COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-13012

MASSACHUSETTS PORT AUTHORITY,
Plaintiff/Appellee,

v.

TURO INC.,
Defendant/Appellant.

ON APPEAL FROM AN INTERLOCUTORY ORDER OF
THE BUSINESS LITIGATION SESSION
SUFFOLK SUPERIOR COURT
(Suffolk Superior Court Docket No. 1984CV1773-BLS1)

BRIEF OF AMICI CURIAE TECHNET, ELECTRONIC FRONTIER FOUNDATION, INNOVATION ECONOMY ALLIANCE, INTERNET ASSOCIATION, NETCHOICE, MATCH GROUP, INC., AND VIMEO, INC. IN SUPPORT OF APPELLANT TURO INC.

December 18, 2020

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Massachusetts Rule of Appellate Procedure 17(c)(1) and Supreme Judicial Court Rule 1:21, amici curiae Technology Network, Electronic Frontier Foundation, Innovation Economy Alliance, Internet Association, NetChoice, and Match Group, Inc., state that they have no parent corporations and that no publicly held corporations own 10% or more of their stock.

Amicus curiae Vimeo, Inc. is majority-owned by IAC/InterActiveCorp ("IAC"), a publicly held corporation. No publicly-traded company owns more than 10% of IAC's stock.

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INTERESTS OF AMICI CURIAE

Amici curiae Technology Network ("TechNet"), Electronic Frontier Foundation ("EFF"), Innovation Economy Alliance ("IEA"), Internet Association ("IA"), NetChoice, Match Group, Inc. ("Match Group") and Vimeo, Inc. ("Vimeo") file this brief in support of Turo Inc. ("Turo") and in favor of reversal.[1]

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

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of the brief. None of the amici nor any of amici's counsel has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal. *See* Mass. R. App. P. 17(c)(5). Because the Court solicited amicus briefs in this matter, no motion for leave to file an amicus brief is required. *See* Mass. R. App. P. 17, 2019 Reporter's Notes.

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 35,000 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.

IEA is a non-politically partisan, but innovation partisan, organization dedicated to informing and educating the public through research and analysis regarding federal, state, and international government on the innovation ecosystem, and calling them to action. IEA believes that creating a policy environment that understands the innovation ecosystem and that accepts and enables dynamic creation,

invention, expression, and experimentation is necessary for our country's continued success.

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.

Match Group owns a diverse portfolio of online dating companies, including some that have been providing online dating

services for more than 20 years. Match Group is headquartered in Dallas, Texas.

Vimeo provides an online platform that allows businesses and individuals to create, collaborate, and communicate with video. Vimeo serves over 200 million registered users who upload hundreds of thousands of videos per day.

Amici have a strong interest in this appeal and in the proper interpretation of the statute on which it 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 immunity to claims based on the exercise of their publishing and editorial functions, 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. Permitting the Superior Court's order to stand would therefore directly harm amici, amici's members, and internet users generally and jeopardize amici's missions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici respectfully urge this Court to reverse the decision below granting the Massachusetts Port Authority's ("Massport's") motion for a preliminary injunction. Amici represent the diverse concerns and perspectives of the technology industry and technology users. Accordingly, amici have a direct and substantial interest in ensuring that the legal rules governing e-commerce and online discourse are properly and consistently applied so that amici and their members can continue to promote innovation, competition, and free speech—just as Congress intended. Amici strongly believe that the Superior Court's order, if allowed to stand, would frustrate those goals and have grave consequences far beyond this case.

In its order, the Superior Court misinterpreted and misapplied Section 230(c)(1) of the Communications Decency Act, which "grant[s] broad immunity to entities . . . that facilitate the speech of others on the Internet." *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007). In particular, the Superior Court erred in holding that Massport's claims did not run afoul of Section 230(c)(1) because they did not treat Turo as a "publisher" of user-generated content. In reaching

that conclusion, the Superior Court relied on—and fundamentally misunderstood—the Ninth Circuit's decision in *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019). Indeed, the Superior Court's misreading of *HomeAway.com*, if not corrected, could gut Section 230(c)(1) immunity for all online platforms that do more than merely publish content—which is to say, virtually all online platforms. *See infra* at 13-20.

But that is not all. If left undisturbed, the Superior Court's misreading of *HomeAway.com* and other precedents also threatens to cause significant economic disruption and to encourage the sort of artful evasion of Section 230(c)(1) immunity that courts have repeatedly and rightly rejected. *See, e.g.*, *Lycos*, 478 F.3d at 422 (rejecting "artful pleading" meant to evade Section 230(c)(1) immunity); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (same). This case therefore presents a valuable and timely opportunity to ensure that Section 230(c)(1) is not misconstrued in a way that frustrates Congress's intent. *See infra* at 20-29.

* * *

The fundamental question in this case is whether appellant Turo, an online platform that connects users who wish to engage in peer-to-peer transactions with each other for the short-term use of cars, can be held liable for its users' decisions to list cars as available at Logan Airport and to arrange vehicle handoffs there.

As the Superior Court rightly observed, Turo "has a different business model from rental car companies." RAII/390. "Turo does not own, lease, or rent a fleet of cars," and "Turo has no office, rental counter, or other physical presence at Logan Airport." *Id.* Unlike rental car companies, "Turo operates an Internet website (www.turo.com) and provides mobile device applications through which Turo users can share their cars." *Id.*

More specifically, Turo provides an interactive website that allows "hosts" (car owners) to connect with "guests" (people who need temporary access to cars). Hosts use Turo's platform to post listings for their privately-owned vehicles, and guests use the platform to search hosts' vehicle listings, select a car, and arrange with the vehicle's owner to pick it up at a certain time and place. *See* RAII/390-391. Turo therefore increases access to transportation and helps hosts—including

hosts who could not otherwise afford the costs of car ownership—to generate income from cars that might otherwise sit idle.

Importantly, Turo does not control where its users pick up or drop off vehicles. Rather, Turo users decide which handoff locations to advertise and select and where to conduct handoffs. Nor could Turo dictate where vehicles are handed off even if it wanted to do so. As the Superior Court recognized, "Turo does not (and cannot) determine for its users where they will meet," RAII/391, and Turo cannot prevent users from handing off vehicles at any particular place—including Logan Airport.

Nevertheless, Massport sued Turo. Among other claims, Massport alleged that Turo aided and abetted trespass by "creating and operating its website" and thereby "facilitating" Logan handoffs by Turo users. RAI/56. Based on that claim (and others not at issue here), Massport sought declaratory relief, injunctive relief, and monetary relief.

Massport also sought a preliminary injunction against Turo. Specifically, Massport asked the Superior Court to enjoin Turo from (1) "listing or permitting vehicles to be listed on Turo's website as available for pick up at Logan," and (2) "accepting reservations or

payments for, or otherwise facilitating in any way, car rental transactions at Logan." *See* RAI/149. Thus, although Massport's claims against Turo are putatively rooted in trespass, the relief Massport sought focused exclusively on Turo's regulation and operation of its online platform. (Massport also asked the Superior Court to enjoin all the defendants, including Turo, from "travelling on the roadways at Logan" and "dropping off or picking up vehicles for rental anywhere at Logan." RAI/149. But all parties agree that Turo itself does neither of those things.)

Turo opposed Massport's motion, arguing that Massport was not entitled to a preliminary injunction because Massport's trespass claims were barred by Section 230(c)(1). At bottom, Turo explained, Massport sought to hold Turo liable for providing an online platform connecting users who sometimes choose to list Logan as a delivery location and arrange handoffs there. Indeed, Massport's requested injunction specifically sought to force Turo to block or remove user posts about handoffs at Logan Airport. But as Turo rightly pointed out, "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online" is "perforce immune" under

Section 230(c)(1). *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (en banc). Thus, Massport's claims failed under decades of settled law.

The Superior Court disagreed. In a single cursory paragraph, it misinterpreted the Ninth Circuit's recent decision in *HomeAway.com* to mean that claims based on providers' alleged "facilitat[ion]" of unlawful activity are categorically beyond the scope of Section 230(c)(1). RAII/398 (relying on *HomeAway.com*, 918 F.3d 676, 680-84). Based on that unprecedented reading of *HomeAway.com*, the Superior Court held that Section 230(c)(1) did not bar Massport's claims because Massport sought to hold Turo liable for facilitating allegedly illegal handoffs—mainly, by "accepting and processing payment[s]" for user transactions involving such handoffs—and not for acting as "a mere publisher or speaker of information." *Id*. The Superior Court therefore granted Massport's motion for a preliminary injunction. And, as demanded by Massport, it specifically required Turo to block and remove users' content, ordering that Turo is "prohibited" from "permitting motor vehicles to be listed on Turo's website . . . as available for pickup or drop-off at Logan Airport." RAII/399; Add./74. This appeal followed.

Turo's briefs correctly explain how the Superior Court erred in its legal analysis and why those errors require reversal. *See generally* Brief of Appellant Turo Inc. ("Turo Br."); Reply Br. of Appellant Turo Inc. ("Turo Reply Br."). Amici urge this Court to reverse for three additional but related reasons directly implicating the interests of amici and their members.

First, failing to reverse would weaken the broad immunity that Congress deliberately conferred on service providers when it enacted Section 230(c)(1). Under the Superior Court's reading of Section 230(c)(1) and *HomeAway.com*, providers cannot invoke that immunity when they are accused of "facilitating" unlawful activity, including by doing no more than "accepting and processing payment[s]" related to activity that is later alleged to be illegal. RAII/398 (internal quotation marks and citation omitted). That novel view has no basis in *HomeAway.com* or Section 230(c)(1) jurisprudence more broadly.

Second, letting the Superior Court's order stand would dramatically increase providers' potential legal exposure and sow confusion in the marketplace. And that, in turn, would risk significant harm to the online economy and the economy as a whole. 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).

Third, and equally important, experience shows that failing to reverse the Superior Court's order in decisive terms would invite more "artful pleading"—like Massport's pleadings in this case—designed to undermine Section 230(c)(1) immunity. *Lycos*, 478 F.3d at 422. Many courts have warned against "attempted end runs" around Section 230(c)(1) immunity, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 24 (1st Cir. 2016), and for good reason: they encourage wasteful litigation, confuse the law, and unnecessarily tax judicial resources. They also force providers to "fight costly and protracted legal battles" they should not have to fight. *Roommates.com*, 521 F.3d at 1175. Congress intended none of those results when it enacted Section 230(c)(1). To the contrary, Congress intended "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).

This Court should reverse.

ARGUMENT

I. THE SUPERIOR COURT'S ORDER CONTRAVENES AND 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 Foundation, *CDA 230: The Most Important Law Protecting Internet Speech*, https://www.eff.org/issues/cda230 (last visited Dec. 18, 2020). The Superior Court's order threatens to restrict the scope of this foundational law, 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.

Section 230(c)(1) was "enacted to protect [providers] against the evil of liability" based on user-generated content—liability that would otherwise represent an existential threat to providers 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.*, *Backpage.com*, 817 F.3d at 18-19 (holding providers liable for "an

enormous amount of potentially harmful content" created by "an infinite number of users" would "have an obvious chilling effect") (internal quotation marks and citation omitted). 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).

Given the important policies animating Section 230(c)(1), "[t]here has been near-universal agreement that [it] should not be construed grudgingly." *Backpage.com*, 817 F.3d at 18. Instead, "[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, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (internal quotation marks and citation omitted).

As the First Circuit has explained, and as Massport acknowledges, Section 230(c)(1)'s broad immunity bars plaintiffs from holding providers liable for the exercise of "traditional editorial functions." *Backpage.com*, 817 F.3d at 18; *see also* Brief of the Plaintiff/Appellee

Massachusetts Port Authority ("Massport Br.") at 27 (same). That expansive category of conduct includes decisions about "whether to publish, withdraw, postpone, or alter" specific pieces of user content. *Id*. In addition, because Section 230(c)(1) protects editorial decisions about specific pieces of user-generated content *and* "inherent decisions about how to treat postings generally," it also bars claims based on choices providers make about the general "construct and operation" of their platforms. *Lycos*, 478 F.3d at 422. Thus, for example, in *Backpage.com*, the First Circuit held that Section 230(c)(1) barred claims challenging "features that are part and parcel of the overall design and operation of the [provider's] website," including the provider's "acceptance of . . . payments." 817 F.3d at 20-21.

The Superior Court's order cannot be squared with that settled understanding of Section 230(c)(1). In fact, as explained below, the Superior Court's order turns Section 230(c)(1) on its head by stripping providers of immunity for doing precisely what Congress sought to encourage when it created that immunity: facilitating online transactions and interactions and otherwise "promot[ing] the continued development of the Internet." 47 U.S.C. § 230(b)(1).

B. The Superior Court's order misinterprets and misapplies Section 230(c)(1).

Section 230(c)(1) immunity applies "if the defendant (1) is a provider or user of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim would treat [the defendant] as the publisher or speaker of that information." *Backpage.com*, 817 F.3d at 19 (internal quotation marks and citation omitted). The Superior Court focused on the third requirement, holding that Turo is not immune to Massport's claims because Massport's claims do not treat Turo as a publisher within the meaning of Section 230(c)(1). That was error.

1. Massport's claims seek to hold Turo liable as a "publisher" of user-generated content on Turo's platform.

In the court below, Massport sought to hold Turo liable on the ground that Turo "facilitat[ed]" illegal conduct (namely, Logan handoffs) by "creating and operating" an online platform through which users could communicate about and coordinate such handoffs. *See* RAI/56. Consistent with that theory, Massport sought and obtained an injunction that requires Turo to change the way it monitors user postings and operates its service. *See* RAII/399 (enjoining Turo from

"[l]isting or permitting motor vehicles to be listed on Turo's website, or by means of any other Turo application, as available for pickup or drop-off at Logan Airport" and "[a]ccepting reservations or payments for, or otherwise facilitating in any way, motor vehicle car-sharing or rental transactions originating and/or ending at Logan Airport").

The problem with that theory is that it runs headlong into a bedrock principle of Section 230(c)(1): plaintiffs may not hold providers liable in their capacity as "publishers" of user-generated content.

"The broad construction accorded to section 230 as a whole has resulted in a capacious conception of what it means to treat a website operator as [a] publisher or speaker[.]" *Backpage.com*, 817 F.3d at 19. To decide whether a claim impermissibly treats a provider as a publisher, "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." *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096, 1102 (9th Cir. 2009); *see also Hassell v. Bird*, 5 Cal. 5th 522, 542 (Cal. 2018) (holding that, "[i]n substance, Yelp is being held to account for nothing more than its ongoing decision to publish the challenged reviews," and rejecting

plaintiffs' attempt to avoid that conclusion through "creative pleading of barred claims") (internal quotation marks omitted), *cert. denied sub nom. Hassell v. Yelp, Inc.*, 139 S. Ct. 940 (2019).

Under that common-sense approach, there is no genuine dispute that Massport's claims are based on Turo's publisher conduct and publisher status. For starters, that is precisely what Massport told the Superior Court in its complaint. *See* RAI/56 (alleging that Turo aided and abetted trespass by "creating and operating its website").

In addition, Massport specifically sought, obtained, and continues to defend an injunction prohibiting Turo from "[l]isting or permitting motor vehicles to be listed on Turo's website . . . as available for pickup or drop-off at Logan Airport." RAII/399. There is no way to characterize that enjoined conduct as anything but traditional publisher conduct, as even Massport grudgingly concedes. *See* Massport Br. at 46 & n.6; *see also Roommates.com*, 521 F.3d at 1170-71 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online" is "perforce immune" under Section 2301(c)(1).).

Finally, the only way in which Turo "facilitates" handoffs specifically at Logan is by publishing user content regarding such

handoffs. As a result, there would be no harm to Massport but for Turo's provision of a platform that enables such postings—conduct that falls squarely within the scope of a "publisher's traditional editorial functions." *Backpage.com*, 817 F.3d at 18; *see also id*. at 19-20 (plaintiffs' claims treated provider as publisher because "there would be no harm to [plaintiffs] but for the content of the [user] postings" on defendant's website that allegedly harmed plaintiffs).

The fact that the misconduct of which Massport complains—Logan handoffs—happens in the "real world," not online, does not change the analysis. Courts routinely dismiss complaints under Section 230(c)(1) where plaintiffs seek to hold providers liable on the ground that their platforms were used to cause offline harms. *See, e.g.*, *id.* at 21 (plaintiffs could not hold provider liable based on its "decisions about how to treat postings," even if those postings caused offline harms). Nor is that surprising. Nothing in Section 230(c)(1) distinguishes between claims rooted in "offline" harms versus "online" harms. Instead, Section 230(c)(1) broadly prohibits *all* claims that, at bottom, seek to hold providers liable based on their publication of user-generated content. And that includes claims, like Massport's claims, that "implicitly

require recourse to [user-generated content] to establish liability or implicate a defendant's role" in the alleged misconduct. *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156 (E.D.N.Y. 2017).

2. The Superior Court erred in holding that Massport's claims do not impermissibly treat Turo as a "publisher" under Section 230(c)(1).

Under the settled law discussed above, the Superior Court should have held that Massport's claims impermissibly treat Turo as a publisher under Section 230(c)(1). It did not.

Instead, the Superior Court relied heavily on the Ninth Circuit's decision in *HomeAway.com* to reach the opposite conclusion. According to the Superior Court, *HomeAway.com* stands for the proposition that providers cannot invoke Section 230(c)(1) immunity when they are accused of "facilitating" transactions tied to unlawful acts, including by "accepting and processing payment[s]" related to such transactions. RAII/398 (internal quotation marks and citation omitted). Similarly, Massport urges this Court to read *HomeAway.com* to mean that Section 230(c)(1) is inapplicable whenever a plaintiff alleges that a provider has "facilitat[ed] . . . unlawful commercial activity." Massport Br. at 34. This Court should reject that view for two related reasons.

a. The Superior Court's order fundamentally misconstrues *HomeAway.com*.

First, the Superior Court's order misconstrues the *HomeAway.com* decision and extends it far beyond the facts giving rise to that case.

In *HomeAway.com*, the Ninth Circuit 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. The Ninth Circuit disagreed, finding that the ordinance did not "proscribe, mandate, or even discuss the content of [user] listings[.]" *Id*. at 683. Rather, the ordinance "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 the

Ninth Circuit repeatedly emphasized, 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)).

Essentially, *HomeAway.com* holds that if the legal duty asserted by a plaintiff does not arise from or implicate a provider's publishing conduct in any way, 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. *See Barnes*, 570 F.3d at 1101-02 (explaining, more than one decade ago, that courts assessing the publisher requirement for Section 230(c)(1) immunity "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'").

The Superior Court read *HomeAway.com* very differently. According to the Superior Court, *HomeAway.com* carved out a wide-ranging exception to Section 230(c)(1) immunity that applies whenever providers do "much more than . . . mere[ly]" publish content, "including by accepting and processing payment" for transactions that are later alleged to be related to illegal activity. RAII/398 (internal quotation marks and citation omitted). But nothing in *HomeAway.com* supports that interpretation. The *HomeAway.com* court certainly did not say that providers forfeit immunity if they do "much more than . . . mere[ly]" publish user content. *Id.* Nor did the *HomeAway.com* court have any reason to consider whether engaging in anything "more" than publishing (whatever that might mean) should categorically exclude a provider from the scope of Section 230(c)(1) immunity. And the *HomeAway.com* court definitely did not say or suggest that merely "accepting and processing payment" for transactions that are later alleged to be illegal somehow disqualifies a provider from invoking Section 230(c)(1) immunity. *Id.*

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 directly regulated the platforms' own conduct in processing transactions and required nothing more than checking an "internal" and "nonpublic" list before completing a transaction. *Id*.

This case bears little resemblance to *HomeAway.com*. Here, no ordinance directly regulates non-publishing conduct by online platforms such as Turo. And Massport does not seek to compel Turo to check a list before processing transactions or to engage in any similar internal or ministerial duties. Rather, as the Superior Court's injunction makes clear, Massport seeks to compel Turo to refrain from (1) "[l]isting or permitting motor vehicles to be listed on Turo's website . . . as available for pickup or drop-off at Logan Airport," and (2) "[a]ccepting reservations or payments for, or otherwise facilitating in any way, motor vehicle car-sharing or rental transactions originating and/or ending at Logan Airport." RAII/399. 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 block user

listings offering handoffs at Logan so as to avoid publishing user-generated content that Massport considers unlawful. *See* Turo Br. at 39. The reasoning of *HomeAway.com* therefore strongly suggests that Section 230(c)(1) immunity *does* apply here—not the opposite. *Compare HomeAway.com*, 918 F.3d at 682 (ordinance "[fell] outside of the CDA's immunity" because the duties it imposed did "not require the Platforms to monitor third-party content") *with Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113, 123 (D. Mass. 2019) (holding that portion of ordinance that compelled providers to "monitor and remove third-party content" amounted to "a threat of liability arising from the publication of third-party content for purposes of the CDA," and was therefore preempted by Section 230(c)(1)).

b. The Superior Court's order creates a broad new exception to Section 230(c)(1) immunity that violates Congress's intent.

Apart from being unprecedented and wrong, the Superior Court's misinterpretation of the "publisher" requirement effectively carves out a nebulous new exception to Section 230(c)(1) immunity. And that new exception threatens to eviscerate the law's protections for virtually all providers who facilitate online transactions.

Under the Superior Court's reading of *HomeAway.com*, a claim that a provider "facilitates" unlawful commercial activity does not impermissibly treat a provider as a publisher, at least so long as the plaintiff alleges that the provider does "much more than . . . mere[ly]" publish content. RAII/398. Further, according to the Superior Court, merely providing common and lawful services intended to increase user engagement—like payment processing—makes a provider "much more" than a mere publisher, and therefore exposes the provider to liability. Again, Massport echoes that view. *See* Massport Br. at 34.

To be clear, 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 activity that was distinct from publishing conduct.

Equally important, endorsing the Superior Court's overreading of *HomeAway.com* would likely have grim consequences for the entire online ecosystem. Almost every aspect of providing an online service or platform could be described as "facilitating" commercial activity in some sense. Further, almost every platform of significance does "much more than . . . mere[ly]" publish content. RAII/398. For example, even social

media platforms that are known mainly for publishing user content also provide ancillary services, like personalized feeds, to improve the user experience. And, of course, no provider can guarantee that its services will be used *only* for lawful purposes by *all* of its users. Thus, if Section 230(c)(1) does not bar claims based on the "facilitation" of unlawful acts, and if merely providing lawful services or features to *all* users amounts to facilitating the unlawful acts of *some* users, then providers could unwittingly forfeit Section 230(c)(1) immunity by offering almost any publishing-related service or feature, including many that have long been considered protected. That includes, for example, payment processing; personalization; search functions; filtering tools; and storage services. 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 and interactions that drive online commerce and speech. But that is not the law.[2]

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[2] *See Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1099 (9th Cir. 2019) (plaintiff could not "circumvent Section 230 immunity" by challenging provider's anonymity policy, which facilitated user interaction); *Force v. Facebook, Inc.*, 934 F.3d 53, 67 (2d Cir. 2019) (Section 230(c)(1) immunized features designed to facilitate user content and engagement); *see also, e.g.*, *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1106 (C.D. Cal. 2017) (explaining

The upshot is that the Superior Court's misreading of *HomeAway.com* 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 weigh in on the proper interpretation of *HomeAway.com*. 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). As explained below, litigants are already seeking to exploit *HomeAway.com* for precisely that purpose. *See infra* at 32-37.

3. Massport's misinterpretation of the "information content provider" requirement is equally wrong and dangerous.

Perhaps recognizing that the Superior Court's analysis of the "publisher" requirement is indefensible, Massport tries another tack: It

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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).

argues that, even if its claims impermissibly treat Turo as a publisher, Turo itself is responsible for the "development of the content at issue"—and therefore cannot establish the "information content provider" requirement of Section 230(c)(1) immunity. Massport Br. at 31.

Massport is correct that Section 230(c)(1) immunity "only applies when the information that forms the basis for the state law claim has been provided by '*another* information content provider,'" *Lycos*, 478 F.3d at 419 (quoting 47 U.S.C. § 230(c)(1)), which means that a service provider "remains liable for its own speech," *id*. But that principle does not help Massport here. The information that forms the basis for Massport's claims is user-generated postings regarding Logan handoffs—not, as Massport claims, "flashy photographs of vehicles" created by Turo or statements by Turo on its website noting the availability of airport pickup as a general matter. Massport Br. at 31. *See also supra* at 16-20.

Massport also seems to suggest that user postings offering Logan handoffs should be treated as "Turo's own content" because Turo allegedly "encourages" that content. Massport Br. at 31-32, 46. Massport cites no authority for that proposition, and for good reason—

there is none. To the contrary, courts have long held that a provider may be treated as the "developer" of user-generated content only if the provider materially contributes to the content's alleged illegality. *See, e.g.*, *Roommates.com*, 521 F.3d at 1169 (explaining that a provider must do something "that contributes to the alleged illegality—such as by removing the word 'not' from a user's message reading '[Name] did *not* steal the artwork' in order to transform an innocent message into a libelous one"). As Turo rightly points out, "Turo did not author any listings for vehicles at Logan and cannot be held liable as if it had." Turo Br. at 27.

Moreover, adopting Massport's "encouragement" theory would have severe consequences for amici, amici's members, and all stakeholders in the online economy. As the Ninth Circuit explained more than a decade ago:

> Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties.

Roommates.com, 521 F.3d at 1174. That admonition is directly relevant here. Under Massport's reading of Section 230(c)(1), a platform could be held liable for any unlawful activity by its users—including *offline* activity—if any feature or combination of features provided by the platform could be characterized as "encouraging" unlawful conduct. That, in turn, would expose countless online service providers to a never-ending litany of claims based on the theory that *something* about their platforms *somehow* made illegal acts by users more likely. But Section 230(c)(1) simply does not work that way—as courts have repeatedly explained.[3] Massport offers no compelling reason to jettison that settled understanding of the law.

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[3] *See, e.g.*, *Lycos*, 478 F.3d at 421 (expressing doubt as to whether "there is a culpable assistance exception to Section 230 immunity," and holding that, even if there was, it would require "affirmative steps taken to foster unlawful activity") (internal quotation marks omitted); *see also Dyroff*, 934 F.3d at 1100 (rejecting argument that website's features and functionality amounted to "collusion [with] and inducement" of illegal conduct); *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"); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009) (explaining that providers "are not culpable for 'aiding and abetting' their customers who misuse their services to commit unlawful acts").

II. IF NOT REVERSED, THE SUPERIOR COURT'S ORDER WILL SOW UNCERTAINTY AND CAUSE SIGNIFICANT ECONOMIC HARM

This Court should also reverse the Superior Court's order because its reasoning poses 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 v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). Nevertheless, the Superior Court's order purports to exclude from the scope of Section 230(c)(1) immunity any provider that arguably "facilitates" illegal conduct by doing "much more" than merely publishing content—without even trying to explain what that "much more" entails. RAII/398.

Failing to reverse that surprising result will create uncertainty and confusion in the marketplace. The Superior Court's order departs abruptly from the settled understanding of Section 230(c)(1) by denying immunity for conduct that Congress meant to protect and by suggesting that offering lawful publishing-related services to all users can expose providers to claims for "facilitating" the illegal acts of some users. Thus, at best, providers will have to expend significant resources assessing

and mitigating their risks under those new rules if the Superior Court's order is not reversed.

At worst, restricting Section 230(c)(1) immunity in the ways contemplated by the Superior 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." *See* Christian M. Dippon, NERA Econ. Consulting, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, 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 Superior 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). In fact, 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." *See* Engine, *Section 230: Cost Report* at 1, https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5c8168cae5e5f04b9a30e84e/1551984843007/Engine_Primer_230cost2019.pdf (last visited Dec. 18, 2020). That is why courts have 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 Congress enacted Section 230(c)(1), it 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). Adopting the Superior 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.

III. IF NOT REVERSED, THE SUPERIOR COURT'S ORDER WILL ENCOURAGE "ARTFUL PLEADING" IN FUTURE CASES, FURTHER UNDERMINING SECTION 230(C)(1) IMMUNITY

Finally, this Court should reverse the Superior 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 Massport'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"); *La Park La Brea*, 285 F. Supp. 3d at 1105 ("Aimco's argument fails, and its creative pleading does not place this case outside [Section 230(c)(1)]'s purview.") (internal quotation marks and citation omitted). And, not surprisingly, plaintiffs are even now trying to weaponize *HomeAway.com* with overbroad interpretations of that decision.[4]

[4] Pet. for a Writ of Cert., *Daniel v. Armslist, LLC*, No. 19-153, 2019 WL 3524224, at *26-28 (U.S. July 29, 2019) (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'

Even when those meritless attempts fail, they impose unnecessary burdens on providers, chill online innovation and speech, and impede Congress's policy goals. "The . . . need to defend against a proliferation of lawsuits, regardless of whether the provider ultimately prevails, undermines the purpose of section 230." *Levitt v. Yelp! Inc.*, No. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526, at *8 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014). Thus, it is imperative that this Court reverse the Superior Court's order and, in so doing, make clear that the Superior Court's (and Massport's) misreading of *HomeAway.com* is not a valid end-run around Section 230(c)(1).

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commercial transactions on its website), *cert. denied* 140 S. Ct. 562 (2019); Opp'n to Def.'s Mot. to Dismiss First Am. Compl. at 5, *924 Bel Air Rd., LLC v. Zillow Grp., Inc.*, No. 19-cv-01368, 2019 WL 6486498 (C.D. Cal. Sept. 9, 2019) (citing *HomeAway.com* to argue that Zillow could be held liable for failing to monitor and prevent users from posting false content), *mot. granted*, 2020 WL 774354 (C.D. Cal. Feb. 18, 2020); Appellant's Opening Br., *Murphy v. Twitter, Inc.*, No. A158214, 2020 WL 292002, at *11, *32 (Cal. Ct. App. Jan. 10, 2020) (relying on *HomeAway.com* to urge denial of Section 230(c)(1) immunity for claims based on termination of user's account); Reply in Supp. of Mot. for Prelim. Inj. at 16, *Prager Univ. v. Google LLC*, No. 19CV340667, 2019 WL 8645786 (Cal. Super. Ct. Aug. 16, 2019) (citing *HomeAway.com* to argue that YouTube could be held liable for removing users' videos); Plaintiff-Appellant's Am. Opening Br., *Smith v. Dennis*, No. A173133, 2020 WL 4730866, at *25 (Or. App. June 22, 2020) (citing *HomeAway.com* to argue that Airbnb could be held liable for allegedly omitted warnings regarding hot tub in property listing).

Otherwise, the Superior 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 1175, and frustrating Congress's clearly stated intent.

CONCLUSION

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

Respectfully submitted,

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December 18, 2020

CERTIFICATE OF COMPLIANCE WITH RULE 17(c)(9)

I certify that the foregoing document complies with the rules of court that pertain to the filing of briefs, including but not limited to Massachusetts Rules of Appellate Procedure Rules 16, 17 and 20. This brief complies with the length limit of Rule 20(a)(2)(C) in that it is written in Century Schoolbook 14-point font, the number of non-excluded words is 6,236, and the word processing program used was Microsoft Word for Office 365.

/s/ Ryan Spear
Ryan Spear

CERTIFICATE OF SERVICE

I certify that on this date of December 18, 2020, I have made, or caused to be made, service of a copy of the foregoing on all counsel of record via the Massachusetts electronic filing system.

/s/ Ryan Spear
Ryan Spear