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18  
19 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
20 IN AND FOR THE COUNTY OF SACRAMENTO

21 **PEOPLE OF THE STATE OF CALIFORNIA,**

22 Plaintiff,

23 v.

24 **CARL FERRER, MICHAEL LACEY, and**  
25 **JAMES LARKIN,**

26 Defendants.  
27  
28

Case No. 16FE019224, Dept. No. 61

**NOTICE OF DEMURRER AND  
DEMURRER OF DEFENDANTS;  
SUPPORTING MEMORANDUM OF  
POINTS AND AUTHORITIES**  
[California Penal Code § 1004]

Opposition Due: November 4, 2016  
Reply Due: November 10, 2016  
Hearing Date: November 16, 2016  
Time: 1:30 p.m.

Complaint Filed: September 26, 2016  
Trial Date: N/A

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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that, on November 16, 2016, at 1:30 p.m. or as soon thereafter  
3 as the matter may be heard in Department 61 of the Sacramento County Superior Court, 651  
4 I Street, Sacramento, California 95814, defendants Carl Ferrer, Michael Lacey and James Larkin,  
5 respectively the CEO and former owners of an online publisher, Backpage.com, LLC, pursuant to  
6 California Penal Code §§ 1002-1005, will and hereby do demur to the criminal Complaint filed by  
7 California Attorney General Kamala D. Harris and all charges asserted on the following grounds:

8 1. The Demurrer should be sustained under Penal Code §§ 1004(4) and (5) because  
9 the Complaint and the prosecution are legally barred under the First Amendment to the United  
10 States Constitution, as the Attorney General seeks to hold an online publisher of third-party speech  
11 criminally liable, with no allegation of scienter that Backpage.com knew the specific speech upon  
12 which the charges are based was unlawful, much less that the named Defendants had *any*  
13 knowledge of or participated in any way in the creation or posting of the speech. The First  
14 Amendment bars the prosecution because imposing an obligation on publishers to review all  
15 speech to ensure that none is unlawful would severely chill free expression.

16 2. The Demurrer should be sustained under Penal Code §§ 1004(4) and (5) because  
17 the Complaint and prosecution are legally barred by Section 230 of the Communications Decency  
18 Act, 47 U.S.C. § 230, which grants immunity to interactive computer services such as  
19 Backpage.com for any liability based on publishing third-party content or for failing to remove  
20 any such content, regardless of any allegations that the website knew or should have known of  
21 illegal content. Section 230 expressly preempts *all* state criminal laws and absolutely precludes  
22 the prosecution in this case. Indeed, the Attorney General has admitted she has no authority to  
23 bring state criminal charges against Backpage.com for publishing third-party content.

24 3. The Demurrer should be sustained under Penal Code §§ 1004(2) and (4) because  
25 the Complaint does not state facts that constitute public offenses under the criminal statutes  
26 charged. Contrary to Penal Code § 950, the Complaint (and the supporting declaration it  
27 incorporates) fails to allege facts supporting each element of the charged offenses.

28

1           a.       With regard to the charges of pimping under Cal. Penal Code § 266h, the  
2       Complaint alleges no facts that Mr. Ferrer knew anything about the nine individuals who  
3       posted ads that are the premise for the charges, much less that they were prostitutes, as  
4       required by section 266h. *See Wooten v. Superior Court*, 93 Cal. App. 4th 422, 437-38  
5       (2001) (directing dismissal of claims based on failure to show defendants had any  
6       knowledge of alleged prostitution, and holding that allegations of generalized knowledge  
7       are insufficient under Section 266h). Moreover, the First Amendment requires that, as  
8       essential elements of the charges against Mr. Ferrer, the State must allege facts (and  
9       ultimately prove) that he knew of the unlawful nature and content of the specific ads that  
10      are the subject of the charges, and, for Counts Two-Six, knew that the individuals involved  
11      were minors. Yet, the Complaint and declaration allege no such facts, and do not even  
12      allege that Mr. Ferrer ever saw the subject ads or knew *anything* about them or the  
13      individuals who posted the ads.

14           b.       With regard to the charges of conspiracy under Penal Code § 182, the  
15      Complaint fails to allege any facts to establish the elements of the crime charged. The  
16      Complaint and supporting declaration do not anywhere allege that Messrs. Lacey, Larkin  
17      and Ferrer entered into any agreement with anyone, or that they had any specific intent to  
18      commit a public offense of pimping as to any individual or engaged in any overt acts even  
19      remotely showing a purpose of accomplishing the illegal objective of any such  
20      (nonexistent) agreement.

21      The demurrer should be sustained without leave to amend, because the charges contained  
22      in the Complaint and the Attorney General's prosecution are absolutely barred by the First  
23      Amendment and Section 230 of the CDA and cannot be cured by amendment, and the Complaint  
24      does not and cannot state facts that constitute public offenses under the criminal statutes charged.

25      This Demurrer is supported by the concurrently filed Memorandum of Points and  
26      Authorities, Request for Judicial Notice (with accompanying Declaration of James C. Grant), and  
27      the papers and pleadings on file in this matter.

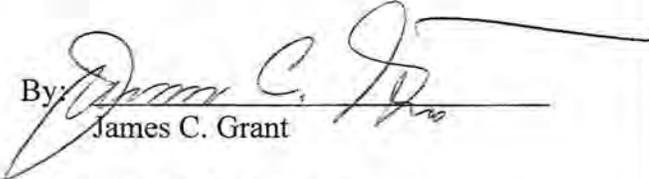
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DATED: October 19, 2016.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By:   
James C. Grant

Attorneys for Defendants  
Carl Ferrer, Michael Lacey and James Larkin

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Attorney General arrested and incarcerated the CEO of Backpage.com, LLC  
4 (“Backpage.com”), charging him with “pimping” under Penal Code § 266h, as well as two former  
5 owners of the company (Michael Lacey and James Larkin) on charges of conspiring to commit  
6 pimping, Penal Code § 182. The basis for the AG’s charges is that third-party users posted ads on  
7 Backpage.com, and the AG’s office determined by responding to the ads that the users were  
8 offering prostitution. With no allegations that Backpage.com had any knowledge of this—much  
9 less that any of the individual Defendants had knowledge or participated in any way in the ads that  
10 were created and posted by users—the Complaint alleges that Defendants are guilty of pimping  
11 and conspiracy because the users paid to post their ads.

12 The AG’s Complaint and theory of prosecution are frankly outrageous. The AG seeks to  
13 impose criminal liability on a website simply because it published and received fees for third-party  
14 ads. The AG’s charges directly contravene the First Amendment and the immunity afforded to  
15 websites under Section 230 of the Communications Decency Act (“CDA”), 47 U.S.C. § 230.  
16 Escort ads on Backpage.com are protected speech under the First Amendment, as several courts  
17 have held. The AG cannot arrest, imprison and refuse to release individuals associated with the  
18 website simply based on an investigator’s opinions about what he believes is “obvious” about  
19 escort ads. Courts upholding the First Amendment rights of Backpage.com and its users have  
20 rejected the same tack time and again. The First Amendment also expressly precludes state  
21 authorities from imposing criminal liability on parties that publish or distribute speech absent  
22 proof of scienter, *i.e.*, that the publisher knew the specific information published was unlawful.  
23 The Supreme Court so held over fifty years ago, *Smith v. California*, 361 U.S. 147 (1959),  
24 recognizing the First Amendment prohibits states from imposing criminal liability that would  
25 require publishers to review all materials they distribute, because such a requirement would  
26 severely chill speech.

27 More specifically, the AG’s theory expressly violates Section 230, which Congress enacted  
28 twenty years ago to preserve and promote free speech on the Internet by immunizing website

1 operators from liability for publishing content provided by third-party users. Section 230  
2 preempts all contrary state laws—including state criminal laws. Indeed, Attorney General Harris  
3 has acknowledged that Section 230 precludes her from prosecuting Backpage.com, but she has  
4 now commenced a prosecution to do precisely what she admits Section 230 prohibits.

5 The AG’s Complaint should be dismissed immediately. The charges the state asserts  
6 amount to a brazen effort to intimidate or shut down an online publisher by using all the criminal  
7 sanctions at the AG’s disposal, despite that she has no authority whatsoever to do so.

## 8 II. BACKGROUND

9 On September 26, 2016, the Attorney General’s office filed the Complaint, charging  
10 Mr. Ferrer with nine counts of pimping and attempted pimping under Cal. Penal Code § 266h, and  
11 charging him and Messrs. Lacey and Larkin with one count of conspiracy based on the same  
12 alleged pimping charges.<sup>1</sup> In support of arrest warrants, the AG submitted a declaration of Special  
13 Agent Brian Fichtner of the California Department of Justice (“Fichtner Decl.”).<sup>2</sup> The Complaint  
14 also expressly incorporates the supporting declaration. Complaint at 9.

15 The AG coordinated with Texas authorities to arrest Mr. Ferrer at the Houston airport on  
16 October 6, 2016, transferring him to California and holding him in custody. Messrs. Lacey and  
17 Larkin voluntarily traveled to and appeared in Sacramento, California on October 10, and were  
18 arrested and incarcerated that day. In the meantime, on October 6-7, Texas authorities executed  
19 search warrants for Backpage.com’s offices in Dallas and Mr. Ferrer’s home.

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23 <sup>1</sup> More specifically, the Complaint alleges against Mr. Ferrer four counts of pimping under Penal  
24 Code § 266h(b)(2) (Counts Two-Four and Six), one count of attempting pimping under Sections  
25 266h(b)(2) and 664 (Count Five), and four counts of pimping under Section 266h(a) (Counts  
26 Seven-Ten). The Complaint also charges Mr. Ferrer in the single conspiracy count under Penal  
27 Code § 182 (Count One), along with Messrs. Lacey and Larkin.

28 <sup>2</sup> Materials supporting this motion are provided with the accompanying Motion for Judicial Notice  
with Declaration of James C. Grant (“MJN”). For the Court’s convenience, the Complaint, the  
Fichtner Declaration and the Texas search warrant for Backpage.com offices are attached to this  
Demurrer as Exhibits A, B and C, respectively.

1           **A.     Backpage.com.**

2           Backpage.com operates an online classified advertising service through which users can  
3 post ads in a variety of categories, including local places, buy/sell/trade, automotive, rentals, real  
4 estate, jobs, dating, adult, and services. *See* Fitchner Decl. at 2-3; *Backpage.com, LLC v. Cooper*,  
5 939 F. Supp. 2d 805, 813 (M.D. Tenn. 2013). The site is organized geographically, by state and  
6 municipality. *Id.* Users post millions of ads every month, making Backpage.com the second-  
7 largest online classified ad service in the country, after Craigslist. *See* Fitchner Decl. at 2  
8 (“BACKPAGE is similar to Craigslist.org”); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d  
9 1262, 1266 (W.D. Wash. 2012).

10           Users provide all the content for ads they post on the website, using an automated  
11 interface; Backpage.com does not dictate or require any content. Until July 2015, the website  
12 charged for ads in the adult and dating categories, while users could post ads for free in other  
13 categories. *See* Fitchner Decl. at 12; *Cooper*, 939 F. Supp. 2d at 813, 815 (noting the charges  
14 helped to discourage improper posting and state AGs originally encouraged Craigslist to impose  
15 charges to aid law enforcement).

16           Backpage.com imposes rules for ads posted on the site, and all users must affirmatively  
17 accept the posting rules. *Cooper*, 939 F. Supp. 2d at 813-14. The rules are designed to prevent  
18 improper ads or misuse of the website. The site’s Terms of Use also prohibit illegal acts and warn  
19 that improper posts will be reported to law enforcement and subject to criminal prosecution. *See*  
20 *McKenna*, 881 F. Supp. 2d at 1266. The site contains numerous hyperlinks to a “User Safety”  
21 page, which includes phone numbers and links for the National Center for Missing and Exploited  
22 Children (“NCMEC”) and similar resources. *Id.* Every ad contains a “Report Ad” button, and  
23 Backpage.com has an email address (abuse@backpage.com) for users to identify ads they believe  
24 improper or suspect. *See Cooper*, 939 F. Supp. 2d at 814.

25           “In addition to user reports, Backpage.com monitors potentially inappropriate ads through  
26 automated and manual reviews.” *Id.* Through this screening, Backpage.com blocks and removes  
27 posts and refers any that may indicate child exploitation to NCMEC. *See McKenna*, 881 F. Supp.  
28 2d at 1266-67. In his declaration, Agent Fichtner confirms that Backpage.com’s practices are

1 effective. When he sought to post an escort ad “containing sexual verbiage indicative of a  
2 prostitution ad,” Backpage.com blocked the ad. Fichtner Decl. at 6-7. On another occasion,  
3 Agent Fichtner attempted to repost an ad that had been removed, “but Backpage.com did not allow  
4 it to go through.” *Id.* at 6.

5 “Backpage.com also regularly works with local, state and federal law enforcement officials  
6 by responding to subpoena requests, providing officials with Internet search tools, and removing  
7 posts and blocking users at the request of officials.” *Cooper*, 939 F. Supp. 2d at 814. Here again,  
8 Agent Fichtner attests to Backpage.com’s cooperation with law enforcement. After he posted  
9 “undercover ads” on the website, he contacted Mr. Ferrer, identified himself as law enforcement,  
10 said that he “had identified a prostitution ad,” and asked that it be removed. Backpage.com  
11 removed the ad that day (as well as another ad Agent Fichtner had posted), and would not allow it  
12 to be re-posted. Fichtner Decl. at 6.

13 **B. Unsuccessful Efforts of AG Harris and Other AGs to Shut Down Adult Online**  
14 **Advertising and Admissions that CDA Section 230 Bars State Prosecutions.**

15 In 2010, Craigslist shut down its adult services category in response to pressure from a  
16 group of state attorneys general.<sup>3</sup> Less than a week later, the AGs targeted Backpage.com,  
17 demanding it shut down its adult category.<sup>4</sup> Attorney General Harris joined and signed an  
18 August 31, 2011 letter from the National Association of Attorneys General (“NAAG”) to  
19 Backpage.com (which was publicly released and promoted by NAAG) demanding that it remove  
20 its adult category as Craigslist had done.<sup>5</sup> Yet, NAAG’s president at the time admitted the state  
21 AGs “have little legal standing to forcibly shut down” Backpage.com, because Section 230  
22  
23

24 <sup>3</sup> See M. Lindenberger, *Craigslist Comes Clean: No More ‘Adult Services,’ Ever*, TIME, Sept. 16,  
25 2010, <http://content.time.com/time/nation/article/0,8599,2019499,00.html>.

26 <sup>4</sup> See State Attorney General Letter, [http://www.illinoisattorneygeneral.gov/](http://www.illinoisattorneygeneral.gov/pressroom/2010_09/Backpage_com9-20-2010.pdf)  
27 [pressroom/2010\\_09/Backpage\\_com9-20-2010.pdf](http://www.illinoisattorneygeneral.gov/pressroom/2010_09/Backpage_com9-20-2010.pdf)).

28 <sup>5</sup> See MJN Ex. D (NAAG August 31, 2011 letter to Backpage.com counsel, [http://www.ct.gov/ag/](http://www.ct.gov/ag/lib/ag/press_releases/2011/083111backpageletter.pdf)  
[lib/ag/press\\_releases/2011/083111backpageletter.pdf](http://www.ct.gov/ag/lib/ag/press_releases/2011/083111backpageletter.pdf)).

1 provides “broad immunity” to websites for third-party content, presenting a “high barrier”  
2 precluding any action by the state AGs.<sup>6</sup>

3 In July 2013, AG Harris signed on to another NAAG letter addressed to various members  
4 of Congress, urging that Section 230 be amended to exempt state criminal laws from immunity so  
5 that state authorities could pursue Backpage.com. The letter acknowledged that “[f]ederal courts  
6 have broadly interpreted the immunity provided by the CDA,” to “prevent[] State and local law  
7 enforcement agencies from prosecuting” Backpage.com and insisted that “[t]his must change.”<sup>7</sup>

8 The efforts of NAAG and Attorney General Harris to amend Section 230 to allow state  
9 prosecutions of websites have been unsuccessful, as have their other efforts to censor  
10 Backpage.com. As discussed below, *see* Section III.B, three states (Washington, Tennessee and  
11 New Jersey) passed criminal laws aimed at Backpage.com, but courts promptly enjoined and  
12 struck down all three laws as unconstitutional and preempted by Section 230. *See McKenna*, 881  
13 F. Supp. 2d 1262; *Cooper*, 939 F. Supp. 2d 805; *Backpage.com, LLC v. Hoffman*, 2013 WL  
14 4502097 (D.N.J. Aug. 20, 2013). And, rather than lessen the CDA’s strong immunity to websites,  
15 Congress has “ratcheted it up ... by expanding the scope of Section 230 immunity to preempt the  
16 enforcement of inconsistent foreign judgments.” *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F.  
17 Supp. 3d 149, 156 (D. Mass. 2015) (dismissing under Section 230 private claims alleging  
18 Backpage.com violated federal sex trafficking laws), *aff’d sub nom. Jane Doe No. 1 v.*  
19 *Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. petition filed*, No. 16-276 (U.S. Aug. 31,  
20 2016).

21  
22  
23 <sup>6</sup> *See* MJN Ex. E (Washington AG gubernatorial campaign website quoting press statements about  
24 AG’s efforts against Backpage.com and the bar presented by Section 230).

25 <sup>7</sup> *See* MJN Ex. F (NAAG July 23, 2013 letter to members of Congress, <https://www.eff.org/files/cda-ag-letter.pdf>). This letter was promoted by a group within NAAG called the “Backpage  
26 Executive Committee,” which explained that the purpose of the proposed Section 230 amendment  
27 was to “extend[] criminal jurisdiction ... to state and local governments,” because under the law  
28 only the federal government has authority to prosecute websites. *See id.* Ex. G (June 14, 2013  
letter from the Backpage Executive Committee to all Attorneys General, Chief Deputies, and  
Executive Assistants, <https://www.cdt.org/files/file/AG-Letter-Section-230.pdf>).

1           **C.     The Criminal Complaint and Arrest Warrant Declaration.**

2           The AG asserts eight charges of pimping and one charge of attempted pimping against  
3 Mr. Ferrer based on allegations that nine individuals posted and paid for ads on Backpage.com.  
4 Complaint at 4-9 (Counts Two-Ten).<sup>8</sup> The Complaint and declaration provide no basis for these  
5 charges except that Mr. Ferrer is the CEO of Backpage.com and the named partner of the  
6 corporate parent of Backpage.com, LLC. Fichtner Decl. at 3. Agent Fichtner's declaration  
7 explains that all of the ads about these individuals were written and posted by the individuals  
8 themselves. *Id.* at 7-11. The AG does not allege that Mr. Ferrer had any role in or any knowledge  
9 of the ads or that he ever even saw them. Indeed, Agent Fichtner alleges the individuals who  
10 posted ads evaded the website's rules and restrictions, so that Backpage.com could not have  
11 known the ads were improper or concerned prostitution. *Id.* at 8, 10 (including statement by one  
12 individual: "how are they supposed to know I'm underage?"). The only specific allegations  
13 Agent Fichtner offers concerning Mr. Ferrer relating to ads on the website are that he promptly  
14 removed ads when requested and he was copied on Backpage.com's responses to "numerous law  
15 enforcement subpoenas and search warrants." Fichtner Decl. at 4, 6.

16           Instead, the Complaint charges that Mr. Ferrer is guilty of pimping because the individuals  
17 paid for their ads (in amounts totaling \$79.60, *see* Complaint at 3-4), Backpage.com received these  
18 payments, and therefore Mr. Ferrer "did live and derive support and maintenance" from persons  
19 engaged in prostitution or "solicit[ed] and receive[d] compensation for soliciting for said  
20 prostitute[s]." Complaint at 5 (*see* Penal Code § 266h).

21           The one-count conspiracy charge alleged against Messrs. Ferrer, Lacey and Larkin is even  
22 more attenuated. These gentlemen were, respectively, the chief editor and publisher of Village  
23 Voice Media Holdings, the company that formerly owned Backpage.com as well as fourteen  
24 weekly newspapers across the country. As Agent Fichtner asserts, they no longer own interests in  
25 Backpage.com and haven't for almost two years. Fichtner Decl. at 3. Nonetheless, the AG  
26 charges them with conspiracy to commit pimping as to the nine individuals who advertised on the  
27

28 <sup>8</sup> The nine individuals are identified as: A.C., E.V., L.F., E.S., Z.G., A.H, S.C., L.B., and K.A.

1 website (the ads that are the predicate for the claims against Mr. Ferrer) based solely on their  
2 former ownership interests in Backpage.com and that the website charged for escort ads,  
3 employed a process to screen ads, arranged for a processor to handle credit card transactions; and  
4 the nine individuals paid for the ads. Complaint at 2-4. As with Mr. Ferrer, the Complaint and  
5 declaration offer no allegations that Messrs. Lacey and Larkin ever had anything to do with or  
6 knew anything about these ads.

7 **D. The AG's Arrests and Incarceration of Defendants, Searches and Seizures,**  
8 **and Opposition to Defendants' Efforts to Post Bail.**

9 The Attorney General's office did not contact Backpage.com, its counsel, or the  
10 Defendants before moving forward with arrests and searches based on the Complaint  
11 (notwithstanding that Backpage.com has cooperated with the AG's office many times before).  
12 Rather, the AG enlisted Texas law enforcement authorities to arrest Mr. Ferrer on October 6,  
13 2016, as he deplaned in Houston from a flight from Amsterdam, based on the California AG's  
14 Complaint and arrest warrant. The Texas authorities jailed Mr. Ferrer, while the California AG's  
15 office sought to extradite him. Through counsel, Mr. Ferrer agreed to be transferred to California,  
16 and he was flown to Sacramento and incarcerated there on October 7.

17 On October 6 and 7, 2016, Texas authorities executed search warrants based on the  
18 declaration supplied by the California AG. In a two-day search of Backpage.com's offices in  
19 Dallas, authorities seized computers, servers, passwords, and scores of boxes of documents,  
20 effectively anything relating to Backpage.com's operation of its business and the website.<sup>9</sup> Texas  
21 law enforcement also searched Mr. Ferrer's home.

22 In the meantime, the AG obtained an order requiring bail of \$500,000 to secure  
23 Mr. Ferrer's release. Counsel for Mr. Ferrer sought to make arrangements to post bail, but the  
24 AG's office insisted it would object to any payment of the bail or posting of a bond under Cal.  
25 Penal Code § 1275.1, and would demand proof that funds were not "tainted" as being connected in  
26 some way to revenues from Backpage.com (notwithstanding that AG lacked authority to prosecute  
27 and the Complaint did not and could not allege that all funds associated with Backpage.com were

28 <sup>9</sup> See Texas search warrant for Backpage.com offices, attached as Exhibit C.

1 unlawful). Mr. Ferrer’s counsel communicated to the AG’s office that bond could be posted based  
2 on funds unrelated to Backpage.com (and offered to provide proof), but the AG still insisted that  
3 Mr. Ferrer remain incarcerated until a hearing could be held on its demands under Penal Code  
4 § 1275.1.

5 Messrs. Lacey and Larkin agreed to voluntarily travel to and appear to state authorities in  
6 Sacramento on October 10, 2016. They expected and were prepared to post bail (set at \$250,000  
7 for each), but, again, the AG insisted that it would contest any bond or bail under Section 1275.1.  
8 As a consequence, these gentlemen were also taken into custody.

9 While defendants’ counsel sought to resolve the bail issues as soon as possible, the AG  
10 asked for a delay until after the defendants appeared for a public arraignment, which they did on  
11 October 12, 2016. The next day, the Court held the 1275.1 hearing and promptly ordered that the  
12 defendants be released on bail. Mr. Ferrer was finally released in the early hours of October 14,  
13 after he had been held in custody for a week, and Messrs. Lacey and Larkin were released after  
14 being incarcerated for four days.

### 15 III. ARGUMENT

#### 16 A. Standards for a Demurrer Under Penal Code § 1004.

17 Penal Code § 1004 authorizes a defendant to demur to an accusatory pleading that (1) fails  
18 to “substantially conform” to the provisions of Sections 950 and 952, which govern the form and  
19 content of accusatory pleadings, (2) alleges facts that “do not constitute a public offense,” or  
20 (3) “contains matter which, if true, would constitute a legal justification or excuse of the offense  
21 charged, or other legal bar to the prosecution.” *Id.* §§ 1004(2), (4), (5). A demurrer “tests only  
22 those defects appearing on the face of [the accusatory] pleading,” and is appropriate when it  
23 “raises an issue of law as to the sufficiency of the ... pleading.” *People v. Osorio*, 235 Cal. App.  
24 4th 1408, 1412 (2015) (quoting *People v. Manfredi*, 169 Cal. App. 4th 622, 626 (2008)). “[F]or  
25 purposes of demurrer ... matters which may be judicially noticed may be said to appear  
26 constructively on the face of the pleading.” *People v. Tolbert*, 176 Cal. App. 3d 685, 689 (1986).

27 A demurrer is appropriate to dismiss charges that are unconstitutional or preempted. *See*  
28 *Williams v. Superior Court*, 111 Cal. App. 4th Supp. 1, 6 (Cal. App. Dep’t Super. Ct. 2003) (“A

1 demurrer’s purpose under section 1004 is dismissal of a pleading which lacks adequate notice of  
2 the public offense charged or charges one that is unconstitutional so as to generate a legally  
3 sufficient accusation.”), *disagreed with on other grounds, Osman v. Appellate Div. of Superior*  
4 *Court*, 134 Cal. App. 4th 32 (2005). Indeed, the California Supreme Court has often sustained  
5 demurrers dismissing criminal charges that violate the First Amendment. *See, e.g., People v.*  
6 *Superior Court*, 49 Cal. 3d 14, 27 (1989) (sustaining superior court demurrer to charges against  
7 theatre for unlawfully displaying adult films based on standard that violated the First  
8 Amendment); *Dulaney v. Municipal Court*, 11 Cal. 3d 77, 89 (1974) (sustaining demurrer and  
9 entering writ of prohibition prohibiting prosecution under municipal ordinance precluding posting  
10 of signs on utility poles as violating the First Amendment); *Whitney v. Municipal Court*, 58 Cal.  
11 2d 907, 910-11 (1962) (sustaining demurrer to prosecution under municipal obscenity ordinance  
12 preempted by state law); *see also Mandel v. Municipal Court*, 276 Cal. App. 2d 649, 673-74  
13 (1969) (reversing trial court decision refusing to grant demurrer and holding that prosecution of  
14 defendant under vagrancy ordinance for distributing anti-draft leaflets on high school campuses  
15 violated First Amendment). As the case law demonstrates, when the State seeks to prosecute  
16 criminal charges that violate the Constitution or as to which the State has no authority, a Section  
17 1004 demurrer is the proper remedy to dismiss the charges and stop the prosecution at the outset.

18 **B. The Complaint and Prosecution Are Legally Barred By the First Amendment.**

19 The Attorney General’s theory of prosecution violates basic principles of First Amendment  
20 law. The AG’s theory, reflected in the Complaint and supporting declaration, is that the State may  
21 prosecute individuals associated with an online publisher simply for publishing third-party speech  
22 if it turns out that some content implicates unlawful conduct, *i.e.* prostitution. Ample Supreme  
23 Court precedent expressly rejects such a theory of unknowing criminal liability, given the chilling  
24 effect it would have on free speech.

25 The AG initiated this prosecution in the face of an unbroken line of cases holding that  
26 online forums for classified ads—and specifically Backpage.com—are protected by the First  
27 Amendment. Government officials at various levels have attempted to censor such advertising  
28 forums in many ways, and each has been held to violate the Constitution. Speech through the

1 Internet is subject to the same First Amendment protections and judicial scrutiny as applied to  
2 other media. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). And, the First Amendment concerns in  
3 this case are particularly acute, where the state has commenced a criminal prosecution. *Ashcroft v.*  
4 *ACLU*, 542 U.S. 656, 660 (2004) (speech restrictions “enforced by severe criminal penalties, have  
5 the constant potential to be a repressive force in the lives and thoughts of a free people”).

6 In a series of cases, federal courts enjoined state criminal laws that targeted Backpage.com,  
7 holding that escort ads on the website are protected speech and states’ efforts to criminalize  
8 publication violated the First Amendment. First, in *Backpage.com, LLC v. McKenna*, 881 F.  
9 Supp. 2d 1262, the court enjoined enforcement of a Washington state statute that made it a felony  
10 to publish, disseminate or display content that contained a “depiction of a minor” and any “explicit  
11 or implicit offer” of sex for “something of value.” 881 F. Supp. 2d at 1268. The court rejected the  
12 state’s argument that the law affected only speech proposing illegal transactions, noting that escort  
13 ads have long been permitted and escort services are licensed and regulated in many states. *Id.* at  
14 1282;<sup>10</sup> *see also id.* at 1280 (“The statute criminalizes more than offers to engage in illegal  
15 transactions because the statute encompasses transactions that are not illegal.”). The court went on  
16 to note that the Washington law was problematic not only because of “the protected speech that it  
17 regulates by its terms,” but also because it would “chill a substantial amount of protected speech,”  
18 by creating a Hobson’s choice for websites of either shutting down escort advertising or requiring  
19 age verification and risking prosecution. *Id.* at 1282.

20 The court in *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, struck down a similar  
21 Tennessee statute, likewise holding that third-party ads on Backpage.com are protected speech  
22 under the First Amendment.<sup>11</sup> Here again, the court rejected the state’s argument that the statute  
23 “[did] not implicate First Amendment scrutiny because it criminalize[d] only offers to engage in

24 \_\_\_\_\_  
25 <sup>10</sup> The same is true in California, as many cities and counties in the state license and regulate  
26 escort services. *See, e.g.*, Sacramento City Code ch. 5.04; San Francisco Police Code, art. 15.6;  
Los Angeles County Code ch. 7.38; Orange County Code, tit. 5, art. 22

27 <sup>11</sup> The Tennessee law made it a felony to sell or offer to sell “an advertisement that would appear  
28 to a reasonable person to be for the purpose of engaging in what would be a commercial sex act.”  
*Cooper*, 939 F.3d at 816.

1 illegal transactions,” noting that the “statute’s potential reach extend[ed] to notices related to legal,  
2 consensual activity by adults.” *Id.* at 833-34. As the court aptly said in that case:

3 The Constitution tells us that—when freedom of speech hangs in the balance—the  
4 state may not use a butcher knife on a problem that requires a scalpel to fix. Nor  
5 may a state enforce a law that flatly conflicts with federal law.

6 *Id.* at 813.

7 In the third case of the trilogy concerning state criminal laws aimed at Backpage.com,  
8 *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, the court struck down a New Jersey statute  
9 almost identical to the Washington law that had been invalidated, again rejecting arguments of the  
10 state that escort ads on the website are unprotected speech. *Id.* at \*9-11 (accepting argument that  
11 the law would impermissibly burden any Internet “forum for communication ... if it does not  
12 police or eliminate user postings”).

13 In each of these cases, state authorities falsely sought to cast all escort ads as ads for  
14 prostitution, and each time courts rejected the arguments because the states’ theories and laws  
15 would have burdened broad swaths of constitutionally protected speech. *See McKenna*, 881 F.  
16 Supp. 2d at 1280, 1282; *Cooper*, 939 F. Supp. 2d at 831; *Hoffman*, 2013 WL 4502097, at \*9-11.<sup>12</sup>  
17 More recently, the Seventh Circuit underscored this point when it enjoined efforts by the Sheriff  
18 of Cook County to bully credit card companies into terminating services to Backpage.com based  
19 on the same false premise. In *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235-36 (7th Cir. 2015),  
20 *cert. denied*, 2016 WL 1723950 (U.S. Oct. 3, 2016), the Seventh Circuit held that Sheriff Dart’s  
21 threatening letters and other actions toward Visa and MasterCard constituted an unconstitutional  
22 prior restraint under *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Here too, the Sheriff  
23 argued that all ads in the adult section of Backpage.com were unlawful, but the Seventh Circuit  
24 rejected the argument and held that First Amendment protections applied. 807 F.3d at 234 (“Nor

25 \_\_\_\_\_  
26 <sup>12</sup> The courts in the three cases discussed above barred enforcement of the respective state laws  
27 because they forced Backpage.com to choose between “foregoing the right to publish third-party  
28 content and risking felony charges.” *Cooper*, 939 F. Supp. 2d at 845. Here, there is not just a risk  
but the reality of criminal charges, coupled with incarceration of the individual defendants and  
dragnet searches and seizures of the publisher’s home and business offices. The constitutional  
stakes here exceed the possible chilling effect that persuaded courts to invalidate state laws in  
*McKenna*, *Cooper*, and *Hoffman*.

1 is Sheriff Dart on solid ground in suggesting that *everything* in the adult section of Backpage’s  
2 website is criminal, violent, or exploitive.... [N]ot all advertisements for sex are advertisements for  
3 illegal sex.”). As Judge Posner wrote, “a public official who tries to shut down an avenue of  
4 expression of ideas and opinions through actual or threatened imposition of government power or  
5 sanction is violating the First Amendment.” *Id.* at 230 (internal quotation marks omitted).

6 The Attorney General’s Complaint and theory of prosecution is likewise based on the  
7 flawed (and oft-rejected) premise that the State can assert criminal charges based merely on  
8 allegations that escort ads are illegal or may concern unlawful conduct. The First Amendment  
9 does not permit such a blunderbuss approach. Under the First Amendment, in all contexts, it is the  
10 *government’s burden* to establish and justify actions that burden speech rights. *United States v.*  
11 *Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000) (“When the Government restricts speech, [it]  
12 bears the burden of proving the constitutionality of its actions.”). In short, the state may not  
13 merely presume that speech is unlawful.

14 The Government may not suppress lawful speech as the means to suppress  
15 unlawful speech. Protected speech does not become unprotected merely because  
16 it resembles the latter. The Constitution requires the reverse. “[T]he possible  
17 harm to society in permitting some unprotected speech to go unpunished is  
18 outweighed by the possibility that protected speech of others will be muted ....”  
19 *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (quoting *Broadrick v. Oklahoma*, 413  
20 U.S. 601, 612 (1973)).

21 Thus, it is a basic proposition of First Amendment law that states cannot criminally punish  
22 publishers or distributors of speech without proof of scienter, *i.e.*, sufficient proof that a defendant  
23 knew that the specific speech that is the basis for criminal charges was unlawful. In *Smith v.*  
24 *California*, 361 U.S. 147, the Supreme Court struck down a Los Angeles ordinance imposing  
25 criminal sanctions on the sale of obscene books which required no scienter, because absent proof  
26 that a seller had knowledge, “he will tend to restrict the books he sells” and the law would  
27 “impose a severe limitation on the public’s access to constitutionally protected matter” because the  
28 threat of unknowing criminal liability would cause self-censorship, and “the bookseller’s burden  
would become the public’s burden.” *Id.* at 153-54. *See also Mishkin v. New York*, 383 U.S. 502,  
511 (1966) (“[t]he Constitution requires proof of scienter to avoid the hazard of self-censorship of

1 constitutionally protected material and to compensate for the ambiguities inherent in the definition  
2 of obscenity”). Similarly, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the  
3 Court interpreted a federal statute prohibiting interstate transfer of child pornography to require  
4 that the government prove a defendant had knowledge of “both ... the sexually explicit nature of  
5 the material and ... the age of the performers,” because a lack of such scienter requirements  
6 “would raise serious constitutional doubts.” *Id.* at 78.<sup>13</sup> California cases recognize and follow  
7 these constitutional principles, holding that statutes criminalizing the distribution of obscene or  
8 unlawful materials must contain scienter requirements (or be fairly interpreted as doing so)  
9 because otherwise such laws “would have an unacceptable chilling effect on the public’s access to  
10 constitutionally protected materials.” *Berry v. City of Santa Barbara*, 40 Cal. App. 4th 1075, 1087  
11 (1995).

12 The AG’s Complaint in this case ignores and is irreparably deficient under these First  
13 Amendment principles. Nothing in the Complaint or Agent Fitchner’s declaration alleges that the  
14 advertisements posted by the nine individuals upon which the charges are based were unlawful on  
15 their face. The declaration states that all of the ads were written and posted by the individuals  
16 themselves. There is no allegation that the defendants or anyone from Backpage.com had any role  
17 in creating or posting the ads. The AG does not even allege that Mr. Ferrer ever saw or had any  
18 knowledge of the ads. The Complaint is still more deficient as to Messrs. Lacey and Larkin, as it  
19 alleges that their only connection is that they formerly owned interests in Backpage.com and so  
20 should be criminally liable because the website received payments of \$79.60 for ads from the nine  
21 individuals. The allegations set forth in Agent Fitchner’s declaration do not even attempt to  
22 establish scienter as to any of the defendants for any of the ads that are the basis for the state’s  
23 prosecution. The First Amendment expressly forbids criminal charges on this premise.

24 Criminal sanctions inhibiting free speech rights are among the most pernicious forms of  
25 government violations of the First Amendment. *See Reno*, 521 U.S. at 872 (“The severity of

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26 <sup>13</sup> *See also United States v. United States District Court*, 858 F.2d 534, 540 (9th Cir. 1988) (“the  
27 first amendment does not permit the imposition of criminal sanctions on the basis of strict liability  
28 where doing so would seriously chill protected speech”); *Video Software Dealers Ass’n v.*  
*Webster*, 968 F.2d 684, 690 (8th Cir. 1992) (“Statutes that impose criminal responsibility for  
dissemination of unprotected speech must contain a knowledge requirement.”).

1 criminal sanctions may well cause speakers to remain silent rather than communicate even  
 2 arguably unlawful words, ideas, and images.”); *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965)  
 3 (even as to criminal charges that are groundless, the threat of prosecution “is a real and substantial  
 4 one” that can have a “chilling effect on protected expression”). Here, the severity of the charges  
 5 leveled, and the aggressiveness with which the AG has sought to demonize and punish the  
 6 defendants on baseless charges illustrates why this Court should promptly dismiss this  
 7 prosecution. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment  
 8 freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

9 **C. The Complaint and Prosecution Are Legally Deficient Under Section 230 of**  
 10 **the CDA, as the Attorney General Has Admitted.**

11 Free speech on the Internet is protected not only by the First Amendment, but also by  
 12 Section 230 of the CDA. “[T]he plain language of section 230 ‘creates a federal immunity to any  
 13 cause of action that would make service providers liable for information originating with a third-  
 14 party user.’” *Barrett v. Rosenthal*, 40 Cal. 4th 33, 43 (2006) (quoting *Zeran v. Am. Online, Inc.*,  
 15 129 F.3d 327, 330 (4th Cir. 1997)). In simple terms, Section 230 bars any state-law claims—civil  
 16 or criminal—against an online publisher such as Backpage.com (and the defendants) based on  
 17 third-party content it publishes. Attorney General Harris knows and has admitted she has no  
 18 authority to prosecute Backpage.com for ads it publishes, yet the Complaint and the prosecution  
 19 here seek to do exactly that.

20 Section 230 states: “No provider ... of an interactive computer service shall be treated as  
 21 the publisher or speaker of any information provided by another information content provider.”  
 22 47 U.S.C. § 230(c)(1).<sup>14</sup> The statute expressly preempts state laws: “No cause of action may be  
 23 brought and no liability may be imposed under any State or local law that is inconsistent with this  
 24 section.” *Id.* § 230(e)(3).<sup>15</sup>

25 <sup>14</sup> An “information content provider” is one “responsible, in whole or in part, for the creation or  
 26 development of information,” 47 U.S.C. § 230(f)(3), such as users who post on Backpage.com.

27 <sup>15</sup> California courts routinely reject claims based on Section 230 on preliminary motions. *E.g.*,  
 28 *Barrett*, 40 Cal. 4th 33 (2006) (affirming trial court order granting special motion to strike claims  
 based on Section 230); *Hupp v. Freedom Commc’ns, Inc.*, 221 Cal. App. 4th 398 (2013) (same);  
*Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 563, 566 (2009) (affirming trial court orders

1 Congress enacted Section 230 to achieve two goals. First, the statute is meant “to  
2 encourage the unfettered and unregulated development of free speech on the Internet, and to  
3 promote the development of e-commerce.” *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003);  
4 *accord Barrett*, 40 Cal. 4th at 56 (Section 230 reflects “legislative commitment to the value of  
5 maintaining a free market for online expression”); *Delfino v. Agilent Techs., Inc.*, 145 Cal. App.  
6 4th 790, 802-03 (2006) (CDA was intended to “avoid the chilling effect upon Internet free speech”  
7 that would arise from imposing liability on “companies that do not create potentially harmful  
8 messages but are simply intermediaries for their delivery”). Congress recognized the Internet  
9 would be crippled if online providers could be held liable for third-party content, “given the  
10 volume of material communicated ..., the difficulty of separating lawful from unlawful speech,  
11 and the relative lack of incentives to protect lawful speech.” *Universal Comm’n Sys., Inc. v.*  
12 *Lycos, Inc.*, 478 F.3d 413, 418-19 (1st Cir. 2007); *see Batzel*, 333 F.3d at 1034 (absent Section  
13 230, “speech over the Internet will be chilled rather than encouraged”); *see* 47 U.S.C. § 230(a)(4)  
14 and (b)(2) (finding the Internet has “flourished, to the benefit of all Americans, with a minimum of  
15 government regulation,” and Section 230 is intended to “preserve the vibrant and competitive free  
16 market that presently exists for the Internet”).

17 Second, Congress sought to encourage online providers to self-police for potentially  
18 harmful or offensive material by providing immunity for such efforts. *See Doe II*, 175 Cal. App.  
19 4th at 570 (emphasizing “Congress’ intent ‘to remove disincentives for the development and  
20 utilization of blocking and filtering technologies’” (quoting 47 U.S.C. § 230(b)(4)); *Batzel*, 333  
21 F.3d at 1028. Congress recognized that if websites undertook to screen or block improper content  
22 but could be held liable for doing so imperfectly, they likely would do no screening at all. *See*  
23 *Barrett*, 40 Cal. 4th at 44 (noting that, in passing Section 230, Congress expressly rejected *Stratton*  
24 *Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), which  
25 applied common law principles to hold Prodigy liable as a publisher because it screened and  
26 edited some bulletin board messages to prevent offensive content but failed to delete the posts  
27  
28 sustaining demurrers based on Section 230); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 819  
(2002) (same).

1 about which the plaintiff claimed); *see also* *Batzel*, 333 F.3d at 1029 (“If efforts to review and  
2 omit third-party defamatory, obscene or inappropriate material make a computer service provider  
3 or user liable for posted speech, then website operators and Internet service providers are likely to  
4 abandon efforts to eliminate such material from their site[s].”).

5 The purposes and scope of Section 230 immunity were summarized by the Fourth Circuit  
6 in *Zeran*, which California courts have followed as “[t]he leading case on immunity protection  
7 under Section 230,” *Doe II*, 175 Cal. App. 4th at 569; *see Barrett*, 40 Cal. 4th at 42-46; *Delfino*,  
8 145 Cal. App. 4th at 802-803:

9 Congress’ purpose in providing the § 230 immunity was thus evident. Interactive  
10 computer services have millions of users. The amount of information  
11 communicated via interactive computer services is therefore staggering. The  
12 specter of tort liability in an area of such prolific speech would have an obvious  
13 chilling effect. It would be impossible for service providers to screen each of  
14 their millions of postings for possible problems. Faced with potential liability for  
15 each message republished by their services, interactive computer service  
16 providers might choose to severely restrict the number and type of messages  
17 posted. Congress considered the weight of the speech interests implicated and  
18 chose to immunize service providers to avoid any such restrictive effect.

19 *Zeran*, 129 F.3d at 331 (citations omitted), *quoted in Doe II*, 175 Cal. App. 4th at 569.<sup>16</sup>

20 Courts have interpreted Section 230 in accordance with its purposes. Thus, California  
21 courts have followed the uniform interpretation of the federal circuit courts in holding that Section  
22 230 establishes broad immunity for online providers. *Barrett*, 40 Cal. 4th at 53 (Section 230  
23 “broadly shield[s] all providers from liability for ‘publishing’ information received from third  
24 parties”); *Doe II*, 175 Cal. App. 4th at 572 (noting “consensus to interpret Section 230 broadly”).<sup>17</sup>

25 <sup>16</sup> Congress recognized that some material on the Internet could be harmful, but made a policy  
26 choice that liability could be imposed on “the person who creates or develops unlawful content,  
27 but not the interactive computer service provider who merely enables that content to be posted  
28 online.” *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009).

<sup>17</sup> *See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (“circuits have  
interpreted [Section 230] to establish broad federal immunity”); *Carafano v. Metroplash.com,  
Inc.*, 339 F.3d 1119, 1123-24 (9th Cir. 2003) (noting “consensus” that “§ 230(c) provides broad  
immunity for publishing content provided primarily by third parties”); *Green v. Am. Online*, 318  
F.3d 465, 471 (3d Cir. 2003); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *Doe v.  
MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Chi. Lawyers’ Comm. for Civil Rights Under  
Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); *Jones v. Dirty World Entm’t  
Recordings LLC*, 755 F.3d 398, 406-07 (6th Cir. 2014); *Klayman v. Zuckerberg*, 753 F.3d 1354,

1 Likewise, the case law uniformly holds that Section 230 forbids claims against a website  
2 “for the exercise of its editorial and self-regulatory functions” about whether to block or allow  
3 content. *Zeran*, 129 F.3d at 331. “[A]ny activity that can be boiled down to deciding whether to  
4 exclude material that third parties seek to post online is *perforce* immune under section 230.” *Fair*  
5 *Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir.  
6 2008) (en banc); *accord Doe II*, 175 Cal. App. 4th at 572 (Section 230 protects “exercise of a  
7 publisher’s traditional editorial functions, such as editing, altering, or deciding whether or not to  
8 publish certain material”); *Carafano*, 339 F.3d at 1124 (“[u]nder section 230(c), ... so long as a  
9 third party willingly provides the essential published content, the interactive service provider  
10 receives full immunity regardless of the specific editing or selection process”).

11 Section 230 immunity applies and protects a website notwithstanding allegations that it  
12 knew or should have known of unlawful content or conduct, as “[s]ubjecting service providers to  
13 notice liability would defeat ‘the dual purposes’ of section 230, by encouraging providers to  
14 restrict speech and abstain from self-regulation.” *Barrett*, 40 Cal. 4th at 45 (quoting *Zeran*, 129  
15 F.3d at 333). “It is, by now, well established that notice of the unlawful nature of the information  
16 provided is not enough to make it the service provider’s own speech.” *Lycos*, 478 F.3d at 420  
17 (citing *Barrett*, 40 Cal. 4th at 51).

18 By its terms, Section 230 preempts and precludes not only state *civil* claims but also  
19 charges under state *criminal* laws. Section 230(c)(1) states, without qualification, that “[n]o cause  
20 of action may be brought and *no liability may be imposed* under *any State or local law* that is  
21 inconsistent with this section.” 47 U.S.C. § 230(e)(3) (emphasis added). While immunity does  
22 not extend to prosecutions under a “*Federal criminal statute*,” *id.* § 230(e)(1) (emphasis added),  
23 *state* criminal statutes are not exempt from its reach. “If Congress had wanted all criminal statutes  
24 to trump the CDA, it could have written subsection [230(e)](1) to cover ‘any criminal statute’ or  
25 ‘any similar State criminal statute.’ Instead, sub-subsection (1) is limited to *federal* criminal  
26

27 1359 (D.C. Cir. 2014); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015); *Ben*  
28 *Ezra, Weinstein & Co. v. Am. Online Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000); *Zeran*, 129 F.3d  
at 330-31.

1 statutes.” *Voicenet Commn’cns, Inc. v. Corbett*, 2006 WL 2506318, at \*4 (E.D. Pa. Aug. 30,  
 2 2006) (emphasis added). Every court to consider this issue has reached the same conclusion,  
 3 holding that Section 230 preempts state criminal laws. *See McKenna*, 881 F. Supp. 2d at 1275 (“If  
 4 Congress did not want the CDA to apply in state criminal actions, it would have said so.”);  
 5 *Cooper*, 939 F. Supp. 2d at 821-26; *Hoffman*, 2013 WL 4502097, at \*6; *People v. Gourlay*, 2009  
 6 WL 529216, at \*3 (Mich. Ct. App. Mar. 3, 2009) (“the phrase ‘any State or local law’ includes  
 7 civil and criminal laws”).<sup>18</sup>

8 Section 230 provides “an *immunity from suit* rather than a mere defense to liability.” *Nemet*  
 9 *Chevrolet*, 591 F.3d at 254, and, as a result, courts uniformly hold that claims against online  
 10 providers based on third-party content should be dismissed at the earliest possible opportunity, to  
 11 avoid “costly and protracted legal battles,” *Roommates.com, LLC*, 521 F.3d at 1175. Congress’s  
 12 intent to protect Internet free speech and the purpose of the immunity are “effectively lost if a case  
 13 is erroneously permitted to go to trial” rather than being dismissed at the outset. *Nemet Chevrolet*,  
 14 591 F.3d at 254; *accord Jones*, 755 F.3d at 417 (“[g]iven the role that the CDA plays in an open  
 15 and robust internet by preventing the speech-chilling threat of the heckler’s veto, we point out that  
 16 determinations of immunity under the CDA should be resolved at an earlier stage of litigation”).

17 In the trilogy of cases striking down state laws aimed at Backpage.com, all three federal  
 18 courts held that the laws were invalid and Backpage.com was entitled to immunity under Section  
 19 230. In *McKenna*, the court held the Washington law “impos[ed] liability on Backpage.com ...  
 20 for information created by third parties—namely ads for commercial sex acts depicting minors—  
 21 so long as it ‘knows’ that it is publishing, disseminating, displaying, or causing to be published,  
 22 disseminated, or displayed such information.” 881 F. Supp. 2d at 1273. In doing so, the law  
 23 “create[d] an incentive for online service providers *not* to monitor content ... precisely the  
 24 situation that the CDA was enacted to remedy.” *Id.*; *see also Cooper*, 939 F. Supp. 2d at 823

25 \_\_\_\_\_  
 26 <sup>18</sup> The legislative history of Section 230 reinforces this conclusion. As originally written, Section  
 27 230(b)(5) stated “[i]t is the policy of the United States to... ensure vigorous enforcement of  
 28 criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of  
 computer.” H.R. 1978 (June 30, 1995). But it was later changed to say “[i]t is the policy of the  
 United States ... to ensure vigorous enforcement of *Federal* criminal laws ....” 47 U.S.C.  
 § 230(b)(5) (emphasis added).

1 (enjoining Tennessee statute because it “impose[d] liability on websites such as Backpage.com for  
2 selling or offering to sell advertisements, activity inherent in their role as publishers”); *Hoffman*,  
3 2013 WL 4502097, at \*6 (similar law “r[a]n[] afoul of Section 230 by imposing liability ... for  
4 information created by third parties—namely ads for commercial sex acts depicting minors”).

5 The AG’s tack to impose criminal liability on the Defendants for Backpage.com’s  
6 publication of third-party content is likewise expressly barred and preempted under Section 230.  
7 Section 230 immunity applies when: “(1) the defendant [is] a provider or user of an interactive  
8 computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of  
9 information; and (3) the information at issue [is] provided by another information content  
10 provider.” *Gentry*, 99 Cal. App. 4th at 830 (citing 47 U.S.C. § 230(c)(1)). All of the elements of  
11 the three-part test for Section 230 immunity are established here.

12 First, Backpage.com indisputably is a “provider ... of an interactive computer service.” 47  
13 U.S.C. § 230(c)(1). *See Roommates.com*, 521 F.3d at 1162 n.6 (the “most common interactive  
14 computer services are websites”); *Hoffman*, 2013 WL 4502097, at \*6 (Backpage is a “provider[]  
15 of an interactive computer service within the meaning of CDA Section 230.”). The defendants are  
16 also entitled to immunity, as Section 230 extends to individuals who operate websites, as well as  
17 to the websites themselves. *See, e.g., Klayman*, 753 F.3d at 1357-58 (“Mark Zuckerberg, too,  
18 qualifies for protection [under § 230] because he is a ‘provider’ of Facebook’s interactive  
19 computer service and Klayman’s complaint seeks to hold him accountable for his role in making  
20 that service available.”).

21 Second, the AG’s charges against Defendants are based on third-party ads on the website,  
22 *i.e.*, content provided by other information content providers. The AG nowhere alleges that  
23 Defendants authored, created, or participated in posting the ads of the nine individuals. To the  
24 contrary, the Complaint and declaration admit the opposite. *See, e.g., Complaint* at 2 (alleging  
25 that “users of Backpage.com ... post[ed] escort advertisements”); *Fitchner Decl.* at 2-3  
26 (“BACKPAGE is similar to Craigslist.org in that it is an on-line general classified advertising site”  
27 allowing “user[s] to post advertisements for ‘escorts’” for certain fees); *id.* at 7-10 (noting that  
28 users identified as A.H. , E.S., A.C. S.C. L.B. E.V. K.A. and L.F. stated that they posted ads on

1 Backpage.com). *See Delfino*, 145 Cal. App. 4th at 807-08 (Section 230 provided immunity to  
2 defendant where “the complaint consistently and repeatedly attributes authorship of the offensive  
3 messages to [a third party]”).<sup>19</sup>

4 Finally, the charges target Backpage.com for publishing information online and alleged  
5 harms “caused by content provided by ... third part[ies].” *Gentry*, 99 Cal. App. 4th at 830; *see*  
6 *also id.* at 832 (Section 230 forbids putting a website “in the shoes” of individuals who misused  
7 the site for unlawful purposes). Indeed, the AG *admits* Backpage.com takes measures to screen  
8 and block inappropriate ads, *see* Complaint at 2 (alleging Mr. Ferrer “developed and oversaw a  
9 process to screen escort ads”); Fitchner Decl. at 4 (acknowledging screening process), and the only  
10 *facts* alleged concerning the website’s screening and removal of ads are that they were effective,  
11 *see* Fitchner Decl. at 6-7 (stating that he was unable to post ads with inappropriate terms,  
12 Mr. Ferrer removed ads as requested, and the website thereafter blocked reposting of the same  
13 ads). These are precisely the efforts the CDA was designed to protect, and the AG’s charges  
14 based on Agent Fichtner’s opinions about the “obvious nature” of escort ads or the efficacy of  
15 Backpage.com’s screening processes are precisely what the CDA prohibits. As *Cooper* held,  
16 “Backpage.com is the quintessential publisher contemplated by the CDA: it hosts and maintains  
17 an ongoing forum for user-generated postings—some paid, others free—that it shares with the  
18 public at large.” 939 F. Supp. 2d at 823. *See also Doe II v. Myspace Inc.*, 175 Cal. App. at 573

19 \_\_\_\_\_  
20 <sup>19</sup> Because there is no dispute here that third-party users created and posted the ads that are the  
21 premise of the AG’s charges, *People v. Bollaert*, 248 Cal. App. 699 (2016), is inapplicable.  
22 There, the Court of Appeal held that a website was not immune under Section 230 because it  
23 forced users to provide information that was itself unlawful and violated privacy rights of  
24 individuals whose compromising photos were posted by other users (*i.e.*, the website required  
25 users to provide names, locations and Facebook addresses of the persons photographed). *Id.* at  
26 833-34. In so doing, the court followed the narrow exception to Section 230 immunity discussed  
27 in *Roommates.com*, 521 F.3d 1157. *See Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1198  
28 (N.D. Cal. 2009) (*Roommates.com* “carved out only a narrow exception” that “turned entirely on  
the website’s decision to force subscribers to divulge the protected characteristics and  
discriminatory preferences as a condition of using its services.” (internal quotation marks  
omitted)); *see also Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009)  
(distinguishing *Roommates.com* because “[t]he Ninth Circuit repeatedly stated ... that the  
*Roommates.com* website *required* its users to provide certain information as a condition of its use  
....” (emphasis in original)).

1 (barring claims by four minors against social networking site where they met men who sexually  
2 assaulted them; plaintiffs wanted website “to ensure that sexual predators do not gain access to  
3 (i.e., communicate with) minors” and “[t]hat type of activity—to restrict or make available certain  
4 material—is expressly covered by section 230”).

5 This case does not present a close question. The AG’s abuse of prosecutorial powers is  
6 obvious because she has *admitted* Section 230 preempts state laws and precludes a state criminal  
7 prosecution of Backpage.com. With other state attorneys general, in 2013 she urged Congress to  
8 amend Section 230 because the law “prevents State and local law enforcement agencies from  
9 prosecuting” Backpage.com, noting the *McKenna* decision, which “held that the CDA preempts  
10 state criminal law.” MJN Ex. F. The AG knows full well that Section 230 precludes the charges  
11 alleged in the Complaint. Yet, she has brought them anyway, in a blatant misuse of prosecutorial  
12 authority. This is particularly egregious in the context of threatening a publisher with criminal  
13 penalties—coupled with arrest and incarceration to enforce the threats.

14 **D. The Complaint Does Not State Facts that Constitute Public Offenses under the**  
15 **Criminal Statutes Charged.**

16 Even setting aside that the AG’s prosecution is legally barred under the First Amendment  
17 and Section 230 of the CDA, the Court should grant the demurrer because the Complaint fails to  
18 allege any public offense. Indeed, the AG has failed to allege essentially all of the elements of the  
19 charges or any facts to support any claim.

20 As noted, the AG’s theory is that the state can prosecute a website (and individuals  
21 associated with the website in some way, no matter how attenuated) based on allegations that  
22 users posted content allegedly relating to unlawful conduct, regardless of whether the defendants  
23 knew of or participated in the unlawful activity. Every court that has considered this theory has  
24 rejected it.

25 For example, the court in *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F.  
26 Supp. 2d 1041 (E.D. Mo. 2011), rejected arguments that Backpage.com could be held liable “as an  
27 aider and abettor of minor sex trafficking.” *Id.* at 1053-54 (under 18 U.S.C. §§ 2, 2255). Noting  
28 that such a charge requires the government to prove that a defendant participated in a specific

1 unlawful venture and acted to make the venture succeed, the court held that accusations attacking  
2 the website fell well short of “the specific intent required for aiding and abetting.” *Id.* at 1054.

3 Sheriff Dart raised and lost a similar claim in *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961  
4 (N.D. Ill. 2009). The court rejected his argument that Craigslist violated criminal prostitution laws  
5 because it had an “adult services” category, holding this does not “cause” postings except “in the  
6 sense of providing a place where people can post,” and websites “are not culpable for ‘aiding and  
7 abetting’ their customers who misuse their services to commit unlawful acts.” *Id.* at 967, 969  
8 (“having an adult services category is not unlawful in itself nor does it necessarily call for  
9 unlawful content”).

10 More recently, the court in *Doe v. Backpage.com*, 104 F. Supp. 3d 149, held that  
11 accusations attacking the Backpage.com website could not establish “affirmative participation in  
12 an illegal venture” because having “an escorts section in a classified ad service, whatever its social  
13 merits, is not illegal” and other features of the website or allegations about its efforts to screen  
14 improper content could not be the basis for criminal liability. 104 F. Supp. 3d at 157. *See also*  
15 *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (noting that “[e]ven entities that know the  
16 information’s content do not become liable for the sponsor’s deeds,” and asking rhetorically:  
17 “Does a newspaper that carries an advertisement for ‘escort services’ or ‘massage parlors’ aid and  
18 abet the crime of prostitution, if it turns out that some (or many) of the advertisers make money  
19 from that activity?”). “A web host cannot be classified as an aider and abettor of criminal  
20 activities conducted through access to the Internet” any more so than a telephone company aids or  
21 abets the sale of tapes or narcotics sold by phone or the Postal Service aids and abets such sales  
22 delivered by mail. *Id.* Backpage.com simply cannot be subject to criminal liability as “an  
23 intermediary between the advertisers of adult services and visitors to [the] website.”  
24 *Backpage.com, LLC v. Dart*, 807 F.3d at 234.

25 Similarly, the U.S. Department of Justice has expressly acknowledged that federal sex  
26 trafficking laws do not impose criminal liability on websites for publishing third-party content that  
27 may concern illegal acts. The DOJ’s National Coordinator for Child Exploitation Prevention and  
28

1 Interdiction was asked in Congressional hearings: “[W]hat laws apply to Internet providers like  
2 craigslist that would make them criminally liable for the postings?” She responded:

3 I am not aware of any laws that would make them liable [for third-party postings],  
4 unless there was evidence that craigslist was a participant ... conspiring with those  
5 who were misusing their site, that is, knowingly conspiring to violate the laws. . . .  
6 [T]he standard for prosecution would be knowing or willful. ... I am not aware of  
7 anything that shows us that craigslist might be criminally liable. [A]t this point  
8 we have the proper tools. We have what we need to prosecute the guilty, that is,  
9 the people who are using the Internet.... And I don't think anyone ... here would  
10 propose closing the Internet.

11 *Domestic Minor Sex Trafficking: Hearing Before Subcomm. on Crime, Terrorism, & Homeland*  
12 *Security of the H Comm. on the Judiciary*, 111th Cong. 215-16 (2010).

13 In fact, when the U.S. Attorney for the Western District of Washington later launched a  
14 criminal investigation of Backpage.com, the federal court in that district quashed the grand jury  
15 subpoenas issued at the government’s behest. Backpage.com argued that the subpoenas and  
16 investigation violated the First Amendment, *see, e.g., Bursey v. United States*, 466 F.2d 1059,  
17 1087-88 (9th Cir. 1972) (“Were we to hold that the exercise of editorial judgments ... raised an  
18 inference that the persons involved in the judgments had or may have had criminal intent, we  
19 would destroy effective First Amendment protection ....”), were unreasonable and oppressive  
20 under Fed. R. Crim. P. 17, and reflected an improper motive rather than a legitimate investigation.  
21 The court’s orders remain sealed, but, as noted, the court quashed the government’s subpoenas,  
22 and the U.S. Attorney's Office then terminated its investigation.

23 ***1. The “Pimping” Allegations Against Mr. Ferrer Are Wholly Deficient.***

24 The allegations of the Complaint and incorporated declaration regarding all defendants are  
25 wholly deficient in that they allege nothing more than that they were associated with  
26 Backpage.com, which published and received \$79.60 in payment for ads from nine individuals  
27 who allegedly were involved in prostitution. The Complaint and declaration provide no  
28 allegations of any knowledge, involvement or participation by any of the defendants in any illegal  
conduct of any of the nine individuals.

First, with regard to the charges against Mr. Ferrer for pimping, the Complaint and  
declaration allege only that he is the CEO of Backpage.com, Fitchner Decl. at 2; has been the sole

1 named partner of Backpage.com’s parent company since late 2014, *id.* at 3; “runs the day-to-day  
 2 operations” of Backpage.com, *id.* at 4; was “copied on” Backpage.com’s responses to law  
 3 enforcement subpoenas, *id.*; had been the recipient of communications from the National Center  
 4 for Missing and Exploited Children (without mentioning whether this relates to Backpage.com’s  
 5 regular reporting to NCMEC of suspect ads), *id.* at 3-4; has “publicly acknowledged” that  
 6 “prostitution occurs on BACKPAGE” while acting to “mitigate[ ] criminal activity through a  
 7 screening process,” *id.*; cooperated and promptly acted to remove an ad that Agent Fitchner had  
 8 posted when he told Mr. Ferrer that he was “law enforcement” and had “identified a prostitution  
 9 ad,” *id.* at 6; and emailed a payment processor about whether banks might be concerned about  
 10 “sexy email address names” of customers, *id.* at 12.

11 Otherwise, Agent Fitchner describes information he and other DOJ personnel learned in  
 12 interviews of the nine individuals about *their* activities, *id.* at 7-11; *see also* Complaint at 4-9;  
 13 mentions unrelated “undercover operations” conducted by DOJ (*i.e.*, posting sting ads on the  
 14 website), *id.* at 4, and offers his opinion that “it [is] plain to any individual ... that BACKPAGE’s  
 15 ‘Escort’ ads are for prostitution,” *id.*

16 None of this shows or even alleges that Mr. Ferrer (or anyone at Backpage.com, for that  
 17 matter) had any connection to any ads of the nine individuals that are the premise for the criminal  
 18 charges. The AG alleges no facts that Mr. Ferrer ever saw any advertisements of these  
 19 individuals, much less that he knew any of them were acting as prostitutes, which is the central  
 20 element of Penal Code § 266h (liability applicable only to “any person who, knowing another  
 21 person is a prostitute ...”); *see also* CALCRIM 1150. Similarly, there is no allegation whatsoever  
 22 that Mr. Ferrer “derive[d] support or maintenance ... from the earnings or proceeds of [these]  
 23 persons’ prostitution,” or that he knowingly “solicit[ed] or receiv[ed] compensation for soliciting  
 24 [prostitution services] for [these] person[s].” Penal Code § 266h.<sup>20</sup> Nor does the AG assert any

25 <sup>20</sup> Penal Codes § 266h(a) provides:

26 [A]ny person who, knowing another person is a prostitute, lives or derives support  
 27 or maintenance in whole or in part from the earnings or proceeds of the person’s  
 28 prostitution, or from money loaned or advanced to or charged against that person  
 by any keeper or manager or inmate of a house or other place where prostitution  
 is practiced or allowed, or who solicits or receives compensation for soliciting for

1 allegations that Mr. Ferrer had any knowledge that the ads posted by the nine individuals were for  
 2 unlawful conduct or knew that the individuals who are the subject of Counts Two-Six were  
 3 minors, as is constitutionally required.

4 California law does not allow a charge or conviction under Penal Code § 266h without  
 5 proof that the defendant had knowledge that another person (from whom he obtained support) was  
 6 acting as a prostitute. *See Wooten v. Superior Court*, 93 Cal. App. 4th 422, 437 (2001) (reversing  
 7 trial court’s denial of motion to set aside information alleging pimping charges against strip club  
 8 owners where there was no showing they had knowledge that a dancer had offered to perform a  
 9 sex act; “pimping requires that a defendant know that another person is a prostitute”). So too, the  
 10 government’s obligation is to allege and prove the defendant’s knowledge of specific acts of  
 11 prostitution; allegations of “general knowledge” are not enough. *Id.* at 438 (rejecting argument  
 12 that strip club owners could be convicted of pimping or pandering based on “general awareness of  
 13 sex acts occurring at the club”).<sup>21</sup>

14 **2. The Conspiracy Charges Against Defendants Are Likewise Deficient.**

15 The Complaint’s charge of conspiracy to commit pimping against all three defendants,  
 16 Complaint at 1-4 (Count One), is also completely deficient under California law.

17 To convict on a charge of conspiracy, the government must prove that the defendant and  
 18 another person entered into an agreement with the specific intent to commit an offense, as well as  
 19 the specific intent to commit the elements of that offense, together with proof of the commission  
 20 of an overt act “by one or more of the parties to such agreement” in furtherance of the conspiracy.  
 21 *People v. Morante*, 20 Cal. 4th 403, 416 (1999) (quoting Penal Code § 184). The Complaint  
 22 alleges none of these elements, and the declaration offers no facts to support any conspiracy  
 23 charge.

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24  
 25 the person, is guilty of pimping, a felony, and shall be punishable by  
 26 imprisonment in the state prison for three, four, or six years.

27 <sup>21</sup> Count Five alleges attempted pimping in violation of Penal Code §§ 266h and 664. Complaint  
 28 at 6. This charge would require proof that the defendant had the specific intent to engage in  
 pimping. *People v. Toledo*, 26 Cal. 4th 221, 229-30 (2001).

1           Again, the Complaint and declaration do not purport to allege that the defendants knew  
2 about any of the supposedly improper advertisements before they appeared on Backpage.com, or  
3 that the ads concerned any illegal activity, or that defendants knew of and agreed to commit any  
4 crime. The allegations concerning Mr. Ferrer (discussed above) do not assert or suggest he  
5 entered into any agreement with anyone with the intent to commit a crime.

6           The allegations concerning Messrs. Lacey and Larkin are no better. The Complaint and  
7 declaration assert that these gentlemen founded Backpage.com in 2004 and remained controlling  
8 shareholders until 2012, when Backpage.com separated from its former parent company, Fitchner  
9 Decl. at 2; owned and participated in operating Backpage.com until late 2014, Complaint at 2,  
10 Fitchner Decl. at 3;<sup>22</sup> received communications from NCMEC, as did Mr. Ferrer, Fitchner Decl. at  
11 3-4; received “regular updates, correspondence, and meeting notices” from Mr. Ferrer, *id.* at 4;  
12 received “bonuses” in September 2014 (before they sold their interests in Backpage.com), *id.* at 4;  
13 and revenues from Backpage.com were once used to pay them salaries and bonuses, *id.* at 6.

14           Nothing in these meager alleged facts suggests participation in a criminal conspiracy.  
15 There is no alleged agreement to commit a crime, no suggestion that Mr. Lacey, Mr. Larkin or Mr.  
16 Ferrer intended to commit the crime of pimping, no contention that any man knew that any of the  
17 subject ads concerned prostitution or any illegal activity, and not even a hint that they knew  
18 anything about or had anything to do with the ads. Instead, the AG charges Messrs. Lacey and  
19 Larkin with a criminal conspiracy on the sole basis that they once owned Backpage.com. Such  
20 allegations are a far cry from meeting the statutory definition of conspiracy. *See Morante*, 20 Cal.  
21 4th at 416; *cf. Doe v. GTE Corp.*, 347 F.3d at 659 (“[Under] the ordinary understanding of  
22 culpable assistance to a wrongdoer,” the defendant must have “a desire to promote the wrongful  
23 venture’s success . . . . That web hosting services . . . may be used to carry out illegal activities does  
24 not justify condemning their provision whenever a given customer turns out to be crooked.”).

25 \_\_\_\_\_  
26 <sup>22</sup> The status of the defendants as corporate officers and shareholders is irrelevant. “It is well  
27 settled that ‘[a]n officer of a corporation is not criminally answerable for any act of a corporation  
28 in which he [or she] is not personally a participant.’” *Sea Horse Ranch, Inc. v. Superior Court*, 24  
Cal. App. 4th 446, 457 (1994) (alterations by *Sea Horse Ranch* court) (quoting *Otis v. Superior  
Court*, 148 Cal. 129, 131 (1905)).

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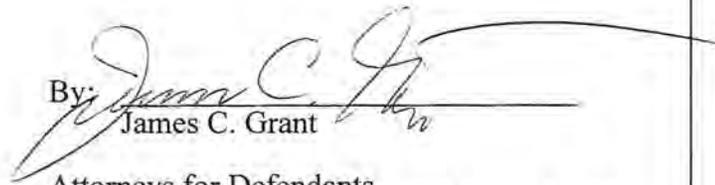
IV. CONCLUSION

This prosecution is patently improper, given the obvious disconnect between the charges in the Complaint and the factual allegations asserted by the AG. The state cannot marshal any facts even suggesting that the defendants committed any crime. The AG's prosecution tramples First Amendment rights and is flatly barred by Section 230, as she has admitted. Defendants' demurrer should be granted without leave to amend, and this proceeding should be swiftly terminated.

DATED: October 19, 2016

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By:   
James C. Grant

Attorneys for Defendants  
Carl Ferrer, Michael Lacey and James Larkin

# **EXHIBIT A**

1 KAMALA D. HARRIS  
Attorney General of California  
2 ROBERT MORGESTER  
Senior Assistant Attorney General  
3 RANDY MAILMAN  
Deputy Attorney General  
4 MAGGY KRELL  
Supervising Deputy Attorney General  
5 State Bar No. 226675  
6 1300 I Street, Suite 125  
P.O. Box 944255  
7 Sacramento, CA 94244-2550  
Telephone: [REDACTED]  
8 Fax: [REDACTED]  
9 *Attorneys for People of the State of California*

**FILED/ENDORSED**  
SEP 26 2016  
By: ~~M. Yarn~~ Deputy Clerk

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 IN AND FOR THE COUNTY OF SACRAMENTO

13 **PEOPLE OF THE STATE OF**  
14 **CALIFORNIA,**  
15 Plaintiff,  
16 v.  
17 1. **CARL FERRER**  
(DOB: [REDACTED]) (Xref # *5094010* )  
18 2. **MICHAEL LACEY**  
(DOB: [REDACTED]) (Xref # *5094013* )  
19 3. **JAMES LARKIN**  
(DOB: [REDACTED]) (Xref # *5094012* )  
20  
21 Defendants.

Case No.  
  
**CRIMINAL COMPLAINT**

22 I, the undersigned, say on information and belief, that in the County of Sacramento, State of  
23 California:

24  
25 **COUNT ONE**  
26 (Penal Code sections 182/266h, PIMPING CONSPIRACY)

27 On or between January 1, 2010 and September 26, 2016, in the County of Sacramento and  
28 throughout the state of California, Defendants FERRER, LACEY, and LARKIN did unlawfully

1 commit the crime of CONSPIRACY in violation of section 182(a)(1) of the Penal Code in that  
2 said Defendants did unlawfully conspire together with each other and with others whose identities  
3 are known and unknown, to commit the crime of pimping, in violation of section 266h of the  
4 Penal Code, a felony; and that pursuant to and for the purposes of carrying out the objectives of  
5 the aforesaid conspiracy, the said Defendants committed the following overt acts, throughout the  
6 alleged time period:

7 **Overt Act 1**

8 On or between January 1, 2010 and September 26, 2016, Defendants LARKIN and  
9 LACEY owned a website at www.Backpage.com, which provided online classified ad services.

10 **Overt Act 2**

11 On or between January 1, 2010 and September 26, 2016 Defendants LARKIN, LACEY,  
12 and FERRER operated Backpage.com.

13 **Overt Act 3**

14 On or between January 1, 2010 and May 2015, Defendants LARKIN, LACEY, and  
15 FERRER required users of Backpage.com to pay to post escort advertisements in the adult  
16 services section, unlike any other section of the website.

17 **Overt Act 4**

18 Defendant FERRER developed and oversaw a process to screen escort ads on  
19 Backpage.com.

20 **Overt Act 5**

21 Defendant FERRER directed the creation of two additional websites, EvilEmpire.com and  
22 BigCity.com.

23 **Overt Act 6**

24 Defendant FERRER used content from escort advertisements on Backpage.com to create  
25 advertisements on EvilEmpire.com and BigCity.com.

26 **Overt Act 7**

27 On or about late 2013, Defendant FERRER arranged for credit card transactions to be  
28 processed by Jetpay because financial institutions were blocking transactions with Backpage.com.

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**Overt Act 8**

Between October 2014 and May 2015, backpage accepted at least \$2,000,000.00 per month in payments from people posting adult section advertisements in California.

**Overt Act 9**

On or about September 10, 2014, Backpage.com received a credit card payment in the amount of \$20.60 for posting an escort advertisement in Sacramento County featuring minor A.C.

**Overt Act 10**

On or about August 19, 2014, Backpage.com received a credit card payment in the amount of \$12.00 for posting an escort advertisement in Los Angeles County featuring minor E.V.

**Overt Act 11**

On or about February 8, 2015, Backpage.com received a credit card payment in the amount of \$10.00 for posting an escort advertisement in Santa Clara County featuring minor L.F.

**Overt Act 12**

On or about July 25, 2015, Backpage.com posted an escort advertisement in Sacramento County featuring minor E.S.

**Overt Act 13**

On or about February 1, 2015, Backpage.com received a payment in the amount of \$10.00 for posting an escort advertisement in Los Angeles County featuring minor Z.G.

**Overt Act 14**

On or about October 7, 2012, Backpage.com received a credit card payment in the amount of \$7.00 for posting an escort advertisement in Sacramento County featuring A.H.

**Overt Act 15**

On or about July 30, 2014, Backpage.com received a payment in the amount of \$5.00 for posting an escort advertisement in Sacramento County featuring S.C.

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**Overt Act 16**

On or about August 19, 2014, Backpage.com received a credit card payment in the amount of \$12.00 for posting an escort advertisement in Los Angeles County featuring L.B.

**Overt Act 17**

On or about April 4, 2015, Backpage.com received a credit card payment in the amount of \$3.00 for posting an escort advertisement in Sacramento County featuring K.A.

**COUNT TWO**

**(Penal Code section 266h(b)(2), PIMPING A MINOR UNDER 16 YEARS OF AGE)**

For a further and separate cause of action, being a different offense from, but connected in its commission with, the charge set forth above, on or about and between September 1, 2014 through December 31, 2014, in the County of Sacramento, Defendant FERRER did unlawfully commit the crime of pimping of a minor, in violation of Penal Code section 266h(b), in that said Defendant, knowing A.C. a minor under 16 years of age, to engage in prostitution, did live and derive support and maintenance in whole or in part from the earnings and proceeds of said prostitution or from money loaned to or advanced to and charged against said prostitute by a keeper manager and inmate of a house and other place where prostitution was practiced or allowed or did unlawfully, knowing A.C., a minor under 16 years of age, to engage in prostitution, solicit and receive compensation for soliciting for said prostitute.

NOTICE: Conviction of this offense will require you to register pursuant to Penal Code section 290. Willful failure to register is a crime.

NOTICE: Pursuant to Penal Code sections 11166 and 11168, a Suspected Child Abuse Report (SCAR) may have been generated in this case. Penal Code sections 11167 and 11167.5 limit access to a SCAR. A court-issued protective order is necessary to obtain a copy of the report.

**COUNT THREE**

**(Penal Code section 266h(b)(2), PIMPING A MINOR UNDER 16 YEARS OF AGE)**

For a further and separate cause of action, being a different offense from, but connected in its commission with, the charge set forth above, on or about and between August 1, 2014 through

1 January 1, 2015, in the County of Los Angeles, Defendant FERRER did unlawfully commit the  
2 crime of pimping, in violation of Penal Code section 266h(a), in that said Defendant, knowing  
3 E.V., to be a prostitute, did live and derive support and maintenance in whole or in part from the  
4 earnings and proceeds of said prostitution or from money loaned to or advanced to and charged  
5 against said prostitute by a keeper manager and inmate of a house and other place where  
6 prostitution was practiced or allowed, or did unlawfully, knowing E.V., to be a prostitute, solicit  
7 and receive compensation for soliciting for said prostitute.

8 NOTICE: Conviction of this offense will require you to register pursuant to Penal Code  
9 section 290. Willful failure to register is a crime.

10 NOTICE: Pursuant to Penal Code sections 11166 and 11168, a Suspected Child Abuse  
11 Report (SCAR) may have been generated in this case. Penal Code sections 11167 and 11167.5  
12 limit access to a SCAR. A court-issued protective order is necessary to obtain a copy of the  
13 report.

#### 14 COUNT FOUR

(Penal Code section 266h(b)(2), PIMPING A MINOR UNDER 16 YEARS OF AGE)

15 For a further and separate cause of action, being a different offense from, but connected in  
16 its commission with, the charge set forth above, on or about and between January 1, 2015 through  
17 February 28, 2015, in the County of Santa Clara, Defendant FERRER did unlawfully commit the  
18 crime of pimping of a minor, in violation of Penal Code section 266h(b), in that said Defendant,  
19 knowing L.F., a minor under 16 years, to engage in prostitution, did live and derive support and  
20 maintenance in whole or in part from the earnings and proceeds of said prostitution or from  
21 money loaned to or advanced to and charged against said prostitute by a keeper manager and  
22 inmate of a house and other place where prostitution was practiced or allowed, or did unlawfully,  
23 knowing L.F., a minor under 16 years of age, to engage in prostitution, solicit and receive  
24 compensation for soliciting for said prostitute.

25 NOTICE: Conviction of this offense will require you to register pursuant to Penal Code  
26 section 290. Willful failure to register is a crime.

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1 NOTICE: Pursuant to Penal Code sections 11166 and 11168, a Suspected Child Abuse  
2 Report (SCAR) may have been generated in this case. Penal Code sections 11167 and 11167.5  
3 limit access to a SCAR. A court-issued protective order is necessary to obtain a copy of the  
4 report.

5 **COUNT FIVE**

6 **(Penal Code sections 266h(b)(2)/664), ATTEMPTED PIMPING OF A MINOR UNDER 16)**

7 For a further and separate cause of action, being a different offense from, but connected in  
8 its commission with, the charge set forth above, on or about and between July 1, 2015 through  
9 August 31, 2015, in the County of Sacramento, Defendant FERRER did unlawfully commit the  
10 crime of attempted pimping of a minor, in violation of Penal Code sections 266h(a)/664, in that  
11 said Defendant, knowing E.S., a minor under 16 years of age, to engage in prostitution, did live  
12 and derive support and maintenance in whole or in part from the earnings and proceeds of said  
13 prostitution or from money loaned to or advanced to and charged against said prostitute by a  
14 keeper manager and inmate of a house and other place where prostitution was practiced or  
15 allowed, or did unlawfully, knowing E.S., a minor under 16 years of age, to engage in  
16 prostitution, solicit and receive compensation for soliciting for said prostitute.

17 NOTICE: Conviction of this offense will require you to register pursuant to Penal Code  
18 section 290. Willful failure to register is a crime.

19 NOTICE: Pursuant to Penal Code sections 11166 and 11168, a Suspected Child Abuse  
20 Report (SCAR) may have been generated in this case. Penal Code sections 11167 and 11167.5  
21 limit access to a SCAR. A court-issued protective order is necessary to obtain a copy of the  
22 report.

23 **COUNT SIX**

24 **(Penal Code section 266h(b)(2), PIMPING A MINOR)**

25 For a further and separate cause of action, being a different offense from, but connected in  
26 its commission with, the charge set forth above, on or about and between June 1, 2015 through  
27 September 30, 2015, in the County of Los Angeles, Defendant FERRER did unlawfully commit  
28 the crime of pimping of a minor, in violation of Penal Code section 266h(b), in that said

1 Defendant, knowing Z.G., a minor, to engage in prostitution, did live and derive support and  
2 maintenance in whole or in part from the earnings and proceeds of said prostitution or from  
3 money loaned to or advanced to and charged against said prostitute by a keeper manager and  
4 inmate of a house and other place where prostitution was practiced or allowed, or did unlawfully,  
5 knowing Z.G., a minor, to engage in prostitution, solicit and receive compensation for soliciting  
6 for said prostitute.

7 NOTICE: Conviction of this offense will require you to register pursuant to Penal Code  
8 section 290. Willful failure to register is a crime.

9 NOTICE: Pursuant to Penal Code sections 11166 and 11168, a Suspected Child Abuse  
10 Report (SCAR) may have been generated in this case. Penal Code sections 11167 and 11167.5  
11 limit access to a SCAR. A court-issued protective order is necessary to obtain a copy of the  
12 report.

13 **COUNT SEVEN**  
14 **(Penal Code section 266h(a), PIMPING)**

15 For a further and separate cause of action, being a different offense from, but connected in  
16 its commission with, the charge set forth above, on or about and between April 28, 2014 through  
17 March 6, 2015, in the County of Sacramento, Defendant FERRER did unlawfully commit the  
18 crime of pimping, in violation of Penal Code section 266h(a), in that said Defendant, knowing  
19 A.H., to be a prostitute, did live and derive support and maintenance in whole or in part from the  
20 earnings and proceeds of said prostitution or from money loaned to or advanced to and charged  
21 against said prostitute by a keeper manager and inmate of a house and other place where  
22 prostitution was practiced or allowed, or did unlawfully, knowing A.H., to be a prostitute, solicit  
23 and receive compensation for soliciting for said prostitute.

24 **COUNT EIGHT**  
25 **(Penal Code section 266h(a), PIMPING)**

26 For a further and separate cause of action, being a different offense from, but connected in  
27 its commission with, the charge set forth above, on or about and between July 1, 2014 through  
28 August 31, 2015, in the County of Sacramento, Defendant FERRER did unlawfully commit the

1 crime of pimping, in violation of Penal Code section 266h(a), in that said Defendant, knowing  
2 S.C., to be a prostitute, did live and derive support and maintenance in whole or in part from the  
3 earnings and proceeds of said prostitution or from money loaned to or advanced to and charged  
4 against said prostitute by a keeper manager and inmate of a house and other place where  
5 prostitution was practiced or allowed, or did unlawfully, knowing S.C., to be a prostitute, solicit  
6 and receive compensation for soliciting for said prostitute.

7  
8 **COUNT NINE**  
9 **(Penal Code section 266h(a))**

10 For a further and separate cause of action, being a different offense from, but connected in  
11 its commission with, the charge set forth above, on or about and between August 1, 2014 and  
12 August 31, 2014, in the County of Los Angeles, Defendant FERRER did unlawfully commit the  
13 crime of pimping, in violation of Penal Code section 266h(a), in that said Defendant, knowing  
14 L.B. to be a prostitute, did live and derive support and maintenance in whole or in part from the  
15 earnings and proceeds of said prostitution or from money loaned to or advanced to and charged  
16 against said prostitute by a keeper manager and inmate of a house and other place where  
17 prostitution was practiced or allowed, or did unlawfully, knowing L.B. to be a prostitute, solicit  
18 and receive compensation for soliciting for said prostitute.

19  
20 **COUNT TEN**  
21 **(Penal Code section 266h(a))**

22 For a further and separate cause of action, being a different offense from, but connected in  
23 its commission with, the charge set forth above, on or about and between January 1, 2016 to June  
24 1, 2016 in the County of Sacramento, Defendant FERRER did unlawfully commit the crime of  
25 pimping, in violation of Penal Code section 266h(a), in that said Defendant, knowing K.A. to be a  
26 prostitute, did live and derive support and maintenance in whole or in part from the earnings and  
27 proceeds of said prostitution or from money loaned to or advanced to and charged against said  
28 prostitute by a keeper manager and inmate of a house and other place where prostitution was  
practiced or allowed, or did unlawfully, knowing K.A. to be a prostitute, solicit and receive  
compensation for soliciting for said prostitute.

1 NOTICE: Penal Code section 1203.065(a) prohibits a grant of probation for offenses  
2 charged in counts 2-10).

3 Pursuant to Penal Code section 1054.5(b), the People hereby informally request that  
4 defense counsel provide the People with discovery as required by Penal Code section 1054.3.

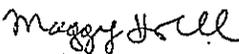
5 DECLARATION

6 Filed herewith and incorporated by reference is a declaration in support of arrest warrant. I  
7 declare under penalty of perjury, pursuant to Penal Code section 806, that the forgoing is true and  
8 correct.

9  
10 Dated: September 26, 2016

Respectfully Submitted,

11 KAMALA D. HARRIS  
12 Attorney General of California

13 

14  
15 MAGGY KRELL  
16 Supervising Deputy Attorney General  
Attorneys for People

17 SA2013311583  
18 32562042

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# **EXHIBIT B**

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SACRAMENTO

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

DECLARATION IN  
SUPPORT OF ARREST  
WARRANT AND  
WARRANT

vs.

CARL FERRER, MICHAEL LACEY, and JAMES LARKIN,

Defendants.

---

I, BRIAN FICHTNER, declare:

I am a Special Agent employed by the California Department of Justice (DOJ),  
and that I allege and state the following:

This Affidavit in support of arrest pertains to an ongoing investigation into CARL FERRER ("FERRER"), MICHAEL LACEY ("LACEY"), and JAMES LARKIN ("LARKIN"), collectively referred to as 'Defendants,' and the online advertising site known as www.backpage.com ("BACKPAGE").

Your affiant, a California Peace Officer per California Penal Code Section 830.1, asserts that there is probable cause to believe that between January 1, 2010 and September 28, 2016, FERRER, LACEY, and LARKIN received earnings from prostitution through the website they created and operated at www.backpage.com. For at least the last five years, Defendants have known that their website is the United States hub for the illegal sex trade and that many of the people who advertised for commercial sex on BACKPAGE are victims of sex trafficking, including children. This affidavit and accompanying complaint seek to arrest and charge Defendants FERRER, LACEY, and LARKIN with conspiracy to commit pimping (Penal Code §§ 182/266h) for their respective roles and stakes in operating BACKPAGE, and FERRER for pimping (Penal Code § 266h) minor victims A.C., E.V., L.F., E.S., Z.G., and adult victims A.H., S.C., L.B., and K.A. These victims represent a small fraction of the thousands of California-based victims exploited in ads reviewed in this investigation.

The relevant identifying information for the victims is contained in "Confidential Attachment" and is herein incorporated. Declarant requests that "Confidential Attachment" be ordered sealed pursuant to California Rule of Court Rule 243.1(d) in order to protect the confidential personal information of the above subject. (See Pen. Code, §§ 293.5 and 964.)

#### **BACKPAGE'S Operation**

In 2004, BACKPAGE was founded by LARKIN and LACEY, and FERRER managed the site's operation. In 2012, BACKPAGE separated from its parent company and LACEY and LARKIN remained controlling shareholders of BACKPAGE while FERRER became Chief Executive Officer (CEO).

BACKPAGE is similar to Craigslist.org in that it is an on-line general classified advertising site. The adult services section on BACKPAGE contains ads for prostitution, body rubs, massages, escort, and other sexual services for sale. Nearly naked persons in provocative positions are pictured in nearly every adult services advertisement on BACKPAGE, and the site charged a fee to the user to post advertisements for "escorts"

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and other similar “services.” This “fee to post” or payment system was restructured in July 2015 once credit card companies ceased doing business with BACKPAGE.

When the largest classified service, Craigslist.org, shut down its “Adult Services” category in 2012, “Adult” ads migrated to BACKPAGE, and BACKPAGE capitalized on this increased traffic by raising its fees. BACKPAGE also expanded operations, creating sites in hundreds of cities throughout the world, including over 30 cities in California.

In late 2014, FERRER bought BACKPAGE through two of his Delaware companies – CF Holdings and CF Acquisitions – and created BACKPAGE’s new parent company, the Netherlands-based UGC Tech Group C.V. (“UGC”). FERRER is the only named partner of UGC and remained the CEO of BACKPAGE. FERRER publicly described the sale as part of BACKPAGE’s international expansion.

Additionally, FERRER devised a way to promote BACKPAGE by creating other prostitution-related sites. BACKPAGE owns and operates EvilEmpire.com and Bigcity.com using content it developed from BACKPAGE users. According to internally records obtained via search warrant, this practice increased BACKPAGE’s share of the online sex advertising market.

As an example, Evilempire.com’s homepage purports to be an “escort phone number directory.” The site presents a series of photos, mostly featuring provocatively dressed females, with phone numbers listed. These photos are hyperlinked to posts containing common indicators of prostitution, such as donations associated with time periods, and each post includes a link to the associated BACKPAGE ad. The linked BACKPAGE ads include essentially identical information to the Evilempire.com posts, from the photos to the contact information. Evilempire.com offers no apparent way for users to submit content, indicating that all of the content was derived from BACKPAGE (in other words, a BACKPAGE escort directory). Evilempire.com functions as an additional platform for BACKPAGE Escort ads.

BACKPAGE acknowledges that pimps routinely pay BACKPAGE for ads trafficking children for sex. I have reviewed numerous communications wherein the National Center for Missing and Exploited Children (NCMEC), among others, inform

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LACEY, LARKIN, and FERRER of the high number of children exploited on BACKPAGE. In reviewing BACKPAGE's email I have also observed numerous law enforcement subpoenas and search warrants served on BACKPAGE for sex trafficking investigations and BACKPAGE's responses. These email responses include the requested copies of BACKPAGE's prostitution advertisement. FERRER was copied on these responses.

FERRER and other BACKPAGE representatives have also publicly acknowledged that ongoing prostitution occurs on BACKPAGE but claim to have mitigated criminal activity through a screening process. However, the obvious nature of the "Escort" ads on BACKPAGE makes it plain to any individual doing any form of screening that BACKPAGE's "Escort" ads are for prostitution. DOJ conducted undercover operations both posting "Escort" ads and arranging meetings with people advertised in the "Escort" section. Commercial sex was the only purpose of both buyers and sellers.

While FERRER currently runs the day-to-day operations for BACKPAGE, he and other high level personnel in BACKPAGE's structure report regularly to LARKIN and LACEY.

I reviewed emails and BACKPAGE financial records obtained via search warrant showing that LACEY and LARKIN regularly receive "bonuses" from BACKPAGE's bank accounts. For instance, in September 2014, LACEY and LARKIN each received a \$10 million bonus. Emails also show regular updates, correspondence, and meeting notices between all three Defendants.

#### **CAL DOJ Investigation**

In 2013, the California Department of Justice (DOJ) began investigating BACKPAGE. This investigation was sparked by reports from law enforcement agencies, the National Center for Missing and Exploited Children (NCMEC), and news stories about children who were repeatedly exploited for commercial sex on BACKPAGE. BACKPAGE has described itself as the second largest online classified advertising service in the country. I have learned that the majority of BACKPAGE's customers use

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the site's fee-based "Adult" section to post "Escort" ads that openly offer sexual, lewd acts for money and have involved individuals under 18 years of age.

Since 2012, the NCMEC has worked on more than 400 cases involving children sold for commercial sex on BACKPAGE. During this same time period, NCMEC has reported 2,900 instances to California law enforcement where suspected child sex trafficking occurred via BACKPAGE.

In May 2014, DOJ agents conducted an undercover sting operation targeting individuals being advertised in the Adult Escort section of BACKPAGE. The operation involved an undercover agent responding to Escort advertisements listed on BACKPAGE by calling the phone number listed in the ad. Throughout the duration of the operation, undercover agents arranged several "dates" with female "Escorts." Each "date" resulted with the "Escort" agreeing to meet the undercover agent in a hotel room. Once in the hotel room, and within a few minutes of arriving, each "Escort" began negotiating sex acts for money with the undercover agent. Based on this behavior, there was no mistaking that the sole purpose of the "Escort" ad posted on BACKPAGE was to offer sex for money. Each "Escort" was interviewed, but not arrested.

In March 2015, I created two undercover advertisements on the website BACKPAGE. One of the ads was posted in the "Escort" section and offered the service of adult companionship for money, the other ad was for the sale of a sofa and was posted in the "buy, sell, trade" section of BACKPAGE. The minimum fee to post the "Escort" ad was \$10.00. Posting the sofa was free of charge. BACKPAGE also offers the ability to upgrade an ad for an additional fee. I upgraded both ads, allowing the ad to be automatically reposted to the top of the page several times during the day. The total cost of the "Escort" ad with the upgrade was \$111.20. The total cost of the sofa ad with the same upgrade was \$1.22. Both of the ads were posted using the same undercover cell phone number. DOJ Special Agent (SA) Tera Mackey monitored the undercover cell phone. Within minutes of the "Escort" ad going live, SA Mackey began receiving calls and texts. SA Mackey told me she received hundreds of inquiries for the "Escort" ad, but received only one inquiry for the sofa. SA Mackey said all the calls and texts related to the "Escort" ad were requests for sexual acts in exchange for money.

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I paid for the undercover ads using a Union Bank credit card. Union Bank provided me with documents showing that the money from my credit card account went to Borgun H.F., an online payment service in Iceland. IA Robert Smith has reviewed internal BACKPAGE emails showing the transfer of monies from Borgun H.F. to BACKPAGE bank accounts in the United States. Revenue from BACKPAGE was used to pay salaries and bonuses to LACEY, LARKIN, and FERRER.

After letting the undercover ads run for approximately (ten )10 days, I decided to call BACKPAGE and ask them to remove it. My goal was to learn the process of removing an "Escort" ad from BACKPAGE that law enforcement identifies as an ad for prostitution. My first call was to Liz McDougal, BACKPAGE legal counsel, but I received her voicemail. My next call was to FERRER. When FERRER answered the phone. I identified myself as law enforcement. I told him that I had identified a prostitution ad in the "Escort" section of BACKPAGE (I did not tell FERRER that I posted the ad) and that I was seeking a way to remove the ad. FERRER initially directed me to report the ad by email to [abuse@BACKPAGE](mailto:abuse@BACKPAGE), but then he asked for the name of the ad. I provided him with the Post ID number for the ad. It was apparent that FERRER was looking up the "Escort" ad on his computer because I could hear him typing as I provided him with the Post ID number. He explained that if I report the ad to [abuse@BACKPAGE](mailto:abuse@BACKPAGE), I should include my phone number in order to confirm that I was law enforcement. He mentioned that they have been "spoofed" by individuals claiming to be law enforcement when they were not.

FERRER told me he located a second ad from the same "user," but it was for a "sofa" and did not appear to be illegal. FERRER said he would personally report the ad and "lock it out." He said it would be removed by the end of the day. A short time later, I searched the website to try and locate the "Escort" ad and the sofa ad, but both ads had been removed. I tried to repost the "Escort" ad, but Backpage.com did not allow it to go through.

In May 2015, I created another BACKPAGE "Escort" ad with the goal of trying to post an ad containing sexual verbiage indicative of a prostitution ad. I used the words "cum" and "quickie" in the ad, but when I tried to post it, I received a message that told

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me those words were “forbidden in this category.” I had to change the words to “come” and “quick session” in order for the ad to be accepted.

BACKPAGE may have restricted the use of the sexual verbiage in my undercover ad, but when I conducted a random search of the BACKPAGE escort section, I viewed numerous “Escort” ads that contained photos and videos that depicted full nudity. Many of these nude ads were simulating and/or performing sexual acts. BACKPAGE states they moderate their ads and implement a policy against posting obscene or lewd and lascivious graphics and photographs, however, my personal observations have indicated otherwise.

### **BACKPAGE Victims**

In October 2015, I interviewed A.H, 27-year-old woman, who was identified as posting advertisements for commercial sex in the escort section of BACKPAGE. A.H. was one of the individuals contacted and detained during the DOJ sting operation. A.H. admitted to posting the advertisements in the escort section of BACKPAGE for the purpose of offering sex for money. A.H. told me that she began posting escort advertisements on BACKPAGE after Craigslist.org shut down their escort section and MyRedbook.com, a prostitution website, was shut down by the federal government. A.H. told me she received numerous calls from her ads and each time she met the person it ended with her providing sex for money. A.H. told me she used the money she made directly from prostitution to pay for the posting fee of her BACKPAGE advertisements. A search for A.H.’s ads revealed continuous postings for a roughly two-year period, including after the DOJ operation. These ads were posted in California cities, including Sacramento, Los Angeles, Monterey, and Modesto.

On October 13, 2015, I interviewed E.S., a 15-year-old female, who has been identified as a victim of sex trafficking. She told me she was forced into prostitution at the age of 13 years old by her pimp. She eventually testified against her pimp, but once she was introduced to “The Life” of prostitution, she began finding her own way of making money. She started with the website MyRedbook.com until it was shut down, and then she immediately began using BACKPAGE. She described BACKPAGE as a

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website that “profits off of women and men.... whether you are wanting to get out there and make some money, or you are being forced to do it.” She stated, “I mean really, coming from someone my age, there is too much access, like it’s too easy for people to get on it and post an ad.” A search for her ads found postings in California, including Sacramento, the East Bay, and Fresno.

On October 22, 2015, I interviewed A.C., a 16 year old female who has been identified as a victim of sex trafficking. A.C. told me she was forced into prostitution when she was 12 or 13 years old. A.C. said the first website she used to post prostitution ads was Craigslist.org. She then used MyRedbook.com until it was shutdown by law enforcement. A.C. said she began using BACKPAGE in late 2013 or early 2014. A.C. said she posted her own ads on BACKPAGE and used a prepaid “Green Dot” credit card to pay the fees. As soon as she posted her ad, she would begin getting calls. A.C. said the purpose of her ads was to make money by finding “dates” and providing sex for money. She said she averaged 10-12 “dates” a day. A.C. said the majority of her “dates” resulted in having sex for money, but not all. Sometimes she said she would arrange a date just to rob them. A.C. told me she used the money she made from her “dates” to repost her prostitution ad on BACKPAGE. I asked A.C. if she knew of any policy restrictions for advertising on BACKPAGE. A.C. said she knew there was a restriction about posting adult ads on their website. I asked if she ever encountered a problem posting in the adult section on BACKPAGE as a minor. She said, “Well no, because how are they supposed to know I’m underage?” A search for her ads found Sacramento postings.

On January 8, 2016, SA Mackey interviewed S.C., a 29-year-old female, who has been identified as a victim of sex trafficking. She was posted on BACKPAGE for the purpose of engaging in sex for money. She described BACKPAGE as a known prostitution site. She said BACKPAGE is an escort service to solicit sexual encounters and the majority of the victims using BACKPAGE have a pimp because there is not enough time to continually update the advertisement and work at the same time. She said all the calls she got from her BACKPAGE ad were for sexual services. She said she paid for her advertisements using pre-paid credit cards. She stated she had two children

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during the time she was being trafficked and never learned how to change a diaper or take care of a child because she was continually forced to engage in commercial sex.

On April 18, 2016, DOJ SA Reye Diaz interviewed Z.G., a 17 year old female who has been identified as a victim of sex trafficking. She was advertised multiple times on BACKPAGE. Z.G. told SA Diaz that the website did not restrict her from posting the prostitution ads even though she was a minor. She said all her ads resulted in her exchanging sex for money. She said she would use the profits from having sex to pay for more advertisement on BACKPAGE. She said she would purchase a "Green Dot Visa" from a CVS store and use this card to pay the fee to BACKPAGE that is required to post the ad. A search for her ads found postings for California cities, including San Gabriel, San Diego, San Jose, and Los Angeles.

On August 18, 2016, I interviewed L.B., a 23-year-old female, who has been identified as a victim of sex trafficking. L.B. told me she began using BACKPAGE in 2012 after being introduced to the prostitution lifestyle by her sister who was also prostituting. I asked her to describe BACKPAGE and she described it as a "prostitution thing.... all prostitutes go on there to sell their bodies." She told me she posted advertisements in the "Escort" section of BACKPAGE for the sole purpose to solicit calls from individuals to have sex for money. I asked her if she ever used BACKPAGE for anything other than posting ads in the "Escort" section and she said "no." She said all of the individuals she met from her ad ended with her having sex for money. L.B. talked about having to pay BACKPAGE to post her advertisements. She said she used the money from having sex to pay for posting or reposting her advertisements. L.B. said she did not have any other income except for the money she made from prostitution. Postings of her ads were found in California cities, including Los Angeles, Long Beach, and the Inland Empire.

L.B. told me she advertised on BACKPAGE with E.V., a 13-year-old female, who had been previously reported as a runaway to the NCMEC multiple times. In 2014, E.V. was identified as a sex trafficking victim during a prostitution sting operation where she encountered an undercover officer who was negotiating sex acts for money. The

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undercover officer met E.V. through their BACKPAGE "Escort" ad. L.B.'s and E.V.'s "Escort" ad was posted in Long Beach and Los Angeles, CA.

On August 11, 2016, SA Tera Mackey and I interviewed K.A., a 21 year old female that is believed to be a victim of sex trafficking. K.A. said she was 18 years old when she started posting "Escort" ads on BACKPAGE. K.A. said that 80-90% of the people she met through her ad ended up paying to have sex with her. K.A. said she made up to \$1,000.00 a day and would use a portion of that money to repost her ads. K.A. said she had a boyfriend who knew she was posting ads on BACKPAGE, but denied that he was involved. K.A. told me she has paid for most of her escort ads using Bitcoin. K.A. explained that she would buy Amazon gift cards and then sell them on the website Paxful.com for Bitcoin. K.A. said she learned about BACKPAGE from friends who also posted "Escort" ads. K.A. has only used BACKPAGE to post "Escort" ads. K.A. said she knows people can use BACKPAGE to sell other things, but she has never known anyone to use BACKPAGE for anything other than the "Escort" section. I asked K.A. if BACKPAGE ever prevented or interfered with her posting "Escort" ads on its website and she said no. K.A. said she knew that BACKPAGE did not allow certain words, language, or nudity in the ads so she avoided those things. Her ads were found posted in Sacramento, CA.

On March 11, 2015, L.F., a 15-year-old female, testified in a California Superior Court as a victim of sex trafficking. I reviewed the transcripts of her testimony. L.F. testified that she went on-line and met a 32-year-old male adult, identified as Patrick SIMMONS, in November 2014 and began "sexting" with him. She said they met in person for the first time in January 2015 and began having a sexual relationship. L.F. said their relationship evolved to the point where she began prostituting for SIMMONS to make him money. L.F. testified she created an escort advertisement for SIMMONS to post on BACKPAGE. L.F. testified that the escort ad was set up for her to meet individuals for "dates" that resulted in her having sex for money. L.F. said the money she made from these dates went directly to SIMMONS. L.F. testified that SIMMONS became physically violent and controlling. She described how SIMMONS would hit her and force her to have sex with him. In February 2015, L.F. and SIMMONS were caught

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during a prostitution sting by the San Jose Police Department after an undercover officer called the phone number in L.F.'s escort ad and arranged a "date." SIMMONS was subsequently charged with pimping, pandering, and human trafficking. I have been able to identify four (4) BACKPAGE escort ads for L.F. that were posted in February 2015 in which BACKPAGE charged a total of \$35.00 for the posting fees. The ad locations include the California city, Fresno and the East Bay area.

I was able to obtain transaction records through BACKPAGE verifying that each of the above victims, with the exception of E.S., made payments to BACKPAGE for their advertisements.

### **BACKPAGE Finances**

DOJ Investigative Auditors Darrel Early and Robert Smith examined BACKPAGE's internal financial records and revenue spreadsheets, which we obtained via search warrant. Their examination focused on BACKPAGE revenue that was attributable to California-based sales.

The BACKPAGE revenue report obtained includes California-based revenue covering the time period of January 2013 through May 2015, broken down into six regions. BACKPAGE internal records break out the percentage of revenue attributable to Adult Services. From January 2013 through March 2015, 99% of BACKPAGE's gross revenue (worldwide income) was directly attributable to Adult ads. In April 2015, this percentage dropped to 97% and in May 2015, it further dropped to 90%. The timing of this decrease coincides with the decision of credit card companies like American Express to stop processing BACKPAGE payments.

During this 29-month period, BACKPAGE's gross monthly income from California rose \$1.5 million/month to \$2.5 million/month. During this reporting period (Jan 2013 – May 2015), BACKPAGE self-reported \$51,723,615.23 in revenue derived from California. Approximately \$50,920,739.36 of this derived from adult entertainment advertising (98.43%). Further examination of BACKPAGE records demonstrated that California, during this reporting period (Jan 2013 – May 2015), was responsible for 14.95% of BACKPAGE's worldwide income.

BACKPAGE internal records further break down the revenue that is attributable to adult entertainment. Adult ads include the subcategories of: Adult Jobs; Body Rubs; Datelines; Domination; Female Escorts; Fetish; Male Escorts; Strippers; and Transsexual Escorts. BACKPAGE records state that the worldwide revenue for these subcategories for June 22-28, 2015 was \$3,137,646.28. Revenue attributable to California for this week was 17% of the total revenue or \$545,952.54. Female Escorts generated 72.8% of this revenue; Body Rubs 18.8%; and Transsexual Escorts 5.5%. All other subcategories were less the 1%.

Until July 2015, BACKPAGE required payment for ads featuring content related to commercial sex acts, particularly in the Escort category. These payments could be made by credit card. During the same time, BACKPAGE allowed users to post ads for free in non-Adult sections of the site, such as furniture sales.

To avoid scrutiny by banks or other credit card processors BACKPAGE controlled the nature of the customer information provided to the payment processor. In a May 2015 email I reviewed, FERRER asked this question of one of his payment processing partners:

*“Do you think we should not send email addresses to processors/banks when we do transactions?”*

*Example of customer email addresses:*

*sexygirl69[REDACTED].com*

*porn\_star [REDACTED].com*

*Naked\_goddess [REDACTED].com*

*We could send an account number instead? Do the banks see these email addresses when we send the transaction to the processor? We think for example Chase might block transactions for their card holders based on overtly sexy email address names...*

In July 2015, major credit cards stopped processing BACKPAGE transactions and BACKPAGE began to allow users to post Adult ads for free. Nonetheless, BACKPAGE has continued to collect fees for promoted or sponsored ads and created complex payment processing procedures to avoid detection from financial institutions.

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## Conclusion

Under California law, it is a felony to either solicit on behalf of a prostitute, or derive any income, from the earnings of a prostitute.<sup>1</sup> (Penal Code section 266h, Pimping.) Section 266h also has a special provision detailing added penalties for the pimping of a minor, depending on whether the victim is under 16 or between 16 and 18 years old.<sup>2</sup>

BACKPAGE's escort services section essentially operates as an online brothel. Transactions consist of a user paying a fee to BACKPAGE. In exchange for the fee, BACKPAGE advertises on behalf of and solicits clients for prostitution services. The ads unequivocally sell sexual services, featuring extremely provocative pictures and lightly veiled or coded sexual terminology. BACKPAGE receives a fee for each ad.

FERRER derived support from the earnings of victims A.C., E.V., L.F., Z.G., A.H., S.C., L.B., and K.A., who were sold for sex through BACKPAGE while FERRER served as CEO overseeing every aspect of the company, including law enforcement correspondence related to sex trafficking, moderation of ad content, and expansion and development.

Based on the aforementioned information, I believe there is probable cause to believe that FERRER, LACEY, and LARKIN, committed the following crimes: conspiracy in violation of Penal Code section 182, (a)(1), a felony; pimping in violation

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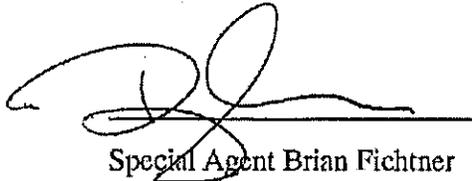
<sup>1</sup> “[D]eriving support with knowledge that the other person is a prostitute is all that is required for violating the section in this manner. No specific intent is required.” (*People v. McNutty* (1988) 202 Cal.App.3d 624, 630.)

<sup>2</sup> Mistake of age is not a defense to this offense; the age only affects the severity of the sentence not the criminality of the conduct. (*People v. Branch* (2010) 184 Cal.App.4th 516.)

of Penal Code section 266h, subdivision (a), a felony; pimping a minor in violation of Penal Code section 266h, subdivision (b)(2), a felony; and attempted pimping of a minor in violation of Penal Code sections 266h, subdivision (b)(2) and 664, a felony; and that an arrest warrant be issued for Defendants for the relevant felony violations charged in the accompanying Felony Complaint.

- Carl FERRER: [REDACTED]; Texas Driver's License: [REDACTED]; SSN: [REDACTED]; Residence on file with Texas [REDACTED].
- James Anthony LARKIN: [REDACTED]; Arizona Driver's License [REDACTED]; SSN: [REDACTED]; Residence on file with Arizona [REDACTED].
- Michael Gerard LACEY: [REDACTED]; Arizona Driver's License [REDACTED]; Residence on file with Arizona [REDACTED].

I declare under penalty of perjury, under the laws of the State of California, that all facts contained in this affidavit is true and correct to the best of my knowledge and belief.

  
Special Agent Brian Fichtner

# **EXHIBIT C**



b. All identifying documents, images real or forged relating to BACKPAGE.COM, its parent companies, or companies that have an invested interest in BACKPAGE.COM, CARL FERRER, JIM LARKIN, and MICHAEL LACEY.

c. Cellular telephones and SIM not known to your Affiant at this time that are registered and or subscribed to CARL FERRER, and any other memory cards or equipment related to the cellular telephone, believed to be in the care custody or control of CARL FERRER, the suspected party.

d. All communication content, including email, subscriber information, text (SMS/MMS or app chats), notes, or voicemail including attachments, source destination addresses, and time and date information, and connection logs, images and any other records that constitute evidence and instrumentalities of Texas Penal Code 34.02 – Money Laundering based on violations of California Penal Code sections 647(b) – Prostitution, 266(h) – Pimping, 182-185 – Conspiracy.

e. All notes, correspondence, documentation pertaining to BACKPAGE.COM its parent companies or companies that have an invested interest in BACKPAGE.COM;

f. Records identifying articles of personal property tending to show the identity of person(s) in ownership, or person(s) exercising dominion and control of said premises, including rent receipts, telephone bills, utility bills, mail, photographs, keys, and locks.

g. Any and all computer hardware that consists of all equipment, which can collect, analyze, create, display, convert, store, conceal, or transmit electronic data. Hardware includes (but is not limited to), servers, any motherboards, any data-processing devices such as, but not limited to chips, memory, and self-contained “laptop” or “notebook” computers; internal and peripheral storage devices (such as fixed hard disk drives, external hard disk disks, optical storage devices (DVD/CD), and flash media storage devices).

h. Any cellular phone, smartphone, or any electronic storage or Internet-connected device capable of storing information sought by this search warrant, belonging to CARL FERRER, BACKPAGE.COM, its employees, its parent companies or companies that have an invested interest in BACKPAGE.COM.

i. Any and all computer software which consists of any digital information which can be executed by a computer and any of its related components to direct the way they work, including programs to run operating systems, applications (like word-processing, graphics, or spreadsheet programs), utilities, compilers, interpreters, and communication programs, including software used to test chips and software to direct laser equipment. Software can be stored in electronic, magnetic, optical, or other digital form.

j. Any and all computer-related documentation described as written, recorded, printed, or electronically stored material, which explains or illustrates how to configure or use computer hardware, software or other related items.

k. Any and all digital storage device passwords and other data security devices designed to restrict access to or hide computer software, documentation or data, consisting of hardware, software or other programming code. Data security hardware may include encryption devices, chips and circuit boards. Data security software or digital code may include programming code that creates "test" keys or "hot" keys, which perform certain preset security functions when touched. Data security software or code may also encrypt; compress, hide or "booby-trap" data to make it inaccessible or unusable, as well as reverse the process to restore it.

To facilitate this search, you are **AUTHORIZED** the collection of evidentiary photographs of the inside and outside of the said suspected place, to search said suspected persons, to search said suspected place and premises for said property, seize the same, and transport said property to the Texas Attorney General's Office, 300 W. 15th Street, Austin, Travis County, Texas for purposes of safekeeping, scientific analysis, and completion of any investigation or proceedings related to the activities described in the Affidavit upon which the foregoing warrant was issued. Digital forensics investigator are granted authorization to examine, make duplicate images/copies of the above-mentioned electronic media and to determine if evidence of the offenses enumerated above are contained therein. Evidence copies of the items relating to these offenses will be created and retained for further proceedings.

Further, you are **ORDERED**, pursuant to the provisions of Article 18.10, Texas Code of Criminal Procedure, to retain custody of any property seized pursuant to this Warrant, until further order of this Court or any other court of appropriate jurisdiction shall otherwise direct the manner of safekeeping of said property.

You are further **ORDERED** to give notice to this Court, as a part of the inventory to be filed subsequent to the execution of this Warrant, and as required by Article 18.10, T.C.C.P., of the place where the property seized hereunder is kept, stored and held.

Herein fail not, but have you then and there this Warrant within three days, exclusive of the day of its execution, with your return thereon, showing how you executed the same.

ISSUED THIS THE 6<sup>th</sup> day of October, A.D., 2016, at 7:57 o'clock A  
M. to certify which, witness my hand this day.

  
DISTRICT COURT JUDGE,  
DALLAS COUNTY, TEXAS

Burns (DCJ)