IN THE
Supreme Court of Virginia

RECORD NO. 140242

YELP, INC.,
Non-party Respondent-Appellant,

v.

HADEED CARPET CLEANING, INC.,
Plaintiff-Appellee.

YELP INC.'S SUPPLEMENTAL BRIEF

Paul Alan Levy (pro hac vice)
Scott Michelman (pro hac vice)

Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org

Raymond D. Battocchi (# 24622)

Raymond D. Battocchi, P.C.
35047 Snickersville Pike
Round Hill, Virginia 20141-2050
(540) 554-2999
battocchi@aol.com

Counsel for Yelp Inc.

January 29, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

Federal Rules of Civil Procedure

MISCELLANEOUS

Yelp Inc. submits this brief in response to the Court's invitation to address the interplay between the subpoena power over foreign corporations and the constitutional limitations arising from the Due Process Clause on personal jurisdiction to bring suit against foreign corporations; whether the subpoena power can be exercised over a foreign corporation over which the state courts cannot exercise personal jurisdiction; and whether, on the facts in this case, Virginia may exercise personal jurisdiction over Yelp without contravening the limitations imposed by the Due Process Clause.

In the lower courts, Yelp argued against the trial court's exercise of the subpoena power largely as a matter of state law. Yelp cited cases that rested on the Due Process limitations of a state's power to regulate non-residents and the dangers posed by a theory that allowed a state to reach the activities of any defendant whose web sites and web services could be accessed within the state, but those arguments were made by analogy. Yelp continues to believe that this issue is best addressed under state law, and that this Court should not allow the trial court to impose on a foreign corporation in a manner not explicitly authorized by the Virginia Legislature.

I. THE SUBPOENA POWER OF VIRGINIA COURTS IS UNRELATED TO QUESTIONS OF PERSONAL JURISDICTION.

Traditionally, state courts have treated the subpoena power and personal jurisdiction to bring suit against a nonresident as two entirely separate questions, squarely rejecting the proposition that discovery can be obtained from non-residents so long as those non-residents have sufficient minimum contacts to warrant the exercise of personal jurisdiction under the Due Process Clause. *Craft v. Chopra*, 907 P.2d 1109, 1111 (Okla. Civ. App. 1995) (rejecting application of Supreme Court personal jurisdiction cases such as *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), as "enumerating constitutional due process requirements as to a *party,* more particularly a *party defendant,* not a *witness* as in the present case"); *Colorado Mills v. SunOpta Grains & Foods*, 269 P.3d 731, 734 (Colo. 2012) ("Nor have we found any authority applying our long-arm statute, or the long-arm statute of any other state for that matter, to enforce a civil subpoena against an out-of-state nonparty.") In contradistinction to the ability to bring suit against non-residents, governed by *International Shoe*, the "subpoena power is governed by the 'strict territorial approach' of *Pennoyer v. Neff* [, 94 U.S. 714 (1877)]." Fuller, *Jurisdictional Issues in Free Speech Cases*, 31-WTR Communications Lawyer 24, 26 (2015).

Although no court has adopted its reasoning, a 1989 law review article argued that this traditional limitation is an outdated throwback. Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 Minn. L. Rev. 37, 92-93, (1989). It argued that, just as the Supreme Court has moved beyond *Pennoyer v. Neff* in articulating the constitutional limits on the ability of civil litigants to bring suit against non-residents, and particularly non-resident corporations, so states should discard *Pennoyer* in the arena of subpoena power and extend the subpoena power to the limits of what the Due Process Clause allows. *Id.* Fifteen years later, a student note, without considering the traditional limitation of subpoena power to the forum state's territory, concurred with Wasserman that the constitutional due process concept of minimum contacts supplied the proper limits to state subpoena power. *See* Scott, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 Minn. L. Rev. 968, 998 (2004).

In the twenty-five years since the first of these articles was published, however, not a single reported decision has embraced that approach to the issue. To the contrary, every state court cites the articles in passing for their recital of the traditional rule that a state's subpoena power stops at the state's border—without discussion of their proposal of broader subpoena power.

Typical in this regard is *Colorado Mills v. SunOpta Grains & Foods*, 269 P.3d 731, 734 n.4 (2012), citing Scott as showing that "states retain strict limits on the reach of the subpoena power," and Wasserman as stating "the states uniformly and steadfastly have refrained from exercising extraterritorial subpoena power." Similarly, the Virginia Court of Appeals cited Wasserman as "discussing territorial limits on a state's subpoena authority" and hence supporting the proposition that an Indian tribe's subpoena power stops at the border of its reservation, "[l]ike the States, whose authority is circumscribed, subject to limited exceptions, to the borders of each particular State." *Thompson v. Fairfax Cnty. Dep't of Family Servs.*, 62 Va. App. 350, 383, 747 S.E.2d 838, 855 (2013). Similarly, no scholarly literature has endorsed the Wasserman/Scott analyses of state-court authority to enforce civil subpoenas against out-of-state residents.[1]

Federal courts have largely taken the same view of discovery of witnesses located outside the forum state. Under the Federal Rules of Civil Procedure, absent a specific federal statute authorizing nationwide personal

[1] Indeed, the one discussion of the Virginia Court of Appeals' analysis of subpoena authority in this action, saying that Virginia could exercise subpoena jurisdiction over a non-resident, criticized it. *Jurisdictional Issues in Free Speech Cases*, 31-WTR Communications Lawyer at 26-27.

jurisdiction, personal jurisdiction in federal cases is limited to the jurisdiction authorized by the law of the forum state, Rule 4(k)(1)(a); similarly, Rule 45 imposes a strict geographical limit on the enforcement of third-party subpoenas. Under Rule 45, a subpoena may require that a non-party produce documents or give pre-trial testimony only within one hundred miles of where "the person resides, is employed, or regularly transacts business in person"; absent consent of the witness or extraordinary circumstances, only the court in the district where compliance is required may hear motions related to the subpoena. Rule 45(c)(1)(A); (c)(2)(A); (d)(3)(A); and (f). In other words, when a federal litigant needs documents or testimony from a non-resident of the forum, the subpoena must typically be enforced by the federal court sitting where the nonparty witness resides. *Id.* In discussing these procedures, the federal cases that cite Wasserman do so in the same way the state courts do, as setting forth the traditional limits on the power to issue subpoenas to non-residents. *E.g.*, *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 192 n.4 (2d Cir. 2010); *Houston Bus. Journal v. Office of Comptroller of Currency*, 86 F.3d 1208, 1213 & n.7 (D.C. Cir. 1996); *Johnson v. Big Lots Stores*, 251 F.R.D. 213, 222 (E.D. La. 2008).

Because the limits of subpoena jurisdiction are mainly territorial, there

may be circumstances—not present here—where a state court may exercise subpoena jurisdiction over a witness, even though the exercise of personal jurisdiction would be improper. For example, if a company maintains the relevant records in Virginia, then a Virginia court could exercise its subpoena jurisdiction to compel production even if the records custodian's presence would be insufficient to establish any form of personal jurisdiction over the company. By the same token, however, if the requested documents are not located in Virginia, *see* JA 79 (identifying records at issue here are accessible only to Yelp staff in San Francisco), then the court cannot compel the production of the out-of-state documents regardless of whether a Virginia court could theoretically exercise personal jurisdiction had the company been named as a party.

At any rate, this case would be a poor vehicle for deciding whether the Due Process Clause allows a state to exercise subpoena jurisdiction beyond its borders. Wasserman and Scott agree on the propositions that states should take the Due Process Clause as allowing more generous limits on the subpoena power than *Pennoyer v. Neff* , and that the Due Process Clause imposes some limits on the subpoena power, citing *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), for the proposition that the Due Process

limitations on extra-territorial authority protect all persons, not just defendants. 88 Minn. L. Rev at 975-977, 1004-1015; 74 Minn. L. Rev at 106-109, 138-146. But these commentators disagree about how the limitations of the Due Process Clause should be applied, and to what extent non-residents should be subject to the subpoena power.

The Virginia Legislature has not attempted to claim extraterritorial subpoena jurisdiction over out-of-state non-parties. Instead, it adopted the Uniform Interstate Depositions and Discovery Act, Va. Stat. § 8.01-412.08 through 412.14, which provides mechanisms for out-of-state litigants to conduct discovery in Virginia where necessary. This statutory scheme implicitly acknowledges the importance of state sovereignty and specifically references the role of reciprocal treatment necessary for its success. *See* Va. Stat. § 8.01-412.14 ("The privilege extended to persons in other states for discovery under this article shall only apply if the jurisdiction where the action is pending has extended a similar privilege to persons in the Commonwealth, by that jurisdiction's enactment of the Uniform Interstate Depositions and Discovery Act, a predecessor uniform act, or another comparable law or rule of court providing substantially similar mechanisms for use by out-of-state parties."). Considering that the Virginia Legislature has yet to wade further

into the issue of subpoena jurisdiction over non-residents, and has, indeed, emphasized the principles of comity and reciprocity with other states with respect to discovery from non-residents, the Court should not venture out onto a constitutional limb, but forbear from addressing this issue unless the Legislature acts, risking reciprocal efforts in other states to exercise subpoena jurisdictions over Virginians, and only then decide whether the Legislature has exceeded constitutional limits.

In this regard, the Court would be following the example of the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In that case, the Supreme Court did not address the issue of due process limits on judicial power over out-of-state companies in the abstract; rather, it addressed those limits in a case where Washington's legislature had specifically authorized personal jurisdiction over out-of-state companies. Indeed, states have generally enacted long-arm statutes that define the power of state courts over non-residents; the courts then decide whether the legislature's authorization exceeds constitutional limits.

At present, the Virginia Legislature has authorized personal jurisdiction only "over a person . . . as to a cause of action arising from the person's . . . causing tortious injury in this Commonwealth by an act or omission outside

this Commonwealth." Va. Stat. § 8.01-328.1(A)(4). It has never, however, authorized personal jurisdiction over any person other than a defendant in an action in which a cause of action is asserted. This Court should not extend personal jurisdiction any further than that. It is a quintessentially **legislative** judgment whether to give Virginia litigants the advantage of being able to pursue discovery from non-residents using Virginia procedures, risking both a constitutional confrontation over whether such jurisdiction is permissible and recognizing as well that other states might follow by imposing the same burden on Virginians who have evidence useful to litigation in other states.

II. EVEN WERE SUBPOENA JURISDICTION COMMENSURATE WITH PERSONAL JURISDICTION, THE DUE PROCESS CLAUSE DOES NOT PERMIT EXERCISE OF PERSONAL JURISDICTION OVER YELP IN THIS CASE.

Although the federal courts generally limit subpoena authority to the borders of the states in which they are located, federal judges have had occasion to consider the Due Process limits on subpoena authority in cases in which they have been asked to enforce subpoenas against companies located outside the United States. In such cases, the courts may enforce the subpoenas only if they have either specific jurisdiction, in that the subpoena recipient "has 'purposefully directed' its activities toward the forum jurisdiction and where the underlying action is based upon activities that arise out of or

relate to the defendant's contacts with the forum," *Application to Enforce Admin. Subpoenas Duces Tecum of S.E.C. v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996), or general jurisdiction, which "may be invoked over the defendant on any matter if the defendant's unrelated contacts are sufficiently continuous and systematic that the exercise of jurisdiction is reasonable and just." *Id.* (internal quotation marks deleted). *Accord*, *Gucci America v. Weixing Li*, 768 F.3d 122, 129 (2d Cir. 2014). [2]

Here, Hadeed cannot avail itself of general personal jurisdiction, unrelated to the subpoena recipient's contacts with the forum, as a basis for its subpoena here. As the Court of Appeals for the Second Circuit explained in *Gucci America,* 768 F.3d at 135, under the Supreme Court's recent decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), "aside from 'an exceptional case,' a corporation is at home (and thus subject to general personal jurisdiction, consistent with due process) only in a state that is the

---

[2]Scott and Wasserman each propose that, in adapting constitutional Due Process limitations from suits to impose liability to subpoenas demanding disclosure of otherwise confidential information, state courts should allow subpoena power to be exercised on some quantum of minimum contacts that is less than would be required for jurisdiction to sue, although they proposed different limits from each other. 88 Minn. L. Rev. at 1004-1015; 74 Minn. L. Rev. at 138-146. But the federal appellate cases cited in the text appear to limit subpoena jurisdiction to the Supreme Court's traditional categories of general and specific jurisdiction.

company's formal place of incorporation or its principal place of business." Yelp is neither incorporated in Virginia, nor does it have its principal place of business there. In fact, Yelp maintains no offices in Virginia. JA 79.

Nor can Hadeed invoke specific personal jurisdiction as a basis for its subpoena to Yelp, because Yelp's only connection to the dispute is its provision of the Internet platform for consumer communications where the seven Doe defendants placed the allegedly defamatory speech. Yelp did not create the speech about which Hadeed complains, and "by its plain language, § 230 [of the Communications Decency Act, 47 U.S.C. § 230] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir.1997); *accord Nemet Chevrolet v. Consumeraffairs.com*, 591 F.3d 250, 252 (4th Cir. 2009).

Moreover, although Yelp has specific connections to Hadeed through its prior advertising relationship with Hadeed, JA 183, as well as through the free business-owner's account that Hadeed opened with Yelp, those relationships are not at issue here. Indeed, those relationships are governed by agreements containing a forum selection clause, requiring Hadeed to maintain any action against Yelp in San Francisco, California. The trial court

refused to enforce the forum selection clause because it held that this case was unrelated to these agreements. The law of the case prevents Hadeed from invoking its agreements with Yelp as a basis for personal jurisdiction over Yelp to enforce a Virginia subpoena.

On the record in this case, there is no basis for holding that the subpoena to Yelp can be enforced consistent with the requirements of constitutional due process.

III. IF THE COURT PREDICATES ITS DETERMINATION OF THE SUBPOENA JURISDICTIONAL ISSUE ON CONSTITUTIONAL DUE PROCESS CONSIDERATIONS, IT SHOULD ALSO REVERSE ON THE FIRST AMENDMENT GROUNDS THAT YELP HAS ARGUED.

If the Court agrees with Yelp's arguments that the absence of express statutory authority for enforcing subpoenas against non-residents of Virginia is a sufficient reason to find a jurisdictional defect in the ruling enforcing the subpoena to Yelp, and hence in the contempt sanction that is under appeal, it will be able to reverse the decision below outright. However, the Court could also rule for Yelp on alternative grounds of lack of personal jurisdiction **and** violation of the First Amendment, inasmuch as both issues have been fully briefed, and the parties have had ample opportunity to create a complete appellate record.

However, if the Court breaks new ground and rests its analysis of

subpoena jurisdiction on the due process considerations raised by the Court's supplemental briefing order, Hadeed may request another opportunity to build a record in an effort to establish a sufficient evidentiary basis to establish its ability to argue for constitutional subpoena jurisdiction under a minimum contacts analysis (although, as Yelp has already argued, such an effort should be unsuccessful). A ruling that only vacated and remanded for further proceedings on the due process issue would afford Yelp less protection than a ruling on whether the subpoena can be enforced consistent with the First Amendment. The First Amendment issue was fully litigated, and Hadeed had every opportunity to show an evidentiary basis for stripping one or more of the seven Does of their First Amendment right to speak anonymously. The order is subject to outright reversal on that ground, and Yelp, which has already been held in contempt as the price of asserting its right to appeal the order of disclosure, should not be subjected to the further uncertainties of litigation on the due process issue when it is entitled to simple reversal based on Hadeed's failure to show a basis for discovery consistent with the First Amendment.

Indeed, the decision below, resting on faulty assumptions about the definition of "commercial speech" and setting a weak standard for plaintiffs

seeking to overcome the First Amendment right to speak anonymously, is likely already chilling the exercise of free speech rights in Virginia. Yelp urges the Court to reach the First Amendment issue and reverse on that ground specifically, even if it addresses the issue of subpoena jurisdiction under the Due Process Clause as well.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

/s/ Paul Alan Levy
Paul Alan Levy (pro hac vice)
Scott Michelman (pro hac vice)

Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org

/s/ Raymond D. Battocchi
Raymond D. Battocchi (# 24622)

Raymond D. Battocchi, P.C.
35047 Snickersville Pike
Round Hill, Virginia 20141-2050
(540) 554-2999
battocchi@aol.com

Counsel for Yelp Inc.

January 29, 2015

CERTIFICATE

Pursuant to Supreme Court Rule 5:6, and the Court's Supplemental Briefing Order, I hereby certify that:

1. The appellant, Yelp Inc., is represented by

Paul Alan Levy (pro hac vice)
Scott Michelman (pro hac vice)
Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000
plevy@citizen.org

Raymond D. Battocchi (# 24622)
35047 Snickersville Pike
Round Hill, Virginia 20141-2050
(540) 554-2999
battocchi@aol.com

2. Appellee Hadeed Carpet Cleaning is represented by

Raighne C. Delaney, Esquire
Bean, Kinney & Korman, P.C.
2300 Wilson Blvd., Seventh Floor
Arlington, Virginia 22201
703-284-7272
rdelaney@beankinney.com

3. I am causing ten paper copies of this brief to be filed on this date by hand with the Clerk of the Supreme Court, and also sent by email to scvbriefs@courts.state.va.us, and one paper copy and one electronic copy each of the brief to be sent on this date by first-class mail to counsel for appellee at the address shown above, as well as to counsel for all amici.

/s/ Paul Alan Levvy

January 29, 2015 Paul Alan Levy