IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Consolidated Case Nos. 04-56916 and 04-57173

FAIR HOUSING COUNCIL OF SAN FERNANDO VALLEY *et al.*,

Plaintiffs, Appellants and Appellees,

v.

ROOMMATE.COM, LLC.

Defendant, Appellee and Appellant.

On Appeal from the United States District Court
for the Central District of California
The Honorable Percy Anderson
United States District Judge, Presiding
Case No. CV-03-09386-PA (RZx)

BRIEF OF *AMICI CURIAE* AMAZON.COM, INC., AOL LLC, EBAY INC., FACEBOOK, INC., GOOGLE INC., IAC/INTERACTIVECORP, MICROSOFT CORPORATION, THE NEW YORK TIMES COMPANY, TRIBUNE COMPANY, YAHOO! INC., ASSOCIATION FOR COMPETITIVE TECHNOLOGY, CENTER FOR DEMOCRACY AND TECHNOLOGY, ELECTRONIC FRONTIER FOUNDATION, INTERNET COMMERCE COALITION, NETCHOICE, ONLINE NEWS ASSOCIATION, TECHNOLOGY NETWORK D/B/A TECHNET, AND UNITED STATES INTERNET SERVICE PROVIDER ASSOCIATION IN SUPPORT OF ROOMMATE.COM, LLC IN THE *EN BANC* PROCEEDINGS

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CORPORATE DISCLOSURE STATEMENT

Amazon.com, Inc. is a publicly held corporation and does not have a parent corporation. Legg Mason, Inc. owns ten percent or more of its stock.

AOL LLC is a majority-owned subsidiary of Time Warner Inc., a publicly traded corporation. No other publicly traded corporation owns ten percent or more of its stock.

eBay Inc. is a publicly held corporation and does not have a parent corporation. No publicly traded corporation owns ten percent or more of its stock.

Facebook, Inc. is not a publicly held corporation and does not have a parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

Google Inc. is a publicly held corporation and does not have a parent corporation. No publicly traded corporation owns ten percent or more of its stock.

IAC/InterActiveCorp is a publicly held corporation and does not have a parent corporation. The following publicly held corporations own, directly or indirectly, more than ten percent of its stock: Liberty Media Corporation and Legg Mason, Inc.

Microsoft Corporation is a publicly held corporation and does not have a parent corporation. No publicly traded corporation owns ten percent or more of its stock.

The New York Times Company is a publicly held corporation and does not have a parent corporation. No publicly traded corporation owns ten percent or more of its stock.

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Yahoo! Inc. is a publicly held corporation and does not have a parent corporation. No publicly traded corporation owns ten percent or more of its stock.

The Association for Competitive Technology is not a publicly held corporation and does not have a parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

The Center for Democracy & Technology is not a publicly held corporation and does not have a parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

The Electronic Frontier Foundation is not a publicly held corporation and does not have a parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

The Internet Commerce Coalition, is not a publicly held corporation and does not have a parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

NetChoice is not a publicly held corporation and does not have a parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

The Online News Association is not a publicly held corporation and does not have a parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

Technology Network, d/b/a TechNet, is not a publicly held corporation and does not have a parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

The United States Internet Service Provider Association is not a publicly held corporation and does not have a parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

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STATEMENT OF THE *AMICI*

Amici curiae Amazon.com, Inc., AOL LLC, eBay Inc., Facebook, Inc., Google Inc., IAC/InterActiveCorp ("IAC"), Microsoft Corporation, The New York Times Company, Tribune Company, Yahoo! Inc., Association for Competitive Technology ("ACT"), Center for Democracy and Technology ("CDT"), Electronic Frontier Foundation ("EFF"), Internet Commerce Coalition ("ICC"), NetChoice, the Online News Association ("ONA"), Technology Network ("TechNet"), and the United States Internet Service Provider Association ("US ISPA") ("Amici") file this brief to respectfully urge the Court to adhere to the broad interpretation of 47 U.S.C. §230(c)(1) that has been adopted by courts during the decade since its enactment. Pursuant to Fed.R.App.P. 29(a), Amici have obtained the parties' consent to file this brief.

Amici are providers of interactive computer services or organizations that either represent such service providers or represent the interests of those who disseminate information online, as well as the interests of the public at large, in fostering a diverse and dynamic Internet. Amazon.com, AOL, eBay, Google, Tribune, Yahoo!, NetChoice, and US ISPA each joined an Amicus brief submitted to the original panel; additional copies of that brief have been submitted to the office of the Clerk for consideration by the *en banc* panel. Those companies and organizations are now joined by Microsoft, Facebook, IAC, The New York Times

Company, ACT, CDT, EFF, ICC, ONA, and TechNet, each of which is described below:

Microsoft's online services division provides a wide variety of interactive services, including: Windows Live Expo, a free online classifieds service; Windows Live Spaces, a blogging and social networking service; Live Search, a search engine that offers an index of billions of third-party Web pages; Soapbox on MSN Video, an online video-sharing service that allows users to upload, share and view their video clips; Windows Live Hotmail, a free Web-based email service used by millions of individuals; Windows Live Messenger, an instant messaging service; an Internet portal; and numerous other offerings that provide access to a variety of third-party content.

Facebook, Inc. provides a social utility that allows users to share information with their friends and others who share their real world social communities. From its founding in a dorm room fewer than four years ago, it has grown to be the sixth most trafficked web site with over 50 million active users worldwide.

IAC is a diversified e-commerce company whose businesses are leaders in numerous sectors of the Internet economy. IAC's operating businesses include Ask.com, Citysearch, CollegeHumor, Evite, HSN, LendingTree, Match.com, RealEstate.com, Shoebuy.com, and Ticketmaster. Many of the websites operated by these businesses provide users with the ability to search for, view, and post

consumer reviews, user profiles, photographs, videos, and other user-generated content.

The New York Times Company is a diversified media company whose core purpose is to enhance society by creating, collecting and distributing high-quality news, information, and entertainment. The New York Times Company owns and operates more than thirty websites including nytimes.com, boston.com, and about.com.

ACT is a trade association representing information technology businesses and professionals. ACT advocates for a regulatory and legal environment that promotes growth and investment in information technology and services.

CDT is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty.

EFF is a non-profit, member-supported civil liberties organization that works to protect rights in the digital world. EFF encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society.

ICC is a trade association of leading broadband Internet service providers, e-commerce sites, and technology trade associations. Its mission is to achieve a legal

environment that allows service providers, their customers, and other users to do business on the Internet under reasonable rules governing liability and the use of technology.

ONA is the premier United States-based organization of online journalists. ONA's members include reporters, news writers, editors, producers, designers, photographers and others who produce news for distribution over the Internet and through other digital media, as well as academics and others interested in the development of online journalism.

TechNet is a national network of CEOs of technology companies in the fields of e-commerce, networking, information technology, biotechnology, and finance. TechNet is organized to promote the growth of the technology industry and to advance America's global leadership in innovation.

Each of the Amici has a substantial interest in the rules governing whether providers of interactive computer services may be liable for unlawful online content generated by third parties and disseminated through their systems. Because they serve as platforms for the online communications of tens of millions of subscribers and users, Amici (and their members) have been and/or inevitably will be parties to controversies in which they must raise Section 230 as a defense. The success and viability of these companies' online businesses—and the vitality of online media generally—depends at least in part on their ability to avoid the

potential for liability in cases in which it is alleged that one or more of their millions of users has misused their interactive services to create and disseminate potentially unlawful content.

As discussed herein, aspects of the panel decision in this case significantly depart from the settled interpretation of Section 230, and if adopted by this Court, could introduce substantial uncertainty in the law. In addition, the Plaintiffs now urge the Court to abandon the settled body of case law altogether—an outcome that would have grave implications for Amici, many of whom are headquartered in this Circuit, and the interests they represent.

SUMMARY OF ARGUMENT

For the past ten years, courts throughout the nation, including four panels of this Court,[1/] have consistently held that 47 U.S.C. § 230(c)(1) provides interactive computer service providers with broad immunity from liability for unlawful content originated by their users or other third parties.[2/] In particular, as these courts have recognized, Section 230 bars a claim whenever (i) the defendant asserting immunity is an interactive computer service provider, (ii) the particular information at issue was provided by "another information content provider," and (iii) the claim "treats" the defendant as a "publisher or speaker" of that information.

Two years ago, during the original round of briefing, many of the present Amici submitted a separate amicus brief (cited herein as "Panel Amicus Br.") that explained why the prevailing interpretation of Section 230(c)(1) is required by the statute's plain language and advances Congress' goals. The present brief does not repeat those arguments, though notably the legion of cases adopting this same

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1/ *Roskowski v. Corvallis Police Officers' Ass'n*, 2007 WL 2963633 (9th Cir. 2007); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

2/ *See, e.g.*, *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Green v. America Online*, 318 F.3d 465 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980 (10th Cir.), *cert. denied*, 531 U.S. 824 (2000); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Barrett v. Rosenthal*, 146 P.3d 510, 515-29 (Cal. 2006); *Doe v. America Online, Inc.*, 783 So.2d 1010, 103-17 (Fla.), *cert. denied*, 534 U.S. 891 (2001) (hereinafter "Florida Doe").

interpretation of Section 230 has continued to grow during the intervening years, including recent decisions by two additional panels of this Court,[3] the First Circuit,[4] the California Supreme Court,[5] and various other courts.[6] Instead, this brief focuses on issues specifically raised by the panel decision, as well as a post-decision suggestion by Plaintiffs that the *en banc* Court abandon the settled interpretation of Section 230 in its entirety in favor of inconclusive and poorly reasoned *dicta* penned four years ago by a Seventh Circuit judge.

The panel decision focused principally on the second element of Section 230 immunity—specifically, whether Roommate.com LLC ("Roommate") itself is an "information content provider" with respect to online profiles of individual users of Roommate's service that allegedly expressed preferences regarding prospective roommate arrangements in violation of Federal and State housing laws. The panel

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[3] *Perfect 10*, 488 F.3d 1102; *Roskowski*, 2007 WL 2963633.

[4] *Universal Commc'n Sys.*, 478 F.3d 413.

[5] *Barrett*, 146 P.3d 510.

[6] *See, e.g.*, *Murawski v. Pataki*, 2007 WL 2781054, at *10-11 (S.D.N.Y. 2007); *Doe v. MySpace, Inc.*, 474 F.Supp.2d 843, 851-52 (W.D.Tex. 2007); *Doe v. SexSearch.com*, 502 F.Supp.2d 719 (N.D.Ohio 2007); *Eckert v. Microsoft Corp.*, 2007 WL 496692 (E.D.Mich. 2007); *Parker v. Google, Inc.*, 422 F.Supp.2d 492, 500-01 (E.D.Pa. 2006); *Doe v. Bates*, 2006 WL 3813758 (E.D.Tex. 2006); *Prickett v. InfoUSA, Inc.*, 2006 WL 887431 (E.D.Tex. 2006); *Dimeo v. Max,* 433 F.Supp.2d 523 (E.D.Pa.), *aff'd*, 2007 WL 217865 (3d Cir. 2006); *Barnes v. Yahoo!, Inc.*, 2005 WL 3005602 (D.Or. 2005); *Associated Bank-Corp. v. Earthlink, Inc.*, 2005 WL 2240952 (W.D.Wis. 2005).

majority acknowledged that the "[t]he touchstone of section 230(c) is that providers of interactive computer services are immune from liability for content created by third parties." (Op. at 5715.) In application, however, the majority proposed novel and problematic limits on the scope of that immunity.

First, the panel decision held that a service provider could become an "information content provider" with respect to information originated by users simply by providing a service that "categorize[s], channel[s], and limit[s] the distribution of" that information. In particular, the panel majority determined that Roommate became an "information content provider" with respect to some portions of its users' online profiles because the Roommate.com web site enabled users to perform targeted searches of other users' profiles based on those users' responses to multiple-choice questions posed by the site's interactive profile-building tool. Plaintiffs and Judge Reinhardt, in his concurrence, would go even further, contending that a service provider becomes an "information content provider" for *everything* in a user's self-descriptive profile, including free-form content supplied in response to an open-ended solicitation for "additional comments," simply because the provider's online tools help users structure other aspects of their profiles. Both of these unprecedented interpretations of the term "information content provider" are irreconcilable with prior case law, particularly this Court's carefully reasoned decision in *Carafano*. And both would turn Section

230(c)(1) on its head, relegating it to protect only relatively simple, rudimentary types of online services while exposing to potentially crushing liability the sorts of robust, innovative services that Congress wanted to encourage.

Second, the panel majority suggested in *dicta* that a service provider might not enjoy immunity at all if it solicited a certain *type* of content, even if it did not originate the specific content that is alleged to be unlawful. This *dicta*, unmoored by any factual record, risks upsetting the careful balance that Congress prescribed in Section 230 and also is contrary to settled law.

Last week, Plaintiffs suggested,[7] for the first time, that the *en banc* Court should reject wholesale the entire existing body of case law interpreting Section 230(c)(1), including not only four other decisions of this Court, but also three other landmark decisions that Congress has explicitly endorsed as having "correctly interpreted" Section 230. In particular, Plaintiffs assert that the *en banc* Court should hold that Section 230(c)(1) provides no immunity at all. Plaintiffs make this plea based on *dicta* from a single, four-year-old decision from the Seventh Circuit, in which that court hypothesized, without deciding, that Section 230(c)(1) might merely be a "definitional clause" with no operative effect. *See Doe v. GTE*

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[7] *See* Appellants' Motion for Leave To File Additional Briefing (filed Oct. 25, 2007). As of the writing of this Amicus Brief, the Court had not acted on Plaintiffs' request. Amici address this issue due to uncertainty as to whether they would have any opportunity to do so later.

Corp., 347 F.3d 655, 660 (7th Cir. 2003). That *dicta* was aberrational when it was issued and is even more out of step today.

Amici cannot emphasize enough the degree to which the protection afforded by Section 230(c)(1), as consistently interpreted by courts across the country over the past decade, has played a critical role in enabling the development of interactive services that both empower users and encourage innovation and self-regulation. Amici therefore respectfully, but also vigorously, urge this *en banc* Court to embrace the settled interpretation of Section 230 and to reject the undue limits that the panel decision and Plaintiffs' positions would place upon it.

ARGUMENT

I. AN "INFORMATION CONTENT PROVIDER" IS ONE WHO ORIGINATES THE SPECIFIC UNLAWFUL INFORMATION AT ISSUE IN THE CASE.

Under Section 230, an "information content provider" is "any person or entity that is responsible, in whole or in part, for the *creation or development* of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3) (emphasis added). In their panel briefs, Roommate and Amici explained that the settled case law from this Circuit and elsewhere, as well as the plain statutory language and Congress's intent, require that the operative inquiry focus on whether the service provider originated the specific, allegedly unlawful content. (Panel Amicus Br. at 15-20.) Judge Ikuta, in her

concurrence, agreed that the question was settled: "Unless a website operator directly provides 'the essential published content,' it is not an 'information content provider'" of that content and therefore is immune under Section 230(c)(1). (Op. at 5733 (Ikuta, J., concurring in part, citing *Carafano*, 339 F.3d at 1124).)

The panel decision departed from this settled law in two respects: first, by suggesting that a service provider loses Section 230(c)(1) immunity when it offers a structured communication tool that helps to organize, channel, and distribute third-party content, and second, by suggesting that a service forfeits immunity when it solicits a particular type or category of content. In these respects, the panel's decision conflicts with the statutory language and its purposes. Most troublingly, the panel's approach would *discourage* service providers from developing and maintaining innovative communications tools that do what online services do best: collect, organize, and make easily searchable vast quantities of information originated by individuals from all around the globe. This result would directly contravene Congress's intent.

A. An Interactive Computer Service Provider Does Not Become an "Information Content Provider" by Offering a Structured Communication Tool that Efficiently Collects, Organizes, and Distributes Third-Party Information.

The panel held that Roommate does not qualify for Section 230(c)(1) with respect to some (but not all) segments of its users' profiles—namely, the segments reflecting users' answers to multiple-choice questions—on the theory that

Roommate itself was an "information content provider" of that content. (Op. at 5721-22.) The basis for this holding was the fact that Roommate's service "categorize[ed], channel[ed], and limit[ed] the distribution of users' profiles" through search and notification features that help users find profiles reflecting compatible preferences. (Id.) The panel majority reasoned that these features, which simply winnow what user-originated information is presented to other users based on their own expressed preferences, negate Roommate's status as either "a passive pass-through of information provided by others [or] merely a facilitator of expression by individuals," and transform it instead into a creator of an "additional layer of information."[8/] (Op. at 5722.)

The panel decision's reasoning in this regard conflicts with the language and purposes of Section 230 and is irreconcilable with the case law, particularly this Court's *Carafano* decision. As the panel noted, the critical question is whether Roommate itself was responsible in whole or in part for "creating or developing" the allegedly unlawful content. (Op. at 5716.) By "categorizing, channeling, and

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[8/] The panel decision also held that, if it was unlawful, in and of itself, for Roommate to pose on its website the multiple-choice questions and potential answer choices, Section 230 would not insulate Roommate from liability for such unlawfulness. (Op. at 5718.) As the earlier Panel Amicus Brief noted, Amici agree that, if the content of questions created by an online intermediary—in isolation and independent of any user's answers or other input—is itself unlawful, then Section 230(c)(1) does not protect the intermediary from liability based solely on the questions themselves.

limiting the distribution of users' profiles," Roommate does not in any way create or develop new "additional information" beyond what its users have provided. Instead, Roommate *is* acting as "a facilitator of expression by individuals" by offering tools that make it easier for those expressions to be communicated to, and found by, others.

To hold otherwise would be tantamount to saying that search engine providers—such as Ask.com, Google, MSN Search, and Yahoo!—are responsible in part for "creating or developing" all the content on the Internet, and therefore potentially liable for unlawful third-party content displayed on their search-result pages. Similarly, to hold that "categorizing" user content makes a service provider partly responsible for the creation or development of its users' content would mean that online auction-style services such as that provided by eBay, and sophisticated online community bulletin board systems such as that provided by Yahoo!, are responsible for the creation or development of all user-generated postings simply because they provide means for organizing such postings into, and searching them according to, channels or categories such as "furniture," "cars," or "scrapbooking."

Congress clearly did not intend that service providers would lose their statutory immunity by harnessing the potential of electronic media to organize, sort, and search content. To the contrary, Congress enacted Section 230 "to promote the continued development of the Internet and other interactive computer services" by

ensuring that the threat of suits concerning third-party content would not discourage or foreclose the development of new and useful services. *See* 47 U.S.C. § 230(b)(1). Search features, structured profiles, and similar tools are precisely the types of services Congress meant to encourage. By channeling and shaping information into a particular form, and by offering users standardized multiple-choice questions and answers, tools such as Roommate's profile system allow users to quickly and easily find information based on a recognizable, predictable form. Similar tools are used in a wide variety of interactive services to enhance the effectiveness and vibrancy of electronic communications.

For example, the AOL service has a Member Profile feature that allows users to post information about themselves in a searchable listing within the AOL Member Directory. eBay, too, allows users to create an "About Me" page where they can create a "storefront," describe their eBay purchases, broadcast their hobbies or interests, or add other personal information. Yahoo!'s Member Directory provides lists of tens of thousands of users who identify themselves as having certain interests among categories that are predetermined by Yahoo!. Yet the panel's analysis would discourage just those services in favor of more rudimentary services that may allow users to provide similar information, but that do not allow other users to easily locate and use that information.

In *Carafano*, another panel of this Court appropriately rejected the approach that the panel majority embraced. As here, the plaintiff in *Carafano* argued that the defendant, the provider of an online dating website, was an information content provider because it offered a highly structured communication tool to prompt users to provide specific types of information about themselves, which the tool then formulated into user profiles having a standardized format. Similarly to Roommate's service, the online service in *Carafano* used multiple-choice questions to collect information about individual users' attributes and preferences, and then enabled users to search for other users having particular combinations of attributes and preferences. 339 F.3d at 1124. *Carafano* carefully considered and soundly rejected the argument that such channeling, categorizing, and limiting of the distribution of user-supplied information defeated the service provider's immunity defense. As it explained, "[t]he fact that some of the content" of the user profile "was formulated in response to [a] questionnaire does not alter [the] conclusion" that information "willingly provide[d]" by a third party is within the scope of Section 230 immunity because "the selection of the content was left exclusively to the user." *Id.*

Moreover, as *Carafano* recognized, a contrary approach would discourage the very types of innovations that Congress intended to promote: the "decision to structure the information provided by users allows the company to offer additional

features, such as 'matching profiles' with similar characteristics or highly structured searches based on combinations of multiple-choice questions. Without standardized, easily encoded answers, Matchmaker might not be able to offer these services and certainly not to the same degree." 339 F.3d at 1124-25.

Other courts have similarly recognized that Section 230 protects service providers from liability for user-originated information even when they provide means of categorizing or channeling that information. In *Gentry*, for example, the court held that eBay enjoyed Section 230 immunity with respect to its "Feedback Forum," a highly structured communication tool that allows eBay users to rate each other regarding their transactions. *See Gentry v. eBay, Inc.*, 121 Cal.Rptr.2d 703, 717 (Ct.App. 2002). Similar to this case, the Feedback Forum employs a questionnaire that has a multiple-choice component to solicit users' opinions of other users with whom they have interacted. Based on these standardized responses, the eBay service generates a composite score for each user, which it then translates into a star of a particular color. *Id.* As the *Gentry* court held, this activity did not transform eBay into an "information content provider":

> [E]nforcing appellants' negligence claim would place liability on eBay for simply compiling false and/or misleading content created by the individual defendants and other co-conspirators. We do not see such activities transforming eBay into an information content provider with respect to the representations targeted by appellants as it *did not create or develop the underlying misinformation.*

Id. at 718 (emphasis added).

As Judge Ikuta's concurrence in this case recognized, Roommate's categorizing, channeling, and limiting functions are equivalent to the structured communication tools described in *Carafano* and *Gentry*. As in those cases, Roommate allowed users to express certain information in an organized, standardized, and easily searchable form—transforming the proverbial hunt for a needle in a haystack into an astonishingly convenient task. The reasoning of the panel majority here, however, would punish Roommate for providing this admittedly "useful service" and would leave all but the most rudimentary services vulnerable to claims that they are not subject to the protection of Section 230 immunity. That would run directly contrary to one of the central goals of Section 230, which, as described in the Panel Amicus Brief (at 20-25), is to promote innovative online services that harness the full power of the Internet.[9/]

[9/] Judge Reinhardt, in his partial dissent, would hold Roommate liable for the *entire* user profile, including the open-ended "additional comments" field in which users can provide any additional information they choose. No other court has adopted such an interpretation. To the contrary, user comments made in free-form fields such as bulletin boards and chat rooms are the classic form of content subject to Section 230 immunity (even though they too are often "categorized" into different subjects). *See, e.g.*, *Zeran*, 129 F.3d at 328-29; *Green*, 318 F.3d at 469; *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 534-35 (E.D.Va. 2003).

B. An Interactive Computer Service Provider Does Not Become an Information Content Provider of Third-Party Information When It Solicits a Particular *Type* of Information.

The panel majority also suggested, in *dicta*, that service providers forfeit the protection of Section 230(c)(1) if they solicit a particular *type* of third-party content. (Op. at 5720-21.) Specifically, the panel majority posited a hypothetical website called "harassthem.com" and suggested that its provider might not enjoy immunity for user-posted content because the website solicited information of a particular type—namely information designed to harass other people. (Id.)

Again, however, as Judge Ikuta also recognized, this *dicta* is not consistent with the statute. The relevant question is whether a service provider is "responsible, in whole or in part, for the *creation or development*" of the particular unlawful content at issue. 47 U.S.C. § 230(f)(3) (emphasis added). A service provider's solicitation of content from users—even when the service provider might have some reason to think that the resulting content might in at least some cases be harmful—does not change the fact that those third parties, and not the service provider, are the ones creating or developing the specific content at issue. And, of course, Section 230 does nothing to absolve those third parties of legal responsibility for their content or to prevent someone harmed by such content from obtaining redress from them. Likewise, Section 230 would not shield service

providers from liability for any unlawful content that they themselves created or developed.

This is exactly the line adopted in many of the leading precedents. In many of these cases, the service providers had in fact solicited the particular type of information at issue or even selected the content or the content provider at issue, but nevertheless were not "responsible" either "in whole or in part" for the "creation or development" of that information. For example, in *Ben Ezra*, AOL was held to be immune from claims based on faulty stock quotes that it had obtained pursuant to contract from a third party. 206 F.3d at 985-86. Even though AOL had solicited and paid for the stock quote information, and even exercised a right to edit that information, AOL did not originate the specific allegedly erroneous information and thus was not "responsible" for its "creation or development." *Id.* Similarly, in *Blumenthal*, AOL was held to be immune from a claim that it distributed an allegedly defamatory article in the Drudge Report, even though it had contracted with and paid Matt Drudge to provide the report and allegedly was aware that he often published unsubstantiated gossip. *Blumenthal v. Drudge*, 992 F. Supp. 44, 50-52 (D.D.C. 1998). And in *Batzel*, the defendant was deemed to be not "responsible" even though he specifically had solicited and selected content about museum security issues and knowingly distributed a

particular story on that subject that, if false, would have constituted defamation. 333 F.3d at 1021-22, 1031.

Likewise, Roommate is not an information content provider of specific user profiles simply because it created a service that solicited particular categories of information through multiple-choice and other questions that allowed users to create those profiles. If the information that was supplied by a user in response to those questions ran afoul of fair housing laws, or any other laws, then that was because the particular user chose to create a profile with certain preferences expressed. Just as in *Carafano*, Roommate "cannot be considered an 'information content provider' under the statute because no profile has any content until a user actively creates it.'" 339 F.3d at 1124.

The panel majority's approach would create highly difficult line-drawing problems that would significantly undermine Section 230's protections. This is illustrated by the disagreement between the panel majority and Judge Reinhardt's partial dissent concerning the free-form comments section of user profiles. In Judge Reinhardt's view, Section 230 should not apply to that section because the website encouraged users to "expand upon" discriminatory preferences allegedly expressed in the Roommate Preferences form even though the question simply asked users to "writ[e] a paragraph or two describing yourself and what you are looking for in a roommate." (Op. at 5728.) The majority (rightly) reached the

opposite conclusion, but the very fact that the dissent suggested Section 230 should not apply to answers to such an open-ended, general question demonstrates the mischief inherent in a "solicitation" standard. Similarly, while the panel majority asserted that a solicitation standard would not implicate the dating site in *Carafano* because "the prankster [there] provided information that was not solicited by the operator of the website" (Op. at 5720), the plaintiff in *Carafano* argued just the opposite, claiming that the multiple-choice questions and the available answers were themselves racy and suggestive—and that the presentation of such options made Matchmaker responsible at least in part for the resulting content. *See* 339 F.3d at 1121, 1124.

As these examples illustrate, adoption of a "solicitation" standard not only finds no support in the actual language of the statute, but also would create significant uncertainty concerning the scope and application of Section 230 immunity. That uncertainty itself would undermine Congress's objective of removing legal disincentives for the creation of innovative services. As this Court recognized, Section 230 was passed "to prevent lawsuits from shutting down websites and other services on the Internet." *Batzel,* 333 F.3d at 1028. Adopting a vague "solicitation" standard would undermine this goal because service providers could no longer be sure that innovative services such as those offered by Roommate and Matchmaker.com are immune from liability for third-party content.

Given the "staggering" volume of third-party content they carry, if service providers were "[f]aced with potential liability for each message republished by their services," they might well be forced to restrict or abandon their services altogether—the very result Congress sought to avoid. *See Zeran*, 129 F.3d at 331.

II. THE COURT SHOULD REJECT PLAINTIFFS' INVITATION TO ADOPT *DICTA* FROM *DOE V. GTE CORP.*

As an afterthought, Plaintiffs now suggest, so far without analysis or argument,[10/] that this *en banc* proceeding is an opportunity for this Court to reverse the reasoned construction of Section 230(c)(1) that has consistently prevailed since its enactment a decade ago. Specifically, Plaintiffs invite this Court instead to embrace wholly aberrational and poorly reasoned *dicta* from the Seventh Circuit's opinion in *Doe v. GTE Corp*. This invitation should be rejected.

In *GTE*, the district court had dismissed the plaintiffs' claims based on the uniform interpretation of Section 230(c)(1) adopted by numerous courts. *See* 347 F.3d at 658. On appeal, the Seventh Circuit affirmed on state law grounds, without deciding anything regarding the meaning or operation of Section 230. *Id.* at 660-61. Nevertheless, the *GTE* panel hypothesized, in *dicta*, that Section 230(c)(1) may not be a prohibition on liability at all, but instead may be simply a "definitional" provision that delineates the class of persons who enjoy a separate

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10/ *See supra* note 7.

immunity created in Section 230(c)(2). *Id.* at 660. Section 230(c)(2) protects a "provider or user" of an interactive computer service from liability for efforts to *remove or restrict* content that the provider determines in good faith to be harmful or objectionable.[11/] *Id.* at 659. Under this "definitional" reading of Section 230(c)(1), "an entity would remain 'a provider or user'—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from someone else; but it would become a 'publisher or speaker' and lose the benefit of § 230(c)(2) if it created the objectionable information." *Id.* at 660.

The "definitional" reading is untenable. *First*, Section 230 has its own, separately designated "definitions" section that explicitly defines terms used elsewhere in the statute, including terms used in Section 230(c). *See* 47 U.S.C. § 230(f). Structurally, therefore, it makes little sense to suggest that Section 230(c)(1) is merely a definition.

Second, Section 230(c)(1) does not purport to *define* anything: it states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). While the *GTE dicta* hypothesizes that Section

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[11/] Specifically, Section 230(c)(2) provides that "[n]o provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of" objectionable content.

230(c)(1) might define the term "provider or user," that section does not ascribe a particular meaning to that term, but instead is clearly a substantive prohibition on how "providers" and "users" may be "treated."

Third, the *GTE dicta* lacks logical coherence. According to *GTE*, a provider or user may become a "publisher or speaker" if it creates the objectionable information and thereby "lose the benefit of § 230(c)(2)." 347 F.3d at 660. But nothing in Section 230(c)(2) suggests that its applicability depends on whether the defendant is or is not a "publisher or speaker." Indeed, Section 230(c)(2) does not even use those terms. The plain meaning of Section 230(c)(2) is that a provider or user is immune for removing or restricting content as long as it believes in "good faith" that the content is unlawful or objectionable—nothing in Section 230(c)(2) implies that being the publisher or speaker of the content in question makes any difference.

Fourth, the meaning that the *GTE dicta* would attribute to Section 230(c)(1) would serve no purpose. As the *GTE* court acknowledged, the purpose of Section 230(c)(2) is to ensure that a provider that removes particular content cannot be held liable to the person whose content is removed. 347 F.3d at 660. The *GTE* court's hypothesis presumes that the purpose of Section 230(c)(1) is to make Section 230(c)(2) immunity unavailable where the service provider itself had created the blocked content. But a service provider is not going to sue *itself* for blocking its

own content, and thus the elimination of the immunity in that context would be meaningless. Thus, contrary to a basic rule of statutory construction, the "definitional" interpretation of Section 230(c)(1) would render it a practical nullity. *See Cook Inlet Native Ass'n. v. Bowen*, 810 F.2d 1471, 1474 (9th Cir. 1987) ("statute should not be interpreted to render one part inoperative").

The only rationale the *GTE* court offered for its "definitional" reading of Section 230(c)(1) was an erroneous assumption that that reading is the only way to reconcile the statute's text with its title—"Protection for 'Good Samaritan' blocking and screening of offensive material." 347 F.3d at 660. Of course, if the heading or title of a statute conflicts with its actual text, the text must prevail. *See United States v. Villa-Lara*, 451 F.3d 963, 965 (9th Cir. 2006). But the supposed conflict between the statute's title and the prevailing interpretation of Section 230(c)(1) is illusory. As courts (including this Court) have recognized, Section 230(c)(1) immunity promotes an important policy that corresponds exactly with the statute's title: by eliminating the risk of liability for third-party content, Section 230(c)(1) frees service providers to monitor and screen their services and take actions to block harmful content without risk that such monitoring would provide the notice or knowledge that could be the basis for liability. *See Batzel*, 333 F.3d at 1028.

Congress understood that service providers could play a constructive role by voluntarily taking steps to restrict access to or availability of objectionable material in ways that are appropriately tailored to the nature and design of their particular services. As Representative Cox, a key sponsor of the immunity law, explained: "Government is going to *get out of the way* and let parents and individuals control [the Internet] rather than government doing that job for us." 141 Cong. Rec. 22,045 (1995) (emphasis added). Congress sought to attain this goal by "encourag[ing] interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material." *Batzel*, 333 F.3d at 1028. *See also Zeran*, 129 F.3d at 331 (Section 230 was intended "to encourage service providers to self-regulate the dissemination of offensive material over their services"); 141 Cong. Rec. 22,046 (Section 230 was designed to give interactive service providers "a reasonable way to . . . help them self-regulate themselves without penalty of law") (statement of Rep. Barton).

Congress achieved this goal by reducing pre-existing legal disincentives to voluntary self-regulation. Under traditional common law and First Amendment principles, an entity that intermediates the flow of substantial quantities of third-party content, such as a bookstore, news vendor, or online forum, may be held liable for that content only if it knew or should have known of the harmful content

at issue.[12/] In the context of online media, however, Congress recognized that a legal regime in which liability depends on "notice" would perversely "reinforce[] service providers' incentives to . . . abstain from self-regulation," for fear of being held liable for anything a jury determines they should have uncovered—that is, "had reason to know" about—in the course of their efforts to monitor their services. *See Zeran*, 129 F.3d at 333 ("Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability.").

The *GTE dicta*'s casual supposition that broad immunity under Section 230(c)(1) would cause all service providers to eschew self-policing of their services, *see* 347 F.3d at 660, is demonstrably wrong. By passing Section 230, Congress freed service providers to adopt robust self-regulatory regimes without exposing themselves to potential liability. Since passage of Section 230, many service providers *have* adopted a wide range of voluntary, self-regulatory measures. Just by way of example:

[12/] Under both common law and constitutional doctrine, such an intermediary, including the provider of an online forum, cannot be held liable for unlawful content that it disseminates unless it knew or should have known of that content. *See, e.g., Smith v. California*, 361 U.S. 147, 152-53 (1959); *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135, 140 (S.D.N.Y. 1991).

- Amazon.com provides users with mechanisms for reporting complaints about content, has automated and manual processes to review complaints, and removes third-party communications that fall outside its guidelines.
- AOL's Terms of Service include detailed Community Guidelines setting rules and standards for member-supplied content, and AOL also has a "Community Action Team" that responds to complaints, monitors message boards and chat rooms, and has authority to enforce the Community Guidelines.
- eBay offers users a simple Web form for making complaints about third-party content on the eBay service, including inappropriate Feedback, listing violations, and problems experienced in dealings with other users.
- Google provides various Web pages and e-mail addresses (such as groups-abuse@google.com) through which users can submit complaints and other comments concerning third-party content available through its services.
- Microsoft requires users submitting content to its online services to agree to a detailed Code of Conduct and provides an abuse reporting system that allows Windows Live users to report improper and unauthorized third-party content.

- Yahoo! provides a "Report Abuse" function that allows users to report improper content and established procedures to ensure that criminal activity is reported to the authorities.

Section 230(c)(1) immunity is therefore having its intended effect, demonstrating that the settled construction of Section 230(c)(1) *does* square with the statute's heading.[13/]

Notably, Congress has explicitly endorsed the body of case law that the *GTE dicta* would reject. In 2002, Congress passed the "Dot Kids Implementation and Efficiency Act," establishing a new "kids.us" sub-domain—dedicated to content deemed safe for minors—within the federally controlled ".us" Internet domain. *See* 47 U.S.C. § 941. In doing so, Congress specifically extended the protections of Section 230 to cover certain entities that would operate in the new sub-domain,

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13/ The *GTE* panel also speculated that Section 230 might be limited to claims for which "publication" is an element. That, too, is an unduly narrow reading. Among other things, that interpretation would mean that the express exceptions contained in Section 230 were unnecessary since most, if not all, of the exceptions (e.g., for claims related to intellectual property and violations of the Electronic Communications Privacy Act) relate to claims for which publication is not an element and therefore would not need to be "excepted" at all under this alternative view of Section 230. This reading would therefore render a part of the statute a nullity. In any event, the court need not address this alternative in this case. As the Northern District of Illinois held in another case, the provision of the FHA at issue here *does* have publication as an essential element; therefore, even under this improperly narrow construction of Section 230, Plaintiffs' claims would be barred. *See Chicago Lawyers' Comm. For Civil Rights Under the Law, Inc. v. craigslist, Inc.*, 461 F.Supp.2d 681 (N.D.Ill. 2006).

knowing full well how courts have consistently interpreted Section 230(c)(1). *Id.* § 941(e)(1). The definitive committee report accompanying the new statute explicitly embraced the leading precedents. Citing the Tenth Circuit's decision in *Ben Ezra*, the Fourth Circuit's decision in *Zeran*, and the Florida Supreme Court's decision in *Florida Doe* as three key examples, the committee report stated that "[t]he courts have *correctly interpreted* section 230(c)," and that "[t]he Committee intends these interpretations of Section 230(c) to be equally applicable to those entities covered by [the new statute]." H.R. Rep. No. 107-449, at 13 (2002) (emphasis added).[14/]

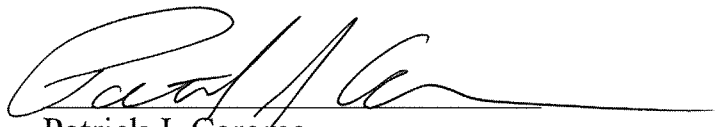
Ultimately, the Seventh Circuit decision is an outlier—even in the Seventh Circuit. Since issuance of the *GTE* opinion, at least one district court in the Seventh Circuit has embraced the broad reading of Section 230 immunity set forth in *Zeran* and subsequent cases. *See Associated Bank-Corp.*, 2005 WL 2240952. And, as set forth above, a legion of cases has continued to confirm that Section 230(c)(1) provides broad immunity. The *dicta* in *GTE* provides no reason for this Circuit to reconsider settled law.

[14/] Even though the *Dot Kids* report post-dated the enactment of Section 230, it is an important guide for interpreting that section. As the California Supreme Court explained, the *Dot Kids* report "does not opine directly on the intent of an earlier Congress, but on the interpretation uniformly given to the statute by intervening court decisions," and "reflects the Committee's intent that the existing statutory construction be maintained in a new legislative context." *Barrett*, 146 P.3d at 523 n.17.

CONCLUSION

Amici respectfully urge the *en banc* Court to reject the limits on Section 230(c)(1) immunity set forth in the panel decision and to reaffirm that Section 230(c)(1) broadly immunizes interactive computer service providers from liability for unlawful content supplied by others.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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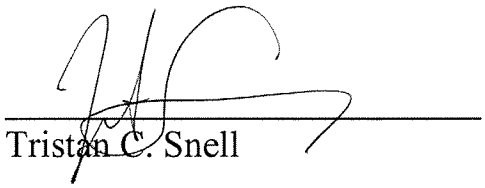

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