

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATE PERMANENT SUBCOMMITTEE ON
INVESTIGATIONS,

The United States Senate
Washington, D.C. 20510,

Applicant,

v.

CARL FERRER,

Chief Executive Officer
Backpage.com, LLC
2501 Oak Lawn Avenue
Dallas, TX 75219,

Respondent.

Misc. No. _____

**APPLICATION TO ENFORCE SUBPOENA DUCES TECUM OF
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS**

1. The Senate Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs (the “Subcommittee”) applies, pursuant to 28 U.S.C. § 1365, for an order of this Court requiring Carl Ferrer to comply forthwith with a subpoena of the Subcommittee issued to him on October 1, 2015, requiring the production of documents to the Subcommittee. Specifically, the Subcommittee seeks an order that Mr. Ferrer produce all documents responsive to subpoena requests 1, 2, and 3.

JURISDICTION

2. This Court has jurisdiction under 28 U.S.C. § 1365(a).

PARTIES

3. Under Rule XXV.1(k)(1) of the Standing Rules of the Senate, and Senate Resolution 445, 108th Congress (2004), the Committee on Homeland Security and Governmental Affairs is a duly authorized Senate committee. Under Rule 7(A) of the Rules of Procedure for the Committee on Homeland Security and Governmental Affairs, the Permanent Subcommittee on Investigations is a duly authorized subcommittee of the Senate. *See* 161 Cong. Rec. S413 (daily ed. Jan. 22, 2015) (publishing rules of Committee on Homeland Security and Governmental Affairs), *reprinted in* S. Doc. No. 114-6, at 131, 146 (2015).

4. Respondent Carl Ferrer is the Chief Executive Officer of Backpage.com, LLC, an online classified advertisement website.

FACTS

5. Under section 12(e)(1) of Senate Resolution 73, 114th Cong. (2015), the Subcommittee, as a duly authorized subcommittee of the Committee on Homeland Security and Governmental Affairs, is authorized to study or investigate:

(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;

[and]

(G) the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs.

6. Pursuant to Senate Rule XXVI.1 and Senate Resolution 73, 114th Cong., the Subcommittee, or its Chairman, is authorized “to require by subpoena or otherwise the attendance of witnesses and production of correspondence, books, papers, and documents.” S. Res. 73, 114th Cong., § 12(e)(3) (2015), *reprinted in* S. Doc. No. 114-6, at 137 (2015).

7. Under its authority in Senate Rules and Senate Resolution 73, the Subcommittee initiated an investigation of sex trafficking on the Internet.

8. As part of that investigation, and acting pursuant to its rules of procedure, on October 1, 2015, the Subcommittee issued a subpoena duces tecum to Carl Ferrer, Chief Executive Officer of Backpage.com, LLC, requiring Mr. Ferrer to appear for testimony before the Subcommittee and to produce to the Subcommittee eight specified categories of records. Exhibit F (Oct. 1, 2015 Subpoena to Carl Ferrer)¹. The subpoena requested materials about the steps Backpage takes to review advertisements for possible illegal activity (particularly child sex trafficking), Backpage’s interaction with law enforcement, its data retention policies, and its basic corporate structure. The subpoena clarified that the Subcommittee is not seeking, and the subpoena’s requests do not include, personally identifying information of any Backpage user or account holder, and that Backpage.com should redact any such information from documents produced. The subpoena required production of the requested records on October 23, 2015.

¹ All exhibits referenced herein are attached to the Memorandum of Points and Authorities in Support of Application to Enforce Subpoena Duces Tecum of Senate Permanent Subcommittee on Investigations that accompanies this Application.

9. The Subcommittee's subpoena was served on Mr. Ferrer's attorney, who accepted service on Mr. Ferrer's behalf, by e-mail and U.S. mail on October 1, 2015.

10. On October 20, 2015, the Subcommittee continued the date of Mr. Ferrer's testimonial appearance but did not extend the time for him to comply with the document requests in the subpoena. Ex. G (Oct. 20, 2015 Letter).

11. On October 23, 2015, Mr. Ferrer's counsel filed objections to the subpoena's document requests on the grounds that the subpoena is outside the Subcommittee's jurisdiction, intrudes on First Amendment rights, and seeks materials not pertinent to the Subcommittee's investigation. Ex. H (Oct. 23, 2015 Letter). Mr. Ferrer voluntarily produced a limited number of publicly available documents in response to requests 1, 2, and 3 in the subpoena but objected to producing any other documents.²

12. On November 3, 2015, after considering the objections raised by Mr. Ferrer, the Chairman and Ranking Member, on behalf of the Subcommittee, issued a ruling and order that overruled Mr. Ferrer's objections and directed him to produce documents responsive to the subpoena by November 12, 2015 at 10:00 a.m. In addition, the Subcommittee's order continued the personal appearance required by the subpoena to November 19, 2015, at 10:00 a.m. Ex. I (Nov. 3, 2015 Letter Ruling).

13. On November 13, 2015, a day after the date by which Mr. Ferrer was ordered by the Subcommittee to produce documents in compliance with the subpoena, Mr. Ferrer's counsel

² Mr. Ferrer indicated that Backpage would compile certain records regarding its cooperation with law enforcement responsive to request 4 of the subpoena, and would investigate and seek to compile statistical information responsive to requests 6 and 7 regarding the number of advertisements in Backpage's adult sections and the number that were blocked or deleted by Backpage's screening mechanisms. Mr. Ferrer did not produce any documents responsive to requests 5 or 8.

responded to the Subcommittee order. Mr. Ferrer provided the Subcommittee with some additional documents and information in response to the subpoena, including a large cache of documents in response to request 4 of the subpoena, but a limited number responsive to the other requests.³ However, Mr. Ferrer again asserted his general jurisdictional, First Amendment, and pertinence objections as to all of the subpoena's requests, Ex. K (Nov. 13, 2015 Letter), objections that had been overruled in the Subcommittee's November 3, 2015 Letter Ruling. Mr. Ferrer did not assert any objection as to specific documents covered by the Subcommittee's subpoena, nor did Mr. Ferrer provide the Subcommittee with a log identifying the responsive documents being withheld, as required by the subpoena. Indeed, Mr. Ferrer objected even to undertaking a complete search for responsive documents and failed to describe with any particularity the contours of the search that yielded the documents he voluntarily produced.⁴

³ Mr. Ferrer produced approximately 16,800 pages with the November 13 letter. Over 16,300 of those pages consisted of Backpage's responses to law enforcement subpoenas, each response containing numerous repetitive pages of advertisements and photos – including one response of more than 750 pages – relating to a single Backpage user. Mr. Ferrer's counsel explained that the company had over five million additional pages of this material it could produce, but Subcommittee staff informed Mr. Ferrer that Backpage need not collect and submit those pages as the Subcommittee needed no further material of that nature. Mr. Ferrer also produced e-mails received by Backpage from law enforcement officials thanking Backpage employees for responding to police inquiries – material Backpage indicated was responsive to request 4.

In addition, Mr. Ferrer reported statistics responsive to requests 6 and 7 regarding: the total number of monthly advertisements placed on Backpage and the number placed in the adult section of the website; the number of reports made by Backpage each month to the National Center for Missing and Exploited Children; and the number of advertisements deleted through Backpage's screening process.

⁴ In addition, Mr. Ferrer's counsel, in letters of November 16 and 18, 2015, asked that Mr. Ferrer's personal appearance on November 19, 2015, be waived, as counsel indicated that Mr. Ferrer intended to refuse to answer questions based on his Fifth Amendment privilege against self-incrimination and on the same First Amendment grounds that were the subject of his
(continued...)

14. The Subcommittee has determined that production of the withheld documents will materially aid the Subcommittee's investigation and that Mr. Ferrer has no privilege against complying with the Subcommittee's subpoena. To narrow the matters in dispute, and to conserve the resources of the Senate, Backpage, and the Court, the Subcommittee is seeking to enforce only requests 1, 2, and 3 of the subpoena at this time.⁵

15. On February 29, 2016, the Committee on Homeland Security and Governmental Affairs reported to the Senate by a vote of 15-0 a resolution directing the Senate Legal Counsel to initiate these proceedings to enforce the Subcommittee's documentary subpoena to Mr. Ferrer. 162 Cong. Rec. S1085, 1087-88 (daily ed. Feb. 29, 2016).

16. On March 17, 2016, the Senate agreed, by a vote of 96 to 0, to that resolution, Senate Resolution 377, 114th Congress (2016), authorizing the Subcommittee under section 705(b) of the Ethics in Government Act of 1978, 2 U.S.C. § 288d(b), to bring this action under 28 U.S.C. § 1365. 162 Cong. Rec. S1561 (daily ed. Mar. 17, 2016).

⁴(...continued)
objections to producing documents. Exs. L, M. The Subcommittee declined to excuse Mr. Ferrer's appearance. Ex. N (Nov. 18, 2015 letter). Despite not being excused from his duty to appear under the subpoena, and having known of the time and date of his scheduled appearance since November 3, Mr. Ferrer failed to appear at the Subcommittee's hearing on November 19. Mr. Ferrer's defiance of the testimonial aspect of the Subcommittee's subpoena is not the subject of this enforcement action as the Subcommittee has not yet determined how it will proceed regarding Mr. Ferrer's appearance and testimony.

⁵ At the time of this filing, Mr. Ferrer has produced in response to requests 1, 2, and 3 of the subpoena, which are the subject of this enforcement action, a total of 65 pages – 21 pages of which were publicly available documents: the website's Terms of Use, Posting Rules, and User Agreement, and testimony by Backpage's General Counsel before the New York City Council in 2012. *See* Ex. H at 6-7 (Letter of Oct. 23, 2015); Recommendation to Enforce Subpoena Issued to the CEO of Backpage.com, LLC, Staff Report to the Permanent Subcommittee on Investigations, Nov. 19, 2015, at 30-31, *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, 114th Cong., 85-86 (2015).

17. The Subcommittee is seeking expedited consideration of this Application pursuant to 28 U.S.C. § 1657 (courts “shall expedite the consideration of any action . . . if good cause therefor is shown”).⁶ Good cause exists as the Subcommittee is in the midst of an important investigation of sex trafficking on the Internet and is seeking to complete its investigation and report its findings and recommendations as soon as possible. The Subcommittee has been seeking this information from Backpage since last July, and the failure of Mr. Ferrer to comply with the duly authorized process of the Subcommittee has created substantial delay in the Subcommittee’s receipt of this information and thereby in its ability to finish its inquiry into this area and provide the Senate with the results of its investigation.

18. The Subcommittee has conferred with Mr. Ferrer’s counsel, and is submitting an accompanying unopposed motion to set a briefing schedule on this application, proposing that Mr. Ferrer respond to the Application no later than April 26, 2016, which is 28 days from the Application’s filing, and that the Subcommittee be permitted to submit a reply in support of its Application no later than May 17, 2016, which is 21 days after Mr. Ferrer’s response is due.

19. This Court has expedited all prior actions to enforce Senate subpoenas under 28 U.S.C. § 1365, with a similar or more advanced schedule than that proposed by the Subcommittee here.

⁶ Originally, the civil enforcement statute for Senate subpoenas expressly required that courts expedite actions seeking to enforce subpoenas. *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, § 705(f)(1), 92 Stat. 1824, 1879. When that requirement was removed as part of legislation that repealed most statutory requirements for expediting specific civil matters in favor of a general requirement that courts “shall expedite the consideration of any action . . . if good cause therefor is shown,” *enacted by* Pub. L. No. 98-620, §§ 401(a), 402 (29)(D), 98 Stat. 3335, 3356, 3359 (1984), the House committee reporting the legislation considered it “virtually certain” that Senate subpoena enforcement actions “will qualify for expedited treatment under the ‘good cause shown’ standard set forth in proposed section 1657 of Title 28.” H.R. Rep. No. 985, 98th Cong., 2^d Sess. 11 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5779, 5789.

CLAIM

20. Respondent Carl Ferrer has failed to invoke a valid privilege against complying with the subpoena duces tecum of the Subcommittee. Pursuant to 28 U.S.C. § 1365, this Court should issue an order that directs him to comply with the subpoena of the Subcommittee and produce forthwith all documents responsive to requests 1, 2, and 3 of that subpoena.

PRAYER FOR RELIEF

WHEREFORE, the Subcommittee respectfully prays:

1. That this Court issue an order directing Carl Ferrer, Chief Executive Officer of Backpage.com, LLC, to comply forthwith with the October 1, 2015 subpoena of the Subcommittee and produce to the Subcommittee all documents responsive to requests 1, 2, and 3 of the subpoena within 10 days of the Court's order; and

2. That the Subcommittee have such other and further relief as may be necessary and appropriate.

Respectfully submitted,



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Dated: March 29, 2016

Counsel for Senate Permanent Subcommittee
on Investigations

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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* Cases and authorities chiefly relied upon are denoted with an asterisk.

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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INTRODUCTION

The Senate Permanent Subcommittee on Investigations (the “Subcommittee” or “PSI”) applies to this Court for an order requiring Carl Ferrer, Chief Executive Officer of Backpage.com, LLC (“Backpage”), an online classified advertising website, to comply forthwith with its subpoena, issued on October 1, 2015, and produce to the Subcommittee documents responsive to requests 1, 2, and 3 of that subpoena. Mr. Ferrer was subpoenaed as part of the Subcommittee’s investigation into sex trafficking on the Internet.

Mr. Ferrer has declined to produce – or even to search comprehensively for and provide a log of – responsive materials. He objects to the Subcommittee’s subpoena on the grounds that the subpoena is outside the Subcommittee’s jurisdiction, intrudes on his First Amendment rights, and seeks materials not pertinent to the Subcommittee’s investigation. As the Subcommittee

concluded after careful consideration when it overruled Mr. Ferrer's objections, those grounds for failing to comply with the subpoena are without legal merit. This Court should grant the application and order compliance with the Subcommittee's subpoena.

The Subcommittee's application for judicial assistance in obtaining the subpoenaed documents is presented pursuant to 28 U.S.C. § 1365(a), which confers jurisdiction upon this Court over civil actions to enforce subpoenas of Senate committees and subcommittees. Once the Court determines that Mr. Ferrer has no legal basis for disobeying the subpoena, it "shall" order him to comply "forthwith." 28 U.S.C. § 1365(b).

BACKGROUND

A. Civil Enforcement of Senate Subpoenas

The statute establishing a civil enforcement mechanism for Senate subpoenas, section 705 of the Ethics in Government Act of 1978, 28 U.S.C. § 1365, was enacted to provide an additional mechanism for enforcing Senate subpoenas beyond the existing methods. Prior to the law's enactment, the Senate "had only two means of enforcing compliance with its subpoenas: a statutory criminal contempt mechanism and the inherent congressional contempt power." *In re Application of U.S. Senate Permanent Subcomm. on Investigations (Cammisano)*, 655 F.2d 1232, 1238 (D.C. Cir. 1981) (footnotes omitted). In enacting § 1365(a), Congress created a "relatively simple" civil enforcement mechanism. *Id.* at 1238. Under this mechanism, when an individual fails to comply with the subpoena of a Senate committee or subcommittee, the committee reports a resolution to the Senate to seek enforcement of the subpoena before this Court, accompanied by a report explaining to the Senate the circumstances of the witness's refusal. 2 U.S.C. §§ 288b(b), 288d(c)(2). The Senate then may adopt the resolution directing the Senate Legal Counsel to bring a civil enforcement action in this Court. *Id.* § 288b(b). In such an enforcement action, the

committee or subcommittee “request[s] a court order requiring the individual to comply with the subpoena,” *Cammisano*, 655 F.2d at 1238, or face civil contempt.¹

The instant enforcement proceeding is initiated through the Subcommittee’s filing an application to enforce the subpoena, 28 U.S.C. § 1365(b), supported by an accompanying memorandum explaining the legal basis supporting the application. The Court’s issuance of an order for Mr. Ferrer to respond to the Subcommittee’s filing provides him notice and an opportunity to raise any matters in defense. In view of the importance of timely completion of its proceedings, the Subcommittee seeks expedited consideration of its application.²

¹ It is rare that a witness, especially after having his objection considered and overruled by a Senate committee, refuses to comply with his legal obligation, thereby requiring the Senate to take the extraordinary step of seeking judicial enforcement. In the almost 40 years since the enactment of 28 U.S.C. § 1365, the Senate has sought to enforce subpoenas through this mechanism only five times prior to the instant action. First, in 1980, this Subcommittee secured an order from this Court requiring testimony of a witness, and subsequently the Court ordered the witness incarcerated for failure to comply with that order. *Cammisano*, 655 F.2d at 1238-39. In 1984, the Subcommittee obtained an order from this Court directing a witness to testify in compliance with the Subcommittee’s subpoena. *See Senate Permanent Subcomm. on Investigations v. Accardo*, Misc. No. 84-53 (D.D.C. Mar. 29, 1984 amended Mar. 30, 1984) (Robinson, C.J.). On a third occasion, in 1987, the Senate Iran-Contra Committee applied for an order requiring a witness to comply with a directive to consent to disclosure of his foreign bank records. The district court upheld the witness’s Fifth Amendment objection, *Senate Select Committee on Secret Military Assistance to Iran v. Secord*, 664 F. Supp. 562, 566 (D.D.C. 1987) (Robinson, C.J.), and the committee’s appeal was mooted by the witness’s subsequent cooperation with the committee. Order, No. 87-5177 (D.C. Cir. Oct. 9, 1987). The civil enforcement mechanism was used a fourth time when the Senate committee hearing evidence in the impeachment trial of Judge Alcee L. Hastings obtained an order directing a subpoenaed witness, William A. Borders, Jr., to testify. *See Impeachment Trial Committee on Articles Against Judge Alcee L. Hastings v. Borders*, Misc. No. 89-129 (D.D.C. Aug. 17, 1989) (Revercomb, J.). Finally, the Senate Select Committee on Ethics successfully enforced a subpoena for the personal diary of Senator Bob Packwood as part of the committee’s inquiry into allegations of improper conduct by the Senator. *See Senate Select Committee on Ethics v. Packwood*, 845 F. Supp. 17 (D.D.C.) (Jackson, J.), *stay denied*, 510 U.S. 1319 (1994).

² Any disobedience of a judicial order to comply with a subpoena may lead, in a subsequent phase of the enforcement action, to an order holding the subpoena respondent in civil
(continued...)

B. Statement of the Case

1. The Permanent Subcommittee on Investigations (PSI)

Rule XXV.1(k)(1) of the Standing Rules of the Senate and Senate Resolution 445, 108th Congress (2004), *reprinted in* S. Doc. No. 114-6, at 131-34 (2015), establish the Committee on Homeland Security and Governmental Affairs as a standing committee of the Senate. Rule 7(A) of the Rules of Procedure for that Committee establishes PSI as one of its subcommittees. *See* 161 Cong. Rec. S413 (daily ed. Jan. 22, 2015) (publishing rules of Committee on Homeland Security and Governmental Affairs), *reprinted in* S. Doc. No. 114-6, at 131, 146 (2015). PSI is the chief investigative subcommittee of the Committee on Homeland Security and Governmental Affairs, and, as a duly authorized subcommittee of that Committee, it is authorized under section 12(e)(1) of Senate Resolution 73, 114th Cong. (2015), to study or investigate, *inter alia*:

(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;

[and]

²(...continued)

contempt. 28 U.S.C. § 1365(b); *see Cammisano*, 655 F.2d at 1238-39. The Subcommittee's application raises only the initial question whether Mr. Ferrer has a legal ground to resist its subpoena and seeks an order from this Court requiring him to comply with the subpoena.

(G) the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs.

In support of its investigatory power, the Senate, in Senate Rule XXVI.1 and Senate Resolution 73, 114th Cong., has authorized the Subcommittee “to require by subpoena or otherwise the attendance of witnesses and production of correspondence, books, papers, and documents.” S. Res. 73, 114th Cong., § 12(e)(3) (2015), *reprinted in* S. Doc. No. 114-6, at 137 (2015).

2. The Subcommittee’s Investigation of Human Trafficking
on the Internet

Pursuant to its authority under Senate Resolution 73, section 12(e), 114th Congress, the Subcommittee is currently investigating the serious and growing problem of human trafficking, particularly sex trafficking, on the Internet.³ As defined in federal law, sex trafficking includes, *inter alia*, the unlawful practice of selling the sexual services of minors or adults who have been coerced into participating in the commercial sex trade. 18 U.S.C. § 1591. While the precise scope of human trafficking is unknown, social scientists have estimated that, in 2013, as many as 27 million individuals were victims of human trafficking, including 4.5 million victims trapped in sexual exploitation. PSI Staff Report at 4 (S. Hrg. No. 114-179, at 59). Over eight in ten suspected incidents of human trafficking in the United States involve sex trafficking, *id.* (citing U.S. Dep’t of Justice, Bureau of Justice Statistics, *Characteristics of Suspected Human*

³ Recommendation to Enforce Subpoena Issued to the CEO of Backpage.com, LLC, Staff Report to the Permanent Subcommittee on Investigations, Nov. 19, 2015 [hereinafter “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, 114th Cong., 53-248 (2015), *available at* <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg98445/pdf/CHRG-114shrg98445.pdf>.

Trafficking Incidents, 2008-2010, at 1 (Apr. 2011), available at <http://www.bjs.gov/content/pub/pdf/cshti0810.pdf>), and the Department of Justice has reported that more than half of sex trafficking victims are under 18 years old. *Id.* (citing U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, *Literature Review: Commercial Sexual Exploitation of Children/Sex Trafficking*, at 3 (2014), available at <http://www.ojjdp.gov/mpg/litreviews/CSECSexTrafficking.pdf>). Available evidence suggests that the scourge of human trafficking continues to grow – particularly the trafficking of children for sex. In just the past five years, the National Center for Missing and Exploited Children (NCMEC) “has seen a[n] 846% increase in reports of suspected child sex trafficking” to its hotline.⁴

Over the past decade, the Internet has become an important means to facilitate human trafficking, helped by the high profitability and relatively low risk associated with advertising trafficking victims online for sexual transactions. *See* PSI Staff Report at 5 (S. Hrg. No. 114-179, at 60). Online marketplace websites satisfy sex traffickers’ need for “an inexpensive and readily available way to publicly offer their victims for commercial sex acts, without subjecting themselves to being easily or immediately identified.”⁵ At the Subcommittee’s 2015 hearing on this subject, the general counsel for NCMEC testified that “most child sex trafficking today is

⁴ Statement of Yiota G. Souras, Sr. V.P. and Gen. Counsel for NCMEC, *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, 114th Cong., 39 (2015) [“Souras statement”].

⁵ Statement for the Record of A. Brant Cook, *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, 114th Cong., 251 (2015) [“Cook statement”]; *see also* Souras statement, S. Hrg. No. 114-179, at 39 (“Online classified ad sites such as Backpage.com provide traffickers with a quick, easy, user-friendly platform and allow them to remain anonymous, test out new markets, attempt to evade public or law enforcement detection, and easily locate customers to consummate their sale of children for sex.”).

facilitated by online classified advertising websites.”⁶ To understand the problem of human trafficking on the Internet, including the role played by online marketplace websites in such trafficking, and to inform the Senate in its consideration of potential legislative measures to address this problem, the Subcommittee initiated an investigation into Internet sex trafficking in April 2015.⁷

As part of its investigation, the Subcommittee has conducted interviews and briefings with many knowledgeable parties, including victims’ rights groups, nonprofit organizations, technology companies, financial institutions, academic researchers, federal, state, and local law enforcement officials, and other online commercial marketplaces similar to Backpage. PSI Staff Report at 10 (S. Hrg. No. 114-179, at 65). An important part of its investigation involves understanding what measures online commercial marketplaces, including Backpage, are taking to prevent the use of their websites for sex trafficking and whether those measures are effective. Such information is material to the Senate’s consideration of potential legislative options to address this problem, in a manner consistent with the First Amendment – including whether to amend federal criminal laws applicable to sex trafficking, to enhance resources devoted to detecting and preventing sex trafficking on the Internet, or to modify the current safe harbor

⁶ Souras statement, S. Hrg. No. 114-179, at 39; *see also* Statement for the Record of Karen Friedman-Agnifilo, Chief Ass’t Dist. Attorney, New York Cnty. Dist. Attorney’s Office, *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, 114th Cong., 253 (2015) (“[N]early all of the sex traffickers we have prosecuted over the past few years used online posting sites to traffic their vulnerable victims.”).

⁷ The Subcommittee has also been investigating other areas of concern regarding human trafficking. *See Adequacy of the Department of Health & Human Services’ Efforts to Protect Unaccompanied Alien Children from Human Trafficking: Hearing Before the Senate Permanent Subcomm. on Investigations of the Senate Comm. on Homeland Security and Governmental Affairs*, 114th Cong. (Jan. 28, 2016).

provision of the Communications Decency Act, 47 U.S.C. § 230, a provision which provides legal protections to Internet service providers and websites that host content created by others.

3. The Subcommittee's Subpoena to Carl Ferrer

The Subcommittee's research and investigation have shown that Backpage is a dominant presence in the online market for commercial sex and that numerous instances of child sex trafficking have occurred through its website. PSI Staff Report at 6-7 (S. Hrg. No. 114-179, at 61-62); *see also* Cook statement, S. Hrg. No. 114-179, at 251 ("the most frequently encountered online marketplace in sex trafficking investigations is Backpage.com"). Given Backpage's prominent position in the online sex marketplace, the Subcommittee has sought to understand the business practices employed by Backpage to protect against the use of its website by sex traffickers, including how it screens advertisements. The Subcommittee first contacted Backpage on April 15, 2015, to request an interview to discuss Backpage's practices in this area. On June 19, 2015, Subcommittee staff interviewed Backpage's general counsel, Elizabeth McDougall. *See* Letter to Carl Ferrer, CEO of Backpage.com, LLC from Chairman and Ranking Member of PSI, Nov. 3, 2015 (Ruling on Objections of Carl Ferrer to Subpoena) [hereinafter "Nov. 3, 2015 Letter Ruling"], at 2-3 [Ex. I].⁸ During the interview, Ms. McDougall could not answer several critical questions about the "moderation"⁹ procedures Backpage uses to review and screen advertisements, the statistics on Backpage's reporting of suspected sex trafficking activities to law enforcement and to the National Center for Missing and Exploited Children, or the corporate

⁸ All exhibits cited herein are attached hereto, and a list of exhibits is included at the end of this memorandum.

⁹ Backpage often refers to its practices of screening and reviewing advertisements as "moderation" activities.

structure and ownership of Backpage. *Id.* After the interview, on June 22, 2015, the Subcommittee sent Backpage follow-up questions and requests for information. Backpage failed to provide answers or documents in response to the Subcommittee's requests. *Id.*

The Subcommittee then issued a documentary subpoena to Backpage on July 7, 2015, with a return date of August 7, 2015. Ex. A. The subpoena requested materials concerning, among other things, the steps Backpage takes to review advertisements for possible illegal activity (particularly child sex trafficking), Backpage's interaction with law enforcement, its data retention policies, and its basic corporate structure. The subpoena sought no information about the identity of Backpage users and specifically permitted redaction of all personally identifying user information. *Id.*

On August 6, Backpage informed the Subcommittee that it would not produce any documents in response to the subpoena. *See* Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Aug. 6, 2015 [Ex. B]. Backpage asserted that the subpoena was overbroad and infringed on its First Amendment rights by "impos[ing] an unreasonable burden" on Backpage. Backpage requested that the Subcommittee either withdraw its subpoena or defer a response to it until Backpage could present "a more fulsome discussion of the constitutional infirmities and concerns regarding the Subcommittee's subpoena." *Id.* at 5.

Explaining that the First Amendment claim pressed in Backpage's August 6 letter was not supported by any of the case law it cited, the Subcommittee provided Backpage the opportunity to submit further legal authority in support of Backpage's First Amendment objection. The Subcommittee noted that Backpage relied on a blanket claim that the First Amendment barred the Subcommittee's subpoena, but failed to assert a privilege regarding any particular documents or even to identify, as the subpoena required, the responsive records

withheld and the grounds for withholding them in a privilege log. The Subcommittee also made clear its willingness to discuss ways to minimize any resource burden that responding to the subpoena might impose on Backpage. Letter to Steven R. Ross, Esq. from Chairman and Ranking Member of PSI, Aug. 26, 2016 [Ex. D].

Backpage met with Subcommittee staff to discuss its constitutional objections to the July 7 subpoena. *See* Nov. 3, 2015 Letter Ruling at 4 [Ex. I]. At that meeting, Backpage's counsel clarified that Backpage was not objecting to any particular request in the subpoena schedule; instead, Backpage objected to the entirety of the subpoena on First Amendment grounds based on the "breadth" of the subpoena as a whole, and on the "context" in which Backpage received the Subcommittee's subpoena – meaning the context of actions taken by other governmental officials adverse to Backpage. *Id.* When Subcommittee counsel asked for authorities to support that objection, Backpage counsel offered to follow up in writing, but did not do so. *Id.* at 3-4.

On October 1, 2015, the Subcommittee withdrew its original subpoena and issued a new, narrower subpoena to Carl Ferrer, CEO of Backpage, focused on the principal areas of Subcommittee interest. Letter and Subpoena to Carl Ferrer, CEO of Backpage.com, LLC from Chairman and Ranking Member of PSI, Oct. 1, 2015 [Ex. F]. 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." *Id.* at 2. The Subcommittee 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." *Id.*

In this application to the Court, the Subcommittee seeks to enforce part of the October 1 subpoena to Mr. Ferrer. That subpoena required Mr. Ferrer to produce documents as described in the subpoena's schedule of requests, or else to appear personally, on October 23, 2015.

Specifically, the subpoena sought the production of eight categories of documents, including documents related to 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. The first three of the subpoena's document requests, which are the only ones that are the subject of this enforcement action, sought:

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.*

Oct. 1, 2015 Subpoena to Carl Ferrer, schedule A [Ex. F]. As request 3 makes clear, the subpoena expressly provides that Mr. Ferrer should exclude any personally identifying information concerning Backpage users. *See also id.* at 2 ("Please note, as previously stated, that in its production Backpage should redact any personally identifying information of users."). That instruction applied to every request in the subpoena schedule. *Id.*

The Subcommittee notified 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, 2015, the return date of the subpoena, along with a complete explanation of the basis of the privilege or other right to withhold documents” in a privilege log specifically identifying the withheld documents. Oct. 1, 2015 Letter at 3 [Ex. F]; Oct. 1, 2015 Subpoena to Carl Ferrer, schedule A [Ex. F]. After receiving any submission supporting objections to producing documents, “[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.” Oct. 1, 2015 Letter at 3 [Ex. F].

Prior to the October 23 return date, counsel for Mr. Ferrer committed to submitting a complete explanation for any noncompliance by that date, and so the Subcommittee continued Mr. Ferrer’s personal appearance to a later date “to permit the Subcommittee to consider any objection you wish to submit.” Letter to Carl Ferrer, CEO of Backpage.com, LLC from Chairman and Ranking Member of PSI, Oct. 20, 2015 [Ex. G]. On October 23, 2015, Mr. Ferrer, through counsel, objected to the subpoena’s document requests on the grounds that the subpoena was outside of the Subcommittee’s investigative authority, infringed on his rights under the First Amendment, and did not seek information pertinent to the Subcommittee’s investigation. Letter to Chair and Ranking Member of PSI from Steve Ross, Esq., Oct. 23, 2015 [Ex. H]. Mr. Ferrer voluntarily produced a limited number of publicly available documents in response to requests 1, 2, and 3 in the subpoena but objected to producing any other documents.¹⁰

¹⁰ With regard to requests 4, 6, and 7, Mr. Ferrer indicated that Backpage would compile certain records regarding its cooperation with law enforcement responsive to request 4 of the subpoena, and would investigate and seek to compile statistical information responsive to
(continued...)

On November 3, 2015, after careful consideration of the objections raised by Mr. Ferrer, the Chairman and Ranking Member, on behalf of the Subcommittee, issued a ruling and order that overruled Mr. Ferrer's objections. *See* Nov. 3, 2015 Letter Ruling [Ex. I]. In its ruling, the Subcommittee found that each of the objections asserted by Mr. Ferrer was without merit. First, the Subcommittee found that the subject of this investigation fell squarely within the jurisdiction of the Subcommittee, which has authority to investigate matters including organized criminal activity that uses the facilities of interstate commerce; criminal activity that affects the national health, welfare, and safety; and the efficiency of Federal regulatory policies and programs. *Id.* at 7-10. Second, the Subcommittee found that the subpoena did not infringe on Backpage's or Mr. Ferrer's First Amendment rights; its requests were supported by the Subcommittee's authorized investigation; and it sought information directly pertinent to that investigation. *Id.* at 10-15. The Subcommittee explained that the categories of documents requested by the subpoena were pertinent to its investigation of sex trafficking on the Internet, particularly its focus on the actions taken 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 documents responsive to the subpoena by November 12, 2015 at 10:00 a.m. *See id.* at 1, 19. In addition, the Subcommittee's order continued Mr. Ferrer's personal appearance required by the subpoena to a hearing on November 19, 2015, at 10:00 a.m. *See id.* at 19.

On November 13, 2015, a day after the date by which Mr. Ferrer had been ordered to produce documents in compliance with the subpoena, Mr. Ferrer's counsel responded to the

¹⁰(...continued)

requests 6 and 7 regarding the number of advertisements in Backpage's adult sections and the number that were blocked or deleted by Backpage's screening mechanisms. Mr. Ferrer did not produce any documents responsive to requests 5 or 8.

Subcommittee order. Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 13, 2015 [Ex. K]. Mr. Ferrer provided the Subcommittee with additional documents and information in response to the subpoena, including a large number of documents in response to request 4.¹¹ However, Mr. Ferrer once again asserted his First Amendment and pertinence objections as to all of the subpoena's requests, and produced a limited number of documents and information responsive to requests other than request 4.¹²

In the November 13 letter, Mr. Ferrer's counsel failed to provide a privilege log; in fact, the letter neither described the universe of responsive materials nor provided information concerning any search Backpage conducted. In response to follow-up inquiries by the Subcommittee staff as to what responsive documents were being withheld under the objections asserted in the November 13, 2015 letter – objections that had been overruled by the Subcommittee in the November 3 letter ruling – Mr. Ferrer's counsel informed the Subcommittee that neither he nor Backpage had conducted a full and complete search for documents responsive

¹¹ Mr. Ferrer produced approximately 16,800 pages with the November 13 letter. Over 16,300 of those pages consisted of Backpage's responses to law enforcement subpoenas, each response containing numerous repetitive pages of advertisements and photos – including one response of more than 750 pages – relating to a single Backpage user. Mr. Ferrer's counsel explained that the company had over five million additional pages of this material it could produce, but Subcommittee staff informed Mr. Ferrer that Backpage need not collect and submit those pages as the Subcommittee needed no further material of that nature. Mr. Ferrer also produced e-mails received by Backpage from law enforcement officials thanking Backpage employees for responding to police inquiries – material Backpage indicated was responsive to request 4.

¹² At the time of this filing, Mr. Ferrer has produced in response to requests 1, 2, and 3 of the subpoena, which are the subject of this enforcement action, a total of 65 pages – 21 pages of which were publicly available documents: the website's Terms of Use, Posting Rules, and User Agreement, and testimony by Backpage's general counsel before the New York City Council in 2012. *See* October 23, 2015 Letter at 6-7 [Ex. H]; PSI Staff Report at 30-31 (S. Hrg. No. 114-179, at 85-86).

to the subpoena, and, indeed, that in their view even being required to *conduct* such a search and review would violate the First Amendment. Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 16, 2015, at 2 [Ex. L]. Mr. Ferrer continued to assert a general objection to the subpoena in its entirety, and did not identify any specific documents being withheld nor raise any particular objection to producing specific documents responsive to the subpoena. To date, Mr. Ferrer's counsel has not even described to the Subcommittee what search was conducted by Backpage to identify the documents provided with the October 23 and November 13 letters.¹³

On November 19, the Subcommittee held its hearing and received testimony from four witnesses, three state law enforcement officials and the general counsel of the National Center for Missing and Exploited Children,¹⁴ regarding sex trafficking on the Internet, and particularly through online commercial marketplaces such as Backpage. The Subcommittee's investigation continues, and the Subcommittee contemplates holding an additional hearing and issuing a final report on this matter. The documents sought by subpoena requests 1, 2, and 3 are important to

¹³ In addition, Mr. Ferrer's counsel, in letters of November 16 and 18, 2015 [Exs. L, M], asked that Mr. Ferrer's personal appearance on November 19, 2015, be waived as counsel indicated that Mr. Ferrer intended to refuse to answer questions based on his Fifth Amendment privilege against self-incrimination and on the same First Amendment grounds that were the subject of his objections to producing documents. Counsel further informed the Subcommittee in those letters – for the first time – that Mr. Ferrer was on international business travel. The Subcommittee declined to excuse Mr. Ferrer's appearance. Letter to Steven R. Ross, Esq. from Chairman and Ranking Member of PSI, Nov. 18, 2015 [Ex. N]. Despite not being excused from his duty to appear under the subpoena, and having known of the time and date of his scheduled appearance since November 3, Mr. Ferrer failed to appear at the Subcommittee's hearing on November 19. Mr. Ferrer's defiance of the testimonial aspect of the Subcommittee's subpoena is not the subject of this enforcement action as the Subcommittee has not yet determined how it will proceed regarding Mr. Ferrer's appearance and testimony.

¹⁴ Two witnesses appeared for testimony; two others submitted testimony for the record.

the Subcommittee's investigation and to reporting to the Senate about sex trafficking on the Internet to inform consideration of legislative approaches to combat that problem.

On March 17, 2016, the Senate, by a vote of 96-0, adopted a resolution authorizing and directing the Senate Legal Counsel to initiate this civil action to enforce the Subcommittee's subpoena. 162 Cong. Rec. S1561 (daily ed. Mar. 17, 2016).

ARGUMENT

I. CONGRESS' POWER OF INVESTIGATION

The Supreme Court has made clear that “[t]he power of the Congress to conduct investigations is inherent in the legislative process.” *Watkins v. United States*, 354 U.S. 178, 187 (1957). That investigatory power, “with process to enforce it[,] is an essential and appropriate auxiliary to the legislative function.” *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). In order to write effective laws, Congress must have access to information on the subjects on which it is considering whether, and in what fashion, to enact laws. *See Ashland Oil, Inc. v. Federal Trade Comm’n*, 409 F. Supp. 297, 305 (D.D.C.) (“Absent such a power, a legislative body could not ‘wisely or effectively’ evaluate those conditions ‘which the legislation is intended to affect or change.’”) (quoting *McGrain v. Daugherty*, 273 U.S. at 175), *aff’d*, 548 F.2d 977 (D.C. Cir. 1976). “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 187-88.

Congress has the authority to investigate any subject about which it may legislate if it “would be materially aided by the information which the investigation was calculated to elicit.”

McGrain, 273 U.S. at 177. Accordingly, Congress’ investigatory power is broad, “encompass[ing] inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes 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. As the Supreme Court has explained: “The power of inquiry has been employed by Congress throughout our history, over the whole range of the 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).

II. THE SUBCOMMITTEE’S INVESTIGATION OF SEX TRAFFICKING ON THE INTERNET IS WITHIN ITS JURISDICTION

This investigation falls squarely within the authority and jurisdiction that the Senate has conferred on the Subcommittee. As detailed above, Senate Resolution 73 authorizes the Subcommittee to investigate matters related to organized criminal activity that operates in or utilizes the facilities of interstate commerce; all aspects of crime and lawlessness that have an impact upon or affect the national health, welfare, and safety; and the efficiency of Federal regulatory policies and programs. S. Res. 73, 114th Cong., § 12(e)(1).

These broad grants of investigative jurisdiction plainly encompass the Subcommittee’s investigation into sex trafficking on the Internet. Such an investigation is rooted in the Subcommittee’s power to investigate organized criminal activity using the facilities of interstate commerce and in its authority to study crimes that affect the national health, safety, and welfare. *See* S. Res. 73, 114th Cong., § 12(e)(1)(C)-(D). Human trafficking, including sex trafficking, is a federal crime, *see* 18 U.S.C. §§ 1581-1592, that has serious effects on the Nation’s health, safety, and welfare. Moreover, as Congress has recognized by making trafficking a “racketeering

activity” for purposes of RICO, trafficking is specifically an activity of organized crime. *See* 18 U.S.C. § 1961(1) (defining “racketeering activity” to include “any act which is indictable under” 18 U.S.C. §§ 1581-1592). And the Internet undoubtedly is a facility of “interstate commerce,” *see Utah Lighthouse Ministry v. Foundation for Apologetic Information and Research*, 527 F.3d 1045, 1054 (10th Cir. 2008) (“We agree that the Internet is generally an instrumentality of interstate commerce”); *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (per curiam) (“As both the means to engage in commerce and the method by which transactions occur, ‘the Internet is an instrumentality and channel of interstate commerce.’”) (quoting *United States v. MacEwan*, 445 F.3d 237, 245 (3^d Cir. 2006)); *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007) (same), the abuse of which by organized crime is plainly within the Subcommittee’s investigative authority. Indeed, more generally, the Subcommittee has conducted several investigations over the past 20 years into abuse of the Internet,¹⁵ including into the use of the Internet to conduct criminal activity.¹⁶

¹⁵ *See Online Advertising and Hidden Hazards to Consumer Security and Data Privacy: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Homeland Security and Governmental Affairs (HSGAC)*, S. Hrg. No. 113-407, 113th Cong. (2014); *Buyer Beware: The Danger of Purchasing Pharmaceuticals Over the Internet: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, S. Hrg. No. 108-684, 108th Cong. (2004); *Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, S. Hrg. No. 108-275, 108th Cong. (2003).

¹⁶ *See Phony Identification and Credentials Via the Internet: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, S. Rep. No. 107-133, 107th Cong. (2002); *Securities Fraud on the Internet: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, S. Hrg. No. 106-137, 106th Cong. (1999); *Fraud on the Internet: Scams Affecting Consumers: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, S. Hrg. No. 105-453, 105th Cong. (1998).

In addition, because Federal agencies conduct a number of programs and initiatives aimed at combating human trafficking, the Subcommittee's separate authority to study and investigate the efficiency of Federal regulatory policies and programs independently supports its investigation. *See* Nov. 3, 2015 Letter Ruling at 9-10 & n.30 [Ex. I] (discussing various Federal departments and agencies involved in anti-trafficking efforts). The Subcommittee is authorized to examine the effectiveness of those programs and initiatives at addressing the problem of sex trafficking; to do so, it needs to understand the nature and extent of sex trafficking on the Internet, the effect current Federal law and regulatory activities are having on that problem, and the efficacy of solutions pursued by the private sector.

In short, the Subcommittee has ample authority to investigate sex trafficking on the Internet, including by issuing documentary subpoenas to persons and entities, such as Mr. Ferrer and Backpage, that have relevant information on that subject. Mr. Ferrer's assertion that the subject matter of the subpoena is beyond the Subcommittee's authority is without merit.

III. SUBPOENA REQUESTS 1, 2, AND 3 SEEK DOCUMENTS THAT ARE DIRECTLY PERTINENT TO THE SUBJECT OF THE SUBCOMMITTEE'S INVESTIGATION

Requests 1, 2, and 3 of the Subcommittee's subpoena seek information that is relevant and important to its investigation. The requested documents will inform the Congress about the extent to which online commercial marketplaces can and do undertake actions to prevent their sites from being used for sex trafficking. Request 1 seeks documents concerning Backpage's "reviewing, blocking, deleting, editing, or modifying advertisements in Adult Sections." Request 2 seeks documents concerning "advertising posting limitations," including banned terms lists and error messages and prompts. Request 3 seeks documents concerning "reviewing, verifying, blocking, deleting, disabling, or flagging user accounts or user account information." Subpoena

to Carl Ferrer, Oct. 1, 2015 [Ex. F]. Each of these requests seeks documents that are pertinent to the Subcommittee's investigation.

In studying the problem of sex trafficking on the Internet, it is important to understand how traffickers use online commercial marketplaces to facilitate illegal sex transactions with victims and how such websites could help prevent that exploitation. Backpage is the dominant presence in the online commercial sex marketplace, and it publicly claims also to be "the industry leader" in establishing screening measures to identify and then to report to law enforcement instances of potential sex trafficking. PSI Staff Report appendix 33 (S. Hrg. No. 114-179, at 122) (testimony of Elizabeth L. McDougall before New York City Council, Comm. on Women's Issues, Apr. 25, 2012). Congress has a vital interest in understanding how Backpage's anti-trafficking screening measures work and how those measures might be improved or more uniformly adopted through new legal incentives or requirements.

For the Subcommittee to garner sufficient knowledge of these practices, it must learn how they are actually applied to block the posting of advertisements by sex traffickers, and how effective such practices are in preventing traffickers from making use of the website.¹⁷ As expert

¹⁷ For instance, the Subcommittee is seeking to understand the particular techniques that Backpage employs to screen for sex trafficking and how it trains its employees to carry out those techniques, including: whether and to what extent Backpage captures the user IP address when an advertisement is created; whether Backpage employs any technology that links advertisements that have been blocked to any other existing advertisements based on similar content or on the identity of the user posting the advertisement; whether and for how long Backpage retains relevant data from advertisements that could be helpful to law enforcement should a particular user or advertisement become the subject of investigation; when Backpage rejects an advertisement for including a prohibited term, whether it blocks the user from re-posting the advertisement with the term changed or deleted; and what steps Backpage takes when it receives a complaint about an advertisement or a poster of advertisements regarding possible child sex trafficking. All of these questions are important to understanding how the Internet is being used for sex trafficking and what measures are being undertaken or could be undertaken to disrupt that pernicious activity.

testimony before the Subcommittee explained:

Online marketplace websites, including Backpage, have made efforts to identify and stop the abuse of their services by traffickers. There is some amount of screening for illegal content, and law enforcement receives tips concerning potential illegal activity with some regularity. It remains unclear, however, precisely how that screening is done, and whether information detected through the screening process may be valuable to an investigation. It is also unclear the extent to which online marketplace websites may engage in the editing of portions of postings users submit for publishing (such as deleting obscene or other contents that violates the websites' terms of service), and whether the full amount of any content edited out is retained by the online marketplace website.

Cook statement, S. Hrg. No. 114-179, at 252.

The Subcommittee's subpoena for information about Backpage's screening procedures will enable the Congress to understand a number of important subjects with greater specificity. These include: what measures are currently employed by online marketplaces (including by the leading website being used for sex trafficking), how those measures operate in practice, what resources those measures require, how effective those measures are in screening out advertisements by child sex traffickers, and the effect of existing federal law on websites' incentives for selecting particular screening methods. A full understanding of these subjects will help the Senate to craft and debate potential legislation to address this serious problem.

Acquiring this information is particularly important for considering the effectiveness of the safe harbor provided by federal law to encourage websites to self-monitor. That provision, section 230 of the Communications Decency Act (CDA) (47 U.S.C. § 230), has proven to be a powerful shield to suits against companies that manage websites. *See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted the [Communications Decency Act] to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the

service.”) (internal quotation marks and citation omitted).¹⁸ Indeed, courts have applied section 230 to bar states’ attempts to prevent the use of online marketplaces such as Backpage for sex trafficking. *See, e.g., Backpage.com LLC v. McKenna*, 881 F. Supp. 2d 1262, 1271-75 (W.D. Wash. 2012) (finding state statute criminalizing advertisement of minors for commercial sexual abuse likely to be preempted by CDA section 230 and enjoining enforcement of statute); *Backpage.com LLC v. Cooper*, No. 3:12-cv-00654, 2013 WL 1249063 (M.D. Tenn. Mar. 27, 2013) (permanently enjoining enforcement of state statute criminalizing the sale of advertisements for the purpose of engaging in a commercial sex act with a minor, finding, *inter alia*, that it was preempted by CDA section 230). For that reason, Congress has a responsibility to examine whether federal law has proven effective at encouraging websites to self-monitor against sex trafficking; whether section 230 should be amended to require particular measures be taken by companies to prevent their websites from being used as a marketplace for sex traffickers¹⁹; whether further measures to screen against advertisements by traffickers might prove effective in combating sex trafficking; and what burdens the cost of further screening measures might impose on these companies.

¹⁸ *See, e.g., J.S. v. Village Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. 2015); *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015), *aff’d*, — F.3d —, No. 15-1724, 2016 WL 963848 (1st Cir. Mar. 14, 2016); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014); *GoDaddy.com, LLC v. Touts*, 429 S.W.3d 752 (Tex. Ct. App. 2014); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); *Backpage.com, LLC v. Hoffman*, No. 13-CV-03952, 2013 WL 4502097 (D.N.J. Aug. 20, 2013), *appeal dismissed*, No. 13-3850 (3^d Cir. May 1, 2014); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008).

¹⁹ For example, 18 U.S.C. § 2258A requires electronic communications service providers to report apparent child pornography, and Congress could consider imposing a similar reporting requirement for sex trafficking.

The need for thorough congressional fact-finding is heightened by the recognized tension in this area of federal law. In a recent opinion affirming the dismissal of a lawsuit against Backpage, the First Circuit observed that the Communications Decency Act and the Trafficking Victims Protection Act of 2008 “do not fit together seamlessly.” *Doe v. Backpage.com, LLC*, — F.3d —, No. 15-1724, 2016 WL 963848, *1 (1st Cir. Mar. 14, 2016). In a coda, the court of appeals noted that the plaintiffs “have made a persuasive case” that “Backpage has tailored its website to make sex trafficking easier,” but that, in its view, the CDA as written still shielded companies like Backpage from liability – a conundrum for which the court said “the remedy is through legislation, not through litigation.” *Id.* at *14. Any such legislative effort would be a complicated endeavor, requiring great sensitivity to protecting free speech on the Internet while ensuring that the immunity from state regulation and ordinary tort liability granted in the CDA does not inadvertently protect large swaths of criminal conduct. Congress cannot make intelligent decisions about whether and how to embark on such a project without full information about it.

The information sought will also aid Congress in considering whether and how to clarify the scope of CDA section 230. Courts have struggled to identify the line between websites that merely host content created by others (which is protected by § 230) and those that partially develop or create content themselves (which is not). *See, e.g., Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 408-14 (6th Cir. 2014); *Federal Trade Comm’n v. Accusearch, Inc.*, 570 F.3d 1187, 1197-1200 (10th Cir. 2009); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-05 (9th Cir. 2009); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1165-74 (9th Cir. 2008). Among the issues that courts have considered is to what extent a website’s screening of content or facilitating the posting of material is covered by

section 230. *See, e.g., Green v. America Online (AOL)*, 318 F.3d 465, 471 (3^d Cir. 2003) (“[Plaintiff] attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network – actions quintessentially related to a publisher’s role. Section 230 ‘specifically proscribes liability’ in such circumstances.”) (citation omitted); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 297-98 (D.N.H. 2008) (finding “slight” edits to content did not remove protection of 47 U.S.C. § 230). The information sought by the Subcommittee’s subpoena will enable the Senate to understand industry practices and decide how far the CDA’s preemptive force should extend.

One particular area of concern involves websites that edit the content of advertisements to remove problematic terms or images prior to posting, without blocking the advertisement or reporting it to authorities. Such editing can serve more to *conceal* illegal activity in advertisements than to prevent it. When interviewed by Subcommittee staff, Backpage’s general counsel indicated that Backpage’s screening personnel sometimes alter or edit advertisements to remove problematic content and then publish the revised advertisement. PSI Staff Report at 15 (S. Hrg. No. 114-179, at 70). In addition, the Subcommittee’s investigation uncovered e-mails between Backpage and an outside contractor Backpage retained to assist in the screening of advertisements. These e-mails show Backpage’s management instructing the outside screeners to edit advertisements that contain certain words or phrases, and to allow posting of the revised advertisement. PSI Staff Report at 17-21, and appendix 80-92, 102-06 (S. Hrg. No. 114-179, at 72-76, 169-81, 191-95).²⁰ These sources indicate that Backpage engaged in some form of editing

²⁰ Although those e-mails are clearly responsive to the Subcommittee’s subpoena, Backpage has not produced them nor has it indicated that it does not possess any such e-mails. It is evidently Backpage’s position that these kinds of documents are protected by the First

(continued...)

of content as part of its screening of advertisements,²¹ but the extent of such editing and the guidelines Backpage follows in making such edits remain unclear.

Subpoena requests 1, 2, and 3 seek documents about Backpage's moderation of advertisements. Those documents will aid the Subcommittee in understanding exactly what website-screening activities, including any editing of advertisements, are being conducted by Backpage under the asserted protection of section 230 immunity. Such information will enable a more complete study of the effect of section 230 on the practices of websites that host adult advertisements for sexual services and thereby will assist the Senate's consideration of whether to amend the scope of that statute. Congress's broad power to inquire into the potential subjects of legislation plainly encompasses the authority to investigate the consequences of laws that it has enacted – especially where, as here, by occupying the field and extinguishing state regulation, Congress has reserved to itself the exclusive power to legislate on the subject.

In sum, the documentary information sought by the Subcommittee's subpoena is directly pertinent to the Subcommittee's investigation of sex trafficking on the Internet and will materially aid the Senate's consideration of whether to enact further legislation or modify existing laws to address the rising tide of harmful sex trafficking on the Internet, and how to do

²⁰(...continued)
Amendment.

²¹ For example, in one e-mail Mr. Ferrer instructed the screeners to delete “bad text” such as references to services based on time increments (15 and 30 minutes) that are standard in the illegal sex industry. PSI Staff Report at 19 (S. Hrg. No. 114-179, at 74). A Backpage manager also instructed reviewers to remove references and hyperlinks to websites such as “The Erotic Review,” which is known for hosting customer reviews of prostitutes that explicitly detail sex acts. *Id.* at 20-21 (S. Hrg. No. 114-179, at 75-76). After making those deletions, screeners would generally publish the edited ads on Backpage.com. *Id.* at 17-21 (S. Hrg. No. 114-179, at 72-76).

so in a manner consistent with the First Amendment. The Subcommittee has authority to compel the production of the materials sought by requests 1, 2, and 3 of the subpoena as part of its investigation of this area. As the D.C. Circuit has recognized, “when the purpose asserted is supported by references to specific problems which in the past have been or which in the future could be the subjects of appropriate legislation, then we cannot say that a committee of the Congress exceeds its broad power when it seeks information in such areas.” *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968).

IV. THE SUBCOMMITTEE’S SUBPOENA DOES NOT INFRINGE ON FIRST AMENDMENT RIGHTS

Mr. Ferrer objected to producing documents to the Subcommittee on First Amendment grounds. He does not assert, however, that any particular document or any specific type of information responsive to the subpoena is protected by the First Amendment. Rather, Mr. Ferrer raises “First Amendment and pertinence objections as to all requested documents and information,” in a general fashion. Nov. 13, 2015 Letter at 5 [Ex. K] (stating that documents submitted to Subcommittee were provided without “waiv[ing] and expressly reaffirm[ing] . . . objections as to all requested documents and information”). In fact, Mr. Ferrer advances the novel proposition that the First Amendment not only provides a blanket protection allowing him to withhold all documents responsive to the Subcommittee’s subpoena, but also immunizes him from having to comply even with the basic duty of a subpoena respondent to search for responsive documents and assert privileges specifically thereon. Nov. 16, 2015 Letter at 2 [Ex. L] (explaining that counsel was not representing that Mr. Ferrer and Backpage had conducted a complete search for documents responsive to subpoena, as “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”). That proposition is incorrect. Because the Subcommittee’s subpoena does not infringe on First Amendment rights, Mr. Ferrer has no lawful basis to withhold the documents sought in the subpoena.

In his October 23, 2015 objection letter, Mr. Ferrer asserted that the Subcommittee’s subpoena to him raises First Amendment “concerns” because Backpage engages in “First Amendment activities,” and that, because of those activities, the First Amendment limits not just Congress’ power to regulate protected conduct but also its authority to subpoena information from him. Oct. 23, 2015 Letter [Ex. H]. In addition, in correspondence with the Subcommittee, Backpage has argued that the subpoena runs afoul of the First Amendment because it is meant solely to harass and punish Backpage for protected activities, and because it is overbroad and imposes an undue burden on Backpage. None of these First Amendment arguments has any merit.

A. The Subpoena Does Not Intrude on Any First Amendment-Protected Activity of Backpage or Its Users

While the First Amendment unquestionably applies to the congressional subpoena power, it shields only against governmental intrusions into protected activities. It offers no blanket immunity from inquiry. The mere fact that persons or entities engage in First Amendment activity does not shield them from government actions that do not infringe on that activity. *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 premises); *cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (holding that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report news”).

Rather, only governmental demands for information that infringe on protected First Amendment activity warrant constitutional scrutiny. Mr. Ferrer's objections failed to show any such infringement.

In his submissions to the Subcommittee, Mr. Ferrer relied principally on cases where courts have found First Amendment problems with state efforts to criminalize certain sex-oriented advertisements. *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); *Backpage.com, LLC v. Hoffman*, No. 13–CV–03952, 2013 WL 4502097 (D.N.J. Aug. 20, 2013). Those cases are inapposite. In each, the state had criminalized protected speech, imposing a content-based restriction that the courts found both vague and overbroad. *See Cooper*, 939 F. Supp. 2d at 830-39; *McKenna*, 881 F. Supp. 2d at 1277-85; *Hoffman*, 2013 WL 4502097 at *7-*10. The Subcommittee's subpoena does not prohibit or punish any speech or expression of Mr. Ferrer or Backpage; rather, it merely seeks information about Backpage's efforts to screen advertisements to prevent its site from being used for unlawful sex trafficking.²²

Instead, to state a First Amendment objection, Mr. Ferrer must articulate what protected activity requests 1, 2, and 3 of the Subcommittee's subpoena allegedly intrude upon. He has failed to do so. It is true, of course, that Backpage is a publisher of commercial advertisements – for both legal and illegal transactions. The Supreme Court has made clear that while advertising in general constitutes “commercial speech” that receives First Amendment protection (albeit less extensive than other speech), advertisements “that propose[] an illegal transaction” are not

²² If the cases cited demonstrate anything relevant to the matter here, it is the importance of legislative fact-finding in this area so that any legislative action to address the problem of sex trafficking is carefully tailored to avoid infringing on First Amendment-protected activity.

protected. *Zauderer v. Office of Disciplinary Counsel of the Supreme Ct. of Ohio*, 471 U.S. 626, 638 (1985). Just as operating a bookstore does not afford a business any special protection from regulation of illegal activities on its property, *Arcara*, 479 U.S. at 707, Backpage's publication of protected commercial advertisements does not shield it from investigation of human trafficking on its website. Mr. Ferrer has given no reason why providing information to the Subcommittee about the screening process itself intrudes on Mr. Ferrer's or Backpage's rights to engage in protected commercial speech. *Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386-87 (1973) (decisions by the media about whether to accept advertisements are entitled to no greater protection than the advertisement itself). Nor, as explained below, has Mr. Ferrer even suggested that such interests would outweigh the governmental interests in investigating the serious problems of sex trafficking. In short, Mr. Ferrer's objections do not even begin to show that his or Backpage's First Amendment rights are violated by the subpoena.

Nor do the subpoena's requests intrude into the First Amendment rights of Backpage's users. The cases on which Backpage relies – where subpoenas were used to uncover the identity of political dissenters and to suppress unpopular ideas – have nothing to do with this case. In *Watkins*, 354 U.S. at 184-86, the House Un-American Activities Committee was trying to compel a witness to identify his Communist associates; in *Gibson v. Florida Legislative Investigative Committee*, 372 U.S. 539, 541-43 (1963), the state legislature's committee was seeking lists of NAACP members; in *United States v. Rumely*, 345 U.S. 41, 42-43 (1953), a House special committee sought documents revealing the identity of persons purchasing disfavored political books; and in *Bursey v. United States*, 466 F.2d 1059, 1068-69 (9th Cir. 1972), a grand jury was seeking to force witnesses to identify persons who belonged to the Black Panther Party and who

worked on the party's newspaper.²³ 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).

The Subcommittee's subpoena does not raise any such concerns. Indeed, as the Subcommittee has continually reminded Mr. Ferrer and Backpage, the subpoena does not seek any personally identifying information of Backpage users, and in fact instructs Mr. Ferrer that he should redact any such information from responsive documents. Oct. 1, 2015 Letter at 2 and Subpoena, schedule A [Ex. F]. Hence, unlike in the cases cited by Mr. Ferrer, the Subcommittee's subpoena does not raise the specter of revealing the identity of individuals engaging in protected First Amendment expression. Mr. Ferrer's objection to the subpoena fails to establish any infringement on either Backpage's or Backpage users' First Amendment activity.

Even if Mr. Ferrer had articulated an intrusion on First Amendment rights, that alone would not preclude the Subcommittee's subpoena; rather, any intrusion would have to be balanced against the Subcommittee's need for the information. *See Watkins*, 354 U.S. at 198; *Rumely*, 345 U.S. at 44. Where a government subpoena infringes on protected activity, it should be sustained if the demand for information is supported by governmental interests "sufficient to justify the deterrent effect" on speech. *NAACP v. Alabama*, 357 U.S. 449, 463 (1958). Here, any possible effect on Mr. Ferrer's or Backpage's First Amendment rights from requests 1, 2, and 3 of the subpoena is marginal, at best; any such intrusion would be outweighed by the Subcommittee's need for the information, as explained in section III above. But in any event,

²³ After having first objected to discussing their work on the newspaper, the witnesses did testify before the grand jury about newspaper operations and their work in the publication of the newspaper. *Bursey*, 466 F.2d at 1067-68.

Mr. Ferrer and Backpage have never even attempted that required balancing of interests. Despite being provided many opportunities to present the full legal basis for his First Amendment objection to the subpoena, Mr. Ferrer has chosen to rest on a blanket assertion of immunity from the subpoena. He has not attempted to demonstrate that any purported burden on his First Amendment rights would outweigh the Subcommittee's need for the subpoenaed information about the serious problem of sex trafficking on the Internet.

Instead, in his objection letter, Mr. Ferrer attempted to sidestep the need for balancing by invoking the canon of constitutional avoidance. Relying on *Rumely*, 345 U.S. 41, Mr. Ferrer argued that the nebulous First Amendment "considerations" he raises require that the Subcommittee's investigative authority, set forth in its authorizing resolution, be narrowly interpreted not to authorize the instant subpoena so that the constitutional question he has raised can be avoided. Oct. 23, 2015 Letter at 1, 3-4 [Ex. H]. *Rumely* is easily distinguishable. In that case, a special House committee invoked its jurisdiction to investigate "lobbying activities," *Rumely*, 345 U.S. at 44, to issue a subpoena to a bookseller explicitly seeking information revealing the identities of purchasers of disfavored books. *Id.* at 42. Noting the obvious First Amendment concerns that would be raised by such an inquiry, the Court gave the words "lobbying activities" a narrow meaning – which was also their "commonly accepted sense," *id.* at 47 (internal quotation marks omitted) – by interpreting the phrase to refer only to making representations to Congress.

Rumely is far afield from the Subcommittee's subpoena here. First, as explained above, the Subcommittee's subpoena does not raise any similarly significant First Amendment concerns. Certainly, it does not raise the concern at issue in *Rumely* – uncovering the identity of those who hold disfavored ideas – as the Subcommittee's subpoena expressly forgoes seeking such

identifying information. As a consequence, *Rumely* provides no justification for a narrow interpretation of the Subcommittee's authorizing resolution here.

Second, unlike in *Rumely*, there is no reasonable interpretation of the Subcommittee's authority that would not cover the subpoena issued to Mr. Ferrer. In contrast to the select committee in *Rumely*, the Subcommittee is not a temporary committee of limited scope. As explained earlier, *supra* at 4-5, the Subcommittee is authorized by the Senate to study and investigate a broad swath of activity, both in the government and in society generally. This jurisdiction includes inquiry into "crime and lawlessness within the United States" which has "an impact upon or affect[s] the national health, welfare, and safety," "organized criminal activity which may operate in or otherwise utilize the facilities of interstate or international commerce," and "the efficiency and economy of operations of all branches and functions of the Government[.]" S. Res. 73, 114th Cong., § 12(e) (2015). Unlike in *Rumely*, where the Court found that the select committee's jurisdiction to investigate "lobbying activities" could be interpreted narrowly to exclude the subpoena in that matter, 345 U.S. at 47-48, there is simply no plausible "narrow" construction of the Subcommittee's authority that would exclude the subpoena issued here. In sum, in light of the clarity of the Subcommittee's jurisdiction to investigate this area and the weakness of Mr. Ferrer's First Amendment arguments, the canon of constitutional avoidance has no application here. *See Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 638 F.3d 794, 801 (D.C. Cir. 2011) ("A clear statute and a weak constitutional claim are not a recipe for successful invocation of the constitutional avoidance canon"); *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (requiring "competing plausible interpretations of a statutory text" and "serious constitutional doubts" to apply the canon of constitutional avoidance).

Indeed, given the broad scope of the Subcommittee's investigative jurisdiction, Mr. Ferrer's objection appears to question whether Congress can investigate this area at all. But such a notion is baseless. Congress has enacted legislation regulating a wide range of activity on the Internet.²⁴ By delegation, congressional committees have the authority to investigate matters involving the Internet generally, and specifically to inquire into the use of the Internet to facilitate crimes such as sex trafficking, including the measures taken by online commercial marketplaces such as Backpage to protect against such trafficking on their websites. "The scope of [Congress'] power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt*, 360 U.S. at 111. In the face of such established legislative authority over the Internet, and the concomitant need for information to exercise that authority responsibly, the argument that the First Amendment prevents Congress from investigating the use of the Internet for sex trafficking, and from obtaining information regarding website practices concerning such trafficking, must be rejected.

²⁴ See, e.g., Section 509 of the Communications Decency Act, Pub. L. No. 104-104, Title V, 110 Stat. 137 (1996) (codified at 47 U.S.C. § 230); 18 U.S.C. §§ 2252B, 2252C (making illegal use of misleading domain names and words or images on Internet to lure children to view sexual material harmful to minors); Unlawful Internet Gambling Enforcement Act, Pub. L. No. 109-347, §§ 801-803, 120 Stat. 1952 (2006) (codified at 31 U.S.C. §§ 5361-5367); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, app. I, title III, § 3002, 113 Stat. 1536 (1999) (codified at 15 U.S.C. § 1125(d)); Trade Facilitation and Trade Enforcement Act, Pub. L. No. 114-125, § 922 (2016) (placing moratorium on Internet access taxes and on multiple and discriminatory taxes on electronic commerce).

Additionally, Congress has enacted a host of laws with general provisions that apply to the Internet. See, e.g., 15 U.S.C. §§ 45, 52 (unfair or deceptive acts or practices; false advertisements); 15 U.S.C. § 1644 (credit card fraud); 18 U.S.C. § 1030 (fraud and unauthorized access in connection with computers); 18 U.S.C. §§ 1341 *et seq.* (wire fraud).

B. The Subpoena Is Not Overbroad, Does Not Impose an Undue Burden, and Is Not an Attempt to Harass or Punish Backpage

In communications with the Subcommittee, Backpage has also asserted that the subpoena is overbroad, imposes an unreasonable burden, and is meant only “to harass and damage” the company for its unpopular business activities. *See* Aug. 6, 2015 Letter at 5 [Ex. B]; Aug. 26, 2015 Letter at 2 [Ex. C]; *see also* Nov. 16, 2015 Letter at 1 [Ex. L]. Those contentions lack merit.

Requests 1, 2, and 3 of the subpoena to Mr. Ferrer – the requests the Subcommittee is seeking to enforce – are not overbroad and do not impose an unreasonable burden on Backpage. To be sure, responding to any subpoena for documents will impose some burden on a person or company. *Cf. Federal Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (“Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.”). But Backpage has not made any showing that producing documents responsive to these requests imposes an overwhelming or undue burden on the company. *See id.* (“The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.”). Indeed, Mr. Ferrer has admitted that Backpage has not even done a complete search to identify all responsive documents. His claims of undue burden and overbreadth are purely speculative.

Moreover, the Subcommittee has already narrowed the documents it sought from Backpage by withdrawing its original subpoena and issuing a more targeted subpoena to Mr.

Ferrer,²⁵ and now it seeks to enforce in this action only a subset of the document requests in the subpoena. Requests 1, 2, and 3 seek documents focused on Backpage's screening and moderating system regarding adult services advertisements. Such requests are focused on the needs of the Subcommittee's investigation and are well within the normal bounds of document subpoenas in congressional investigations.

Nor is the Subcommittee's investigation intended to harass or damage Backpage. At the outset, the Supreme Court has made clear that "[s]o long as 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*, 360 U.S. at 132. But, in any case, the Subcommittee's investigation is entirely proper and has been conducted with a due regard for Backpage's rights. As discussed above, the Subcommittee is investigating the important and pressing problem of sex trafficking on the Internet, a topic on which Backpage has relevant information as a predominant website used by sex traffickers to sell their victims. The Subcommittee has sought information in accordance with both the Senate's and its own rules. It has engaged with Backpage in an attempt to address concerns the company raised regarding the subpoena – even issuing a second narrower subpoena to address those concerns. The Subcommittee allowed Backpage ample time to articulate fully its objections to the subpoena, and carefully and thoroughly considered Backpage's objections – overruling them in a comprehensive ruling by the Chairman and Ranking Member. There is simply no basis to claim

²⁵ In addition, as mentioned earlier, *supra* n.11, the Subcommittee allowed Mr. Ferrer to forgo production of large sets of records in response to subpoena request 4 that the Subcommittee determined it does not need in their entirety. The Subcommittee also offered to discuss with Backpage ways to minimize any burden that responding to the subpoena may present – such as by agreeing to electronic search terms or limiting the search to particular document custodians or employees – yet Backpage declined to engage with the Subcommittee on these matters.

that the Subcommittee has engaged in this investigation to harass or harm Backpage, and Backpage's conclusory assertions regarding the Subcommittee's motivations are insufficient to raise any First Amendment issue. *See McLaughlin v. Service Employees Union, AFL-CIO, Local 280*, 880 F.2d 170, 175 (9th Cir. 1989) ("Bare allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation. The record must contain objective and articulable facts, which go beyond broad allegations or subjective fears.") (internal quotation marks and citation omitted).

While it is true that Backpage has been the subject of various government legal actions, state laws, and private suits adverse to it,²⁶ Backpage's attempt to link the Subcommittee's investigation as "connected with" those actions, Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Aug. 26, 2015 at 2 [Ex. C], is wholly unfounded. The fact that other governmental actors – such as state agencies and legislatures – have taken actions adverse to Backpage does not alter the constitutional authority of the Subcommittee to conduct an investigation within its jurisdiction. *Cf. Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2011) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.") (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007)).

In sum, Mr. Ferrer's arguments before the Subcommittee fail to establish that the subpoena violates his First Amendment rights. The Subcommittee has a substantial legislative

²⁶ *See, e.g., Backpage.com, LLC v. Lynch*, No. 1:15-cv-02155-RBW (D.D.C., complaint filed Dec. 11, 2015); *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Doe ex rel. Roe v. Backpage.com LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015), *aff'd*, — F.3d —, No. 15-1724, 2016 WL 963848 (1st Cir. Mar. 14, 2016); *Backpage.com, LLC v. Hoffman*, No. 13-CV-03952, 2013 WL 4502097 (D.N.J. Aug. 20, 2013) ; *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

interest in obtaining information from Backpage regarding sex trafficking, and the documents sought in requests 1, 2, and 3 of the subpoena, as explained in detail in section III above, are directly pertinent to the Subcommittee's investigation. Accordingly, the First Amendment does not shield Mr. Ferrer from complying with requests 1, 2, and 3 of the Subcommittee's subpoena.

CONCLUSION

For these reasons, the application of the Senate Permanent Subcommittee on Investigations should be granted, and Carl Ferrer should be ordered to comply with requests 1, 2, and 3 of the Subcommittee's subpoena and produce all documents responsive to those requests.

Respectfully submitted,



Patricia Mack Bryan, Bar #335463
Senate Legal Counsel

Morgan J. Frankel, Bar #342022
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

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(202) 224-4435 (tel)
(202) 224-3391 (fax)

Dated: March 29, 2016

Counsel for Senate Permanent Subcommittee
on Investigations

EXHIBITS LIST

Exhibit A	Subpoena to Backpage, July 7, 2015
Exhibit B	Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Aug. 6, 2015
Exhibit C	Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Aug. 26, 2015
Exhibit D	Letter to Steven R. Ross, Esq. from Chairman and Ranking Member of PSI, Aug. 26, 2015
Exhibit E	Letter to Steven R. Ross, Esq. from Chairman and Ranking Member of PSI, Aug. 28, 2015
Exhibit F	Letter and Subpoena to Carl Ferrer, CEO of Backpage.com, LLC, from Chairman and Ranking Member of PSI, Oct. 1, 2015
Exhibit G	Letter to Carl Ferrer, CEO of Backpage.com, LLC, from Chairman and Ranking Member of PSI, Oct. 20, 2015
Exhibit H	Letter to Chairman and Ranking Member of PSI from Steve R. Ross, Esq., Oct. 23, 2015
Exhibit I	Letter to Carl Ferrer, CEO of Backpage.com, LLC, from Chairman and Ranking Member of PSI, Nov. 3, 2015
Exhibit J	Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 5, 2015
Exhibit K	Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 13, 2015
Exhibit L	Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 16, 2015
Exhibit M	Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 18, 2015
Exhibit N	Letter to Steven R. Ross, Esq. from Chairman and Ranking Member of PSI, Nov. 18, 2015
Exhibit O	Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., November 24, 2015

CERTIFICATE OF SERVICE

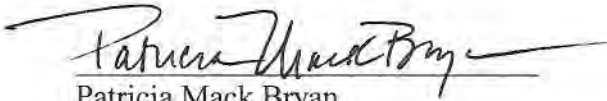
I hereby certify that on March 29, 2016, copies of the foregoing

1. Application to Enforce Subpoena Duces Tecum of Senate Permanent Subcommittee on Investigations;
2. Memorandum of Points and Authorities in Support of Application to Enforce Subpoena Duces Tecum of Senate Permanent Subcommittee on Investigations;
3. Proposed Order Granting Application; and
4. Exhibits attached to Memorandum of Points and Authorities in Support

were served by electronic mail and Federal Express overnight delivery on counsel for Respondent Carl Ferrer, Chief Executive Office of Backpage.com, LLC, at the following address:

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

Counsel for Respondent Carl Ferrer


Patricia Mack Bryan

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

Exhibit A

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

KEITH H. ASHDOWN, STAFF DIRECTOR
GABRIELLE A. RATKIN, MINORITY STAFF DIRECTOR

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

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 7th 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. 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.¹

¹ 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.

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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. 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.² 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.

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

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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).³

³ 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

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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.

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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

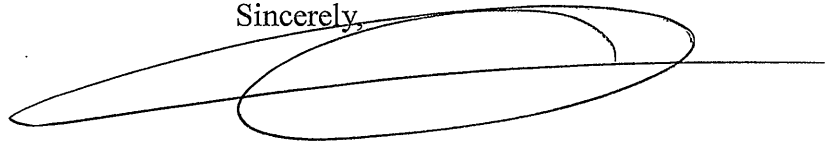
Akin Gump
STRAUSS HAUER & FELD LLP

August 6, 2015
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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 handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line.

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 C

Akin Gump

STRAUSS HAUER & FELD LLP

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

August 26, 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: July 7, 2015 & August 13, 2015 Subpoenas 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 July 7, 2015 (the "Document Subpoena"), and in regard to the subpoenas for testimony issued by the Subcommittee to two Backpage.com employees on August 13, 2015 (the "Deposition Subpoenas").

As we outlined in our August 6, 2015 letter regarding the Document Subpoena, a copy of which is enclosed, the Subcommittee's investigation of Backpage.com raises fundamental constitutional concerns. However, rather than responding to these concerns or working, as we suggested, to "discuss[] a way to proceed that ensures that the Subcommittee...not encroach on Backpage.com's well settled constitutional and statutory protections" (including a discussion regarding utilizing the statutorily-provided procedure to obtain judicial review through civil enforcement), the Subcommittee chose instead to expand its inquiry and to issue the Deposition Subpoenas. We believe these subpoenas further violate Backpage.com's constitutional rights, and we reiterate all of the concerns and objections outlined in our August 6, 2015 letter in this regard. As a publisher of speech, Backpage.com's First Amendment concerns are far from frivolous and deserve serious consideration. Further, the preservation of these important

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constitutional rights would appear to be precisely the type of issue that would lend itself to best be resolved by judicial consideration.¹

In addition, we are further concerned that the Senate's inquiry is related to—and indeed connected with—recent explicit efforts by other governmental actors to halt Backpage.com's legitimate, legal, and First Amendment-protected business operations. Indeed, members of the Senate have targeted Backpage.com since at least 2012, when four Senators—from both political parties and four separate states—sent letters to 40 advertisers of the Village Voice Media (Backpage.com's former parent company), urging them to “use [their] economic influence” to “do the right thing and shut down the ‘adult entertainment’ section” of Backpage.com.²

More recently, Senator Mark Kirk has partnered with local law enforcement to continue his crusade against Backpage.com.³ 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, Senator Kirk applauded the efforts.⁴ Since that time, Senator Kirk has repeatedly commended Sheriff Dart and leveled his own attacks against Backpage.com. For example, on July 21, 2015, Senator Kirk released a statement that said, “Sheriff Tom Dart has stood up to Backpage, the leading source of underage sex trafficking in the United States, and deserves our praise. Backpage isn't a legitimate business, and it's time the Department of Justice shuts it down for good and holds its owners accountable for facilitating the sale of underage girls for sex.”⁵ In addition, Senator Kirk—joined by three Senators and three Members of the House of Representatives—has sent multiple letters to the Department of Justice urging that it utilize the FBI and criminal investigations sections to pursue an “aggressive” investigation of Backpage.com.⁶ As recently as August 20,

¹ See 28 U.S.C. § 1365 (2012).

² See Press Release, Sen. Mark Kirk, Kirk, Blumenthal, Rubio, Cornyn Call on Advertisers and Investors to End Online Child Sex Trafficking at Backpage (Apr. 18, 2012), *available at* http://www.kirk.senate.gov/?p=press_release&id=476.

³ See, e.g., Press Release, Sen. Mark Kirk, Kirk, Dart Continue to Lead Charge to Crack Down on Child Prostitution (Jun. 30, 2014), *available at* http://www.kirk.senate.gov/?p=press_release&id=1128.

⁴ See, e.g., Press Release, Sen. Mark Kirk, Kirk Statement on Visa, Mastercard Banning Use of Credit Cards to Buy Ads Facilitating Human Trafficking (Jul. 1, 2015), *available at* http://www.kirk.senate.gov/?p=press_release&id=1457.

⁵ Press Release, Sen. Mark Kirk, Kirk Backs Dart in Fight With Human Trafficking Site Backpage (Jul. 21, 2015), *available at* http://www.kirk.senate.gov/?p=press_release&id=1483.

⁶ See Press Release, Sen. Mark Kirk, Kirk Leads Call for Investigation into Sex-Trafficking Site Backpage.com (Aug. 10, 2015), *available at* http://www.kirk.senate.gov/?p=press_release&id=1501; see also Press

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2015, Senator Kirk reiterated his support of Sheriff Dart's efforts to put Backpage.com out of business and called for sponsors to "pull ads" and for the Department of Justice to "shut it down."⁷ Given the close proximity of time and the overlapping subject matter between Senator Kirk's campaign against Backpage.com and the Subcommittee's investigation, it appears that the Senate, through the Subcommittee, is a participant in a coordinated attempt to drive Backpage.com out of business.

As the Subcommittee is aware, Backpage.com is in the midst of pursuing legal action against Sheriff Dart in federal court. Backpage.com is aggressively defending itself against Sheriff Dart's efforts to use the power of his office to damage Backpage.com's legal business. Given the significance of the potential impact to the company posed by Sheriff Dart's attack, Backpage.com's legal attention and focus must first be dedicated to defending itself against such an overarching threat.

In addition to the ongoing litigation against Sheriff Dart, and as we proposed in our August 6, 2015 letter, Backpage.com has sought—for the explicit purpose of being permitted to provide the relevant judicial opinion to the Subcommittee—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. That motion was filed with the appropriate court on August 13, 2015, and a decision is imminent. Should Backpage.com's motion be granted, and the order be unsealed for the purposes of the Subcommittee's review, we will promptly inform the Subcommittee.

However, until that time and until Backpage.com has had sufficient opportunity to pursue its remedies against Sheriff Dart's efforts to banish the company from continuing to engage in First Amendment-protected communicative activities, we believe it is inappropriate for the Subcommittee to continue use its governmental authority to seek to compel disclosure of information and documents from Backpage.com and its employees. As such, we respectfully request that the Document Subpoena and the Deposition Subpoenas be withdrawn, or otherwise suspended by the Subcommittee for 30 days. Alternatively, we request a meeting with the Subcommittee staff and Senate Legal Counsel to discuss a method by which the Subcommittee's

Release, Sen. Mark Kirk, Kirk Leads Letter to DOJ Requesting Immediate Investigation of Backpage.com (Jan. 28, 2015), *available at* http://www.kirk.senate.gov/?p=press_release&id=1315.

⁷ See Mark Kirk (@SenatorKirk), TWITTER (Aug. 20, 2015), <https://twitter.com/SenatorKirk/status/634365297374457857>.



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Page 4

subpoenas be subject to judicial review and consideration, and by which Backpage.com and the individual employees may be able to raise constitutional concerns.⁸

In closing, Backpage.com respects the Subcommittee's professed efforts to investigate issues related to human trafficking, and it has indeed voluntarily assisted the Subcommittee in this regard. Toward this end, in our August 6, 2015 letter, rather than simply refusing to provide documents, we asked that the subpoena be withdrawn or that, in the alternative, we discuss another way in which to proceed. Respectfully, we believe that any path forward must fall within the bounds of the Subcommittee's constitutional authority and must not infringe upon Backpage.com's constitutional rights.

We thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "SRoss/my".

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.

⁸ Recent events, including the above-referenced Senators' repeated requests for an aggressive criminal investigation of Backpage.com (the latest of which was made at the very time the Subcommittee was issuing the Deposition Subpoenas), as well as yesterday's high-profile arrests of multiple current and former employees of an adult website, will, in our view, clearly present the necessity for any witness to be deposed to first consider the invocation of his or her individual constitutional rights, in addition to Backpage.com's constitutional rights as discussed in this and in our August 6, 2015 letter.

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

Exhibit D

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 SASSÉ, 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

KEITH B. ASHCOWN, STAFF DIRECTOR
GABRIELLE A. BATON, MINORITY STAFF DIRECTOR

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

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.¹ 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.² 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

¹ 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).

² 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.³ 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

³ 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 E

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, NEBRASKATHOMAS 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 20510-6250KEITH B. ASHDOWN, STAFF DIRECTOR
GABRIELLE A. BAIKIN, MINORITY STAFF DIRECTOR

August 28, 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 August 26, 2015 letter on behalf of Backpage.com, LLC ("Backpage") restating your First Amendment concerns regarding the Subcommittee's subpoena for documents and raising similar concerns regarding the deposition subpoenas issued to Backpage employees Mr. Andrew Padilla and Ms. Joye Vaught. In that letter, you request that the Subcommittee withdraw or suspend the deposition subpoenas to Mr. Padilla and Ms. Vaught. The Subcommittee declines that request and will proceed with these depositions as provided in the subpoenas.

As a preliminary matter, Backpage's August 26, 2015 letter was transmitted more than four hours *after* the Subcommittee had responded in detail to its constitutional claims. Therefore, the letter's assertion that the Subcommittee has not "responded to [its constitutional] concerns" is incorrect.

As explained in the Subcommittee's August 26 letter, Backpage provided no plausible rationale for refusing to comply with the Subcommittee's July 6, 2015 subpoena for documents. Backpage now asserts—with no further legal analysis or authority—that the First Amendment shields Mr. Padilla and Ms. Vaught from their legal obligation to appear for a deposition on September 2 and 3. Our assessment remains the same: Backpage's blanket assertion of privilege with respect to the deposition subpoenas, like its sweeping refusal to comply with the documentary subpoena, is without merit. Accordingly, the Subcommittee refers Backpage to its August 26, 2015 letter, in which it reminded the company of its continued obligation to provide responsive documents for which it has no legitimate claim of privilege and, if necessary, a privilege log for any specific documents or category of documents that it considers to be protected by constitutional privilege.

The Subcommittee also objects to Backpage's unfounded and irresponsible claim that our investigation is "related to—and indeed connected with—recent explicit efforts by other governmental actor's to halt Backpage.com's" business. As previously stated to Backpage counsel, that allegation is false. Furthermore, Backpage's litigation in other jurisdictions, including any "legal attention" that the company may "dedicate[]" to the lawsuit it filed against

Cook County Sheriff Thomas J. Dart, provides no legal excuse to refuse to comply with the Subcommittee's subpoenas.¹

We remind you that the Subcommittee attempted to work with Backpage to obtain the information necessary to its inquiry. Given the serious legal consequences that may result from the refusal to comply with duly authorized congressional subpoenas, please let us know *today*: (a) whether the deponents have been advised of their opportunity to choose their own counsel, and if so whom they have retained; (b) the deponents' individual positions with respect to the subpoenas; and (c) whether Backpage continues to claim that the First Amendment bars all three subpoenas.

Thank you for your attention to this matter.

Sincerely,



Rob Portman
Chairman
Permanent Subcommittee on Investigations



Claire McCaskill
Ranking Member
Permanent Subcommittee on Investigations

¹ We note that Backpage's motion for a preliminary injunction against Sheriff Dart was denied on August 20, 2015. See *Backpage.com, LLC v. Dart*, No. 15-cv-06340, slip op. at 24 (N.D. Ill. Aug. 24, 2015).

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

Exhibit F

RON JOHNSON, WISCONSIN, CHAIRMAN

JOHN MCCAIN, ARIZONA
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KELLY AYOTTE, NEW HAMPSHIRE
JONI ERNST, IOWA
BEN SASSÉ, 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

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.¹ 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

¹ 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.² 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.³ 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.⁴ Finally, Backpage has suggested that the Subcommittee's investigation is part of a concerted effort, with other unrelated governmental actors, to engage in harassment.⁵ 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.⁶ 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

² 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").

³ 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)").

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

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

⁶ 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.⁷

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

⁷ 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
1st & 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.

Updated July 2015

Data Delivery Standards
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

Field	Comment
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

Field	Comment
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_ACCESSSD	
TIME_ACCESSSD	Time the attachment was accessed; must be a separate field and cannot be combined with the DATE_ACCESSSD 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

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

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

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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), 114th 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:

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(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), 114th Cong., 1st 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.

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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

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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

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*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



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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.

Akin Gump
STRAUSS HAUER & FELD LLP

October 23, 2015

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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

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United States Senate

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

KEITH B. ASHDOWN, STAFF DIRECTOR
GABRIELLE A. RATKIN, 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.¹ Over eight in ten suspected incidents of human trafficking in the United States involve sex trafficking,² and reports have shown

¹ 18 U.S.C. § 1591.

² 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.³ In recent years, sex trafficking has migrated to the Internet,⁴ where it has flourished in part because of the high profitability and relatively low risk associated with advertising trafficking victims' services online.⁵

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.⁶ 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."⁷

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

³ 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>.

⁴ 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.").

⁵ 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>.

⁶ 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/>.

⁷ 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.⁸

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.⁹

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 advertisements¹⁰ 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).¹¹ The Subcommittee's subpoena, by contrast, was scrupulously drawn to avoid such concerns.

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

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

⁹ 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.

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

¹¹ 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).

¹² 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."¹³ 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."¹⁴

The October 1 subpoena required you to produce documents named in the schedule, or else appear personally, on October 23, 2015.¹⁵ 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.¹⁶ 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."¹⁷ 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.

¹³ Letter from PSI to Backpage at 2 (Oct. 1, 2015).

¹⁴ *Id.*

¹⁵ Subpoena, Oct. 1, 2015.

¹⁶ Subpoena, Schedule A (Oct. 1, 2015).

¹⁷ 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.¹⁸ Counsel for Backpage committed to submitting a complete explanation for any noncompliance by the return date.¹⁹ 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.”²⁰

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 investigation²¹ and (ii) that the subpoena is not pertinent to a proper investigation within the Subcommittee’s jurisdiction.²² On those two bases, Backpage objected to five of the document requests in the subpoena: Requests One, Two, Three, Five, and Eight.²³

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”)²⁴ 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.”²⁵ 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.²⁶

¹⁸ *Id.*; see 2 U.S.C. §§ 192, 194.

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

²⁰ Letter from PSI to Backpage at 1 (Oct. 20, 2015).

²¹ Letter from Backpage to PSI at 3 (Oct. 23, 2015).

²² *Id.* at 6.

²³ *Id.* at 6–8.

²⁴ *Id.* at 7 (emphasis added).

²⁵ *Id.*

²⁶ 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.²⁷ 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.

²⁷ *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.

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.”²⁸ 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.²⁹

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-

²⁸ 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>.

²⁹ 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,³⁰ 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.³¹ And significant federal funds are devoted to serving victims of trafficking and providing grants for related academic research.³² 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.³³ As to Backpage itself, much of what the company publishes is indeed

³⁰ 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>.

³¹ *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.

³² *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>.

³³ 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."³⁴ 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.").

³⁴ 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.³⁵ 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.”).³⁶

Relatedly, Backpage also argues that “the Subcommittee cannot legitimately expand its authority to investigate by inappropriately trying to conflate online advertising with illegal activity.”³⁷ 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*

³⁵ *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).

³⁶ 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.

³⁷ 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.³⁸ 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”³⁹ 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:

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

³⁹ *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”⁴⁰ if it must operate blindly.⁴¹

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.”

⁴⁰ Letter from Backpage to PSI at 1 (Oct. 23, 2015).

⁴¹ 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.”⁴²

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.⁴³ Ms. McDougall’s testimony from 2012 stated that “Backpage leads the industry in” its moderation methods.⁴⁴ 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.⁴⁵

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.”⁴⁶ Again, these are procedures and methods that Backpage itself highlights as an

⁴² Letter from Backpage to PSI at 7 (Oct. 23, 2015).

⁴³ 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/>.

⁴⁴ 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.”).

⁴⁵ 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.

⁴⁶ 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 images⁴⁷ in the adult section.⁴⁸ 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.”⁴⁹ “Forensic footprints” described by Ms. McDougall in her testimony include metadata⁵⁰ 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.

⁴⁷ 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.

⁴⁸ Subpoena, Schedule A (Oct. 1, 2015).

⁴⁹ BP-PSI-000016.

⁵⁰ 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."⁵¹ 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.⁵²

⁵¹ Letter from Backpage to PSI at 7 (Oct. 23, 2015).

⁵² 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 J

Akin Gump

STRAUSS HAUER & FELD LLP

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

November 5, 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. To that end, today's submission contains Backpage.com's "Software License, Hosting, Maintenance and Development Agreement" with DesertNet, L.L.C. For purposes of identification and reference, this agreement has been numbered from BP-PSI-000022 to BP-PSI-000068.

Please note that this agreement is confidential and proprietary in nature, and has been marked as such. 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 discloses any such information or documents to any third parties.

Akin Gump
STRAUSS HAUER & FELD LLP

November 5, 2015
Page 2

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 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,



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.

**SOFTWARE LICENSE, HOSTING, MAINTENANCE AND DEVELOPMENT
AGREEMENT**

**[AGREEMENT REDACTED PURSUANT TO REQUEST
OF BACKPAGE, SEE LETTER OF NOV. 5, 2015]**

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:

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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).¹

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.

¹ 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

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- 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

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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.

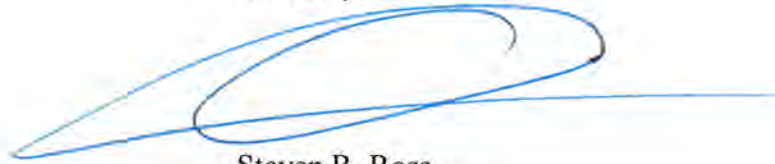
Finally, while Backpage.com has agreed to provide particular documents in response to some of the Subpoena’s requests, Backpage.com does not waive and expressly reaffirms its First Amendment and pertinence objections as to all requested documents and information. The production of this information is 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 'S' 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.

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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.¹ 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

¹ 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.²

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.³ 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.

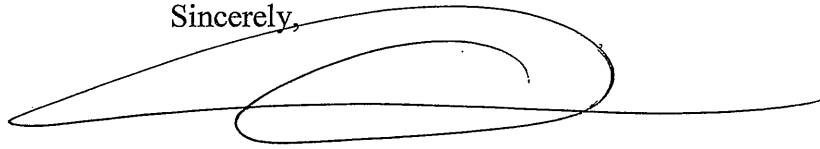
² We have further indicated to the Subcommittee that Backpage.com will comply with any production or disclosure requirements found in a final judicial decision to be constitutionally proper.

³ 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, 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

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

Exhibit N

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, NEBRASKATHOMAS 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 MAILMr. 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 22.¹ At this late date, that is not an adequate excuse. Mr. Ferrer has been subject to a subpoena requiring his personal appearance since October 1,² 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."³ We considered those objections and overruled them on November 3 by a letter order addressed to Mr. Ferrer.⁴ 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.⁵

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.

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

² Subpoena, Oct. 1, 2015.

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

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

⁵ *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."⁶ 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.⁷ 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

⁶ *Id.*

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

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

Exhibit O

Akin Gump

STRAUSS HAUER & FELD LLP

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

November 24, 2015

VIA ELECTRONIC DELIVERY

The Honorable Ron Johnson, Chairman
The Honorable Thomas R. Carper, Ranking Member
Committee on Homeland Security & Governmental Affairs
United States Senate
Dirksen Senate Office Building, SD-340
Washington, DC 20510

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

Re: November 19, 2015 Hearing Regarding Backpage.com

Dear Chairman Johnson, Ranking Member Carper, Chairman Portman, and Ranking Member McCaskill:

On behalf of Backpage.com, LLC (“Backpage.com”), we write in regard to the November 19, 2015 public hearing held by the Permanent Subcommittee on Investigations (the “Subcommittee”) regarding Backpage.com.

As you know, the legal system provides few options for a private party such as Backpage.com to challenge a Congressional subpoena it views as invasive and constitutionally improper.¹ Because Backpage.com believes, based on established judicial precedent, including recent decisions addressing improper government harassment of Backpage.com, that the Subcommittee’s investigation of Backpage.com directly infringes upon its First Amendment rights—rights that should be protected by the judiciary, not defined by the Subcommittee itself—

¹ See, e.g., *U.S. v. House of Representatives*, 556 F.Supp. 150, 152 (D.D.C. 1983) (“Courts have been extremely reluctant to interfere with the statutory scheme [established for contempt of Congress] by considering cases brought by recalcitrant witnesses seeking declaratory or injunctive relief.”).

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we have raised these concerns with Subcommittee staff repeatedly since June 2015. Specifically, in its written response to the Subcommittee's first overbroad and constitutionally deficient subpoena, on August 6, 2015 Backpage.com suggested that the Senate's civil contempt process would allow for judicial review of the constitutional issues presented by this investigation. We have repeated this suggestion over the past several months, both in Backpage.com's written submissions to the Subcommittee and in our discussions with Subcommittee staff. Backpage.com has also repeatedly committed to complying with a final judicial opinion that establishes the appropriate contours of the Subcommittee's authority to compel Backpage.com to produce information. As counsel for Backpage.com, we continue to believe that a judicial resolution of this matter is the appropriate course. To that end, Backpage.com has declined to produce documents to the Subcommittee on the basis that the Subcommittee's requests for those documents violate its constitutional rights.

However, it would be improper to conclude that the inability of Mr. Carl Ferrer, Backpage.com's Chief Executive Officer, to attend the November 19, 2015 Subcommittee hearing was an intentional defiance of the Subcommittee's inquiry. Notwithstanding assertions made at the November 19, 2015 hearing, Mr. Ferrer was never served with a subpoena for his testimony on that date. Rather, the Subcommittee issued an October 1, 2015 subpoena, and the Subcommittee itself has referred to its request as a "subpoena for documents."² Indeed, the face of the subpoena and our discussions with Subcommittee staff all indicated that Mr. Ferrer's appearance may be required only insofar as the appearance by a company's custodian of records might be required; there was never any specific request or subpoena for Mr. Ferrer to give public testimony regarding the many detailed topics the Subcommittee professes to be investigating. Indeed, it was not until less than one week before the hearing that Subcommittee staff informed us by email that a public hearing would be held on November 19, 2015 and that Mr. Ferrer "should plan to appear."

Further, given the Subcommittee's tradition and practice of allowing individuals to assert their constitutional rights without appearing before the Subcommittee—a precedent that was used in this very matter for other Backpage.com employees³—it was not unreasonable for Mr. Ferrer to expect that his personal appearance may be waived or, at the least, continued.

Finally, and while we continue to believe that it is inappropriate for the Subcommittee to require Mr. Ferrer's personal appearance, we reiterate Mr. Ferrer's willingness to travel to

² See, e.g., October 1, 2015 Letter from the Subcommittee.

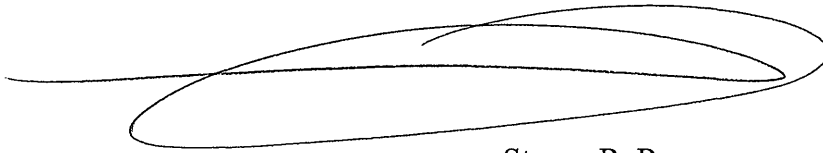
³ Unlike Mr. Ferrer, these employees did receive subpoenas for their testimony from the Subcommittee on August 13, 2015.

Akin Gump
STRAUSS HAUER & FELD LLP

November 24, 2015
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Washington, D.C. to appear before the Subcommittee to assert, in person, his constitutional rights.

Sincerely,

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the left.

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
SENATE PERMANENT SUBCOMMITTEE ON)	
INVESTIGATIONS,)	
)	
Applicant,)	
)	Misc. No. _____
v.)	
)	
CARL FERRER,)	
)	
Respondent.)	
_____)	

[Proposed] **ORDER**
GRANTING APPLICATION TO ENFORCE SUBPOENA DUCES TECUM
OF SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

Upon consideration of the Application to Enforce Subpoena Duces Tecum of Senate Permanent Subcommittee on Investigations, all papers filed in support thereof and opposition thereto, and the entire record herein, the Court hereby finds that the Subcommittee is entitled to enforce its subpoena issued to Carl Ferrer on October 1, 2015, for production of documents responsive to requests 1, 2, and 3 of that subpoena, and that Mr. Ferrer has no privilege against complying with the Subcommittee's subpoena. Accordingly, it is hereby

ORDERED that the Application is GRANTED; and it is further

ORDERED that Carl Ferrer shall comply forthwith with the October 1, 2015 subpoena of the Subcommittee 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 Order.

Dated: _____

United States District Judge

To be served on:

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