

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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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. Touns*, 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 *Burse 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. *Burse*, 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,



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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:

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