Nos. 20-55729 & 20-55731 (consol.)

IN THE

United States Court of Appeals for the Ninth Circuit

TURO INC.,

PLAINTIFF-COUNTER-DEFENDANT-APPELLANT,

v.

CITY OF LOS ANGELES,

DEFENDANT-COUNTER-PLAINTIFF-APPELLEE.

On Appeal from the United States District Court
for the Central District of California
The Honorable Christina A. Snyder
District Court Case No. 2:18-cv-6055-CAS-(GJSx)

BRIEF OF AMICI CURIAE TECHNET, ELECTRONIC FRONTIER FOUNDATION, INTERNET ASSOCIATION, AND NETCHOICE IN SUPPORT OF APPELLANT TURO INC. AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), amici curiae Technology Network, Electronic Frontier Foundation, Internet Association, and NetChoice state that they have no parent corporations and that no publicly held corporation owns 10% or more of their stock.

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INTERESTS OF AMICI CURIAE

Amici curiae Technology Network ("TechNet"), Electronic Frontier Foundation ("EFF"), Internet Association ("IA"), and NetChoice file this brief in support of Turo Inc. ("Turo") and in favor of reversal. *See* Fed. R. App. P. 29(a)(2), (a)(4)(D). All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief.

TechNet is a national, bipartisan network of chief executive officers and senior executives of leading technology companies from across the nation. TechNet's objective is to promote the growth of the technology industry and to advance America's global leadership in innovation. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet, and represents more than three million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance. A list of TechNet's members is available at

https://technet.org/membership/members. No one affiliated with Turo is a member of TechNet's Executive Council or staff.

EFF is a member-supported, nonprofit civil liberties organization that has worked for 30 years to protect free speech, privacy, security, and innovation in the digital world. EFF, with over 30,000 members, represents the interests of technology users in court cases and broader policy debates surrounding the application of law to the internet and other technologies. EFF has litigated or otherwise participated in a broad range of intermediary liability cases.

IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. A list of IA's members is available at https://internetassociation.org/our-members. No one affiliated with Turo is a member of IA's leadership or staff.

NetChoice is a national trade association that works to make the internet safe for free enterprise and free expression. Its members include online businesses, online marketplaces, and e-commerce businesses. For nearly two decades, NetChoice has worked to increase

consumer access and options via the internet, while minimizing burdens on small businesses that are making the internet more accessible and useful. A list of NetChoice's members is available at https://netchoice.org/about/. No one affiliated with Turo is a member of NetChoice's leadership or staff.

Amici have a strong interest in the outcome of this appeal and, more generally, in the proper interpretation and application of the federal law on which this appeal turns: Section 230(c)(1) of the Communications Decency Act. Section 230(c)(1) is the legal cornerstone of e-commerce and online speech. By vesting online service providers with broad federal immunity to claims based on the editorial decisions they necessarily make when regulating user content, Section 230(c)(1) has promoted free speech and innovation for more than 20 years. The decision below threatens to undermine the legal framework that has allowed the internet to thrive by restricting the scope of Section 230(c)(1) immunity and inviting a flood of meritless lawsuits challenging providers' editorial discretion. Permitting the district court's order to stand would harm amici and amici's members and jeopardize amici's missions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici respectfully urge this Court to reverse the decision below denying Turo's motion to dismiss the City of Los Angeles's counterclaims and granting the City's motion for a preliminary injunction. Amici, who represent the diverse concerns and perspectives of the technology industry and technology users, have a direct interest in ensuring that the legal rules governing e-commerce and online discourse continue to promote innovation, competition, and free speech. Amici strongly believe that the district court's order, if allowed to stand, would frustrate those goals and have grave consequences far beyond this case.

The principal flaw in the district court's order is that it misinterprets and misapplies Section 230(c)(1) of the Communications Decency Act—a provision that grants "broad federal immunity" against claims based on service providers' purported failure to prevent unlawful content and conduct on their platforms. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007). Specifically, the district court extended this Court's decision in *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019), far beyond the narrow circumstances giving rise to that case, potentially setting a precedent

that could gut Section 230(c)(1) immunity for all online platforms that facilitate commercial transactions—which is to say, countless online platforms.

If not reversed, the district court's misreading of *HomeAway.com* and this Court's other precedents could substantially restrict Section 230(c)(1) immunity in future cases, risk significant economic disruption, and encourage the very sort of "artful skirting" of Section 230(c)(1) that this Court has repeatedly and rightly rejected. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016). This case therefore presents a valuable and timely opportunity to clarify the bounds of *HomeAway.com* and to ensure that it is not misconstrued in a way that frustrates Congress's intent.

* * *

"Turo operates an online and mobile peer-to-peer car sharing marketplace that allows car owners to rent their cars to other Turo users." ER00004. Turo does not own or rent any cars. Instead, Turo provides an online platform that allows "hosts" (car owners) to connect with "guests" (people who need access to cars). Hosts use Turo's platform to post listings for their vehicles, and guests use the platform

to search for and select cars to share from pickup locations across the country. *See* ER00004. Turo therefore increases access to transportation and helps hosts generate income from their vehicles.

Importantly, Turo does not decide where vehicles are picked up or dropped off. Rather, Turo users decide on handoff locations. *See id*. Nor could Turo dictate where vehicles are handed off if it wanted to do so. Although Turo users may communicate about handoff locations via Turo's platform, they can also communicate privately via other means, such as telephone and email, to discuss and decide on handoff locations. *See* ER00084-85.

In 2016, the City of Los Angeles learned that some Turo users were using Los Angeles International Airport ("LAX") as a vehicle handoff location. *See* ER00005. The City demanded that Turo obtain a permit under an ordinance stating that "no person shall engage in any business or commercial activity of any kind whatsoever on the Airport without first having applied for and obtained the appropriate license, lease, or permit therefor." L.A. Mun. Code § 171.02(b).

Turo denied that it was subject to that ordinance but offered to negotiate a permit reflecting Turo's activities. *See* ER00442-43. The

City declined. Turo then sued, seeking a declaration that it could not be held liable under the City's ordinance or its implementing regulations. The City responded by asserting counterclaims against Turo under state law.[1] In addition, the City moved for a preliminary injunction enjoining Turo from, among other things, "[l]isting or permitting motor vehicles to be listed on Turo's website as available for pick-up or drop-off at LAX." ER00414.

Turo moved to dismiss the City's claims and opposed the City's motion. Most relevant here, Turo argued that it was immune to the City's claims because the City sought to hold Turo liable "for its users' online content and related offline conduct in offering delivery at LAX." Turo Inc.'s Opening Brief ("Turo Br.") at 10. That theory of liability ran afoul of Section 230(c)(1), Turo argued, because Section 230(c)(1) immunizes providers against claims based on their "publishing conduct," *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009), which necessarily includes "any activity that can be boiled down to

[1] Specifically, the City sought a declaration that Turo's services violate the City's Municipal Code and its implementing regulations. The City also alleged that, by providing its online platform, Turo trespasses and aids and abets trespassing at LAX and that Turo violates California's Unfair Competition Law. *See generally* ER00416-65.

deciding whether to exclude material that third parties seek to post online," *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (en banc).

The district court disagreed. It interpreted this Court's decision in *HomeAway.com* as establishing an exception to Section 230(c)(1) immunity under which providers are not immune to claims based on their "commercial transaction-facilitating functions." ER00012. Based on that understanding of *HomeAway.com*, the district court held that Section 230(c)(1) did not bar the City's claims "because the City seeks to hold Turo liable for its role facilitating online rental car transactions, not as the publisher or speaker of its users' listings." ER00010 (internal quotation marks and citation omitted). The district court therefore denied Turo's motion to dismiss and granted the City's motion for a preliminary injunction. *See* ER00030. This appeal followed.

Turo's opening brief correctly explains how the district court erred in its legal analysis and why those errors require reversal. *See* Turo Br. at 16-38. Amici urge this Court to reverse for two additional but related reasons directly implicating the interests of amici and their members:

First, failing to reverse would weaken the broad federal immunity that Congress deliberately conferred on service providers when it enacted Section 230(c)(1). Under the district court's reading of *HomeAway.com*, providers cannot invoke that immunity when they are sued based on their "commercial transaction-facilitating functions." ER00012. That novel view has no basis in *HomeAway.com* or this Court's other precedents. Further, letting it stand could dramatically increase providers' potential legal exposure, subvert providers' ability to regulate their platforms, and risk significant economic harm. That is not what Congress intended when it enacted Section 230(c)(1) "to promote the continued development of the Internet and other interactive computer services." 47 U.S.C. § 230(b)(1).

Second, and relatedly, experience shows that failing to reverse the district court's order would invite "artful skirting" of Section 230(c)(1) immunity in future cases. *Kimzey*, 836 F.3d at 1266. That, in turn, would waste judicial resources and force providers to "fight costly and protracted legal battles" they should not have to fight, *Roommates.com*, 521 F.3d at 1175—precisely the opposite of what Congress intended when it enacted Section 230(c)(1) "to preserve the

vibrant and competitive free market that presently exists for . . . interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

ARGUMENT

I. The District Court's Order Undermines Section 230(c)(1)

Section 230(c)(1) has rightly been called "one of the most valuable tools for protecting freedom of expression and innovation on the Internet." Electronic Frontier Found., *CDA 230: The Most Important Law Protecting Internet Speech*, https://www.eff.org/issues/cda230.[2] If not reversed, the district court's order threatens to restrict the scope of Section 230(c)(1) immunity in ways never contemplated by this Court, thereby undermining Congress's policy goals and "the legal and social framework for the Internet we know today." Jeff Kosseff, *The Twenty-Six Words That Created the Internet* 3 (2019).

A. Section 230(c)(1) promotes innovation and free speech by immunizing providers against claims based on user-generated content.

"Simply put," Section 230(c)(1) was "enacted to protect . . . against the evil of liability" for providers based on their "failure to remove

[2] All websites and online documents cited in this brief were last visited on August 24, 2020.

offensive content" from their platforms—liability that would otherwise represent an existential threat to services that host millions or even billions of pieces of user content. *Roommates.com*, 521 F.3d at 1174 (internal quotation marks and citation omitted); *see also, e.g.*, *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) (by immunizing providers, Congress "sought to further First Amendment and e-commerce interests on the Internet"). And by shielding providers from that liability, Section 230(c)(1) "paved the way for a robust new forum for public speech as well as a trillion-dollar industry centered around user-generated content." *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (internal quotation marks and citation omitted).

Consistent with Congress's intent to protect providers and promote online speech and innovation, "[t]he majority of federal circuits have interpreted [Section 230(c)(1)] to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Perfect 10*, 488 F.3d at 1118 (internal quotation marks and citation omitted). Accordingly, plaintiffs may not hold providers liable for any activity that falls within the scope of "a publisher's traditional editorial

functions," e.g., "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102 (internal quotation marks and citation omitted). Like its sister circuits, the Ninth Circuit interprets those principles "expansive[ly]" and "robust[ly]" to ensure that Section 230(c)(1) continues to serve Congress's important policy goals. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); *see also, e.g.*, *Kimzey*, 836 F.3d at 1266 ("We decline to open the door to . . . artful skirting of [Section 230(c)(1) immunity] . . . given congressional recognition that the Internet . . . 'ha[s] flourished . . . with a minimum of government regulation.'") (quoting 47 U.S.C. § 230(a)(3)-(4)).

The district court's order cannot be reconciled with that settled understanding of Section 230(c)(1).

B. The district court's order conflicts with this Court's decisions and Congress's intent.

As interpreted by this Court, Section 230(c)(1) immunity bars claims against "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Barnes*, 570 F.3d at 1100-01. The district

court's order turns on whether the City's claims impermissibly treat Turo as a "publisher."[3]

In the proceedings below, Turo explained that Turo itself does not engage in any of the underlying conduct of which the City complains (mainly, undertaking "commercial activity" on LAX property or "trespassing" on LAX property). *See, e.g.*, ER00082, ER00476 ¶ 34, ER00480 ¶¶ 51-53. The City did not argue otherwise. Instead, the City argued that Turo should be held liable for providing its online platform and related services, which, according to the City, facilitate and enable LAX handoffs by Turo users. *See, e.g.*, ER00445. In other words, the City sought to hold Turo liable for failing to prevent Turo users from engaging in conduct that the City considers illegal.

That theory, however, runs headlong into Section 230(c)(1). An essential purpose of Section 230(c)(1) is to protect providers against claims based on their alleged failure to discover and prevent unlawful acts by their users. *See, e.g.*, *Roommates.com*, 521 F.3d at 1169 n.24

[3] As for the other requirements, the City does not dispute that Turo is an "interactive computer service." In its order, the district court declined to decide whether the City's claims seek to hold Turo liable for information provided by another content provider. *See* ER00010. That requirement is satisfied as well. *See* Turo Br. at 19-25.

(under Section 230(c)(1), "there is no vicarious liability for the misconduct of [providers'] customers"). Thus, courts routinely reject attempts to hold providers liable on the theory that the mere provision of their services equals facilitating, aiding, or abetting allegedly illegal content or conduct.[4] The district court should have reached the same result here.

It did not. Instead, the district court interpreted this Court's decision in *HomeAway.com* to compel a different conclusion. According to the district court, *HomeAway.com* stands for the proposition that claims based on providers' "commercial transaction-facilitating functions" do not implicate the publishing conduct immunized by Section 230(c)(1). ER00012. Thus, the district court reasoned, the City's claims are not barred by Section 230(c)(1) "because the City seeks to hold Turo liable for its role facilitating online rental car transactions,

[4] *See, e.g.*, *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1100 (9th Cir. 2019) (rejecting plaintiff's argument that website's functionality amounted to "collusion [with] and inducement" of illegal conduct by its users); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009) (explaining that, under Section 230(c)(1), providers "are not culpable for 'aiding and abetting' their customers who misuse their services to commit unlawful acts").

not as the publisher or speaker of its users' listings." ER00010 (internal quotation marks and citation omitted).

This Court should reject that reasoning for three related reasons.

1. The district court's order misinterprets *HomeAway.com* and undercuts providers' protected editorial discretion.

First, the district court's order misconstrues *HomeAway.com* in a manner wholly inconsistent with Congress's clearly stated intent to enable providers to determine how best to regulate their platforms.

In *HomeAway.com*, this Court considered an ordinance requiring homeowners who wished to rent their properties on a short-term basis to register with the city of Santa Monica. The ordinance also prohibited online housing booking platforms, such as HomeAway and Airbnb, from "completing any booking transaction for properties not licensed and listed on the City's registry." 918 F.3d at 680. The booking platforms sued, arguing that the ordinance "require[d] them to monitor and remove third-party content, and therefore violate[d] [Section 230(c)(1)] by interfering with federal policy protecting internet companies from liability for posting third-party content." *Id.* at 681. This Court disagreed, finding that the ordinance did not "proscribe, mandate, or

even discuss the content of [user] listings." *Id.* at 683. Rather, it "prohibit[ed] processing transactions for unregistered properties." *Id.* at 682. And, crucially, the platforms could comply with that narrow legal duty simply by "cross-referenc[ing] bookings against Santa Monica's property registry." *Id.* Thus, as this Court was at pains to emphasize, the ordinance did *not* require the platforms "to monitor third-party content" or "choose to remove noncompliant third-party listings on their website[s]" at all. *Id.* at 682-83. And because "the underlying duty 'could have been satisfied without changes to content posted by the website's users,'" Section 230(c)(1) did not preempt the ordinance. *Id.* (quoting *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016)).

The reasoning and result in *HomeAway.com* hew closely to this Court's precedents. At bottom, *HomeAway.com* holds that if the legal duty asserted by a plaintiff does not arise from or implicate a provider's publishing conduct, then the plaintiff's claim may not be barred by Section 230(c)(1). *See id.* (immunity applies when "the underlying legal duty at issue . . . seek[s] to hold the defendant liable as a 'publisher or speaker' of third-party content"). That is neither controversial nor new; it is the same view that this Court has espoused for more than ten

years. *See Barnes*, 570 F.3d at 1101-02 (explaining, in 2009, that "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability").

The district court read *HomeAway.com* very differently. According to the district court, *HomeAway.com* carved out a wide-ranging new exception to Section 230(c)(1) immunity for claims based on providers' "commercial transaction-facilitating functions." ER00012. But nothing in *HomeAway.com* supports that interpretation. This Court did not use the phrase "commercial transaction-facilitating functions" in *HomeAway.com*. Nor did it have any reason to consider whether claims based on such a broad and amorphous category of conduct should be categorically excluded from the scope of Section 230(c)(1) immunity. Instead, *HomeAway.com* rightly focused on a narrow issue arising from the unique facts of that case: whether Santa Monica's ordinance necessarily "require[d] the Platforms to monitor third-party content and thus [fell] outside of the CDA's immunity." *HomeAway.com*, 918 F.3d at 682. The answer to that question was "no" because the ordinance

required nothing more than checking an "internal" and "nonpublic" list before completing a transaction. *Id*.

Properly understood, this case bears little resemblance to *HomeAway.com*. Here, the City does not seek to compel Turo to check a list before processing transactions. Nor does it seek to compel Turo to engage in any similarly internal or ministerial duties. Rather, as the district court's preliminary injunction makes clear, the City seeks to compel Turo to (1) prevent "its users [from using] the Turo platform to arrange vehicle handoffs at LAX" and (2) cease "facilitat[ing] in any way, any car-sharing transaction leading to a vehicle handoff that takes place on LAX property." ER00030-31. Complying with *those* expansive legal duties would require far more than checking a list. In fact, the only way for Turo to comply with those duties would be to monitor the content of all listings for any mention of LAX and then remove listings from its platform that the City considers unlawful. *See* Turo Br. at 28. The reasoning of *HomeAway.com* therefore strongly suggests that Section 230(c)(1) immunity *does* apply in this case—not the opposite. *See HomeAway.com*, 918 F.3d at 682 (ordinance at issue "[fell] outside

of the CDA's immunity" because the duties it imposed did "not require the Platforms to monitor third-party content").

The district court's order tries to square that circle by asserting that "any obligation on Turo to 'remove offending content' could also be 'satisfied without changes to content posted by the website's users' by, for example, eliminating an owner's ability to post a vehicle for rent at an address (or with geographic coordinates) that fall within the LAX excludable area in the first place." ER00013 (quoting *HomeAway.com*, 918 F.3d at 682, 683). But that reasoning turns Section 230(c)(1) on its head. Few principles are as settled as the principle that Section 230(c)(1) immunizes providers' "exercise of [their] editorial and self-regulatory functions." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). And that immunity necessarily extends to decisions that providers make about how to structure their services and how to regulate content on their platforms. *See, e.g.*, *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (rejecting attempt to "plead around Section 230 immunity" by challenging the "features and functions" of a website); *see also Force v. Facebook, Inc.*, 934 F.3d 53, 67 (2d Cir. 2019) (Section 230(c)(1) barred claims based on

the theory that a website's features and functionality facilitated unlawful content and conduct).

Thus, by suggesting that Turo should change how it regulates user content to comply with the broad legal duties asserted by the City, the district court fundamentally misunderstood Section 230(c)(1). Turo's decisions about how to regulate its platform *generally* are no less protected than Turo's decisions about whether to "publish, withdraw, postpone or alter" *specific* content. *Barnes*, 570 F.3d at 1102 (internal quotation marks and citation omitted). If that were not the rule, then providers could not "self-regulate . . . without fear of liability." *Internet Brands*, 824 F.3d at 852. The district court erred in holding otherwise.[5]

[5] Many other cases are in accord. *See, e.g.*, *Herrick v. Grindr, LLC*, 765 F. App'x 586, 591 (2d Cir. 2019) (Section 230(c)(1) barred claims based on provider's "[user-profile] matching and geolocation features"); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20-21 (1st Cir. 2016) (rejecting claims challenging the "construct and operation" of a website to the extent those features "reflect[ed] choices about what content can appear on the website and in what form"); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (Section 230(c)(1) barred claims based on "structure and design of the website"); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (Section 230(c)(1) barred claims based on provider's "failure to implement measures" on its website "that would have prevented" the alleged harm because that was "merely another way of claiming that" the provider was "liable for publishing").

2. The district court's order carves out a broad new exception to Section 230(c)(1) immunity that violates Congress's intent.

Even more troubling, the district court's order creates a nebulous new exception to Section 230(c)(1) immunity that threatens to eviscerate the law's protections for virtually all providers who facilitate online transactions.

Under the district court's reading of *HomeAway.com*, Section 230(c)(1) does not bar claims based on "platforms' commercial transaction-facilitating functions." ER00012. But that is not what *HomeAway.com* held; *HomeAway.com* simply declined to apply Section 230(c)(1) immunity to bar a *specific* claim that implicated a *specific* commercial function that had nothing to do with publishing conduct. And endorsing the district court's overreading could have grim consequences for the entire online industry. As a practical matter, almost every aspect of online providers' platforms and services could be described as "commercial transaction-facilitating functions"—a phrase that the district court's order neither explains nor cabins. Thus, it could be argued, if Section 230(c)(1) immunity does not apply to claims based on "commercial transaction-facilitating functions," then it does not

apply to a vast and uncharted universe of routine commercial activities that have long been understood to fall within the scope of Section 230(c)(1). That potentially includes, for example, processing payments related to user content; providing tools, features, and functionality that facilitate user engagement and interaction; and even the bare act of soliciting user content as part of a service's business model. And if that were the law, then providers could routinely be held liable for doing precisely what Congress sought to encourage when it enacted Section 230(c)(1): facilitating transactions that drive online commerce and online speech. Fortunately, that is not the law.[6]

[6] *See Dyroff*, 934 F.3d at 1098 (plaintiff could not "circumvent Section 230 immunity" by challenging provider's anonymity policy, which facilitated user interaction); *Force*, 934 F.3d at 67 (Section 230(c)(1) immunized features designed to facilitate user content and engagement); *Carafano*, 339 F.3d at 1125 (similar); *see also, e.g.*, *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1106 (C.D. Cal. 2017) (explaining that courts in this circuit and elsewhere have routinely "granted CDA protection to websites that process payments and transactions in connection with third-party listings," and collecting cases); *Goddard v. Google, Inc.*, No. C 08-2738 JF (PVT), 2008 WL 5245490, at *3, *4 n.4 (N.D. Cal. Dec. 17, 2008) (explaining that the "broad scope of § 230 extends to multiple forms of putative 'involvement' by an interactive service provider in generating online content" including "eliciting online content for profit").

The district court's order suffers from another, related flaw. Because it focuses on the superficial similarities between this case and *HomeAway.com*, the order fails to grapple with the deeper and far more important differences. In particular, in *HomeAway.com*, the legal duties asserted by the city were narrow and focused on the *providers'* conduct. Here, in contrast, the City's theory is that Turo is liable for providing a platform that can be used to facilitate and enable unlicensed "commercial activity" *by Turo's users*. ER00013-16, ER00023-25. But if Section 230(c)(1) allowed such a theory, then any provider could be held indirectly liable for any allegedly unlawful commercial activity—including any *offline* activity—by any of its users. That, in turn, would expose countless providers of all kinds to a never-ending litany of claims based on their purported "facilitation" of users' illegal or harmful conduct. Section 230(c)(1) simply is not supposed to work that way. *See, e.g.*, *Roommates.com*, 521 F.3d at 1169 n.24 (under Section 230(c)(1), providers are not subject to "vicarious liability for the misconduct of their customers," even if they are alleged to have "passive[ly] acquiesc[ed]" to that misconduct).

The upshot is that the district court's reasoning could drastically restrict the scope of Section 230(c)(1) immunity for many providers in many cases—not just providers like Turo in cases like this one. This case therefore provides a critical opportunity for this Court to interpret and clarify *HomeAway.com* and its other Section 230(c)(1) precedents. In particular, this Court should explain that the reasoning of *HomeAway.com* applies only when a legal duty directly regulates a provider's conduct and when compliance with that legal duty would not require monitoring, blocking, or removing user content. Otherwise, litigants and lower courts will continue to misconstrue *HomeAway.com* in a way that threatens to eviscerate Section 230(c)(1). Indeed, as explained below, litigants are already seeking to exploit *HomeAway.com* for precisely that purpose. *See infra* at 28-29 & n.7.

3. If it is not reversed, the district court's order will sow uncertainty and confusion and could cause significant economic harm.

Relatedly, this Court should reverse the district court's order because its errors pose a serious threat to the online economy and the economy as a whole.

One of Congress's main objectives in enacting Section 230(c)(1) was to "promote the development of e-commerce." *Batzel*, 333 F.3d at 1027. Nevertheless, the district court's order purports to exclude all "commercial transaction-facilitating functions" from the scope of Section 230(c)(1). ER00012. Failing to reverse that surprising result will undoubtedly create uncertainty and confusion in the marketplace. The district court's order departs abruptly from settled understandings of Section 230(c)(1) by denying immunity for conduct that Congress specifically intended to protect and by suggesting that providing services to the public can make providers liable for "facilitating" online and offline illegality by their users. Thus, at best, providers will have to expend significant resources assessing and mitigating their risks under those new rules if the district court's order is not reversed.

At worst, restricting Section 230(c)(1) immunity in the ways contemplated by the district court's order could inflict significant harm on the entire economy. For example, one recent analysis concluded that materially narrowing the scope of legal safe harbors for internet intermediaries, including Section 230(c)(1) immunity, "would cost the U.S. economy $75 billion annually, lower employee earnings by some

$23 billion annually, and eliminate over 425,000 jobs." Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA Economic Consulting at 18 (June 5, 2017), https://internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf. In addition, "[t]he U.S. gross domestic product would decrease by $44 billion annually." *Id.*

Importantly, startups and emerging companies would suffer the most under the new regime contemplated by the district court's order. "For smaller Internet services, defending a single protracted lawsuit may be financially ruinous." Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 Notre Dame L. Rev. Reflection 33, 40 (2019). Indeed, a recent survey of legal counsel found that "the cost of defending even a frivolous claim" barred by Section 230(c)(1) may often "exceed a startup's valuation." Engine, *Section 230: Cost Report* at 1, https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5c8168cae5e5f04b9a30e84e/1551984843007/Engine_Primer_230cost2019.pdf. That is why this Court has repeatedly emphasized the importance of interpreting Section 230(c)(1) broadly to

protect providers—especially smaller providers—from "having to fight costly and protracted legal battles." *Roommates.com*, 521 F.3d at 1175.

Again, when it enacted Section 230(c)(1), Congress sought to promote the development of interactive computer services and encourage online innovation and e-commerce, "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Endorsing the district court's flawed interpretation of Section 230(c)(1) would have the opposite effect: it would disrupt the settled framework governing providers' liability for user-generated content, inject uncertainty and confusion into the marketplace, and chill innovation by magnifying providers' potential exposure to a broad new swath of claims.

II. Affirming the District Court's Order Would Encourage "Artful Skirting" of Section 230(c)(1) Immunity

Finally, this Court should reverse the district court's order so that it does not inspire future efforts to plead around Section 230(c)(1).

Section 230(c)(1) jurisprudence is littered with artful attempts—like the City's attempts in this case—to plead around the broad immunity that Congress intentionally conferred on providers. *See, e.g.*, *Kimzey*, 836 F.3d at 1266 (rejecting effort "to circumvent the CDA's protections through 'creative' pleading" and "artful skirting"); *see also*

La Park La Brea A LLC v. Airbnb, Inc., 285 F. Supp. 3d 1097, 1105 (C.D. Cal. 2017) ("Aimco's argument fails, and its creative pleading does not place this case outside the CDA's purview.") (internal quotation marks and citation omitted). And, not surprisingly, the *HomeAway.com* decision has already been weaponized for that very purpose, with many plaintiffs seeking to hold providers liable based on overbroad and misguided interpretations of the panel's reasoning.[7]

[7] *See, e.g.*, Pet. for a Writ of Certiorari, *Daniel v. Armslist, LLC*, No. 19-153 (U.S. July 29, 2019), 2019 WL 3524224, at *26-*28 (arguing that *HomeAway.com* takes "a narrow view of what it means to treat a party as a publisher" and that a provider should be held liable for its users' commercial transactions on its website); Plaintiff's Opp. to Def.'s Mot. to Dismiss First Am. Compl. at 5, *924 Bel Air Rd., LLC v. Zillow Grp., Inc.*, No. 2:19-cv-01368-ODW-AFM (C.D. Cal. Sept. 9, 2019), 2019 WL 6486498 (citing *HomeAway.com* to argue that Zillow could be held liable for failing to monitor and prevent users from posting false content); Appellant's Opening Br., *Murphy v. Twitter, Inc.*, No. A158214 (Cal. Ct. App. Jan. 20, 2020), 2020 WL 292002, at *11, *32 (relying on *HomeAway.com* to urge denial of Section 230(c)(1) immunity for claims based on termination of user's account); Appellant's Opening Br., *Bolger v. Amazon.com*, No. D075738 (Cal. Ct. App. Sept. 27, 2019), 2019 WL 4919990, at *62-*63 (arguing that *HomeAway.com* supports holding a provider liable for its users' commercial transactions on its website); Reply in Support of Mot. for Prelim. Injunction at 16, *Prager Univ. v. Google LLC*, No. 19CV340667 (Cal. Super. Ct. Aug. 16, 2019), 2019 WL 8645786 (citing *HomeAway.com* to argue that YouTube could be held liable for removing users' videos).

Even when those meritless attempts fail, they impose unnecessary burdens on providers, chill online innovation and speech, and impede Congress's policy goals. *See, e.g.*, *Levitt v. Yelp! Inc.*, No. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *8 (N.D. Cal. Oct. 26, 2011) ("The Ninth Circuit has made it clear that the need to defend against a proliferation of lawsuits, regardless of whether the provider ultimately prevails, undermines the purpose of section 230."), *aff'd*, 765 F.3d 1123 (9th Cir. 2014). Thus, it is imperative that this Court reverse the district court's order and, in so doing, make clear that the district court's misreading of *HomeAway.com* is not a valid end-run around Section 230(c)(1). Otherwise, the district court's reasoning will surely incite even more attempts to plead around Section 230(c)(1)—further taxing judicial resources, forcing providers to fight "costly and protracted legal battles," *Roommates.com*, 521 F.3d at 1174, and frustrating Congress's clearly stated intent.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to reverse the district court's order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,666 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Century Schoolbook 14-point font.

/s/ Ryan Spear
Ryan Spear

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 24, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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