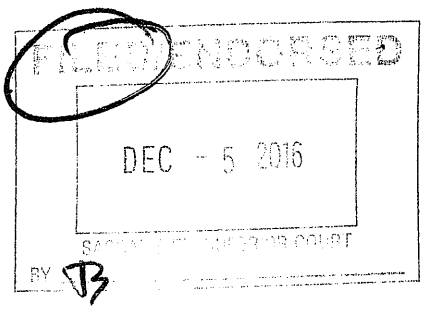

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

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

Defendants.

Case No. 16FE019224, Dept. No. 61

DEFENDANTS' RESPONSE TO ATTORNEY GENERAL'S SUPPLEMENTAL BRIEF OPPOSING DEMURRER
[California Penal Code § 1004]

Hearing Date: N/A
Dept.: 61
Judge: Hon. Michael G. Bowman
Trial Date: N/A

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I. INTRODUCTION

The November 16, 2016 Tentative Ruling reflects that the Court correctly understands Section 230, 47 U.S.C. § 230, and its important protections of free speech on the Internet. The "People's Supplemental Brief," ("Supp. Br."), shows the AG does not get it, and instead seeks to misconstrue the law to continue the baseless prosecution in this case.

The AG first tries to avoid Section 230 by contending Backpage.com is an "information content provider" because it established other websites that reposted user-submitted content. Republishing content in this way is common, Backpage.com users expressly consent to it, and, as the Court correctly observed before, such "republication [is] not content creation." Tentative Ruling at 7. Application of Section 230 depends on who created *the specific content at issue*, not whether an online provider created some other content. It remains undisputed that all of the ads about the nine individuals that are the basis for the AG's charges were created by third-parties and *not* by Backpage.com or Defendants. The AG cannot defeat Section 230 immunity by alleging an operator was a "content provider" merely because it set up a website—such a theory would destroy Section 230 and the protections Congress provided.

The state's strained view of Section 230 is underscored by its second argument, that it can pursue its charges by alleging Backpage.com violated the nine individuals' rights of publicity by reposting photographs they submitted. State intellectual property claims are also preempted under Section 230(e)(2). Regardless, even if someone else might assert a tort claim outside of Section 230, that does not give the AG carte blanche to assert criminal claims for pimping here. No case has ever accepted the theory the AG suggests—*i.e.*, that if Section 230 may not apply to one claim, it does not apply to *any* claims. Again, the AG's illogic would make Section 230 a nullity.

Overall, the AG's supplemental brief disregards the Tentative Ruling and misreads the case law applying Section 230 in this prosecution of Defendants for their association with an online publisher. The AG's theme is the same as before: she claims all escort ads are for prostitution; Backpage.com received payments for escort ads; and, therefore, without more, Defendants are guilty of pimping-related offenses. The Court correctly rejected this theory, noting that it contradicts many prior cases:

> As alleged here, the prostitution took place as a result of an advertisement placed by a third party. Backpage's decision to charge money to allow a third-party to post content, as well as any decisions regarding posting rules, search engines and information on how a user can increase ad visibility are all traditional publishing decisions and are generally immunized under the CDA. In short, the victimization resulted from the third-party's placement of the ad, not because [of] Backpage profiting from the ad.

Tentative Ruling at 5. The AG's supplemental brief offers nothing to respond to Court's accurate summary of the law. She relies on inapposite cases that have nothing to do with online publishers or the free speech protections of Section 230.

Enforcing Section 230 immunity is appropriate at the demurrer stage, because the statute's language demonstrates that it is a "foreclosure from prosecution." Tentative Ruling at 1. The state insists the case should proceed to a preliminary hearing—that it should be allowed another bite at the apple to try to avoid Section 230 and come up with some basis to show viable claims. Enough is enough. Section 230 must be applied at the earliest possible opportunity to protect website operators from costly and protracted legal battles—and in this case to halt further stigma and repercussions from outstanding, baseless criminal charges. The Complaint should be dismissed now.[1]

II. ARGUMENT

A. The AG's Attempt to Avoid Section 230 by Labeling Defendants "Content Providers" Is Disingenuous, Irrelevant and Wrong Under the Law.

The state argued before that Section 230 immunity should not apply because they alleged Backpage.com itself created content by "develop[ing] ... related sites of EvilEmpire.com and BigCity.com." Opp. at 16. The Court fully addressed this argument, Tentative Ruling at 6-7, explaining the case law holding that a website may fall outside of Section 230 if it *requires* users to post unlawful content, *e.g.*, *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008), or retains third-parties to illegally obtain information

[1] Defendants focus here on Section 230, as the Court premised its Tentative Ruling on the statute and the AG's supplemental brief purports to address Section 230 only. Defendants still maintain the AG's Complaint should be dismissed under the First Amendment and because it does not state grounds to charge a public offense under Cal. Penal Code §§ 182, 266h, and 1004, *see* Demurrer at 8-14, 21-26, and reserve all arguments on these grounds.

for a website to publish, *e.g.*, *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1192, 1199-1200 (10th Cir. 2009).

The AG ignores the Court's discussion of the law, citing only one sentence stating generally that "immunity is removed when the service provider affirmatively acts to create the offensive content." Supp. Br. at 3 (quoting Tentative Ruling at 4). The AG does not mention the Court's conclusion that, based on the Complaint's allegations and the admitted facts, EvilEmpire.com and BigCity.com "at most, republished material," and "republish[ing] material that was created by a third-party [is] not content creation." Tentative Ruling at 7 (citing *Barrett v. Rosenthal*, 40 Cal. 4th 33, 63 (2006)).

The state first contends that *People v. Bollaert*, 248 Cal. App. 4th 699 (2016), is the "only ... controlling authority," but then essentially acknowledges that case does not support its position. As explained before, *see* Demurrer at 20, n.19, *Bollaert* found that a website operator was not immune under Section 230 because it forced users to provide private information about compromising photos of others they uploaded to the website—the names, addresses and Facebook pages of the individuals in the photos—without their consent. 248 Cal App. 4th at 833-34. Because the website *required* unlawful information, it fell within the narrow exception to Section 230 immunity recognized by *Roommates.com*. *See* Tentative Ruling at 6 (discussing *Roommates.com*). The state does not explain how the holding in *Bollaert* supports its position, and indeed acknowledges that *Bollaert* turned on the fact that the website there required unlawful content. Supp. Br. at 3. Plainly, Backpage.com did not require users to submit any content of any kind, and certainly did not require unlawful content. Ultimately, the AG effectively concedes *Bollaert* is inapposite by pivoting to say that it "did not suggest that these were the only ways to create or develop content." *Id.*

The AG then levels new allegations concerning BigCity.com and EvilEmpire.com in a misguided effort to cast Defendants as "content creators" beyond the protections of Section 230. The AG's accusations are contradictory, unsupported and in many respects disingenuous. They also contravene Section 230 and are irrelevant for several reasons, most importantly because they have nothing to do with the third-party content at issue in this case.

Setting aside the hyperbole,[2] the fact allegations in the AG's brief and the accompanying Declaration of Bassem Banafa ("Banafa Decl.") are few: Backpage.com established two affiliated websites, BigCity.com (launched in October 2013) and EvilEmpire.com (April 2015). The AG recognizes that listings and ad content on BigCity.com and EvilEmpire.com came from user-submitted ads on Backpage.com. *See* Complaint at 2; Fitchner Decl. at 3; Supp. Br. at 5 ("BigCity profiles [came from] likenesses and information from Backpage.com … ads"); Tentative Ruling at 7 (noting AG's admissions that content on the EvilEmpire "was taken from ads placed [on] Backpage," was "essentially identical" to the ads placed by third-parties on Backpage, and "EvilEmpire was an 'additional platform for Backpage Escort ads'"). The AG cannot take back these admissions now.

BigCity.com was designed as a mobile application (similar in format to Tindr), featuring photos submitted by users and very brief text excerpted (automatically) from their ads. *See* Banafa Decl. ¶¶ 8, 9 & Ex. A. EvilEmpire.com reformatted users' Backpage.com escort ads to organize them as a phone number directory, including photos and text excerpted from the Backpage ads and links to those ads. *Id.* ¶ 24. The AG does not dispute (now or before) that Backpage.com did not create any of this content, but merely reformatted and republished it on other sites.[3]

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[2] The AG's conclusory pejoratives, repeated throughout the supplemental brief, are entirely unsupported by the materials the AG has provided as supposed evidence. None of the exhibits to the AG's brief or the Banafa Declaration say or remotely suggest anything to support the AG's assertions that the affiliated websites were designed to "conceal illegality" or to "expand [a] pimping operation" or to further "dominance as an online brothel." *See* Supp. Br. at 6-7. Indeed, the AG's characterizations are so incorrect and unsupported in so many ways that they cannot all be addressed here (additional examples are provided below). Yet, they call into question, again, the AG's good faith in this action.

[3] Two accusations in the Banafa Declaration deserve brief mention, although they are baseless (and, perhaps for that reason, the state does not mention or rely upon them in is brief). Mr. Banafa characterizes listings on BigCity.com as "fake profiles" created by Backpage.com. *See, e.g.*, Banafa Decl. ¶¶ 12, 13, 18, 19. The documents he attaches as purported support for his characterization do not say *anywhere* that Backpage.com ever created fake listings on BigCity.com or any website. In fact, Mr. Banafa cites to communications from the period when Backpage.com was brainstorming about the design and possible features of the BigCity mobile app and was working on mockups of the app. *See, e.g.*, Banafa Decl. Exs. A, B, E. To suggest that Backpage.com created "fake ads" by doing pre-launch mockups is disingenuous. Separately, Mr. Banafa asserts Backpage.com "added new information" to BigCity profiles by including headings such as "Interested in Men" or "Interested in Women," which he admits are "in

The Tentative Ruling is correct in stating that "republish[ing] material that was created by a third party" is "not content creation" and "[r]epublication is entitled to immunity under the CDA." Tentative Ruling at 7. As the Court noted, the California Supreme Court so held in *Barrett v. Rosenthal*, 40 Cal. 4th 33, 62-63 (2006) ("Congress has comprehensively immunized republication"). This is also the consensus of courts across the country. *See, e.g.*, *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270–71 (9th Cir. 2016) ("Simply put, proliferation and dissemination of content does not equal creation or development of content."); *Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311, 1320 (M.D. Fla. 2015) (website's reposting of portions of user posts via Twitter as a "teaser" or preview of the posts and "[t]rimming [them] to fit within Twitter's character limit" did not make the website an "information content provider" or preclude Section 230 immunity); *Novins v. Cannon*, 2010 WL 1688695, at *2 (D.N.J. Apr. 27, 2010) ("[a]s multiple courts have accepted, there is no relevant distinction between [an online provider] who knowingly allows content to be posted to a website [and one] who takes affirmative steps to republish another person's content; CDA immunity applies to both" and "it does not matter *how* Defendants republished the ... statements"); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 295–96 (D.N.H. 2008) (website immune under Section 230 for reposting a portion of a user profile to an affiliated website, because Section 230 "immunity depends on the source of the *information*" which came from a third party).

Otherwise, the state offers conclusory characterizations about what it contends is the intent and design of the BigCity and EvilEmpire websites, again disregarding the case law under Section 230 rejecting identical theories. On the whole, the AG's theory is that the two websites were

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line with" the "purpose of [each] profile." Banafa Decl. ¶ 19. However, it is well established that websites may classify user submissions; this is an editorial function protected by Section 230. *See Roommates.com*, 521 F.3d at 1172 ("The mere fact that an interactive computer service "classifies user characteristics ... does not transform [it] into a 'developer' of the 'underlying misinformation.'"). Regardless, as discussed below, even if a user might assert some claim against Backpage.com on the basis that it misclassified her ad on BigCity (*e.g.*, as "Interested in Men" if, for example, she was actually interested in women), that would not eliminate Section 230 immunity for all other claims or charges. As is true of all of the AG's "content creator" allegations, the state cannot base criminal charges for pimping and conspiracy on the premise that some user might have a tort claim that her ad was classified improperly.

designed to encourage prostitution ads. *See, e.g.*, Supp. Br. at 6 (alleging the "specific intent [was] to further Defendants' conspiracy to pimp"). But Section 230 cannot be avoided on such an "encouragement" theory. *See Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 414 (6th Cir. 2014) ("an encouragement test would inflate the meaning of 'development' [*i.e.*, whether a website created or developed content] to the point of eclipsing the immunity from publisher liability that Congress established"); *accord Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 163 (D. Mass. 2015), *aff'd sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016). The AG cannot cast Defendants as "content creators" simply because they designed and launched websites; if that were the rule, Section 230 would be a dead letter.[4] *See Hill v. StubHub, Inc.*, 727 S.E.2d 550, 561-62 (N.C. App. 2012) (rejecting argument that StubHub website "essentially ensured that unlawful content would be posted," noting that an "'entire website' approach [is] fatally flawed" under Section 230). As the Court has recognized, the AG's allegations about Defendant's motivations are irrelevant; they cannot alter the fundamental premise that the state is asserting charges based on Backpage's "decisions as a publisher with respect to third-party content." Tentative Ruling at 5 (quoting *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016)). In short, the AG's supplemental brief offers more of the same—arguments and aspersions to plead around Section 230 that this Court and many others have rejected before.[5]

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[4] It bears noting that *nothing* in the AG's supplemental brief or supporting materials mentions Messrs. Lacey or Larkin or that they personally participated in *anything* the AG alleges. As noted before, *see* Demurrer at 26, n.22, criminal charges may not lie against corporate officers and shareholders on a vicarious liability theory. *See Sea Horse Ranch, Inc. v. Superior Court*, 24 Cal. App. 4th 446, 457 (1994).

[5] For example, the AG asserts that Backpage.com created EvilEmpire.com to "improve Backpage.com's search results." Supp. Br. at 4. While none of the "evidence" the AG offers states this (Mr. Banafa only says this is what he "believes," *see* Banafa Decl. ¶ 25), even if that were true, it does not make Backpage.com or Defendants "content creators." Online providers' actions to increase visibility through search engines are common and are "publishing decisions … immunized under the CDA." Tentative Ruling at 5; *see also Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011) (website's actions to "appear higher in search engine results list … do not render [it] an information content provider"); *Asia Econ. Inst. v. Xcentric Ventures LLC*, 2011 WL 2469822, at *6 (C.D. Cal. May 4, 2011) (website's manipulation of webpage code to make certain reports more visible in online search results immune under Section 230); *Small Justice LLC v. Xcentric Ventures LLC*, 2014 WL 1214828, at *7 (D. Mass. Mar. 24,

Most importantly, the AG misses the fundamental premise of Section 230 that liability (and, conversely, immunity to online providers) turns on who created the *content at issue* that allegedly caused harm and that is the basis for the claims alleged. Simply alleging that a website creates content in some fashion cannot overcome Section 230 immunity, as all websites create content in that they design and offer features for submitting and publishing content. As the Court of Appeal explained in *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (2002):

> [T]he fact appellants allege eBay is an information content provider is irrelevant if eBay did not itself create or develop the content for which appellants seek to hold it liable. ... The critical issue is whether eBay acted as an information content provider with respect to the information that appellants claim is false or misleading.

Id. at 833 n.11. *Every case* interpreting Section 230 is in accord. Website providers are immune for all content created by third-parties; they may be held liable and outside of Section 230's protections only as to specific content they created or developed that is the basis for the claims at issue:

2014) ("merely endeavoring to increase the prominence of Xcentric's site among Google's search results does not make Xcentric an information content provider under the CDA").

The AG also asserts the "intention [of the BigCity website] is plain" and, according to the AG, supposedly illicit, based on the site's rules and policies that users cannot advertise sex acts for money and ads that contained images of minors must be removed. *See* Supp. Br. at 6 (here again, the state misstates the materials it purports to rely upon, which do not state that "only ... 'unquestionable'" photos of minors were to be removed, *compare* Ex. 9 (describing numerous rules for moderation of user submissions to BigCity.com)). As this Court and others have held, posting rules are also part of "traditional publishing decisions" fully protected by Section 230 immunity. *See* Tentative Ruling at 5; *Jane Doe*, 817 F.3d at 22 ("We hold that claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1).").

Further in the vein of attempting to evade Section 230 immunity based on aspersions, the AG suggests there was something improper about Backpage.com's submission of the BigCity mobile app to Apple. Supp. Br. at 5. Here again, the AG grossly misstates the supporting materials it provides. The AG cites an email stating that Apple's rejection was not "too surprising" and asserts this was "of course because they [Backpage.com] generated the content—not real users." Supp. Br. at 5. Neither this email exchange nor anything the AG has provided says this—Backpage.com never created any of the listings on BigCity.com. The email the AG references actually states that Apple's initial rejection of the BigCity mobile app was not surprising because Apple enforces strict rules about adult or sexually explicit content. *See* Supp. Br., Ex. 8. The AG should be bounded by its obligations not to misrepresent facts or evidence to the Court.

> The case law confirms that the immunity analysis turns on who was responsible for the specific harmful material at issue, not on whether the service provider was responsible for the general features and mechanisms of the service or other content … that might also have appeared on the service.

Doe v. Bates, 2006 WL 3813758, at *16–17 (E.D. Tex. Dec. 27, 2006) ("the plain language of Section 230 dictates an analysis that focuses on whether the particular injurious 'information' giving rise to the claims was provided by the service provider or by 'another information content provider'"); *accord Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (immunity premised on the " portion of the statement or publication at issue"); *Roommates.com*, 521 F.3d at 1180 (same); *Jones*, 755 F.3d at 408 (same); *FTC v. Accusearch, Inc.*, 570 F.3d at 1197 ("The question remains whether Accusearch was … responsible for the development of the specific content that was the source of the alleged liability" (internal quotation marks omitted)); *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1051 (E.D. Mo. 2011) (same). The law is clear—when "a third party willingly provides the essential published content, the interactive service provider receives full immunity." *Carafano*, 339 F.3d at 1124.[6]

Thus, the AG's accusations about BigCity.com and EvilEmpire.com are not only baseless, they are irrelevant. The AG's Complaint asserts charges based on ads posted by nine individuals (the putative "victims") on Backpage.com and the $79.60 the website received for these ads—supposedly compensation for pimping. *See* Complaint at 3-4. Regarding the EvilEmpire and BigCity websites, the Complaint alleges only that Mr. Ferrer "directed the creation" of the sites, "us[ing] content from escort advertisements on Backpage.com." *Id.* at 2. Despite the three-year investigation the AG's office purportedly has conducted, it did not assert in the Complaint or the supporting Fitchner Affidavit that any listings about the nine individuals ever appeared on the EvilEmpire or BigCity websites. *See* Tentative Ruling at 4, 7 (noting "there are no allegations that the victims' advertisements were listed on any site except for Backpage.com" but proceeding to

[6] *See also Beckman v. Match.com*, 2013 WL 2355512, at *4 (D. Nev. May 29, 2013) ("Whether a website is an 'information content provider' turns on whether the website 'created or developed' the particular information or content alleged to have resulted in the harm at issue."), *aff'd in relevant part*, 2016 WL 4572383 (9th Cir. 2016); *S.C. v. Dirty World, LLC*, 2012 WL 3335284, at *4 (W.D. Mo. Mar. 12, 2013) (rejecting allegations about "the general structure and operation of the Website" because "the CDA focuses on the specific post at issue").

discuss that any such republication would be irrelevant to Section 230 immunity). Mr. Banafa asserts now that he found listings on these sites for some of the individuals, *see* Banafa Decl. ¶ 30, although he provides nothing to support this, nor does he indicate when or where listings appeared or what they said. But, none of this matters, because the AG has never alleged that anything ever happened as a result of any such listings, or most importantly, that Defendants ever knew anything about the activities of the alleged victims or knowingly republished their listings on BigCity.com or EvilEmpire.com to solicit or participate in prostitution. The Complaint and the AG's charges are wholly premised on ads that appeared on Backpage.com, not listings that appeared somewhere else. *See* Tentative Ruling at 5 (noting the alleged "victimization" resulted from third-party ads on Backpage.com). The AG cannot plead around Section 230 by claiming that an online provider "created content" by establishing another website that has nothing to do with the charges alleged.[7]

No case has ever accepted this theory, and the AG cites none. To contend that a website loses Section 230's protections on the basis of allegations that it has created content somewhere, somehow, albeit unrelated to the specific content for the claims at issue would destroy Section 230 and its purposes.

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[7] The AG also asserts that, in reposting listings on BigCity.com, Backpage deleted references to "donations," and this allegedly reflected users' "implied endorsement" and the "transformative nature" of the sites. Supp. Br. at 7. This is another instance in which the AG's office offers no support for its bare accusations. *See, e.g., id.* at 5 (contending that some Backpage ads included disclaimers about "donations, but not citing or providing any support for this claim); *id.* at 6 (asserting that some ad for "Z.G." on Backpage.com requested a "donation," but providing no support for this either). Regardless, BigCity was designed as a mobile app, and automatically excerpting photos and minimal text from users' Backpage.com posts to fit the mobile app format was not nefarious nor was it "content creation." *See Roca Labs*, 140 F. Supp. 3d at 1320 (trimming user posts for Twitter did not make website an information content provider). Here, the AG cites *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011), and *Perkins v. Linkedin Corp.*, 53 F. Supp. 3d 1222 (N.D. Cal. 2014), but those cases are also inapplicable. In *Fraley*, for example, the plaintiffs claimed that Facebook misappropriated their names and personal information by creating "sponsored stories" posted to their friends' pages whenever they "liked" a company or product for any reason. *Id.* at 790. On a motion to dismiss, the court held that Facebook could be a content provider because it created and posted the sponsored stories, which were paid advertisements, adding company logos, and thereby indicating that plaintiffs endorsed the advertisers. 830 F. Supp. 2d at 801-803. *See also Perkins v. Linkedin*, 53 F. Supp. 3d at 1246-49 (Linkedin could be treated as a content provider for creating and sending successive "reminder" emails without permission to users' contacts pressing them to join as members of the website).

B. The AG Cannot Avoid Section 230 to Support Criminal Charges Based on Allegations that Users Might Assert Tort Claims.

The AG also tries to end-run Section 230 by claiming the law "does not apply because Defendants violated the victims' rights of publicity." Supp. Br. at 8. This too is a transparent effort to misconstrue Section 230 by suggesting that if an individual might pursue a private tort claim, the statute's immunity and preemption of state criminal laws somehow does not apply.

The state contends "Defendants violated the intellectual property rights" of "the victims" "whose likenesses they took from Backpage ads and used on either Big City or Evil Empire," supposedly without consent. *Id.* The state provides no factual support for its argument, either in its declaration or in supporting exhibits. Further, the AG notably fails to mention that users posting on Backpage.com accept the website's Terms of Use, by which they assign all intellectual property rights and agree that their photos and content may be reposted.[8]

Even if some user might assert a state-law right-of-publicity claim against Backpage.com, such a claim would also be preempted by Section 230. While the CDA provides an exemption for claims "pertaining to intellectual property," 47 U.S.C. § 230(e)(2), this applies only to alleged violations of *federal* intellectual property laws, not state laws. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1108, 1118-19 (9th Cir. 2007). The CDA's preemption applies to "any number of [state] laws that could be characterized as intellectual property laws: trademark, unfair competition, dilution, right of publicity and trade defamation, to name just a few." *Id.* at 1119 n.5. The Ninth Circuit so ruled because, "[a]s a practical matter, inclusion of rights protected by state

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[8] *See, e.g.*, http://sacramento.backpage.com/classifieds/TermsOfUse ("Any ads or messages that you post, transmit, or otherwise make available for viewing on public areas of the Site will be treated as non-confidential and non-proprietary to you. You understand and agree that any such ads and messages may be used by the Site or our affiliates, without review or approval by you, for any purpose whatsoever, and in any medium, including our print media, if any. You grant the Site (and our affiliates) the irrevocable right to use and/or edit your ads and messages, without review or approval by you, for any purpose whatsoever, including, without limitation, reproduction, disclosure, transmission, publication, broadcast, posting, and advertising in any media in perpetuity without notice or compensation to you. … In posting content on the Site, you grant the Site, and its owners and licensees, the right to use, reproduce, distribute, translate, modify, adapt, publicly perform, publicly display, archive and create derivative works from the posted content."). *See also* https://web.archive.org/web/20120107004547/http://www.backpage.com/classifieds/TermsOfUse (Backpage.com Terms of Use in effect on January 2, 2012).

law within the 'intellectual property' exemption would fatally undermine the broad grant of immunity provided by the CDA." *Id.*[9]

Regardless of these proscriptions, the state's assertion that individuals might assert private tort claims does not support in any way its purported criminal charges in this case. The state's argument is again premised on the flawed premise that if someone may assert some claim outside of Section 230, then *no claims are preempted* by the CDA. But that plainly is not the law. *Cf. Roommates.com*, 521 F.3d at 1173-74 (although online provider was not immune for claims regarding a portion of website requiring users to submit discriminatory preferences, it was immune from claims based on the "additional comments" section of the site).[10] Even assuming any of the nine individuals have viable right-of-publicity claims, at most *they* might be able to assert those claims in a civil action against Backpace.com—but that would not give them rights to assert other claims, much less give the State the right to prosecute the individual Defendants for criminal charges that *are* preempted by the CDA. The state cannot bootstrap its criminal charges against the Defendants in this way. The hypothetical civil claims the state posits provide no support for its claims that the Defendants committed the crime of pimping or conspired to do so, nor any basis for taking the state's criminal charges outside of the CDA's preemption.

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[9] The Ninth Circuit's holding that state intellectual property claims are preempted has been followed in many subsequent cases concerning California law. *See, e.g., Free Kick Master LLC v. Apple Inc.*, 140 F. Supp. 3d 975, 983 (N.D. Cal. 2015) ("Plaintiff's argument about the 'intellectual property' exception is also without merit. The Ninth Circuit has held that state intellectual property claims against service providers are also precluded by CDA § 230."); *Joude v. WordPress Found.*, 2014 WL 3107441, *7 (N.D. Cal. 2014) ("Because computer service providers in this circuit are entitled to immunity from state intellectual property claims, including the right of publicity, Automattic enjoys immunity from all state claims treating [it] as a publisher, including Plaintiffs' allegation of misappropriation of likeness."); *Perfect 10, Inc. v. Giganews, Inc.*, 2013 WL 2109963, at *15 (C.D. Cal. 2013) (holding that claims under California law for violation or individuals' rights of publicity were precluded under Section 230).

[10] The cases cited by the state do not compel a contrary result. In *Jane Doe*, the First Circuit dismissed the individual plaintiffs' intellectual property claims on the merits—assuming, without deciding, that the claims would have been within the scope of the intellectual property exemption of the CDA. 817 F.3d at 26. The AG's citation to *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008), is of no moment, because that case simply disagreed with the Ninth Circuit and other courts' application of Section 230 as regards California and other states' intellectual property laws.

C. The AG's Charges Treat Defendants As the Publisher of Third-Party Content.

In the final section of its supplemental brief, the state rehashes its contention that its criminal charges do not treat Defendants as publishers or speakers of third party content. In so doing, the state avoids the Court's Tentative Ruling and the case authority directly on point, *see* Tentative Ruling at 4-5, and instead cites cases that have nothing to do with online publishing and, indeed, predate the Internet and Section 230 by decades.

The AG's supplemental brief largely just repeats the theme that all escort ads are not "legitimate" because, according to the state, "the ads' overwhelming use is prostitution." Supp. Br. at 12. This would no doubt come as a surprise to the seven courts that have held that escort ads on Backpage.com are legal and protected speech under the First Amendment and Section 230.[11] The state also does not explain why California cities such as Sacramento can legitimately license and regulate "escorts," *see* Sacramento City Code § 5.04.060, yet all escorts who advertise on Backpage.com are illegitimate "prostitutes."

The cases the state offers now provide no support for its position. The AG cites *People v. Lauria*, 251 Cal. App. 2d 471 (1967), as supposedly "provid[ing] a legal framework for cases where the defendant profits from illegal activity by charging for an ostensibly legitimate service," Supp. Br. at 11, but that case actually disallowed a prosecution for pimping. In *Lauria*, the state asserting pimping conspiracy charges against the owner of a telephone messaging service used by prostitutes. The AG claims that *Lauria* shows "[t]he key to attaching criminal liability [is] the defendant's knowledge," *id.* at 11, but the court in that case emphasized that, to prove conspiracy, the government must show *both* knowledge of illegal activity *and* intent to further the criminal activity. Although the state established that the defendant knew some of his customers were

[11] *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016); *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 (D.N.J. Aug. 20, 2013); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013), *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); *M.A. ex rel. P.K. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011); *see* Demurrer at 10-12 (discussing these cases).

prostitutes (and he admitted to engaging in prostitution with one), the trial court set aside the indictment as lacking probable cause and Court of Appeal affirmed:

> [T]here is nothing in the furnishing of telephone answering service which would necessarily imply assistance in the performance of illegal activities. Nor is any inference to be derived from the use of an answering service by women, either in any particular volume of calls, or outside normal working hours.

251 Cal. App. 2d at 479.

The AG also purports to rely on *People v Tipton*, 124 Cal. App. 2d 213 (1954), a case involving a defendant who, as the state explains, "lived across the hall … from a minor who engaged in prostitution to feed her heroin addiction [and] gave all her earnings to [the] defendant … in exchange [for] heroin." Supp. Br. at 12. The state fails to mention, however, that the state proved the defendant knew the minor was a prostitute and had specifically "arranged with her that if she would turn over her earnings to him from her prostitution he would furnish her with narcotics." 124 Cal. App. 2d at 218. It is impossible to see how the AG believes *Tipton* has any bearing on this case, when the state cannot even show that Defendants had any knowledge that the nine alleged "victims" ever advertised on Backpage.com, much less that their escort ads may have been for prostitution. And, more to the point, *Tipton*, *Lauria*, and the other cases the AG cites have nothing to do with online publishers or the free speech protections of Section 230 and the First Amendment.

The crux of the AG's argument now—as it has been from the outset—is that the state can advance pimping-related charges based on allegations that Defendants knew or should have known that some users have posted ads for prostitution on Backpage.com. *See* Supp. Br. at 10 ("Defendants' culpability stems from their knowledge, general and direct, of victim's commercial sex …."). But this theory of inferential "knowledge" to support criminal charges is flatly wrong under the First Amendment, the CDA, and Penal Code § 266h.

Under the First Amendment, the state has it backwards—the government can never presume that speech is unlawful, but must prove the specific speech it seeks to restrict or punish was, in fact, unlawful. *See* Demurrer at 12; *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir. 1972) ("The Government has it backwards. All speech, press, and associational relationships are

presumptively protected by the First Amendment; the burden rests on the Government to establish that the particular expressions are outside its reach."); *see also Smith v. California*, 361 U.S. 147 (1959) (to prosecute a publisher or distributor, government must prove defendant's scienter that specific speech was unlawful); *Castro v. Superior Court*, 9 Cal. App. 3d 675 (1970) (when charges involve First Amendment interests, the state cannot establish a criminal conspiracy based on circumstantial evidence that unlawful conduct occurred); Demurrer Reply at 8-9.

Under the CDA, "[i]t is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech" to defeat Section 230 immunity. *Universal Commc'n Sys, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007). And, this is so regardless of whether a website allegedly has general knowledge of illegality of third-party content or receives notice that specific content is unlawful. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (online provider immune even though plaintiff provided notice that content was false and harmful). "Subjecting service providers to notice liability would defeat 'the dual purposes' of section 230, by encouraging providers to restrict speech and abstain from self-regulation." *Barrett*, 40 Cal. 4th at 45 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997)).

And, even setting aside the free speech protections of the First Amendment and Section 230, a prosecution under Penal Code § 266h cannot be based on generalized knowledge that offers or acts of prostitution may have occurred. *Wooten v. Superior Court,* 93 Cal. App. 4th 422, 437 (2001) ("pimping requires a defendant know that another person is a prostitute"); *see also* Demurrer at 25.

What is clear is that the state's bald, unsupported assertion that Section 230 does not immunize the Defendants in this case if they allegedly should have known that prostitutes use Backpage.com is plainly wrong. Backpage is "an intermediary between the advertisers of adult services and visitors to [the] website." *Dart*, 807 F.3d at 234. There can be no "affirmative participation in an illegal venture" here because "an escorts section in a classified ad service, whatever its social merits, is not illegal." *Doe*, 104 F. Supp. 3d at 157.

The state fares no better with its ancillary argument that Section 230 is inapplicable because Backpage.com earned revenues from ads, and, the state insists, Defendants therefore allegedly sought to maximize profits. As the Court said: "Whatever Backpage's motivations, those motivations do not alter the fact that the complaint premises liability on the decisions that Backpage is making as a publisher with respect to a third party." Tentative Ruling at 5 (quoting *Jane Doe*, 817 F.3d at 21). Section 230 immunity extends to all traditional publisher functions, including "accepting payment for services." Tentative Ruling at 4 (citing *Fields v. Twitter, Inc.*, 2016 WL 6822065, at *7 (N.D. Cal. Nov. 18, 2016)). "[T]o find Backpage to be not immune from suit based on ... allegations about how it structured its website in order to increase its profits would be to create a for-profit exception to Sec. 230's broad grant of immunity. This the court may not do." *M.A.*, 809 F. Supp. 2d at 1050.

The AG's charges patently are based on the fact that Backpage.com publishes escort ads, which the state contends are not "legitimate" and further contends that receiving payment for the ads constitutes "pimping." The AG's Complaint is based on publishing. The AG's charges against Defendants are based on the fact that they are (or once were) affiliated with an online publisher. The state cannot pretend that this case does not concern online publishing or does not implicate Section 230 or free speech rights.

III. CONCLUSION

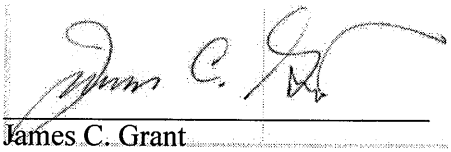
As with its initial response to the demurrer, the AG is silent as to why, if a "receiving earnings" theory of prosecution supposedly overrides CDA immunity, she signed a letter to Congress three years ago urging that Section 230 be amended so that the states could prosecute Backpage.com. Penal Code § 266h was on the books then; Backpage.com received payments for escort ads at the time; yet the AG said she had no authority to prosecute because of the preemptive effect of Section 230. Nor does the state explain why no state prosecutor anywhere has ever brought a criminal case against Backpage or any other web host on the pimping theory set forth in the Complaint. The answer is simple: Under the clear authority interpreting Section 230 (which the Court explained in its Tentative Ruling), the state's theory to avoid immunity and pursue this prosecution is absurd on its face.

The Court's Tentative Ruling was correct in its interpretation of Section 230. Section 230 forecloses prosecution in this case. The AG's supplemental brief offers nothing to the contrary. Defendants respectfully request that the Court sustain the demurrer, dismiss all charges in this case, exonerate the bail bond, and take such other actions as necessary to end and remedy the AG's baseless prosecution.

DATED: December 5, 2016

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: 
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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Davis Wright Tremaine, LLP, Suite 2400, 865 South Figueroa Street, Los Angeles, California 90017-2566.

On December 5, 2016, I served the following document: **DEFENDANTS' RESPONSE TO ATTORNEY GENERAL'S SUPPLEMENTAL BRIEF OPPOSING DEMURRER** by electronic mail on each addressee named below as follows:

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☐ (VIA U.S. MAIL) I placed such envelope(s) with postage thereon fully prepaid for deposit in the United States Mail in accordance with the office practice of Davis Wright Tremaine LLP, for collecting and processing correspondence for mailing with the United States Postal Service. I am familiar with the office practice of Davis Wright Tremaine LLP, for collecting and processing correspondence for mailing with the United States Postal Service, which practice is that when correspondence is deposited with the Davis Wright Tremaine LLP, personnel responsible for delivering correspondence to the United States Postal Service, such correspondence is delivered to the United States Postal Service that same day in the ordinary course of business.

☒ (ELECTRONIC MAIL) – I served a true and correct copy by electronic delivery pursuant to C.C.P. 1010.6, calling for agreement to accept service by electronic delivery, to the interested parties in this action as indicated above.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on December 5, 2016, at Los Angeles, California.

Ellen Duncan
Print Name

Ellen Duncan
Signature