

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

craigslist, Inc.,	*	2:09-CV-1308
	*	
Plaintiff	*	Charleston,
	*	South Carolina
vs	*	February 23, 2010
	*	11:00 a.m.
Henry D. McMaster, in his	*	
Official capacity as Attorney	*	
General of the State of South	*	
Carolina, et al.,	*	
	*	
Defendants	*	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE C. WESTON HOUCK,
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Joseph P. Griffith Law Firm, LLC BY: JOSEPH P. GRIFFITH, JR., ESQ. Seven State Street Charleston, South Carolina 29401
	Wilmer, Cutler, Pickering, Hale and Dorr BY: PATRICK J. CAROME, ESQ. 1875 Pennsylvania Avenue NW Washington, D.C. 20006
For the Defendants:	SC Attorney General's Office BY: DEBORAH SHUPE, ESQ. JAMES EMORY SMITH, JR., ESQ. P.O. Box 11549 Columbia, South Carolina 29211
Transcriptionist:	J. Collins Reporting, LLC BY: JANET A. COLLINS, RMR, CRR, CRI 222 West Coleman Boulevard, Ste. 220 Mt. Pleasant, South Carolina 29464 (843) 881-8435

Proceedings recorded by digital recording system, transcript
produced by Computer-Aided Transcription software

1 (On the record, 10:54 a.m.)

2 THE COURT: All right. This is Civil Action
3 09-1308, craigslist, Inc., Plaintiff, against Henry D.
4 McMaster, et al., Defendants.

5 The Defendants have made a Motion to Dismiss this
6 action for failure to state a claim, and that is what we're
7 here to do this morning, to hear that motion. Okay?

8 THE CLERK: All right.

9 THE COURT: You with the Attorney General? Okay.

10 MS. SHUPE: Yes, sir.

11 THE COURT: It's your motion.

12 MS. SHUPE: May it please the Court?

13 First of all, would the Court prefer that I go up
14 to the podium?

15 THE COURT: I don't care, doesn't make any
16 difference me.

17 MS. SHUPE: Okay, then if you don't mind, I'll
18 stay here.

19 My name is Debbie Shupe, and I am appearing here
20 today on behalf of the Defendants in this action.

21 As the Court noted, we are here on the Defendants'
22 Motion to Dismiss the action pursuant to Rule 12(b). And in
23 going over all of the documents, this thing has been fully
24 briefed by the parties, and I don't think I need to sit here
25 and regurgitate the stuff that's in the Pleading for the

1 Court.

2 But in going through what's been filed, it dawned
3 on me that we've done what lawyers tend to do, and that is
4 go around in circles and dance around and -- and the issue
5 somehow gets lost in the shuffle. And when you boil it down
6 to its essence, there are essentially four basic issues
7 before the Court today.

8 First issue is whether this Court should abstain
9 from deciding this case in light of the Attorney General's
10 ongoing criminal investigation involving the Plaintiff.

11 The second issue is whether 47 USC, Section 230,
12 commonly referred to as the "Communications Decency Act,"
13 gives a blanket immunity from prosecution for knowingly
14 violating South Carolina criminal law prohibiting the aiding
15 and abetting of prostitution.

16 The third issue is whether the threat of criminal
17 prosecution for knowingly aiding and abetting prostitution
18 in South Carolina violates the First Amendment rights of
19 Plaintiff and its users.

20 And the final issue before the Court is whether
21 that threat of prosecution violates the commerce clause by
22 imposing an undue burden on interstate commerce.

23 As to the abstention issue, Your Honor, Younger
24 and its progeny developed a three-prong test.

25 The first prong is, there is "An ongoing state

1 judicial proceeding";

2 There should be an important State interest
3 implicated, and;

4 There should be an adequate opportunity to present
5 Federal claims in a State Court proceeding.

6 There can be no question that enforcement of South
7 Carolina's criminal laws in general, and the prostitution
8 laws in particular, constitutes an important State interest
9 for the State of South Carolina.

10 It can also be no question that South Carolina's
11 State Courts are very capable of handling any Federal claims
12 the Plaintiff may need to raise in the event of a -- of
13 judicial -- I mean prosecution that may be instituted at the
14 end of the investigation.

15 THE COURT: What's going on now?

16 MS. SHUPE: What's going on now, Your Honor? We
17 are still maintaining contact with Sheriffs' Offices around
18 the State, tracking -- we are monitoring the, um -- "Adult
19 Services" Web sites, categories, and we are getting
20 information about any arrests that are made.

21 But as Your Honor knows, we consented to maintain
22 the status quo regarding prosecution until, I would -- I
23 say, cooler heads could prevail and things could settle down
24 and this Court could hear this on the merits.

25 And so we have done -- while we have continued the

1 investigation just as we said we would, we have not taken
2 any action regarding prosecution, because of the Consent
3 Order.

4 THE COURT: Now, in -- in the . . . do I have the
5 Complaint?

6 (Pause.)

7 THE COURT: Where is it?

8 (Pause.)

9 THE COURT: In the Complaint on Page 5, Paragraph
10 7, the following alleged quotation takes place: "As of 5
11 p.m. this afternoon, the craigslist South Carolina site
12 continues to display advertisements for prostitution and
13 graphic pornographic material. This content was not removed
14 as we requested. We have no alternative but to move forward
15 with criminal investigation and potential prosecution."

16 Is that the strongest statement that the
17 Plaintiffs allege the Attorney General made?

18 MS. SHUPE: I believe it is, Your Honor. I
19 believe it is.

20 He thereafter, and I -- and I think this is also
21 important for purposes of the strength of the threat to
22 them.

23 Thereafter, in all of the news articles in which
24 the Attorney General was quoted, he made it abundantly
25 clear, we recognized that craigslist had put in additional

1 measures to continue to -- to better monitor the now "adult
2 Services" site. And he specifically said, in the very last
3 public statement that he -- that's accredited to him, that
4 We hoped they were going to do better; That we hoped they
5 were going to do what they promised; And they had to be
6 given a reasonable time to fix it. That's the last public
7 statement that was made by the Attorney General.

8 THE COURT: Okay.

9 MS. SHUPE: And that was approximately May the
10 18th. What, he said, We were doing was monitoring it. But,
11 again, he also made it clear they would have time, and then
12 on May the 20th, they started this action.

13 THE COURT: Okay.

14 MS. SHUPE: Younger clearly indicates that Federal
15 Courts should not interfere with State officials who have a
16 duty to enforce State Law, and; Federal Court action in
17 cases involving State criminal proceedings, even those not
18 yet formally instituted, is only proper under very special
19 circumstances.

20 Now, I would -- I noted -- I've read the case
21 submitted by opposing counsel in the last week, and it's
22 the -- I know I'll mispronounce this, I apologize, but it's
23 Guillemard-Ginorio out of the Fourth Circuit on the
24 abstention issue.

25 And the important thing I think the Court should

1 take from that case is the Court, again, reaffirmed the
2 civil immunity under Section 230 of the CDA. That's not
3 even an issue here. The Defendants don't dispute there is a
4 very broad civil immunity under Section 230.

5 But what the Fourth Circuit said is they noted a
6 split in the Circuit -- and this is on Page 520 of that
7 opinion.

8 They said, The Fourth Circuit has taken no
9 position on the issue of when a criminal proceeding is
10 sufficient to warrant abstention.

11 I freely admit there are cases going both ways
12 pre-indictment, you know, what exactly has -- where it has
13 to be in the process. But the Fourth Circuit has not ruled
14 on that, and very clearly said they were not going to do it
15 at this point.

16 And then they even said, We're not going to set a
17 brightline rule for when an agency investigation has
18 proceeded far enough. So this is an open issue in the
19 Fourth Circuit.

20 In South Carolina, however, under South Carolina
21 Law, the investigation is part and parcel of the prosecution
22 proceeding. So it all constitutes a judicial proceeding for
23 purposes of when something starts and ends.

24 And so the initiation of a formal criminal
25 investigation like we have here is part of the prosecution

1 process and part of the judicial process in South Carolina.

2 The important thing we'd like the Court to -- to
3 consider is if the Younger abstention doctrine only applies
4 after a formal indictment is issued, anytime the subject of
5 a State criminal investigation mentioned the possibility of
6 a Federal claim, prosecutors will be faced with having to
7 rush to an indictment and then -- you know, and do the
8 thorough investigation later in order to retain the case in
9 the State Courts.

10 And that would preclude -- that would preclude,
11 Your Honor, the opportunity that an issue might be resolved
12 in the course of the investigation.

13 And I submit to the Court, it's clear from what's
14 been submitted in the Complaint, this is a case that may
15 very well have been resolved if the criminal proceeding
16 was -- investigation was allowed to run its course.

17 The Attorney General said, We recognize their
18 efforts, we're going to continue monitoring it, we're going
19 to continue talking to the Sheriffs, but they have to have
20 time -- they have to have time to fix it.

21 They want it both ways, Your Honor, and -- and I
22 think this is kind of -- important for the Court to realize,
23 too. Depending on what issue the Plaintiff is arguing, they
24 argue out of both sides of their mouth.

25 In the Complaint, they allege that the criminal

1 investigation was ongoing and prosecution was imminent,
2 which justified the rush to this Court for equitable relief.

3 Then, in response to the Defendants' abstention
4 argument, they argue the criminal investigation may be
5 nothing more than the Attorney General's May 5th letter
6 demanding they take them down.

7 So if that's the case, if what they're now arguing
8 is the case, then they can't show the type of irreparable
9 harm necessary to warrant the incredible injunctive relief
10 they are seeking from this Court.

11 They are asking this Court to permanently enjoin
12 all the prosecutors in the State of South Carolina from even
13 investigating craigslist for possible criminal actions.

14 That is an extraordinary relief, Your Honor,
15 and -- and it's -- they can't show the type of harm,
16 irreparable harm and imminent harm, that's necessary to
17 justify such a relief.

18 THE COURT: Well, I don't have that issue before
19 me now.

20 MS. SHUPE: What issue?

21 THE COURT: I mean, I -- the irreparable harm that
22 they can show.

23 MS. SHUPE: Well, Your Honor, I think it goes --
24 it does go to the abstention issue, that if they can't -- if
25 they're not -- if what they've alleged doesn't show

1 irreparable harm, then they're not entitled to it and the
2 Federal Court should back off.

3 So it has come up in the abstention arena as well
4 as analyzing whether an injunction should issue.

5 We submit, Your Honor, on the abstention issue,
6 that the criminal investigation should be allowed to
7 proceed. And if the issues aren't resolved during the
8 investigation -- and, frankly, if craigslist is as committed
9 to cleaning up its Web sites, particularly the "Adult
10 Services" Web site, then there's probably no issue.

11 In fact, the Attorney General said at an -- at an
12 on-TV interview, They'll have nothing to fear from us and
13 they do what they say they're going to do.

14 So it should be allowed to proceed, and; if it's
15 not resolved, they can bring up whatever Federal claims they
16 need to raise in any State Court proceeding that may be
17 commenced.

18 And that's basically our abstention argument, Your
19 Honor.

20 The next issue is the immunity under Section 230
21 of the "Communications Decency Act."

22 The specific provisions of the act that are at
23 issue here is Section (c) -- Subsection (c)(1), which
24 provides that, "No provider or user of an interactive
25 computer service shall be treated as the publisher or

1 speaker of any information provided by another information
2 content provider." We don't dispute that, Your Honor;
3 that's what the law says, and it's clear.

4 Subsection (e)(1) says there, No effect on Federal
5 criminal law. It doesn't bar enforcement of Federal
6 criminal law.

7 The particular subsection at issue here is
8 subsection (e)(3), which provides that, "Nothing in this
9 section shall be construed to prevent any State from
10 enforcing any State Law that is consistent with this
11 section. No cause of action may be brought and no
12 liability . . . imposed under any State or local law that is
13 inconsistent with this section."

14 Again, Your Honor, as I stated earlier, we do not
15 dispute that Section 230 - particularly as interpreted by
16 the Courts across the nation - provides Internet service or
17 interactive computer service providers like craigslist very
18 broad immunity from civil actions.

19 And even in Zeran, which is the Fourth -- the
20 seminal Fourth Circuit case, the Fourth Circuit specifically
21 said there was no doubt that Congress, in enacting 230,
22 intended to protect these providers from the danger that
23 tort-based lawsuits would pose to freedom of speech.

24 So the issue in this case is to what extent
25 Section 230 affords the Plaintiff immunity from enforcement

1 of South Carolina criminal laws prohibiting prostitution,
2 and the knowing aiding and abetting of prostitution.

3 In other words, is South Carolina's -- are South
4 Carolina's prostitution laws consistent or inconsistent with
5 Section 230?

6 Plaintiff contends that Section 230 preempts all
7 State criminal laws -- it prohibits the enforcement of any
8 State criminal law, but; the case law is clear that in
9 order -- before preemption is found, there must be the
10 Congressional intent: To preempt must be unmistakably
11 clear.

12 And the analysis begins with an assumption that
13 the State's historic police powers, which would include the
14 regulation of prostitution, are not superseded by a Federal
15 Law, absent evidence the preemption, was the clear and
16 manifest intent of Congress.

17 And if the Federal Law is capable of more than one
18 plausible interpretation, the Court should accept the
19 reading that dis-favors preemption.

20 On its face, Section 230, contrary to the
21 Plaintiff's contention, contains no clear and unmistakable
22 expression of Congressional intent to preempt enfoldment of
23 State Laws regarding prostitution and the facilitation of
24 prostitution.

25 On the contrary, again, it expressly allows

1 enfoldment of consistent laws. And that is the first
2 sentence in that subsection.

3 So the limitation on the immunity is the first
4 thing Congress pointed out.

5 And the second part is where they said, Okay,
6 this is the only time that immunity is going to apply.

7 To date -- well, the Plaintiff is asking this
8 Court to interpret Section (e)(3) as if the first sentence
9 regarding nothing barring the enfoldment of consistent laws
10 isn't even there.

11 And no court to date has held that Section 230
12 provides the type of blanket immunity from prosecution under
13 any State criminal law that Plaintiff is now asking this
14 Court to give it.

15 Even the civil immunity that's afforded under
16 Section 230 isn't complete. It isn't absolute, and; the
17 Ninth Circuit has held that in the Barnes v. Yahoo case that
18 is cited in our Brief, the important distinction here,
19 because the Court has to determine if it's consistent or
20 inconsistent.

21 And the ongoing criminal investigation that is the
22 heart of this case is not related to either Plaintiff's
23 efforts to block or screen objectional material, which
24 Section 230 specifically wants to promote . . . or even to
25 hold the Plaintiff accountable for the content of ads posted

1 on its Web site.

2 Rather, the State is only investigating whether
3 the Plaintiff itself knowingly allowed specific ads relating
4 to prostitution in South Carolina. Their knowledge --
5 craigslist's knowledge and its conduct is the focus.

6 The content of a particular ad may be relevant to
7 the question of craigslist's knowledge of the intent of the
8 ad, but it is not determinative of its criminal
9 responsibility for the resulting prostitution.

10 Now, contrary to what they've alleged, they're
11 contending that the State is trying to impose strict
12 liability. That is absolutely incorrect.

13 South Carolina's statute, the statute on aiding
14 and abetting prostitution, expressly requires knowing
15 conduct. And that is an element the State would have to
16 prove beyond a reasonable doubt.

17 We've never threatened prostitution based just on
18 a general knowledge that illegal ads were on there, even
19 though in November of 2008, craigslist signed an agreement
20 in which it acknowledged that its "Erotic Services" category
21 was being used to facilitate unlawful conduct.

22 We've never suggested that their -- they have
23 liability under our aiding and abetting statute because of
24 this general acknowledgement they made. We have stated we
25 would have to show they knew a specific ad was related to

1 prostitution and they allowed it to be posted anyway. That
2 would be what the State would have to prove.

3 So since the prosecution -- the prostitution laws
4 don't impose liability for content of the ad, whether
5 provided by the Plaintiff or a third party, it only involves
6 the conduct of the Plaintiff. It is entirely consistent
7 with Section 230.

8 And I would analogize this to a bar owner, Your
9 Honor, who has a known prostitute coming to his facility and
10 says, "I want to stand out front your property and hold up a
11 sign that says, 'For a good time, call Nicky,' and a phone
12 number." And the bar owner knows that Nicky is a prostitute
13 and what she's advertising is prostitution services, and he
14 says, "Okay, you can stand on my property."

15 He hasn't had anything to do with the content of
16 her sign. Even if the sign said, "Best prostitute in South
17 Carolina," he hasn't had anything to do with what, but; he
18 has knowingly allowed the facilitation of prosecution -- of
19 prostitution on his property, and, therefore, he would be
20 guilty of aiding and abetting prostitution.

21 Again, I think it's important for the Court to
22 keep in mind the consequences that will result if the
23 Plaintiff prevails in its argument about the broad immunity
24 to criminal liability.

25 If he -- if the -- if craigslist prevails and 230

1 provides blanket immunity from State prosecution, even from
2 craig -- even involving craigslist's intentional knowing
3 conduct, it will have more protection than any other media
4 outlet, newspapers, TV, anything, has under the fourth -- in
5 the First Amendment or any other law.

6 And they will be able to allow even the most
7 openly and egregious criminal ads on their site, such as
8 offering the sale of cocaine, solicitation of prostitution,
9 or even - and I realize this is an extreme example but it's
10 nonetheless an accurate one - murder for hire.

11 They could put that -- they could knowingly put
12 that on their site and they could say: We don't have
13 anything to do with it, We're immune; You can't go after us
14 because, even though we knew, we didn't provide the content,
15 so we're not liable.

16 And if they have the immunity they seek, even if
17 the State official calls them -- say a Sheriff in South
18 Carolina calls craigslist and says, Here's a specific ad; I
19 know this person, this person is a prostitute, this is how
20 this person is advertising her services, she's out there
21 doing it now, please take the ad down.

22 craigslist, and any other computer service
23 provider, can say, No; Okay, yeah, we know it's
24 prostitution, but we don't care. South Carolina, you deal
25 with it and you deal with it if she's got people coming from

1 all over the State to her, if she's got people coming from
2 neighboring States to her. So it's your resources that are
3 going to have to deal with the aftermath, but you deal with
4 it because we're immune.

5 That, Your Honor, could not be the intent of
6 Congress in passing Section 230.

7 And now as to the First Amendment, Your Honor.

8 The Plaintiff does not challenge the validity of
9 South Carolina's law prohibiting the knowing aiding and
10 abetting of prostitution. So it's a valid law.

11 The issue before the Court in this action is:
12 Does the threat of prosecution for knowingly aiding and
13 abetting prostitution -- of prosecution for knowingly aiding
14 and abetting prostitution constitute an unconstitutional
15 restraint of protected speech?

16 The United States Supreme Court has made it clear
17 in the Pittsburgh Press case and subsequent cases that
18 neither the Plaintiff nor its users have a constitutionally
19 protected right to advertise prostitution.

20 They stated, in the Pittsburgh Press case, that
21 offers to engage in illegal transactions are excluded from
22 First Amendment protection.

23 The Attorney General's demand that Plaintiff
24 remove prostitution ads, particularly from its "Erotic
25 Services/"adult Services"" category, does not impact

1 protected speech.

2 Now, their First Amendment and their commerce
3 clause amendment and, in fact, a lot of their allegations,
4 are premised on their contention that the only way
5 craigslist can comply with the Attorney General's demands
6 would be to shut down the entire South Carolina site.

7 And, Your Honor, with all due respect to
8 craigslist and its counsel, that is nonsense and it is
9 unreasonable.

10 And as the Fourth Circuit stated in the case,
11 again, submitted by opposing counsel just recently, the
12 Nemet case, for purposes of a Motion to Dismiss, the Court
13 doesn't have to assume the truth of allegations that are
14 unwarranted inferences, unreasonable conclusions, or
15 arguments.

16 Plaintiff's own pleadings reveal the ads at issue
17 are only a small fraction of the ads on the South Carolina
18 sites.

19 Even if they blocked all the ads in the adult
20 now -- "Adult Services" category, it would only impact .01
21 percent of the total ads on their South Carolina Web sites.
22 On its face, that doesn't constitute an undue burden on
23 anything.

24 But, more importantly, no one in South Carolina,
25 including the Attorney General, has ever demanded or even

1 implied that Plaintiff would have to, or even -- much less
2 should, shut down the entire South Carolina Web site to
3 comply with the prostitution laws.

4 In fact, from the very beginning, the May 5th,
5 2009, letter from the Attorney General to Mr. Buckmaster of
6 craigslist, the Attorney General acknowledged that the vast
7 majority of the ads on South Carolina -- on the South
8 Carolina Web sites serve a valuable -- provide a valuable
9 service to South Carolina residents.

10 No one disputes that. No one has ever said the
11 only way you can comply is shut it all down. In fact, quite
12 the contrary. The only demand that has been made is that
13 prostitution ads be removed.

14 According to its Complaint, craigslist currently
15 has the technology in place to detect and block ads related
16 to illegal activity, at least in the "Adult Services"
17 category. They say they -- they require a tel -- a verified
18 telephone number. They require a valid credit card so they
19 have the billing address. So they know who the person is,
20 they know the credit card number, and they say they can't --
21 if they -- if they give an ad that is illegal conduct, they
22 block it and they have the ability to block future ads
23 submitted by that person.

24 So they have the technology in place now that
25 could do everything that the Attorney General has asked them

1 to do, which is, do what you promised you would do.

2 Now they are supposedly -- according to their
3 Complaint, they have started, as of May 12th or soon around
4 that time, manually reviewing every ad that is submitted for
5 the "Adult Services" category.

6 All we're saying and all the Attorney General has
7 said: Do what you promised. You promised some things in
8 November of '08, you didn't do 'em, or you weren't real
9 serious about it, we're serious in South Carolina 'cause
10 this is a problem; law enforcement's come to us and told us.
11 Be serious.

12 And the -- the Attorney General remarked in one of
13 the news articles, Well, it appears they're serious now.
14 And that's all been asked of them to do.

15 The Plaintiff concedes that prostitution is
16 illegal in South Carolina and it has no constitutional
17 protections, so since prostitution ads and, more
18 importantly, only those ads the Plaintiff knows are related
19 to prostitution are at issue here, there is no
20 constitutional protection and the Complaint fails to state a
21 cognizable First Amendment claim.

22 And finally, Your Honor, on the commerce clause,
23 there's a two-prong analysis:

24 The first prong is does the Federal Law preclude
25 State legislation in this area, and;

1 If it does not, does the State Law conflict with
2 Federal Law.

3 Congress has determined prostitution is not in the
4 national interest and declared it illegal in interstate or
5 foreign commerce. And in light of that finding and
6 determination by Congress, the States are free to burden
7 that commerce without violating the commerce clause. So
8 State Laws governing intrastate prostitution are consistent
9 with and complementary to the Federal Laws governing
10 prostitution in inter -- interstate or foreign commerce.

11 Requiring the Plaintiff to remove the ads it knows
12 are facilitating illegal prostitution does not unduly burden
13 otherwise legitimate commerce.

14 Again, the Plaintiff is simply not required to
15 shut down its entire site; it need only remove the known
16 prostitution ads, that is all that has ever been asked of
17 them: Do what you promised; you know there's a problem, you
18 said you were going to try and fix it. Do what you
19 promised; remove the known prostitution ads and you have
20 nothing to fear from any Prosecutor in the State of South
21 Carolina.

22 Thank you, Your Honor.

23 MR. CAROME: Good morning, Your Honor, my name is
24 Pat Carome, thank you for the pro hac admission, and I'm
25 appearing on behalf of Plaintiff craigslist.

1 May it please the Court?

2 Counsel has -- for Defendants has completely
3 mischaracterized and misstated the nature of the threat that
4 the Attorney General presented to craigslist.

5 I would direct the Court's attention -- before we
6 get into the legal arguments, I just want to get some basic
7 facts correct.

8 Exhibit E to the Complaint is the May 5th letter
9 that the Attorney General sent to craigslist's CEO, and also
10 posted publicly on his Web site, and also presented at a
11 public press conference.

12 The last paragraph of that letter --

13 THE COURT: Let me find it now.

14 MR. CAROME: Okay.

15 THE COURT: That's Exhibit E to your Complaint?

16 MR. CAROME: Exhibit E, that's correct, Your
17 Honor.

18 (Pause.)

19 THE COURT: Okay.

20 MR. CAROME: The last paragraph, Your Honor, is
21 the one that -- that I would draw your attention to. It
22 states that, "Please be advised that the craigslist
23 management may be subject to criminal investigation and
24 prosecution by this office if the portions of the Internet
25 site dedicated to South Carolina and its municipal regions

1 and which contain categories for and functions allowing for
2 the solicitation of prostitution and the dissemination and
3 posting of graphic pornographic material are not permanently
4 removed on or before 5 p.m. ten days hence."

5 There was nothing about "knowledge," this --
6 this -- this demand required craigslist to insure that none
7 of its users could post anywhere on the
8 South-Carolina-directed portions of its site an ad
9 soliciting prostitution or an ad containing graphic
10 pornographic images. Nothing about "knowledge."

11 That -- to comply with that threat, we allege this
12 in the Complaint, it must be taken as true at this stage,
13 and it is absolutely true and it is explained in detail in
14 the Complaint.

15 To comply with that threat, craigslist had no
16 choice but to take down its entire site.

17 THE COURT: Well, now, you call that a "threat."
18 And it is a threat. But it -- what is it a threat to do?

19 MR. CAROME: It's a threat to prosecute.

20 THE COURT: I don't think it is.

21 MR. CAROME: "Please be advised" --

22 THE COURT: You say in your Complaint that there
23 was a "threat of prosecution." This is a threat of
24 investigation and possible prosecution.

25 MR. CAROME: It doesn't say "Possible

1 prosecution," Your Honor. It says "criminal investigation
2 and prosecution."

3 THE COURT: It's only the criminal investigation,
4 and you're subject to that whether he puts it in a letter or
5 not. I'm subject to that every time I file my income tax
6 return. I mean, you know, everybody's subject to criminal
7 investigation and prosecution.

8 MR. CAROME: Your Honor, on the 18th of -- of
9 May --

10 THE COURT: I mean, if he said "We are going to
11 prosecute you if you don't do this," then that's a threat.

12 MR. CAROME: He -- he called Mr. Buckmaster, the
13 CEO of the company, "Defendant Number 1" on FOXNews. He
14 said they haven't stopped, they haven't done what I demanded
15 in my May 5th letter, I'm opening an investigation and
16 Mr. Buckmaster is Defendant Number 1.

17 What -- what that does, Your Honor, it puts an
18 entity like craigslist at -- it forces it to choose between
19 two things which the Supreme Court has said time and again,
20 and the Fourth Circuit as well, a -- a citizen cannot be
21 pushed -- put in this situation with not having a right to
22 go to Federal Court.

23 He put us in the position of either abiding by
24 that threat, which to -- I -- for these purposes, abiding by
25 that threat meant shutting down the entire South Carolina

1 component of the Web site. We could do that, and then we
2 could say "Now we can breathe free, we're not -- we're not
3 at risk of being prosecuted."

4 Or, we proceed as we're doing with what we believe
5 to be completely lawful constitutionally and statutorily
6 protected conduct. And, if we do that, we're putting
7 ourselves at peril of -- of criminal prosecution.

8 This is precisely --

9 THE COURT: That letter doesn't put you in any
10 more peril than you're in without that letter. You're
11 always subject to criminal prosecution if you break a
12 criminal law.

13 MR. CAROME: Your Honor, the Courts have held that
14 threats of prosecution, short of actually bringing the
15 indictment, may be indicted because they have precisely the
16 impact that this threat had.

17 You -- if -- if prosecutors were free to do this
18 without any potential for court review, they could --

19 THE COURT: Do what?

20 MR. CAROME: Start going around and saying what --
21 what you're doing -- "You have to stop what you're doing or
22 you're going to be investigated and prosecuted." People
23 then have to -- if there's not Federal review of those kinds
24 of statements, then people are put to the choice of stopping
25 the behavior, which is frankly what I'm sure the Attorney

1 General wanted; the Attorney General wanted craigslist just
2 to completely abide by what he was demanding. And that --
3 that is the force of State action.

4 It's not a -- it's not an indictment, but it is
5 action that a citizen has to take extraordinarily seriously.
6 If the State -- if the highest-ranking State Law enforcement
7 officer says, Look, if you don't -- ten days from now, stop
8 what you're doing right now, or I'm going to commence an
9 investigation and may prosecute you, that is extraordinary
10 State action.

11 And if there is no -- it puts -- the Courts have
12 referred to this as putting you between a sylla and
13 charybdis, a two -- a Catch 22, a rock and a hard place:
14 The choice between knuckling under to a threat that goes
15 beyond what the -- the law enforcement Executive Branch can,
16 in fact, compel you to do, or going forward with the conduct
17 but being at risk of putting yourself and your company in --
18 in criminal prosecution.

19 That is precisely the situation that the Courts
20 like Telco, and -- and Steffel versus Thomas, and case after
21 case that we site on abstention say, that is the sylla and
22 charybdis; that is the rock and a hard place that no Federal
23 citizen should be put between without having a right to go
24 to Federal Court.

25 The --

1 THE COURT: Well, now, Telco was a little
2 different, wasn't it?

3 MR. CAROME: I -- I --

4 THE COURT: You don't -- you don't place any
5 distinction between a -- a State criminal prosecution and a
6 Federal civil action; you think they're all the same?

7 MR. CAROME: Well, for Younger purposes, Your
8 Honor -- I -- I think, Your Honor --

9 THE COURT: How would -- let's assume we don't
10 dismiss and let's assume we go to trial. Then what kind of
11 discovery are we going to have; are we going to have civil
12 discovery or criminal discovery? And if we have civil
13 discovery, how does that impact on a criminal justice
14 system, if at all?

15 MR. CAROME: This is a -- this is a civil case,
16 Your Honor. I would submit that --

17 THE COURT: But the issues are criminal. We're
18 talking about criminal prosecution.

19 MR. CAROME: We are talking about whether or not
20 craigslist as a matter of law is subject to -- or may be
21 subject to criminal prosecution for the content that is
22 posted by third parties.

23 THE COURT: As a matter of law, but that law is
24 driven by facts.

25 MR. CAROME: Well, Your Honor, I don't think any

1 of the facts will be disputed. The question here is -- now
2 I think we're into, first and foremost, the section of the
3 230 immunity argument.

4 Case law couldn't be clearer, and Zeran from the
5 Fourth Circuit is the -- is the -- the fountainhead of this
6 case law, that a on-line service provider cannot be held
7 liable for third-party content. This is classic third-party
8 content, Your Honor.

9 The only argument that I hear the Defendants --
10 I'm sorry, I hear the Defendants making on that is simply
11 that -- that the statute doesn't reach -- doesn't provide
12 immunity from State criminal laws.

13 The -- that -- they're plainly wrong about that as
14 a matter of law on the face of the statute.

15 THE COURT: But in Paragraph B of your Prayer, you
16 ask the Court to enjoin the Defendants from issuing further
17 threats of prosecution against craigslist or its officers,
18 employees in relation to contents posted by third parties on
19 craigslist's Web site or from initiating or pursuing any
20 such prosecution --

21 MR. CAROME: That's exactly right.

22 THE COURT: -- in the future.

23 MR. CAROME: That's correct, Your Honor.

24 THE COURT: No matter what the facts are.

25 MR. CAROME: No, the --

1 THE COURT: No matter what they may undercover at
2 some later date.

3 MR. CAROME: No, the -- no, the facts -- I think
4 the facts are limited by the Prayer. The Prayer says, with
5 respect to third-party content posted on the site:
6 Regardless of the facts, regardless of whether craigslist
7 knows about the content, regardless -- unless craigslist
8 itself is posting prostitutions here, or is requiring its
9 users to post prostitution ads, which no one is remotely
10 suggesting, Section 230 provides immunity. So that the
11 Prayer for Relief is confined to the relief that we're
12 entitled to under Section 230.

13 It is with respect to -- we cannot be held
14 liable -- craigslist may not be held liable, Federal -- I'm
15 sorry, under civil or criminal State Law, with -- if that
16 liability is based on postings by third parties on its Web
17 site. And that is what -- that is how the Fourth Circuit
18 and every other Court has interpreted Section 230.

19 Counsel for Defendants said there haven't been --
20 cases haven't said that that Section 230 is an immunity from
21 State criminal prosecution. They're wrong about that.

22 The only two cases that have looked at that issue,
23 we've cited in our Brief, have held that Section 230 extends
24 to provide immunity from State criminal prosecution. Not --
25 not absolute immunity, but immunity where the -- where

1 the -- the liability is based on what some third party
2 posted on the craigslist site or an on-line provider.

3 Counsel says, well, this gives craigslist greater
4 protection than a newspaper has or that a bar owner has if
5 somebody stands up in his bar saying this. That's exactly
6 right. That is exactly right; Section 230 provides
7 protections that go beyond what any other medium of
8 communication has. That is because Congress made a policy
9 choice about that. It's clear in the statute, section --
10 the Zeran Court carefully walked through it.

11 The purpose of Section 230 is to do two things.
12 It's to promote the growth of Internet media -- craigslist,
13 in fact, being probably the best example of how the -- an
14 Internet media can provide enormous value to society,
15 basically for free.

16 Congress sought to promote the growth of those
17 sorts of media by shielding them from what would be enormous
18 liability that could otherwise fall on their shoulders by
19 virtue of all of the potentially unlawful conduct or content
20 that third parties could post on the service.

21 craigslist has 40 million postings per month on
22 its service. That's what we alleged in the Complaint at the
23 time. It's grown enormously since then. The --

24 THE COURT: Do you charge for it?

25 MR. CAROME: In almost all respects, it's free,

1 Your Honor. In almost all respects, it's free.

2 THE COURT: Well, how do you make it a
3 profit-making business?

4 MR. CAROME: Well, Your Honor, in many respects, I
5 think craigslist has decided that maximizing profits is not
6 really its -- its ultimate goal. It does make a profit.
7 There are a few categories in which it charges people to
8 post. A small -- real estate ads by brokers in a couple
9 cities, help-wanted employment ads in some places are paid
10 for.

11 Also for different reasons, to post in -- in the
12 "Adult Services" category, there's a payment required, and
13 that was suggested by the Attorneys General around the
14 country to create another method for tracking the posters.
15 So that -- who are the ones -- if someone's committing a
16 crime here, those are the people who liability is to be
17 directed at.

18 So, amazingly, craigslist, it's used by, at the
19 time of the Complaint, over 50 million people in the U.S.,
20 20 billion page views per month. It's the seventh most
21 visited English language Web site in the world. It does
22 this with only 30 employees. It does this with only 30
23 employees.

24 And it is the notion that craigslist can be held
25 responsible, civilly or criminally, for that huge torrent of

1 content from others that flows through it. There wouldn't
2 be a craigslist if there could be civil and criminal
3 liability of the sort being talked about here and the sort
4 that Attorney General McMaster threatened in his May 5th
5 letter when he said that "Mr. Buckmaster is Defendant Number
6 1."

7 So, I mean -- maybe I . . . if I could just
8 briefly go through the -- the -- the four legal arguments.

9 I think that Defendants' counsel is right, we are
10 talking about an abstention question, we're talking about a
11 Section 230 question, and then there are two constitutional
12 claims that we make.

13 And we're Plaintiffs, we're proceeding under the
14 declaratory judgment action under Section 1983, and so that
15 all of the allegations in the Complaint at this stage must
16 be -- must be accepted as true.

17 THE COURT: Nobody's briefed you -- you talk about
18 "declaratory judgment action," and of course the language of
19 that act contains the words "case or controversy."

20 MR. CAROME: That's correct, Your Honor.

21 THE COURT: Nobody briefs that -- nobody has any
22 concern about whether or not there is existing in this case
23 a case or controversy such as to make that declaratory
24 judgment action applicable?

25 MR. CAROME: That certainly is applicable. There

1 must be a case in controversy --

2 THE COURT: No question about it.

3 MR. CAROME: -- for there to be jurisdiction in
4 this court; absolutely right, Your Honor.

5 I had not thought that there was doubt about that
6 question. Certainly the Defendants have not raised that
7 issue. Of course the Court may -- is free to raise, and
8 properly should raise, subject matter jurisdiction at any
9 point in the case.

10 I believe, Your Honor, that the nature of the
11 public threats, the drumbeat of -- of threats, a ten-day
12 ultimatum letter, you're Defendant Number 1, Mr. craigslist,
13 is about as clear-cut a case of there being a -- a fully
14 ripe, crystallized dispute that puts in place whether --
15 puts properly before this Court a crystallized question of
16 whether the -- the threat that Attorney General McMaster
17 made in his May 5th letter is or is not consistent with
18 Federal Law.

19 If we had waited until an indictment was
20 brought --

21 THE COURT: You'd be -- you couldn't -- you
22 couldn't do anything.

23 MR. CAROME: We'd be out of luck.

24 THE COURT: Yeah.

25 MR. CAROME: Now, they say -- I do not contend

1 that the indictment is the brightline. The -- the point
2 that -- our main point under the Younger abstention is that
3 no case, no case, has ever held that a -- their assertion by
4 an Executive Branch official that a investigation is taking
5 place or something is enough to trigger the Younger
6 abstention. There must be an ongoing judicial proceeding.

7 For example, in the -- in the -- in the Sachs
8 versus Pepco case, which the Defendants heavily rely upon,
9 that was pre-indictment. There was a Grand Jury.

10 THE COURT: I don't think that was a criminal
11 case. That was an administrative proceeding.

12 MR. CAROME: No, Your Honor, I believe -- I
13 believe that was.

14 THE COURT: Was that the solicitation case?

15 MR. CAROME: No, this was a case for -- this was
16 an environmental crimes case.

17 THE COURT: Okay, okay.

18 MR. CAROME: And -- and that was a case -- it
19 was -- and Pepco, the power company, was asserting that
20 there was Federal preemption, that Federal Law governed the
21 area completely; akin to the argument that we're making
22 here. And there there was a Grand Jury proceeding up and
23 running fully focused on the matter.

24 THE COURT: Subpoenas issued?

25 MR. CAROME: Subpoenas have been issued to Pepco,

1 so there was a judicial proceeding underway, with a judge,
2 an independent decision maker.

3 Pepeco could have gone into contempt, for example,
4 on the subpoenas and raised in the State proceeding its --
5 its Federal claims.

6 THE COURT: We certainly don't have that here.

7 MR. CAROME: Absolutely not, Your Honor.

8 THE COURT: I think probably the -- I don't know
9 all about it, because it kind of came along after I finished
10 practicing law, but the State Grand Jury, I think, sits all
11 the time, and I think the Attorney General probably has
12 control of it.

13 But I don't think -- I think it's clear that no
14 witnesses had been brought before that Grand Jury, as far as
15 this investigation is concerned. At least the Defendants
16 don't contend they have.

17 MR. CAROME: That's absolutely right. Nor do they
18 contend that any Grand Jury, even one that's otherwise
19 generally pending, has -- has spent a second thinking about
20 this matter.

21 And really I think -- if, you know, they had
22 issued subpoenas, you know, before we came to Federal Court
23 and before we began this proceeding, this -- that would be a
24 different case.

25 So I'm not -- I'm not asserting that --

1 Defendants' counsel talked about there being some problem
2 of, you know, prosecutors having to race to indict.
3 That's -- that's not at all the situation we're talking
4 about here.

5 What the Younger abstention -- I think we agree on
6 what the test is. There has to be an ongoing judicial
7 proceeding, and "administrative proceedings" can be, for
8 these purposes, judicial proceedings as long as they have
9 the trappings of -- of trial-like proceedings with
10 independent factfinders, neutral decision makers, which of
11 course we don't have anything of the sort here.

12 All we have here is Mr. McMaster asserting, I'm
13 investigating you and I'm free to indict you anytime I want.
14 And there's nothing -- and there's no -- so there's no
15 ongoing judicial proceeding, there is also no opportunity in
16 the --

17 THE COURT: I don't think he said that. I mean,
18 he didn't say, "I've got an ongoing investigation and I'm
19 going to" invite you -- "indict you anytime I want." I
20 think that we can assume that he was not going to indict the
21 Defendants, or any of them, unless his investigation
22 revealed that they committed a crime.

23 MR. CAROME: Yes, but --

24 THE COURT: I think we can assume that. I mean,
25 that's what his oath would require him to do, and we can't

1 assume that he's going to violate his oath.

2 MR. CAROME: I -- I accept that, Your Honor, but I
3 also think we can assume that he was going to proceed in
4 accordance with what he publicly threatened, which is if you
5 don't make sure that you've removed all functionalities that
6 allow someone to post a prostitution ad somewhere on the
7 craigslist service, you -- if you don't remove all those
8 functionalities, you -- you will be subject to investigation
9 and prosecution.

10 So may -- maybe I should step back on that point
11 just a little bit to explain.

12 The -- the functionalities that would allow
13 someone to post a prostitution ad or a solicitation of
14 prostitution on craigslist is the craigslist service.
15 Nothing -- anybody can just go on the craigslist service,
16 pick any category they want. They could pick "Used Cars"
17 and post an ad for prostitution. There's nothing -- there's
18 nothing in the world that -- that craigslist can do to stop
19 that.

20 And so when you say, as -- as the Attorney General
21 did in the May 5, letter, remove all the functionalities
22 that allow for the posting of such an ad, you're talking
23 about removing -- you know, stopping the craigslist service
24 because there's -- anyone can post at anytime for free an ad
25 for anything they want on the craigslist service. That

1 indeed is what makes it what it is.

2 It is -- it is an extremely easy-to-use platform
3 where third parties can advertise to one another and
4 express, you know, their needs and have their needs met.

5 So it's not -- it's not possible to comply with
6 that demand, other than to take -- other than to take the
7 service down in South Carolina.

8 So -- and what the key is at that point, when
9 you're between that rock and a hard place, Federal Courts
10 have got to be there to save you from being -- having to
11 make that choice about stopping conduct which is absolutely
12 protected by Federal Law, and going forward with that
13 conduct, even though you've been told if you do so, you're
14 subjecting yourself to criminal investigation and
15 prosecution.

16 That is pre -- if this is not a situation where
17 craigslist can get -- where a party can get to Federal Court
18 to have its rights heard, then the Younger abstention has
19 swallowed the entire possibility of there ever being a right
20 to go into Federal Court and getting a Federal Court to
21 assess whether Federal rights are being -- are being -- are
22 going to be violated.

23 The Fourth Circuit has held the Younger abstention
24 is an exception to the general rule that Federal Courts are
25 to hear all cases that are properly within their

1 jurisdiction and put before them.

2 I think I probably said all I have to say on
3 abstention, unless Your Honor has questions.

4 On the Section 230 point, I think the main thing
5 that I haven't talked about is why is the statute properly
6 construed as extending to provide immunity from State
7 criminal prosecution.

8 And as I said, the two Courts that have looked at
9 that question, they're lower-level Courts -- actually, one
10 is a Federal District Court in Pennsylvania; that's the
11 Voicenet case.

12 The other is a -- is a Michigan intermediate
13 appellate court. That's People versus Gourlay.

14 Both of those cases, as we discuss in our Brief,
15 looked at the language of Section 230 and found that it
16 does, indeed, provide immunity, not just from State civil
17 laws, but also from State criminal laws. The analysis for
18 that is really right on the face of the statute.

19 First of all, Section 230(e)(3) says that, "No
20 cause of action may be brought and no liability may be
21 imposed under any State or local law that is inconsistent
22 with this section." "Any" means any; it means all State or
23 local laws, which is both civil and criminal.

24 The Fourth Circuit in the Mapoy case specifically
25 talked about the fact that any -- "Any" in a Federal Statute

1 means all.

2 The -- the -- what Plaintiffs -- I'm sorry, what
3 Defendants point to is the fact that the statute has an
4 exception for enforcement of criminal laws, but the statute
5 couldn't be more clear --

6 THE COURT: Let me interrupt you. Let me
7 interrupt you.

8 MR. CAROME: Sir?

9 THE COURT: Your Prayer for Relief, I think, is
10 something that disturbs me. I've been kind of searching
11 for -- for a solution to this case and, of course, you
12 always get first impressions when you read something, and;
13 as you get into them deeper, sometimes those first
14 impressions are fortified and sometimes they vanish.

15 But in Paragraph A of your Prayer, you asked me to
16 declare that "Defendant McMaster threatened prosecution" is
17 inadmissible in the light of Section 230 and certain
18 constitutional provisions. And that seems like a pretty
19 good stretch for me.

20 And then in B you ask me to permanently enjoin the
21 Defendants from doing certain acts. In other words, I'm --
22 I'm asked to enjoin a constitutional officer in the State of
23 South Carolina from carrying out what he might consider as
24 his duty.

25 Seems to me that that's broad, and I'm not so sure

1 but what the broadness of it is what kind of made me look at
2 it in a certain way.

3 If you boil down what you're doing here, it seems
4 to me it boils down -- and this is in the form of a
5 question. It boils down to an interpretation of Section
6 230, and what 230 gives the Defendants immunity from, civil
7 or criminal.

8 Now, if that were in the Prayer for Relief, I
9 think my fears about case or controversy would be minimized,
10 and I think my fears about enjoining the Defendants in an
11 overly broad fashion, so as to take their discretion and
12 their job away from them, so far as this case is concerned,
13 may be allayed.

14 Because I think after hearing your arguments and
15 considering what I considered before I came in here, the
16 whole crux of the whole matter is Section 230 and
17 interpretation of that. And what you're asking for, even
18 though you didn't ask for it, is for determination by the
19 Court of what type immunity 230 actually gives to the
20 Defendants or people who fall within the category described
21 in 230. Is that -- make sense?

22 MR. CAROME: It does, Your Honor. I think that
23 certainly the 230 claim, I think is the -- is really the
24 crux of the case.

25 THE COURT: And certainly we've got an interest in

1 interpreting Federal Law.

2 MR. CAROME: Absolutely, Your Honor.

3 THE COURT: Okay. Go ahead.

4 MR. CAROME: Well, I -- no, I think you're putting
5 your finger on a very important part of the -- of the case.

6 THE COURT: Because what you -- what you ask this
7 Court to do in your Prayer is pretty strong stuff.

8 MR. CAROME: But I think it's -- I think it's
9 simply saying -- it's no more than interpreting what Section
10 230 says on its face, though, I believe, as construed by the
11 Courts, that -- that a -- a State prosecutor may not
12 prosecute an entity such as craigslist on interactive
13 computer service provider based on the content of postings
14 that originated entirely with a third party. That cannot --
15 that -- that cannot be a basis for prosecution.

16 Zeran said that that's clear as on the civil side;
17 you cannot be -- any cause of action that holds you liable
18 for the content of third-party postings is contrary to
19 Section 230.

20 So the only additional stretch here for Zeran, I
21 think, and this is first impression in the Court -- or
22 Fourth Circuit, and certainly in this district, is whether
23 section -- whether that same immunity that Zeran recognized
24 in the civil context applies to State criminal liability.

25 I think that, as we lay out in our Brief, that

1 Congress very carefully preserved the ability -- said that
2 Federal criminal statutes -- Federal criminal statutes do
3 trump Section 230.

4 And some State statutes trump 230. For example,
5 the -- the last exception to Section 230 immunity is spelled
6 out in the statute; it's a very narrow one, doesn't apply
7 here, but I think it shows how Congress thought the --
8 understood the statute works.

9 This is (e)(4), 230(e)(4). "No effect on
10 communications privacy law.

11 "Nothing in this section shall be construed to
12 limit the application of the Electronic Communications
13 Privacy Act of 1986," that's a Federal statute, "or any
14 similar State Law."

15 So there Congress said there's -- here's a small
16 category of laws that trump Section 230, this particular
17 Electronic Communications Privacy Act or any similar State
18 laws.

19 What -- what I hear Defendants trying to argue is
20 to say, Well, because there's a sentence in the statute that
21 says States may enforce consistent State laws, well, then
22 the fact that Federal criminal laws are excepted from the
23 immunity, State criminal laws should -- because they're
24 similar to Federal criminal laws, should be accepted.
25 That's not at all how the statute is set up, and you can see

1 that in (e)(4).

2 What Congress is very clear -- when it wrote
3 Section 230, to pick and choose its words about whether it
4 was speaking about Federal statutes or Federal liability, or
5 State liability. And when it chose to do so with respect to
6 criminal laws, it very clearly spoke only of Federal --
7 Federal criminal laws trumping -- trumping the immunity.

8 So I don't think that -- the parade of horrors
9 that the Attorney General puts out there of, Well, if
10 there's immunity here, prostitution is just going to run
11 wild on the Internet. I think that's sort of, at bottom,
12 what they're saying.

13 That's not at all the result that -- that -- that
14 immunity for craigslist here provides. In fact, I would
15 submit that immunity for craigslist here helps to control
16 prostitution on the Internet. That may seem
17 counterintuitive, but that's how -- that is how Courts have
18 thought through the statute, including Chief Judge Wilkins
19 for the Fourth Circuit in the Zeran case.

20 What the statute makes clear is, is that the
21 posters -- the people who post unlawful content, the
22 originators of that content, are fully subject to the full
23 force of State and Federal Law enforcement. Congress in
24 Section 230 chose to not go after the intermediators for
25 that harmful content but to go after the originators.

1 So what does craigslist do? Craigslist does many
2 many different things. It was at the request of State Law
3 enforcement that craigslist began to insist on credit card
4 charges for post -- people posting in the "Erotic Services"
5 and then the "Adult Services" category, so that it would be
6 easier to go after the posters. Same thing with insisting
7 on working telephone numbers.

8 And so -- indeed the fact that craigslist has
9 quarantined ads for legal "adult Services" in one particular
10 area is itself a great assistance to law enforcement. It is
11 very easy -- if law enforcement wants to see where most
12 likely -- while it's not the only place, but it -- where
13 most likely there may be ads that are crossing the line
14 between lawful and unlawful conduct related to "adult
15 Services," they can go to the "Adult Services" section and
16 see the postings, they can respond to the postings.

17 Law enforcement all around the country is doing
18 sting operations on these things and the liability is
19 properly being put, not on the intermediary, but on the --
20 on the source of the illegal conduct.

21 In fact, and this is the counterintuitive part and
22 Zeran recognized this, providing immunity from liability for
23 unlawful speech actually gives an entity like craigslist the
24 breathing space to do self-regulation and self-policing to
25 try to cooperate with law enforcement's desires to stamp out

1 this kind of terrible unlawful content.

2 Craigslisat set aside this first "Erotic Services"
3 and then "Adult Services" category, not because it wanted to
4 attract ads for those categories, it's because ads for legal
5 adult services, escort services and the like. Legal escort
6 services, legal massage services and things like that, may
7 not be my cup of tea, but it's lawful.

8 Craigslisat was getting complaints from its users
9 that they were seeing those ads when they were, you know,
10 shopping for used furniture and the like.

11 And so in response to craigslist's desire, it
12 quarantined those ads off in a particular category so that
13 only people who were looking for those lawful services
14 would -- would find them.

15 That itself is the -- is something that -- that
16 the statute is designed to -- Section 230 is designed to
17 give providers the incentive to -- to channel the -- what
18 may be offensive to some speech so it's not popping up in
19 front of people who don't -- who don't want to see that.

20 It also -- craigslist engages in electronic
21 screening and it has flagging systems so that users can flag
22 content that they think is contrary to craigslist's rules.
23 Which if they prohibit anything, clearly, they absolutely
24 prohibit prostitution ads.

25 Craigslisat would not be able to -- craigslist

1 would have a strong disincentive to be -- to be looking for
2 problem ads, receiving information about problem ads and
3 acting on them if it was going to be liable every time it
4 knew about a particular unlawful ad.

5 Because, as the Zeran Court recognized, notice
6 liability, liability because you know it's there, well, the
7 best way to avoid that is to stick your head in the sand if
8 you're craigslist and not do any screening. Not -- not --
9 not do any policing, as craigslist does enormous amounts.

10 But with so much -- with \$40 million -- 40 million
11 postings every month, this huge torrent of -- of -- of -- of
12 third-party content, there's no way that any screening
13 efforts are going to be completely successful. Congress
14 recognized that if you impose notice liability of the sort,
15 that what you'll do is drive these providers to put their
16 head in the sand, not do any self-policing, not do the sort
17 of screening that craigslist does.

18 So, in fact, the statute -- by providing
19 craigslist immunity here, we are actually helping craigslist
20 to be able to have the breathing space to do what it is
21 doing to -- to do its best to limit the amount of unlawful
22 speech that's on its service. It's never going to be
23 perfect, but it does -- certainly does the best it can.

24 I've been talking a very long time, Your Honor, I
25 think perhaps I should sit down, unless you have --

1 THE COURT: No, I don't have any questions. Thank
2 you.

3 MR. CAROME: All right, thank you.

4 THE COURT: Anything in reply?

5 MS. SHUPE: Yes, Your Honor.

6 You were looking at the letter on May 5, 2009, and
7 that is the basis of craigslist's contention, that one
8 paragraph in that letter is what they're saying we had no
9 choice but to shut down our whole site. If it ended
10 there -- even though I agree with you that that's nothing
11 more than any citizen, corporate or individual, is subjected
12 to, if that's where it ended, you -- they might have
13 something of an argument, even though we don't agree with
14 it.

15 But it didn't end there, and it's in their
16 Complaint that it didn't end there.

17 Admittedly, that first letter was broad, as the
18 first salvo in any criminal process generally is. You need
19 to get their attention. And craigslist, in November '08,
20 entered into an agreement that the Attorney General signed
21 off on as well, in which it said, We know there's a problem
22 and we agree we're going to try and fix it.

23 That didn't appear to be done. The ads were still
24 prolific. So you fire off a salvo to get their attention
25 and let them know you're serious.

1 However, if you look at Exhibit K, that is a news
2 article from 5-15 of '09 in which it says, "McMaster
3 threatened to prosecute craigslist officials." This is the
4 second paragraph. "While no charges are imminent, he
5 iterated, the San Francisco-based company will be
6 responsible for ads after that deadline." Earlier this
7 week, they did these new things. "If prostitution listings
8 come up on the revamped site," which is the 'Adult Services'
9 site," so that's all we're talking about, "McMaster could,"
10 not would but could, "charge craigslist executives with
11 aiding and abetting prostitution."

12 Next paragraph. Quote from Henry McMaster, "All
13 we're asking craigslist to do is take the prostitution ads
14 off its Web site." So the issue starts to get narrow.

15 If you look at Exhibit L, which is another news
16 article from the State, and he says that the -- "The
17 Attorney General's office can't prosecute until a sheriff"
18 brings it a case and brings the -- "makes a case and brings
19 it to the Attorney General's Office." No sheriff has
20 presented a case yet.

21 THE COURT: Did the Attorney General's office know
22 about Section 230 at that time?

23 MS. SHUPE: Yes, we did, Your Honor.

24 THE COURT: You did?

25 MS. SHUPE: Yes, we did.

1 We had talked with -- met with the attorney for
2 craigslist. They had laid out their position on it. It was
3 a position we didn't and don't agree with, and, again, we
4 were talking about a very specific South Carolina statute at
5 that point.

6 He also says, and this is directly a quote from
7 this article -- well, it's not a quote but he said,
8 craigslist must be given a reasonable amount of time to fix
9 the problem.

10 THE COURT: You mentioned all that earlier.

11 MS. SHUPE: Okay. So -- but I'm just pointing it
12 out that it's here --

13 THE COURT: You've already pointed it out.

14 MS. SHUPE: -- in the Complaint.

15 Basically, if you take their -- their argument on
16 Section 230, they can never be held criminally liable for
17 anything, even their own intentional conduct, if they can
18 simply say, Hey, a third party put it there.

19 And that, Your Honor, I submit was not the intent
20 of Congress in the Communications Decency Act, to allow
21 providers like craigslist to just say, Hmm, well, we don't
22 care.

23 They wanted -- true, we want to encourage the
24 monitoring, but all we asked them to do and all we've ever
25 asked them to do is do what they promised to do.

1 THE COURT: You -- you've mentioned that in your
2 opening argument. I'm familiar with that argument.

3 MS. SHUPE: Okay, Your Honor, well, unless you
4 have any further --

5 THE COURT: I don't.

6 Anything in reply?

7 MR. CAROME: I would just say briefly that I think
8 counsel for Defendant just put the point very nicely. They
9 knew about Section 230. They don't agree with us about what
10 Section 230 says. That is the issue that this Court needs
11 to decide.

12 THE COURT: That's not what you asked me to
13 decide.

14 Let's take about ten minutes and then we'll come
15 back and finish up.

16 (Recess taken from 12:19 p.m. until 12:27 p.m.)

17 THE COURT: I'm trying to kind of think through
18 some of the problems we've got with a view towards disposing
19 of all the critical issues in this case.

20 In the Complaint . . . the Plaintiff alleges
21 several basis of jurisdiction. First, 42 United States
22 Code, Section 1983. That source of jurisdiction would
23 relate to the First Amendment claims and the commerce clause
24 claim.

25 The second source of jurisdiction is a declaratory

1 judgment act contained in 288 USC, Section 2201.

2 And of course the dilemma is that the declaratory
3 judgment action - I can't say in all cases, there may be
4 some exceptions, but in most cases - is not an independent
5 source of jurisdiction, which means ultimately, that if we
6 granted the Defendants' Motion to Dismiss, as to the First
7 Amendment in the commerce clause, leaving only the
8 declaratory judgment, the question would rise, do we have
9 jurisdiction.

10 And I think I need some additional briefing on
11 that.

12 During counsel for the Plaintiff's argument, I had
13 a tendency to redraft his Complaint, but that's just the way
14 I'm reading it. And I'm kind of pointing out some of the
15 items in the Complaint, the injunctive relief, that concern
16 me. I mean, I have concerns about ordering the Attorney
17 General to do something.

18 But no matter how you couch it, ultimately we're
19 going to have to interpret Section 230 in reaching a
20 decision in this case, and, because of my feeling about the
21 injunctive relief, I'd probably be more inclined to sidestep
22 those prayers and just deal with an interpretation of 230.

23 I think that's probably the way it should have
24 been framed in the first place. But, again, I'm not trying
25 to rewrite your Complaint.

1 But that's just kind of where I'm going now. But
2 I'm not as concerned about the case or controversy as I was.

3 If anybody wants to brief that, they can, bearing
4 in mind that I had just thought about the issue, and my
5 Clerk and I just bounced it out there, but I hadn't really
6 tried to put a name on it and I hadn't put the name of
7 "subject matter jurisdiction" on it, which I should've and
8 which is appropriate now.

9 And, of course, any time we're dealing with
10 subject matter jurisdiction or any question about subject
11 matter jurisdiction, we need to have our ears perked up,
12 because it's important that we address that issue and
13 dispose of that issue early on for fear that we can spin our
14 wheels forever here in Charleston and when it gets up to
15 Richmond, they can raise that issue. It seems like they
16 usually raise it with some degree of delight.

17 So that's where we are. I'm not in any hurry to
18 dispose of this case. I'd like to, but I really would like
19 to have a briefing on what jurisdiction remains once 1983 is
20 gone.

21 In other words, what jurisdiction does the
22 Declaratory Judgment Act give us in this case; and if the
23 First Amendment and the commerce clause, which I assume is a
24 1983 claim, when that type jurisdiction is gone, what's
25 left. And the other thing is, if you choose to deal with

1 the case or controversy, I'd like to hear you on that.

2 I -- I don't know if we can stretch the dispute
3 that exists as to an interpretation of Section 230 to make
4 that the case or controversy, because of the way the
5 Complaint's drafted. If it were drafted alleging that
6 difference of opinion to be the controversy, then probably
7 it would be okay, and I think it's okay. But feel free to
8 do that.

9 I don't know how much time you need. Two weeks,
10 is that enough?

11 MR. CAROME: Do you -- would Your Honor like --
12 should it be simultaneous briefing?

13 THE COURT: I don't care. Doesn't make any
14 difference to me. Might as well. I don't know why one
15 party would have to go before the other.

16 MR. CAROME: Perhaps there could be an opportunity
17 for --

18 THE COURT: You can, certainly.

19 MR. CAROME: -- briefs -- simultaneous briefs and
20 then simultaneous replies.

21 THE COURT: That's fine. That's fine. Anytime
22 anybody wants to add anything, I'm happy to have them add
23 it.

24 You know, I'm not going to foreclose anybody if
25 there's something legitimate that they want to submit to the

1 Court. I think that gives us an opportunity to make a
2 better, fairer decision.

3 So let's say two weeks and you can submit your
4 briefs, and then the week after that, if you want to reply,
5 you can do it.

6 MS. SHUPE: Your Honor, we would just like to ask,
7 because of other things that we've got going on, if we could
8 have 30 days to do that.

9 THE COURT: No, I'm not going to give you 30 days.
10 Two weeks is plenty time.

11 MS. SHUPE: Okay.

12 THE COURT: Okay. Thank you very much.
13 We'll be in recess.

14 MR. CAROME: Thank you very much, Your Honor.

15 MR. GRIFFITH: Thank you, Your Honor.

16 (Concluded, 12:36 p.m.)

17 ***** ***** *****

18 I certify that the foregoing is a correct transcript
19 from the record of proceedings in the above-titled
matter.

20 S/JANET A. COLLINS

2/28/2010

21 -----
Janet A. Collins, RMR, CRR, CRI

DATE

22

23

24

25