

VIA EMAIL AND U.S. MAIL

October 17, 2016

The Honorable Kamala D. Harris
Office of the Attorney General of California
California Department of Justice
P.O. Box 944255
1300 I Street, Suite 125
Sacramento, CA 94224-2550

Re: *People v. Ferrer*, et al., Case No. 16FE019224 (Sup. Ct., Sacramento County)

Dear Attorney General Harris:

Along with other counsel, my firm and I represent defendants Carl Ferrer, Michael Lacey and James Larkin in the above-entitled action. I write concerning the criminal complaint your office has filed and to request that you withdraw the complaint. The State of California cannot pursue the charges asserted and, in fact, is expressly precluded from doing so under Section 230 of the Communications Decency Act (“CDA”), 47 U.S.C. § 230.

The complaint asserts charges of pimping against Mr. Ferrer under Cal. Penal Code § 266h and charges conspiracy against Messrs. Lacey and Larkin, based on allegations that nine third-party users created and posted advertisements on the Backpage.com website, which the State alleges were for prostitution. Backpage.com hosts tens of millions of online classified ads posted by users every year. The State seek to impose felony criminal liability on the defendants based on allegations that Backpage.com published the ads, the website received payments totaling \$79.60 for them, and the defendants are connected to the website by Mr. Ferrer being the CEO and owner of Backpage.com and by Messrs. Lacey and Larkin being the company’s former owners.

As we indicated in hearings before the Superior Court on October 13 and 14, defendants will file a demurrer seeking dismissal of the complaint and all charges, as they violate the First Amendment and Section 230 of the CDA. Our motion will detail the case law that plainly bars the state’s prosecution, although we assume you are familiar with the law. To summarize:

Ads posted on Backpage.com are protected by the First Amendment, as several courts have held.¹ As the Seventh Circuit recently said in enjoining the Sheriff of Cook County, Illinois and rejecting much the same theories that the State asserts here: “[A] public official who tries to shut down an avenue of expression of ideas and opinions through actual or threatened imposition of government power or sanction is violating the First Amendment.” *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015) (internal quotation omitted), *cert. denied*, 2016 WL 1723950 (U.S. Oct. 3, 2016). The State cannot prosecute a publisher for publishing speech with absolutely no showing that the speech was unlawful, much less any allegation that defendants ever even saw the specific ads that are the basis for its charges.² As the Supreme Court has long recognized, states cannot punish parties that publish or distribute speech without proving they had knowledge of illegality, as any other rule would severely chill speech. *Smith v. California*, 361 U.S. 147 (1959).

More specifically, Section 230 precludes the charges the State seeks to assert. As you know, Section 230 bars state-law claims against websites and other interactive computer services based on the publication of third-party content. A website cannot be held liable for publishing content submitted by users or for failing to block or remove such content, notwithstanding any allegations that it knew or should have known the content concerned unlawful conduct. Section 230 expressly preempts all inconsistent civil and criminal state laws. Literally hundreds of cases have applied and underscored the broad immunity that Section 230 provides and that Congress intended so as to avoid government interference—especially by state authorities—that would chill free speech on the Internet.

Indeed, in July 2013, you and other state attorneys general signed a letter to various members of Congress urging that Section 230 be amended to exempt state criminal laws from CDA immunity so that you could pursue Backpage.com. *See* July 23, 2013 letter from National Association of Attorneys General, <https://www.eff.org/files/cda-ag-letter.pdf>. It is troubling that the State is now pursuing a prosecution you admitted you have no authority to bring.

Accordingly, the State should dismiss the complaint and all charges against Messrs. Ferrer, Lacey and Larkin. We write now to urge that this happen immediately. The State has

¹ *See, e.g., Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1282 (W.D. Wash. 2012); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 832 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 (Aug. 20, 2013)

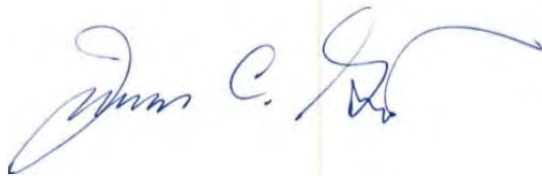
² Websites are not culpable for aiding and abetting “customers who misuse their services to commit unlawful acts,” *Dart v. Craigslist, Inc.* 665 F. Supp. 2d 961, 966-968 (N.D. Ill. 2009), any more so than a telephone company aids or abets the sale of narcotics over the telephone or the U.S. Postal Service is culpable for delivering contraband through the U.S. mails, *see Doe v. GTE Corp.*, 347 F. 3d 655, 659 (7th Cir. 2003).

Attorney General Kamala Harris
October 17, 2016
Page 3

already burdened and infringed the rights of these gentlemen by arresting and incarcerating them, while refusing to permit their release on bail (based on a groundless objection under Penal Code § 1275.1 that the Superior Court summarily rejected). The State has further infringed their rights and those of Backpage.com and its users by executing broad search warrants and seizing computers, business records and communications of Backpage.com, apparently without informing judges who issued the warrants of your admission over three years ago that your office has no authority to bring this case. The State's actions to date raise serious questions, and continued pursuit of meritless criminal charges only compounds the problems and injuries. Defendants and Backpage.com reserve all rights for appropriate relief under the Civil Rights Act. *See* 42 U.S.C. §§ 1983, 1988.

Sincerely,

DAVIS WRIGHT TREMAINE LLP



James C. Grant

cc via email:

Maggy R. Krell
Randy M. Mailman
Robert Morgester
Christina Arguedas
Robert Corn-Revere
Don Bennett Moon
Tom Henze
Janey Henze
David Dratman