James C. Grant (admitted *pro hac vice*)
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101
Telephone: (206) 622-3150
Facsimile: (206) 757-7700
Email: jamesgrant@dwt.com

Counsel for Defendants Carl Ferrer, Michael Lacey and James Larkin

Cristina C. Arguedas (SBN 87787)
Ted W. Cassman (SBN 98932)
ARGUEDAS CASSMAN & HEADLEY LLP
803 Hearst Ave
Berkeley, CA 94710
Telephone: (510) 845-3000
Facsimile: (510) 845-3003
Email: arguedas@achlaw.com
cassman@achlaw.com

Counsel for Defendants Michael Lacey and James Larkin

Tom Henze (admitted *pro hac vice*)
Janey Henze Cook (SBN 244088)
HENZE COOK MURPHY PLLC
4645 N. 32nd St., Suite 150
Phoenix, AZ 85018
Telephone: (602) 956-1730
Facsimile: (602) 956-1220
Email: tom@henzecookmurphy.com
janey@henzecookmurphy.com

Counsel for Defendant Carl Ferrer

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

REPLY IN SUPPORT OF DEFENDANTS' DEMURRER
[California Penal Code § 1004]

Hearing Date: November 16, 2016
Time: 1:30 p.m.

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

Additional Counsel:

Don Bennett Moon (admitted *pro hac vice*)
500 Downer Trail
Prescott, AZ 86305
Telephone: (928) 778-7934
Email: don.moon@azbar.org

Counsel for Defendants Michael Lacey and James Larkin

Robert Corn-Revere (admitted *pro hac vice*)
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW, Suite 800
Washington, D.C. 20006
Telephone: (202) 973-4200
Facsimile: (202) 973-4499
Email: bobcornrevere@dwt.com

Rochelle L. Wilcox (SBN 197790)
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111
Telephone: (415) 276-6500
Facsimile: (415) 276-6599
Email: rochellewilcox@dwt.com

Counsel for Defendants Carl Ferrer, Michael Lacey and James Larkin

DAVIS WRIGHT TREMAINE LLP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

I. INTRODUCTION

The Attorney General's Opposition to the Demurrer ("Opp.") seeks to avoid the obvious problems under the First Amendment and CDA of prosecuting an online publisher of third-party speech. The AG misstates the law, ignores the actual allegations of the criminal Complaint she has lodged, and is glaringly silent as to her 2013 admission to Congress that she has no authority to prosecute Backpage.com.

Seeking to sidestep the First Amendment, the AG repeatedly states that the pimping and conspiracy charges she asserts against Defendants concern only conduct and have nothing to do with speech. But the *conduct* the AG has alleged as grounds for criminal charges is that third-party users submitted ads that were posted on Backpage.com and paid $79.60 for doing so, *i.e.*, that Backpage.com acted as an online publisher. The AG concedes that neither posting the ads nor profiting from them constitutes pimping, Opp. at 9, but the Complaint offers no factual allegations that Defendants did *anything else* except publish the ads and receive payment. First Amendment law is clear that the state cannot punish a publisher absent proof he knew the specific speech that is the basis for criminal charges was unlawful. Equally clear—as several cases concerning Backpage.com itself have held—escort ads are protected speech and the state cannot impose liability merely by opining that such ads must concern prostitution.

The AG's attempts to plead around Section 230 also fundamentally misstate the law. The AG clearly understood Section 230 before, when in 2013 she signed a letter, along with forty-five other state attorneys general, acknowledging that Section 230 bars prosecuting Backpage.com. Now, in stark contrast, the AG's Opposition asserts that prosecution of individuals associated with an online publisher based on third-party content is somehow "not inconsistent" with Section 230, when that is what the statute expressly immunizes and preempts. The AG's arguments attack the Backpage.com website as a whole and assert that Defendants knew or should have known third-party content was unlawful. Yet, courts interpreting Section 230 have uniformly rejected this very argument. Allegations about the construct and operation of a website cannot override Section 230 immunity, as the law turns on who created and developed the particular content that is the basis for alleged claims. And, "[i]t is, by now, well established that notice of the unlawful nature of the

information provided is not enough" to impose liability on an online provider. *Universal Commcn's Sys. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007). Section 230 is a nullity if the immunity Congress provided could be avoided by allegations that a website, by its nature or design, promoted or encouraged unlawful conduct—and this too has been repeatedly recognized by courts applying Section 230.

In this case, the AG asserts she can pursue *criminal* claims and should be allowed to avoid a demurrer and prolong the prosecution when the same claims have been summarily rejected and dismissed on the same theories under *civil* standards, where the burden of proof and speech-threatening consequences are less. In short, in this regard and otherwise, the AG has the law backwards.

As Harvard constitutional law professor Noah Feldman has written, the AG's Complaint in this case "is a fairly astonishing document."[1] Underscoring the myriad ways the AG's theory of prosecution does violence to First Amendment law, Professor Feldman aptly states that a pimping prosecution based on "a claim that Backpage.com is designed to, and does, publish third-party ads for sex trafficking" means that "essentially any publication that sells ads could be outlawed—and that's almost any publication on earth." The Court should grant the demurrer and dismiss the AG's prosecution immediately.

II. ARGUMENT

A. The Complaint and Prosecution Violate the First Amendment.

1. The AG's Attempt to Cast Her Charges as Relating to "Conduct" are Nonsensical Because the Challenged Conduct is Publishing Speech.

The persistent theme of the AG's Opposition is that the Complaint and the state's theory of prosecution concern only conduct and have nothing to do with speech. *See, e.g.*, Opp. at 1, 2, 5, 7, 8-9, 14, 18, 21, 22. The AG's argument is illogical sophistry.

[1] Noah Feldman, *Publisher of Sex Trafficking Ads Isn't the Criminal*, BLOOMBERG (Oct. 10, 2016), https://www.bloomberg.com/view/articles/2016-10-10/publisher-of-sex-trafficking-ads-isn-t-the-criminal; *see also* Elizabeth Nolan Brown, *Here's How Backpage CEO Carl Ferrer Supposedly Profited From Child Sex Trafficking*, Reason.com (Oct. 7, 2016) (referring to the Complaint as "insane"), http://reason.com/blog/2016/10/07/charges-against-backpage-ceo-listed#comment.

Even a cursory reading of the Complaint and supporting Declaration of Agent Fitchner makes plain the charges are based on ads submitted to and published on Backpage.com. *See* Complaint at 4-9 (Counts Two-Ten). All of the allegations about Mr. Ferrer concern his role as the CEO and named partner of Backpage.com. *See, e.g.*, Fitchner Decl. at 3. Those about Messrs. Lacey and Larkin simply allege that they held ownership interests in Backpage.com until 2014. Complaint at 2-4. When all of the allegations supposedly supporting criminal charges against Defendants arise exclusively from their relationships with an online publisher, it is unfathomable to suggest this case has nothing to do with publication of speech.

The AG's attempts to explain its theory frankly make no sense. The AG insists the charges "make absolutely no reference to publishing of any kind" and are not "base[d] on material posted … on Backpage.com." Opp. at 14, 16; *see also id.* at 7 (asserting, with no explanation, the AG will prove scienter "independent of any publishing conduct"); *id.* at 18 ("[t]he People's case does not turn on Defendants' publishing content"). Patently, the AG's charges are *entirely* based on allegations that Backpage.com published and received payment for ads relating to nine individuals. The AG refers to these individuals as the "victims" of the crimes charged. *See* Opp. at 2; Kitchner Decl. at 2, 7, 11, 13. The only connection between Backpage.com and these individuals was the ads they posted (or others posted about them) on the website, and Defendants' only connections were that they had managerial responsibilities or former ownership interests in Backpage.com. *See Jane DoeNo. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016) (rejecting federal sex trafficking claims against Backpage.com, including assertions that the claims were unrelated to ads on the website, noting the ads were "like Banquo's ghost" as they were an "essential component of each and all of [plaintiff's] claims").

More importantly, the AG concedes "[t]he mere posting of ads [by Backpage.com] does not constitute pimping," and "[e]ven Defendants' profiting from the ads is not pimping." Opp. at 9. Defendants agree. This then begs the question as to what conduct forms the basis for the AG's claims *independent* of publishing third-party speech and being paid to do so. There is simply nothing else, a conclusion demonstrated by a review of the Complaint and Declaration, without their references to third-party ads on the website or publishing conduct.

The state's repeated, unexplained efforts to characterize its criminal charges as only challenging "conduct" cannot trump the First Amendment. "It would be anomalous if the mere fact of publication and distribution were somehow deemed to constitute 'conduct' which in turn destroyed the right to freely publish." *Wilson v. Superior Court*, 13 Cal. 3d 652, 660 (1975) (rejecting argument that injunction prohibiting political candidate from distributing allegedly inaccurate newsletter restricted only conduct of "deceptive campaign practices"). Here, even accepting the AG's claim that she is challenging conduct, *that conduct is the publication of speech.* The AG's effort to reframe the act of publishing as "conduct" is wordplay.

The state's shallow understanding of First Amendment law is exemplified by its reliance on *People v. Frey*, 228 Cal. App. 2d 33 (1964), the only case the AG cites as supposedly analogous to its prosecution of Defendants here. The AG asserts that "*Frey* teaches that someone who runs a business, such as renting apartments, is not immune from prosecution if that person knowingly designs the business to profit from prostitution." Opp. at 4. In fact, the defendant in *Frey* was convicted based on evidence that he solicited and brought customers to a woman acting as a prostitute, collected money and paid the woman, took all of her personal belongings and said he would only return them if she would continue working as a prostitute, and offered to pay her $20,000 to recant testimony against him. *Frey*, 228 Cal. App. 2d at 39-51. The circumstances in *Frey* bear not the slightest similarity to the AG's theory and allegations in this case—most notably, that case had nothing to do with prosecuting the publication of third-party ads.

2. The AG Offers No Constitutionally Adequate Allegations of Scienter.

Defendants explained in their motion that the state cannot criminally punish a publisher without proving that he knew the *specific speech* on which the charges are based was unlawful, relying on *Smith v. California*, 361 U.S. 147 (1959) and its progeny. *See* Motion at 12. Those cases require proof that a defendant had sufficient scienter that specific speech the state seeks to criminally punish was, in fact, unlawful—because any other rule would severely chill speech to the limited amounts the distributor was able to review. *Id.* at 153. The Complaint offers no factual allegations to satisfy this constitutional requirement, nor does the AG's Response. Instead,

AG repeats the faulty argument that "the basis for the charges is criminal conduct, not speech," Opp. at 4, and misreads the cases Defendants cited.

The AG suggests *Mishkin v. New York*, 383 U.S. 502 (1966) requires only proof that a defendant prosecuted for "possessing" obscene books was "in some manner aware" of the nature of the works he sold. Opp. at 6. *Mishkin* does not say this. Instead, in that case, the Supreme acknowledged that "[t]he Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material." *Id.* at 511. The Court declined to address the issue of the requisite mental element because the proof showed that, as to the fifty allegedly obscene books, the defendant hired the artists and writers that produced the books and gave them specific instructions about the sexual material to include. *Id.* at 505. Interpreting *Mishkin*, courts have rejected the very argument the AG makes here, i.e., that generalized knowledge or awareness is enough. *See, e.g., Ripplinger v. Collins*, 868 F.2d 1043, 1056 (9th Cir. 1989) (invalidating Arizona obscenity statute setting a presumption that "'one who knows or is aware that material depicts or describes sexual conduct is also aware of the nature and character of the entire item,'" as "[s]uch a presumption would require a bookseller to examine personally any book he had reason to believe contained sexual conduct to determine if it was obscene").

In short, when the state sets out to prosecute a publisher in connection with speech the state claims to concern unlawful conduct—as the AG does here—it must plead and prove as a constitutional requisite that the defendants knew the specific speech was unlawful. The AG's Opposition offers no authority to the contrary. And the AG's Complaint offers no allegations that any of the Defendants had any involvement in or *mens rea* of any kind with regard to the Backpage.com ads that are the foundation of all the criminal charges here.

3. The AG Ignores that Escort Ads Are Protected Speech.

Defendants also explained in their motion that courts have uniformly held that escort ads on Backpage.com are constitutionally-protected speech. *See Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com,*

LLC v. Hoffman, 2013 WL 4502097 (D.N.J. Aug. 20, 2013).[2] The AG misses the thrust of these cases too, *i.e.*, that state authorities may not presume escort ads are unlawful. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."). The AG directs the Court to the Fitchner Declaration, but one agent's opinion that all escort ads must concern commercial sex is a far cry from satisfying First Amendment requirements.

The AG cites to *Backpage.com, LLC v. Lynch*, — F. Supp. 3d —, 2016 WL 6208368 (D.D.C. Oct. 24, 2016), *see* Opp. at 7, but that case supports Defendants' position by demonstrating the First Amendment limitations that apply here. In *Lynch*, Backpage.com challenged amendments to 18 U.S.C. § 1591 that added "advertising" to the conduct that may constitute sex trafficking and changed the *mens rea* requirement for a charge that one "benefits financially" from participation in a venture of sex trafficking if the underlying act is advertising. Backpage.com urged that the amendments were vague, but the DOJ contended the statute was clear that "[e]ven if an advertisement for illegal sex trafficking appeared on Plaintiff's website, [Backpage.com] could not be convicted under either § 1591(a)(1) or (a)(2) without proving that [it] knew that the advertisement at issue related to illegal sex trafficking of a minor or of a victim of force, fraud, or coercion." DOJ's Reply in Support of Motion to Dismiss at 7-8, *Backpage.com, LLC v. Lynch*, No. 1:15-2155 (RBW) (Dkt. 13, at 11.). The district court accepted this interpretation and dismissed Backpage.com's challenge, concluding the website faced no credible threat of prosecution. 2016 WL 6208368, at *9. The court held that the statutory amendments *increased* the *mens rea* standard to require knowledge (rather than reckless disregard) for a charge of financially benefitting from an act of sex trafficking if the underlying alleged conduct is advertising, noting legislators' statements about their intent, *id.* at *9 & n.7, which was to "raise the bar" by requiring proof that websites had knowledge that given ads were unlawful so as to

[2] The AG contends the three cases that struck down state laws targeting Backpage.com are inapposite because the statutes mentioned "information" and "publication," while Penal Code § 266(h) does not contain these words. Opp. at 8. As discussed above, this is a distinction without a difference because the AG's Complaint and prosecution unquestionably do target publishing of third-party information. The state's misapplication of Penal Code § 266(h) to target a publisher is no basis to avoid First Amendment scrutiny.

avoid constitutional problems, *See* 161 CONG. REC. H596, H598-H600 (daily ed. Jan. 27, 2015).[3] Here, in contrast—and contrary to First Amendment requirements—the AG offers no allegations that any of the Defendants knew in advance that the ads for the nine individuals concerned prostitution or even that Defendants knew of the ads *at all*.

The AG also cannot assert constitutionally sufficient charges by alleging Backpage.com were paid for ads and Defendants, in turn, received compensation for their work and investments in the company. As the Supreme Court has long held, constitutional protections are not forfeited simply because the speech involved was "published in the form of a paid advertisement." *New York TimesCo. v. Sullivan*, 376 U.S. 254, 266 (1964).[4] Courts have also consistently held that websites are fully protected by Section 230 immunity even if they earn revenues for third-party content. *See* Section II.B, below. More specifically, a prosecution for pimping under § 266(h) cannot be based on the fact that a person was paid for providing services to a person who acted as a prostitute; this does not constitute knowingly "deriving support" from prostitution, as the individual "derives his support from his own performance of services." *Allen v. Stratton*, 428 F. Supp. 2d 1064, 1072 n.7 (C.D. Cal. 2006), *quoted with approval in People v. Grant*, 195 Cal. App. 4th 107, 116 (2011).

If the AG can pursue criminal charges based on allegations that a website received payments for ads and later learned that some concerned unlawful conduct (especially here, given that it appears the AG's allegations are based on the fact that Backpage.com regularly screens and reports suspect ads to law enforcement), then, as Professor Feldman observed, any website or

[3] The AG's misunderstanding of the First Amendment is also underscored by her reliance on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). *See* Opp. at 9. There, the Court upheld a state court order closing an adult bookstore because of sexual activities that occurred on the premises, 478 U.S. at 700, because the order concerned "absolutely no element of protected expression" and "ha[d] nothing to do with any expressive conduct at all," *id*. at 705 & n.2. *See also Doe v. Harris*, 772 F.3d 563, 573 (9th Cir. 2014) (*Arcara* concerned public health regulation and did not implicate the First Amendment).

[4] *See also Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (voiding conviction of Virginia publisher for accepting advertising for abortion services and rejecting state's assertion that First Amendment protections are inapplicable to paid commercial advertisements); *Ginzburg v. United States*, 383 U.S. 463, 474 (1966) (the existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment").

publication that sells ads would be at risk. *See supra* note 1; *see also McKenna*, 881 F. Supp. 2d at 1282-83 (noting studies that escort ads continue to appear on Craigslist and 83% of prostitutes have Facebook pages). But the potential scope of the state's theory of criminal liability would be even greater, as it could allege that ISPs, cell phone providers, and many other companies know their services have been used in connection with unlawful conduct, such as prostitution.

4. The AG Cannot Avoid Constitutional Requirements Based on Procedural Rules.

The AG is tone deaf to the First Amendment flaws of her Complaint. The state advocates generic principles and procedural machinations as though this were a run-of-the mill case having nothing to do with online publishing or speech—insisting that any First Amendment problems must be treated as an affirmative defense, the Complaint is sufficient if it merely offers conclusory allegations based on statutory terms, and the state need not provide any showing of *scienter* at the demurrer stage (merely asserting it will provide it at some time). *See, e.g.*, Opp. at 3, 4, 7, 9, 13, 14, 16. But ordinary rules do not apply when a state prosecution implicates the First Amendment.

Castro v. Superior Court, 9 Cal. App. 3d 675 (1970), illustrates the point. In *Castro*, the state charged several defendants with conspiracy to disturb the peace because they were involved in walkouts to protest conditions for Latino students at Los Angeles-area high schools. The Court of Appeal granted a writ of prohibition barring the prosecution. The court concluded that, while in an ordinary criminal case the state could prove a conspiracy based on circumstantial evidence, "stricter standards of proof are called for" when a prosecution involves the exercise of First Amendment rights. *Id.* at 682 (Kaus, P.J., lead opinion); *accord Long v. Valentino*, 216 Cal. App. 3d 1287, 1294 n.4 (1989) (adopting *Castro*). In *Castro*, circumstantial evidence that disturbances occurred during the walkouts was insufficient; rather, the state had to plead and prove by direct evidence that the defendants sought to bring about unlawful disturbances. 9 Cal. App. at 694-98. Judge Kaus noted that a long line of California and Supreme Court cases had held that different and more exacting standards govern state prosecutions that implicate speech rights.[5] As *Castro* explains, to protect against self-censorship in the face of threatened governmental sanctions:

[5] *See id.* at 687-91 (discussing *Smith v. California*, 361 U.S. 147, as "[t]he clearest case exemplifying this approach," but also citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-

> The theme is plain: it does not matter that the conduct which the state purports to penalize, criminally or civilly, is not itself what the First Amendment protects—it is the effect of such sanctions on the Constitution's promises that will be scrutinized.

Id. at 689.[6]

In short, more stringent requirements apply to the AG's prosecution here because "what is permissible when ordinary criminal conduct is involved, frequently comes to grief when tested against the First Amendment." *Id.* at 686. When the state seeks to apply a criminal statute to expressive activities, the elements to be proved must be consistent with First Amendment protections. *See, e.g.*, *In re M.S.*, 10 Cal. 4th 698, 713 (1995) (construing California hate crimes statutes to "require proof of a specific intent to interfere with a person's right protected under state or federal law" so as "to protect against unconstitutional application to protected speech").

The AG cannot avoid a demurrer based on pleading rules applicable in a routine criminal case. While literal compliance with Penal Code § 952 might be sufficient elsewhere, it is not sufficient when reciting the terms of a criminal statute fails to satisfy constitutional standards. *See In re Rudolfo A.*, 110 Cal. App. 3d 845, 855 (1980). "Pleading rules, too, must be read with a First

---

79 (1964) (proof of actual malice required for defamation claim against public officials); *Marcus v. Search Warrants*, 367 U.S. 717, 731 (1961) (where object of search warrant is allegedly obscene materials, procedure that would be adequate for other seizures is constitutionally defective); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (invalidating presumptions and burden of proof implicating First Amendment interests concerning tax exemptions)).

[6] The holding in *Castro* directly rejects the AG's conspiracy charges in this case. In *Castro*, the state contended it could prove conspiracy claims circumstantially on the premise that it would be "unrealistic … [t]o anticipate that the students would walk out silent and solemnly." 9 Cal. App. at 693 (quoting state's argument). Judge Kaus recognized the flaw of this logic:

> This may be perfectly true, but where does it lead? Only to the conclusion that anyone who organizes a demonstration of high school students inevitably takes a chance that he may have to stand trial on a felony charge the moment student misbehavior reaches misdemeanor proportions, regardless of the fact that no direct testimony profess that such misbehavior was planned.

Id. at 693-94. This is the same theory the AG advances here—that Defendants can be held liable for pimping and conspiracy based on circumstantial allegations that prostitution occurred when third-parties misused the Backpage.com website, but with no evidence that Defendants had any knowledge or plan for this to occur.

Amendment gloss," because "[g]iven the First Amendment's rigorous standards, necessitated by fear that free expression otherwise would be chilled, it is unlikely that such [a] conclusory pleading [standard] could withstand demurrer." *Lewis v. Time Inc.*, 83 F.R.D. 455, 464 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983) (internal citations omitted) (citing *Castro*, 9 Cal. App. 3d at 691). California law is clear that the AG's Complaint cannot survive by simply reciting the elements of the statute when the facts alleged fall short of Constitutional requirements. *Mandel v. Mun. Court.*, 276 Cal. App. 2d 649, 668 (1969) (because fact allegations showed that defendant was engaged in constitutionally protected activity of passing out leaflets and handbills, they controlled over the prosecution's general allegations reciting statutory terms that he "did loiter").

The AG touts procedural grounds to urge the Court to ignore the constitutional deficiencies in the Complaint and allow her to prolong this prosecution through a preliminary hearing. *See* Opp. at 3 ("[t]he First Amendment is commonly regarded as an affirmative defense" that should "not be considered on demurrer"); *id*. ("the People will present evidence, at the appropriate time"). This too does violence to First Amendment law.

Early dismissal of allegations that threaten First Amendment freedoms is essential to the preservation of those rights, because, as the California Supreme Court has recognized, the "threat of sanctions may deter almost as potently as the application of sanctions." *In re Kay*, 1 Cal. 3d 930, 941 (1970). Early dismissal of charges repugnant to the First Amendment is necessary because the litigation itself creates a chilling effect. *See Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 855 (1984) (noting in a libel suit that failure to dismiss unwarranted claims early could result in "long and expensive trial proceedings [which] would themselves offend" First Amendment principles "because of the chilling effect of such litigation"). The AG does not address any of the cases Backpage.com cited previously that one of the central purposes of a § 1004 demurrer is dismissal of a pleading that "charges [an offense] that is unconstitutional so as to generate a legally sufficient accusation." *Williams v. Superior Court*, 111 Cal. App. 4th Supp. 1, 6 (Cal.

App. Dep't Super. Ct. 2003); *see generally* Motion at 8-9 (discussing other cases sustaining demurrers on First Amendment grounds).[7]

The AG's efforts to disregard the First Amendment are, in all respects, simply wrong under the law. The AG cannot presume that protected speech is unlawful. She cannot pretend that a prosecution against an online publisher has nothing to do with speech rights. She cannot withstand a demurrer by failing to allege any facts to show *scienter* as required by the First Amendment. "*A fortiori*, the prosecution should fail." *Castro,* 9 Cal. App. 3d at 691.

B. The Complaint and Prosecution Violate Section 230, as the AG Has Admitted.

The AG's efforts to avoid Section 230 immunity and preemption likewise pervert that statute and the extensive case law interpreting it. Frankly, it is difficult to respond to the AG's arguments about Section 230, which are based on out-of-context snippets from a few cases but ignore the holdings of hundreds of cases that Section 230 preempts state laws and precludes imposing liability on websites based on content provided by third-party users. The AG's asserted views of Section 230 are wrong at every turn.

1. Section 230 Expressly Preempts State Criminal Laws.

The AG argues at length that Section 230 does not preempt state laws or provide immunity to websites for state civil or criminal claims that arise from content posted by third-party users. Opp. at 10-18. Yet, without question, this is what Section 230 proscribes, as both California and federal cases have held. *See Barrett v. Rosenthal*, 40 Cal. 4th 33, 43 (2006) ("[T]he plain language of section 230 'creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user." (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

[7] Indeed, none of the cases the AG cites holds that constitutional defenses cannot be raised on a demurrer. For example, *People v. Mason*, 184 Cal. App. 2d 317 (1960), holds that the AG need not expressly plead the inapplicability of a statutory exception to a charged offense; it says nothing about challenging a constitutionally defective pleading by demurrer. In *Wooten v. Superior Court*, 93 Cal. App. 4th 422, 443 (2001), the defendants *chose* to file a writ of prohibition after the preliminary hearing on pimping charges; the court did not consider the appropriateness of a demurrer, and the defendants "d[id] not rely on the First Amendment."

Most notably, the AG *has admitted* that Section 230 bars California and other states from prosecuting Backpage.com, because, while the law permits federal prosecutions, it precludes state prosecutions, *see* MJN Ex. F (NAAG July 23, 2013 letter signed by AG Harris stating that "[f]ederal courts have broadly interpreted the immunity provided by the CDA" to "prevent[] State and local law enforcement agencies from prosecuting" Backpage.com, and insisting "[t]his must change"); *see also id.* Ex. G. Remarkably, in the Opposition, the AG says nothing about her 2013 admission—nor offer any explanation why the state can pursue a prosecution of Backpage.com today when she conceded before that it lacks authority to do so.[8] Likewise, the AG also fails to mention or address that *every case* to consider the issue under Section 230 has held that efforts to apply state criminal laws to hold websites liable for publishing third-party content are expressly preempted under Section 230. *See* Motion at 17-18.

Now, the AG asserts Section 230 preempts only "State laws that are inconsistent with Section 230," and that California's pimping and conspiracy statutes are consistent with Section 230, without explaining why. Opp. at 11, 16. The AG does not quote the terms of Section 230, but the statute says "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C. § 230(e)(3). The reference to "this section" means Section 230 itself and its prohibition against imposing liability on an interactive computer service for publishing third-party content. Penal Code §§ 187 and 266(h) say no such thing. And the AG's theory of prosecution in this case *is to impose criminal liability* based on a website's publication of third-party content, so the AG's purported application of these statutes is entirely inconsistent with Section 230. As other courts have recognized, such a strained view of how state criminal laws are supposedly "consistent" with and not preempted by Section 230 misunderstands the law. *See, e.g.*, *McKenna*, 881 F. Supp. 2d at 1273-74 (rejecting state's argument that law targeting Backpage.com was consistent with Section 230 because it was similar

[8] Instead, the AG insists the Court should not take judicial notice of her statements, which she made in her official capacity as Attorney General. *See* People's Opp. to Request for Judicial Notice. This is perhaps the epitome of an argument of form over substance. When the AG admits she has no authority to pursue a prosecution she later advances, her statements made in her official capacity are certainly relevant and should be subject to judicial notice.

to federal criminal sex trafficking laws); *Cooper*, 939 F. Supp. 2d at 825 (rejecting argument that state statute was consistent with the CDA because it sought to protect minors).[9]

2. The AG Cannot Escape Section 230 Immunity by Characterizing the Law as an Affirmative Defense.

As with the First Amendment, the AG opposes dismissal under Section 230 based on procedure rather than substance, asserting the Court should not address Section 230 immunity because it is an affirmative defense that may only be considered later. Opp. at 13. Like every other interpretation of Section 230 the AG offers, this is wrong.

In *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015), the plaintiffs, who asserted claims against Backpage.com based on federal and state sex trafficking statutes, made the same argument. *Id.* at 155. The court found it "does not bear scrutiny" because "entitlement to immunity under section 230 is not only an affirmative defense, but also a right to be immune from being sued." *Id.* at 155 n.4. Essentially *every* court that has considered how and when Section 230 should be applied has held that claims against online providers based on third-party content should be dismissed at the earliest possible opportunity, to avoid "costly and protracted legal battles," *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1175 (9th Cir. 2008), and because Section 230's immunity is "effectively lost if a case is erroneously permitted" to proceed. *Nemet Chevrolet v. Consumeraffairs.com Inc.*, 591 F.3d 250, 254 (4th Cir. 2009). Contrary to the AG's procedural arguments, Section 230 is "an immunity from suit rather than a mere defense to liability." *Id.* Here again, the AG cannot end run the substance of federal law precluding her prosecution by attempting to recast express immunity as an affirmative defense.

[9] The AG also focuses on cases concerning implied rather than express preemption. *See* Opp. at 13 (asserting states' "historic police powers" may not be preempted unless that is Congress's purpose). Section 230 provides *express* preemption and its force is not solely based on an implied intent to "occupy the field," Opp. at 14; *see Zeran*, 129 F.3d at 334 (Congress's "exercise of its commerce power" in Section 230 "is clear [and] explicitly stated"); *Cooper*, 939 F. Supp. 2d at 823 (Section 230 preemption is express); *McKenna*, 881 F. Supp. 2d at 1273 (same).

3. The AG's Accusations that Backpage.com Is a Content Provider Are Baseless and Cannot Avoid Section 230 Immunity.

The AG otherwise attempts to avoid Section 230 by asserting that Backpage.com itself created content in some way and asserts that "the People have charged Defendants based on the content that *they* created." Opp. at 14. The state does not contend that Backpage.com or any of the Defendants had anything to do with creating the content of the ads that are the premise of the charges in this case. As Backpage.com explained before, Agent Fitchner's declaration makes clear that all of the ads were written and posted on Backpage.com by the individuals themselves, Motion at 6; *see* Fitchner Decl. at 7-11. The AG does not dispute this and instead vaguely asserts Backpage.com "helped develop content," apparently based on the nature of the website and the fact Backpage.com operated two other websites (EvilEmpire.com and BigCity.com). Opp. at 15-16. Here again, the law interpreting Section 230 has uniformly rejected such theories.

Courts have held that websites "develop" content only if they directly participate in creating the specific content alleged to be unlawful or require users to provide such content. *Roommates.com, LLC.*, 521 F.3d at 1168, 1174 ("a website helps to develop unlawful content, and thus falls within the exception to section 230, if it *contributes materially to the alleged illegality of the conduct*" (emphasis added)); *FTC v. Accusearch Inc*., 570 F.3d 1187, 1199 (10th Cir. 2009). On the other hand, courts have rejected attempts to evade Section 230 through allegations that a website "encouraged" or acquiesced in the submission of content, because such theories would "cut the heart out of" Section 230. *Roommates.com*, 521 F.3d at 1174.

Thus, in *Roommates.com*, the Ninth Circuit held that Section 230 did not shield an online provider with regard to one portion of its website that required users to answer discriminatory questions about their gender, sexual orientation, and whether they lived with children. *Roommates.com*, 521 F.3d at 1161, 1166;[10] *see also FTC v. Accusearch Inc.*, 570 F.3d 1187, 1192,

[10] Courts have interpreted *Roommates.com* as "carv[ing] 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." *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1198-99 (N.D. Cal. 2009) (internal quotation marks omitted); *see also Atl. Recording Corp. v. Project Playlist, Inc*., 603 F. Supp. 2d 690, 701 (S.D.N.Y. 2009) (*Roommates.com* "was based solely on the fact that the content on the website that was discriminatory was supplied by Roommates.com itself"); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d

1199-1200 (10th Cir. 2009) (website was responsible for developing content because it sold private telephone records and hired researchers to obtain them, which required violating or circumventing the Telecommunications Act by fraud or theft). But the court also held that Roommates.com *was immune* from claims stemming from a section of the site allowing users to provide comments. Roommates.com was "not responsible, in whole or in part, for the development of this content," because the website could not review every post, making it "precisely the kind of situation for which section 230 was designed to provide immunity." 521 F.3d at 1174. The court analogized this part of the Roommates.com website to Craigslist (which, notably, is structured the same as Backpage.com), in that users are given an open field to enter information they choose "without any … requirement to enter discriminatory information." *Id.* at 1172 n.33. The Ninth Circuit also explained that courts must reject arguments that a website by its nature implicitly encourages unlawful content:

> [T]here will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged – or at least tacitly assented – to the illegality of third parties. [I]n cases of enhancement by implication or development by inference – such as with respect to the "Additional Comments" here – section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.

Id. at 1174-75.

Many cases apply and reinforce these principles. For example, in *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012), the court found Section 230 barred claims that Stubhub violated state anti-scalping laws, notwithstanding allegations that Stubhub designed and intended its website to violate the law. Even if the website "encouraged the posting[s]" or was on notice of "unlawful sales," third-party users posted the ticket offers and set prices, and the plaintiff's attacks on the website as a whole could not "support a conclusion that Defendant's website essentially

---

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 ….").

ensured that unlawful content would be posted." *Id.* at 561; *see also id.* at 562 (an "'entire website' approach [is] fatally flawed").

More to the point, the court in *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), rejected arguments that Backpage.com could be deemed responsible for creating or developing escort ads posted by users on the site. *Id.* at 1044. Noting the focus must be on "the specific content that was the source of the alleged liability," *id.* at 1051 (quoting *Accusearch*, 570 F.3d at 1198), the court held Backpage.com immune because "there is no allegation that Backpage was responsible for the development of any portion of the *content* of [the ads posted about the plaintiff] or specifically encouraged the development of the offensive nature of that content." *Id.* at 1052. (emphasis in original) (footnote omitted). The court held that having an "adult" category for escort ads could not override CDA immunity, *id.* at 1049; whether "a website elicits online content for profit is immaterial," *id.* at 1050; and "[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," *id.* (quoting *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007)).[11]

Most recently, the court in *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015), *aff'd sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), again rejected arguments attempting to avoid Section 230 by casting Backpage.com as a content provider. The court held that features and practices of the website – *e.g.*, "the existence of an escorts section in a classified ad service," the "creation of sponsored ads with excerpts taken from the original posts," the "stripping of metadata from photographs[,] a standard practice among Internet service providers," or accepting payments from sources such as Bitcoins "amount to neither affirmative participation in an illegal venture nor active web content creation." 104 F. Supp. 3d at 157. The court also rejected these arguments as improper challenges to the website as

[11] The AG asserts *M.A.* is distinguishable because the plaintiff did not allege that Backpage.com developed content. *See* Opp. at 21. That is flatly incorrect. The plaintiff in *M.A.* did allege that Backpage.com developed content generally, 809 F. Supp. 2d at 1044, but the court noted this was irrelevant and could not defeat Section 230 immunity because the plaintiff did not allege that Backpage.com created the content that allegedly caused harm, *i.e.*, the ads about her. *Id.* at 1052.

a whole, noting "courts have repeatedly rejected this 'entire website' theory as inconsistent with the substance and policy of section 230." *Id.* at 162. Nor could plaintiffs avoid Section 230 based on arguments that Backpage.com "encourages" unlawful content, as "an encouragement test would inflate the meaning of 'development' to the point of eclipsing the immunity from publisher-liability that Congress established." *Id.* at 163 (quoting *Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398, 414 (6th Cir. 2014)).[12]

The AG's attempt to end run Section 230 by calling Backpage.com a content provider contradicts these cases and many others.[13] Indeed, the state's only allegation that Backpage.com itself created content is its assertion that Backpage.com "developed … related sites of EvilEmpire.com and BigCity.com." Opp. at 16. This argument is a red herring.

First, as the AG admits, the posts on these websites are taken entirely from third-party user posts on Backpage.com. *See* Fitchner Decl. at 3 (Backpage.com ads include "essentially identical information to the Evilembire.com posts, from the photos to the contact information"). All of the posts on the subsidiary sites are still written, created and posted by the users themselves. Reformatting and publishing user-submitted content in other ways or on other websites does not strip Backpage.com of Section 230 immunity. For example, in *Doe v. Friendfinder Network, Inc.*,

[12] The AG deceptively tries to distinguish *Doe* by citing the First Circuit's opinion, asserting that "the court stated that it might reach a different result if Backpage had used victim photographs to advertise its own services, a fact which had not been alleged in the victim's complaint." Opp. at 15. The AG cites to a portion of the First Circuit decision addressing and rejecting plaintiffs' right-of-publicity claims under state law, and holding that a user's posting of photographs on a website cannot establish unauthorized use by the website for its own advertising. *Jane Doe No. 1*, 817 F.3d at 26-27. The First Circuit affirmed dismissal under Section 230 in all respects and did not say that its decision would have been different if the plaintiffs had made different allegations about their photos on the website.

[13] The AG misstates *J.S. v. Village Voice Media Holdings, LLC*, 184 Wash. 2d 95, 359 P.3d 714 (2015), asserting it held that three plaintiffs' claims against Backpage.com "were not preempted by the CDA." Opp. at 15. In fact, the court held only that dismissal was not appropriate under Washington's liberal pleading rules, and the case could proceed to determine whether, by imposing posting rules prohibiting improper ads, Backpage.com developed the content of the ads about the plaintiffs. 359 P.3d at 717. In any event, the decision in *J.S.* has been roundly criticized, *see, e.g.*, Eric Goldman, *Backpage Gets Bummer Section 230 Ruling in Washington Supreme Court–J.S. v. Village Voice*, http://blog.ericgoldman.org/archives/2015/09/backpage-gets-bummer-section-230-ruling-in-washington-supreme-court-j-s-v-village-voice.htm, and has not been followed by any other courts.

540 F. Supp. 2d 288 (D.N.H. 2008), the court rejected a plaintiff's arguments that Section 230 should not apply when AdultFriendFinder posted her profile on other websites, because the source of the information was still a third-party. The court held that "defendants cannot be held liable for 're-posting' the profile elsewhere without impermissibly treating them as 'the publisher or speaker of [ ] information provided by another information content provider.' … The CDA shields the defendants from precisely that kind of liability." *Id.* at 296 (quoting 47 U.S.C. § 230(c)(1)); *see also Doe*, 104 F. Supp. 3d at 157 (holding that "sponsored ads" on Backpage.com are protected by Section 230 immunity because they are based on "excerpts taken from the original posts"); *Lycos*, 478 F.3d at 422 (Section 230 protections for online publishers extend to "decisions about how to treat postings generally").

Moreover, the AG does not allege that any ads about the nine individuals ever appeared on EvilEmpire.com or BigCity.com. Allegations that a website generally creates *some* content cannot avoid Section 230 immunity. *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703, 717 n.11 (2002) ("[T]he fact [plaintiffs] allege eBay is an information content provider is irrelevant if eBay did not itself create or develop the content for which the [plaintiffs] seek to hold it liable."). Again, The issue is whether the website was "responsible for the development of the specific content that was the source of the alleged liability." *Accusearch*, 570 F.3d at 1198-99; *accord Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) ("The critical issue is whether [the website] acted as an information content provider with respect to the information that [plaintiffs] claim is [unlawful]"; Section 230 "bar[s] claims unless [the website] created or developed the particular information at issue."). Conversely, when "a third party willingly provides the essential published content, the interactive service provider receives full immunity." *Carafano*, 339 F.3d at 1124.[14]

[14] This principle appears in countless cases. *See, e.g.*, *Doe v. Bates*, 2006 WL 3813758, at *17 (E.D. Tex. Dec. 27, 2006) ("[T]he 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 …."); *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."); *S.C. v. Dirty World, LLC*, 2012 WL 3335284, at *4 (rejecting allegations about "the general structure and operation of the Website" because "the CDA focuses on the specific post at issue"); *M.A. v. Village Voice Media Holdings, Inc.*, 809 F. Supp. 2d 1041, 1051-52 (E.D. Mo. 2011) (focusing on the "specific content" at issue).

The AG cannot escape Section 230 merely by alleging that Backpage.com operated other websites that are also based entirely on third-party content. Put simply, "[n]o amount of artful pleading can avoid" Section 230. *Lycos*, 478 F.3d at 418.

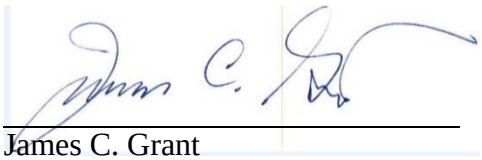
III. CONCLUSION

The AG's Opposition does not and cannot overcome the flaws of the Complaint and this prosecution under the First Amendment and Section 230. The AG was correct in 2013 when she admitted she has no authority to pursue criminal charges against Backpage.com. The Court should grant Backpage.com's demurrer and bring this case to a swift end to avoid any further trampling of free speech rights.

DATED: November 10, 2016

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: 
James C. Grant

Attorneys for Defendants
Carl Ferrer, Michael Lacey and James Larkin

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 November 10, 2016, I served the following document: **REPLY IN SUPPORT OF DEFENDANTS' DEMURRER** by electronic mail on each addressee named below as follows:

KAMALA D. HARRIS (attorneygeneral@doj.ca.gov)
Attorney General of California
ROBERT MORGESTER (Robert.Morgester@doj.ca.gov)
Senior Assistant Attorney General
RANDY MAILMAN (Randy.Mailman@doj.ca.gov)
Deputy Attorney General
MAGGY KRELL (Maggy.Krell@doj.ca.gov)

1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

Attorneys for Plaintiff

☐ (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 November 10, 2016, at Los Angeles, California.

Ellen Duncan
Print Name

Signature