

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 16-5232

---

SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,  
Appellee,

v.

CARL FERRER,  
Appellant.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

**OPPOSITION OF APPELLEE SENATE PERMANENT  
SUBCOMMITTEE ON INVESTIGATIONS TO  
EMERGENCY MOTION OF APPELLANT CARL FERRER  
FOR A STAY PENDING JUDICIAL REVIEW**

---

PATRICIA MACK BRYAN  
D.C. Bar #335463  
[pat\\_bryan@legal.senate.gov](mailto:pat_bryan@legal.senate.gov)  
Senate Legal Counsel

MORGAN J. FRANKEL  
D.C. Bar #342022  
Deputy Senate Legal Counsel

GRANT R. VINIK  
D.C. Bar #459848  
Assistant Senate Legal Counsel

THOMAS E. CABALLERO  
Assistant Senate Legal Counsel

Office of Senate Legal Counsel  
642 Hart Senate Office Building  
Washington, D.C. 20510-7250  
(202) 224-4435 (tel)  
(202) 224-3391 (fax)

August 19, 2016

Counsel for Appellee

**CERTIFICATE OF APPELLEE  
AS TO PARTIES, RULINGS, AND RELATED CASES**

**A. Parties and Amici**

This appeal arises from a civil action in the district court, No. 16-mc-00621-RMC. The applicant-appellee is the Senate Permanent Subcommittee on Investigations. The respondent-appellant is Carl Ferrer. No *amici curiae* appeared, and no parties intervened, below or, to date, in this Court.

**B. Ruling Under Review**

The ruling under review on this appeal, issued by District Judge Rosemary M. Collyer on August 5, 2016, granted the applicant-appellee's motion to enforce its subpoena *duces tecum*. *Permanent Subcomm. on Investigations v. Ferrer*, --- F. Supp. 3d ---, 2016 WL 4179289 (D.D.C. Aug. 5, 2016).

**C. Related Cases**

This appeal has not previously been before this Court. There are no related cases pending in this Court or in any other court.

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES. .... ii

INTRODUCTION. .... 1

STATEMENT OF THE CASE. .... 2

STANDARD FOR STAY PENDING APPEAL..... 11

ARGUMENT..... 11

    I.    Mr. Ferrer Cannot Show Any Likelihood of Success  
          on the Merits..... 11

    II.   Mr. Ferrer Has Not Shown Actual, Non-theoretical  
          Irreparable Injury.. .... 16

    III.  The Subcommittee Would Suffer Serious Harm From  
          a Stay..... 18

    IV.  The Public Interest Would Not Be Served by a Stay..... 19

CONCLUSION. .... 20

## TABLE OF AUTHORITIES

| <b>Cases:</b>  | Page              |
|--|-------------------|
| <i>Barenblatt v. United States</i> , 360 U.S. 109 (1959).....  | 16                |
| <i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972). ....  | 15                |
| <i>Bursey v. United States</i> , 466 F.2d 1059 (9 <sup>th</sup> Cir. 1972). ....                               | 12, 13            |
| <i>Cuomo v. Nuclear Regulatory Comm’n</i> , 772 F.2d 972 (D.C. Cir. 1985). ....                                | 11, 20            |
| <i>Davis v. Pension Benefit Guar. Corp.</i> , 571 F.3d 1288 (D.C. Cir. 2009). ....                             | 11                |
| <i>Gibson v. Florida Legislative Investig. Comm.</i> , 372 U.S. 539 (1963).....                                | 12                |
| <i>Google, Inc. v. Hood</i> , 822 F.3d 212 (5 <sup>th</sup> Cir. 2016). ....                                   | 17, 18            |
| <i>Jane Doe No. 1 v. Backpage.com, LLC</i> , 817 F.3d 12 (1 <sup>st</sup> Cir. 2016). ....                     | 20                |
| <i>McCammon v. United States</i> , 588 F. Supp. 2d 43 (D.D.C. 2008).....                                       | 16                |
| <i>NAACP v. Alabama</i> , 357 U.S. 449 (1958).....   | 12, 13            |
| <i>Nken v. Holder</i> , 556 U.S. 418 (2009).....   | 16                |
| <i>Packwood v. Senate Select Comm. on Ethics</i> , 510 U.S. 1319 (1994)<br>(Rehnquist, C.J., in chambers)..... | 18                |
| <i>PSI v. Ferrer</i> , 16-mc-621, ECF No. 17 (D.D.C. Aug. 5, 2016),<br>2016 WL 4179289. ....                   | <i>passim</i>     |
| <i>PSI v. Ferrer</i> , 16-mc-621, ECF No. 23 (D.D.C. Aug. 12, 2016). ....                                      | 2, 10, 12, 19, 20 |
| <i>United States v. Judicial Watch, Inc.</i> , 241 F. Supp. 2d 15 (D.D.C. 2003).....                           | 18                |
| <i>United States v. Oakland Cannabis Buyers’ Coop.</i> , 532 U.S. 483 (2001).....                              | 20                |
| <i>United States v. Williams</i> , 553 U.S. 285 (2008).....  | 15                |



## Page

\**WMATC v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) . . . . . 11

*Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985) . . . . . 16

**Statute:**

28 U.S.C. § 1365. . . . . 8

**Congressional Materials:**

S. Res. 73, § 12(e)(1)(C), (D), & (e)(3), 114<sup>th</sup> Cong. (2015) . . . . . 3

S. Res. 377, 114<sup>th</sup> Cong. (2016) . . . . . 8

162 Cong. Rec. S1561-68 (daily ed. Mar. 17, 2016) . . . . . 8

*Human Trafficking Investigation: Hearing Before the Permanent Subcomm.  
on Investigations of the Senate Comm. on Homeland Security and  
Governmental Affairs*, S. Hrg. No. 114-179, 114<sup>th</sup> Cong. (2015),  
available at [https://www.gpo.gov/fdsys/pkg/CHRG-  
114shrg98445/pdf/CHRG-114shrg98445.pdf](https://www.gpo.gov/fdsys/pkg/CHRG-114shrg98445/pdf/CHRG-114shrg98445.pdf). . . . . 8

Recommendation to Enforce Subpoena Issued to the CEO of  
Backpage.com, LLC, Staff Report to the Permanent  
Subcommittee on Investigations, Nov. 19, 2015  
("PSI Staff Report"), reprinted in S. Hrg. No. 114-179,  
114<sup>th</sup> Cong., at 53-248 (2015). . . . . 3, 15

**Rule:**

\*D.C. Cir. R. 8(a). . . . . 11

---

\* Cases and authorities chiefly relied upon are denoted with an asterisk.

## INTRODUCTION

Appellant Carl Ferrer, CEO of Backpage.com, LLC, refuses to comply with a valid subpoena issued by the Senate Permanent Subcommittee on Investigations (“Subcommittee” or “PSI”). He claims that the First Amendment shields him from producing *any* responsive documents – and even from searching for responsive materials and identifying them in a privilege log. The district court correctly rejected that position and ordered Mr. Ferrer to comply “forthwith” with the Subcommittee’s subpoena.

Mr. Ferrer’s application for a stay should be denied. He cannot establish likelihood of success on the merits of his appeal. The Subcommittee is investigating the serious problem of human trafficking on the Internet – much of which takes place on Backpage’s website – and has subpoenaed Mr. Ferrer for documents relating to Backpage’s screening for illegal trafficking. It is important for the Subcommittee’s investigation of Internet sex trafficking to understand what methods the leading on-line marketplace for sex advertisements employs to screen out illegal sex trafficking on its website. Mr. Ferrer has no First Amendment right to ignore a subpoena for documents about Backpage’s business practices related to that topic. He has refused to identify his First Amendment interests except in sweeping generalities, and failed even to attempt to show that any such interests outweigh important governmental interests served by the Subcommittee’s investigation. Indeed, Mr. Ferrer cannot make any balancing argument because he refused to search for responsive documents or

produce a privilege log describing them, claiming that the First Amendment gave him blanket immunity from having to carry out these basic duties of all subpoena respondents. The court below held there was “no legal or factual support” for that proposition, Opinion, *PSI v. Ferrer*, 16-mc-621, ECF No. 17, at 20 (D.D.C. Aug. 5, 2016), 2016 WL 4179289 (“Op.”), and this Court is not likely to reverse that conclusion.

The other stay factors similarly favor the Subcommittee. Without articulating any specifics about the documents withheld, Mr. Ferrer cannot establish any actual and non-theoretical irreparable injury likely to result from their production. Further, the balance of equities strongly favors prompt enforcement of the subpoena, as a stay would hamper completion of the Subcommittee’s investigation before the end of this Congress, undermining the public interest in the Subcommittee’s ability to report to the Senate its findings for legislative consideration of this serious problem. Mr. Ferrer’s “dilatory” conduct, Order, *PSI v. Ferrer*, 16-mc-621, ECF No. 23, at 6 (D.D.C. Aug. 12, 2016) (“Stay Order”), has stymied the Subcommittee’s investigation for over a year and should not be countenanced further.

### **STATEMENT OF THE CASE**

1. The Senate Permanent Subcommittee on Investigations is empowered to issue subpoenas for documents as part of its authority to investigate “organized criminal activity which may operate in or otherwise utilize the facilities of interstate or international commerce” and to assess “whether any changes are required in the laws of the United States in order to protect the public against such [organized criminal]

practices or activities,” as well as “all other aspects of crime and lawlessness within the United States which have an impact upon or affect the national health, welfare, and safety.” S. Res. 73, § 12(e)(1)(C), (D), & (e)(3), 114<sup>th</sup> Cong. (2015).

2. Since April 2015, the Subcommittee has been investigating the serious and growing problem of Internet sex trafficking. Its investigation seeks to learn what measures online commercial marketplaces take to prevent use of their websites for sex trafficking and whether those measures are effective. Backpage dominates the online market for commercial sex, and numerous instances of child sex trafficking have occurred through its website. *See* Recommendation to Enforce Subpoena Issued to the CEO of Backpage.com, LLC, Staff Report to the Permanent Subcommittee on Investigations, Nov. 19, 2015, at 6-7 (“PSI Staff Report”), *reprinted in Human Trafficking Investigation: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Homeland Security and Governmental Affairs*, S. Hrg. No. 114-179, 114<sup>th</sup> Cong., at 53-248 (2015).<sup>1</sup> The Subcommittee seeks to understand how Backpage reviews and screens advertisements – a practice called “moderation” – that Backpage touts as effective in combatting online trafficking.

Following unsuccessful attempts to gather information from Backpage through voluntary means, in July 2015, the Subcommittee issued a subpoena to Backpage for materials concerning, *inter alia*, its moderation practices, interactions with law

---

<sup>1</sup> A copy of the hearing record was lodged with the district court, and is also available at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) under “Congressional Hearings.”

enforcement, data retention policies, and its corporate structure, *see* Letter and Subpoena to Backpage, schedule A, Jul. 7, 2015 [Ex. A, ECF No. 1-2]<sup>2</sup> – all of which are relevant to evaluating Backpage’s moderation practices. Cognizant of the First Amendment interests of Backpage’s legitimate users, that subpoena expressly permitted redaction of all personally identifying user information. *Id.* at 1.

Backpage refused to produce any responsive documents, asserting that the subpoena was overbroad and infringed on Backpage’s First Amendment rights. Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Aug. 6, 2015, at 5 [Ex. B, ECF No. 1-3]. Backpage did not identify any particular documents (or even categories of documents) that it believed were shielded from production by the First Amendment. Rather, it argued that the subpoena as a whole was invalid and asked that it be withdrawn. *See id.* In response, the Subcommittee made clear that it was willing to discuss ways to minimize any resource burden that the subpoena might impose. Letter to Steven R. Ross from Chairman and Ranking Member of PSI, Aug. 26, 2015, at 3 [Ex. D, ECF No. 1-5]. In addition, the Subcommittee noted that Backpage “has not explained its legal rationale for its categorical assertion of [a First Amendment] privilege,” and that any objections should be asserted as to particularized documents. *Id.* at 4.

---

<sup>2</sup> All exhibits cited accompanied the memorandum supporting the Subcommittee’s application to enforce the subpoena (ECF No. 1), and are referenced with their ECF number from the district court docket. A copy of each is provided in an Addendum to this Opposition.

3. On October 1, 2015, the Subcommittee withdrew its subpoena and issued a new, narrower subpoena to Carl Ferrer, CEO of Backpage. Op. at 22; Stay Order at 5. The Subcommittee explained that it “continue[d] to see no legal merit in Backpage’s explanation for its categorical refusal to comply with the Subcommittee’s subpoena,” but that, in “a good-faith effort to address Backpage’s expressed concerns,” it was withdrawing its subpoena and issuing a new subpoena seeking a narrower subset of documents. Letter and Subpoena to Carl Ferrer, CEO of Backpage.com, LLC from Chairman and Ranking Member of PSI, Oct. 1, 2015, at 2 [Ex. F, ECF No. 1-7]; *see* Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Oct. 23, 2015, at 1 [Ex. H, ECF No. 1-9] (Mr. Ferrer’s counsel describing new subpoena as “more targeted”). The October 1 subpoena required Mr. Ferrer to produce eight categories of documents by October 23 or appear personally before the Subcommittee on that date. Only the first three of the subpoena’s specifications are the subject of this enforcement action.<sup>3</sup>

The subpoena explicitly provided that Mr. Ferrer should exclude any personally

---

<sup>3</sup> Those requests sought documents concerning: (1) “reviewing, blocking, deleting, editing, or modifying advertisements in Adult Sections, either by Backpage personnel or by automated software processes, including but not limited to policies, manuals, memoranda, and guidelines;” (2) “advertising posting limitations, including but not limited to the ‘Banned Terms List,’ the ‘Grey List,’ and error messages, prompts, or other messages conveyed to users during the advertisement drafting or creation process;” and (3) “reviewing, verifying, blocking, deleting, disabling, or flagging user accounts or user account information, including but not limited to the verification of name, age, phone number, payment information, email address, photo, and IP address. *This request does not include the personally identifying information of any Backpage user or account holder.*” Subpoena to Carl Ferrer, schedule A [Ex. F, ECF No. 1-7].

identifying information concerning Backpage users. Subpoena to Carl Ferrer, schedule A [Ex. F, ECF No. 1-7]. The Subcommittee informed Mr. Ferrer that, in responding to the subpoena, he was required to “assert any claim of privilege or other right to withhold documents from the Subcommittee by October 23, along with a complete explanation of the basis of the privilege or other right to withhold documents” in a privilege log. Oct. 1, 2015 PSI Letter at 3 and Subpoena to Carl Ferrer, schedule A [Ex. F, ECF No. 1-7].<sup>4</sup>

On October 23, Mr. Ferrer objected, contending that the Subcommittee lacked jurisdiction to issue the subpoena, the subpoena sought information not pertinent to a valid investigation, and the subpoena infringed on his First Amendment rights. Oct. 23, 2015 Ross Letter [Ex. H, ECF No. 1-9]. Mr. Ferrer voluntarily produced 21 pages of publicly available documents in response to requests 1, 2, and 3, but objected to producing any other documents responsive to those requests. *See id.* at 6.

4. On November 3, after careful consideration, the Chairman and Ranking Member jointly overruled Mr. Ferrer’s objections on behalf of the Subcommittee. Nov. 3, 2015 Letter Ruling [Ex. I, ECF No. 1-10]. The Subcommittee found that the investigation fell squarely within its investigative jurisdiction, *id.* at 7–10, the subpoena sought information pertinent to the Subcommittee’s investigation, and the subpoena

---

<sup>4</sup> As Mr. Ferrer’s counsel agreed to submit a complete explanation for any non-compliance by October 23, the Subcommittee continued Mr. Ferrer’s personal appearance to a later date “to permit the Subcommittee to consider any objection [he] wish[ed] to submit.” Letter to Carl Ferrer, CEO of Backpage.com, LLC from Chairman and Ranking Member of PSI, Oct. 20, 2015 [Ex. G, ECF No. 1-8].

did not infringe on Backpage's or Mr. Ferrer's First Amendment rights. *Id.* at 10–15. The Subcommittee explained that the requested documents were directly pertinent to its investigative focus on actions by online commercial marketplaces to prevent their websites from being used for sex trafficking. *Id.* at 15–18. The Subcommittee directed Mr. Ferrer to produce all responsive documents by November 12, and continued his personal appearance to a hearing on November 19. *Id.* at 19.

On November 13 – one day *after* the date by which Mr. Ferrer had been ordered to produce documents – Mr. Ferrer's counsel responded to the Subcommittee's ruling. Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Nov. 13, 2015 [Ex. K, ECF No. 1-12]. Mr. Ferrer informed the Subcommittee that, while he was not waiving his First Amendment objection, he was “provid[ing] particular documents in response to some of the Subpoena's requests.” *Id.* at 5. He produced an additional 44 pages of documents responsive to requests 1, 2, and 3 – for a total of 65 pages, 21 of which were publicly available.<sup>5</sup> Mr. Ferrer did not submit a privilege log.

The Subcommittee then asked Mr. Ferrer what documents were being withheld pursuant to his objections. In response, Mr. Ferrer's counsel informed the Subcommittee that neither he nor Backpage had even conducted a full and complete search for documents – because, in their view, being required to conduct such a search

---

<sup>5</sup> Mr. Ferrer also produced over 16,000 pages in response to request 4 – which is not at issue here – about Backpage's cooperation with law enforcement, with many pages of repetitive advertisements and photos. Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Nov. 16, 2015, at 2 [Ex. L, ECF No. 1-13]; Op. at 7-8.



would violate the First Amendment. Nov. 16, 2015 Ross Letter at 2 [Ex. L, ECF No. 1-13]. Mr. Ferrer declined to identify any specific documents protected by the First Amendment or even to describe the searches by which he identified the documents he did produce. On November 19, the Subcommittee held a hearing concerning online sex trafficking. S. Hrg. No. 114-179, 114<sup>th</sup> Cong. (2015). Despite being under subpoena, Mr. Ferrer failed to appear.<sup>6</sup>

5. In light of Mr. Ferrer's refusal to comply with the subpoena (or even to search for documents and produce a privilege log), the Subcommittee sought authority from the Committee on Homeland Security and Governmental Affairs and from the Senate to enforce the subpoena. On March 17, 2016, the Senate, by a vote of 96-0, adopted a resolution, S. Res. 377, 114<sup>th</sup> Cong. (2016), directing the Senate Legal Counsel to initiate this action to enforce the Subcommittee's subpoena. 162 Cong. Rec. S1561-68 (daily ed. Mar. 17, 2016). On March 29, the Subcommittee filed this action under 28 U.S.C. § 1365 to enforce requests 1, 2, and 3 of the subpoena.

6. On August 5, the district court granted the Subcommittee's application to enforce the subpoena. The court found that "the Subcommittee is legitimately

---

<sup>6</sup> On November 16 and 18, days before the November 19 hearing, Mr. Ferrer's counsel belatedly advised the Subcommittee that Mr. Ferrer was on business travel and asked that Mr. Ferrer's personal appearance be waived, as he intended to refuse to answer questions based on his privilege against self-incrimination and the First Amendment. Nov. 16, 2015 Ross Letter at 2 [Ex. L, ECF No. 1-13]; Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Nov. 18, 2015 [Ex. M, ECF No. 1-14]. The Subcommittee declined to excuse Mr. Ferrer's appearance, Letter to Steven R. Ross from Chairman and Ranking Member of PSI, Nov. 18, 2015 [Ex. N, ECF No. 1-15], but nevertheless he failed to appear.

interested in investigating the nature and extent of Backpage’s moderation procedures,” Op. at 16, and that the subpoena “has a valid legislative purpose and seeks pertinent information that falls within the scope of the Subcommittee’s authority.” *Id.* at 18.

The court rejected Mr. Ferrer’s First Amendment objections, including his claim of “a First Amendment right not to conduct a full and comprehensive search for responsive documents and not to file a privilege log.” *Id.* at 20. The court found that “Mr. Ferrer has had ample time to perform the necessary duties of searching for, locating, identifying, and producing either responsive documents or a privilege log with an explanation for any withheld material” and, “[h]aving done none of the above, he is hard put to plead a barren First Amendment claim without underlying facts.” *Id.* at 24.

Further, the court held, “Mr. Ferrer has failed to demonstrate that requesting information on Backpage’s efforts to screen out sex trafficking from commercial advertisements on its website . . . would produce an impermissible chilling effect upon freedoms of the press, association, or speech.” *Id.* at 25. Noting that Mr. Ferrer “engages in no legal analysis to weigh his rights against the Subcommittee’s asserted interest,” the court held that “[h]is position” – “essentially” that “[t]he Court should presume that any responsive document that has not been produced contains constitutionally-protected information that no governmental need could possibly overcome” – was “untenable and without legal support.” *Id.* at 27. Moreover, the Court found that “to the extent the Subpoena implicates Mr. Ferrer’s protected

freedoms, it is only in an incidental and minimal fashion,” and “the record shows that the subpoena’s impact on Mr. Ferrer’s First Amendment freedoms is ‘so slight’ that the Subcommittee’s interests must prevail.” *Id.* at 28 (citation omitted). The court rejected Mr. Ferrer’s claims that the subpoena was overly broad or burdensome or that it violated the First Amendment by seeking to punish Backpage. *Id.* at 28-30.

Having rejected each of Mr. Ferrer’s objections, the court granted the Subcommittee’s application and ordered Mr. Ferrer to “comply forthwith” and “produce to the Subcommittee all documents responsive to requests 1, 2, and 3 of the subpoena no later than 10 days from the date of this Opinion.” *Id.* at 32.

7. On August 12, 2016, the district court denied Mr. Ferrer’s motion for a stay pending appeal. The court found that Mr. Ferrer’s “likelihood of success on the merits is not very high.” Stay Order at 5. The court rejected Mr. Ferrer’s argument that complying with the subpoena would impose irreparable harm, noting that, “since Mr. Ferrer has not conducted a full search for responsive documents, any showing of harm would be ‘theoretical’ and comprised of ‘unsubstantiated and speculative allegations.’” *Id.* The court also found that “Mr. Ferrer’s refusal to comply with the subpoena has stymied the Subcommittee’s investigation,” and “grant[ing] a stay would further delay the Subcommittee’s efforts, interfere with the investigation, and reward Mr. Ferrer’s dilatory conduct.” *Id.* at 6. The court concluded that a stay would “undermine the public interest,” and thus that “the balance of equities weighs against the issuance of a stay in this case.” *Id.*

## STANDARD FOR STAY PENDING APPEAL

A stay pending appeal is an “extraordinary remedy” and it is “the movant’s obligation to justify” such relief. *See Cuomo v. Nuclear Regulatory Comm’n*, 772 F.2d 972, 978 (D.C. Cir. 1985). Whether to issue a stay pending appeal depends on four factors: “(i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (4) the public interest.” D.C. Cir. R. 8(a); *WMATC v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

## ARGUMENT

### I. Mr. Ferrer Cannot Show Any Likelihood of Success on the Merits.

Mr. Ferrer cannot carry his burden of establishing a likelihood of success on the merits. This Court has long held that a movant must make a “strong showing that it is likely to prevail on the merits of its appeal,” or else “there would be no justification for the court’s intrusion into the ordinary processes of administration and judicial review.” *Holiday Tours*, 559 F.2d at 843 (quoting *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir 1958)). Although Mr. Ferrer argues that this factor can generally be satisfied by showing only the existence of substantial merits questions, *see* Emergency Motion of Appellant Carl Ferrer for a Stay Pending Judicial Review (“Mot.”) at 8, this Court has said that argument “misread[s] our precedent.” *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). That “less[e]r likelihood of success might suffice” only if “each of the other

three factors ‘clearly favor[]’ granting the injunction.” *Id.* (citation omitted). As explained below, here they do not.

Mr. Ferrer’s chances of prevailing on appeal are remote under any standard. Mr. Ferrer contends, Mot. at 9-12, that the First Amendment provides categorical protection from the subpoena for documents about Backpage’s moderation practices – regardless of the content of any responsive document (which he refused to search for or describe) and no matter the comparative strength of the speech interests in those documents and the competing governmental interests in obtaining them (which he refused to address). *See* Op. at 26-27. As the district court recognized, Mr. Ferrer is exceedingly unlikely to persuade this Court on appeal to accept that position, which would allow unsupported and undefined assertions of constitutional privilege to defeat valid subpoenas. “To be frank, in the face of such intransigence and the blanket nature of his objections, the Court cannot find that Mr. Ferrer has made a strong showing on likelihood of success.” Stay Order at 5.

To be sure, documentary subpoenas can raise First Amendment concerns under circumstances not applicable here – for example, where they are used to discover the identity of disfavored speakers. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958); *Gibson v. Florida Legislative Investig. Comm.*, 372 U.S. 539, 544-49 (1963); *see also Bursley v. United States*, 466 F.2d 1059, 1068-71 (9<sup>th</sup> Cir. 1972) (grand jury seeking information about staff of Black Panther Party publication). In stark contrast to those cases, however, the Subcommittee explicitly directed Mr. Ferrer to redact

personally identifying information about Backpage's users. Oct. 1, 2015 PSI Letter at 2 and Subpoena to Carl Ferrer, schedule A [Ex. F, ECF No. 1-7].

Even if the subpoena triggered First Amendment scrutiny, that would not aid Mr. Ferrer. Under the Supreme Court's cases, courts must balance the "restraint upon the exercise" of First Amendment interests against the governmental interests in obtaining the information sought. *See NAACP*, 357 U.S. at 462-63. The Subcommittee has a powerful legislative interest in documents regarding Backpage's purportedly market-leading efforts to screen for illegal advertisements on its website. As the district court found, any impact on Mr. Ferrer's "undefined" speech interests would be "so slight," "incidental and minimal" that the Senate's manifest interest in "[u]nderstanding the magnitude of Internet sex trafficking and how to stop it . . . must prevail." *Op.* at 28.

Mr. Ferrer cannot successfully challenge that conclusion because he failed to make any argument below to the contrary. Mr. Ferrer "engage[d] in no legal analysis to weigh his rights against the Subcommittee's asserted interest." *Id.* at 27.<sup>7</sup> Rather than engage in the interest-balancing required by precedent, Mr. Ferrer asked the district court "essentially" to "presume that any responsive document that has not

---

<sup>7</sup> Citing *Bursey*, 466 F.2d at 1086-88, Mr. Ferrer argues that the government carries the burden of demonstrating compliance with the First Amendment. *Mot.* at 12. *Bursey*, however, does not relieve a subpoena respondent from having to object to particular information requests. To the contrary, as the district court recognized, unlike Mr. Ferrer, the subpoena respondents in *Bursey* "objected to specific questions on the record, thus allowing the court to weigh the First Amendment interests implicated by each question against the asserted governmental interest." *Op.* at 26.

been produced contains constitutionally-protected information that no governmental need could possibly overcome.” Op. at 27. The court termed that argument “untenable and without legal support.” *Id.*

Mr. Ferrer’s failure to address the strength of his asserted First Amendment interests in the withheld documents is not surprising because he “refused to conduct a full search for responsive documents” and “failed to articulate specific objections in a privilege log” – refusals for which he could cite no legal authority and that render interest-balancing analysis impossible. *Id.* at 26.<sup>8</sup> As the district court held, “[t]here is simply no legal or factual support for” the novel proposition that Mr. Ferrer enjoys a special right not to search for responsive documents and articulate specific objections to producing them. *Id.* at 20. “Mr. Ferrer does not possess an absolute right to be free

---

<sup>8</sup> Mr. Ferrer claims, for the first time here, that the reason he did not submit a privilege log was that “just days before the hearing” the Subcommittee “expand[ed] the demands to include all internal editorial communications,” rendering his ability to produce such a log “fanciful.” Mot. at 13. What is truly fanciful is this claim. The notion that the Subcommittee prevented him from submitting a privilege log by “expanding the demands” is belied by Mr. Ferrer’s failure even so much as to *mention* this problem – either then or in the nine months since. Mr. Ferrer told the Subcommittee, as he told the court below, that he did not prepare a log, or even begin a comprehensive search for responsive documents, because the First Amendment immunized him from doing so. Mr. Ferrer had been fully on notice of the scope of the Subcommittee’s document requests for six weeks, as the October 1 subpoena explicitly covered “interoffice and intra office communications” and “electronic mail (e-mail.)” Subpoena to Carl Ferrer [Ex. F, ECF No. 1-7] (definition of “document”). The Subcommittee never expanded the scope of the subpoena. His startling claim that discussions with the Subcommittee days before the November 19 hearing prevented him from preparing a privilege log is not credible. *See* Op. at 24 (“Mr. Ferrer has had ample time . . . [for] searching for, locating, identifying, and producing either responsive documents or a privilege log . . .”).



from government investigation when there are valid justifications for the inquiry.” *Id.*<sup>9</sup>

In lieu of making specific objections, Mr. Ferrer contends that the subpoena intrudes generally on “editorial policies” or “functions.” Mot. at 2, 10. But he provides no information whatsoever about those “editorial decisions,” *id.* at 9-11, nor does he explain why they are constitutionally protected. Merely affixing the “editorial” label to Backpage’s business practices does not imbue them with constitutional protection. In any case, evidence suggests, *see* PSI Staff Report at 17-21, that Backpage’s editing practices – for example, editing out incriminating material from advertisements for illegal transactions – enjoys no constitutional protection. “Offers to engage in illegal transactions are categorically excluded from First Amendment protection.” *United States v. Williams*, 553 U.S. 285, 297 (2008).

Mr. Ferrer also argues that the Subcommittee is acting “in coordination with other governmental actors” to use its subpoena power “as a bludgeon to burden or restrict editorial policies of which it disapproves.” Mot. at 2. As the district court found, those allegations are factually wrong and legally irrelevant. Op. at 28. The Subcommittee’s investigation has a well-defined legislative purpose. “So long as

---

<sup>9</sup> Mr. Ferrer claims special status as an “online intermediar[y]” who exercises “editorial judgments.” Mot. at 10. Even traditional newspapers and political associations must engage in interest-balancing to defeat a governmental subpoena. *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972) (explaining the “prevailing constitutional view” that “First Amendment interest asserted by [a journalist] was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses”). Applying a special rule to “online intermediaries” would preclude government investigation into online activity even though much conduct today occurs online.



Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.”

*Barenblatt v. United States*, 360 U.S. 109, 132 (1959).

Equally misplaced is Mr. Ferrer’s reliance on cases “of potentially great significance for the balance of power between the Legislative and Executive Branches,” and other close cases involving weighty constitutional questions. Mot. at 14-15 n.9. *This* case is not close. “Put simply,” Mr. Ferrer “has provided no compelling legal or factual support for [his] claim[s]” demonstrating a likelihood of success on the merits. *McCammon v. United States*, 588 F. Supp. 2d 43, 48 (D.D.C. 2008). Because Mr. Ferrer cannot demonstrate any likelihood of success on appeal, his motion for a stay should be denied.

## **II. Mr. Ferrer Has Not Shown Actual, Non-theoretical Irreparable Injury.**

Nor has Mr. Ferrer shown he will suffer irreparable harm absent a stay.<sup>10</sup> It is a “well known and indisputable principle[]” that “unsubstantiated and speculative allegations” cannot constitute “irreparable harm” sufficient to justify injunctive relief. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying stay motion grounded on speculative allegations of economic injury). Mr. Ferrer must establish an “injury [that is] both certain and great; it must be actual and not theoretical.” *Id.* He

---

<sup>10</sup> Because a stay “intru[des] into the ordinary processes of administration and judicial review,” it “is not a matter of right, even if irreparable injury might otherwise result to the appellant.” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations and internal quotation marks omitted).

cannot possibly carry that burden. As the district court found, because Mr. Ferrer “has not conducted a full search for responsive documents, any showing of harm would be theoretical and comprised of unsubstantiated and speculative allegations.” Stay Order at 5 (citation and internal quotation marks omitted).

Mr. Ferrer argues that the irreparable injury he will suffer is the loss of First Amendment rights. But just as Mr. Ferrer is “hard put to plead a barren First Amendment claim without underlying facts,” Op. at 24, he cannot show any actual, non-theoretical injury to his concrete First Amendment interests. As the Fifth Circuit recently stated, “invocation of the First Amendment cannot substitute for the presence of an imminent, non-speculative irreparable injury.” *Google, Inc. v. Hood*, 822 F.3d 212, 228 (5<sup>th</sup> Cir. 2016). The district court described Mr. Ferrer’s asserted speech interests as “undefined,” Op. at 28, and recognized that his argument amounted to a hypothetical. *Id.* at 27 (describing Mr. Ferrer’s position as “essentially” that “[t]he Court should presume that any responsive document that has not been produced contains constitutionally-protected information that no governmental need could possibly overcome”); *id.* at 28 (“Even if accurate that this effect [infringement on First Amendment liberties] ‘can’ be true, Mr. Ferrer offers no facts or argument, beyond the conclusory statement, that it *is* true here.”). Even if the subpoena did implicate Mr. Ferrer’s First Amendment interests, the district court found that the subpoena’s impact on Mr. Ferrer’s “undefined” speech interests would be “so slight,” “incidental and minimal” that the Subcommittee’s interest in “[u]nderstanding the magnitude of

Internet sex trafficking and how to stop it . . . must prevail.” *Id.*<sup>11</sup>

Mr. Ferrer also claims that the extraordinary remedy of a stay is justified to allow him to maintain an effective appeal of the district court’s order. But he “cannot be permitted to manufacture irreparable harm by simply stating a legal principle with no precedential support whatsoever, and then claiming irreparable harm if [he] believe[s] a court order violates that principle.” *United States v. Judicial Watch, Inc.*, 241 F. Supp. 2d 15, 17 (D.D.C. 2003) (citation omitted). The last time a Senate committee had to resort to the courts to compel compliance with a subpoena for documents, which was 23 years ago, the respondent’s motion to stay the order requiring production was denied by the district court, a unanimous panel of this Court, and the Chief Justice in chambers, *see Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319-20 (1994) (Rehnquist, C.J., in chambers) (noting court of appeals’ denial of stay), notwithstanding the respondent’s claim that compliance with the subpoena prior to adjudication of his appeals would cause irreparable injury to his Fourth and Fifth Amendment rights.

### **III. The Subcommittee Would Suffer Serious Harm From A Stay.**

Unlike Mr. Ferrer’s speculative claims of injury, the Subcommittee will suffer

---

<sup>11</sup> Mr. Ferrer’s comparison, Mot. at 3-4, 13-14, of the Subcommittee’s three document requests to the “unduly burdensome” subpoena in *Google v. Hood* is wholly inaccurate. In denying Mr. Ferrer’s stay motion, the district court found that “[t]he Subcommittee spent months in discussions and negotiations with Backpage in an effort to obtain compliance with the subpoena and minimize its burden.” Stay Order at 1. By contrast, Attorney General Hood refused to modify an “expansive[]” 79-page subpoena, including 69 interrogatories and 141 document requests. *Google*, 822 F.3d at 219.

considerable, actual harm from delays attending a stay. A stay will almost certainly frustrate the Subcommittee's ability to complete this investigation – which requires the Subcommittee to receive and review these documents for use in anticipated depositions, a public hearing, and a final report to the Senate – before the adjournment of the 114<sup>th</sup> Congress.

The Subcommittee first contacted Backpage sixteen months ago and first subpoenaed Backpage over a year ago. Despite the Subcommittee's significant efforts to accommodate Mr. Ferrer's and Backpage's concerns in an effort to avoid the instant proceeding, "Mr. Ferrer's refusal to comply with the subpoena has stymied the Subcommittee's investigation." Stay Order at 6. "To grant a stay would further delay the Subcommittee's efforts, interfere with the investigation, and reward Mr. Ferrer's dilatory conduct." *Id.*<sup>12</sup>

#### **IV. The Public Interest Would Not Be Served By a Stay.**

The public interest also strongly favors denial of a stay. Under the public interest prong, the views of "Congress, the elected representatives of the entire

---

<sup>12</sup> Mr. Ferrer argues that the Subcommittee will suffer no harm from a stay because, in his view, it waited too long to enforce the subpoena. Mot. at 18. Mr. Ferrer's default occurred in November 2015, shortly before adjournment of the first session of the 114<sup>th</sup> Congress. When Congress reconvened in 2016, the Subcommittee began the process of initiating this action. After considering whether to pursue criminal contempt against Mr. Ferrer for his refusal to appear at the November 19 hearing, the Subcommittee (i) drafted a Senate resolution; (ii) drafted a committee report to accompany the Senate resolution; (iii) scheduled a mark-up vote to gain approval for the resolution by the Homeland Security and Governmental Affairs Committee; and (iv) scheduled a vote of the full Senate to authorize this action.

nation,” are “another sense by which public interest should be gauged.” *Cuomo*, 772 F.2d at 978. “[A] court sitting in equity cannot ‘ignore the judgment of Congress, deliberately expressed in legislation.’” *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 497 (2001) (internal quotation marks and citation omitted).

Here, the Senate’s unanimous vote of 96 to 0 authorizing the Subcommittee to enforce the subpoena reflects the entire body’s considered judgment of the importance of the information sought to the Subcommittee’s investigation of the serious and growing problem of online sex trafficking. It is the constitutional duty of the Congress to serve the public interest through timely and effective legislation addressing serious national problems.

Recently, the First Circuit noted that “a persuasive case” had been made that “Backpage has tailored its website to make sex trafficking easier,” and suggested the “remedy [for that problem] is through legislation.” *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1<sup>st</sup> Cir. 2016). “[G]iven the seriousness of the inquiry’s subject (illegal sex trafficking), a stay would undermine the public interest in ensuring that the Subcommittee is able to complete its investigation promptly and make informed recommendations to the Senate on potential legislation addressing the use of the Internet for illegal sex trafficking.” Stay Order at 6.

## CONCLUSION

For the foregoing reasons, the Court should deny Appellant Carl Ferrer’s Emergency Motion for a Stay Pending Judicial Review.

Respectfully submitted,

/s/ Patricia Mack Bryan  
PATRICIA MACK BRYAN  
D.C. Bar #335463  
[pat\\_bryan@legal.senate.gov](mailto:pat_bryan@legal.senate.gov)  
Senate Legal Counsel

MORGAN J. FRANKEL  
D.C. Bar #342022  
Deputy Senate Legal Counsel

GRANT R. VINIK  
D.C. Bar #459848  
Assistant Senate Legal Counsel

THOMAS E. CABALLERO  
Assistant Senate Legal Counsel

Office of Senate Legal Counsel  
642 Hart Senate Office Building  
Washington, D.C. 20510-7250  
(202) 224-4435 (tel)  
(202) 224-3391 (fax)

August 19, 2016

Counsel for Appellee Senate Permanent  
Subcommittee on Investigations

**CERTIFICATE OF SERVICE**

I certify that, on August 19, 2016, I filed electronically the foregoing Opposition of Appellee Senate Permanent Subcommittee on Investigations to Emergency Motion of Appellant Carl Ferrer for Stay Pending Judicial Review and accompanying Addendum with the Clerk of the Court using the CM/ECF system, which will provide notice of electronic filing to the following:

Robert Corn-Revere  
Ronald London  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, NW  
Suite 800  
Washington, DC 20006-3401  
(202) 973-4225  
Fax: (202) 973-4499  
bobcornrevere@dwt.com  
ronnielondon@dwt.com

Steven R. Ross  
Stanley M. Brand  
Akin Gump Strauss Hauer & Feld  
1333 New Hampshire Avenue, N.W.  
Washington, DC 20036-1564  
(202) 887-4343  
sross@akingump.com  
sbrand@akingump.com

Counsel for Appellant

/s/ Patricia Mack Bryan  
PATRICIA MACK BRYAN

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 16-5232

---

SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,

Appellee,

v.

CARL FERRER,

Appellant.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

**ADDENDUM TO  
OPPOSITION OF APPELLEE SENATE PERMANENT SUBCOMM.  
ON INVESTIGATIONS TO EMERGENCY MOTION OF APPELLANT  
CARL FERRER FOR A STAY PENDING JUDICIAL REVIEW**

---

PATRICIA MACK BRYAN  
D.C. Bar #335463  
[pat\\_bryan@legal.senate.gov](mailto:pat_bryan@legal.senate.gov)  
Senate Legal Counsel

MORGAN J. FRANKEL  
D.C. Bar #342022  
Deputy Senate Legal Counsel

GRANT R. VINIK  
D.C. Bar #459848  
Assistant Senate Legal Counsel

THOMAS E. CABALLERO  
Assistant Senate Legal Counsel

Office of Senate Legal Counsel  
642 Hart Senate Office Building  
Washington, D.C. 20510-7250  
(202) 224-4435 (tel)  
(202) 224-3391 (fax)

August 19, 2016

Counsel for Appellee



## CONTENTS

1. Order denying motion for stay, *PSI v. Ferrer*, 16-mc-621, ECF No. 23 (D.D.C. Aug. 12, 2016)

Exhibits accompanying Memorandum of Points and Authorities in Support of Application to Enforce Subpoena Duces Tecum of Senate Permanent Subcommittee on Investigations:

2. Exhibit A ECF No. 1-2 Letter and Subpoena to Backpage.com, LLC, Jul. 7, 2015
3. Exhibit B ECF No. 1-3 Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Aug. 6, 2015
4. Exhibit D ECF No. 1-5 Letter to Steven R. Ross from Chairman and Ranking Member of PSI, Aug. 26, 2015
5. Exhibit F ECF No. 1-7 Letter and **Subpoena to Carl Ferrer, CEO of Backpage.com, LLC** from Chairman and Ranking Member of PSI, Oct. 1, 2015
6. Exhibit G ECF No. 1-8 Letter to Carl Ferrer, CEO of Backpage.com, LLC from Chairman and Ranking Member of PSI, Oct. 20, 2015
7. Exhibit H ECF No. 1-9 Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Oct. 23, 2015
8. Exhibit I ECF No. 1-10 Nov. 3, 2015 Letter Ruling
9. Exhibit K ECF No. 1-12 Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Nov. 13, 2015
10. Exhibit L ECF No. 1-13 Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Nov. 16, 2015
11. Exhibit M ECF No. 1-14 Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Nov. 18, 2015
12. Exhibit N ECF No. 1-15 Letter to Steven R. Ross from Chairman and Ranking Member of PSI, Nov. 18, 2015

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

|                                      |   |                                      |
|--------------------------------------|---|--------------------------------------|
| <b>SENATE PERMANENT SUBCOMMITTEE</b> | ) |                                      |
| <b>ON INVESTIGATIONS,</b>            | ) |                                      |
|                                      | ) |                                      |
| <b>Applicant,</b>                    | ) |                                      |
|                                      | ) |                                      |
| <b>v.</b>                            | ) | <b>Misc. Action No. 16-621 (RMC)</b> |
|                                      | ) |                                      |
| <b>CARL FERRER,</b>                  | ) |                                      |
|                                      | ) |                                      |
| <b>Respondent.</b>                   | ) |                                      |

---

**ORDER**

The Senate Permanent Subcommittee on Investigations is investigating the use of the Internet for illegal sex trafficking, as well as evaluating potential legislation and the effectiveness of existing statutes, programs, and regulatory initiatives addressing this problem. The Subcommittee initiated its investigation in April 2015. Interested in learning more about the measures being taken by online commercial marketplaces to prevent illegal sex trafficking, the Subcommittee sought the cooperation of Backpage.com, LLC, an online website for classified ads. As part of the investigation, the Subcommittee issued a documentary subpoena on July 7, 2015, requiring Carl Ferrer, Chief Executive Officer of Backpage, to produce certain documents concerning the company’s moderation procedures, interaction with law enforcement, terms of use, data retention policies, and basic corporate structure. Mr. Ferrer and Backpage objected to the subpoena on a number of grounds, including the breadth and prosecutorial nature of the subpoena and the alleged infringement of First Amendment rights.

The Subcommittee spent months in discussions and negotiations with Backpage in an effort to obtain compliance with the subpoena and minimize its burden. On October 1,

2015, the Subcommittee withdrew its subpoena and issued a new one with more targeted requests and fewer categories. This new subpoena, like the previous one, did not request any materials concerning the identity of Backpage users. To further facilitate Mr. Ferrer's compliance and encourage his cooperation, the Subcommittee offered to negotiate the use of limited electronic search terms and to focus on particular document custodians or employees of the company. Mr. Ferrer did not accept the offer. Instead, Backpage provided a small number of publicly available and outdated documents. With respect to the subpoena's first three requests, which are the subject of this miscellaneous action, Mr. Ferrer's production was practically non-existent. Moreover, Mr. Ferrer did not produce a privilege log with specific objections to the production of any materials or explain his claims to such privileges, as required by the subpoena. In fact, Mr. Ferrer argued that he had a First Amendment right not to conduct a full and comprehensive search for responsive documents.

The Subcommittee filed the instant action to enforce a limited portion of its October 1, 2015 subpoena — specifically, requests 1, 2, and 3:

1. Any documents concerning Backpage's reviewing, blocking, deleting, editing, or modifying advertisements in Adult Sections, either by Backpage personnel or by automated software processes, including but not limited to policies, manuals, memoranda, and guidelines.
2. Any documents concerning advertising posting limitations, including but not limited to the "Banned Terms List," the "Grey List," and error messages, prompts, or other messages conveyed to users during the advertisement drafting or creation process.
3. Any documents concerning reviewing, verifying, blocking, deleting, disabling, or flagging user accounts or user account information, including but not limited to the verification of name, age, phone number, payment information, email address, photo, and IP address. *This request does not include the personally identifying information of any Backpage user or account holder.*

Mem. Op. [Dkt. 17] at 9-10 (emphasis in original).<sup>1</sup> Mr. Ferrer opposed the Subcommittee's Application to Enforce its Subpoena on the basis that: (1) the Court lacked subject matter jurisdiction over the Application; (2) the Subpoena lacked a legislative purpose and did not seek information pertinent to an investigation within the Subcommittee's jurisdiction or power; (3) the Subpoena violated the First Amendment and was overly broad, burdensome, and part of a targeted campaign against Backpage; and (4) the Subpoena violated the Due Process Clause.

On August 5, 2016, the Court rejected Mr. Ferrer's objections and ordered him to search for and produce responsive documents to the first three requests of the Subpoena within a period of ten days. On August 8, 2016, Mr. Ferrer filed the current Motion to Stay the Court's Order Pending Appeal, *see* Mot. [Dkt. 19], which is opposed by the Subcommittee, *see* Opp'n [Dkt. 22]. The following day, on August 9, Mr. Ferrer filed its notice of appeal to the D.C. Circuit.<sup>2</sup>

In determining whether to grant a motion to stay pending appeal, the moving party bears the burden of showing the balance of the following four factors favors the stay: "(1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of harm to other parties if relief

---

<sup>1</sup> For a more detailed recitation of the underlying facts in this miscellaneous action, *see* the Court's August 5, 2016 Memorandum Opinion, *available at Senate Permanent Subcomm. v. Ferrer*, No. 16-MC-621 (RMC), 2016 WL 4179289, at \*1-5 (D.D.C. Aug. 5, 2016).

<sup>2</sup> "Although a party's filing of a notice of appeal generally divests the district court of jurisdiction over the matter being appealed, it does *not* deprive a district court of jurisdiction over a motion for stay of its judgment or to grant an injunction pending appeal." *McCammon v. United States*, 588 F. Supp. 2d 43, 45 n.2 (D.D.C. 2008) (citing Fed. R. Civ. P. 62) (other citations omitted).

is granted; and (4) the public interest.” D.C. Cir. R. 8(a); *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Moreover, “granting a stay pending appeal is ‘always an *extraordinary remedy*,’ and . . . the moving party carries a *heavy burden* to demonstrate that the stay is warranted.” *United States v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d 988, 990 (D.D.C. 2006) (internal citations omitted) (emphasis added). Mr. Ferrer has failed to meet that burden.

With respect to the first factor of likelihood of success on the merits, Mr. Ferrer exclusively focuses on his First Amendment objection. The Court readily recognizes that First Amendment rights might be strongly implicated in a congressional investigation and the use of documentary subpoenas. The Court is not insensitive to Mr. Ferrer’s First Amendment rights. However, the Court cannot accept Mr. Ferrer’s position that he has a First Amendment right to withhold — much less to refuse to search for — documents that are relevant to the Subcommittee’s investigation on Backpage’s practices to prevent advertisements for illegal sex trafficking. The Court noted in its Memorandum Opinion that “[s]ome of the documents that the Subcommittee is requesting may contain information that is not subject to First Amendment protection due to its illegal nature.” *Ferrer*, 2016 WL 4179289, at \*11 (citing *Flytenow, Inc. v. FAA*, 808 F.3d 882, 894 (D.C. Cir. 2015) (noting that “the advertising of illegal activity has never been protected speech”). In the absence of specific evidence or a privilege log, Mr. Ferrer cannot expect the Court to simply assume that the subpoena violates the First Amendment.

Mr. Ferrer again argues generally that Backpage is entitled to “significant First Amendment protection.” Mot. at 4. Once again, Mr. Ferrer does not elaborate on the conclusory assertion that the “Subcommittee’s demands impinge on significant and demonstrable First Amendment interests . . . .” *Id.* The Court already noted that “merely arguing that Backpage

enjoys ‘significant’ First Amendment protections proves nothing as a matter of fact or law.” *Ferrer*, 2016 WL 4179289, at \*13. Mr. Ferrer’s First Amendment objection requires a balancing of “the nature of the intrusion against the asserted governmental interest — an exercise that Mr. Ferrer simply does not acknowledge, let alone discuss, in his briefs or letters.” *Id.* at \*10 (citing *Konigsberg v. State Bar of California*, 366 U.S. 36, 51 (1961)). Mr. Ferrer’s failure to recognize and undertake the First Amendment’s balancing of competing interests is fatal to his claim and to his motion to stay. “By not attempting to balance the parties’ competing interests and failing to identify the applicable level of First Amendment scrutiny, Mr. Ferrer is essentially saying: The Court should presume that any responsive document that has not been produced contains constitutionally-protected information that no governmental need could possibly overcome.” *Id.* at \*13. The likelihood of success on the merits is not very high.

Mr. Ferrer is long on First Amendment law and short on dealing with the only facts in the record, that is, his refusals to negotiate more favorable terms, to search for and produce responsive documents, or to provide a privilege log asserting applicable objections. To be frank, in the face of such intransigence and the blanket nature of his objections, the Court cannot find that Mr. Ferrer has made a strong showing on likelihood of success.

With respect to the second factor of irreparable harm, Mr. Ferrer has failed to establish an injury that is “both certain and great.” *Wisconsin Gas Co. v. Federal Energy Regulatory Comm’n*, 758 F.2d 669, 674 (D.C. Cir. 1985). In fact, since Mr. Ferrer has not conducted a full search for responsive documents, any showing of harm would be “theoretical” and comprised of “unsubstantiated and speculative allegations.” *Id.* In the absence of a privilege log or concrete evidence of prejudice by Mr. Ferrer, the Court cannot find that actual harm would flow from a search for responsive materials and production of non-privileged documents once

identified. Finally, given Mr. Ferrer's failure to show that he has a meritorious appeal warranting a stay, he "cannot be permitted to manufacture irreparable harm" on the basis of a categorical First Amendment objection, "a legal principle with no precedential support whatsoever . . . ." *United States v. Judicial Watch, Inc.*, 241 F. Supp. 2d 15, 17 (D.D.C. 2003).

Mr. Ferrer's refusal to comply with the subpoena has stymied the Subcommittee's investigation. To grant a stay would further delay the Subcommittee's efforts, interfere with the investigation, and reward Mr. Ferrer's dilatory conduct. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 511 & n.17 (1975) (recognizing that "protracted delay has frustrated a valid congressional inquiry"); *see also Judicial Watch, Inc.*, 241 F. Supp. 2d at 18. In addition, given the seriousness of the inquiry's subject (illegal sex trafficking), a stay would undermine the public interest in ensuring that the Subcommittee is able to complete its investigation promptly and make informed recommendations to the Senate on potential legislation addressing the use of the Internet for illegal sex trafficking. *McCammon*, 588 F. Supp. 2d at 49 (stating that "the public interest in fact favors a prompt and final resolution of the instant lawsuit, which has delayed the Government's effort to carry out its duties to collect and lay taxes").

In conclusion, the Court finds that the balance of the equities weighs against the issuance of a stay in this case. Mr. Ferrer has not met the "heavy burden" required to demonstrate that such an "extraordinary remedy" is warranted. *Phillip Morris USA*, 449 F. Supp. 2d at 990. As the Court previously noted, "Mr. Ferrer has had ample time to perform the necessary duties of searching for, locating, identifying, and producing either responsive documents or a privilege log with an explanation for any withheld material. Having done none of the above, he is hard put to plead a barren First Amendment claim without underlying facts." *Ferrer*, 2016 WL 4179289, at \*11. Accordingly, in its discretion, it is hereby

**ORDERED** that Mr. Ferrer’s Motion to Stay this Court’s August 5, 2016 Order

Pending Appeal, Dkt. 19, is **DENIED**.

Date: August 12, 2016

\_\_\_\_\_  
/s/  
ROSEMARY M. COLLYER  
United States District Judge



MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

# Exhibit A

JOHN McCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
KELLY AYOTTE, NEW HAMPSHIRE  
JONI ERNST, IOWA  
BEN SASSE, NEBRASKA

RON JOHNSON, WISCONSIN, CHAIRMAN  
THOMAS R. CARPER, DELAWARE  
CLAIRE McCASKILL, MISSOURI  
JON TESTER, MONTANA  
TAMMY BALDWIN, WISCONSIN  
HEIDI HEITKAMP, NORTH DAKOTA  
CORY A. BOOKER, NEW JERSEY  
GARY C. PETERS, MICHIGAN

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR  
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

July 7, 2015

**VIA U.S. MAIL AND EMAIL (sross@akingump.com)**

Custodian of Records  
Backpage.com, LLC  
2501 Oak Lawn Ave.  
Dallas, TX 75219

Dear Mr. Carl Ferrer and Ms. Elizabeth McDougall:

Pursuant to its authority under Senate Resolution 73, Section 12(e), 114th Congress, the U.S. Senate Permanent Subcommittee on Investigations is currently investigating matters related to human trafficking.

To assist the Subcommittee in this matter, please provide the documents requested in the attached subpoena no later than August 7, 2015. We ask that you submit the material responsive to this subpoena as it becomes available, rather than waiting to provide it all at once. In addition, we ask that you meet and confer with Subcommittee staff by July 14, 2015, in order to discuss matters related to the production of documents. Subcommittee staff may also want to interview personnel from Backpage.com, LLC ("Backpage") after reviewing the documents. Please note that in its production, Backpage may redact where appropriate the personally identifying information of users.

Due to security concerns, the Senate Sergeant at Arms requires special treatment for materials delivered to Senate offices. To avoid any unnecessary delays in connection with the production, therefore, we ask that you carefully review the attached *Procedures for Transmitting Documents to the Permanent Subcommittee on Investigations*. Please contact Mark Angehr (Senator Portman) or Brandon Reavis (Senator McCaskill) at 202.224.3721 if you have any questions about this matter. Thank you for your assistance with this matter.

Rob Portman  
Chairman  
Permanent Subcommittee on Investigations

Sincerely,

Claire McCaskill  
Ranking Member  
Permanent Subcommittee on Investigations

Attachments

cc: Steve Ross, Esq.  
Akin Gump Strauss Hauer & Feld LLP  
1333 New Hampshire Avenue, N.W.  
Washington, DC 20036  
sross@akingump.com

**UNITED STATES OF AMERICA**  
*Congress of the United States*

To Custodian of Records  
Backpage.com, LLC  
2501 Oak Lawn Ave.  
Dallas, TX 75219

*Greeting:*

*Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear before the SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS of the Senate of the United States, on August 7, 2015, at 10:00 o'clock a.m., in Russell Senate Office Building 199, then and there to testify what you may know relative to the subject matters under consideration by said Subcommittee, and produce all materials as set forth in Schedule A, attached hereto and made a part thereof.*

*Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.*

To \_\_\_\_\_

*to serve and return.*

Personal appearance in Washington, D.C., waived if subpoenaed materials are produced to the Subcommittee on or before the herein appointed date and time.

*Given under my hand, by authority vested in me by the Committee, on this 7<sup>th</sup> day of July, 2015.*



*Chairman, Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security & Governmental Affairs*

Custodian of Records  
Backpage.com, LLC  
2501 Oak Lawn Ave.  
Dallas, TX 75219

### SCHEDULE A

Please provide the following documents by August 7, 2015:

1. All documents relating to reviewing, filtering, blocking, deleting, rejecting, or removing advertisements in Adult Sections (defined below), including but not limited to policies, criteria, manuals, training manuals, procedures, memoranda, instructions, guidance, guidelines, and communications. This request includes but is not limited to documents relating to:
  - a. Training or evaluating moderators engaged in reviewing advertisements;
  - b. Prohibited or banned terms, symbols, letters, or numbers, or combinations thereof (“Banned Terms List”);
  - c. Sources used in the creation, maintenance, updating, or editing of the Banned Terms List;
  - d. “Grey Words,” or words that trigger further review;
  - e. The “Violations Queue”;
  - f. Automated review (automatic filtering based on the Banned Terms List), Tier I review (pre-publication manual review), and Tier II review (post-publication manual review); and
  - g. Number of advertisements in Adult Sections deleted or blocked by automated review, Tier I review, and Tier II review. In lieu of producing documents, state the number of advertisements in Adult Sections deleted by each such process by year for the last five years.
2. All documents relating to editing, changing, modifying, or manipulating advertisements in Adult Sections, either by moderators or by automated software processes, including but not limited to removing pictures or text, or adding pictures or text.
3. All documents relating to reviewing or verifying user account information, including but not limited to the verification of name, age, phone number, payment information, email address, photo, or IP address. This request includes any documents related to products, services, or software programs used or considered for use in connection with verification processes.
4. All documents relating to blocking, deleting, terminating, disabling, or flagging accounts or users posting advertisements in Adult Sections, for reasons including but not limited to:
  - a. Use of prohibited or banned words, “Grey Words,” or combinations thereof, as described in ¶ 1, *supra*;
  - b. Violation or suspected violation of Terms of Use, Privacy Policy, Posting Rules, or Disclaimer;
  - c. Violation or suspected violation of local, state, or federal law;
  - d. Connection to advertisements referred to law enforcement agencies; and
  - e. Connection to advertisements referred to the National Center for Missing and Exploited Children’s CyberTipline (“CyberTipline”).

5. All documents relating to data retention and archiving of posted advertisements, including but not limited to changes in data retention and archiving policies. This request includes but is not limited to documents relating to:
  - a. Retention or removal of metadata of images users have uploaded or have attempted to upload into advertisements in Adult Sections;
  - b. Capturing and retaining IP addresses, or deleting stored IP addresses, of users posting advertisements in Adult Sections; and
  - c. Number of attempts to post per each advertisement in Adult Sections (*i.e.*, number of times a user attempts to post an advertisement in Adult Sections but is rejected by the automated filter).
  
6. All documents relating to hashing of images in Adult Sections, including but not limited to the comparison of images from previously blocked or deleted advertisements to images in existing or live advertisements in Adult Sections.
  
7. All documents relating to:
  - a. Total number of advertisements posted in Adult Sections. In lieu of producing documents, state the number by month for the past five years;
  - b. Number of advertisements posted in Adult Sections for each geographic subsection of Backpage. In lieu of producing documents, state the number by month for the past five years;
  - c. Total number of advertisements in all other sections, not including Adult Sections. In lieu of producing documents, state the number by month for the past five years; and
  - d. Number of advertisements posted in all other sections, not including Adult Sections, for each geographic subsection of Backpage. In lieu of producing documents, state the number by month for the past five years.
  
8. All documents relating to the reporting of advertisements, pre- or post-publication, to local, state or federal law enforcement agencies, or to the CyberTipline. Documents in this request include but are not limited to documents relating to:
  - a. Total number of advertisements directly reported by Backpage to local, state, or federal law enforcement agencies by month for the past five years. In lieu of producing documents, state the number by month for the past five years;
  - b. Number of advertisements directly reported by Backpage to local, state, or federal law enforcement agencies, for each geographic subsection of Backpage, by month for the past five years. In lieu of producing documents, state the number by month for the past five years;
  - c. Total number of advertisements reported to the National Center for Missing and Exploited Children's CyberTipline by month for the past five years. In lieu of producing documents, state the number by month for the past five years; and
  - d. Number of advertisements reported to the National Center for Missing and Exploited Children's CyberTipline, for each geographic subsection of Backpage, by month for the past five years. In lieu of producing documents, state the number by month for the past five years.



Documents in this request do not include the content of individual CyberTipline reports or reports to law enforcement, or the content of individual advertisements.

9. All documents relating to “Report Ad” user reports in Adult Sections, including but not limited to:
  - a. Number of advertisements posted in Adult Sections that received “Report Ad” user reports. In lieu of producing documents, state the number by year for the past five years;
  - b. Number of advertisements posted in all other sections, not including Adult Sections, that received “Report Ad” user reports. In lieu of producing documents, state the number by year for the past five years;
  - c. Number of advertisements in Adult Sections removed in response to “Report Ad” user reports. In lieu of producing documents, state the number by year for the past five years;
  - d. Number of advertisements in all other sections, not including Adult Sections, removed in response to “Report Ad” user reports. In lieu of producing documents, state the number by year for the past five years;
  - e. Number of advertisements posted in Adult Sections that received “Report Ad” user reports and were not subjected to further review. In lieu of producing documents, state the number by year for the past five years; and
  - f. Number of advertisements that Backpage has reported to the CyberTipline that had received “Report Ad” user reports. In lieu of producing documents, state the number by year for the past five years.
  
10. All documents relating to policies and procedures regarding “abuse@backpage.com,” including but not limited to:
  - a. Number of emails received by “abuse@backpage.com.” In lieu of producing documents, state the number of emails received by year for the past five years;
  - b. Number of advertisements in Adult Sections removed in response to or as a result of emails received by “abuse@backpage.com.” In lieu of producing documents, state the number by year for the past five years;
  - c. Number of advertisements in all other sections, not including Adult Sections, removed in response to “Report Ad” user reports. In lieu of producing documents, state the number by year for the past five years;
  - d. Number of advertisements posted in Adult Sections that were identified in emails received by “abuse@backpage.com” and were not subjected to further review. In lieu of producing documents, state the number by year for the past five years; and
  - e. Number of advertisements that Backpage has reported to the CyberTipline that were identified in emails received by “abuse@backpage.com.” In lieu of producing documents, state the number by year for the past five years;
  - f. Number of advertisements that Backpage has reported directly to law enforcement that were identified in emails received by “abuse@backpage.com.” In lieu of producing documents, state the number by year for the past five years;
  
11. All documents relating to current or former versions of the Terms of Use, Privacy Policy, Posting Rules, or Disclaimer.

12. With respect to advertisements in Adult Sections, all documents relating to what constitutes a violation of current or former versions of the Terms of Use, Privacy Policy, Posting Rules, or Disclaimer.
13. All documents relating to current or former versions of a webpage labeled “Stop Trafficking,” which lists contact information for various organizations and can be accessed as of the date of this subpoena via a hyperlink on the “Disclaimer” webpage referred to in ¶¶ 11 and 12, *supra*.
14. All documents relating to compliance with or violation of local, state, or federal laws regarding human trafficking, sex trafficking, human smuggling, prostitution, or the facilitation thereof.
15. All documents relating to policies and procedures regarding law enforcement’s actual or suspected posting of advertisements in Adult Sections.
16. All documents related to meetings, telephone calls, or partnerships concerning human trafficking, sex trafficking, human smuggling, or prostitution with law enforcement agencies, non-profit organizations, advocacy organizations, or subject matter experts. This request includes but is not limited to documents relating to:
  - a. Names of agencies, organizations, or experts;
  - b. Documents given to Backpage by those agencies, organizations, or experts; and
  - c. Notes taken before, at, or after such meetings, telephone calls, or partnerships.

This request does not include documents relating to compliance with individual law enforcement subpoenas or court-ordered warrants requiring the production of information related to specific advertisements in Adult Sections or users posting advertisements therein.

17. All documents relating to law enforcement trainings and presentations, including but not limited to training materials, PowerPoint presentations, promotional materials, prepared remarks, notes, and handouts.
18. All documents relating to compliance with law enforcement subpoenas, court-ordered search warrants, and other law enforcement requests for information, including but not limited to standards, guidelines, or policies relating to whether, when, and how to respond such requests.

This document request includes any documents relating to how Backpage standards, guidelines, or policies have changed over time. This document request does not include actual law enforcement subpoenas or court-ordered search warrants received by Backpage, nor does it include Backpage’s subpoena or search warrant returns.

19. All documents relating to internal studies, surveys, or analyses conducted or commissioned by Backpage regarding the number, proportion, or prevalence of advertisements in Adult Sections that feature minors or promote human trafficking.
20. All documents relating to agreements or contracts between Backpage and Internet Service Providers, including but not limited to registrars, domain registration sites, and web-hosting

entities. This request includes the corporate name, corporate location, and location of operations of all such providers.

21. All documents relating to the use of a Tor browser, or any other anonymizing Internet browser on the Onion Network, to post advertisements on Backpage.
22. All documents relating to agreements or contracts for the development, operation, and maintenance of Backpage, including but not limited to agreements or contracts with DesertNet.
23. All documents relating to or posted on “blog.backpage.com.”
24. All documents relating to Backpage’s entity name, entity number, formation, registration or conversion date, status, jurisdiction, entity address, bylaws, operating agreements, standing, and name and address of agent for service of process.
25. All documents relating to websites under the control of Backpage. In lieu of producing documents, produce a list of all such websites including the exact Uniform Resource Locator (“URL”).
26. For all subsidiaries, holding companies, or associated entities, all documents relating to entity name, entity number, formation, registration or conversion date, status, jurisdiction, entity address, URL, and name and address of agent for service of process.
27. A list of all current and former corporate officers, directors, and managers, including name, job titles, and years employed.
28. All documents relating to each meeting of Backpage’s Board of Directors or any of its committees, including minutes of each such meeting, notes taken in connection with each meeting, written presentations prepared for or made at each such meeting, and resolutions passed.
29. All documents relating to marketing activities, including but not limited to communications, advertisements, and outreach activities.
30. All documents relating to Backpage’s sale, transfer, assignment, corporate restructuring, or formation of a holding company abroad (the “Overseas Sale”), including but not limited to:
  - a. Entity name, entity number, formation, registration or conversion date, status, jurisdiction, entity address, bylaws, operating agreements, standing, and name and address of agent for service of process;
  - b. All filings made to any foreign governmental agency or public or private regulator;
  - c. Documents presented to owners, stockholders, or Board of Directors of Backpage or foreign owners or entities, including but not limited to agreements, contracts, due diligence reports, analyses, or policies; and
  - d. Documents relating to the valuation of Backpage.



31. All documents relating to Classified Solutions Ltd., The East Stable Thrales End Farm, Harpenden, United Kingdom, AL5 3NS and Payment Solutions BV, Zuidplein 116 - 1077XV, Amsterdam, Netherlands. Documents in this request include but are not limited to:
  - a. Entity name, entity number, formation, registration or conversion date, status, jurisdiction, entity address, bylaws, operating agreements, standing, and name and address of agent for service of process;
  - b. All filings made to any foreign governmental agency or public or private regulator; and
  - c. Documents presented to owners, stockholders, or Board of Directors of Backpage or foreign owners or entities, including but not limited to agreements, contracts, due diligence reports, analyses, or policies.
  
32. All documents relating to Backpage's employee headcount, including but not limited to:
  - a. Number of U.S.-based employees. In lieu of producing documents, state the total number by year for the past five years;
  - b. Number of foreign-based employees, including position and location. In lieu of producing documents, state the total number and location by year for the past five years;
  - c. Number of U.S.-based employees whose primary duties include review of advertisements. In lieu of producing documents, state the total number by year for the past five years;
  - d. Number of foreign-based employees, including position and location, whose primary duties include review of advertisements. In lieu of producing documents, state the total number and location by year for the past five years; and
  - e. Agreements, contracts, training materials, or scope of work orders for any foreign contractors, businesses, vendors, or service providers engaged in reviewing advertisements.
  
33. All documents related to:
  - a. Annual revenue;
  - b. Annual revenue derived from Backpage's U.S.-based websites;
  - c. Annual revenue derived from Backpage's foreign websites;
  - d. Annual revenue derived from Backpage's Affiliate Program;
  - e. For Backpage's U.S.-based websites:
    - i. Annual revenue derived from Adult Sections; and
    - ii. Annual revenue derived from all other sections, not including Adult Sections.
  
34. All documents related to:
  - a. Annual profits;
  - b. Annual profits derived from Backpage's U.S.-based websites;
  - c. Annual profits derived from Backpage's foreign websites;
  - d. Annual profits derived from Backpage's Affiliate Program;
  - e. For Backpage's U.S.-based websites:
    - i. Annual profits derived from Adult Sections; and
    - ii. Annual profits derived from all other sections, not including Adult Sections.
  
35. All documents related to Backpage's "Affiliate Program," including but not limited to annual commissions paid under Backpage's "Affiliate Program" with respect to each of following:

- a. Traffic directed to or from Adult Sections of Backpage's U.S.-based websites; and
  - b. Traffic directed to or from all other sections, not including Adult Sections, for Backpage's U.S.-based websites.
36. All documents relating to arrangements or contracts with other websites for the purpose of offering advertising discounts or promotions, including but not limited to arrangements or contracts with websites such as CityVibe.com and TheEroticReview.com.
37. All documents relating to processing of payment and fees associated with posting advertisements, including but not limited to names and addresses of all companies and entities performing such services.
38. All documents relating to the use of prepaid credit cards or gift cards to pay for advertisements in Adult Sections, including but not limited to:
- a. Documents showing the number and percentage of advertisements in Adult Sections purchased with prepaid credit cards or gift cards by year for the past five years. In lieu of producing documents, state the number and percentage of advertisements in Adult Sections purchased with prepaid credit cards or gift cards by year for the past five years;
  - b. Documents showing the number and percentage of advertisements in all other sections, not in Adult Sections, purchased with prepaid credit cards or gift cards by year for the past five years. In lieu of producing documents, state the number and percentage of advertisements posted in all other sections, not in Adult Sections, purchased with prepaid credit cards or gift cards by year for the past five years; and
  - c. Discounts, promotions, or other benefits relating to the use of prepaid credit cards or gift cards to pay for advertisements.
39. All documents relating to the termination or discontinuation of services provided by or undertaken with payment processors, payment networks, credit card companies, payment technology firms, merchant service providers, acquiring banks, or issuing banks. This document request includes but is not limited to documents related to MasterCard Inc., Visa Inc., and American Express Co. terminating their business relationship with Backpage and refusing to permit credit cards from being used to buy advertisements or other services on Backpage.
40. All documents relating to the use or intended use of Bitcoin or other digital currencies to pay for advertisements, promotions, or upgrades, including but not limited to:
- a. Documents showing the number and percentage of advertisements purchased in Adult Sections with Bitcoin or other digital currencies by year for the past five years. In lieu of producing documents, state the number and percentage of advertisements in Adult Sections purchased with Bitcoin or other digital currencies by year for the past five years;
  - b. Documents showing the number and percentage of advertisements purchased in all other sections, not including Adult Sections, with Bitcoin or other digital currencies by year for the past five years. In lieu of producing documents, state the number and percentage of advertisements in all other sections, not in Adult Sections, purchased with Bitcoin or other digital currencies by year for the past five years; and

- c. Discounts, promotions, or other benefits for the use of Bitcoin, or other digital currencies, to pay for advertisements, promotions, or upgrades.
41. All documents relating to the use or intended use of “Credits” to pay for advertisements, promotions, or upgrades, including but not limited to:
- a. Documents related to any “Buy Credits (new!)” link on Backpage;
  - b. Documents identifying accepted payment methods for the purchase of “Credits” on Backpage. In lieu of producing documents, list all payments methods that Backpage accepts for the purchase of “Credits”;
  - c. Documents relating to the exchange rate between US dollars and “Credits” on Backpage;
  - d. Documents related to the expiration period, if any, of “Credits” on Backpage;
  - e. Documents relating to any maximum amount of “Credits” that may be purchased by one user;
  - f. Documents relating to any maximum amount of “Credits” that may be purchased in one transaction;
  - g. Documents relating to any transaction fee associated with the purchase of “Credits” on Backpage;
  - h. Agreements with payment processors, payment networks, credit card companies, payment technology firms, merchant service providers, acquiring banks, or issuing banks for the sale of “Credits” on Backpage; and
  - i. Documents showing the number and percentage of advertisements purchased in Adult Sections with “Credits” since the acceptance of “Credits” for the purchase of ads on Backpage. In lieu of producing documents, state the number and percentage of advertisements in Adult Sections purchased with “Credits” since the acceptance of “Credits” for the purchase of ads on Backpage.

**For purposes of this subpoena:**

The time period covered by this subpoena is from January 1, 2010 to the present.

The documents subpoenaed include all those that are in the custody, control or possession, or within the right of custody, control, or possession, of Backpage, or its agents, employees, or representatives. The documents subpoenaed included work-related communications transmitted via non-work email addresses and non-work email systems.

Documents should be produced in their entirety, without abbreviation, modification, or redaction, including all attachments and materials affixed thereto. The only permissible redaction is of personally identifying information of users posting advertisements or accessing advertisements.

All documents should be produced in the same order as they are kept or maintained in the ordinary course, or the documents should be organized and labeled to correspond to the categories of the documents requested below. Parties subject to this subpoena are subject to a duty to supplement with respect to each request. Each category of documents subpoenaed shall be construed independently, and no category shall be viewed as limiting the scope of any other category.

If the subpoena cannot be complied with in full, it shall be complied with to the extent possible, with an explanation of why full compliance is not possible. Any document withheld on the basis of privilege shall be identified on a privilege log submitted with response to this subpoena. The log shall state the date of the document, its author, his or her occupation and employer, all recipients, the title and/or subject matter, the privilege claimed and a brief explanation of the basis of the claim of privilege. If any document responsive to this subpoena was, but no longer is, in your custody, control, or possession, identify the document and explain the circumstances by which it ceased to be in your custody, control, or possession.

Documents shall be delivered as delimited text with images and native files in accordance with the attached Data Delivery Standards.

Other than native files produced along with TIF images in accordance with the attached Data Delivery Standards, every page of material produced to the Subcommittee must contain a unique Bates number. All files produced shall be named according the Bates range that file contains (e.g. YourCo-00001-YourCo-00035).

Documents produced on paper (those from paper files that you choose to produce as such) shall not contain any permanent fasteners (i.e. staples), but shall be separated based on the divisions between documents as it is maintained in the custodian's files by non-permanent fasteners (e.g. paper clips, binder clips, rubber bands) or a non-white flip sheet.

**Definitions:**

For purposes of this subpoena:

1. “Backpage” includes, but is not limited to, Backpage.com LLC, Camarillo Holdings LLC, New Times Media LLC, or any other predecessors, successors, or other entity administering, owning, operating, or controlling the website or suite of websites comprising Backpage.com and its affiliated websites from January 1, 2010 to the present day.
2. “Adult Sections” includes, but is not limited to all subsections in the “adult” section of Backpage (“escorts,” “body rubs,” “strippers and strip clubs,” “dom & fetish,” “ts,” “male escorts,” “phone & websites,” and “adult jobs”) and the subsection “massages” in the “services” section of Backpage.
3. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in meeting, by telephone, mail telex, facsimile, computer, discussions, releases, delivery, or otherwise. It includes work-related communications transmitted via non-work email address or non-work email system.
4. The term “document” includes any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: agreements; papers; memoranda; correspondence; reports; studies; reviews; analyses; graphs; marketing materials; brochures; diagrams; photographs; charts; tabulations; presentations; working papers; records; records of interviews; desk files; notes; letters; notices; confirmations; telegrams; faxes; telexes, receipts; appraisals; interoffice and intra office communications; electronic mail (e-mail); contracts; cables; recordings; notations or logs of any type of conversation, telephone call, meeting or other communication; bulletins; printed matter; computer printouts; teletype; invoices; transcripts; audio or video recordings; statistical or informational accumulations; data processing cards or worksheets; computer stored and generated documents; computer databases; computer disks and formats; machine readable electronic files or records maintained on a computer; diaries; questionnaires and responses; data sheets; summaries; minutes; bills; accounts; estimates; projections; comparisons; messages; correspondence; electronically stored information and similar or related materials. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
5. The term “concerning” means relating to, referring to, describing, evidencing, or constituting.



6. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information that might otherwise be construed to be outside its scope. The term “any” means both any and all. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders. The use of a verb in any tense, mood, or voice shall be construed as the use of the verb in all other tenses, moods, or voices, as necessary to bring within the scope of this subpoena any information that might otherwise be construed to be outside its scope.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

# Exhibit B

# Akin Gump

STRAUSS HAUER & FELD LLP

STEVEN R. ROSS  
202.887.4343/fax: 202.887.4288  
sross@akingump.com

August 6, 2015

## VIA HAND DELIVERY

The Honorable Rob Portman, Chairman  
The Honorable Claire McCaskill, Ranking Member  
Permanent Subcommittee on Investigations  
Committee on Homeland Security & Governmental Affairs  
United States Senate  
Russell Senate Office Building, SR-199  
Washington, DC 20510

*Re: July 7, 2015 Subpoena Issued to Backpage.com*

Dear Chairman Portman and Ranking Member McCaskill:

On behalf of Backpage.com, LLC (“Backpage.com”), we write regarding the subpoena issued by the Permanent Subcommittee on Investigations (the “Subcommittee”) on July 7, 2015 (the “Subpoena”).

As the Subcommittee is aware, Backpage.com operates the second-largest online classified advertising service, located at [www.backpage.com](http://www.backpage.com). The service began in 2004. Users of Backpage.com may post and review ads in a number of categories (e.g., local places, community, buy/sell/trade, automotive, musician, rentals, real estate, jobs, dating, adult and services) and subcategories. Users post over six million ads every month. Users provide all the content for ads they post on Backpage.com using an automated interface. Backpage.com does not dictate or require any content, although it does block and remove user-supplied content pursuant to its moderation standards and policies. Users may post individual ads for free in most categories, although until recently, Backpage.com charged for certain ads and services.<sup>1</sup>

---

<sup>1</sup> For example, Backpage.com charged \$5–\$17 for users to post in the adult category and \$1 for dating ads. These charges discouraged abusive posting and provided data to help track users engaged in illegal activities. Indeed, law enforcement officials have urged that classified ad websites such as Backpage.com should require payment by credit cards because of the user information this provides.



August 6, 2015  
Page 2

Backpage.com prohibits illegal content and activity on its website and takes extensive steps to prevent such misuse, especially to guard against any form of human trafficking or child exploitation. For example, Backpage.com's Terms of Use prohibit any ads for illegal services or posting "any material ... that exploits minors in any way." <http://www.backpage.com/classifieds/TermsOfUse>. Before users can post or view ads in the adult category, they must affirm they are at least eighteen years old and accept the site's Posting Rules, which mirror the prohibitions of the Terms of Use and also state that any suspected child exploitation will be reported for law enforcement investigation. In addition, every ad on the website contains a link for users to report if they believe the ad may be improper, emphasizing that concerns about any possible threat to a child should also be reported to [abuse@backpage.com](mailto:abuse@backpage.com). Links are also provided at many places on the site to the CyberTipline of the National Center for Missing and Exploited Children ("NCMEC") and a User Safety page addressing the issue of human trafficking. In addition, Backpage.com prominently features an ad from a national support and rescue organization, Children of the Night ("Want Out? National Free Help 24/7: 1-800-551-1300. Tired of Turning Tricks? Pimps Don't Care. We Do!").

Backpage.com also developed and had implemented extensive measures to police user posts. The multi-tiered system created by Backpage.com includes automated filtering and two levels of manual review by over 100 personnel. The filter scans for more than 100,000 terms, phrases, URLs, and email and IP addresses. The system also includes two levels of manual review. Prior to the recent actions by Cook County Sheriff Thomas J. Dart, discussed below, the first manual review assessed ads in the adult and dating categories before they were allowed to appear on the site, and the second level examined nearly every such ad after posting, as a double-check for potentially improper content.<sup>2</sup> Through its review processes, Backpage.com blocks or removes over a million ads per month and immediately reports any ad that may concern child exploitation to NCMEC (approximately 300 to 400 per month). Backpage.com regularly works with local, state and federal law enforcement officials in connection with investigations and prosecutions, including responding to subpoenas and other information requests (most within 24 hours), providing training to law enforcement officials, and removing and blocking posts at their request. In some instances, Backpage.com personnel conduct additional Internet research to provide law enforcement further information to assist in rescuing victims and arresting and prosecuting criminals. Law enforcement officials often commend Backpage.com for its support and cooperation.

---

<sup>2</sup> Based upon the major credit card companies' response to Sherriff Dart's demands to stop processing payments to Backpage.com, Backpage.com has needed to impose some limitations on certain moderation measures.

August 6, 2015  
Page 3

In recent years, under the guise of fighting human trafficking and/or child exploitation, various government actors have attempted to silence the user-provided information posted on Backpage.com. Indeed, legislatures in three states—Washington, Tennessee, and New Jersey—passed criminal laws targeting Backpage. In each instance, federal courts enjoined the laws, finding them unconstitutional under the First Amendment—which affords rights equally applicable in the context of congressional and other federal oversight—and preempted by Section 230 of the Communications Decency Act (“CDA”). *See Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 (D.N.J. Aug. 23, 2013). Noting that escort ads have long been permitted (and escort services are licensed and regulated in many states), these cases held that the states’ efforts to regulate or effectively block such ads “would likely chill protected speech.” *McKenna*, 881 F. Supp. 2d at 1282. The courts rejected arguments that the laws only prohibited advertisements for illegal transactions and instead found that they were overbroad and could not survive strict scrutiny. *See Hoffman*, 2013 WL 1249063, at \*8. Further, the laws violated CDA Section 230 because they sought to impose liability on websites for publishing third-party content, they “would encourage websites either to restrict speech or to relax their current self-policing,” and Section 230 preempts all state civil and criminal laws. *McKenna*, 881 F. Supp. 2d at 1273–75; *Cooper*, 939 F. Supp. 2d at 825. As the Tennessee court summarized:

Child sexual exploitation is an evil that states have an undisputed interest in dispelling. However despicable this evil, though, the Constitution stands as a shield against broad assaults by states on the rights of their citizens. The Constitution tells us that—when freedom of speech hangs in the balance—the state may not use a butcher knife on a problem that requires a scalpel to fix.

*Cooper*, 939 F. Supp. 2d at 813. In all three cases, the courts ultimately entered permanent injunctions and awarded Backpage.com attorneys’ fees. *See, e.g., Backpage.com, LLC v. Cooper*, 2013 WL 1249063 (M.D. Tenn. Mar. 27, 2013).<sup>3</sup>

---

<sup>3</sup> Of course, significant First Amendment problems result not just from efforts to regulate content directly, as in the case of the three state laws just described, but also from governmental measures that place special burdens on Internet intermediaries like Backpage.com. Congress provided broad immunity for online intermediaries specifically to support First Amendment protection for Internet communication. 47 U.S.C. § 230(a)(4). This “Good Samaritan provision” furthers the goal of encouraging intermediaries to self-police their sites for objectionable material, as Backpage.com does, free from fear of legal repercussions. Congress enacted this measure to “encourage the unfettered and unregulated development of free speech on the Internet.” *Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003); *Zeran v. America Online, Inc.*, 129 F. 3d 327, 331 (4th Cir. 1997) (“Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive

August 6, 2015  
Page 4

The Supreme Court has long recognized that “[t]he Bill of Rights is applicable to investigations as to all forms of government action.” *Watkins v. United States*, 354 U.S. 178, 187 (1957). In this sense, it has found that burdensome demands for information can have a serious impact on First Amendment rights. *See id.* at 188. Accordingly, even where the general subject matter of an inquiry is uncontroversial, particular requests for information may be excessive where they threaten to impair the exercise of constitutional rights. *See, e.g., Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 549 (1963). Consequently, the Supreme Court has cautioned that “[i]t is particularly important that the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas.” *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (plurality op.).

In the face of these important principles, and despite clear rulings from a growing number of courts, governmental attacks on Backpage.com and its First Amendment rights continue. Indeed, just last month, Cook County Sheriff Thomas J. Dart mounted a campaign to pressure the major credit card companies—Visa and MasterCard—to cut off use of their cards for purchases on Backpage.com, with the aim of eliminating the website’s ability to do business altogether. Though the matter is in active litigation, another federal court issued a temporary restraining order against Sheriff Dart on July 24, 2015, halting his effort to use the power of his office to damage Backpage.com’s legal business.

Thus, it is in the context of these various attempts by the government—legislative and executive branch attacks at both the state and federal levels—to seemingly press every angle to shut the company down that Backpage.com received the Subcommittee’s Subpoena.

Your staff has indicated that the Subcommittee is conducting a far-ranging inquiry into issues relating to human trafficking. To be clear, Backpage.com respects these efforts, and it has been pleased to voluntarily assist the Subcommittee in this regard. For example, Backpage.com’s General Counsel spent nearly an entire day with Subcommittee staff, and in doing so described Backpage.com’s many processes and mechanisms by which it seeks to

---

effect.”). The interest of free expression would likewise be undermined if Internet intermediaries were saddled with special, or particularly burdensome, investigative demands because they serve as the platforms for millions of messages posted by others.

August 6, 2015  
Page 5

prevent and report any advertisements that may involve instances of human trafficking or child exploitation. During that briefing, Backpage.com's General Counsel also outlined how Backpage.com regularly works with various law enforcement agencies to combat human trafficking and child exploitation.

However, just as other recent governmental efforts to harass and damage Backpage.com went beyond the proper limits on the government's authority to restrict speech, the Subpoena reveals that the Subcommittee's interest in fact extends far beyond issues of human trafficking. Rather, the 41 enumerated requests (many of which contain multiple sub-requests) in Schedule A of the Subpoena show that the Subcommittee is seeking a stunning breadth of information about Backpage.com and its operations, much of which is wholly unrelated to issues of human trafficking and which questions the activities of Backpage.com itself, rather the conduct of individual users. Indeed, the Subpoena appears to call for each and every piece of paper within Backpage.com's possession for the past five years. It reads far more like an examination of and collateral attack on Backpage.com's business than it does an exploration of potential legislation related to human trafficking.

In this sense, we believe that the Subpoena is so expansive that it imposes an unreasonable burden on Backpage.com. Its expansive requests necessarily infringe the First Amendment rights of Backpage.com and its users to such an extent that even attempting to revise the subpoena in its current form would be a fruitless endeavor. Accordingly, we respectfully request that the Subcommittee withdraw the Subpoena in its entirety. While Congress possesses a great power of inquiry, that power is bounded by the Constitution's limits on the powers of the government. There is, perhaps, no area where caution in exercising that power is more essential than in those instances where a Committee or Subcommittee seeks to use the compulsory power of a subpoena to overcome a constitutionally-based claim. History has taught, and in particular the history of this Subcommittee has provided vivid evidence, that Congress should not relegate unto itself the clearly judicial function of determining the extent of the protections afforded to all Americans under the Bill of Rights.

Alternatively, we request that the Subcommittee defer the Subpoena to permit Backpage.com the opportunity to seek a modification of an existing judicial order that placed under seal a specific federal judicial opinion that provides an informed discussion of the First Amendment limitations on a similar attempt to subpoena comparable information from the company. We would propose to then submit to the Subcommittee for its consideration this recent federal opinion and a more fulsome discussion of the constitutional infirmities and concerns regarding the Subcommittee's Subpoena. Given the well-defined law that has been established by the judicial branch over the decades regarding the constitutional limits on governmental action, including investigatory activity, this is an area that calls for a cautious

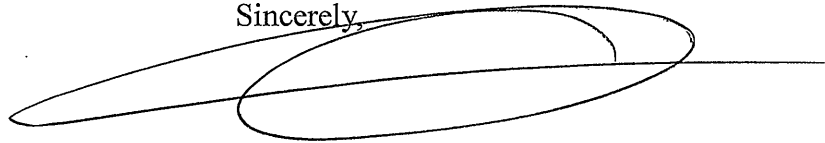
**Akin Gump**  
STRAUSS HAUER & FELD LLP

August 6, 2015  
Page 6

approach by the Subcommittee. Similarly, in the event that the Subcommittee would take steps to enforce a subpoena over constitutional objections, it should avail itself of the civil judicial review mechanism the Senate enacted into law.

In conclusion, various elements within the government have sought to use the full panoply of governmental authority to attack Backpage.com—elected officials have sought to legislate, investigate, and to indirectly interfere with the operation of a legal business by Backpage.com. In each and every instance, these efforts to attack and harass Backpage.com have been halted by various courts that, in measuring the government's actions against the Constitution's limits on the government, have found these efforts to violate the Constitution. With respect to the Subcommittee's inquiry, we look forward to discussing a way to proceed that ensures that the Subcommittee—like all other governmental entities that have sought to challenge Backpage.com's operations—not encroach on Backpage.com's well settled constitutional and statutory protections.

Sincerely,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Steven R. Ross  
Stanley M. Brand  
Akin Gump Strauss Hauer & Feld  
Counsel for Backpage.com, LLC

Robert Corn-Revere  
Davis Wright Tremaine, LLP  
Counsel for Backpage.com, LLC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

# Exhibit D



JOHN MCCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
KELLY AYOTTE, NEW HAMPSHIRE  
JONI ERNST, IOWA  
BEN SASSE, NEBRASKA

RON JOHNSON, WISCONSIN, CHAIRMAN  
THOMAS R. CARPER, DELAWARE  
CLAIRE McCASKILL, MISSOURI  
JON TESTER, MONTANA  
TAMMY BALDWIN, WISCONSIN  
HEIDI HEITKAMP, NORTH DAKOTA  
CORY A. BOOKER, NEW JERSEY  
GARY C. PETERS, MICHIGAN

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR  
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

August 26, 2015

## VIA ELECTRONIC MAIL

Mr. Steven R. Ross  
Akin, Gump, Strauss, Hauer & Feld LLP  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036

Dear Mr. Ross:

We write in response to Backpage.com’s failure to comply with the subpoena issued by the Permanent Subcommittee on Investigations on July 7, 2015.

In a letter dated August 6, 2015, the day before the subpoena’s return date, Backpage claims that the subpoena “imposes an unreasonable burden” on Backpage and “necessarily infringes the First Amendment rights” of Backpage and its users. The letter does not, however, point to any particular document request in the subpoena. Instead, Backpage asserts a blanket First Amendment privilege over all of its records and refuses to provide a single page of responsive material. Backpage also contends that the subpoena “reveals that the Subcommittee’s interest in fact extends far beyond issues of human trafficking” and potential legislation related to trafficking — an apparent challenge to the Subcommittee’s authority. On these grounds, Backpage requests that the Subcommittee “withdraw the Subpoena in its entirety” or, in the alternative, “defer” the subpoena. After due consideration, the Subcommittee declines at this time to withdraw or defer the subpoena and directs Backpage to submit an appropriate response.

The contention that the Subcommittee’s subpoena somehow exceeds its legitimate investigative authority is meritless. To the contrary, the Subcommittee is engaged in a carefully structured inquiry into a complex problem of significant legislative interest — the use of the Internet as a marketplace for interstate sex trafficking, including trafficking in children. The purpose of this long-term investigation is to produce a Subcommittee report addressing the problem and reform options that have received considerable legislative and scholarly attention. The Subcommittee’s fact-finding will inform the Senate regarding these issues and assist in its consideration of any potential legislation relating to, *inter alia*, interstate and international human trafficking and sex trafficking; interstate cyberstalking; federal law enforcement policies and resources to combat trafficking; the federal anti-money laundering regime as it concerns illegal trafficking proceeds; and federal telecommunications policy.

Nor is there any merit to your assertion that the Subcommittee's investigation is designed to "harass and damage" Backpage.<sup>1</sup> Our objective is to conduct responsible fact-finding in aid of Congress's legislative and oversight responsibilities, not to single out Backpage. As part of this investigation, the Subcommittee has met with dozens of stakeholders, including non-profit organizations, advocacy groups, federal law enforcement agencies and officials, federal regulatory authorities, social media and technology companies, and companies that operate websites advertising "adult" services. Of course, the business practices of Backpage are an area of significant interest, given the company's large reported market share and the widespread, credible reporting that many children have been advertised for sex services on your site in the United States.<sup>2</sup> Businesses similar to Backpage have voluntarily provided information and documents detailing corporate structure, finances, and policies and procedures for preventing trafficking of minors.

As part of its fact-finding endeavor, the Subcommittee issued a duly authorized subpoena to Backpage on July 7, 2015. The subpoena requires the production of documents related to seven specific topics: (1) review of adult advertisements for illegal activity; (2) interaction and compliance with law enforcement; (3) reporting of suspicious advertisements to the National Center for Missing and Exploited Children; (4) payment processing; (5) anti-trafficking policies and provisions; (6) data retention policies and website data; and (7) corporate information, including ownership, revenue, employee headcount, and other websites under Backpage's control. These categories of documents fall within the Subcommittee's broad fact-finding mandate to build a record for potential legislation. The requested documents will afford the Subcommittee a better understanding of the practices of a major business that disseminates and profits from advertisements for commercial sex work, the abuse of such businesses by individuals engaged in unlawful sex trafficking, and the efficacy of screening measures to prevent such abuses.

With regard to the scope of the subpoena, the corporate information that we seek is necessary to conduct an effective investigation. The information sought in the subpoena is necessary to evaluate, among other things, Backpage's claims about the effectiveness of its monitoring; the proportion of company resources devoted to combating sex trafficking; and the potential migration of online escort advertising to foreign countries outside the reach of U.S. law

---

<sup>1</sup> As evidence of alleged "governmental attacks" on its business, Backpage cites to ongoing litigation concerning public letters written by Cook County Sheriff Thomas J. Dart to three major credit card companies detailing the sheriff's experiences with Backpage. Backpage sued Sheriff Dart on the theory that his letters constituted an informal prior restraint in violation of the First Amendment. On August 21, 2015, a federal judge denied Backpage's motion for a preliminary injunction and allowed a previously-entered temporary restraining order to expire, finding that the sheriff's actions did not amount to informal or improper censorship. *See Backpage.com, LLC v. Dart*, No. 15-cv-06340, slip op. at 24 (N.D. Ill. Aug. 24, 2015).

<sup>2</sup> Indeed, at least two federal district courts have recognized this fact—in cases Backpage cited in its own letter to the Subcommittee. *See Dart*, No. 15-cv-06340, slip op. at 3 ("Backpage's adult services section overwhelmingly contains advertisements for prostitution, including the prostitution of minors."); *id.* ("Backpage.com's adult section is the leading forum for unlawful sexual commerce on the Internet and . . . the majority of the advertisements there are for sex."); *Backpage.com LLC v. McKenna*, 881 F.Supp.2d 1262, 1267 (W.D. Wash. 2012) ("Many child prostitutes are advertised through online escort advertisements displayed on Backpage.com and similar websites."); *see also* Nicholas Kristof, *Where Pimps Peddle Their Goods*, N.Y. TIMES, Mar. 17, 2012, available at <http://www.nytimes.com/2012/03/18/opinion/sunday/kristof-where-pimps-peddle-their-goods.html>.



enforcement.<sup>3</sup> In light of Backpage’s unwillingness to provide basic corporate information such as its ownership structure and the websites it controls, the Subcommittee had no choice but to resort to a subpoena.

Your August 6 letter contends that the subpoena “appears to call for each and every piece of paper within [its] possession.” That assertion is unhelpful hyperbole. Indeed, that suggestion is belied by your own August 6 letter, which describes Backpage as “the second-largest online classified advertising service,” where users “may post and review ads in a number of categories (e.g., local places, community, buy/sell/trade, automotive, musician, rentals, real estate, jobs, dating, adult and services) and subcategories.” The subpoena seeks targeted information concerning only one of those eleven categories. If Backpage has concerns regarding the burden of specific requests in the subpoena, the Subcommittee remains willing to discuss options for minimizing that burden (e.g., through selecting search terms and covered custodians).

\* \* \*

In the face of the Subcommittee’s targeted requests for information, Backpage also makes a blanket assertion of First Amendment privilege with respect to the entire subpoena. The rhetoric of the company’s August 6 letter does not, however, come close to supporting that novel and sweeping claim. Backpage begins by citing cases that stand for the uncontroversial proposition that the First Amendment applies in the context of congressional investigations. *See, e.g., Watkins v. United States*, 354 U.S. 178, 187 (1957). We heartily agree. That is why, from the outset, the Subcommittee has been scrupulously mindful of any potential First Amendment issues in this investigation and crafted its subpoena accordingly.

Backpage next relies on cases in which courts have enjoined certain state-law bans on the advertisement of minors for sex, on federal preemption and First Amendment grounds. *See, e.g., Backpage.com LLC v. McKenna*, 881 F. Supp. 2d 1262, 1267 (W.D. Wash. 2012) (enjoining Washington statute criminalizing advertisement of minors for commercial sexual abuse); *Backpage.com LLC v. Cooper, Jr.*, 939 F. Supp. 2d 805, 807 (M.D. Tenn. 2013) (enjoining Tennessee statute criminalizing the sale of advertisements for the purpose of engaging in a commercial sex act with a minor). The holding of these cases is unavailing here for an obvious reason: The Subcommittee merely *seeks information* regarding Backpage’s business practices. The subpoena does not regulate, much less criminalize, any speech. Indeed, to the extent these cases are relevant, they only underscore the need for *better-informed* legislation to avoid unconstitutionally overbroad or vague enactments in this area of acute public concern. *Cf. Cooper*, 939 F. Supp. 2d at 832-33 (holding that overly expansive definition of “commercial sex

---

<sup>3</sup> As Backpage is doubtless aware, media reports of the company’s sale to an undisclosed entity in the Netherlands have led to speculation about Backpage’s continued compliance with U.S. law enforcement. Korri Kezar, *Backpage.com Sold to Dutch Company for Undisclosed Amount*, DALLAS BUS. J. (Dec 30, 2014), available at <http://www.bizjournals.com/dallas/news/2014/12/30/backpage-com-sold-to-dutch-company-for-undisclosed.html>. In fact, Backpage has repeatedly stated that efforts to drive it and similar websites out of business would have the perverse effect of weakening anti-trafficking efforts by forcing websites overseas and outside the reach of U.S. law. Yet, in a Subcommittee staff interview on June 19, 2015, Backpage’s General Counsel was unable to answer basic questions about Backpage’s ownership and overseas restructuring.

act” rendered statute overbroad); *McKenna*, 881 F. Supp. 2d. at 1280 (recognizing that the challenged statute “might find itself on better constitutional footing if the statute included [more clear] definitions”). That is one of the principal reasons Congress engages in fact-finding of the kind the Subcommittee has undertaken — to enable it to write statutes that do *not* run afoul of the First Amendment.

Backpage also points to cases that bar investigative demands seeking information concerning participation in protected First Amendment activity, such as membership lists of political organizations. *See Watkins*, 354 U.S. at 214-16 (witness could not be compelled to disclose whether his associates were members of the Communist Party); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 554-58 (1963) (witness could not be compelled to produce membership list of NAACP for state legislative committee to determine whether those individuals were Communists); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 254 (1957) (college professor could not be compelled to reveal, among other things, opinions about Communism to state attorney general). But Backpage does not even attempt to argue that the subpoena seeks any information of that kind. Quite the contrary, the Subcommittee has on its own volition taken great care to avoid any plausible First Amendment concerns. For that reason, in an abundance of caution, the Subcommittee avoided seeking *any* documents that identify Backpage users. Indeed, the subpoena explicitly stated “Backpage may redact where appropriate the personally identifying information of users.”

In short, Backpage has not explained the legal rationale for its categorical assertion of privilege. To the extent Backpage wishes to assert privilege over particular documents or categories of documents, the Subcommittee will consider those objections in accordance with its procedure. As Subcommittee staff advised you, Backpage has failed to comply with the Subcommittee’s procedure for asserting privilege. With no lawful excuse, Backpage has rebuffed the Subcommittee’s repeated requests to produce a privilege log, as the subpoena instructions and longstanding Subcommittee custom require. A privilege log is necessary in order for the Subcommittee to evaluate the basis for withholding specific documents or categories of information. In addition, please provide a detailed update—including dates and specific actions taken—regarding any efforts to unseal the “recent federal opinion” described in your August 6 correspondence. Please note that Backpage is not relieved of any obligation to begin producing responsive documents for which it has no claim of privilege.

Thank you for your attention to this matter.

Sincerely,



Rob Portman  
Chairman  
Permanent Subcommittee on Investigations



Claire McCaskill  
Ranking Member  
Permanent Subcommittee on Investigations

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

# Exhibit F



JOHN MCCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
KELLY AYOTTE, NEW HAMPSHIRE  
JONI ERNST, IOWA  
BEN SASSE, NEBRASKA

THOMAS R. CARPER, DELAWARE  
CLAIRE McCASKILL, MISSOURI  
JON TESTER, MONTANA  
TAMMY BALDWIN, WISCONSIN  
HEIDI HEITKAMP, NORTH DAKOTA  
CORY A. BOOKER, NEW JERSEY  
GARY C. PETERS, MICHIGAN

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

October 1, 2015

KEITH B. ASHDOWN, STAFF DIRECTOR  
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

**VIA U.S. MAIL AND EMAIL (sross@akingump.com)**

Carl Ferrer, CEO  
Backpage.com, LLC  
2501 Oak Lawn Ave.  
Dallas, TX 75219

c/o Steve Ross, Esq.  
Akin Gump Strauss Hauer & Feld, LLC  
1333 New Hampshire Ave., NW  
Washington, DC 20036

Dear Mr. Ferrer:

Pursuant to its authority under Senate Resolution 73, Section 12(e), 114th Congress, the U.S. Senate Permanent Subcommittee on Investigations is currently investigating matters related to human trafficking. We write regarding the Subcommittee’s attempts to advance its legitimate legislative fact-finding on that issue by better understanding the business practices of Backpage.com, LLC.

As you know, on July 7, 2015, the Subcommittee issued a subpoena for documents to Backpage. In response, your company asserted a sweeping claim of First Amendment privilege and on that basis refused to produce any documents. The company declined, however, to identify any particular request for information in the subpoena that it considered constitutionally problematic. Indeed, Backpage conceded at a September 14 meeting with Subcommittee staff that the subpoena did not request any of the types of information that trigger scrutiny under well-established First Amendment doctrine concerning informational demands.<sup>1</sup> Instead, Backpage’s constitutional argument is that the subpoena is overly broad and allegedly reflects an attempt by the Subcommittee to “harass” and “damage” Backpage rather than conduct bona fide fact-finding.

To date, Backpage has provided neither factual support nor plausible legal authority for its novel claim of constitutional privilege. The company points chiefly to the “breadth” of the July 7 subpoena as its evidence of an alleged motive of harassment. We find that contention to be meritless. The Subcommittee has given Backpage a number of opportunities to engage in

<sup>1</sup> See generally *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963) (witness could not be compelled to produce membership list); *NAACP v. Alabama*, 357 U.S. 449 (1958) (same); *Watkins v. United States*, 354 U.S. 178 (1957) (witness could not be compelled to disclose whether his associates were members of the Communist Party).

discussions to narrow the subpoena, but the company has declined to negotiate.<sup>2</sup> Backpage has similarly rebuffed the Subcommittee's repeated invitation to negotiate appropriate search terms, custodians, and data sources to limit the request in a reasonable manner to mitigate any potential burden on Backpage.<sup>3</sup> Not only has the company failed to identify specific burdensome or problematic items, counsel for Backpage has also declined to tell the Subcommittee whether the company made *any* attempt to determine the extent of the burden it alleges by searching its files for responsive documents.<sup>4</sup> Finally, Backpage has suggested that the Subcommittee's investigation is part of a concerted effort, with other unrelated governmental actors, to engage in harassment.<sup>5</sup> That suggestion is false; our investigation is our own.

For these reasons and for those described in the Subcommittee's August 26, 2015, letter, we continue to see no legal merit in Backpage's explanation for its categorical refusal to comply with the Subcommittee's subpoena. Nevertheless, in the hope of overcoming the current impasse, we are withdrawing the Subcommittee's July 7 subpoena and issuing the attached subpoena seeking a narrower subset of documents. The withdrawal of the July 7 subpoena does not reflect, in any way, our agreement with the merits of Backpage's expansive claim of privilege; rather, it represents a good-faith effort to address Backpage's expressed concerns. As always, the Subcommittee remains willing to discuss data sources, custodians, and search terms to facilitate the production of documents in a timely and efficient manner. Please note, as previously stated, that in its production Backpage should redact any personally identifying information of users.

The attached subpoena contains requests for information that are at the core of the Subcommittee's investigation—namely, Backpage's business practices as the premier online purveyor of escort advertisements, which have been linked to sex trafficking.<sup>6</sup> We believe that gaining a complete understanding of Backpage's anti-trafficking measures, including its screening and verification procedures for advertisements posted in its "adult" section, will aid Congress as it considers additional legislation in this area. More specifically, robust fact-finding will potentially aid Congress in crafting legislation that combats human trafficking in a focused way while also respecting First Amendment rights.

Given the seriousness of Backpage's refusal to comply with the previous subpoena, we request that the company advise the Subcommittee, no later than October 13, 2015, if it intends

---

<sup>2</sup> See, e.g., Letter from Backpage to Permanent Subcommittee on Investigations (Aug. 6, 2015) ("even attempting to revise the subpoena in its current form would be a fruitless endeavor").

<sup>3</sup> See, e.g., Letter from Permanent Subcommittee on Investigations to Backpage (Aug. 26, 2015) ("the Subcommittee remains willing to discuss options for minimizing that burden (e.g., through selecting search terms and covered custodians)").

<sup>4</sup> Despite repeated requests, Backpage has also failed to provide a privilege log, as the subpoena instructions and longstanding Subcommittee custom require.

<sup>5</sup> Meeting between Steven Ross, Robert Corn-Revere, and Stanley Brand and Permanent Subcommittee on Investigations Staff (Sept. 14, 2015).

<sup>6</sup> See, e.g., *Backpage.com, LLC v. Dart*, No. 15-cv-06340, slip op. at 3 (N.D. Ill. Aug. 24, 2015) ("Backpage's adult services section overwhelmingly contains advertisements for prostitution, including the prostitution of minors."); *Backpage.com LLC v. McKenna*, 881 F.Supp.2d 1262, 1267 (W.D. Wash. 2012) ("Many child prostitutes are advertised through online escort advertisements displayed on Backpage.com and similar websites.").

not to produce any documents in response to the attached subpoena. In addition, Backpage must assert any claim of privilege or other right to withhold documents from the Subcommittee by October 23, 2015, the return date of the subpoena, along with a complete explanation of the basis of the privilege or other right to withhold documents—whether constitutional or otherwise, and whether general or specific to particular documents or types of documents. The Subcommittee will rule on any objections to the subpoena, including any claim of privilege, based on submissions in the record at that time. We caution you that failure to comply with the attached subpoena or raise a legitimate privilege for withholding documents may cause the Subcommittee to consider further enforcement actions, including civil enforcement and referral for criminal contempt.<sup>7</sup>

Due to security concerns, the Senate Sergeant at Arms requires special treatment for materials delivered to Senate offices. To avoid any unnecessary delays in connection with the production, therefore, we ask that you carefully review the attached *Procedures for Transmitting Documents to the Permanent Subcommittee on Investigations*. Please contact Mark Angehr (Senator Portman) or Brandon Reavis (Senator McCaskill) at 202.224.3721 if you have any questions about this matter. Thank you for your assistance.

Sincerely,



Rob Portman  
Chairman  
Permanent Subcommittee on Investigations



Claire McCaskill  
Ranking Member  
Permanent Subcommittee on Investigations

Attachments

---

<sup>7</sup> 2 U.S.C. § 192 (criminal refusal of witness to testify or produce papers); 2 U.S.C. §§ 288b, 288d (civil action to enforce subpoena).



UNITED STATES OF AMERICA

*Congress of the United States*

To Carl Ferrer, CEO  
Backpage.com, LLC  
2501 Oak Lawn Ave.  
Dallas, TX 75219

*Greeting:*

*Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear before the SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS of the Senate of the United States, on October 23, 2015, at 10:00 o'clock a.m., in Russell Senate Office Building 199, then and there to testify what you may know relative to the subject matters under consideration by said Subcommittee, and produce all materials as set forth in Schedule A, attached hereto and made a part thereof.*

*Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.*

To \_\_\_\_\_

*to serve and return.*

Personal appearance in Washington, D.C., waived if subpoenaed materials are produced to the Subcommittee on or before the herein appointed date and time.

*Given under my hand, by authority vested in me by the Committee, on this 1st day of October, 2015.*



*Chairman, Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security & Governmental Affairs*

Carl Ferrer, CEO  
Backpage.com, LLC  
2501 Oak Lawn Ave.  
Dallas, TX 75219

**SCHEDULE A**

Please provide the following documents by October 23, 2015:

1. Any documents concerning Backpage's reviewing, blocking, deleting, editing, or modifying advertisements in Adult Sections, either by Backpage personnel or by automated software processes, including but not limited to policies, manuals, memoranda, and guidelines.
2. Any documents concerning advertising posting limitations, including but not limited to the "Banned Terms List," the "Grey List," and error messages, prompts, or other messages conveyed to users during the advertisement drafting or creation process.
3. Any documents concerning reviewing, verifying, blocking, deleting, disabling, or flagging user accounts or user account information, including but not limited to the verification of name, age, phone number, payment information, email address, photo, and IP address. *This request does not include the personally identifying information of any Backpage user or account holder.*
4. Any documents concerning human trafficking, sex trafficking, human smuggling, prostitution, or the facilitation or investigation thereof, including but not limited to policies, manuals, memoranda, and guidelines.
5. Any documents concerning Backpage policies regarding the following: (a) data retention; (b) retention or removal of metadata of images; and (c) hashing of images in Adult Sections.
6. Documents sufficient to show, for each of the past three years, the number of advertisements: (a) posted in Adult Sections on a monthly and yearly basis; (b) posted in all other sections, not including Adult Sections, on a monthly and yearly basis; and (c) directly reported by Backpage to local, state, or federal law enforcement agencies. In lieu of producing documents, you may state the numbers for (a), (b), and (c) by month for each of the past three years.
7. Documents sufficient to show, for each of the past three years, the number of advertisements in Adult Sections deleted or blocked by: (a) automated review; (b) Tier I review; and (c) Tier II review. In lieu of producing documents, you may state the number of advertisements in Adult Sections deleted or blocked by each such process by year for each of the past three years.
8. Documents sufficient to show, for each of the past five years, Backpage's: (a) annual revenue and profit; (b) annual revenue and profit derived from Adult Sections; and (c) annual revenue and profit derived from all other sections, not including Adult Sections. In lieu of producing documents, you may provide the financial information described in (a), (b), and (c) for each of the past five years.



Except where indicated otherwise, the time period covered by this subpoena is from January 1, 2010 to the present.

The documents subpoenaed include all those that are in the custody, control or possession, or within the right of custody, control, or possession, of Backpage, or its agents, employees, or representatives. The documents subpoenaed included work-related communications transmitted via non-work email addresses and non-work email systems.

Documents should be produced in their entirety, without abbreviation, modification, or redaction, including all attachments and materials affixed thereto. The only permissible redaction is of personally identifying information of users posting advertisements or accessing advertisements.

All documents should be produced in the same order as they are kept or maintained in the ordinary course, or the documents should be organized and labeled to correspond to the categories of the documents requested below. Parties subject to this subpoena are subject to a duty to supplement with respect to each request. Each category of documents subpoenaed shall be construed independently, and no category shall be viewed as limiting the scope of any other category.

If the subpoena cannot be complied with in full, it shall be complied with to the extent possible, with an explanation of why full compliance is not possible. Any document withheld on the basis of privilege shall be identified on a privilege log submitted with response to this subpoena. The log shall state the date of the document, its author, his or her occupation and employer, all recipients, the title and/or subject matter, the privilege claimed and a brief explanation of the basis of the claim of privilege. If any document responsive to this subpoena was, but no longer is, in your custody, control, or possession, identify the document and explain the circumstances by which it ceased to be in your custody, control, or possession.

Documents shall be delivered as delimited text with images and native files in accordance with the attached Data Delivery Standards.

Other than native files produced along with TIF images in accordance with the attached Data Delivery Standards, every page of material produced to the Subcommittee must contain a unique Bates number. All files produced shall be named according the Bates range that file contains (e.g. YourCo-00001-YourCo-00035).

Documents produced on paper (those from paper files that you choose to produce as such) shall not contain any permanent fasteners (i.e. staples), but shall be separated based on the divisions between documents as it is maintained in the custodian's files by non-permanent fasteners (e.g. paper clips, binder clips, rubber bands) or a non-white flip sheet.

**Definitions:**

For purposes of this subpoena:

1. “Backpage” includes, but is not limited to, Backpage.com LLC, Camarillo Holdings LLC, New Times Media LLC, or any other predecessors, successors, or other entity administering, owning, operating, or controlling the website or suite of websites comprising Backpage.com and its affiliated websites from January 1, 2010 to the present day.
2. “Adult Sections” includes, but is not limited to all subsections in the “adult” section of Backpage (“escorts,” “body rubs,” “strippers and strip clubs,” “dom & fetish,” “ts,” “male escorts,” “phone & websites,” and “adult jobs”) and the subsection “massages” in the “services” section of Backpage.
3. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in meeting, by telephone, mail telex, facsimile, computer, discussions, releases, delivery, or otherwise. It includes work-related communications transmitted via non-work email address or non-work email system.
4. The term “document” includes any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: agreements; papers; memoranda; correspondence; reports; studies; reviews; analyses; graphs; marketing materials; brochures; diagrams; photographs; charts; tabulations; presentations; working papers; records; records of interviews; desk files; notes; letters; notices; confirmations; telegrams; faxes; telexes, receipts; appraisals; interoffice and intra office communications; electronic mail (e-mail); contracts; cables; recordings; notations or logs of any type of conversation, telephone call, meeting or other communication; bulletins; printed matter; computer printouts; teletype; invoices; transcripts; audio or video recordings; statistical or informational accumulations; data processing cards or worksheets; computer stored and generated documents; computer databases; computer disks and formats; machine readable electronic files or records maintained on a computer; diaries; questionnaires and responses; data sheets; summaries; minutes; bills; accounts; estimates; projections; comparisons; messages; correspondence; electronically stored information and similar or related materials. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
5. The term “concerning” means relating to, referring to, describing, evidencing, or constituting.
6. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information that might otherwise be construed to be outside its scope. The term “any” means both any and all. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders. The use of a verb in any tense, mood, or voice shall be construed as the use of the verb in all other tenses, moods, or voices, as necessary to

bring within the scope of this subpoena any information that might otherwise be construed to be outside its scope.

## PROCEDURES FOR TRANSMITTING DOCUMENTS TO THE U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

Due to security procedures at the U.S. Senate, the following are guidelines for transmitting documents to the Permanent Subcommittee on Investigations.

### **VIA U.S. MAIL, FEDERAL EXPRESS OR OTHER COMMERCIAL CARRIERS:**

Be advised that there is **NO OVERNIGHT MAIL DELIVERY** to the Senate complex.

1. **All packages and boxes should be addressed as follows:**

Permanent Subcommittee on Investigations  
199 Russell Senate Office Building  
1<sup>st</sup> & Constitution, N.E.  
Washington, DC 20510  
Telephone: 202/224-3721

**Please do NOT include the Senator's name on the mailing label** as that will divert the package to the Senator's personal office rather than the Subcommittee office. Any accompanying letters can be addressed to the Senator but we ask that you not include the Senator's name on the mailing label. If you want to include a name on the mailing label, please use the name of a Subcommittee staff member.

2. **Packages should be sent via Federal Express or other commercial carriers.** Unfortunately, packages sent via the U.S. Postal Service are irradiated. Irradiation causes disintegration of the documents being shipped, often rendering them unusable. (Discs have been known to arrive melted due to the irradiation process.) Documents sent via Federal Express or other commercial carriers do not undergo irradiation but undergo a testing process for harmful agents. All packages and boxes being sent via the Federal Express or other commercial carriers are tested and usually delivered to the Subcommittee office within 72 hours (3 days). Please keep this 72 hour testing period in mind when sending documents.
3. **If overnight delivery is imperative, please contact the Subcommittee.** Subcommittee staff may be able to provide an alternate address for overnight delivery.

### **VIA PERSONAL DELIVERY AND/OR COURIER SERVICE:**

Deliveries during normal business hours (9:00 am to 5:00 pm) should be brought in an unsealed envelope directly to Senate Russell Room 199 and dropped off with Chief Clerk Kelsey Stroud.

**Any questions regarding the transmittal of documents to the Subcommittee can be directed to Subcommittee Chief Clerk Kelsey Stroud at 202-224-9868 or [Kelsey\\_Stroud@hsgac.senate.gov](mailto:Kelsey_Stroud@hsgac.senate.gov).**

*Updated July 2015*

Permanent Subcommittee on Investigations  
United States Senate

The following document describes the technical requirements for electronic productions produced to the Senate Permanent Subcommittee on Investigations (“PSI”). **Any proposed formats other than what is listed below (including databases) should not be produced without prior discussion with PSI staff.** PSI uses Concordance 10 and Concordance Image 5.

**General Instructions:**

1. Provide a cover letter with each production which includes the Bates range and a general description of the documents. The cover letter should also summarize the number of records, images, emails and attachments in the production.
2. Produce documents in the same form that they were created or maintained. Documents created or stored electronically should not be produced in hard copy.
3. Deliver data on CD, DVD, or hard drive. Hard drives with external power supplies are preferred. The smallest number of media is requested.
4. Label all media submitted. Include on the label at least the following information: producing party, production date, Bates range, and disk number, if applicable.
5. Provide all passwords for documents, files, or compressed archives provided in the production.
6. To the extent practicable, de-duplication of email and native file productions is preferred.
7. Overview of preferred formats for production:
  - a. Paper Documents – Scanned paper converted/processed to TIFF files, Bates numbered, and includes OCR text.
  - b. Email Collections – Electronic mail converted/processed to TIFF files for the email and attachment(s), Bates numbered, includes a link to the email or native file, and includes full text.
  - c. Native Files – Electronic documents converted/processed to TIFF files, Bates numbered, includes a link to the native file, and includes full text.

**A. Paper Documents:**

- 1) **Image files.** Images must be Group IV TIFF files (single or multi-page files). All images should be Bates numbered. The number of files per folder should be limited to 1,000 files.
- 2) **Delimited Text file.** At a minimum, this file must contain an IMAGEID field (image key used to reference images in Concordance Image). The image key must be unique, fixed length, and CANNOT be the Bates number of the document. Bates numbers (endorsed on the documents and included in the delimited text file) MUST be delivered in a consistent manner for sorting purposes. For example, if the first production delivered is Bates stamped ABC-0000001-ABC-0005267, subsequent productions with the same prefix should have the same format (spaces, dashes, etc.) and the same number of digits, not ABC 0005268, ABC0005268 or ABC-00005268. The delimited text file must also include a header record. The delimiters for the file should be as follows:

Comma – ASCII character 20  
Quote – ASCII character 254  
Newline – ASCII character 174

- 3) **OCR Text.** The OCR text provided to the PSI can be delivered two ways. (1) The OCR text can be delivered as multi-page ASCII files. The name of the file must match the IMAGEID field. (2) The OCR text can be included in the Delimited Text file (OCRTEXT field). Option 1 is preferred.

If possible (regardless of delivery method), please place page markers at the beginning or end of each OCR text page as shown:

\*\*\* LA000001 \*\*\*

The data surrounded by \*\*\* is the Concordance Image ImageID.

- 4) **Concordance Image Cross-Reference file.** The Concordance Image cross-reference file is a comma delimited file consisting of six fields per line. There must be a line in the cross-reference file for every image in the database. The format for the file is as follows:

ImageID,VolumeLabel,ImageFilePath,DocumentBreak,FolderBreak,BoxBreak,PageCount

- *ImageID*: The unique designation that Concordance and Concordance Image use to identify an image.
- *VolumeLabel*: Optional.
- *ImageFilePath*: The full path to the image file.
- *DocumentBreak*: If this field contains the letter “Y,” then this is the first page of a document. If this field is blank, then this page is not the first page of a document.
- *FolderBreak*: Leave empty.
- *BoxBreak*: Leave empty.
- *PageCount*: Optional.

## B. Email Collections:

### Preferred Format: Delimited Text with Images and Native Attachments

- 1) **Image files.** The producing party will provide a TIFF image for each page of the email and attachment(s). Images must be Group IV TIFF files (single or multi-page files). All images should be Bates numbered. The number of TIFF files per folder should be limited to 1,000 files. Refer to the Paper Documents section for Bates and image key numbering rules.
- 2) **Native files.** The producing party will provide a copy of the email and native attachment files. The number of native files per folder should be limited to 1,000 files.
- 3) **Delimited Text file.** The text and metadata of the email and the attachment(s) is extracted and entered in the appropriate fields and provided as an ASCII delimited text file. The email will be the “parent” and the attachment(s) will be the “child.” An email may have more than one *child*. The *child* attachment’s Bates number will be listed in the *parent* email’s coded fields under *CHILD\_BATES*. If there is more than one attachment, list the first Bates number of each attachment and separate them by semi-colons (;). The *parent* email’s Bates number will be listed in the *child(s)* attachment(s) under *PARENT\_BATES*. The *child/children* will immediately follow the parent record. The following is a field definition table of the data requested.



**Field Definitions - Email**

| <b>Field</b>       | <b>Comment</b>  |
|--------------------|---|
| BEGBATES           | First Bates number of email   |
| ENDBATES           | Last Bates number of email  |
| BEGATTACH          | First Bates number of attachment range  |
| ENDATTACH          | Last Bates number of attachment range   |
| PARENT_BATES       | First Bates number of parent email  |
| CHILD_BATES        | First Bates number of “child” attachment(s); can be more than one Bates number listed; depends on number of attachments |
| CUSTODIAN          | Mailbox where the email resided   |
| FROM               | Sender  |
| TO                 | Recipient(s)  |
| CC                 | Carbon copy recipient(s)  |
| BCC                | Blind carbon copy recipient(s)  |
| SUBJECT            | Subject of the email  |
| DATE_SENT          | Date the email was sent   |
| TIME_SENT          | Time the email was sent; must be a separate field and cannot be combined with the DATE_SENT field                       |
| HYPERLINK          | Hyperlink to the email  |
| FILE_EXTEN         | The file extension of the email; will vary depending on the email format  |
| AUTHOR             | Empty for email   |
| DATE_CREATED       | Empty for email   |
| TIME_CREATED       | Empty for email   |
| DATE_MOD           | Empty for email   |
| TIME_MOD           | Empty for email   |
| DATE_ACCESSD       | Empty for email   |
| TIME_ACCESSD       | Empty for email   |
| PRINTED_DATE       | Empty for email   |
| FILE_SIZE          | Size of email in KB   |
| INTFILEPATH        | Location of email   |
| MESSAGE ID         | Unique Identifier from the email system used to deduplicate emails  |
| CONVERSION ID      | Identifier from the email system used to group and manage related emails  |
| CONVERSATION INDEX | Identifier from the email system used to group and manage related emails  |
| HASHVALUE          | Value generated for deduplication   |
| TEXT               | Text of the email   |

**Field Definitions - Attachment**

| <b>Field</b> | <b>Comment</b>  |
|--------------|---|
| BEGBATES     | First Bates number of attachment  |
| ENDBATES     | Last Bates number of attachment   |
| BEGATTACH    | First Bates number of the attachment range  |
| ENDATTACH    | Last Bates number of the attachment range   |
| PARENT_BATES | First Bates number of parent email  |
| CHILD_BATES  | First Bates number of “child” attachment(s); can be more than one Bates number listed; depends on number of attachments |
| CUSTODIAN    | Mailbox where the email resided   |

|              |   |
|--------------|---|
| FROM         | Empty for attachment  |
| TO           | Empty for attachment  |
| CC           | Empty for attachment  |
| BCC          | Empty for attachment  |
| SUBJECT      | Empty for attachment  |
| DATE_SENT    | Empty for attachment  |
| TIME_SENT    | Empty for attachment  |
| HYPERLINK    | Hyperlink to the native attachment  |
| FILE_EXTEN   | The file extension will vary depending on the document type   |
| AUTHOR       | Attachment/native file metadata   |
| DATE_CREATED | Attachment metadata   |
| TIME_CREATED | Time the attachment was created; must be a separate field and cannot be combined with the DATE_CREATED field  |
| DATE_MOD     | Attachment metadata   |
| TIME_MOD     | Time the attachment was modified; must be a separate field and cannot be combined with the DATE_MOD field     |
| DATE_ACCESSD | Attachment metadata   |
| TIME_ACCESSD | Time the attachment was accessed; must be a separate field and cannot be combined with the DATE_ACCESSD field |
| PRINTED_DATE | Attachment metadata   |
| FILE_SIZE    | Size of file in KB  |
| INTFILEPATH  | Path where attachment file was stored   |
| HASHVALUE    | Value generated for deduplication   |
| TEXT         | Text of the attachment  |

The delimited text file must include a header record. Please refer to the Paper Documents section for ASCII character assignments.

- 4) **Full Text.** When the full text is not provided in the ASCII delimited text file or if text exceeds 12MB in the TEXT field, the full text provided to the PSI can be delivered as multi-page ASCII files. The name of the file must match the image key field. Any document in which text cannot be extracted should be OCR'd, particularly in the case of PDFs without embedded text.
- 5) **Concordance Image Cross-Reference file.** The Concordance Image cross-reference file is a comma delimited file consisting of six fields per line. There must be a line in the cross-reference file for every image in the database. Refer to the Paper Documents section for file format.

**Optional Format:** We will also accept personal storage files native to Microsoft Outlook (PST). You must provide any necessary passwords or decryption.

**C. Native Files:**

**Preferred Format: Delimited Text with Images and Links to Native Files:**

1. **Image files.** The producing party will provide a TIFF image of the native files. Images must be Group IV TIFF files (single or multi-page files). All images should be Bates numbered. The number of TIFF files per folder should be limited to 1,000 files. Refer to the Paper Documents section for Bates and image key numbering rules.

2. **Native files.** The producing party will provide a copy of the native files. The number of native files per folder should be limited to 1,000 files.
  
3. **Delimited Text file.** An ASCII delimited file containing the metadata associated with the file, text extracted from the native file, and a directory path to the native file. The fields to be included in the production are as follows:

| FIELD        | COMMENT   |
|--------------|---|
| BEGBATES     | First Bates number of native file   |
| ENDBATES     | Last Bates number of native file  |
| CUSTODIAN    | Individual from whom the documents originated   |
| HYPERLINK    | Hyperlink to native file  |
| AUTHOR       |   |
| DATE_CREATED |   |
| TIME_CREATED | Time the document was created; must be a separate field and cannot be combined with the DATE_CREATED field    |
| DATE_MOD     |   |
| TIME_MOD     | Time the document was modified; must be a separate field and cannot be combined with the DATE_MOD field       |
| DATE_ACCESSD |   |
| TIME_ACCESSD | Time the attachment was accessed; must be a separate field and cannot be combined with the DATE_ACCESSD field |
| PRINTED_DATE |   |
| FILE_SIZE    | Size of file in KB  |
| PATH         | Path where native file was stored   |
| HASHVALUE    | Value generated for deduplication   |
| TEXT         | Text extracted from native file.  |

The delimited text file must include a header record. Please refer to the Paper Documents section for ASCII character assignments.

4. **Full Text.** When the full text is not provided in the ASCII delimited text file or if text exceeds 12MB in the TEXT field, the full text provided to the PSI can be delivered as multi-page ASCII files. The name of the file must match the image key field. Any document in which text cannot be extracted should be OCR'd, particularly in the case of PDFs without embedded text.
  
5. **Concordance Image Cross-Reference file.** The Concordance Image cross-reference file is a comma delimited file consisting of six fields per line. There must be a line in the cross-reference file for every image in the database. Refer to the Paper Documents section for file format.

**If Unable to Comply with Format Described Above:**

**Any proposed formats other than what is listed above should not be produced without prior discussion with PSI staff.**

All documents derived from word processing programs, email applications, instant message logs, spreadsheets, and wherever else practicable, may be produced in text searchable PDF format. Spreadsheets shall also be provided in their native form. Audio and video files shall be produced in their native format, although picture files associated with email or word processing programs shall be produced in PDF format along with the document it is contained in or to which it is attached.

Native files may be delivered in Custodian named folders.

If PDFs are delivered, all PDF files must meet the following requirements:

1. All PDFs must be unitized i.e. each PDF represents a discrete document; a single PDF cannot contain multiple documents
2. All PDFs must contain embedded text to include all discernable words within the document, not selected text.
3. The PDF file will be named as the Bates range, with all document text contained within.

###

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

# Exhibit G

JOHN McCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
KELLY AYOTTE, NEW HAMPSHIRE  
JONI ERNST, IOWA  
BEN SASSE, NEBRASKA

THOMAS R. CARPER, DELAWARE  
CLAIRE McCASKILL, MISSOURI  
JON TESTER, MONTANA  
TAMMY BALDWIN, WISCONSIN  
HEIDI HEITKAMP, NORTH DAKOTA  
CORY A. BOOKER, NEW JERSEY  
GARY C. PETERS, MICHIGAN

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR  
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

October 20, 2015

**VIA U.S. MAIL AND EMAIL (sross@akingump.com)**

Carl Ferrer, CEO  
Backpage.com, LLC  
2501 Oak Lawn Ave.  
Dallas, TX 75219

c/o Steve Ross, Esq.  
Akin Gump Strauss Hauer & Feld, LLC  
1333 New Hampshire Ave., NW  
Washington, DC 20036

Dear Mr. Ferrer:

As part of its investigation of matters related to human trafficking, the U.S. Senate Permanent Subcommittee on Investigations issued to you a subpoena on October 1, 2015, requiring the production of documents. As you know, the subpoena commands your personal appearance, which is waived if the documents named in the attached schedule are produced on or before the return date of October 23, 2015.

We understand from your attorneys that you will file and explain any objections to the documentary subpoena by the return date of October 23. Your personal appearance is therefore continued to a date to be determined later to permit the Subcommittee to consider any objection you wish to submit. The requested documents along with any objections remain due on the return date at 10:00AM.

Please contact Mark Angehr (Senator Portman) or Brandon Reavis (Senator McCaskill) at (202) 224-3721 if you have any questions about this matter. Thank you for your assistance.

Sincerely,

Rob Portman  
Chairman  
Permanent Subcommittee on Investigations

Claire McCaskill  
Ranking Member  
Permanent Subcommittee on Investigations



MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

# Exhibit H

# Akin Gump

STRAUSS HAUER & FELD LLP

STEVEN R. ROSS  
202.887.4343/fax: 202.887.4288  
sross@akingump.com

October 23, 2015

## VIA ELECTRONIC & HAND DELIVERY

The Honorable Rob Portman, Chairman  
The Honorable Claire McCaskill, Ranking Member  
Permanent Subcommittee on Investigations  
Committee on Homeland Security & Governmental Affairs  
United States Senate  
Russell Senate Office Building, SR-199  
Washington, DC 20510

*Re: October 1, 2015 Subpoena Issued to Backpage.com*

Dear Chairman Portman and Ranking Member McCaskill:

On behalf of Backpage.com, LLC (“Backpage.com”), we write in regard to the subpoena for documents issued by the Permanent Subcommittee on Investigations (the “Subcommittee”) on October 1, 2015 (the “Subpoena”).

As a preliminary matter, Backpage.com appreciates that the Subcommittee chose to withdraw its prior July 7, 2015 subpoena seeking 41 categories of documents and to issue instead the Subpoena on October 1, 2015 for what it describes as “a narrower subset of documents” comprised of eight categories. As we outlined in our August 6, 2015 and August 26, 2015 letters, we believe the Subcommittee’s investigation of Backpage.com raises fundamental and overarching constitutional concerns. Nonetheless, Backpage.com is endeavoring to provide documents sufficient to respond to most of these more targeted requests based on the understanding that “[w]hen First Amendment interests are at stake, the Government must use a scalpel, not an ax.” *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972). As described in more detail below, however, certain requests still raise First Amendment and other concerns, and are therefore objectionable.

Previous correspondence with the Subcommittee reflects a significant difference of opinion on how First Amendment considerations limit the extent to which the Subcommittee may compel information from Backpage.com regarding its internal operations and finances. The Subcommittee points to the various cases that have invalidated state-level prohibitions of certain online classified advertising practices and suggests that, contrary to a ban, “[t]he Subcommittee

October 23, 2015  
Page 2

merely *seeks information* regarding Backpage’s business practices.” Letter from Chairman Rob Portman to Steven R. Ross, Aug. 26, 2015, at 3 (“August 26 Letter”). And with respect to Supreme Court cases cited by Backpage.com illustrating First Amendment limits to congressional inquiries, the Subcommittee responded that its demands for documents do not pose a First Amendment problem because it is not seeking sensitive information such as membership lists of political organizations, and therefore “avoided seeking *any* documents that identify Backpage users.” *Id.* at 4.

In order to establish common ground for discussing First Amendment limits on the government’s ability to investigate members of the press, it is important to understand that seeking information can itself exceed the government’s constitutional authority, and this is not just limited to inquiries seeking disclosure of a publication’s readers or a website’s users. The Supreme Court made this clear in *United States v. Rumely*, 345 U.S. 41 (1953), when it held that the Committee for Constitutional Government could not be compelled by subpoena to produce information on the buyers of its books and financial records, including information on receipts from the sale of books, pamphlets, and other literature. It is basic law that investigations alone can violate the First Amendment where “no legal sanction is involved” and even though “Congress has imposed no tax, established no board of censors, instituted no licensing system.” *Id.* at 57 (Douglas, J., concurring). Merely “seek[ing] information” (as the Subcommittee puts it) can impose a restriction that is “equally severe” as direct legal sanctions. “Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press. Congress could not do this by law. The power of investigation is also limited.” *Id.* at 58. As the Court held in *Watkins v. United States*, 354 U.S. 178, 188 (1957), “[t]he Bill of Rights is applicable to investigations as to all forms of governmental action.” See also *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (“There is no doubt that legislative investigations, whether on a federal or state level, are capable of encroaching upon the constitutional liberties of individuals.”).

To understand the constitutional limits on a congressional investigation, it is first necessary to examine the scope of the committee’s authorization and then to analyze the nature of the information being sought. In this case, the cover letter for the October 1, 2015 subpoena explains that the Subcommittee is investigating matters “related to human trafficking” pursuant to Senate Resolution 73, Section 12(e), 114<sup>th</sup> Congress, and that the Subcommittee is seeking a “better understanding [of] the business practices of Backpage.com, LLC.” However, the broad, general terms of the authorizing resolution fail to provide the necessary authority where the specific subpoena demands threaten to encroach on constitutionally-protected activity.

Specifically, Section 12(e) authorizes the Subcommittee to study or investigate, in relevant part:



October 23, 2015  
Page 3

(C) organized criminal activity which may operate in or otherwise utilize the facilities of interstate or international commerce in furtherance of any transactions and the manner and extent to which, and the identity of the persons, firms, or corporations, or other entities by whom such utilization is being made, and further, to study and investigate the manner in which and the extent to which persons engaged in organized criminal activity have infiltrated lawful business enterprise, and to study the adequacy of Federal laws to prevent the operations of organized crime in interstate or international commerce, and to determine whether any changes are required in the laws of the United States in order to protect the public against such practices or activities.

(D) all other aspects of crime and lawlessness within the United States which have an impact upon or affect the national health, welfare, and safety, including investment fraud schemes, commodity and security fraud, computer fraud, and the use of offshore banking and corporate facilities to carry out criminal objectives.

S. Res. 73, Sec. 12(e), 114<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2015). While the committee's investigatory authority unquestionably is broad, that does not necessarily vest it with blanket authority to probe the details of a business that provides a platform for online speech.

Where such First Amendment activities are implicated, the Subcommittee's authority must be construed narrowly. *Sweezy*, 354 U.S. at 245 ("It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech and press, freedom of political association, and freedom of communication of ideas . . ."). Indeed, the broader and more general the authorizing resolution, the greater is the constitutional obligation to establish the pertinence and compelling need for the information being sought. This is because "the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights," and "when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter." *Watkins*, 354 U.S. at 198. See *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 545 (1963) ("The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information."). Where the delegation of authority is expansive, "[n]o one could reasonably deduce from the charter the kind of investigation that the Committee was directed to make." In these circumstances, reviewing courts will not defer to a committee's interpretation of its mandate because "such deference cannot yield to an unnecessary and unreasonable dissipation of constitutional freedoms." *Watkins*, 354 U.S. at 204.

October 23, 2015  
Page 4

Based on these principles, the courts have employed the doctrine of constitutional avoidance to limit the scope of congressional investigations. In *Rumely*, for example, the Supreme Court held that a congressional resolution authorizing the Select Committee on Lobbying Activities to study and investigate (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation did not empower it to “inquire into all efforts of private individuals to influence public opinion through books and periodicals.” *Rumely*, 345 U.S. at 45-46. The Court interpreted the mandate to investigate “lobbying activities” narrowly to include only “representations made directly to the Congress, its members, or its committees” in order to accommodate “contending principles – the one underlying the power of Congress to investigate, the other at the basis of the limitation imposed by the First Amendment.” *Id.* See also *Russell v. United States*, 369 U.S. 749, 758 (1962); *Deutch v. United States*, 367 U.S. 456, 471 (1961); *Shelton v. United States*, 327 F.2d 601, 605 (D.C. Cir. 1963) (using doctrine of constitutional avoidance to invalidate subpoena to NEW YORK TIMES copy editor).

These principles apply more broadly than just to subpoenas seeking disclosure of readers’ names or membership lists for political organizations. *E.g.*, *Gibson*, 372 U.S. at 550-551; *NAACP v. Alabama*, 357 U.S. 449 (1958). In *Rumely*, for example, the committee sought “pertinent financial records” to determine whether lobbying laws were being circumvented, but the Court held that the First Amendment did not permit the investigatory mandate to be read so expansively. *Rumely*, 345 U.S. at 47. When it comes to the press, any investigation seeking information of an organization’s internal operations inherently raises constitutional concerns. See, *e.g.*, *Bursey*, 466 F.2d at 1088 (“If Bursey and Presley can be required to disclose the identity of all persons who worked on the paper and the pamphlets, to describe each of their jobs, to give the details of financing the newspaper, any editor, reporter, typesetter, or cameraman could be compelled to reveal the same information about his paper or television station, if his paper or station carried the story. The First Amendment forbids that result.”).

The Subcommittee cannot legitimately expand its jurisdiction or avoid constitutional limits by framing its investigation a general inquiry into “the Internet as a marketplace for interstate sex trafficking, including trafficking in children.” August 26 Letter, at 1. Indeed, the fact that Backpage.com provides an online platform for communication does nothing to diminish the First Amendment tensions in this matter, and may well magnify them. The D.C. Circuit long ago anticipated such issues in *Rumely*, and found that the development of new technologies does nothing to diminish these time-tested constitutional principles:

The new features are new mechanics of communication and new mass interest in the minutiae of congressional activities. But speech and press by these new



October 23, 2015  
Page 5

means – on the radio, on television, and in the movies – are freedoms protected by the First Amendment. And the public policy which prohibits any current congressional membership from abridging the impact of public opinion upon the Congress is as sound today as it was when it was first formulated. . . . If we ever agree that modern mechanical devices and modern mass interest in public affairs have destroyed the validity of these principles, we will have lost parts of the foundation of the Constitution.

*Rumely v. United States*, 197 F.2d 166, 177 (D.C. Cir. 1952), *aff'd*, 345 U.S. 41 (1953). Notwithstanding the power of new communications technologies, the court held that the First Amendment was crucial to ensuring the congressional power to investigate stayed within its constitutional boundaries.

And so it is with the Internet. The Supreme Court recognized that the Internet constitutes a new, unprecedented global medium the content on which is “as diverse as human thought.” Accordingly, it held that “our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Backpage.com operates on this medium by providing a platform for third-party speech. Since 2004, it has operated an online classified advertising service where its users post ads in a number of categories (*e.g.*, local places, community, buy/sell/trade, automotive, musician, rentals, real estate, jobs, dating, adult and services) and subcategories. Backpage.com does not dictate any content, although it does screen, block and remove ads that may violate its terms of use to guard against any form of human trafficking or child exploitation and reports suspected user-submitted posts to authorities. This is the role Congress envisioned for online intermediaries when it adopted the Good Samaritan provisions of the Communications Decency Act. It sought to “encourage the unfettered and unregulated development of free speech on the Internet” and “to encourage interactive computer services . . . to self-police the Internet for obscenity and other offensive material.” *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003); *see* 47 U.S.C. §§ 230(a), 230(b).

Given these First Amendment considerations, the Subcommittee cannot legitimately expand its authority to investigate by inappropriately trying to conflate online advertising with illegal activity. Various state laws and other regulatory efforts predicated on this misconception have been invalidated as violating the First Amendment, Section 230, or both. *See, e.g., Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 968 (N.D. Ill. 2009) (“The phrase ‘adult,’ even in conjunction with ‘services,’ is not unlawful in itself nor does it necessarily call for unlawful content.”); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 830-32 (M.D. Tenn. 2013) (same); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1279 (W.D. Wash. 2012) (same); *Backpage.com, LLC v. Hoffman*, No. 13-CV-03952 DMC JAD, 2013 WL 4502097, at



October 23, 2015  
Page 6

\*8-10 (D.N.J. Aug. 20, 2013), (same). Just as the Select Committee on Lobbying Activities was not permitted to expand the scope of its investigation beyond First Amendment boundaries despite innovations in lobbying methods, *Rumely*, 345 U.S. at 45-46, this Subcommittee cannot demand information on all aspects of Backpage.com's business practices—despite constitutional limits—by claiming to be investigating an Internet problem.

In addition to the First Amendment issues outlined above, the Subcommittee's efforts to compel information from Backpage.com present significant concerns regarding the pertinence of this information to any valid inquiry. As this Subcommittee should be well aware, while the authority of the Congress to investigate is broad, it is not unbounded. The Senate's investigative power may only be invoked in aid of its legislative function, and it is inappropriate for it to be used to "expose for the sake of exposure." *See Watkins*, 354 U.S. at 200. This constitutional caution is particularly meaningful when the target of an investigation is a person engaged in a sphere of activities that are afforded specific constitutional protections and for which Congress's power to legislate is circumscribed.

In such circumstances the Subcommittee's authority must be clearly enunciated; a general reliance on the Senate's interest in potentially criminal activity is not sufficient. It is not the job of the Subcommittee to conduct law enforcement inquiries—that task is constitutionally the province of others in government. This Subcommittee should not, and indeed cannot, exercise the authority to compel information to either substitute for or to assist those engaged in that law enforcement function.

Accordingly, Backpage.com's responses and/or objections to the Subcommittee's eight requests are as follows:

In response to Subpoena Requests One through Three, Backpage.com submits the following documents: the Terms of Use by which Backpage.com's users are bound, which expressly prohibit the posting of any material "that in any way constitutes or assists in human trafficking," enclosed at BP-PSI-000001 to BP-PSI-000009; Backpage.com's Posting Rules for its "Adult" section, which also expressly prohibit the posting of any material "that in any way constitutes or assists in human trafficking," enclosed at BP-PSI-000010; and the agreement to report "suspected exploitation of minors and/or human trafficking" that a Backpage.com user must affirmatively accept before entering the "Adult" section of the website, enclosed at BP-PSI-000011.

Although Backpage.com does not maintain policies or procedures regarding its moderation process, this process was detailed for the Subcommittee in the briefing provided by

October 23, 2015  
Page 7

General Counsel Liz McDougall on June 19, 2015 and in prior sworn testimony (enclosed at BP-PSI-000012 to BP-PSI-000021).

It is important to note, however, the challenges that arose in July 2015 when Cook County Sheriff Thomas J. Dart pressured the major credit card companies to cut off use of their cards for purchases on Backpage.com, with the aim of eliminating the website's ability to do business altogether. First and foremost, the credit card information was a valuable tool to identify and verify the identity of Backpage.com users. In addition, without credit card charges and verification, the volume of ads posted on Backpage.com has increased and, by extension, Backpage.com's ability to moderate those ads has decreased. Backpage.com continues to assess this situation.

To the extent that the Subcommittee seeks further documents in this regard, Backpage.com objects to the request on the basis that it violates the First Amendment, is overbroad, and is not pertinent to a proper legislative inquiry by this Subcommittee.

In response to Subpoena Request Four, Backpage.com is compiling its many records regarding its cooperation with law enforcement, including responses to subpoenas, testimony provided by Backpage.com personnel, voluntary investigations by Backpage.com, and communication with law enforcement commending Backpage.com for its work and support combatting human trafficking. Backpage.com expects to provide these documents to the Subcommittee as soon as it completes locating and redacting personally-identifying information from those documents.

Backpage.com objects to Subpoena Request Five on the basis that it violates the First Amendment and is not pertinent to a proper legislative inquiry by this Subcommittee.

In response to Subpoena Request Six, Backpage.com does not routinely maintain ad volume information as requested by the Subcommittee. However, Backpage.com will investigate whether compilation and production of such figures are possible. Backpage.com can state at this time that, since the July 2015 elimination of credit card services because of Sheriff Thomas Dart's actions, the ad volume has increased exponentially, and appears to continue to grow.

In response to Subpoena Request Seven, Backpage.com does not routinely maintain the statistical information requested by the Subcommittee. However, Backpage.com will investigate whether compilation and production of such data are possible.

October 23, 2015  
Page 8

In response to Subpoena Request Eight, Backpage.com objects on the basis that it violates the First Amendment and is not pertinent to a proper legislative inquiry by this Subcommittee.

Finally, while Backpage.com has agreed to provide certain documents in response to certain of the Subpoena's requests, Backpage.com does not waive and expressly reaffirms its First Amendment and pertinence objections as to all requested documents and information. The production of this information is not intended, and should not be taken, as a waiver of these or any other privilege that might be asserted in any other forum or proceeding. The objections outlined in this letter, as well as our earlier letters, are specifically asserted as a basis for not producing documents or information called for by the Subpoena

Sincerely,



Steven R. Ross  
Stanley M. Brand  
Akin Gump Strauss Hauer & Feld  
Counsel for Backpage.com, LLC

Robert Corn-Revere  
Davis Wright Tremaine, LLP  
Counsel for Backpage.com, LLC

Encl.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

# Exhibit I



RON JOHNSON, WISCONSIN, CHAIRMAN  
JOHN McCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
KELLY AYOTTE, NEW HAMPSHIRE  
JONI ERNST, IOWA  
BEN SASSE, NEBRASKA

THOMAS R. CARPER, DELAWARE  
CLAIRE McCASKILL, MISSOURI  
JON TESTER, MONTANA  
TAMMY BALDWIN, WISCONSIN  
HEIDI HEITKAMP, NORTH DAKOTA  
CORY A. BOOKER, NEW JERSEY  
GARY C. PETERS, MICHIGAN

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR  
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

November 3, 2015

**VIA U.S. MAIL AND EMAIL (sross@akingump.com)**

Carl Ferrer, CEO  
Backpage.com, LLC  
2501 Oak Lawn Avenue  
Dallas, TX 75219

c/o Steve Ross, Esq.  
Akin Gump Strauss Hauer & Feld, LLC  
1333 New Hampshire Avenue, NW  
Washington, DC 20036

**Re: Ruling on Objections to Subcommittee Subpoena**

Dear Mr. Ferrer:

On October 1, 2015, the Permanent Subcommittee on Investigations issued a subpoena to you, as Chief Executive Officer of Backpage.com, LLC (“Backpage”), requiring Backpage to produce eight categories of documents to the Subcommittee. In response, Backpage produced twenty-one pages of publicly available documents and raised a number of objections to the subpoena. On behalf of the Subcommittee, we have reviewed those objections carefully and now overrule them. Backpage is ordered and directed to produce all responsive documents by November 12, 2015, at 10:00 a.m.

**BACKGROUND**

Pursuant to its authority under Senate Resolution 73, § 12(e), 114th Congress, the Subcommittee is currently investigating the problem of human trafficking.

1. Under federal law, human trafficking includes, *inter alia*, the unlawful practice of selling the sexual services of minors, or of adults who have been coerced into participating in the commercial sex trade.<sup>1</sup> Over eight in ten suspected incidents of human trafficking in the United States involve sex trafficking,<sup>2</sup> and reports have shown

<sup>1</sup> 18 U.S.C. § 1591.

<sup>2</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *Characteristics of Suspected Human Trafficking Incidents, 2008-2010*, at 1 (Apr. 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf>.

that more than half of sex-trafficking victims are 17 years old or younger.<sup>3</sup> In recent years, sex trafficking has migrated to the Internet,<sup>4</sup> where it has flourished in part because of the high profitability and relatively low risk associated with advertising trafficking victims' services online.<sup>5</sup>

Sex traffickers have made extensive use of websites that serve as marketplaces for ordinary commercial sex and escort services. Backpage.com is a market leader in that area: It reportedly nets more than 80% percent of all revenue from online commercial sex advertising in the United States, from nearly 400 cities throughout the country.<sup>6</sup> Unsurprisingly, then, Backpage has also been linked to an alarming number of sex trafficking cases. According to Shared Hope International, "[s]ervice providers working with child sex trafficking victims have reported that between 80% and 100% of their clients have been bought and sold on Backpage.com."<sup>7</sup>

To better understand this phenomenon, the Subcommittee is reviewing what measures commercial sex advertising sites, including Backpage, have taken to prevent the use of their websites for sex trafficking and whether those measures are effective. Careful fact-finding in this area is vital as Congress considers what action, if any, should be taken to protect exploited women and children from those making illicit use of the facilities of interstate commerce. To that end, the Subcommittee issued a subpoena to Backpage for the production of documents related to the Subcommittee's investigation. Backpage has failed to comply with that subpoena.

2. The Subcommittee initiated an inquiry into Internet sex trafficking in April 2015. As part of that investigation, the Subcommittee has conducted interviews and briefings with many relevant parties, including victims' rights groups, nonprofit organizations, technology companies, financial institutions, academic researchers, federal, state, and local law enforcement officials, and several other advertising websites similar to Backpage.

The Subcommittee first contacted Backpage on April 15, 2015, to request an interview to discuss Backpage's business practices. On June 19, 2015, after extensive communication with Backpage's outside counsel regarding the specific topics that the

---

<sup>3</sup> U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Literature Review: Commercial Sexual Exploitation of Children/Sex Trafficking*, at 3 (2014), <http://www.ojjdp.gov/mpg/litreviews/CSECSexTrafficking.pdf>.

<sup>4</sup> See M. Dank, et al., Urban Institute Research Report, *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities*, at 234 (Mar. 2014), <http://www.urban.org/research/publication/estimating-size-and-structure-underground-commercial-sex-economy-eight-major-us-cities> ("[T]he Internet has transformed the street-based sex market.").

<sup>5</sup> U.S. Dep't of Justice, *National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress*, at 31 (Aug. 2010), <http://www.justice.gov/psc/docs/natstrategyreport.pdf>.

<sup>6</sup> Advanced Interactive Media Group, *Online Prostitution-ad Revenue Crosses Craigslist Benchmark* (July 2013), <http://aimgroup.com/2013/07/10/online-prostitution-ad-revenue-crosses-craigslist-benchmark/>.

<sup>7</sup> Shared Hope International, *White Paper: Online Facilitation of Domestic Minor Sex Trafficking*, at 1 (Aug. 2014), <http://sharedhope.org/wp-content/uploads/2014/09/Online-Faciliator-White-Paper-August-2014.pdf>.



Subcommittee wished to discuss, the Subcommittee interviewed Backpage's General Counsel, Elizabeth McDougall. During the interview, Ms. McDougall could not answer several critical questions about Backpage's ownership, statistics on reporting to law enforcement and to the National Center for Missing and Exploited Children ("NCMEC"), and the "moderation" procedures Backpage uses to review and screen advertisements. After the interview, on June 22, 2015, the Subcommittee sent Backpage follow-up questions and requests for information. Despite initially indicating that it would do so, Backpage failed to provide answers or documents.

3. The Subcommittee first issued a subpoena to Backpage on July 7, 2015, with a return date of August 7, 2015. The subpoena requested materials related to Backpage's basic corporate structure, the steps it takes to review advertisements for illegal activity, interaction with law enforcement, and data retention policies, among other relevant subjects. The subpoena sought no information about the identity of Backpage users and specifically provided for redaction of all personally identifying user information.<sup>8</sup>

On August 6, Backpage submitted a letter to the Subcommittee explaining that it would not produce any documents in response to the subpoena. Backpage contended that the subpoena was overbroad and violated the First Amendment. Backpage asked the Subcommittee to defer the subpoena so that Backpage could present "a more fulsome discussion of the constitutional infirmities and concerns regarding the Subcommittee's subpoena," and so that Backpage could seek leave of an unnamed federal court to produce a sealed judicial opinion that Backpage contended would be persuasive authority.<sup>9</sup>

In response, the Subcommittee sent a letter to Backpage explaining that the cases relied upon in Backpage's August 6 letter were inapposite: They concerned either state laws imposing content-based restrictions on advertisements<sup>10</sup> or investigational demands seeking personally identifying information about individual speakers' political beliefs (e.g., their membership in the NAACP or sympathy with the Communist Party).<sup>11</sup> The Subcommittee's subpoena, by contrast, was scrupulously drawn to avoid such concerns.

The Subcommittee invited Backpage to better explain its constitutional objections.<sup>12</sup> On September 14, 2015, counsel for the Subcommittee and counsel for

---

<sup>8</sup> See Letter and Subpoena from PSI to Backpage (July 7, 2015).

<sup>9</sup> See Letter from Backpage to PSI at 5 (Aug. 6, 2015). Subcommittee staff responded immediately to encourage Backpage to seek leave to produce the opinion.

<sup>10</sup> E.g., *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012),

<sup>11</sup> See generally *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Watkins v. United States*, 354 U.S. 178 (1957).

<sup>12</sup> In an attempt to continue its fact-finding, the Subcommittee issued subpoenas for the depositions of two Backpage employees, Andrew Padilla and Joye Vaught, to discuss their job duties. According to Ms. McDougall, Mr. Padilla is the head of Backpage's moderation department—the division of employees who, among other things, review advertisements to screen them for evidence of illegal activity—and Ms. Vaught is in charge of training line moderators to perform those functions. Both Mr. Padilla and Ms. Vaught retained individual counsel and, invoking their Fifth Amendment

Backpage met for the purpose of discussing the company's constitutional objections to the July 7 subpoena. During that meeting, counsel for Backpage conceded that the subpoena did not seek any type of information that triggered heightened First Amendment scrutiny in the cases cited in Backpage's August 6 letter. The company objected to no particular request in the subpoena schedule. Instead, Backpage objected to the entirety of the subpoena on First Amendment grounds based on two considerations: (i) the "breadth" of the subpoena as a whole; and (ii) the "context" in which Backpage received the Subcommittee's subpoena—*i.e.*, the fact that other governmental actors have recently taken an interest in Backpage. When Subcommittee counsel asked Backpage counsel for authorities to support that position, Backpage counsel demurred and committed to following up in writing. That response never arrived.

4. On October 1, 2015, the Subcommittee withdrew its original subpoena and issued a new, more targeted subpoena focused on its areas of principal interest. In the letter accompanying the subpoena, the Subcommittee explained that "we continue to see no legal merit in Backpage's explanation for its categorical refusal to comply with the Subcommittee's subpoena. Nevertheless, in the hope of overcoming the current impasse, we are withdrawing the Subcommittee's July 7 subpoena and issuing the attached subpoena seeking a narrower subset of documents."<sup>13</sup> We explained that the withdrawal of the earlier subpoena "does not reflect, in any way, our agreement with the merits of Backpage's expansive claim of privilege; rather, it represents a good-faith effort to address Backpage's expressed concerns."<sup>14</sup>

The October 1 subpoena required you to produce documents named in the schedule, or else appear personally, on October 23, 2015.<sup>15</sup> Specifically, the new subpoena seeks the production of eight categories of documents previously sought in the initial subpoena, including information about Backpage's review and moderation procedures; its practices with respect to verifying user accounts; documents concerning human trafficking and similar offenses; data-retention practices; and statistical information concerning its advertisements, review practices, and revenue.<sup>16</sup> The subpoena provides that the company should exclude any personally identifying information concerning Backpage users.

The Subcommittee notified Backpage that it must "assert any claim of privilege or other right to withhold documents from the Subcommittee by October 23, 2015, the return date of the subpoena, along with a complete explanation of the privilege or other right to withhold documents" and that "[t]he Subcommittee will rule on any objections to the subpoena, including any claim of privilege, based on submissions in the record at that time."<sup>17</sup> The Subcommittee cautioned you that failure to comply with the

---

privilege, declined to testify on the ground that it might tend to incriminate them. On that basis, the Subcommittee released them from their obligation to personally appear for their depositions.

<sup>13</sup> Letter from PSI to Backpage at 2 (Oct. 1, 2015).

<sup>14</sup> *Id.*

<sup>15</sup> Subpoena, Oct. 1, 2015.

<sup>16</sup> Subpoena, Schedule A (Oct. 1, 2015).

<sup>17</sup> Letter from PSI to Backpage at 3 (Oct. 1, 2015) (emphasis added).

subpoena, or to raise a legitimate privilege, could lead to civil enforcement of the subpoena or criminal contempt.<sup>18</sup> Counsel for Backpage committed to submitting a complete explanation for any noncompliance by the return date.<sup>19</sup> In light of that, on October 20, the Subcommittee continued your personal appearance “to permit the Subcommittee to consider any objection you wish[ed] to submit.” The Subcommittee reminded you, however, that “[t]he requested documents along with any objections remain due on the return date.”<sup>20</sup>

5. On October 23, 2015, Backpage submitted a response to the subpoena, along with a production of twenty-one pages of publicly available documents. That response asserts (i) that the First Amendment constrains the Subcommittee’s jurisdiction to conduct this investigation<sup>21</sup> and (ii) that the subpoena is not pertinent to a proper investigation within the Subcommittee’s jurisdiction.<sup>22</sup> On those two bases, Backpage objected to five of the document requests in the subpoena: Requests One, Two, Three, Five, and Eight.<sup>23</sup>

Backpage did not specifically object to Requests Four, Six, or Seven. But neither did it produce any documents responsive to those Requests. Instead, as to Request Four—“documents concerning human trafficking, sex trafficking, human smuggling, prostitution, or the facilitation or investigation thereof”—Backpage explained that it would eventually produce certain items (“its many records regarding its *cooperation* with law enforcement, including responses to subpoenas \* \* \* and communication with law enforcement *commending* Backpage.com for its work and support on human trafficking”)<sup>24</sup> but made no commitment about any other responsive documents. As to Requests Six and Seven (seeking data about Backpage’s advertisement volume and law-enforcement reporting), Backpage represented that it does not regularly maintain the information requested by the Subcommittee, but that it will “investigate whether compilation and production of [the information] are possible.”<sup>25</sup> Despite the fact that the company has been on notice since the original July 7 subpoena of the Subcommittee’s interest in this information, Backpage offered no explanation for why it did not produce documents responsive to these three Requests before the return date of the subpoena; nor did it offer any excuse for its untimely compliance or its failure to seek an extension.<sup>26</sup>

---

<sup>18</sup> *Id.*; see 2 U.S.C. §§ 192, 194.

<sup>19</sup> E-mail from Steven Ross to PSI (Oct. 15, 2015).

<sup>20</sup> Letter from PSI to Backpage at 1 (Oct. 20, 2015).

<sup>21</sup> Letter from Backpage to PSI at 3 (Oct. 23, 2015).

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.* at 6–8.

<sup>24</sup> *Id.* at 7 (emphasis added).

<sup>25</sup> *Id.*

<sup>26</sup> Backpage’s submission contained no additional information about a sealed judicial opinion discussed in its August 6 letter. At the September 14 conference between Subcommittee counsel and counsel for Backpage, Backpage explained that it had moved the relevant district court to unseal the opinion to permit the Subcommittee to review it, but that the motion was denied in part because either the court or the Department of Justice was unsure that the Subcommittee had a genuine

## DISCUSSION

In its October 23 submission, Backpage lodged objections to several of the document requests in the Subcommittee's subpoena. Those objections are not meritorious. First, Backpage asserts that several items in the subpoena violate the First Amendment, but it does not attempt to show either (i) that any request for documents seeks information that infringes recognized First Amendment interests; or (ii) that those requests are not supported by an adequate legislative interest. Instead, Backpage contends that First Amendment concerns counsel against construing the Subcommittee's authorizing resolution to encompass this investigation and the challenged subpoena. As we will explain, there are circumstances under which such an argument would be plausible—but this is not one of them. The Subcommittee's subpoena to Backpage, and its investigation of human trafficking on the Internet, is plainly encompassed by specific language in our authorizing resolution. *See* S. Res. 73, § 12(e), 114th Cong. The First Amendment cases cited by Backpage are inapposite and do not alter that result. Second, Backpage objects that some document requests in the subpoena are not pertinent to a proper investigation by this Subcommittee. That too lacks merit: Each category of requested information is directly related to the legitimate legislative inquiry authorized by Senate Resolution 73.

In the discussion that follows, we will first describe why the challenged subpoena is within the scope of the Subcommittee's investigative authority. We will then explain why Backpage has not demonstrated any constitutional infirmity in the subpoena or given any persuasive First Amendment reason to read our authorizing resolution not to encompass this investigation. Finally, we will address Backpage's response to each of the subpoena's specific document requests, and explain why those requests seek information directly related to the Subcommittee's valid investigative interests. Those interests would justify the requests even if they triggered heightened scrutiny under the First Amendment.

---

interest in the opinion. Backpage therefore asked the Subcommittee to provide it with a letter in support of its unsealing request, so that it could file a motion to reconsider. After notifying the Department of Justice, we provided that letter to counsel for Backpage on September 18.

Counsel for Backpage, however, later informed the Subcommittee that they did not file the motion to reconsider until October 6, 2015—three weeks after we provided the requested letter, and nearly a week after we issued the new, October 1 subpoena. Backpage offered no explanation for the delay in filing.



**I. The Subpoena is Within the Subcommittee’s Authority.**

The Subcommittee is investigating the problem of human trafficking; how those who commit that crime have made use of the Internet and other facilities of interstate commerce to commit it; the role that private-sector enterprises play in facilitating, or should play in preventing, domestic and international sex trafficking; and the adequacy of existing federal laws and federal programs at combating the problem. That investigation, along with the subpoena we have issued to Backpage in furtherance of it, is within the Subcommittee’s authority.

**A. Congress’s Investigative Power.**

“The power of the Congress to conduct investigations is inherent in the legislative process.” *Watkins v. United States*, 354 U.S. 178, 187 (1957). Congress’s investigatory power “is broad,” *id.*, reaching “the whole range of national interests concerning which Congress might legislate or decide upon due investigation not to legislate.” *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). “It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes,” as well as “surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.” *Watkins*, 354 U.S. at 187-88.

That authority includes the power of legal process. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). “It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.” *Watkins*, 354 U.S. at 187–188. In that respect, “[a] legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress.” *United States v. Orman*, 207 F.2d 148, 153 (3d Cir. 1953) (quotation marks and citation omitted). Unlike in a lawsuit, which “relates to a *case*, and [in which] the evidence to be admissible must be measured by the narrow limits of the pleadings \* \* \* \* [a] legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad.” *Id.* (quoting *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938)).

**B. The Subcommittee’s Subpoena Is Proper.**

1. The Senate has entrusted the Subcommittee with significant investigative power. Specifically, the Senate has authorized the Subcommittee to conduct investigations into a broad range of matters of potential legislative interest. Those subjects include:

- (A) the efficiency and economy of operations of all branches of the Government;

\* \* \* \* \*

(C) *organized criminal activity which may operate in or otherwise utilize the facilities of interstate or international commerce* in furtherance of any transactions and the manner and extent to which, and the identity of the persons, firms, or corporations, or other entities by whom such utilization is being made, and further, to study and investigate the manner in which and the extent to which persons engaged in organized criminal activity have infiltrated lawful business enterprise, and to study the adequacy of Federal laws to prevent the operations of organized crime in interstate or international commerce; and to determine whether any changes are required in the laws of the United States in order to protect the public against such practices or activities; [and]

(D) *all other aspects of crime and lawlessness within the United States which have an impact upon or affect the national health, welfare, and safety*; including but not limited to investment fraud schemes, commodity and security fraud, computer fraud, and the use of offshore banking and corporate facilities to carry out criminal objectives.

S. Res.73, § 12(e)(1), 114th Cong. (emphasis added).

2. The Subcommittee's authority to investigate crime, its effects on public welfare and safety, and how the facilities of interstate commerce are used to commit it, places this investigation squarely within its jurisdiction. To repeat, the Subcommittee is authorized to investigate "all \* \* \* aspects of crime" within the United States that affect the "national health, welfare, safety," *id.* § 12(e)(1)(D), and is specifically tasked with examining "organized criminal activity which may operate in or otherwise utilize the facilities of interstate or international commerce," *id.* § 12(e)(1)(C). Human trafficking is a federal crime. See 18 U.S.C. §§ 1581–1592. Importantly, Congress has specifically recognized human trafficking as an activity of *organized* crime; the Trafficking Victims Protection Reauthorization Act of 2003 declared human trafficking offenses are predicates to liability under the Racketeer Influenced Corrupt Organizations (RICO) Act. See Pub. L. 108-193, 117 Stat. 2875, 2879, § 5(b); 18 U.S.C. § 1961(1). And the Internet, an important facility of interstate commerce, has become an increasingly central marketplace for human trafficking in the United States.<sup>27</sup> The Subcommittee seeks to understand how individuals are utilizing the Internet, including commercial sex advertising websites like Backpage.com, to further their illicit trafficking schemes, as well as what mechanisms websites can use to prevent such abuse of interstate facilities.

<sup>27</sup> See generally, Latonero, M., et al., USC Annenberg Ctr. on Comm'n Leadership & Policy, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds* (2011), [https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking\\_FINAL.pdf](https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking_FINAL.pdf).



Based on the available public record, Backpage, in particular, appears to be an epicenter of illegal sex trafficking. A federal district court recently observed that “Backpage’s adult services section overwhelmingly contains advertisements for prostitution, including the prostitution of minors.” *Backpage.com, LLC v. Dart*, No. 15-C-06340, 2015 WL 5174008, at \*2 (N.D. Ill. Aug. 24, 2015) (finding that Backpage is “the leading forum for unlawful sexual commerce on the Internet and that the majority of advertisements [on Backpage] are for sex”); *see also Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d. 1262, 1267 (W.D. Wash. 2012) (“Many child prostitutes are advertised through online escort advertisements displayed on Backpage and similar websites.”). The Subcommittee’s own investigation and study of the public record support that conclusion. Indeed, Backpage forthrightly acknowledges that its website is used by sex traffickers; its General Counsel has lamented publicly, “we are being abused by these criminals.”<sup>28</sup> That criminal “abuse,” along with the strategies used by Backpage to combat it, is a subject of this investigation. Information regarding Backpage’s anti-trafficking measures, contact with law enforcement, and basic corporate revenue are all important to the Subcommittee’s understanding of how sex trafficking occurs on the Internet. That information will also enable the Subcommittee to evaluate the cost-effectiveness of mechanisms employed by websites to combat sex trafficking and whether legislative action is needed to incentivize or require more effective strategies.

Importantly, the Subcommittee’s investigative jurisdiction does not depend on whether Backpage *itself*, or its officers or employees, bear any criminal liability under existing federal law. Rather, the matter is straightforward: Criminal sex trafficking is happening on Backpage, and the Subcommittee is investigating the nature and quality of Backpage’s efforts to stop it, in order to better understand the role online marketplaces can play in facilitating or preventing this criminal activity.<sup>29</sup>

3. In addition to its authority to investigate crime, the Subcommittee’s power to examine “the efficiency and economy of operations of all branches of the Government,” S. Res. 73 § 12(e)(1)(A), supplies an independent basis for our jurisdiction to investigate human trafficking on the Internet. The federal government has an array of anti-

---

<sup>28</sup> Committee on Women’s Issues, City Council of New York, Tr. 92 (Apr. 25, 2012), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1078130&GUID=D1C2D58A-C5A2-48A1-BB64-7AF44AFDC030&Options=&Search>.

<sup>29</sup> Backpage suggests that the Subcommittee’s investigation is outside its jurisdiction because it is a “law enforcement inquir[y]” or because the Subcommittee’s findings may assist law enforcement agencies. Letter from Backpage to PSI at 6 (Oct. 23, 2015). Of course the Subcommittee has no authority to engage in “law enforcement inquiries.” The Subcommittee does, however, have authority to examine the problem of crime in order that Congress may better address it through legislation. This Subcommittee has a rich history of doing that through investigations of criminal activity, including money laundering, narcotics trafficking, child pornography, labor racketeering, and organized crime. *See, e.g.*, S. Hrg. 112-597 (July 17, 2012); S. Hrg. 109-25 (Mar. 16, 2005); S. Hrg. 104-604 (May 15, 1996); S. Hrg. 102-346 (Nov. 5-6, 1991); S. Hrg. 100-654 (Jan. 28, 1988); S. Hrg. 99-18 (Nov. 29-30, 1984). A full listing of Subcommittee hearings concerning organized crime and other types of crime or fraud is too voluminous to detail here, but can be found on the Subcommittee’s website. *See* U.S. Senate, PSI: Resources, List of Permanent Subcommittee on Investigations Hearings & Reports (1947-Present), <https://www.hsgac.senate.gov/subcommittees/investigations/resources>.

trafficking forces, including federal departments and agencies,<sup>30</sup> cross-agency task forces such as the Internet Crimes Against Children Task Force, and major public-private partnership such as the NCMEC. The federal anti-money laundering regime has taken recent steps to target proceeds of human trafficking.<sup>31</sup> And significant federal funds are devoted to serving victims of trafficking and providing grants for related academic research.<sup>32</sup> Congress has an interest in whether these authorities and resources are being effectively deployed. A better understanding of how sex trafficking has migrated to the Internet—and whether federal efforts are well-adapted to this new reality—unquestionably relates to the “efficiency and economy” of these interrelated government agencies and programs.

\* \* \*

In short, careful fact-finding about the problem of human trafficking on the Internet will assist Congress in its consideration of potential legislation in a number of legitimate areas of legislative interest, including interstate and international human trafficking and the federal law enforcement policies and resources devoted to combatting it. Because that is precisely what the Subcommittee’s authorizing resolution contemplates, the Subcommittee’s work is plainly within its jurisdiction. See S. Res. 73 § 12(e)(1)(C) (Subcommittee empowered to investigate crime in order to “determine whether any changes are required in the laws of the United States in order to protect the public against [illegal] practices or activities”).

## II. Backpage’s First Amendment Arguments Lack Merit.

Backpage’s response relies extensively on the First Amendment in defense of its noncompliance with the Subcommittee’s subpoena. But Backpage offers only a vague discussion of the First Amendment interests with which it believes the subpoena interferes—either those of its users or its own. We do not believe the subpoena threatens either. As to Backpage’s users, the subpoena is carefully drawn to avoid seeking any information about any individual engaged in commercial speech on Backpage.com.<sup>33</sup> As to Backpage itself, much of what the company publishes is indeed

---

<sup>30</sup> Federal departments and agencies involved in anti-trafficking efforts include the Departments of Justice, Homeland Security, Health and Human Services, State, Defense, Commerce, Education, and Agriculture, as well as the Federal Trade Commission, Federal Communications Commission, U.S. Postal Inspection Service, and NASA. See generally U.S. Dep’t of Justice, *National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* (Aug. 2010), <http://www.justice.gov/psc/docs/natstrategyreport.pdf>.

<sup>31</sup> See U.S. Dep’t of Treasury, Financial Crimes Enforcement Network, Advisory, FIN-2014-A008, *Guidance on Recognizing Activity That May Be Associated with Human Smuggling or Human Trafficking –Financial Red Flags* (Sept. 11, 2014), [https://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-A008.pdf](https://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-A008.pdf).

<sup>32</sup> See, e.g., Federal Strategic Action Plan for Victims of Human Trafficking in the United States, 2013-2017, <http://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>.

<sup>33</sup> Backpage is a publisher of third-party commercial advertisements; commercial speech is protected by the First Amendment, even if it is validly subject to much more extensive restriction, than the core political speech at issue in the cases relied on by Backpage. See *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 564 (1980); see also *Florida Bar v. Went For*

the protected commercial speech of third parties; but that does not immunize Backpage from legitimate investigations into the *unlawful* activity marketed through its site, which enjoys no First Amendment protection. But in any case, as Part III explains, the information sought by the Subcommittee's subpoena bears a direct relationship to the Subcommittee's investigative needs, and the governmental interests served by the subpoena are adequate to justify any incidental burden on Backpage's commercial-speech rights. Backpage also invokes the First Amendment in support of a slightly different argument: that we should adopt a narrow construction of the Subcommittee's authorizing resolution so that it does not include the power to issue the subpoena to "a business that provides a platform for online speech."<sup>34</sup> That argument also fails.

1. Documentary subpoenas by government agencies can, in relatively rare circumstances, raise First Amendment concerns. See *NAACP v. Alabama*, 357 U.S. 449, 462–63 (1958); *Gibson v. Florida Legislative Investigative Committee*, 372 U.S. 539, 546 (1963). Under these cases, a subpoena will be subjected to First Amendment scrutiny if it creates a "likelihood of a substantial restraint upon the exercise" of First Amendment rights, and then should be sustained only if the demand for information is supported by governmental interests "sufficient to justify the deterrent effect" on speech." *NAACP*, 357 U.S. at 463; see *Gibson*, 372 U.S. at 546 (in case where subpoena sought information about identity of those engaged in political expression, government had to "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest"). In other cases, the Court has avoided the need to conduct that balancing of interests because it construed a congressional investigative demand to be outside the scope of a valid authorizing resolution. See *Watkins*, 354 U.S. at 199-206; *United States v. Rumely*, 345 U.S. 41, 44-48 (1953).

But in *each* of these cases the investigative demand was aimed at discovering information about people who actually engaged in protected speech or associational activity—for example, southern States trying to find out the identity of NAACP members (*Gibson*, 372 U.S. at 540–41; *NAACP*, 357 U.S. at 451); the House Un-American Activities Committee trying to discover the identity of a witness's Communist associates (*Watkins*, 354 U.S. at 184–85); the House of Representatives trying to discover who is reading disfavored books (*Rumely*, 345 U.S. at 42); or prosecutors trying to obtain personally identifying information about individuals who worked on particular issues of a publication issued by the Black Panther Party (*Bursey v. United States*, 466 F.2d 1059, 1068-71 (9th Cir. 1972)). In those cases, compelling the disclosure of such information would risk chilling core political speech. In other words, the central First Amendment evil, the "official suppression of ideas[, was] afoot," *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992).

Backpage makes no effort to explain how the Subcommittee's subpoena poses any similar danger to those of its users who are engaged in protected commercial speech. As we have reminded Backpage repeatedly, the Subcommittee's subpoena was

---

*It, Inc.*, 515 U.S. 618, 623 (1995) ("[W]e engage in 'intermediate' scrutiny of restrictions on commercial speech.").

<sup>34</sup> Letter from Backpage to PSI at 3 (Oct. 23, 2015).



carefully drawn to avoid the possibility of deterring protected speech by excluding any information that could personally identify its advertisers.<sup>35</sup> This subpoena bears no resemblance to those used fifty years ago to investigate political dissenters: It seeks no information about individual users—what speech they engage in, what organizations they belong to, what books they read, or the like. A subpoena seeking information about the business practices of a company whose facilities are undisputedly being used for criminal activity is far afield from the kinds of investigative demands that courts have invalidated for trenching on core First Amendment protections.

Backpage also contends that its status as a publisher of commercial speech—along with, it appears, the simple fact that its activities take place on the Internet—means that the Subcommittee cannot investigate what occurs on its website. But the mere presence of protected speech on Backpage does not prevent the Subcommittee from investigating criminal activity that *also* occurs there. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (holding that statute regulating establishments hosting prostitution did not trigger First Amendment concerns merely because books were also sold on the premises); *cf. Pittsburgh Press Co. v. Human Relations Comm'n.*, 413 U.S. 376, 388 (1973) (“We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.”).<sup>36</sup>

Relatedly, Backpage also argues that “the Subcommittee cannot legitimately expand its authority to investigate by inappropriately trying to conflate online advertising with illegal activity.”<sup>37</sup> Nor have we done so. The illegal activity we are investigating is not advertising; it is selling children, or coerced adults, online for sex.

In any event, “the First Amendment” is not a talismanic incantation. Even where subpoenas seek information raising First Amendment concerns, the question becomes whether the subpoena is supported by an adequate governmental interest. *See*

---

<sup>35</sup> *See, e.g.*, Letter from PSI to Backpage at 1 (July 7, 2015); Letter from PSI to Backpage at 4 (Aug. 26, 2015); Letter from PSI to Backpage, at 2 (Oct. 1, 2015).

<sup>36</sup> Backpage also urges (Letter from Backpage to PSI at 4 (Oct. 23, 2015)) that that the financial records of a publisher cannot be discovered without trenching on the First Amendment. Specifically, Backpage contends that, “[i]n *Rumely*, the committee sought ‘pertinent financial records’ to determine whether lobbying laws were being circumvented, but the Court held that the First Amendment did not permit the investigatory mandate to be read so expansively.” *Id.* That seriously misreads *Rumely*. As described below, *Rumely* concerned a House committee’s attempt to learn the identity of purchasers of disfavored books. 345 U.S. at 42. In its opinion, the court of appeals made clear that “as the case comes to us, *there was no refusal to produce financial records*. Over and over again *Rumely* asserted before the Committee that he had given, and was willing to give, all records except the names and addresses of the purchasers of the books. \* \* \* [The prosecutor] insisted, and the [district] court sustained his view, that, *so long as the names of purchasers of books were not given, financial records on contributions and loans were immaterial to the issues in the case.*” 197 F. 2d 166, 172 (D.C. Cir. 1952) (emphasis added). Unsurprisingly, then, the Supreme Court’s opinion in *Rumely* does not mention these financial records (though the concurrence does); and nothing in the Court’s analysis turned on them. In any event, the financial records in *Rumely*, unlike those sought in our subpoena, were designed to assist a House committee in identifying the readers of “political[ly] tendentious[ly]” literature. *See Rumely*, 345 U.S. at 544. Our subpoena does not raise similar concerns.

<sup>37</sup> Letter from Backpage to PSI at 4 (Oct. 23, 2015).

*NAACP*, 357 U.S. at 461. Backpage does not dispute the gravity of Congress’s interest in combating the scourge of interstate sex trafficking by means of well-informed legislation. And the company does not address, in its objections, whether the First Amendment interests it asserts are sufficient to overcome the governmental interests in obtaining the requested information. The closest it comes to doing so is by lodging terse objections to the *pertinence* of the Subcommittee’s particular requests—*i.e.*, that the requests are insufficiently connected to a legitimate investigation.<sup>38</sup> We will address the direct connection between the requests and the Subcommittee’s investigative interests in Part III. That connection satisfies both the pertinence requirement and any required First Amendment showing that the requests are directed at legitimate investigative interests.

2. In short, Backpage has not shown any violation of First Amendment rights. Instead, relying on *Rumely*, Backpage invokes the canon of constitutional avoidance to argue that “First Amendment tensions”<sup>39</sup> compel a cramped reading of the Subcommittee’s authorizing resolution that excludes this subpoena. That argument has no support in *Rumely* or in the text of our authorizing resolution.

As an initial matter, *Rumely*, like Backpage’s other cases, involves an attempt to obtain personally identifying information about individuals engaged in core political speech. In *Rumely*, a congressional committee was authorized to evaluate the efficacy of lobbying laws. As part of those efforts, the committee demanded of a witness “the names of those who made bulk purchases” of “books of a particular political tendentiousness.” 345 U.S. at 42. The Supreme Court concluded that the power to make such a demand threatened First Amendment interests because it would permit Congress to “inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process.” *Id.* at 46. The Court, however, avoided the need to balance those First Amendment interests against Congress’s investigative power because it construed the relevant language in its authorizing investigation—the word “lobbying”—not to include what books people buy. Instead, the Court held that “lobbying” should be given its “commonly accepted” meaning: representations made directly to the Congress, its members, or its committees, and [not to] attempts ‘to saturate the thinking of the community.’” *Id.* at 47 (citation omitted).

Backpage relies on *Rumely* to argue that First Amendment concerns militate against interpreting Senate Resolution 73 to authorize this investigation and the challenged subpoena. That argument is wrong for two independent reasons. First, as explained above, the Subcommittee’s subpoena does not threaten First Amendment interests, much less the core political speech at issue in *Rumely*, so its enforcement raises no “serious constitutional doubt.” 345 U.S. at 47. Second, in *Rumely*, the natural reading of the word “lobbying” did indeed exclude, “[a]s a matter of English,” the House committee’s investigation into book-reading. *Id.* Our authorizing resolution, by contrast, cannot be read to bar the challenged subpoena. Indeed, it plainly embraces the subject of this investigation:

---

<sup>38</sup> Letter from Backpage to PSI at 7-8 (Oct. 23, 2015).

<sup>39</sup> *Id.* at 4.

organized criminal activity which may operate in or otherwise utilize the facilities of interstate or international commerce in furtherance of any transactions \* \* \* and to study the adequacy of Federal laws to prevent the operations of organized crime in interstate or international commerce; and to determine whether any changes are required in the laws of the United States in order to protect the public against such practices or activities.

S. Res. 73, § 12(e)(1)(C), 114th Cong. That is a crystal-clear statement of the Senate's intention to authorize investigations into the use of interstate facilities to commit organized crime, and Congress has defined human trafficking as a racketeering offense. 18 U.S.C. § 1961(1). No permissible construction of that language excludes the challenged subpoena. *Cf. Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("The key to application of [the avoidance canon] is that the statute must be readily susceptible to the limitation; we will not rewrite a \* \* \* law to conform it to constitutional requirements.").

3. Backpage also relies on a number of cases invalidating state statutes seeking to criminalize the advertising of sexual services on the Internet. *See Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, at \*9 (D.N.J. Aug. 20, 2013); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 830–33 (M.D. Tenn. 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1280–81 (W.D. Wash. 2012). Those cases are unavailing here. First, unlike the state laws at issue in those cases, the Subcommittee's subpoena does not regulate the content of speech, which automatically triggers First Amendment scrutiny. *See Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011). Second, these cases are also distinguishable because the challenged state laws were held to be preempted by Section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230. *See Cooper*, 939 F. Supp. 2d at 817, 822–24 (holding that the CDA preempts a state criminal ban on knowingly "advertising commercial sexual abuse of a minor"); *McKenna*, 881 F. Supp. 2d. at 1273 (same). The CDA "overrides the traditional treatment of publishers [and] distributors . . . under statutory and common law" by immunizing certain internet-based businesses from state-law liability for content created by third parties. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1176 (9th Cir. 2008) (citation omitted). But having preempted traditional state police powers in this area, and reserved the task of regulation to itself, Congress has a heightened responsibility to marshal the "facts needed for intelligent legislative action." *Watkins*, 354 U.S. at 187.

Indeed, legislative fact-finding is necessary to ensure that any potential future legislation on this issue is carefully tailored to protect a free and open Internet and respect First Amendment rights. The cases cited by Backpage only underscore the peril of enacting imprecise or ill-informed legislation on this issue. In *Cooper* and *McKenna*, for example, courts enjoined state statutes for, *inter alia*, vagueness and overbreadth; a better informed legislative effort might have prevented those legislatures from drafting invalid statutes. *See McKenna*, 881 F. Supp. 2d. at 1280 (recognizing that the challenged statute "might find itself on better constitutional footing if the statute included [more clear] definitions"); *Cooper*, 939 F. Supp. 2d at 832–33 (holding that



overly expansive definition of “commercial sex at” rendered statute overbroad). Congress cannot be expected to legislate with a “scalpel”<sup>40</sup> if it must operate blindly.<sup>41</sup>

### III. The Subpoena’s Document Requests Are Directly Related to the Subject of the Subcommittee’s Investigation.

The Subcommittee’s investigation is designed to serve Congress’s interest in well-informed legislation to combat sex trafficking on the Internet, including the sale of minors for sexual services through online marketplaces. Backpage cannot dispute the validity or weight of that interest. But it has objected to several document requests in the subpoena—Requests One, Two, Three, Five, and Eight—on the ground that they are not pertinent to the investigation. Like its jurisdictional objection, Backpage blends this objection with vague references to the First Amendment. It has not, however, offered any analysis of any document request in the subpoena—either to explain why Backpage believes the documents sought do not pertain to our investigation, *see Orman*, 207 F.2d at 154–55; or why the requests are not supported by an adequate governmental interest, *see NAACP*, 357 U.S. at 461. As explained below, however, the subpoena’s requests are directly related to the subject matter of the Subcommittee’s legitimate investigation. *See Sinclair v. United States*, 279 U.S. 263, 299 (1929) (“The matter for determination . . . [is] whether the facts called for by the question were so related to the subjects covered by the Senate’s resolutions that such facts reasonably could be said to be ‘pertinent to the question under inquiry.’”).

#### A. Requests One, Two, and Three.

1. Backpage groups Requests One, Two, and Three together for the purpose of its response. These items require the production of documents concerning (1) “Backpage’s reviewing, blocking, deleting, editing, or modifying of advertisements in Adult Sections, either by Backpage personnel or by automated software processes, including but not limited to policies, manuals, memoranda, and guidelines”; (2) “advertising posting limitations, including but not limited to the ‘Banned Terms List,’ the ‘Grey List,’ and error messages, prompts, or other messages conveyed to users during the advertisement drafting or creation process”; and (3) “reviewing, verifying, blocking, deleting, disabling, or flagging user accounts or user account information, including but not limited to the verification of name, age, phone number, payment information, email address, photo, and IP address,” subject to the reminder that it “does not include the personally identifying information of any Backpage user or account holder.”

---

<sup>40</sup> Letter from Backpage to PSI at 1 (Oct. 23, 2015).

<sup>41</sup> Backpage also relies on two cases in which courts invalidated investigative demands because of procedural foot-faults. In *Russell v. United States*, the Supreme Court reversed a contempt conviction because the indictment failed to “identif[y] the topic under inquiry.” 369 U.S. 749, 759, 771-72 (1962). And in *Shelton v. United States*, the D.C. Circuit reversed a conviction because the underlying subpoena was not issued pursuant to the committee’s rules. 327 F.2d 601, 606-07 (D.C. Cir. 1963). These cases do not bear on the question whether First Amendment concerns are present here.

In response to these requests, Backpage produced its Terms of Use, Posting Rules, User Agreement, and testimony given by Ms. McDougall before the New York City Council. These items are all publicly available. Backpage then asserted that “[t]o the extent the Subcommittee seeks further documents in this regard, Backpage.com objects to the request that it violates the First Amendment, is overbroad, and is not pertinent to a proper legislative inquiry by this Subcommittee.”<sup>42</sup>

2. We have already addressed and rejected Backpage’s First Amendment objections to the subpoena. It is equally clear that these requests are pertinent to our investigation. In her interview with Subcommittee staff, Ms. McDougall confirmed that Backpage’s moderation practices have included the ability to edit or modify advertisements that are being reviewed by moderators. Other information acquired by the Subcommittee has supported this finding. Gathering more information about these practices is important to understanding what steps can be taken to identify criminal activity on the Internet and to assessing whether Backpage’s moderation practices are helping or hindering that effort. Backpage publicly touts its moderation efforts as an effective way to prevent illegal content from appearing on its site.<sup>43</sup> Ms. McDougall’s testimony from 2012 stated that “Backpage leads the industry in” its moderation methods.<sup>44</sup> If indeed Backpage’s moderation practices are the gold standard, it would be useful for lawmakers to better understand those practices and whether they should be adopted or incentivized more broadly.<sup>45</sup>

Requests Two and Three ask for more specific information about Backpage’s review practices for advertisements and accounts. In Request Two, the Subcommittee seeks documents concerning an advertising moderation method described by Ms. McDougall in her interview with Subcommittee staff. Ms. McDougall stated that Backpage maintains a “black list” of more than 95,000 items, including emails, IP addresses, and specific words. Further, Ms. McDougall describes Backpage’s automated filter designed “to preclude ads with suspect words, phrases, codes and data.”<sup>46</sup> Again, these are procedures and methods that Backpage itself highlights as an

---

<sup>42</sup> Letter from Backpage to PSI at 7 (Oct. 23, 2015).

<sup>43</sup> Liz McDougall, SEATTLE TIMES, *Backpage.com is an Ally in the Fight Against Human Trafficking*, May 6, 2012. <http://www.seattletimes.com/opinion/backpagecom-is-an-ally-in-the-fight-against-human-trafficking/>.

<sup>44</sup> BP-PSI-000016 (“A key to disrupting and eventually ending human trafficking via the World Wide Web is therefore an online service provider community—of business including Backpage.com—that aggressively monitor for and trace potential trafficking cases and promptly report to and cooperate with frontline law enforcement. As stated, Backpage.com leads the industry in these measures.”).

<sup>45</sup> Backpage’s submission asserts that it “does not maintain policies or procedures regarding its moderation process.” Letter from Backpage to PSI at 2 (Oct. 23, 2015). It is not clear to us whether that is also an assertion that Backpage has no responsive documents in its possession. We have reason to believe otherwise: In her interview with Subcommittee staff, Ms. McDougall explained that Backpage previously did have a written moderation policy, but has since abolished it in favor of hands-on apprenticeship-style training of its moderators. Another witness interviewed by the Subcommittee has also confirmed that documents containing moderation guidelines did once exist at Backpage.

<sup>46</sup> BP-PSI-000016.

effective tool to combat trafficking that the Subcommittee seeks to understand. Request Three seeks documents about how Backpage reviews, verifies, blocks, deletes, disables, or flags user accounts—but specifically reminds Backpage not to produce information that could identify specific users. All this information will enable Congress to assess how effectively it has “encourag[ed] service providers to self-regulate” as Congress intended in the CDA. *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

3. Finally, Backpage leaves completely unexplained its assertion that Requests One, Two, and Three (but evidently no other Requests to which it objects) are “overbroad.” Nowhere else in its submission does Backpage supply any argument relating to the breadth of the subpoena. It does not identify the burden imposed by the Requests or explain what information would be captured by them that would raise special problems. In any event, the Requests are not overbroad. They are targeted at information concerning practices at the core of the Subcommittee’s investigation.

### B. Request Five.

Request Five concerns documents about Backpage’s policies regarding data retention, metadata removal or retention, and hashing of images<sup>47</sup> in the adult section.<sup>48</sup> Backpage’s objection to the pertinence of this Request has no merit. In fact, Ms. McDougall’s 2012 testimony details its value. In a section titled “Backpage.com’s Combat of Online Trafficking,” Ms. McDougall stated, “When traffickers use the Internet, especially in a financial transaction, they leave forensic footprints that create unprecedented tools and evidence that law enforcement can use to locate and rescue victims of exploitation and to investigate, arrest and convict pimps and their criminal networks.”<sup>49</sup> “Forensic footprints” described by Ms. McDougall in her testimony include metadata<sup>50</sup> and image hashing technology that law enforcement and investigators use to conduct investigations into sex trafficking. The retention of that data is also vital to those efforts. As companies make decisions to purge data, those forensic footprints vanish—often along with law enforcement’s ability to find new leads. The details of Backpage’s efforts to maintain, archive, and otherwise limit access to this valuable data are relevant to this inquiry. It will enable the Subcommittee to understand whether existing retention policies are adequate for law enforcement needs.

---

<sup>47</sup> Image hashing refers to reducing an image file to a numeric value, which serves as a unique fingerprint for each photo. This technique permits one to search for identical photos in other places, including on different web pages.

<sup>48</sup> Subpoena, Schedule A (Oct. 1, 2015).

<sup>49</sup> BP-PSI-000016.

<sup>50</sup> Metadata summarizes basic information about data, which can make finding and working with particular instances of data easier. For example, *author*, *date created*, *date modified*, and *file size* are examples of very basic document metadata.

### C. Request Eight.

Request Eight seeks information about Backpage's annual revenue and profit over the last five years. In particular, the request calls for information that will identify what proportion of Backpage's annual revenue and profit derives solely from advertisements in its "adult" section. This information is important to the Subcommittee's ability to assess the impact on the profitability of online advertising sites on voluntary anti-trafficking measures, and to evaluate the resources available to commit to other potential efforts. When considering changes to any regulatory system, it is a basic task of any legislative or regulatory body to assess the compliance costs, and available resources, of the regulated industry. The requested information will also enable Congress to assess the financial incentives for effective private efforts against human trafficking on the Internet.

### IV. Backpage Has Not Timely Produced Documents In Connection With Other Requests To Which It Has Not Objected.

Backpage has lodged no specific objection to Requests Four, Six, or Seven. But neither has it produced any documents, sought an extension of its time to do so, or certified that it has no responsive materials. To the contrary, Backpage suggests it may produce some materials responsive to these requests on an unknown future date.

Request Four seeks documents concerning "human trafficking, sex trafficking, human smuggling, prostitution, or the facilitation or investigation thereof, including but not limited to policies, criteria, manuals, procedures, memoranda, instructions, guidelines, and communications." Backpage has announced it will produce to the Subcommittee certain documents responsive to Request Four: "its many records regarding its cooperation with law enforcement, including responses to subpoenas, testimony provided by Backpage.com personnel, voluntary investigations by Backpage.com, and communication with law enforcement commending Backpage.com for its work and support combatting human trafficking."<sup>51</sup> But Request Four encompasses more than these records. It requires the production of *all* documents concerning the enumerated illegal activities, not just those Backpage selects. Accordingly, the Subcommittee expects Backpage to produce all responsive materials.

Requests Six and Seven seek basic statistical data about the number of advertisements posted, blocked, and reported to law enforcement over the past three years. Backpage has not asserted that it has no documents responsive to these requests; instead, it represents that it does not routinely maintain records of this information.<sup>52</sup>

---

<sup>51</sup> Letter from Backpage to PSI at 7 (Oct. 23, 2015).

<sup>52</sup> We have reason to doubt that Backpage lacks documents responsive to this request. Backpage has made several public and private statements about the volume of advertisements on its website. In an interview with Subcommittee staff, for example, McDougall stated that only 12% of the advertisements placed on the site were placed in the adult section. And while Backpage claims it does "not routinely maintain ad volume information as requested by the Subcommittee," it was able to state that ad volume has recently increased. In any event, given that advertisements in



Because Backpage's submission did not articulate any specific objections to Requests Four, Six, or Seven, we do not understand the company to be asserting any basis for withholding those documents. If, however, Backpage is relying on general objections to withhold documents responsive to these requests, then those objections are overruled for the reasons stated above. In either case, Backpage must produce documents responsive to these requests by November 12, 2015, at 10 a.m.

### CONCLUSION

On behalf of the Subcommittee, we overrule each of your objections to the October 1 subpoena. We understand those objections to apply only to Requests One, Two, Three, Five, and Eight. You are ordered and directed to produce all documents responsive to each of the subpoena's eight requests by November 12, 2015, at 10:00 a.m., in accordance with the instructions attached to the subpoena.

Your personal appearance is further continued until November 19, 2015, at 10:00 a.m., at 342 Dirksen Senate Office Building. We strongly caution you that further noncompliance may be treated as contempt of the Subcommittee's subpoena and may subject you to civil enforcement or criminal penalties.

Sincerely,



Rob Portman  
Chairman  
Permanent Subcommittee on Investigations



Claire McCaskill  
Ranking Member  
Permanent Subcommittee on Investigations

---

Backpage's adult section are a significant source of its revenue, we think it unlikely that Backpage does not regularly maintain some documents about advertising volume.



MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

# Exhibit K

# Akin Gump

STRAUSS HAUER & FELD LLP

STEVEN R. ROSS  
202.887.4343/fax: 202.887.4288  
sross@akingump.com

November 13, 2015

## VIA HAND DELIVERY

The Honorable Rob Portman, Chairman  
The Honorable Claire McCaskill, Ranking Member  
Permanent Subcommittee on Investigations  
Committee on Homeland Security & Governmental Affairs  
United States Senate  
Russell Senate Office Building, SR-199  
Washington, DC 20510

*Re: October 1, 2015 Subpoena Issued to Backpage.com*

Dear Chairman Portman and Ranking Member McCaskill:

On behalf of Backpage.com, LLC (“Backpage.com”), we write in further regard to the subpoena for documents issued by the Permanent Subcommittee on Investigations (the “Subcommittee”) on October 1, 2015 (the “Subpoena”).

As outlined in our October 23, 2015 letter, and notwithstanding the Subcommittee’s letter of November 3, 2015, Backpage.com continues to object to the Subpoena on the basis that its requests violate the First Amendment, are overbroad, and/or are not pertinent to a proper legislative inquiry by the Subcommittee. Nonetheless, and as discussed with Subcommittee staff, Backpage.com is willing to provide certain additional documents and information to the Subcommittee as a gesture of good faith.

Notwithstanding that, as you know, Backpage.com is in the midst of other legal challenges, the company has been working diligently to try to compile information and documents responsive to your Subpoena. To that end, today’s submission contains additional documents identified by Backpage.com as responsive to the Subpoena. Certain documents have been withheld on the basis of attorney-client and/or attorney work product privilege, and certain documents within the submission contain redactions on that same basis. Please note that although the Subpoena identifies “Adult Sections” to include the Massage category of the website, Backpage.com does not include Massage as a subset of its Adult category; as such, documents and information contained in this submission may not pertain to the “Adult Sections” as defined in the Subpoena.

November 13, 2015  
Page 2

For purposes of identification and reference, these documents have been numbered from BP-PSI-000069 to BP-PSI-016838. Specifically, the documents being provided are as follows:

In response to Subpoena Request One, Backpage.com has provided the following: screen shots of the moderation team's computer interface that display certain moderation guidelines (BP-PSI-000069 – BP-PSI-000071 and BP-PSI-000073); a previously-used list of moderation guidelines (BP-PSI-000072); documents regarding the moderation process discussions with SSP Blue in 2011 (BP-PSI-000074 – BP-PSI-000081); a sample moderation log (BP-PSI-016831 – BP-PSI-016838); and a list of banned terms used by Backpage.com moderators in the manual review process (BP-PSI-000082).<sup>1</sup>

In response to Subpoena Request Two, Backpage.com has provided the following: screen shots of user error screens (BP-PSI-000083 – BP-PSI-000104). In addition, Backpage.com intends to supplement this submission next week with a list of terms used in the filtering process.

In response to Subpoena Request Three, Backpage.com refers the Subcommittee to the documents provided in response to Subpoena Request One.

In response to Subpoena Request Four, Backpage.com has provided the following: correspondence with Cook County, Illinois Sheriff Thomas J. Dart in 2011 (BP-PSI-000105 – BP-PSI-000112); presentations and guides created to assist law enforcement officials (BP-PSI-000113 – BP-PSI-000163 and BP-PSI-000409 – BP-PSI-000463); correspondence with law enforcement entities regarding potential human trafficking or similar potentially illegal activity (BP-PSI-000164 – BP-PSI-000408); and other records pertaining to Backpage.com's cooperation with law enforcement subpoenas (BP-PSI-000473 – BP-PSI-016830). Given the volume of these documents, Backpage.com continues to process these files for the electronic production to the Subcommittee, and expects to complete this portion of its submission shortly.

In response to Subpoena Request Five, Backpage.com does not maintain formal written retention policies. At this time, we are unaware of non-privileged documents responsive to the remainder of the request, and will follow-up with the Subcommittee if such documents are discovered.

---

<sup>1</sup> As noted in our letter of October 23, 2015, Backpage.com does not maintain policies or procedures regarding its moderation process.

November 13, 2015  
 Page 3

In response to Subpoena Request Six, as explained in our October 23, 2015 letter, Backpage.com does not routinely maintain advertisement volume information as requested by the Subcommittee. In an effort to provide the Subcommittee with information relevant to this request, however, Backpage.com has compiled the following information:

- In response to Request Six Subparts A and B, Backpage.com reports the following advertisement volumes:

|                 | All       | Adult Section | Non-Adult Section |
|-----------------|-----------|---------------|-------------------|
| January, 2013   | 1,876,045 | 169,508       | 1,706,537         |
| February, 2013  | 1,600,261 | 139,703       | 1,460,558         |
| March, 2013     | 1,847,002 | 163,222       | 1,683,780         |
| April, 2013     | 1,748,318 | 164,055       | 1,584,263         |
| May, 2013       | 1,706,100 | 169,335       | 1,536,765         |
| June, 2013      | 1,605,029 | 169,266       | 1,435,763         |
| July, 2013      | 1,530,333 | 174,047       | 1,356,286         |
| August, 2013    | 1,259,296 | 170,644       | 1,088,652         |
| September, 2013 | 1,270,105 | 158,373       | 1,111,732         |
| October, 2013   | 1,537,488 | 164,570       | 1,372,918         |
| November, 2013  | 1,717,038 | 154,585       | 1,562,453         |
| December, 2013  | 2,324,225 | 156,102       | 2,168,123         |
| January, 2014   | 2,018,720 | 154,975       | 1,863,745         |
| February, 2014  | 1,684,353 | 128,270       | 1,556,083         |
| March, 2014     | 1,793,397 | 156,032       | 1,637,365         |
| April, 2014     | 1,614,980 | 162,109       | 1,452,871         |
| May, 2014       | 1,341,548 | 176,172       | 1,165,376         |
| June, 2014      | 1,113,937 | 177,013       | 936,924           |
| July, 2014      | 1,121,579 | 188,859       | 932,720           |
| August, 2014    | 1,040,015 | 190,424       | 849,591           |
| September, 2014 | 1,080,722 | 182,438       | 898,284           |
| October, 2014   | 1,091,408 | 192,915       | 898,493           |
| November, 2014  | 1,009,889 | 183,951       | 825,938           |
| December, 2014  | 946,859   | 193,192       | 753,667           |
| January, 2015   | 1,034,848 | 205,370       | 829,478           |
| February, 2015  | 900,586   | 161,313       | 739,273           |
| March, 2015     | 1,019,451 | 196,061       | 823,390           |
| April, 2015     | 726,397   | 203,059       | 523,338           |
| May, 2015       | 648,519   | 207,422       | 441,097           |
| June, 2015      | 637,683   | 206,842       | 430,841           |
| July, 2015      | 1,487,639 | 1,017,990     | 469,649           |
| August, 2015    | 1,910,150 | 1,289,517     | 620,633           |
| September, 2015 | 2,564,313 | 1,884,697     | 679,616           |
| October, 2015   | 2,811,871 | 2,100,602     | 711,269           |

November 13, 2015  
Page 4

- In response to Request Six Subpart C, Backpage.com has made the following number of reports to the National Center for Missing & Exploited Children “NCMEC”):

|                |     |
|----------------|-----|
| October 2012   | 778 |
| November 2012  | 711 |
| December 2012  | 789 |
| January 2013   | 723 |
| February 2013  | 645 |
| March 2013     | 767 |
| April 2013     | 824 |
| May 2013       | 958 |
| June 2013      | 808 |
| July 2013      | 807 |
| August 2013    | 847 |
| September 2013 | 700 |
| October 2013   | 542 |
| November 2013  | 512 |
| December 2013  | 592 |
| January 2014   | 530 |
| February 2014  | 422 |
| March 2014     | 458 |
| April 2014     | 475 |
| May 2014       | 455 |
| June 2014      | 475 |
| July 2014      | 473 |
| August 2014    | 471 |
| September 2014 | 372 |
| October 2014   | 445 |
| November 2014  | 396 |
| December 2014  | 318 |
| January 2015   | 327 |
| February 2015  | 318 |
| March 2015     | 306 |
| April 2015     | 413 |
| May 2015       | 417 |



November 13, 2015  
Page 5

|                |     |
|----------------|-----|
| June 2015      | 509 |
| July 2015      | 540 |
| August 2015    | 155 |
| September 2015 | 185 |

With respect to law enforcement entities other than NCMEC, Backpage.com has included correspondence with these law enforcement entities regarding potentially illegal conduct (BP-PSI-000464 – BP-PSI-000472).

In response to Subpoena Request Seven, as explained in our October 23, 2015 letter, Backpage.com does not routinely maintain the statistical information requested by the Subcommittee. In an effort to provide the Subcommittee with information relevant to this request, however, Backpage.com has used a reporting tool to estimate the number of advertisements deleted through Tier One review. Based upon that tool and available data, Backpage.com estimates that from October 23, 2012 through October 23, 2015, more than 1,040,661 advertisements were deleted through Tier One review. With respect to Tier Two review, based upon the data and tools available, Backpage.com estimates that from January 1, 2015 to June 30, 2015, approximately 557,763 advertisements were deleted.

As discussed with Subcommittee staff, documents included in this submission contain sensitive information regarding victims and/or potential victims of crime and confidential law enforcement tactics used to investigate and/or prosecute criminal activity. These documents have been specifically marked as “Law Enforcement Sensitive.” To preserve the privacy of victims and/or potential victims of crime, and to preserve the efficacy of law enforcement strategies and tactics, Backpage.com expressly requests these documents and information be kept strictly confidential by the Subcommittee and its staff. In addition, please note that this submission contains documents that are confidential and proprietary in nature, and have been marked as such. As also discussed with Subcommittee staff, Backpage.com expressly requests that this information be kept confidential by the Subcommittee and its staff. In addition, I ask that Subcommittee staff provide me with notice and an opportunity to be heard before it nonetheless discloses any such information or documents to any third parties.

Finally, while Backpage.com has agreed to provide particular documents in response to some of the Subpoena’s requests, Backpage.com does not waive and expressly reaffirms its First Amendment and pertinence objections as to all requested documents and information. The production of this information is not intended, and should not be taken, as a waiver of these or any other privilege that might be asserted in any other forum or proceeding. The objections

**Akin Gump**  
STRAUSS HAUER & FELD LLP

November 13, 2015  
Page 6

outlined in our October 23, 2015 letter, as well as our earlier letters, are specifically asserted as a basis for not producing documents or information called for by the Subpoena

Sincerely,

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

Steven R. Ross  
Stanley M. Brand  
Akin Gump Strauss Hauer & Feld  
Counsel for Backpage.com, LLC

Robert Corn-Revere  
Davis Wright Tremaine, LLP  
Counsel for Backpage.com, LLC

Encl.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

# Exhibit L

# Akin Gump

STRAUSS HAUER & FELD LLP

STEVEN R. ROSS  
202.887.4343/fax: 202.887.4288  
sross@akingump.com

November 16, 2015

## VIA ELECTRONIC DELIVERY

The Honorable Rob Portman, Chairman  
The Honorable Claire McCaskill, Ranking Member  
Permanent Subcommittee on Investigations  
Committee on Homeland Security & Governmental Affairs  
United States Senate  
Russell Senate Office Building, SR-199  
Washington, DC 20510

*Re: October 1, 2015 Subpoena Issued to Backpage.com*

Dear Chairman Portman and Ranking Member McCaskill:

On behalf of Backpage.com, LLC (“Backpage.com”), we write in further regard to the subpoena for documents issued by the Permanent Subcommittee on Investigations (the “Subcommittee”) on October 1, 2015 (the “Subpoena”), and specifically in response to an email from Subcommittee Chief Counsel Matt Owen on November 14, 2015.

While our sense of the conversation I had on November 13, 2015 with Subcommittee staff differs from Mr. Owen’s email description—a matter I sought to clarify both during that conversation and again in writing shortly thereafter in an email to Subcommittee staff—Backpage.com continues to object to the Subcommittee’s efforts to compel production of an alarmingly vast amount of documents and information regarding the First Amendment protected activities of Backpage.com and those individuals who engage in First Amendment protected activities on its internet platform. As clearly outlined in our numerous letters to the Subcommittee, Backpage.com’s objections are based on the overbreadth of the demands, the lack of pertinence to any constitutionally valid legislative purpose, the burden of compliance with the Subcommittee’s demands, as well as Backpage.com’s core First Amendment objections.

Notwithstanding these objections, in its continuing effort to be of assistance to the Senate—just as it has assisted law enforcement efforts directed at the scourge of human trafficking—Backpage.com has provided the Subcommittee with extensive information regarding its endeavors to assist in efforts to combat human trafficking. First, Backpage.com’s general counsel provided a lengthy briefing to Subcommittee staff in June 2015, and the

November 16, 2015  
Page 2

company has since submitted more than 16,000 pages of documents and information compiled by the company relating to the Subcommittee's requests for information. As I stated in my phone call with Subcommittee staff on November 13, 2015, the only request to which the company has declined to provide *any* information is Request Eight, which seeks extensive revenue and profit information regarding Backpage.com's business.

As counsel for Backpage.com, we have not represented, and do not now represent, that the company's submissions of information and documents to date constitute either the fruits of a complete search of every bit of data possessed by Backpage.com or by all of its employees over the full (nearly six year) time period covered by the Subpoena. Indeed, to be required to conduct such a search and review in light of the significant overbreadth and First Amendment infirmities of the Subpoena would in itself be constitutionally inappropriate.

Rather, the November 13, 2015 submission, as explained in the accompanying cover letter, was made because Backpage.com was "willing to provide certain additional documents and information to the Subcommittee as a gesture of good faith." In its effort to be helpful to the stated purpose of the Subcommittee's inquiry, Backpage.com did compile and, in some instances, did collect information and documents from the employees most likely to have the relevant information and documents. Backpage.com strove to include the documents most relevant to the Subcommittee's professed inquiry concerning potential legislation regarding human trafficking, and the company undertook significant efforts to collect over five million pages of documents specifically responsive to the Subpoena's document request regarding suspected human trafficking or other illegal activities and the investigation of such activities. In his November 14, 2015 email, Mr. Owen instructed us to suspend the production of these documents.

In addition to Backpage.com's clearly and consistently stated constitutional objections to the Subpoena, our recent communications with the Subcommittee and its staff continue to raise concerns regarding the actual purpose and intent of the Subcommittee's inquiry.

It is in light of these concerns and of the ongoing dispute over documents that Subcommittee staff informed us on November 13, 2015 that the Subcommittee has published notice of a public hearing to be held on November 19, 2015 and commanded the personal appearance of Carl Ferrer, Backpage.com's Chief Executive Officer. Respectfully, Mr. Ferrer will decline to provide testimony on the First Amendment and related constitutional grounds outlined in this and our prior letters, as well as his Fifth Amendment rights. Accordingly, we ask that his personal appearance—which would necessitate Mr. Ferrer's international travel solely for the assertion of his constitutional rights—be waived by the Subcommittee. If the Subcommittee insists upon a personal appearance by Mr. Ferrer, we would ask that it be scheduled following November 22, 2015 to accommodate Mr. Ferrer's schedule.



**Akin Gump**  
STRAUSS HAUER & FELD LLP

November 16, 2015  
Page 3

As we have said in our past correspondence, the concerns we raise with regard to the First Amendment implications of the Subcommittee's investigation of an entity engaged in speech and publication activities are far from trivial. The legal seriousness of these concerns is evidenced by the quashing of one subpoena, which sought similar information, by one federal district court, and, in a separate matter, by the issuance of an injunction earlier today by the Federal Court of Appeals for the Seventh Circuit.

In its very language, the First Amendment constitutes a textual limitation on the authority of Congress. It is therefore uniquely the case that a determination of the limits imposed by the First Amendment on the actions of a congressional subcommittee should be made not by that subcommittee itself, but by the judicial branch which bears the responsibility of interpreting the First Amendment in a manner to protect the rights of citizens. While we had hoped that Backpage.com's significant production of information and documents would have satisfied any legitimate need for information regarding human trafficking, our recent communications with the Subcommittee belie that hope. Therefore, we repeat our suggestion that if the Subcommittee seeks additional documents and information from Backpage.com, Subcommittee counsel and Backpage.com's counsel should next discuss the presentation of this issue to the courts for resolution. As we have stated before, a civil statutory mechanism exists for the Subcommittee to present the constitutional issues for judicial determination, and Backpage.com would abide by a final judicial determination of these constitutional questions.

Thank you for your consideration.

Sincerely,



Steven R. Ross  
Stanley M. Brand  
Akin Gump Strauss Hauer & Feld  
Counsel for Backpage.com, LLC

Robert Corn-Revere  
Davis Wright Tremaine, LLP  
Counsel for Backpage.com, LLC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

# Exhibit M

# Akin Gump

STRAUSS HAUER & FELD LLP

STEVEN R. ROSS  
202.887.4343/fax: 202.887.4288  
sross@akingump.com

November 18, 2015

## VIA ELECTRONIC DELIVERY

The Honorable Rob Portman, Chairman  
The Honorable Claire McCaskill, Ranking Member  
Permanent Subcommittee on Investigations  
Committee on Homeland Security & Governmental Affairs  
United States Senate  
Russell Senate Office Building, SR-199  
Washington, DC 20510

*Re: October 1, 2015 Subpoena Issued to Backpage.com*

Dear Chairman Portman and Ranking Member McCaskill:

On behalf of Backpage.com, LLC (“Backpage.com”), we write in further regard to the subpoena for documents issued by the Permanent Subcommittee on Investigations (the “Subcommittee”) on October 1, 2015 (the “Subpoena”), and specifically in response to emails from Subcommittee Chief Counsel Matt Owen on November 16 and 17, 2015.

On Friday, November 13, 2015, Subcommittee staff informed us by email that a *public* hearing would be held on November 19, 2015 and that Backpage.com’s Chief Executive Officer, Carl Ferrer, “should plan to appear.” By letter on November 16, 2015 to the Subcommittee, we (as counsel to Backpage.com) formally repeated Backpage.com’s request Mr. Ferrer’s personal appearance be waived or continued, on the basis that Mr. Ferrer will decline to provide testimony on the First Amendment and related constitutional grounds, as well as on the basis of his Fifth Amendment rights. By email sent Monday evening, Mr. Owen denied our request.

Again, we write today to confirm that Mr. Ferrer will, on the basis of his constitutional rights, decline to answer any and all questions posed the Subcommittee. As explained further below, we believe it is inappropriate for the Subcommittee to require Mr. Ferrer’s personal appearance. As we have also previously informed the Subcommittee, Mr. Ferrer is presently out of the country for business. He will not be in Washington, D.C. on November 19, 2015.

To be clear, Mr. Ferrer has never agreed to appear before the Subcommittee on November 19, 2015. As we explained in our November 16, 2015 letter, Mr. Ferrer is on

November 18, 2015  
Page 2

important international business travel, and does not return until November 22, 2015. We note that these travel plans were made well before the Subcommittee decided—without any attempt to consult Mr. Ferrer regarding his availability—commanded his personal appearance on November 19, 2015 regarding the Subpoena.<sup>1</sup> Multiple times since, we requested Subcommittee staff to continue the personal appearance date, both by email and in discussion. Subcommittee staff indicated that they would only entertain such a request once Backpage.com provided documents in response to the Subpoena. As the Subcommittee is aware, Backpage.com has now voluntarily produced more than 16,000 pages responsive to the Subpoena's requests. It also collected more than five million additional pages of documents directly related to human trafficking before the Subcommittee staff instructed Backpage.com to cease production.

Notwithstanding the foregoing, if the Subcommittee—in a departure that echoes the ignominious approach of an earlier era of Senate inquiries—elects to engage in the unnecessary exercise of requiring a private citizen to attend a public hearing to assert his constitutional rights, Mr. Ferrer will do so after his return to the United States this weekend. Indeed, we are presently able to obtain and convey Mr. Ferrer's agreement to a specific future date on which he will personally appear before the Subcommittee.

Backpage.com is well aware that its business, particularly the advertisements posted by users in its Adult section, is unpopular with some audiences. Because some do not approve of the content of the speech that occurs on Backpage.com's internet platform, multiple branches of the government have attempted and still continue to attempt to disrupt its business. But protected speech is protected speech. Therefore, to protect the First Amendment, the courts—most recently the U.S. Court of Appeals for the Seventh Circuit—have enjoined inappropriate attempts to use the government's authority to disrupt Backpage.com's internet speech-based business, and the judicial branch has quashed subpoenas that were, like this Subcommittee's subpoena, overly broad and intrusive. Thus, the Subcommittee's investigation of Backpage.com must be viewed in the context of concerted government actions to shut the company down, particularly when there have been efforts by some in the Senate to collaborate or coordinate with those other government entities engaged in these targeted and non-legislative matters.

Despite the disapproval of some in the government, however, the fact remains that both Backpage.com and Mr. Ferrer are engaged in the business of speech. This business is specifically protected by the limits specifically imposed upon Congress by the First Amendment to the U.S. Constitution, and we believe the Subcommittee's investigation is outside of these

---

<sup>1</sup> We note that the Subpoena itself contemplates that the personal appearance be waived upon the production of documents.

November 18, 2015  
Page 3

constitutional bounds. Throughout this inquiry, we have attempted to raise these concerns with the Subcommittee respectfully, consistently, and in the manner requested by Subcommittee staff.

While the Subcommittee has itself rejected Backpage.com's constitutional objections to the Subpoena, we believe the appropriate arbiter of such a dispute is the federal judiciary. Over the past months, we have suggested to Subcommittee staff that we pursue such a course. Indeed, we would welcome a proper judicial review of whether or not the Subcommittee's inquiry is within proper constitutional bounds. If the Subcommittee would like to pursue a civil contempt against Backpage.com—an action which would provide an opportunity for judicial review of the Subpoena—a sufficient foundation has already been established through our writings, and through Backpage.com's objections to the Subpoena's requests.<sup>2</sup>

Accordingly, the Subcommittee need not conduct a public spectacle attempting to shame Mr. Ferrer in order to advance this matter. Indeed, requiring his appearance on November 19, 2015 would be a further denigration of his rights, and an action unbecoming of the Subcommittee and its recent history of conducting fair and serious investigations.<sup>3</sup> Given the existing record, and given that the Subcommittee has received written notice that Mr. Ferrer will decline to testify before the Subcommittee on the basis of his constitutional rights, we believe there is no legitimate reason to compel his appearance.

Thank you for your consideration.

---

<sup>2</sup> We have further indicated to the Subcommittee that Backpage.com will comply with any production or disclosure requirements found in a final judicial decision to be constitutionally proper.

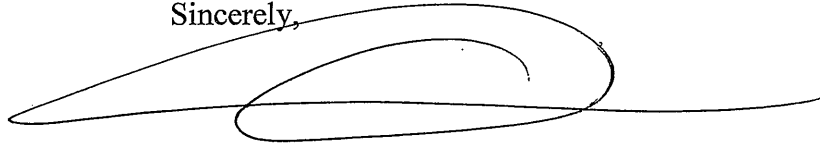
<sup>3</sup> In Opinion 31, the Rules Review Committee of the District of Columbia Bar has stated that a congressional staff attorney violates ethical rules where he or she knows that summoning a witness to appear (1) will provide no information to the committee and (2) is intended merely to degrade a witness. *See* D.C. Bar Ethics Opinion 31 (1977). According to this opinion, a lawyer violates the D.C. Rules of Professional Conduct if he or she summons a witness to appear when "it is known in advance that no information will be obtained and the sole effect of the summons will be to pillory the witness." *Id.* In 2011, in Ethics Opinion 358, the D.C. Rules Review Committee rejected a request to vacate Opinion 31, holding that the Rules of Professional Conduct are violated "if there is no substantial purpose in calling a witness other than embarrassment, burden, or delay." D.C. Bar Ethics Opinion 358 (2011).



**Akin Gump**  
STRAUSS HAUER & FELD LLP

November 18, 2015  
Page 4

Sincerely,

A handwritten signature in black ink, consisting of a large, sweeping loop that starts on the left, goes up and over, then down and under, ending with a long horizontal line extending to the right.

Steven R. Ross  
Stanley M. Brand  
Akin Gump Strauss Hauer & Feld  
Counsel for Backpage.com, LLC

Robert Corn-Revere  
Davis Wright Tremaine, LLP  
Counsel for Backpage.com, LLC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF  
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

# Exhibit N

JOHN MCCAIN, ARIZONA  
 ROB PORTMAN, OHIO  
 RAND PAUL, KENTUCKY  
 JAMES LANKFORD, OKLAHOMA  
 MICHAEL B. ENZI, WYOMING  
 KELLY AYOTTE, NEW HAMPSHIRE  
 JONI ERNST, IOWA  
 BEN SASSE, NEBRASKA

THOMAS R. CARPER, DELAWARE  
 CLAIRE McCASKILL, MISSOURI  
 JON TESTER, MONTANA  
 TAMMY BALDWIN, WISCONSIN  
 HEIDI HEITKAMP, NORTH DAKOTA  
 CORY A. BOOKER, NEW JERSEY  
 GARY C. PETERS, MICHIGAN

## United States Senate

COMMITTEE ON  
 HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR  
 GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

November 18, 2015

### VIA ELECTRONIC MAIL

Mr. Steven R. Ross  
 Akin, Gump, Strauss, Hauer & Feld LLP  
 1333 New Hampshire Avenue, N.W.  
 Washington, D.C. 20036

Dear Mr. Ross:

We write in response to your November 18, 2015, letter informing us that Mr. Ferrer will not appear before the Subcommittee tomorrow, November 19, 2015, despite being under subpoena to do so. Your letter offers two separate reasons why Mr. Ferrer will likely not appear. As explained below, neither reason is sufficient.

*First*, according to your letter, Mr. Ferrer is presently out of the country for business and will not return until November 22.<sup>1</sup> At this late date, that is not an adequate excuse. Mr. Ferrer has been subject to a subpoena requiring his personal appearance since October 1,<sup>2</sup> and on notice of the time and place of his appearance since November 3. As you will recall, on October 15, you informed Subcommittee staff that you would file objections to the subpoena by the return date, October 23. For that reason, on October 20, we continued Mr. Ferrer's personal appearance "to a date to be determined later to permit the Subcommittee to consider any objection [he] wish[ed] to submit."<sup>3</sup> We considered those objections and overruled them on November 3 by a letter order addressed to Mr. Ferrer.<sup>4</sup> That order further continued Mr. Ferrer's appearance "until November 19, 2015, at 10:00 a.m., at 342 Dirksen Senate Office Building," the Subcommittee's hearing room.<sup>5</sup>

That same day, Subcommittee staff spoke with you and Ms. Greer by phone. During that phone call, Subcommittee staff called your attention to Mr. Ferrer's appearance date and informed you that he should make travel arrangements to appear before the Subcommittee on that date. Subcommittee staff expressly cautioned that it would not accept logistical impediments as an excuse for Mr. Ferrer not to appear. Despite that, and despite extensive communications between you and Subcommittee staff in the interim, Mr. Ferrer only suggested today—the day before the hearing—that he would refuse to appear regardless of whether the Subcommittee continued his appearance.

<sup>1</sup> See Letter from Steven R. Ross to Permanent Subcommittee on Investigations, at 1-2 (Nov. 18, 2015).

<sup>2</sup> Subpoena, Oct. 1, 2015.

<sup>3</sup> Letter from Permanent Subcommittee on Investigations to Carl Ferrer, at 1 (Oct. 20, 2015).

<sup>4</sup> Letter from Permanent Subcommittee on Investigations to Carl Ferrer, at 19 (Nov. 3, 2015).

<sup>5</sup> *Id.* at 19.

Last Friday, November 13, in a letter to us, you explained that the company and Mr. Ferrer continued to object to the October 1 subpoena on First Amendment grounds. In that letter, you said nothing about any planned international travel by Mr. Ferrer or any other logistical impediment to his appearance. In fact, you first mentioned that travel on Monday, November 16—two days ago. Even then, you did not say that Mr. Ferrer’s travel plans would prevent his appearance; instead you simply “ask[ed] that his personal appearance—which would necessitate Mr. Ferrer’s international travel solely for the assertion of his constitutional rights—be waived by the Subcommittee.”<sup>6</sup> The Subcommittee denied that request within hours, acting promptly because of the urgent nature of the request. The next day, November 17, the Subcommittee asked you to confirm that Mr. Ferrer would appear for the hearing.

In short, Mr. Ferrer has received more than adequate notice that his appearance is legally required tomorrow. If Mr. Ferrer scheduled his travel prior to November 3—the date on which he received notice that he was required to appear on November 19—he had an obligation to inform the Subcommittee as soon as possible. If Mr. Ferrer scheduled his travel after November 3, he did so despite knowing that he was required to appear on November 19.

*Second*, you contend that, because it is your understanding that Mr. Ferrer will invoke his Fifth Amendment rights if questioned by the Subcommittee, it is inappropriate to require his appearance.<sup>7</sup> That is not so. As you know, this Subcommittee is not a criminal tribunal, and a witness before the Subcommittee is not a criminal defendant. The witness has no right to avoid questioning before the Subcommittee. It is proper and consistent with the practice of the Senate to require a witness to appear, hear the questions put to him, and then invoke his Fifth Amendment right to not answer if he has a good-faith belief that the answer will tend to incriminate him—a judgment that depends upon the question asked. In addition, witnesses may choose to answer questions despite their lawyers’ previous representation that they will not, or even their own previous intention not to do so. For those reasons, we decline to continue Mr. Ferrer’s November 19 appearance. If he validly invokes the Fifth Amendment in response to specific questions, however, the Subcommittee will respect his privilege to do so.

In short, we deny your client’s untimely request for a further continuance. We strongly caution Mr. Ferrer that failure to abide by his obligation to appear before the Subcommittee tomorrow may subject him to criminal penalties for contempt.

Sincerely,



Rob Portman  
Chairman  
Permanent Subcommittee on Investigations



Claire McCaskill  
Ranking Member  
Permanent Subcommittee on Investigations

<sup>6</sup> *Id.*

<sup>7</sup> Letter from Steven R. Ross to Permanent Subcommittee on Investigations, at 2 (Nov. 18, 2015).