No. 24-581

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YELP, INC.,

Plaintiff-Appellant,

vs.

KEN PAXTON, in his official capacity as Attorney General of Texas,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
San Francisco
Case No. 3:23-CV-04977-TLT
The Honorable Trina L. Thompson

BRIEF OF AMICI CURIAE FIRST AMENDMENT CLINICS AND SCHOLARS IN SUPPORT OF APPELLANT AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF AMICI CURIAE

The **First Amendment Clinic at Southern Methodist University Dedman School of Law**, the **Stanton Foundation First Amendment Clinic at Vanderbilt Law School**, the **Tulane First Amendment Law Clinic**, and Professor **Lyrissa Lidsky** (collectively, "First Amendment Clinics and Scholars" or "*amici*") are legal clinics and scholars who devote a substantial amount of their teaching and legal research to First Amendment rights and federalist traditions.[1] In particular, *amici* focus their efforts on the preservation and development of law protective of the First Amendment and its values and principles. They are thus interested in the outcome of this appeal, which juxtaposes those two concepts within the broader context of *Younger* abstention. A full description of each *amicus* is included in the Appendix.[2]

[1] The positions taken in this brief are those of the First Amendment Clinics and Scholars, and do not necessarily reflect the views of the larger institutions with which they are respectively affiliated.

[2] No party's counsel authored this brief in whole or in part. No party, or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made such a monetary contribution. *See* Fed. R. App. P. 29(a)(4)(E), (b)(4).

All named parties do not oppose the filing of this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

In the immediate aftermath of the Supreme Court's June 2022 *Dobbs* decision, Yelp, Inc. ("Yelp"), a global platform that provides consumer reviews and basic information about local businesses, observed a significant increase in reported confusion among its users over facilities that purported to offer abortion services but that in reality encouraged patients to pursue alternatives *other than* abortion. Consistent with its mission to provide reliable information about local businesses, Yelp created a truthful notice (the "Original Notice") that advised of the limited medical services that these facilities, termed "crisis pregnancy centers" ("CPCs"), typically offered. The word "abortion" never appeared in the Original Notice. Although it was under no obligation to do so, Yelp, at the request of a coalition of two dozen states' Attorneys General, amended the Original Notice in February 2023 (creating a "Revised Notice") to make clear that CPCs did not offer abortion or referrals to abortion providers.[3] The official who led the coalition, then-Kentucky Attorney General Daniel Cameron, publicly praised "Yelp's timely response" and

[3] Yelp's Original Notice stated: "This is a Crisis Pregnancy Center. Crisis Pregnancy Centers typically provide limited medical services and may not have licensed medical professionals onsite." ER-136.

Yelp's Revised Notice reads: "This is a Crisis Pregnancy Center. Crisis Pregnancy Centers do not offer abortions or referrals to abortion providers." ER-171.

commended it for offering "accurate information about crisis pregnancy centers." ER-572.

Yet in September 2023, just days after surviving an impeachment trial in the Texas Senate, Texas Attorney General Ken Paxton announced that his office planned to sue Yelp. Paxton alleged that Yelp's Original Notice somehow violated the state's Deceptive Trade Practices Act ("DTPA"). In response, Yelp sought a preliminary injunction barring Paxton's lawsuit in the U.S. District Court for the Northern District of California, and later responded to the Texas-based case after Paxton filed that action. During the preliminary injunction proceedings, Yelp introduced "strong" evidence—or evidence that, as the District Court acknowledged, offered at least a "persuasive story"—that Paxton's suit was a bad-faith prosecution initiated against Yelp's protected, abortion-related speech—specifically, speech that informed users (accurately) about the services and staff that CPCs typically offered. ER-009, 011. "Reluctantly," the District Court denied the injunction request and dismissed Yelp's federal suit, citing the *Younger* abstention doctrine and an absence of what the District Court termed "concrete" proof that Paxton had acted in bad faith. ER-002, 011.

This Court should reverse the District Court's decision for three reasons. *First*, the plain text of *Younger* and the principle of comity that underlies its abstention rule confirm the need for immediate federal intervention to enjoin state prosecutions

initiated to discourage or retaliate against the exercise of protected rights. This Court should accordingly join all Courts of Appeals that have reached the issue in expressly recognizing a bad-faith exception to *Younger* for retaliatory prosecutions initiated to discourage the exercise of constitutional rights. *Second*, the District Court applied the wrong standard to Yelp's injunction motion, requiring "concrete" proof of subjective bad faith notwithstanding Yelp's presentation of substantial evidence that even the District Court recognized as persuasive and indicative of bad faith—*i.e.*, evidence of a sort that other courts accept as sufficient in the *Younger* context. To the extent Yelp's evidentiary showing of bad faith fell short, the District Court further erred in denying Yelp limited discovery and an evidentiary hearing to develop and present evidence about whether Paxton acted in bad faith (and therefore, whether abstention was justified). *Third*, the District Court's approach jeopardizes First Amendment protections to which Yelp and other publishers are constitutionally entitled, and serves as an implicit endorsement of government officials' use of broad state deceptive practices laws to prosecute truthful, non-commercial speech with which they personally disagree. To safeguard the principles underlying *Younger*, this Court should reverse the District Court's dismissal and direct the entry of the injunction Yelp seeks. In the alternative, this Court should remand this case to the District Court with instructions to permit limited discovery and hold an evidentiary hearing on the question of whether Paxton's prosecution was in bad faith.

ARGUMENT

I. This Court Should Recognize an Independent Bad-Faith Exception to *Younger* for Prosecutorial Actions that Retaliate Against or Discourage the Exercise of Constitutional Rights.

Under the *Younger* abstention doctrine, the Supreme Court has instructed that federal courts should refrain from enjoining pending state criminal or quasi-criminal proceedings absent extraordinary circumstances—specifically, circumstances that present a great and immediate danger of irreparable loss or impairment of constitutional rights. *Younger v. Harris*, 401 U.S. 37, 46 (1971) (criminal proceedings); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) (certain state-initiated civil proceedings). One widely-recognized situation that necessitates federal intervention is when "a prosecution brought in bad faith or for harassment could cause irreparable injury." *Privitera v. Cal. Bd. of Med. Quality Assur.*, 926 F.2d 890, 898 (9th Cir. 1991). This Circuit has historically recognized bad faith when a prosecution is brought "without a reasonable expectation of obtaining a valid conviction." *Baffert v. Cal. Horse Racing Bd.*, 332 F.3d 613, 621 (9th Cir. 2003) (citing *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975)).

But every other circuit to consider the question has also expressly recognized that retaliation for the exercise of constitutional rights constitutes a second, separate basis for the bad-faith exception to *Younger* abstention. This Court has not considered, and therefore has not recognized, a prosecutor's actions against a party

in "retaliation for exercising [their] constitutional rights" as an exception to *Younger*. ER-007. The Court should use this appeal to clarify the standard. As all Courts of Appeals that have considered the issue have held, federal-court intervention to prevent retaliation for exercising constitutional rights is fully consistent with *Younger*, and clarifying the standard will alleviate confusion over what constitutes bad faith for purposes of an exception to *Younger* abstention.

A. *Younger* Identified a Prosecution Initiated to Retaliate Against the Exercise of Constitutional Rights as Bad Faith.

In 1965, the Supreme Court planted the seeds of the *Younger* abstention doctrine in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). *Dombrowski* featured a rather troubling set of facts: the lead plaintiff, an advocacy group "active in fostering civil rights" for African Americans in Louisiana and other Southern States, alleged that Louisiana officials were initiating prosecutions under facially invalid state laws "to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights" of African Americans. *Id.* at 481-82. To redress the situation, plaintiffs sought injunctive relief in federal court—a remedy that *Dombrowski* recognized was atypical, given that ordinarily, "state courts and prosecutors will observe constitutional limitations," obviating any need for federal intervention. *Id.* at 484.

The *Dombrowski* plaintiffs' allegations, however, presented "a situation in which defense of [Louisiana's] criminal prosecution [would] not assure adequate

vindication of constitutional rights." *Id.* at 485. Specifically, the very act of being forced to defend against the state-court prosecutions constituted "irreparable injury" through the "substantial loss or impairment of freedoms of expression." *Id.* at 486. The *Dombrowski* court reasoned that even if plaintiffs ultimately prevailed in their state proceedings, that victory "would not alter the impropriety of [the authorities] invoking the statute in bad faith to impose continuing harassment in order to discourage appellants' activities." *Id.* at 490. These oppressive conditions warranted immediate federal-court intervention to enjoin prosecutions initiated to discourage the exercise of constitutional rights.

Some six years later, the Supreme Court issued *Younger* and established its familiar abstention doctrine: federal courts, absent exceptional circumstances, must abstain from enjoining pending state criminal proceedings. 401 U.S. at 46. But in doing so, the Court recognized that certain "unusual situations calling for federal intervention might also arise," such as a "showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." *Id.* at 54. In fact, the *Younger* court expressly identified the situation in *Dombrowski* as emblematic of bad faith, noting a litany of distressing activities—"records seized pursuant to search and arrest warrants that were later summarily vacated" in state court; prosecutors threatening to "initiate new prosecutions of appellants" after having their original warrants quashed; "public hearings" where copies of illegally-seized documents

were distributed—that reflected prosecutions undertaken to discourage plaintiffs "from asserting and attempting to vindicate the constitutional rights" of African American citizens in Louisiana. *Id.* at 48 (quoting *Dombrowski*, 380 U.S. at 482).

It necessarily follows that *Younger*'s bad-faith exception to abstention must encompass prosecutions undertaken to retaliate against the exercise of constitutional rights. Accordingly, it is no surprise that a majority of the Courts of Appeals have recognized retaliation for the exercise of constitutional rights as an exception to the *Younger* abstention doctrine.

- **Second Circuit***: Cullen v. Fliegner*, 18 F.3d 96, 103-04 (2d Cir. 1994) ("refusal to abstain is also justified where a prosecution or proceeding has been brought to retaliate for or to deter constitutionally protected conduct").
- **Fifth Circuit:** *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979) (a state "by definition does not have any legitimate interest in pursuing a bad faith prosecution brought to retaliate for or to deter the exercise of constitutionally protected rights.").
- **Sixth Circuit**: *Doe v. Univ. of Ky.*, 860 F.3d 365, 371 (6th Cir. 2017) ("*Younger* discussed [*Dombrowski*] as an example of the harassment exception, because that case involved repeated threats by prosecutors designed to discourage individuals from asserting their constitutional rights.").

- **Seventh Circuit**: *Collins v. Kendall Cty., Ill.*, 807 F.2d 95, 98 (7th Cir. 1986) (exception to abstention where "state prosecution was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights") (quotation marks omitted).
- **Eighth Circuit**: *Lewellen v. Raff*, 843 F.2d 1103, 1109 (8th Cir. 1988) ("Bad faith and harassing prosecutions also encompass those prosecutions that are initiated to retaliate for or discourage the exercise of constitutional rights.").
- **Tenth Circuit**: *Phelps v. Hamilton*, 122 F.3d 885, 889 (10th Cir. 1997) (factor in *Younger* abstention is whether the prosecution was initiated "in retaliation for the defendant's exercise of constitutional rights").
- **Eleventh Circuit**: *Leonard v. Ala. State Bd. of Pharmacy*, 61 F.4th 902, 912 (11th Cir. 2023) (exception required showing of "harassment in response to the exercise of her constitutional rights").

Significantly, *amici* have found no case in which a Court of Appeals has considered the matter and yet declined to recognize retaliatory prosecutions as within the bad-faith exception to *Younger* abstention. This case affords the Court the opportunity to join the nation's other Courts of Appeals in correctly recognizing an exception to *Younger* abstention for prosecutions initiated in retaliation for the exercise of constitutional rights.

The benefits of doing so lie not merely in aligning this Circuit with the other Courts of Appeals, but also in clarifying confusion about the standard that appears to exist among District Courts in this Circuit. The District Courts have employed divergent approaches when presented with allegations of prosecutions initiated to retaliate against the exercise of constitutional rights. Some have simply adopted the bad-faith retaliation exception from other Circuits. *See, e.g.*, *Cornell v. Off. of Dist. Att'y, Cty. of Riverside*, 616 F. Supp. 3d 1026, 1036 (C.D. Cal. 2022) (citing the Second Circuit and defining bad faith as a prosecution "animated by a retaliatory, harassing, or illegal motive"); *Kihagi v. Francisco*, No. 15-CV-01168-KAW, 2016 WL 5682575, at *3 (N.D. Cal. Oct. 3, 2016) (citing the Tenth Circuit's "expansive view" of bad faith). Others, however, appear to have interpreted this Court's silence as a suggestion that only prosecutions brought "without a reasonable expectation of obtaining a valid conviction"—the exception identified by this Court in *Baffert*, 332 F.3d at 621—qualify as being in bad faith. *See, e.g.*, *Gibson v. Schmidt*, 522 F. Supp. 3d 804, 818 (D. Or. 2021) (stating that it is "not clear that *Younger*'s bad-faith exception may be applied without a showing that the state has no reasonable expectation of obtaining a valid conviction"); *Applied Underwriters, Inc. v. Lara*, 530 F. Supp. 3d 914, 938 (E.D. Cal. 2021) (rejecting retaliatory actions as bad faith because plaintiffs failed to show that "the state proceeding was brought with no legitimate purpose"). As other Courts of Appeals have held, the latter approach is

incorrect. *Cullen*, 18 F.3d at 104 ("expectations for success of the party bringing the action need not be relevant"); *Lewellen*, 843 F.2d at 1109-10 (injunction justified for a prosecution initiated to discourage exercise of constitutional rights, regardless of expectations of success). Where District Courts within the Circuit have reached different conclusions as to the governing standard on a dispositive issue, this Court should clarify the standard to foster correct and consistent application of the *Younger* doctrine.

B. Comity, the Principle that Underlies *Younger* Abstention, is Not Served When a Federal Court Abstains from Enjoining a Prosecution Initiated to Retaliate Against or Discourage the Exercise of Constitutional Rights.

A federal court's acceptance of jurisdiction when presented with evidence of a bad-faith prosecution initiated to chill or retaliate against the exercise of constitutional rights fully comports with "the main reason for federal court restraint in the face of ongoing state judicial proceedings": comity. *Gilbertson v. Albright*, 381 F.3d 965, 975 (9th Cir. 2004). As the Supreme Court has explained, comity represents:

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger, 401 U.S. at 44. Importantly, comity does not compel "blind deference to [s]tates' [r]ights any more than it means centralization of control over every

important issue in our National Government." *Id.* The principle instead envisions a balanced system that respects "the legitimate interests of *both* State and National Governments." *Id.* (emphasis added). Thus, when federal rights are at stake, comity directs federal courts to protect those rights and interests "in a way that will not 'unduly interfere with the legitimate activities of the States.'" *Gilbertson*, 381 F.3d at 970 (quoting *Younger*, 401 U.S. at 44).

As other Courts of Appeals have explained, prosecutions initiated to retaliate against or discourage the exercise of constitutional rights fall outside of the balance that *Younger* contemplates for multiple reasons. First, comity—and the deference that *Younger* generally affords to state prosecutions—relies upon a "State's legitimate pursuit of its substantive interests." *Wilson*, 593 F.2d at 1383. But a state "cannot have a legitimate interest in discouraging the exercise of constitutional rights." *Cullen*, 18 F.3d at 104.

Second, federal intervention is needed to protect against the constitutional affront that a state prosecution tainted by bad faith represents. Yelp, like any person or corporate entity, holds a "federal right to be free from bad faith prosecutions." *Shaw v. Garrison*, 467 F.2d 113, 120 (5th Cir. 1972). But when the allegation upon which an injunction is sought is that the "state's legal machinery is being used in bad faith," relying "upon comity is to beg the question." *Sheridan v. Garrison*, 415 F.2d 699, 707 (5th Cir. 1969). Stated otherwise, "[t]he justification for comity disappears

if the [bad-faith] allegation is proved true, and allowing the state to continue will defeat policies that, in such cases, are more important than comity." *Id.*

Third, a federal court's abstention from enjoining an improper prosecution denies, as a practical matter, adequate redress to an aggrieved party. When a party is confronted with charges asserted by the state in bad faith, submitting to the state's procedures and defending against the "prosecution will not assure adequate vindication of constitutional rights." *Younger*, 401 U.S. at 48-49 (quoting *Dombrowski*, 380 U.S. at 489). The problem is not merely procedural, but also temporal: forcing aggrieved parties to "suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right" they seek to protect. *Zwickler v. Koota*, 389 U.S. 241, 251-52 (1967); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

This triad of concerns—the lack of a legitimate state interest in a prosecution initiated to chill the exercise of constitutional rights; the presence of a paramount federal interest in safeguarding those rights; and the delay in redress for the constitutional violation that the improper prosecution represents—confirm the need for an abstention exception focused on preventing prosecutions initiated to retaliate for or to deter constitutionally protected conduct. *See generally Wilson*, 593 F.2d at 1381-83; *Cullen*, 18 F.3d at 103-04. Regardless of how the Court ultimately decides

this case, it should make clear that its bad-faith exception to *Younger* extends to retaliatory state conduct, and validate the exception's availability to redress governmental misconduct.

II. The District Court Erred in "Reluctantly" Dismissing Yelp's Lawsuit Despite Yelp Having Presented "Persuasive" Evidence of an Unconstitutional Motive, Thereby Chilling Yelp's First Amendment Rights.

The foundational reasons for *Younger* abstention and its bad-faith exception also illustrate why it is critical for courts to carefully consider every proffered fact when evaluating whether abstention is appropriate. As a general rule, federal courts hold a "virtually unflagging" obligation to "decide cases within the scope of federal jurisdiction," including disputes centered on the First Amendment's speech and press guarantees. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014); *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). *Younger* abstention deviates from this default rule to a limited extent—and, as its exceptions make clear, the abstention is entirely inappropriate when a prosecutor initiates a criminal prosecution or quasi-criminal civil action in bad faith. A federal court must accordingly evaluate evidence of bad faith with great care to ensure it faithfully discharges its obligation to resolve federal disputes involving improper state prosecutions.

A. Yelp Presented Substantial Evidence of Paxton's Bad-Faith Motivations in Initiating the Texas DTPA Suit.

In the proceedings below, Yelp offered ample evidence strongly suggesting that Paxton brought his DTPA suit in bad faith. First, the District Court correctly recognized that "no other [A]ttorney [G]eneral" in the country—neither the ones who joined Paxton in signing the then-Kentucky Attorney General's coalition letter, nor the three interim Attorneys General of Texas that assumed Paxton's position during his suspension—had brought a deceptive trade practices suit against Yelp for its Original Notice. ER-010. And the nexus between Yelp and Bastrop County, the county whose state court Paxton hand-selected as the venue for his DTPA lawsuit, is tenuous at best: the only known connection is that Yelp's Original Notice could have been viewed on any Internet-accessible device within that county. Of course, the same is true of every state, county, city, or other jurisdiction in this country, yet Paxton was the only government official, at any level, who brought legal action.

This prosecutorial abnormality echoes the facts of *Netflix v. Babin*, where the Fifth Circuit concluded that a local prosecutor acted in bad faith in part because he was "the only prosecutor in the country to have charged Netflix for child pornography" despite Netflix having streamed the allegedly offending film "across the nation to millions of viewers." 88 F.4th 1080, 1094-95 (5th Cir. 2023). Paxton's "lone prosecution" of Yelp is likewise "a hard reality to ignore," and represents an

"anomaly" that reinforces concerns that his prosecution of Yelp violates *Younger*'s notions of comity. *Id.*

The record further reflects that Paxton's decision to charge Yelp in September 2023 was likely influenced by political motivations. Paxton used his *first* press release after being reinstated as Texas Attorney General—a reinstatement that followed a bipartisan impeachment in the Texas House of Representatives and trial in the Texas Senate—to chastise Yelp for allegedly disparaging "facilities that counsel pregnant women instead of providing abortions." ER-207. This Court, like other circuits, has long recognized press statements touting government actions directed at controversial First Amendment activities as probative of bad faith. *Krahm v. Graham*, 461 F.2d 703, 705 (9th Cir. 1972) (affirming a bad-faith finding where a mayor launched an "anti-pornography campaign" to "influence the tenor of the community" against sellers of allegedly obscene literature); *Shaw*, 467 F.2d at 118 (prosecutor's press conferences and press releases evinced bad faith); *Netflix*, 88 F.4th at 1086 (prosecutor "candidly expressed his motivation" for seeking charges in a press release).

Moreover, in the very press release where Texas proclaimed its decision to charge Yelp, Paxton expressed his personal dissatisfaction with abortion-related comments made by Yelp's Chief Executive Officer, Jeremy Stoppelman. The release specifically complained that Stoppelman "boasted that Yelp provides special

assistance to select organizations that are fighting the legal battle against abortion bans, and he attempted to rally the business community behind the pro-abortion cause." ER-207 (quotation marks omitted). Paxton's candid admission suggests that he prosecuted Yelp in response to the exercise of protected constitutional rights—specifically, Stoppelman's personal free speech rights and Yelp's freedom to publish truthful, non-commercial statements about CPCs on its platform. These are acts of retaliation that, *Younger* teaches, federal courts should not tolerate.

But there is more. For example, Paxton's lawsuit reversed the prior prosecutorial practice of the Texas Attorney General's Office: one of Paxton's predecessors "prosecuted a CPC under the DTPA for [inaccurately] advertising itself under 'Abortion Information & Services' in the medical clinic section of the Yellow Pages." ER-009 (citing *Mother & Unborn Baby Care of N. Tex., Inc. v. State*, 749 S.W.2d 533 (Tex. App. – Fort Worth 1988), *pet. denied*, 490 U.S. 1090 (1989)). And Paxton justified his departure from prior practice, as well as his ultimate decision to sue Yelp, on, as the District Court confirmed, the State's "thin investigation" that primarily consisted of "correspond[ing] with only one or two CPCs." ER-010.

Developments since the District Court's decision further undermine the legitimacy of the State's prosecution. On February 28, 2024, Texas's 355th District Court, where Paxton chose to file his suit, dismissed all of the State's DTPA claims with prejudice. *See State v. Yelp*, No. 2519-335 (Tex. Dist. Ct. Bastrop Cty., Feb. 28,

2024). This Court need not speculate on why Paxton's claims were summarily dismissed: as Yelp explained in its Opening Brief, Paxton's suit was dismissed for "lack of personal jurisdiction." Opening Br. at 14 (ECF 9.1). Paxton's unsuccessful attempt to use a "clearly inapplicable" state law to sue Yelp adds another tile—and likely a dispositive one—to the mosaic of bad faith that the evidence in this case presents. *Universal Amusement Co. v. Vance*, 559 F.2d 1286, 1294-95 (5th Cir. 1977), *on reh'g*, 587 F.2d 159 (5th Cir. 1978), *aff'd*, 445 U.S. 308 (1980), and *on reh'g*, 587 F.2d 176 (5th Cir. 1978).

B. The District Court Erred in Not Only Applying an Incorrect Evidentiary Standard, but in also Denying Yelp the Opportunity to Meet It.

Each of these facts at least raises eyebrows concerning Paxton's actions; in combination, Yelp's showing supports that Paxton acted in bad faith when he commenced his DTPA suit against Yelp. The District Court recognized as much—noting that Yelp had presented "strong circumstantial evidence" and a "persuasive story" that Paxton had not "acted entirely in good faith." ER-009, 011. On this record, then, the District Court's decision to dismiss Yelp's lawsuit is incongruous. The District Court did so, however, because it concluded that Yelp had not presented "concrete evidence of [Paxton's] subjective motivations." ER-011. The Court should reverse this conclusion for two reasons.

First, the District Court employed an evidentiary standard—"concrete evidence"—that finds no basis in this Circuit's caselaw (or, to *amici*'s knowledge, any Circuit's holdings) and that, on an issue of an individual's mental state, appears difficult if not impossible to satisfy. Perhaps the District Court articulated this standard to support its (correct) view that "conclusory allegations are not enough" to demonstrate bad faith. ER-009 (citing *Laine v. Cty. of Contra Costa*, No. 21-CV-10052-JST, 2022 WL19975414, at *7 (N.D. Cal. Sept. 2, 2022) (quotation marks omitted)). But "conclusory allegations" and "concrete evidence" are at different extremes along the evidentiary spectrum; a requirement that a plaintiff put forward more than mere conclusions does not equate to an obligation to provide absolute proof, particularly on an issue of an individual's subjective intent to act in bad faith. Yelp's "strong circumstantial evidence" and "persuasive story" of bad faith suffice to support federal intervention. ER-009, 011. In any event, requiring a plaintiff to present indisputable evidence of a prosecutor's subjective bad faith, particularly at the outset of a case and without the benefit of discovery, is unrealistic. *Cf. Crawford-El v. Britton*, 523 U.S. 574, 594-95 (1998) (rejecting the notion that, even at the *summary judgment* stage, plaintiffs asserting a claim under 42 U.S.C. § 1983 must present "clear and convincing" evidence of an improper motive to avoid dismissal). After all, few officials will openly "admit that they abuse the coercive powers of government to punish and silence their critics. They're often able to invent some

reason to justify their actions." *Gonzalez v. Trevino*, 60 F.4th 906, 907 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc), *cert. granted*, 144 S. Ct. 325 (2023); *see Seattle-First Nat'l. Bank v. N.L.R.B.*, 638 F.2d 1221, 1225 (9th Cir. 1981) (as it would be "extraordinary for a party directly to admit a bad faith intention, his motive must of necessity be ascertained from circumstantial evidence") (internal quotation omitted).

Second, Yelp requested, but was denied, a middle ground for resolving any evidentiary concerns at the District Court: an evidentiary hearing that, when paired with limited discovery, could have allowed the District Court to ascertain, presumably with greater confidence than it had when "reluctantly" dismissing the case, whether Paxton's prosecution was brought in bad faith. ER-002, 012. Indeed, the District Court stated that Yelp's "persuasive" evidence prevented it from confirming that Paxton initiated his lawsuit "entirely in good faith"—a telltale sign that *Younger*'s comity interest was in serious doubt. ER-010, 011; *see also Netflix*, 88 F.4th at 1096 (the case "does not resemble what we would otherwise presume to be a good-faith prosecution."). Under these circumstances, the District Court's stated reluctance to dismiss Yelp's lawsuit as an exercise of *Younger* abstention does not comport with its denying Yelp the opportunity to gather additional evidence through discovery to better ascertain whether Paxton's suit rested upon improper, bad-faith motivations or retaliation, or to present that evidence at a hearing.

To safeguard the principles underlying *Younger*, this Court should reverse the District Court's "reluctant[]" dismissal and direct the entry of the injunction Yelp sought and seeks. ER-002. In the alternative, this Court should remand the case with instructions to permit limited discovery and hold an evidentiary hearing on whether Paxton's prosecution was in bad faith. Federal courts owe state officials comity in connection with "legitimate activities of the States." *Gilbertson*, 381 F.3d at 970 (quoting *Younger*, 401 U.S. at 44). But where, as here, the District Court cannot comfortably confirm that the State's actions *are* legitimate, it cannot properly rely on *Younger* as a basis to abstain and simultaneously dismiss Yelp's suit without affording a meaningful opportunity, through limited discovery and an evidentiary hearing, to explore the non-trivial indicia of bad faith that were presented below.

C. Affirming the District Court Would Undermine Critical First Amendment Protections that Protect the Truthful Speech and Editorial Freedoms of Content Publishers.

Obscured by the District Court's *Younger* analysis are the significant First Amendment considerations at the heart of this dispute. Affirming a *Younger*-based dismissal of Yelp's lawsuit would significantly infringe upon fundamental First Amendment rights that Yelp holds as a publisher of constitutionally-protected speech. Of potentially greater concern, an affirmance of the decision below could serve as a blueprint for ill-intentioned state officials to punish protected speech by abusing deceptive trade practice laws without concern over scrutiny from federal courts.

That result, which would in effect enable First Amendment violations, offends the principles underlying *Younger* abstention.

Supreme Court pronouncements over the past century make clear that the freedoms of speech and press enshrined by the First Amendment encompass "the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. State of Ala.*, 310 U.S. 88, 101-02 (1940); *see also Near v. State of Minn. ex rel. Olson*, 283 U.S. 697, 707 (1931) (press and speech rights applicable to the states). These constitutional protections unquestionably extend to Yelp as a content publisher: the speech and press rights encompass "every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938). And these critical protections allow Yelp to protect its platform and facilitate the "unfettered interchange of ideas for the bringing about of political and social changes" without fear of government infringement or retaliation. *Roth v. United States*, 354 U.S. 476, 484 (1957).

Paxton does not dispute Yelp's fundamental constitutional rights. But he attempts to end-run them by alleging that his suit is about Texas "enforc[ing its] laws penalizing deceptive trade practices." ER-280. This is a red herring, and Paxton knows it: he has previously conceded to this very Court that the DTPA prevents him from investigating a publisher's content-moderation decisions. *See Twitter, Inc. v.*

Paxton, 56 F.4th 1170, 1172 (9th Cir. 2022) (Paxton explaining that his office "does not seek to investigate the content-moderation decisions that Twitter makes—and could not do so under [Texas's unfair and deceptive trade practices law]") (original bracketed text). Indeed, immediately after offering his supposed trade-practices justification for prosecuting Yelp, Paxton makes clear that his real complaint is the supposedly "disparate treatment" by Yelp of CPCs. ER-281. "Yelp did not append [the Original Notice] to other facilities that cater to pregnant women (*i.e.*, those that perform abortions) even though those centers frequently *lack* licensed, on-site medical professionals." ER-280 (original emphasis).

Through this forthright statement, Paxton concedes that he is trying to wield the DTPA as a cudgel to impose his preferences on and concerning the content of abortion-related speech. For Yelp to have satisfied Paxton and avoided the specter of litigation and monetary or other penalties, it had to either engage in compelled silence by not publishing its Original Notice at all, or participate in compelled speech by affixing Paxton-approved text to Yelp's profiles of abortion clinics. And Yelp would have had to decide the matter *ex ante*.

The scenario is an archetype of an unconstitutional Hobson's choice. In any case, the "difference between compelled speech and compelled silence" is "without constitutional significance" as both plainly violate the First Amendment. *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). "Just as the First

Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *see also Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) ("By compelling individuals to speak a particular message, such notices alte[r] the content of [their] speech.") (quotation omitted, alterations in original).

Paxton's charge that Yelp's publication of the Original Notice constituted "disparate treatment" also falls flat in light of well-established First Amendment protections for content publishers. ER-280. Yelp's choices about the material it publishes, including its well-researched statement about the services that CPCs typically offer—constitute an "exercise of editorial control and judgment" protected by the First Amendment. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). And what Paxton seeks—"compel[led] speech" with which Yelp disagrees—is impermissible because it forces a publisher to "alter its own message as a consequence." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion). At bottom, Paxton has no right to infiltrate Yelp's "enviable vehicle for the dissemination of" protected speech, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 577-78 (1995), so that Paxton can "enhance the relative voice" of an alternative position that he prefers. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam).

Having identified Paxton's objectives in bringing his DTPA suit, the impropriety—and danger—of the District Court's reluctant abstention becomes more apparent. The Supreme Court has warned that laws that are "fair on [their] face, and impartial in appearance" are still capable of unconstitutional application if "applied and administered by public authority with an evil eye and an unequal hand." *United States v. Steele*, 461 F.2d 1148, 1151 (9th Cir. 1972) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)). And "[i]n the vital area of First Amendment rights[,] it is just as easy to discourage exercise of them by abusing a valid statute as by using an invalid one." *Krahm*, 461 F.2d at 707-08 (9th Cir. 1972).

By suing Yelp, Paxton is attempting to use Texas's DTPA to punish Yelp for publishing truthful, protected information with which Paxton personally disagrees and to chill Yelp's future speech and/or pressure it to adopt Paxton-approved content. The District Court's reluctant choice to abstain in the face of such abuse may inspire Paxton (or other state or local officials) who dislike other content on Yelp or other platforms to initiate similarly meritless lawsuits, confident that the threat posed by their lawsuits will be effective to stifle free speech, and that a federal court will not likely intervene. That is an outcome that neither the First Amendment nor *Younger* tolerate, and the District Court's dismissal of Yelp's lawsuit accordingly warrants reversal.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to reverse the District Court's dismissal of Yelp's lawsuit and to enter the preliminary injunction that Yelp requested. In the alternative, *amici* urge that the Court reverse the District Court's dismissal and remand with instructions to the District Court to permit limited discovery into whether Paxton's lawsuit was brought in bad faith and if necessary, to conduct an evidentiary hearing to consider the issue further.

Dated: March 19, 2024

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APPENDIX OF AMICI CURIAE DESCRIPTIONS

The **First Amendment Clinic at Southern Methodist University Dedman School of Law** defends and advances the freedoms of speech, press, assembly, and petition through litigation, public advocacy, and education. The Clinic serves as a resource on the liberties guaranteed by the First Amendment, and provides students with real-world practice experience to prepare them to become leaders on First Amendment issues when they become practicing attorneys. The Clinic engages in advocacy and representation across Texas and the country, and thus has a special interest in promoting the sound interpretation of the First Amendment.

The **Stanton Foundation First Amendment Clinic at Vanderbilt Law School** defends and advances freedoms of speech, press, assembly, and petition through court advocacy. The Clinic serves as an educational resource on issues of free expression and press rights and provides law students with the real-world practice experience to become leaders on First Amendment issues. The Clinic engages in advocacy and representation across the country and has an interest in promoting the sound interpretation of the First Amendment in a way that preserves the important freedoms afforded by the U.S. Constitution and subsequent court precedents.

Tulane University's First Amendment Law Clinic launched in 2020 to defend and advance the rights of free speech, press, assembly and petition through litigation and advocacy, while providing law students with practice and real-world experience to become leaders on First Amendment issues. The Clinic takes on a wide array of matters, including defending journalists against intimidation lawsuits; representing students in engaging in free speech; protecting the rights of citizens to engage in robust online commentary; and supporting Louisianans in the free use of our streets and public places for the exchange of ideas. The Clinic represents citizens of all political viewpoints and from diverse parts of Louisiana, and participates in advocacy across the nation.

Professor Lyrissa Lidsky is the Raymond & Miriam Ehrlich Chair in U.S. Constitutional Law at the University of Florida's Levin College of Law. Her research and teaching focuses on the intersection of the First Amendment and Tort Law, with an emphasis on defamation and free speech issues in social media. Professor Lidsky is a co-reporter for the in-progress Restatement of Defamation and Privacy (Third), and has co-authored a leading Media Law casebook, a First Amendment casebook, and a reference book on press freedom, in addition to publishing dozens of law review articles. She previously served as Dean of the University of Missouri School of Law, as well as in a variety of leadership roles at the University of Florida's Levin College of Law.

CERTIFICATE OF SERVICE

I certify that on March 19, 2024, I caused a true and accurate copy of the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the CM/ECF system. I certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and Ninth Circuit Rule 32-1(a) because it contains **6,223** words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This figure is inclusive of the words in the Appendix of *amici* descriptions.

2. This brief complies with the type-face requirements and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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