

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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|---|---|------------------------------------|
| craigslist, Inc. |) | Civil Action No. 2:09-cv-01308-CWH |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| Henry D. McMaster, in his official |) | |
| capacity as the Attorney General |) | DEFENDANTS' MEMORANDUM |
| of the State of South Carolina; David |) | IN SUPPORT OF |
| Pascoe; Barbara R. Morgan; C. Kelly |) | MOTION TO DISMISS |
| Jackson; Jay E. Hodge, Jr.; W. Barney |) | |
| Giese; Douglas A. Barfield, Jr.; Trey |) | |
| Gowdy, III; Jerry W. Peace; Scarlett |) | |
| Wilson; Christina T. Adams; Donald V. |) | |
| Myers; Edgar L. Clements, III; Robert M. |) | |
| Ariail; I. McDuffie Stone, III; Gregory |) | |
| Hembree; and Kevin S. Brackett, in their |) | |
| official capacities as South Carolina Circuit |) | |
| Solicitors, |) | |
| |) | |
| Defendants. |) | |

I. INTRODUCTION

The Defendants Henry D. McMaster and the sixteen Circuit Solicitors¹ submit this memorandum in support of their Motion to Dismiss the Complaint pursuant to Rule 12(b)(6), Federal Rule of Civil Procedure. Initially, Defendants submit the Court should abstain from intervening in this case because there is a pending state proceeding in which Plaintiff's federal issues can be decided if necessary. In the event the Court determines federal intervention is warranted at this time, however, Defendants submit dismissal is still warranted based on the allegations set forth

¹J. Strom Thurmond was elected as Solicitor for the Second Judicial Circuit upon the retirement of Barbara Morgan, and William B. Rogers, Jr., was elected as Solicitor for the Fourth Judicial Circuit upon the retirement of Jay E. Hodge, Jr.

in the Complaint.

This case presents the straight-forward issue of whether Plaintiff is subject to prosecution for aiding and abetting prostitution in violation of South Carolina criminal law. *See* S.C. Code Ann. § 16-15-90 (2003). Plaintiff contends 1) it has absolute immunity under the Communications Decency Act (the “CDA”), 47 U.S.C.A. §230, from criminal investigation or prosecution under any state criminal law, 2) the speech at issue is protected by the First Amendment of the United States Constitution, and 3) the Commerce Clause precludes state action against Plaintiff. Defendants submit the CDA does not give Plaintiff immunity from prosecution for violating South Carolina’s criminal law regarding prostitution, speech relating to unlawful conduct has no constitutional protections, and enforcing state criminal laws regarding prostitution is not prohibited by the Commerce Clause.

Illegal conduct is not afforded special protections merely because it is facilitated via the Internet, and the focus of this case is Plaintiff’s role in facilitating illegal conduct in South Carolina. In initiating this action, Plaintiff asks this Court to issue a preemptive strike against the enforcement of long standing South Carolina criminal law by declaring Plaintiff has absolute immunity under the CDA from any state criminal investigation or prosecution, regardless of the type of conduct involved. If Plaintiff gets the relief it seeks, the Internet will become a lawless, no man’s land where Internet service providers are free to facilitate, and even encourage, illegal conduct with impunity.

II. BACKGROUND

Plaintiff operates internet websites on which parties may advertise for goods and services, and post other matters such as community information. After repeated communications between Plaintiff and state attorneys general regarding unlawful activities facilitated through Plaintiff’s

“Erotic Services” advertising category, in November 2008, Plaintiff entered into an agreement with forty attorneys general, including the South Carolina Attorney General (the “Attorney General”), and the National Center for Missing and Exploited Children, acknowledging on-going use of the “Erotic Services” category “to facilitate unlawful activity.” Complaint, Exhibit D (the “Agreement”).

Pursuant to the Agreement, Plaintiff agreed to implement additional security measures designed to curb such use of its websites, including a system allowing users to “flag” an advertisement believed to violate Plaintiff’s terms of use, an electronic screening process to block certain advertisements, verification of telephone numbers posted in the “Erotic Services” category, and imposition of a fee and credit card verification for postings in that category. *Id.* Plaintiff also agreed to provide evidence of unlawful activity to the attorneys general for potential prosecution, and to meet with the attorneys general on a regular basis in a continuing effort to combat unlawful activity on its websites. *Id.*

On May 5, 2009, the Attorney General notified Plaintiff that “ongoing law enforcement efforts in South Carolina” indicated Plaintiff had not installed sufficient safeguards “to prohibit the Internet site from being **used as a vehicle to advertise or solicit prostitution.**” Complaint, Exhibit E (emphasis added). The Attorney General further stated it appeared Plaintiff’s management “has knowingly allowed the site to be used for illegal and unlawful activity after warnings from law enforcement officials and after an agreement with forty state attorneys general.”² *Id.* Plaintiff was given ten days (May 15) to remove portions of its South Carolina sites containing categories and functions allowing the solicitation of prostitution. *Id.*

²Information from South Carolina law enforcement officials revealed numerous prostitution arrests directly related to advertisements in Plaintiff’s “Erotic Services” category, which had become “the hottest way sex is being sold.” Complaint, Exhibit F.

On May 13, the Attorney General's staff met with Plaintiff's attorney, who outlined Plaintiff's decision to terminate the "Erotic Services" category (effective May 20) in favor of an "Adult Services" category, charge a \$10 fee for each advertisement in that category, and manually screen and reject any advertisement containing nudity or appearing to offer illegal services. Complaint, Exhibit H. By letter dated May 15, the Chief Deputy Attorney General confirmed in writing that the Attorney General's concern was "the facilitation of prostitution in South Carolina, a concern widely voiced by law enforcement." Complaint, Exhibit I. The Chief Deputy assured counsel Plaintiff would be afforded a reasonable opportunity to respond before the Attorney General initiated any criminal prosecution. *Id.*

When his stated deadline for Plaintiff to remove offending advertisements expired, the Attorney General indicated he had no choice but "to move forward with criminal investigation and potential prosecution." Complaint, Exhibit J. In media interviews, the Attorney General acknowledged Plaintiff's stated intent to remove the "Erotic Services" category, but noted the November 2008 Agreement had not worked, and stated: "[w]hat they do is what will count." He further indicated his office would "monitor the site," and stated Plaintiff "must be given a reasonable amount of time to fix the problem." Complaint, Exhibit K and Exhibit L.

Plaintiff initiated this action in the pre-dawn hours of May 20, 2009, even though no prosecution had been initiated and the Attorney General had clearly stated his intent to afford Plaintiff reasonable time to fix the on-going problem of illegal activity facilitated through its websites. It asserts it is entitled to immunity under the CDA from any prosecution, and seeks a judicial bar to any and all investigations into its conduct, as well as prosecutions based on that conduct, even though no such prosecution has been instituted. By Consent Order dated May 22,

2009, the parties agreed to maintain the status quo until the matter could be heard on the merits.

The Defendants now move for dismissal pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. As set forth below, Defendants assert the Court should abstain from interceding in this matter. Defendants further assert Plaintiff is not entitled to CDA immunity from prosecution for aiding and abetting prostitution in violation of South Carolina criminal law, and the Complaint fails to state a claim for First Amendment or Commerce Clause violations.

III. ARGUMENT

A. This Court should abstain from interceding in an on-going state proceeding.

1. The Younger abstention doctrine

Plaintiff concedes in its Complaint there is an ongoing state proceeding involving a pending criminal investigation of Plaintiff's role in aiding and abetting prostitution in South Carolina. Deference to this state proceeding is thus warranted under the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971).

Younger recognizes federalism requires "a system in which there is sensitivity to the legitimate interests of both State and National Governments," 401 U.S. at 44. Abstention under Younger is applicable "not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987).

In Martin Marietta v. Md. Comm. on Judicial Relations, 38 F.3d 1392, 1396 (4th Cir. 1994), the Fourth Circuit recognized Younger "serves as an exception to the traditional rule that federal

courts should exercise jurisdiction conferred on them by statute.” Thus, Ex Parte Young, 209 U.S. 123 (1908), does not apply when Younger is properly invoked because federal courts ordinarily should not interfere with prosecutors who “are charged with the duty of prosecuting offenders against the laws of the state, and [who] must decide when and how this is to be done.” Younger, 401 U.S. at 45.

Younger abstention applies when “(1) there is an ongoing state judicial proceeding, (2) the proceeding implicates important state interests, and (3) there is an adequate opportunity to present the federal claims in the state proceeding.” Employers Res. Mgmt. Co. v. Am. Employers Benefit Trust, 65 F.3d 1126, 1134 (4th Cir. 1995) (*citing* Middlesex Co. Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423, 432 [1982]). When these criteria are met, the Younger doctrine is triggered for both declaratory and injunctive relief. Samuels v. Mackell, 401 U.S. 66, 73 (1971).

Further, Younger emphasizes that state courts are fully competent to decide issues of federal constitutional law. Lynch v. Snapp, 472 F.2d 769, 774 (4th Cir. 1973). Abstention under Younger is premised on the recognition that a defendant “has an adequate remedy at law” since he “can raise his constitutional claims as a defense to prosecution” in “a typical criminal trial.” Nivens v. Gilchrist, 444 F.3d 237, 241 (4th Cir. 2006).

The linchpin of Younger’s applicability “is the existence of an ongoing state proceeding.” Telco Comm. v. Carbaugh, 885 F.2d 1225, 1228 (4th Cir. 1989). As the Fourth Circuit recognized in Telco, “[i]f such a proceeding exists, ‘reinstating the action in the federal courts’ is impermissible; indeed to do so would involve a loss of time and duplication of effort.” *Id.* (quoting Wulp v. Corcoran, 454 F.2d 826, 831 [1st Cir. 1972]). Once the Younger criteria are met, there are only certain recognized narrow exceptions. As the Fourth Circuit explained in Nivens,

[t]he Supreme Court has recognized that a federal court may disregard Younger's mandate only where (1) "there is a showing of bad faith or harassment by state officials responsible for the prosecution"; (2) "the state law to be applied in the criminal proceeding is flagrantly and patently violative of express constitutional prohibitions"; or (3) "other extraordinary circumstances exist that present a threat of immediate and irreparable injury. Kugler v. Helfant, 421 U.S. 117, 124, 95 S.Ct. 1524, 44 L.Ed. 15 (1975)

Nivens, 444 F.2d at 241. Based on these criteria, exceptions to Younger are extremely rare, and none of them apply in this case.

In Cameron v. Johnson, 390 U.S. 611 (1968), the Supreme Court emphasized a prosecutor need not prove his state criminal case in federal court to avoid the Younger exceptions. Cameron involved an alleged violation of "a statute narrowly regulating conduct which is intertwined with expression" *Id.* at 618. In applying Younger, the Court stated: "[t]he issue of guilt or innocence is for the state court at the criminal trial; the state was not required to prove appellants' guilt in the federal proceeding to escape the finding that the State had no expectation of securing valid convictions." *Id.* at 621. The "mere possibility of erroneous application of the [criminal] statute [involved] does not amount 'to the irreparable injury necessary to justify a disruption of orderly state proceedings.'" *Id.*

Significantly, Younger itself involved a federal action to enjoin a pending criminal prosecution. The Younger decision recognized "courts of equity ... particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." Younger, 401 U.S. at 43-44. Younger referenced the Court's earlier decision in Fenner v. Boykin, 271 U.S. 240 (1926), where "in a unanimous opinion [the Court] made clear that [a federal] ... suit even with respect to state criminal proceedings not yet formally instituted, could be proper only under very special circumstances." *Id.* at 45.

The Court also cited a wealth of other decisions holding that any federal injunction of a state prosecution required “the threat to the plaintiff’s federally protected rights ... [to] be one that cannot be eliminated by his defense against a single criminal prosecution.” *Id.* Quoting from Watson v. Buck, 313 U.S. 387, 400 (1941), the Court stated:

‘... No citizen or member of the community is immune from prosecution, in good faith for his alleged criminal acts. The imminence of such prosecution **even though alleged to be unauthorized and hence unlawful** is **not** alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid.’

Id. (emphasis added).

2. Plaintiff’s Complaint should be dismissed under Younger.

Consistent with the authorities discussed above, federal courts have applied the Younger abstention doctrine to situations where, as here, a state has initiated a criminal investigation that is pending when the federal action is filed. The courts’ rationale is a criminal investigation is part and parcel of any formal criminal prosecution that may ultimately be sought, and if such prosecution materializes, the federal claims can be raised in that state criminal proceeding. Accordingly, application of Younger does not depend upon the formalism of an initiated prosecution. *See Hicks v. Miranda*, 422 U.S. 332, 349 (1975) (“... the requirements of Younger v. Harris could not be avoided on the ground that no criminal prosecution was pending against appellees on the date the federal complaint was filed.”)

As noted, Younger reiterated the holding in Fenner that a federal action “even with respect to criminal proceedings **not yet formally instituted**, could be proper only under very special circumstances.” 401 U.S. at 45 (emphasis added). The Court later observed in Morales v. Trans World Airlines, 504 U.S. 374 (1982), that Younger “imposes heightened requirements for an

injunction to restrain an already-pending **or an about-to-be pending state criminal action**” *Id.* at 381, n. 1 (emphasis added).

North v. Walsh, 656 F.Supp. 414 (D.C.D.C. 1987), presents a good example of Younger’s applicability to pending criminal investigations. The plaintiff brought a federal action challenging the investigation conducted by Independent Counsel Lawrence Walsh. The Court initially concluded the case was not sufficiently “ripe” for adjudication because the plaintiff had not alleged sufficient hardship “to warrant anticipatory judicial involvement in the ongoing criminal investigation.” *Id.* at 418-419. The Court then found the Younger abstention doctrine applied as well, stating:

[t]he strong policy against intervening in ongoing criminal investigations also persuades the court to refrain from reviewing plaintiff’s substantive claim. Courts have almost never found that an ongoing criminal investigation imposes a sufficient hardship to the person investigated to warrant judicial review prior to his or her indictment. The standard for obtaining any form of injunctive relief is high, Younger v. Harris, 401 U.S. 37, 46, 91 S.Ct. 746, 751, 27 L.Ed. 669 (1971), but a party who seeks to enjoin a criminal investigation has a particularly heavy burden.

Fieger v. Cox, 524 F.3d 770 (6th Cir. 2008), is also persuasive. The Michigan Attorney General initiated an investigation involving certain illegal expenditures, and the Sixth Circuit affirmed the District Court’s decision to abstain under Younger. Finding there was a “pending” judicial proceeding, the Court concluded:

First and most importantly, there was an ‘ongoing judicial proceeding’ at the time of the district court’s review namely a criminal investigation with the same parties, involving the same underlying set of facts and circumstances.

Id. at 775. Accord Tax Assn. of Bus. v. Earle, 388 F.3d 515 (5th Cir. 2004) (grand jury investigation); Amanatullah v. Colo. Bd. of Medical Examiners, 187 F.3d 1160, 1163 (10th Cir. 1999) (“... state proceedings began ... when the Colorado Board issued its first ‘30-day’ letter to Amanatullah advising him of its investigation into the allegations of the Nevada complaint.”); Berger

v. Cuyahoga County Bar Assn., 983 F.2d 718 (6th Cir. 1993) (state bar investigation); Kaylor v. Fields, 661 F.2d 1177, 1182 (8th Cir. 1981) (issuance of a prosecutor's subpoena is a pending state proceeding); Seligman v. Spitzer, 2007 WL 2822208 (S.D.N.Y. 2007) (Attorney General's ongoing criminal investigation); Nick v. Abrams, 717 F.Supp. 1053 (S.D.N.Y. 1989) (same).

Significantly, the Fourth Circuit has also applied Younger to pending criminal investigations. In Traverso v. Penn, 874 F.2d 209 (4th Cir. 1989), the Court held that Younger was applicable to defendant's §1983 action against Virginia police officers who engaged in unconstitutional actions during the course of a murder investigation. Defendant's Virginia murder charge had been reversed on the basis venue was not proper in that state, but a subsequent prosecution was contemplated in Maryland, and the Court was advised the prosecution "was either imminent or underway" *Id.* at 212. In applying Younger, the Fourth Circuit concluded "any uncertainty about the exact stage of the Maryland prosecution, or whether it is indeed being pursued, is of no consequence." *Id.*

In Potomac Electric Power Co. v. Sachs, 802 F.2d 1527 (4th Cir. 1986), *vacated on other grounds*, 484 U.S. 1022 (1988), the Fourth Circuit squarely held Younger applied to an ongoing criminal investigation. The Court reversed the District Court's conclusion Younger was inapplicable because a pending grand jury investigation did not provide adequate opportunity to raise the federal preemption claim in the state courts. In the Fourth Circuit's view, "subsequent judicial proceedings in which the [federal] claim can be raised are ... relevant ..." to Younger's applicability, and in the Court's opinion, there existed an opportunity for state review of the federal claims. The Court concluded:

[g]rand jury investigation and indictment initiate a criminal prosecution in Maryland's system of criminal enforcement. **If indicted, PEPCO can present its claim of federal preemption by TSCA as a defense in the criminal prosecution, and therefore has an adequate opportunity to present the claim in the ongoing**

proceedings.

Id. at 1532 (emphasis added). *See also* Craig v. Barney, 678 F.2d 1200, 1202 (4th Cir. 1982) (*Younger* applies because appellants “have the requisite opportunity to vindicate their constitutional rights ... even absent any grand jury indictment.”)

The situation before the Court in this case is virtually on point with Sachs, and the analysis articulated in Sachs controls here. Plaintiff’s Complaint concedes the Attorney General had already initiated a criminal investigation into whether Plaintiff was aiding and abetting of prostitution before the Complaint was filed on May 20. Complaint, Para. 55-59. As in Amanatullah, *supra*, where the judicial proceeding began with notification to plaintiff that an investigation was underway, the criminal proceeding in this case commenced on May 15 upon expiration of the deadline set in the Attorney General’s May 5 letter to Plaintiff demanding removal of advertisements facilitating violation of South Carolina’s prostitution laws. On that date, the Attorney General formally initiated his criminal investigation.

Indeed, as Plaintiff concedes, Chief Deputy John McIntosh formally notified Plaintiff in a May 15 letter that the Attorney General’s concern was “facilitation of prostitution.” Certainly, as South Carolina’s Chief Prosecutor under Art. V, § 24 of the South Carolina Constitution, the Attorney General has full authority to initiate a criminal probe of this nature. *See* Condon v. Hodges, 349 S.C. 232, 239, 562 S.E.2d 623, 627 (2002) (as chief law officer of the State, the Attorney General “may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State”).

A criminal investigation is part and parcel of the prosecution process in South Carolina. This principle is illustrated by Crowell v. Herring, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990), where

statements made during the investigation were deemed as absolutely privileged as those made in the judicial proceeding itself. The Court recognized:

... the investigation of Crowell's alleged misdeeds [relevant to an investigation leading to a court martial] can be likened to a prosecutor gathering evidence, interviewing witnesses and preparing a case. Accordingly, we hold the statements made by Allen and Wilder during the course of their investigation of Crowell as trustees and as members of the investigatory committee were absolutely privileged, inasmuch as the statements **bore relation to the contemplated proceeding**.

Id. at 467 (emphasis added). See also U.S. v. Schwartz, 924 F.2d 410, 423 (2nd Cir. 1991) (Customs Service investigation is a "proceeding" for purposes of 18 U.S.C. § 1505); U.S. v. Ballestas, 1997 WL 240704 (S.D.N.Y. 1997) (same); Amylou R. v. County of Riverside, 28 Cal. App. 4th 1205, 1210, 34 Cal.Reptr.2d 319, 321 (1994) ("Because investigation is 'an essential step' toward the institution of formal proceedings, it 'is also cloaked with immunity.'"); Bentler v. Commonwealth, 136 S.W. 896, 898 (Ky. 1911) ("the investigation and indictment constitute the first step in the prosecution").

As in Sachs, Plaintiff will have ample opportunity to raise its various federal claims **if and when it is prosecuted** following the Attorney General's on-going criminal investigation. It would elevate form over substance to hold Younger inapplicable because a prosecution is not yet formally pending, when the criminal investigation that may lead to criminal charges was already underway prior to commencement of this action, and is continuing.³ Plaintiff seeks to torpedo the pending state criminal investigation by resorting to this Court. As in North, *supra*, however, Plaintiff has not

³ Steffel v. Thompson, 415 U.S. 452 (1974), and Doran v. Salem Inn, 422 U.S. 922 (1975) are clearly distinguishable from the instant case. Those cases instruct that Younger does not apply when offenders are threatened with prosecution, but cease the illegal activity and challenge the underlying criminal law in federal court. When, as in this case, the illegal activity is not terminated even after warnings, and a federal action is initiated after commencement of a state criminal proceeding, Steffel and Doran teach that abstention is appropriate under Younger.

alleged sufficient hardship “to warrant anticipatory involvement in the ongoing criminal investigation.” Under the controlling authority cited above, Younger applies to this **pending criminal proceeding**, and Defendants request the case be dismissed in its entirety on the basis of Younger abstention.⁴

If the Court determines federal intervention is appropriate in this case, however, Defendants submit the Complaint should be dismissed because it fails to state viable statutory or constitutional claims. The CDA does not afford Plaintiff immunity for criminal prosecution for aiding and abetting prostitution, and South Carolina’s enforcement of its laws against prostitution does not impact either the First Amendment or the Commerce Clause.

B. The CDA

The CDA provides in pertinent part:

(b) Policy . . .

It is the policy of the United States— . . .

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for “good samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the

⁴ While abstention is appropriate under Younger, abstention is also warranted under Burford v. Sun Oil Co., 319 U.S. 315 (1943). In Russell v. Giles Co., 105 F.Supp.2d 841 (M.D. Tenn. 2000), the Court abstained under Burford and Younger when the plaintiff sought to enjoin the State’s enforcement of the State under Tennessee’s Public Indecency and Adult Oriented Establishment Registration Act. The Court concluded federal court intervention would be “disruptive to the State’s efforts” to establish a policy regarding regulation of adult establishments. Federal intervention would be equally disruptive in this case. The important state policy of deterring prostitution, and those who aid and abet it, would be severely undermined by federal court intercession in this case.

publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

...

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute. . . .

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

1. The CDA does not grant blanket immunity from state criminal prosecutions.

a. Preemption

Plaintiff contends §230 preempts application of any and all state criminal laws to providers of an interactive computer service. Basic federalism considerations, however, dictate deference to

South Carolina's right to prosecute prostitution. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (federalism assures a decentralized government more sensitive to the diverse needs of a heterogeneous society, increases opportunity for citizen involvement in democratic processes, allows for more government innovation and experimentation, makes government more responsive, and constitutes a check on abuses of government power).

Even though Congress may legislate in areas traditionally regulated by the states, courts must assume Congress does not exercise such authority lightly. *Gregory*, 501 U.S. at 460. Thus, when Congress intends to upset the federal/state balance of power, it must make it "unmistakably clear." *Atascadero State Hospital v. Scanlon*, 463 U.S. 234, 242 (1985); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984); *United States v. Bass*, 404 U.S. 336, 349 (1971); *Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999). Any preemption analysis begins with an assumption the state's historic police powers are **not** superseded by a federal law absent evidence indicating preemption was "the clear and manifest purpose of Congress." *Altria Group v. Good*, 129 S.Ct. 538, 543 (2008) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 [1947]); *Casino Ventures*, 183 F.3d at 310. If a statute's language is capable of more than one plausible interpretation, courts should "accept the reading that disfavors preemption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

This case involves regulation of prostitution - a "traditional area of state regulation." *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997). Unless the prostitution involves interstate human trafficking, states have traditionally been the regulating sovereign pursuant to their broad police power to enact legislation protecting the health, safety and welfare of its citizens. *See Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 737 (9th Cir. 2003) (prostitution

is in a category of products or activities deemed harmful, which states have dealt with through means ranging from location restriction to outright prohibition); *see also* 63C Am.Jur.2d §4 (statutes regulating public morals, including regulation and punishment of prostitution and related offenses, fall within the state’s police power).

Since preemption of state law requires a clearly stated Congressional intent to do so, and regulation of prostitution has traditionally been left to the states, the first question before this Court is whether §230 provides a clear statement preempting traditional state prostitution laws. Review of §230 reveals no such statement. To the contrary, the statutory language specifically contemplates continuing viability of state laws. Therefore, Congress did not express an intent to preempt state laws regulating prostitution.

b. Statutory Language and Legislative History

i. Statutory Language

A general principle of statutory interpretation requires a court to presume Congress says “what it means and means . . . what it says [in the statute].” Connecticut Nat. Bank. v. Germain, 503 U.S. 249, 254 (1992). Accordingly, statutory interpretation begins with the language of the statute itself. United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989).

On its face, the CDA does not immunize Plaintiff from every state criminal prosecution. On the contrary, it expressly allows enforcement of “consistent” state laws. §230(e)(3). To the extent it provides any immunity from state criminal law, that immunity only extends to laws that are “inconsistent” with the CDA. *Id.* Thus, the analysis must necessarily focus on whether the particular state criminal law at issue is “consistent” with the CDA. South Carolina’s aiding and abetting prostitution law is consistent with the CDA.

Further, the CDA expressly endorses the policy of ensuring “ vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer,” and states the statute “is not to be construed as impairing the enforcement of any other Federal criminal statute.” §230(b)(5) and (c)(2). Since the CDA does not impair the enforcement of any Federal criminal statute, it would not preclude enforcement of any state law regarding criminal activity that is consistent with, and complementary to, enforcement of federal criminal laws.

ii. Title

Section 230 is entitled: "Protection for private blocking and screening of offensive material." (emphasis added). As the title expressly indicates, the intended protection was for taking action to block or screen offensive material, or as §230 (b) (4) states, to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material. Congress acted to protect "good samaritan" interactive computer service providers who act for the public good and seek to protect children and families from the pornography and offensive materials Congress identified as harmful to the future health of the Internet and its attached computer services.

The “title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.” Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998). In light of this principle, the title and headings of §230 leave no doubt Congress intended any immunity thereunder to apply to civil liability.

iii. Legislative History

The CDA Conference Report also makes it abundantly clear §230 was intended to protect from civil liability, even repeating the term, "civil liability" three times in describing the protections.

Section 509--online family empowerment . . .

House amendment

Section 104 of the House amendment protects from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material.

Conference agreement

The conference agreement adopts the House provision with minor modifications as a new section 230 of the Communications Act. This section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services. These protections apply to all interactive computer services, as defined in new subsection 230(e)(2), including non-subscriber systems such as those operated by many businesses for employee use. They also apply to all access software providers, as defined in new section 230(e)(5), including providers of proxy server software. The conferees do not intend, however, that these protections from civil liability apply to so-called "cancelbotting," in which recipients of a message respond by deleting the message from the computer systems of others without the consent of the originator or without having the right to do so.

S. Conf. Rep. No. 104-230, 184 (1996) (emphasis added). Thus, Congress intended only to address potential civil immunity, and never even contemplated immunizing interactive computer service providers against prosecution when they knowingly engage in conduct that violates a state criminal law.

iv. Purpose

As indicated by its very name - the Communications **Decency** Act - the overall purpose of the CDA was to address the trafficking of offensive material via the Internet, not to immunize interactive computer service providers when they knowingly disseminate such material. *See* S. Conf.

Rep. No. 104-230, 435 (1996); 141 Cong. Rec. S1953 (daily ed. Fed., 1, 1995) (the focus of the CDC is to "promote decency" on the Internet). Thus, the "good samaritan" immunity is conditional protection predicated on taking affirmative positive steps to block or screen objectionable materials.

Section 230 precludes claims placing a computer service provider in a publisher's role, thereby barring lawsuits seeking to hold the service provider liable for merely exercising traditional publisher's editorial functions, including decisions whether to publish, withdraw, postpone or alter content. Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). Congress enacted §230 in recognition of "the threat that **tort-based lawsuits** pose to freedom of speech," and chose not to deter harmful online speech through imposing tort liability on companies serving as mere intermediaries for other parties' potentially injurious messages. *Id.* at 330-331 (emphasis added).

The Fourth Circuit did not indicate any purpose whatsoever to immunize service providers from criminal prosecutions. Following Zeran, courts have consistently found §230 immunity in cases involving civil liability. *See* Barnes v. Yahoo, Inc., ___ F.3d ___ (9th Cir. 2009) (2009 WL 1740755) (negligent undertaking claim); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003) (invasion of privacy, misappropriation of right of publicity, and negligence); Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2007) (defamation); Ben Ezra, Weinstein and Co. v. America Online, Inc., 206 F.3d 980 (10th Cir. 2000) (defamation); Perfect 10, Inc. v. CCBill, LLC, 340 F.Supp.2d 1077 (C.D. Cal. 2004) (state law unfair competition claim); Novak v. Overture Services, Inc., 309 F.Supp.2d 446 (E.D.N.Y. 2004) (tortious interference with prospective economic advantage); Noah v. AOL Time Warner, Inc., 261 F.Supp.2d 532 (E.D. Va. 2003) (Title II of the Civil Rights Act of 1964, intentional infliction of emotional distress, unjust enrichment, negligence and fraud); Donato v. Moldow, 865 A.2d 711 (N.J.Sup. 2005); Kathleen R. v. City of Livermore, 87 Cal.App.4th 684

(2001) (nuisance and premises liability); Doe v. America Online, Inc., 783 So.2d 1010 (2001) (negligent failure to control third party's illegal postings); Schneider v. Amazon.com, Inc., 108 Wash.App. 454 (Wash.Ct.App. 2001) (breach of contract).⁵

Another underlying purpose of §230 was to remove disincentives to self-regulation by computer service providers. Zeran, 129 F.3d at 331. "In line with this purpose, §230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions." *Id.* In other words, a service provider is clearly shielded from liability for removing or blocking content it finds to be objectionable. *Id.*; §230(c)(2)(A).

2. The CDA does not immunize the conduct at issue in this case.

This case does not involve actions of an interactive computer service provider to block or screen objectionable materials. On the contrary, the Attorney General has merely stated an intent to investigate and potentially prosecute Plaintiff for its knowing facilitation of prostitution in South Carolina by allowing the continued use of its websites to advertise prostitution.

Construing the CDA as allowing state criminal prostitution prosecutions recognizes that the Internet does not insulate responsibility. "The [CDA] was not meant to create a lawless no-man's-land on the Internet," and illegal conduct does not become lawful simply because it occurs online. Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1164 (9th

⁵While courts have undoubtedly interpreted the service provider's civil immunity under §230 very broadly, it is not absolute. *See Federal Trade Commission v. Accusearch, Inc.*, ___ F.3d ___ (10th Cir. 2009) (2009 WL 1846344) (service provider liable as content provider when its actions encourage such content); Barnes (state promissory estoppel claim not barred by §230). Further, civil immunity does not ordinarily include criminal immunity. By way of example, official immunity does not encompass criminal conduct. *Cf. Ex parte Virginia*, 100 U.S. 339 (1880); *see also O'Shea v. Littleton*, 414 U.S. 488 (1974) (the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct"). Similarly, the CDA's grant of civil immunity does not reach so far as to immunize criminal conduct.

Cir. 2008.) “If an interactive computer service were shown to be actively involved in the sale of drugs or other contraband, the fact that sales were consummated over the computer service would not necessarily provide a shield from liability.” Stoner, 2000 WL 1705637 at *4.

In cases not involving the Internet, courts recognize people can be criminally responsible for aiding a crime by publishing the activity, or by providing a place for it, even if they do not actively participate in the crime themselves.

[A] newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned ‘Narcotics for Sale’ and ‘Prostitutes Wanted’ rather than stated within the four corners of the advertisement.

Pittsburgh Press Company v. Pittsburgh Comm. Human Relations, 413 US 376, 388 (1973); *see also* State v. Katz, 51 Ohio App.2d 14, 364 N.E.2d 1384 (Ohio App. 1976) (bar owner’s charging a prostitute a sum of money and then allowing her to solicit patrons in the bar constituted a sufficient expression of encouragement and support to be the “concurrence or the doing of something to contribute to an unlawful act” to support an aiding and abetting conviction). Thus, the mere fact that the Internet was used to facilitate prostitution does not insulate Plaintiff from criminal responsibility if it knowingly aids and abets that illegal conduct.

Nor can Plaintiff escape responsibility for its knowing conduct by hiding behind the claim it does not provide the content of advertisements posted on its websites, and therefore, it is not an “information content provider” as defined by the CDA. An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” §230(f)(3). “This a broad definition, covering those who are responsible for development of content only ‘in

part.” Accusearch, 2009 WL 1846344 at *8 (*quoting Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 [1st Cir. 2007]). “[A] service provider is ‘responsible’ for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content.” *Id.* at *9.

By creating the “Erotic Services” section of its websites, Plaintiff encouraged development of the very advertisements at the heart of the Attorney General’s expressed concerns. By continuing this category after acknowledging in November 2008 that it was being used to facilitate prostitution nationwide, Plaintiff essentially ratified, and became responsible for, the contents of advertisements it posted there, especially after Plaintiff was informed the illegal conduct continued. Significantly, Plaintiff only took serious steps to stem the flood of prostitution advertisements after the Attorney General informed it South Carolina law enforcement would no longer sit idly by while Plaintiff continued to facilitate prostitution in South Carolina. Plaintiff acknowledges the Attorney General indicated all it had to do to avoid criminal investigation was act to “take the prostitution ads off its Web site.” Complaint, Para. 55.⁶

Only two courts, in unpublished decisions, have determined §230 bars state criminal prosecutions. *See Voicenet Communications, Inc. v. Corbett*, 2006 WL 2506318 (E.D. Pa. August 30, 2006); *People v. Gourlay*, 2009 WL 52916 (Mich. App. Mar. 1, 2009). Both courts addressed the §230 immunity issue in *dicta*, and determined the CDA provided immunity from enforcement of “inconsistent” state criminal laws, which is the Defendants’ contention in this case. Neither court

⁶Contrary to Plaintiff’s assertion the only way it can comply with the Attorney General’s demand would be to shut down its six South Carolina websites (Complaint, Para. 60), it need only remove advertisements identified as related to illegal prostitution. The Attorney General expressly advised Plaintiff no prosecutions would be initiated until Plaintiff had a reasonable time to respond. Complaint, Para. 53).

reached the issue of whether a particular state criminal law was inconsistent with the CDA since the issue was not presented in the context of either case. Voicenet, 2006 WL 2506318 at *5 (court could not determine whether law enforcement officers treated plaintiffs as publishers of content for purposes of state criminal law in securing a search warrant; Gourlay, 2009 WL 529216 at *3 (defendant failed to present argument that state laws under which he was convicted were inconsistent with §230). Implicit in these cases is a recognition that **consistent** state criminal prosecutions are not precluded by §230.

The CDA does not afford Plaintiff any immunity from criminal prosecution for knowingly facilitating prostitution in South Carolina via advertisements posted on its South Carolina websites. Holding that it does will literally open the legal floodgates for Internet service providers to advertise and encourage the most blatantly illegal activities, including murder, and states will have no means to stem the resulting tide of unlawful conduct. Such a result runs contrary to the purpose of the CDA. Therefore, Count I of the Complaint fails to state a claim for which relief can be granted and should be dismissed.

C. Enforcement of South Carolina’s prostitution laws does not implicate any First Amendment rights.

Plaintiff alleges the Attorney General’s threatened investigation and prosecution “constitute a content-based speech restriction that is not narrowly tailored to advance any compelling governmental interest,” and the practical effect of the Attorney General’s actions “is to shut down the operation of [Plaintiff’s] South Carolina-directed site, thereby silencing vast amounts of protected speech.” Complaint, Para. 71. Plaintiff relies on Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), as support for its assertion the Attorney General’s actions are “an overbroad content-based restriction on speech.”

Significantly, Plaintiff does not contend South Carolina's criminal statute regarding aiding and abetting prostitution is overbroad, merely that the Attorney General's threats to enforce the law are overbroad. Plaintiff cites no authority, and Defendants can find none, applying the overbreadth analysis to a **threatened** prosecution rather than an actual challenge to a statute. The doctrine is typically invoked to strike down facially invalid statutes before the potential defendant is actually prosecuted, and is "predicated on the danger than an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions." Massachusetts v. Oakes, 491 U.S. 576, 581 (1989). Indeed, a threat to enforce a state law, "the validity of which has not been called into question," does not violate First Amendment rights. State Cinema of Pittsfield, Inc. v. Ryan, 422 F.2d 1400, 1402 (1st Cir. 1970). Therefore, Plaintiff's reliance on Ashcroft is misplaced.

In any event, the conduct targeted by the Attorney General enjoys no constitutional protection. "Offers to engage in illegal transactions are categorically excluded from First Amendment protection." United States v. Williams, 128 S.Ct. 1830, 1841 (2008) (*citing* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 [1973]). "Many long established criminal proscriptions - such as laws against conspiracy, incitement, and **solicitation** - criminalize speech (commercial or not) that is intended to induce or commence illegal activities. *Id.* at 1841-1842 (emphasis added). *See also* Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997) (every court that has addressed the issue has held the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime); Arcara v. Cloud Books, 478 U.S. 697 (1986) (First Amendment does not prevent closing down bookstore pursuant to generally applicable statute on basis of solicitation of prostitution taking place on the premises); The Casbah, Inc. v. Thone, 651

F.2d 551 (8th Cir. 1981) (restraint of advertising promoting sale of drug paraphernalia upheld; such speech is analogous to advertising the sale of narcotics or solicitation of prostitution and may constitutionally be prohibited); First Global Communications, Inc. v. Bond, 413 F.Supp.2d 1150 (W.D. Wa. 2006) (states may prohibit speech that aids or abets illegal prostitution).

In Pittsburgh Press Co., the Court stated:

We have no doubt that a newspaper **constitutionally could be forbidden** to publish a want ad proposing a sale of narcotics or **soliciting prostitutes**. Nor would the result be different if the nature of the transaction were indicated by **placement under columns captioned** ‘Narcotics for Sale’ and ‘**Prostitutes Wanted**’ rather than stated within the four corners of the advertisement.

413 U.S. at 388 (emphasis added). In this case, Plaintiff’s category “Erotic Services” was the functional equivalent of a “Prostitutes Available” column, and prostitution advertisements posted there enjoy no First Amendment protection. *See also Nat. Org. for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994) (“That ‘aiding and abetting’ of an illegal act may be carried out through speech is no bar to its illegality.”).

Plaintiff’s reliance on Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), as support for its contention the Attorney General’s “threats” constitute a unconstitutional prior restraint on speech is misplaced. Bantam Books involved enforcement of a Rhode Island anti-obscenity statute. In striking down the statute as unlawful prior restraint of arguably protected speech, the Supreme Court stated: “the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.” *Id.* at 66.

Unlike the “dim and uncertain line” regarding what constitutes obscene material, Pittsburgh Press Co. makes the line bright and certain when the activity at issue involves solicitation of criminal

activity. In rejecting the newspaper's claim that a regulatory order prohibiting job postings delineated by gender constituted an unlawful prior restraint on expression, the Supreme Court found that gender discrimination in employment was illegal, and therefore, the regulatory order did "not endanger arguably protected speech." 413 U.S. at 390.

The Supreme Court further illuminated that bright line in Arcara v. Cloud Books, Inc., *supra*, in which the Court upheld closure of an adult bookstore based on, *inter alia*, "instances of solicitation of prostitution," where "the management . . . was fully aware of the sexual activity on the premises." 478 U.S. at 699. The Court stated that "when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 702-703. *See also* Pittsburgh Press Co., 413 U.S. at 329 ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulations is **altogether absent when the commercial activity itself is illegal** and the restriction on advertising is incidental to a valid limitation on economic activity.") (emphasis added). South Carolina's interest in regulating prostitution cannot be seriously debated, and to the extent enforcement of state prostitution laws may impose an incidental limitation on otherwise protected speech, the limitation is clearly justified.

Plaintiff's claim that shutting down the entire South Carolina section of its websites is the only way it can avoid prosecution is blatantly misleading, and nothing short of First Amendment blackmail. The Attorney General has never demanded such drastic steps, and indeed, has acknowledged "[m]any of the classified and communication services on the craigslist site provide the public with a valuable service." Complaint, Exhibit E.

The only thing at issue in this case are the advertisements on Plaintiff's South Carolina websites facilitating prostitution in South Carolina, speech that is not protected by the First Amendment. As the Supreme Court stated in Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949): “[i]t rarely has been suggested the constitutional freedom for speech and press extends to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now” *Id.* at 502.

Contrary to Plaintiff's attempt to paint the issue broadly, South Carolina's aiding and abetting prostitution law, which has been codified and validly enforced for over sixty years, does not impose strict liability. Rather, potential defendants must “knowingly” aid and abet prostitution, and the State must prove the “knowing” element of the offense beyond a reasonable doubt in any prosecution. The Attorney General's continuing investigation will reveal whether, when and to what extent, Plaintiff knew (and knows) specific advertisements related to prostitution are posted on its websites. Neither Plaintiff nor the users of its websites have a constitutionally protected right to post such advertisements, and if Plaintiff is as serious about stopping the use of its websites to facilitate illegal activities as it claims, it should have no problem removing known prostitution advertisements.

Since the conduct at issue in this case is not protected by the First Amendment in any forum, including the Internet, Plaintiff's Complaint fails to state a claim for which relief can be granted under the First Amendment. Therefore, Count II of the Complaint should be dismissed.

D. Enforcement of South Carolina's prostitution laws does not violate the Commerce Clause.

Finally, Plaintiff contends the Attorney General's attempts to enforce South Carolina's laws against prostitution violate the Commerce Clause of the United States Constitution by seeking to apply state law to regulate commercial transactions taking place outside South Carolina, and by

applying state law in a manner constituting an unreasonable and undue burden on interstate commerce that outweighs any local benefit to South Carolina. As with its First Amendment argument, Plaintiff's contentions are fatally flawed because Congress has affirmatively determined interstate commerce in prostitution is not in the national interest, and prostitution and the facilitation thereof is undeniably illegal in virtually every United States jurisdiction.

“Where Congress has proscribed certain interstate commerce, Congress has determined that that commerce is not in the national interest.” Pic-A-State PA, Inc. v. Pennsylvania, 42 F.3d 175, 179 (3rd Cir. 1994). Once Congress makes such a determination, the Commerce Clause is not offended by state laws burdening that commerce. *Id.* In cases involving Commerce Clause challenges to state laws in an area Congress has made it a crime to conduct such commerce, courts conduct only a two-prong analysis: 1) whether federal law precludes all state legislation in that area; and 2) if state regulation is not precluded, whether the state law conflict with the federal law. *Id.* (*citing* California v. Zook, 336 U.S. 725 [1949] and Asbell v. Kansas, 209 U.S. 251 [1908]). State laws aiding the prohibition of activity Congress has made unlawful are valid. Zook, 336 U.S. at 729.

Congress declared the transportation of women in interstate or foreign commerce for immoral purposes (prostitution) illegal by enacting the White Slave Traffic Act (the “Mann Act”), 18 U.S.C. §2421, et seq. State laws prohibiting prostitution within state boundaries are consistent with the Mann Act, and aid in the enforcement of Congress’ prohibition of such conduct. *See* Taylor v. State, 516 P.2d at 1351 (Okla.Crim.App. 1973) (state pandering law upheld as consistent with the Mann Act to the extent the state law related to conduct occurring within the state).

Other than some areas of Nevada, all fifty states prohibit prostitution or the facilitation thereof. *See* First Global Communications, Inc., 413 F.Supp.2d at 1155 (prostitution is legal in some

countries and parts of Nevada). Thus, on its face, requiring Plaintiff to remove advertisements on its websites facilitating prostitution in South Carolina cannot constitute an undue burden on otherwise legitimate commerce.

Further, as discussed in depth above, the CDA expressly authorizes states to regulate or prohibit Internet activities if such regulation or prohibition is consistent with the CDA. “When Congress so chooses, state actions that it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.” Northeast Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 174 (1985). *See also* Head v. New Mex. Bd. of Examiners, 374 U.S. 424 (1963); Underhill Associates, Inc. v. Bradshaw, 674 F.2d 293 (4th Cir. 1982) (Virginia Securities Act is not preempted by federal law, and state regulation not inconsistent with federal law is authorized; thus Virginia law does not violate Commerce Clause).

Further, the description of Plaintiff’s operations as outlined in the Complaint belie its contention the Attorney General is attempting to regulate transactions occurring “wholly outside of the State of South Carolina.” Plaintiff’s service “is organized into separate websites dedicated to particular localities,” and “[t]here are six such websites for South Carolina - one each for Charleston, Columbia, Florence, Greenville/Upstate, Hilton Head and Myrtle Beach.” Complaint, Para. 21. Plaintiff charged a fee for advertisements in the “Erotic Services” category, and now charges \$10 for advertisements in the “Adult Services” category. Complaint, Para. 23 Given the construction of Plaintiff’s websites by geographic region, of necessity, the vast majority of fees for those categories on the South Carolina websites are paid by South Carolina residents, and the services advertised occur in South Carolina. Therefore, the transactions at issue begin and end within South Carolina’s

borders.⁷

The Complaint also belies Plaintiff's claim enforcement of South Carolina's prostitution laws by requiring Plaintiff to remove advertisements facilitating prostitution from the South Carolina websites will constitute an unreasonable and undue burden on interstate commerce. As of May 18, 2009, out of 334,180 advertisements on Plaintiff's South Carolina websites, "there were a total of 40 ads" in the South Carolina "Erotic Services" and/or "Adult Services" sections combined. Complaint, Para. 44. Thus, even if all "Adult Services" advertisements were removed, it would affect only approximately .01% of the advertisements on the South Carolina websites, and 0% of the advertisements on the 300 plus websites Plaintiff maintains for other localities. Complaint, Para. 21. On its face, that is not an unreasonable and undue burden on interstate commerce.

Enforcement of South Carolina's prostitution laws does not violate the Commerce Clause because prostitution is not protected commerce, and South Carolina's laws aid enforcement of the federal laws prohibiting it. Further, the transactions at issue occur within South Carolina's borders, and prohibiting them will not unreasonably burden otherwise valid business facilitated in South Carolina via Plaintiff's websites. Accordingly, as a matter of law, Count III of the Complaint fails to state a cause of action for which relief can be granted.

⁷Plaintiff clearly does business in South Carolina, and therefore, is subject to the long-arm jurisdiction of South Carolina courts. *See* S.C. Code Ann. §36-2-803 (2003) (long-arm statute).

IV. CONCLUSION

This Court should abstain from considering the issues raised in the Complaint because they are primarily state law issues that should be resolved by a South Carolina state court. Further, §230 of the CDA does not immunize Plaintiff from criminal prosecution for knowingly aided and abetting prostitution in South Carolina, nor have the Attorney General's actions violated Plaintiff's First Amendment rights or the Commerce Clause.

The issue before the Court is a narrow one - does enforcement of South Carolina's prostitution laws violate §230 of the CDA, the First Amendment or the Commerce Clause. Ruling for the Defendants will merely allow enforcement of those laws and not impact other state laws.

If Plaintiff prevails in this action, however, its websites will become the functional equivalent of the "Wild West" with the only law being the federal marshal, who enforces federal law when he happens to pass through town. Plaintiff will be free to develop categories such as "Murder for Hire," "Preferred Prostitutes," or "Drug Supermarket," with absolute impunity, and states will be helpless to stop the resulting destruction and chaos within their borders.

Based on the foregoing, the Defendants submit the Complaint fails to state a cause of action for which relief can be granted, and this action should be dismissed pursuant to Rule 12(b)(6), FRCP.

Respectfully submitted,

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