
In The
Supreme Court of Virginia

RECORD NO. 140242

YELP, INC.,

Petitioner,

v.

HADEED CARPET CLEANING, INC.,

Respondent.

**SUPPLEMENTAL BRIEF OF AMICI CURIAE AUTOMATTIC, INC.,
FACEBOOK, INC., GOOGLE INC., TRIPADVISOR LLC, AND TWITTER, INC.
IN SUPPORT OF APPELLANT YELP, INC.**

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In response to the Court's invitation for supplemental briefing dated January 8, 2015, amici Automattic Inc., Facebook, Inc., Google Inc., TripAdvisor, LLC, and Twitter, Inc. respond to the Court's questions as follows:

QUESTION 1: What is the relationship between a Virginia court's subpoena power and the constitutional limitations on personal jurisdiction arising from the Due Process Clause?

A Virginia court's subpoena power and a Virginia court's power to exercise personal jurisdiction consistent with the Due Process Clause are separate and distinct. See Brief of Amici Curiae Automattic Inc., Facebook, Inc., Google Inc., Medium, Pinterest, TripAdvisor LLC, and Twitter, Inc. in Support of Appellant Yelp, Inc. ("Amici's Brief"), at 9–10. This is because "[p]ersonal jurisdiction is based on conduct that subjects the nonresident to the power of the [state's] courts to adjudicate its rights and obligations in a legal dispute," while subpoena power "is based on the power and authority of the court to compel the

attendance of a person at a deposition or the production of documents by a person or entity." *In re Nat'l Contract Poultry Growers' Ass'n*, 771 So. 2d 466, 469 (Ala. 2000); see also *Ulloa v. CMI, Inc.*, 133 So. 3d 914, 919–20 (Fla. 2013) (holding that the state's personal jurisdiction statute "does not address or extend the court's subpoena power in a criminal proceeding to require an out-of-state, nonparty corporation to produce documents that are also located out-of-state"); accord *Phillips Petroleum Co. v. OKC Ltd. P'ship*, 634 So. 2d 1186, 1187–89 (La. 1994) (quashing a subpoena duces tecum directed to a nonresident nonparty); *Syngenta Crop Prot., Inc. v. Monsanto Co.*, 908 So. 2d 121, 127 (Miss. 2005) (same).

The personal jurisdiction of Virginia courts is defined, in the first instance, by statute. See VA. CODE ANN. § 8.01-328.1. To the extent that the statute directs courts to exercise authority across state lines to summon a foreign corporation to appear, and then to adjudicate the rights of that nonresident as a party to litigation in Virginia, the application of the statute is limited by the Due Process Clause. See *Int'l Shoe Co. v. State of Wash. Office of*

Unemployment Compensation & Placement, 326 U.S. 310, 319 (1945) (considering whether the exercise of personal jurisdiction by a Washington state court over a foreign defendant in Delaware violated due process); *Peninsula Cruise, Inc. v. New River Yacht Sales, Inc.*, 257 Va. 315, 319 (1999) (“The Due Process Clause of the Fourteenth Amendment to the federal constitution protects a person’s liberty interest in not being subject to the binding judgment of a forum unless that person has certain minimum contacts within the territory of the forum so that maintenance of an action against that person does not offend ‘traditional notions of fair play and substantial justice.’”) (citing *Int’l Shoe*, 326 U.S. at 316).

A Virginia court’s subpoena power, however, is inherently limited to the territory of Virginia. It does not extend across state lines to nonparty witnesses who are not subject to suit. Because subpoena power cannot summon a nonparty, nonresident witness to produce or appear in Virginia, it does not raise the same due-process issues as personal jurisdiction. See Amici’s Brief at 6–9; see also *Craft v. Chopra*, 907 P.2d 1109, 1111 (Okla. Civ. App.

1995) (holding that a motion to compel a nonparty's compliance with an out-of-state subpoena was properly denied, that a "minimum contacts" jurisdictional analysis had no bearing on a court's lack of authority to compel discovery from nonresident nonparties, and distinguishing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Int'l Shoe Co.*, 326 U.S. 310, as "enumerating constitutional due process requirements as to a *party*, more particularly a *party defendant*, not a *witness* as in the present case") (emphasis in original). If, despite the lack of any basis for expanding the subpoena power of Virginia courts, see Amici's Brief at 10, the Court should nevertheless expand the subpoena power of Virginia courts beyond the borders of the Commonwealth to reach a nonparty located in California, it would raise novel and difficult questions under the Due Process Clause. *Cf. Peninsula Cruise, Inc.*, 257 Va. at 319.

QUESTION 1(a): Under what circumstances, if any, may a Virginia court exercise subpoena power over a foreign corporation over which it may not constitutionally exercise personal jurisdiction?

When a foreign corporation and its records custodians are located outside Virginia, as with Yelp and amici, they are not subject to the subpoena power of Virginia courts. *See supra* at 1–3; Amici’s Brief at 6–8. In theory, if the foreign corporation has a records custodian but few other activities in Virginia, then it might be subject to subpoena, but not to general personal jurisdiction (because its contacts with Virginia are not “continuous and systematic”) or specific personal jurisdiction (if those contacts are unrelated to the controversy). *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). Such circumstances are likely to be very rare.

Procedures are available, however, to allow litigants in the courts of Virginia to obtain records or testimony from foreign corporations that are not subject to the subpoena power of the Virginia courts. *See* Amici’s Brief at 13–15 (discussing the

Uniform Interstate Depositions and Discovery Act, (“UIDDA”), VA. CODE ANN. §§ 8.01-412.8 *et seq.*, which establishes procedures for interstate discovery through subpoenas issued by the state where the discovery is sought, not by the forum state). These procedures are widely adopted and easy to pursue. *See id.*; *see, e.g.*, CAL. CIV. PROC. CODE § 2029.350 (providing that an out-of-state litigant can domesticate an out-of-state subpoena without court involvement simply by having a California attorney serve a California subpoena incorporating the out-of-state subpoena).

QUESTION 1(b): Under what circumstances, if any, may a Virginia court lack subpoena power over a foreign corporation over which it may constitutionally exercise personal jurisdiction?

When a foreign corporation is a nonparty, a Virginia court lacks subpoena power over the foreign corporation even if the court might constitutionally exercise personal jurisdiction over the foreign corporation if it were a party to a matter in Virginia.

A court's exercise of personal jurisdiction over a foreign corporation is "based on conduct that subjects the nonresident to the power of the [state's] courts to adjudicate its rights and obligations in a legal dispute." *In re Nat'l Contract Poultry Growers' Ass'n*, 771 So. 2d at 469. And as amici explained, it is possible that the courts of Virginia could exercise personal jurisdiction over a foreign corporation as a party to a lawsuit in the Commonwealth consistent with the Due Process Clause. See Amici's Brief at 8.

But a Virginia court's ability to enforce compliance with a subpoena over any nonparty is based on its sovereign subpoena power, which is limited to the territory of the Commonwealth. See *supra* at 1–3; Amici's Brief at 6–8. This sovereign authority therefore cannot extend to a nonparty foreign corporation that has no records custodians or documents in Virginia.

This also makes sense as a matter of policy. A nonparty should not have to bear the burden of being summoned to courts all over the country because it might have records relevant to the parties' dispute. *Id.* at 9. This applies equally to corporations in

Virginia that might be summoned to appear in the courts of other states. *Id.* at 9–10. If any online service that enables people to communicate could be forced to appear in any court in any state just because one of its users was subject to suit in that court, the resulting burden on the nonparty providers would divert resources from innovation to litigation. The territorial limitation on states’ subpoena power has always been and remains well-grounded in law and sound as a matter of public policy.

QUESTION 2: May Virginia courts exercise personal jurisdiction over Yelp under the facts of this case without contravening the limitations imposed by the Due Process Clause?

Yelp is a nonresident, nonparty, so whether Virginia courts could constitutionally exercise personal jurisdiction over Yelp as a foreign corporation if it were a party to a lawsuit in Virginia is not determinative in this appeal. *See supra* at 3–4; Amici’s Brief at 10–12.

Amici take no position as to whether Yelp, as a party, would be subject to the personal jurisdiction of a Virginia court in a lawsuit. Either way, nonparty Yelp, located in California, is not subject to the subpoena power of a Virginia court, although there are procedures available for litigants in Virginia to obtain documents for use in their litigation. *See supra* at 4–5.

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CERTIFICATE OF COMPLIANCE AND SERVICE

Under this Court's request for supplemental briefing, amici certify that a copy of this brief has been mailed and emailed today, January 29, 2015, to counsel, including counsel for amici listed below, and also sent by email to scvbrieffs@courts.state.va.us.

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