, whether the source is agreeing to provide information subject to certain promises of confidentiality or anonymity. Those agreements can also concern whether any conversations between the reporter and the source will be recorded. Often the nature of exactly what has been agreed to between the reporter and the source is embedded within a larger set of interactions between the reporter and the source. That is, while reporters endeavor to

be as clear as possible with sources about whether conversations are "on the record," or "on background," or whether a promise of anonymity has been extended, sources at times have, after the fact, raised disagreements in court about those ground rules. Likewise, while journalists will usually explicitly ask for consent to record, there are certainly instances where recording is simply the routine practice between the reporter and the source in their interactions, and consent to record is not explicitly requested for each conversation.

The fear here is that the Superior Court's lowering of the bar for when the consent issue is amenable to class treatment will expose news organizations to class actions lawsuits. These could take the form of lawsuits on behalf of sources challenging a news organization's general practices around confidentiality under theories of breach of contract, promissory estoppel, or unjust enrichment. *See generally Cohen v. Cowles Media Co.* (1991) 501 U.S. 663, 671-72 (holding generally that news organizations can be sued by sources for breach of confidentiality agreements under contract-based and quasi-contract theories). Or, they could take the form of lawsuit under CIPA or analogous statutes based on challenges to the adequacy of their practices in obtaining consent to record conversations with sources. The point is that, under the approach set forth in *CashCall* and *Hataishi*, no such challenge could be brought on a class-wide basis, since the consent analysis in the reporter-source context will always turn on their individual interactions. Under the Superior Court's analysis in this case, that is much less certain.

As indicated above, the concern here is not that any lawsuits of the type described above would be meritorious. News organizations are definitely not in the habit of breaking promises to sources or recording them without their consent. Indeed, news organizations quite often go to court to avoid being compelled to break confidentiality promises to sources. But, even if the Superior Court's class-certification decision will not affect the ultimate outcomes of cases against news organizations, it nonetheless threatens to massively increase the scope and expense of such litigation by creating a mechanism for seeking class-wide relief against news organizations that previously did not exist. A common tactic for suppressing speech is to bring "meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1024. In a world in which news organizations are threatened by the existence of secretly funded, well-orchestrated lawsuits against the news media,[2] courts

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[2] *See generally* Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism* (2017) 66 Am. U. L. Rev. 761, 763 (noting that "[a]n important new salvo" in the "war against the media" is "third-party litigation funding supporting proxy plaintiffs tort actions against the press"); Papandrea, *Media Litigation in a Post-Gawker World* (2019) 93 Tul. L. Rev. 1105, 1135-36 (discussing the rise of politically motivated efforts to fund lawsuits against media organizations); Mullin, *What does Peter Thiel's lawsuit against Gawker mean for a resource-strapped news industry?*, Poynter Institute (May 25, 2016), available at https://www.poynter.org/business-work/2016/what-does-peter-thiels-lawsuit-against-gawker-mean-for-a-resource-strapped-news-industry/ (describing the rise of ideologically motivated funding of lawsuits against media organizations as "a forbidding sign that has broader implications

should be especially reluctant to expand the toolkit of tactics that can be used against media organizations. This is all the more so considering the dramatic consequences of permitting class certification. *See* Miller, *Rethinking Certification and Notice in Opt-Out Class Actions* (2006) 74 UMKC L. Rev. 637, 642 ("For defendants, certification of a large-scale class action can turn an insignificant case into one with potentially devastating liability exposure."); *see also AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 350 (noting "the risk of 'in terrorem' settlements that class actions entail" and recognizing that "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims").

The Media Coalition, thus, urges the Court to vacate the Superior Court's order permitting class certification.

II. THE SUPERIOR COURT'S RULING RESTS ON A DANGEROUSLY EXPANSIVE UNDERSTANDING OF THE GOVERNMENT'S RIGHT TO RESTRICT RECORDING.

The Media Coalition urges the Court to vacate the Superior Court's order for an additional reason—it rests on an impermissibly expansive understanding of the government's power to restrict recording.

Courts have increasingly come to recognize that the right to record is a crucial right protected by the First Amendment, one that serves both the press and the public. This issue is most often litigated in the context of the right to record police activity

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for a news industry that is already struggling to wage lawsuits in defense of their journalism").

in public, where such a right is understood to play a critical role in allowing the public to stay informed about, and monitor, police activity. *See, e.g.*, *Fields v. City of Phila.* (3d Cir. 2017) 862 F.3d 353, 358; *ACLU v. Alvarez* (7th Cir. 2012) 679 F.3d 583, 602. But, the right to record is by no means limited to that context, and rests generally on a right to gather information, which can be circumscribed only by legitimate private interests. *See Askins v. Dep't of Homeland Sec.* (9th Cir. 2018) 899 F.3d 1035, 1044 (discussing parameters of the right to record); *see also Animal Legal Def. Fund v. Wasden* (9th Cir. 2018) 878 F.3d 1184, 1203-05 (striking down as unconstitutional under the First Amendment a regulation prohibiting "a person from entering a private agricultural production facility and, without express consent from the facility owner, making audio or visual recordings of the 'conduct of an agricultural production facility's operations'"). The Superior Court's class-certification order threatens to undermine that right to record.

In its ruling, the Superior Court rejected Yelp's argument that its First Amendment defense to liability requires individualized assessment. The court held that Yelp's First Amendment argument amounted to a facial challenge to the constitutionality of CIPA, as interpreted to bar one-sided recordings without the consent of both parties, and, thus, presented a general merits issue that was not a barrier to class certification. *See* App.4436. That holding side-stepped the crucial First Amendment issue that <u>is</u> indisputably relevant to class certification—*i.e.*, whether the First Amendment permits

liability for one-sided recordings irrespective of whether those recordings captured any private information about the non-recorded party.

As indicated above, the Media Coalition has serious doubts about whether the First Amendment would permit liability for one-sided recording under any circumstances, given the absence of any privacy interest in the recording of a voice other than one's own. At a minimum, the First Amendment bars subjecting one-sided recordings to liability without individualized assessment of whether any privacy interest is implicated by the recording, such as might occur, for instance, if the recorded party were to repeat back private information divulged by the non-recorded party. *See Gruber v. Yelp Inc.* (2020) 55 Cal. App. 5th 591, 600 (noting, in prior appeal, that the named plaintiff "had a personal friendship" with the Yelp employee, and "revealed personal information . . ., including information regarding his beer drinking habits").

As one federal court has explained, while states have some latitude under the First Amendment to enact content-neutral restrictions on the right to record, states do not have the right to restrict "audio recording that implicates *no* privacy interests at all." *Alvarez*, 679 F.3d at 606. In the case of two-sided recordings, the privacy interest CIPA protects is the non-consenting party's interest in not having his or her own "statements" in a private conversation recorded without knowledge/consent. *Ribas v. Clark* (1985) 38 Cal. 3d 355, 361. That interest does not depend on the "content" of the recorded conversation. *Flanagan v. Flanagan* (2002) 27 Cal. 4th 766, 774-

76. But, the same does not apply to one-sided recordings, which, by definition, do not record the non-consenting side of the conversation. If such recordings are to be constitutionally prohibited, it must be because there is some privacy interests implicated by the content of what was recorded. And, that consideration necessarily depends on the examination of the content of each one-sided recording.

Yet, the Superior Court held in this case that the First Amendment does not demand individualized inquiry as to whether any privacy interests were actually implicated by any challenged one-sided recording. The result is to de-couple restrictions on recording from the privacy interests those restrictions are supposed to protect. Such an expansive understanding of the government's power to restrict recording, one completely unmoored from any need to protect legitimate privacy interests, represents a grave threat to the First Amendment right of the press and the public to record.

The Media Coalition, thus, urges the Court to vacate the Superior Court's order permitting class certification on this additional ground.

CONCLUSION

This Court should grant the Writ of Mandate and vacate the order permitting the CIPA claims asserted against Yelp to be pursued on a class-wide basis. As explained above, the order (1) lowers the bar for when the consent issue is amenable to class treatment, and does so in a way that may create tools for asserting harassing class-action claims against news

organizations, and (2) rests on an indefensibly expansive understanding of the government's power to restrict recording, one that no longer ties that right to the protection of any cognizable privacy interest.

Dated: February 24, 2023

Respectfully submitted,

BALLARD SPAHR LLP

By: _____
Matthew S.L. Cate

Counsel for Amici Curiae

WORD COUNT CERTIFICATE

Pursuant to Cal. Rule of Court 8.204(c)(1), the undersigned hereby certifies the text of this brief, excluding the cover, certificate of interested entities or persons, tables of contents and authorities, application, this certificate, and signature blocks, consists of 2,713 words as counted by the Microsoft Word 2016 word processing program.

Dated: February 24, 2023

Respectfully submitted,

BALLARD SPAHR LLP

By: _____
Matthew S.L. Cate

Counsel for Amici Curiae

PROOF OF ELECTRONIC SERVICE

Yelp Inc. v. San Francisco County Superior Court,
First Appellate District Case No. A167205
San Francisco Superior Court Case No. CGC 16-554784

I am a resident of the State of California, over the age of eighteen years, and not a party to this action. My business address is Ballard Spahr LLP, 1909 K St., NW, 12th Fl., Washington, D.C. 20006. My electronic service address is catem@ballardspahr.com. I hereby certify that on this 24th day of February, 2023, I caused a true and correct copy of the **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF ADVANCE PUBLICATIONS, INC., THE CENTER FOR INVESTIGATIVE REPORTING, E.W. SCRIPPS COMPANY, THE FIRST AMENDMENT COALITION, THE NEWS/MEDIA ALLIANCE, AND WP COMPANY LLC IN SUPPORT OF PETITIONER** to be electronically served on the following parties by 1) transmitting the document via email and 2) filing same with the Court's TrueFiling system, which will supply e-service of the same:

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I also caused the document to be enclosed in a sealed envelope addressed to:

Civil Clerk of the Superior Court
San Francisco County Superior Court
400 McAllister St., Room 103
San Francisco, CA 94102-4514

and caused the envelope to be placed for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 24, 2023, at New Orleans, Louisiana.

Matthew S.L. Cate