

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 8(a)(4), Appellant states as follows:

1. The Applicant to enforce a legislative subpoena before the District Court was the Senate Permanent Subcommittee on Investigations, and the Respondent was Carl Ferrer. *See Senate Permanent Subcomm. on Investigations v. Ferrer*, __ F.Supp.3d __, 2016 WL 4179289 (D.D.C. Aug. 5, 2016).

2. Appellant in this Court is Carl Ferrer. Appellee is the Senate Permanent Subcommittee on Investigations. There are no other parties or *amici* at this time.

3. The ruling on review for the merits appeal is *Senate Permanent Subcomm. on Investigations v. Ferrer*, __ F.Supp.3d __, 2016 WL 4179289 (D.D.C. Aug. 5, 2016). There is no ruling on review for purposes of this Motion insofar as, although Appellant Ferrer moved the District Court for a stay pending appeal pursuant to Fed. R. App. P. 8(a)(1)(A) and Cir. R. 8(a)(1), the District Court has not ruled before a motion to this Court was necessary in order to secure relief before the time expires for compliance with the District Court Order that Appellant seeks stayed. A copy of the decision on the merits is attached. There are no related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rules 8(a)(4) and 26.1, Appellant states as follows:

Appellant Carl Ferrer is an individual not required to submit a corporate disclosure statement. However, the Senate Permanent Subcommittee on Investigations served a subpoena on Mr. Ferrer in his capacity as Chief Executive Officer of Backpage.com LLC.

Backpage.com, LLC operates an online website for classified ads and is a Delaware limited liability company that is a subsidiary of and owned by several other privately held companies, respectively: IC Holdings, LLC; Dartmoor Holdings, LLC; Atlantische Bedrijven C.V.; Kickapoo River Investments, LLC; Lupine Investments LLC; and Amstel River Holdings, LLC. No publicly held company owns any interest in Backpage.com, LLC or any of its parent companies.

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This Emergency Motion pursuant to Fed. R. App. P. 8(a) and Cir. R. 8(a) seeks to stay the District Court's August 5, 2016, order requiring the production of documents in response to a contested legislative subpoena by **August 15, 2016**. This case presents a novel First Amendment question of great significance: whether a Senate committee may use its investigative authority so as to intrude on the editorial processes of an online publisher of third-party content. The Subpoena *Duces Tecum* issued by the Appellee Senate Permanent Subcommittee on Investigations ("Subcommittee" or "PSI"), the application to enforce which the order below granted,¹ seeks documents from Backpage.com, LLC ("Backpage"), the second largest online classified ad forum in the United States, to whose Chief Executive Officer, Appellant Carl Ferrer, the Subpoena was directed.

Grant of a stay pending appeal on an expedited basis is required to allow for a full and fair presentation of the constitutional issues implicated by the Subpoena, *before* a release of documents that imperils First Amendment rights, and which would eviscerate the right to appellate review if compliance were required before this Court can rule. As required by Rule 8(a), Appellant Mr. Ferrer moved the District Court for a stay pending appeal – the next business day after the order sought to be stayed issued – but the court has not ruled. The impending

¹ *Senate Permanent Subcomm. on Investigations v. Ferrer*, __ F.Supp.3d __, 2016 WL 4179289 (D.D.C. Aug. 5, 2016) ("*PSI v. Ferrer*") (ECF Nos. 17 & 18).

compliance deadline requires seeking expedited relief from this Court at this time, so that there is an opportunity for a ruling on this motion before production of documents is required. This motion is filed fewer than 7 days before a ruling is needed because the order from which relief was sought issued only 7 days ago, and allowed only 10 days for compliance, and the Rules require seeking relief first from the District Court. *See* Fed. R. App. P. 8(a) & Cir. R. 8(a) & 27(f). Appellant has telephonically notified counsel for Appellee of this motion.

INTRODUCTION

Although Congress undoubtedly has broad investigative power to support legitimate legislative objectives, the Supreme Court has long recognized that “[t]he Bill of Rights is applicable to investigations as to all forms of governmental action.” *Watkins v. United States*, 354 U.S. 178, 188 (1957). Under this principle, “Congress has no more right, whether through legislation or investigations conducted under an overbroad enabling Act, to abridge the First Amendment freedoms of the people, than do the other branches of government.” *Stamler v. Willis*, 415 F.2d 1365, 1370 (7th Cir. 1969). Here, PSI, in coordination with other governmental actors at various levels, is asking the judiciary to approve the use of subpoena power as a bludgeon to burden or restrict editorial policies of which it disapproves.

The District Court was dismissive of Backpage.com’s First Amendment concerns because they did not fall into familiar areas in which this Subcommittee or other legislative bodies historically abused authority – including efforts to root out subversives, political dissidents, or civil rights agitators. *PSI v. Ferrer*, at *12. *See, e.g., United States v. Rumely*, 345 U.S. 41 (1953); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963). But the decision overlooked the way broad and punitive investigatory demands increasingly are used in the online context to exert pressure on speakers and publishers of third-party content.²

Such tactics are exemplified by a close analog to this case – an investigative subpoena by Mississippi Attorney General Jim Hood based on his distaste for Google’s posting of “certain content he [found] objectionable, namely

² For example, on May 10, 2016, the Senate Committee on Commerce, Science, and Transportation launched an investigation about Facebook’s “Trending Topics” section, based on press accounts that Facebook had selectively chosen not to feature content concerning conservative views. *See, e.g., Ferrer Surreply* § B (citing Ltr. from Sen. John Thune to Mark Zuckerberg, Chairman & CEO, Facebook, May 10, 2016 (purporting to open investigation into Facebook’s publishing practices)) (ECF No. 15). Legal scholars and the press immediately cited the investigation as an improper infringement on Facebook’s First Amendment rights. *See, e.g.,* Nick Canasaniti & Mike Isaac, *Senator Demands Answers From Facebook on Claims of ‘Trending’ List Bias*, N.Y. TIMES, May 10, 2016; Peter Scheer, *Facebook, under attack for choosing “trending” stories, should embrace the 1st Amendment*, First Amendment Coalition, May 11, 2016, available at <https://firstamendmentcoalition.org/2016/05/facebook-attack-choosing-trending-stories-embrace-1st-amendment/>; Charles C.W. Cooke, *The Senate Should Leave Facebook Alone*, NATIONAL REVIEW, May 10, 2016.

advertisements and videos [] from third parties” and his belief that the company should make changes “to ‘better’ sanitize the material ... available to users.” *Google, Inc. v. Hood*, 96 F.Supp.3d 584, 593 (S.D. Miss. 2015), *rev’d on other grounds*, 822 F.3d 212 (5th Cir. 2016). “Given the gravity of the rights asserted,” the District Court enjoined further actions to enforce the subpoena based on its finding that the company was likely to succeed on its claim under “developing jurisprudence ... that Google’s publishing of lawful content and editorial judgment as to its search results is constitutionally protected.” *Id.* at 598.

The injunction was reversed, but only on ripeness grounds, not because Google failed to raise significant First Amendment issues. To the contrary, the Fifth Circuit stressed that the case, “like others of late,” reinforces “the importance of preserving free speech on the internet, even though the medium serves as a conduit for much that is distasteful or unlawful.” *Google v. Hood*, 822 F.3d at 220 (citing *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015)). The court found Google would have an adequate remedy at law if the government ever sought to compel compliance, and would “not presume that Mississippi courts would be insensitive to the First Amendment values that can be implicated by investigatory subpoenas.” *Hood*, 822 F.3d at 225 & n.10 (citing *United States v. R. Enters., Inc.*, 498 U.S. 292, 303 (1991); *id.* at 306-07 (Stevens, J., concurring)).

Unlike the situation in *Hood*, enforcement of PSI's subpoena is imminent and the Subcommittee is pressing aggressively for a broad interpretation of its document demands. A stay is thus essential to enable this Court, for the first time, to assess the First Amendment consequence of permitting Congress to use such investigatory demands as a tool of speech regulation. The answer is of vital importance not only to Backpage.com, but to all online publishers of third party content because "whatever affects the rights of the parties here, affects all." *Gibson*, 372 U.S. at 546.

PROCEDURAL HISTORY

The Subcommittee has sought information and documents related to Backpage since April 2015. It first emailed Backpage's General Counsel Liz McDougall on April 15, 2015 "to request an interview to discuss Backpage's business practices."³ On April 17, 2015, Ms. McDougall responded, offering to travel to D.C. for a meeting with PSI's lawyers, and on June 19, 2015, she met voluntarily with six PSI staff members for a day-long interview. On July 7, 2015, PSI issued Backpage a document subpoena for 41 categories of documents on all

³ STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, REP. ON RECOMMENDATION TO ENFORCE A SUBPOENA ISSUED TO THE CEO OF BACKPAGE.COM, LLC at 29 (Nov. 19, 2015) (hereinafter, "*PSI Staff Report*") (ECF Nos. 8-7 – 8-11).

aspects of its business, terms of use, and editorial policies.⁴ Counting the multiple sub-parts for each category, PSI sought documents on approximately 120 subjects.

On July 16, 2015, Backpage counsel met with PSI staff to raise concerns about the subpoena's scope, the First Amendment issues it posed, and the extent to which the inquiry appeared part of the larger governmental effort targeting Backpage. Declaration of Steven Ross ¶ 4 (ECF No. 8-13). On October 1, 2015, the Subcommittee wrote Backpage and reiterated its position that Backpage's First Amendment concerns were without merit.⁵ The Subcommittee also withdrew its July 7, 2015 Subpoena and, in its place, issued Mr. Ferrer the Subpoena now at issue. *Id.* The new Subpoena had eight enumerated requests, covering what PSI called "the core" of its investigation. *Id.* But it did not materially narrow the document requests so much to reframe the demands using more general language.⁶

⁴ Subpoena to Backpage.com by the Permanent Subcomm. on Investigations (July 7, 2015) (ECF No. 8-12). The Subcommittee issued the subpoena to Backpage immediately after its staff consulted with members of a team that Sheriff Dart of Cook County, Illinois, assembled to "crush Backpage, period." *Backpage.com v. Dart*, 807 F.3d at 230. The Seventh Circuit later held the Sheriff's scheme was unconstitutional. *Id.*

⁵ See Subpoena to Backpage.com by the Permanent Subcomm. on Investigations (Oct. 1, 2015) (ECF No. No. 8-1).

⁶ The subpoena demanded all documents from January 1, 2010 to the present relating to: (1) Backpage's reviewing, blocking, deleting, editing, or modifying advertisements in Adult Sections; (2) posting limitations, including banned terms lists; (3) reviewing, verifying, blocking, deleting, disabling, or flagging user accounts; (4) human trafficking, sex trafficking, human smuggling, prostitution, or

On February 29, 2016, five months after issuing the Subpoena, PSI presented a resolution to the Senate Committee on Homeland Security and Governmental Affairs directing Senate Legal Counsel to bring a civil action to enforce three of the eight paragraphs in the Subpoena. S. Rep. No. 114-214 (2016). The Subcommittee did not seek to enforce the Subpoena's single paragraph requesting documents regarding human trafficking – the purported focus of its inquiry. *Id.* On March 29, 2016, the Subcommittee filed with the District Court its Application to enforce the subpoena.

Specifically, PSI asked the court to enforce the demands for any documents concerning:

1. 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. [A]dvertising 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. [R]eviewing, 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

its facilitation or investigation, including any policies, manuals, memoranda, or guidelines; (5) policies related to hashing of images, data retention, or removal of metadata; (6) the number of ads posted, by category, for the past three years, and ads reported to law enforcement agencies; (7) the number of ads for the past three years deleted or blocked at each stage of the reviewing process; and (8) Backpage's annual revenue for each of the past five years, by category. *Id.*

address, photo, and IP address. This request does not include the personally identifying information of any Backpage user or account holder.

The court entered an Order enforcing the Subpoena on August 5, 2016. *PSI v. Ferrer*, 2016 WL 4179289. The next business day, Mr. Ferrer moved for a stay pending appeal (ECF No. 19) to ensure his right to judicial review of enforcement of the subpoena, which would be lost if disclosure were required before this Court could consider the matter. The District Court has not ruled on the motion.

LEGAL STANDARD

In determining whether to issue a stay pending appeal, courts consider four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the prospect that the moving party will be irreparably harmed if relief is withheld; (3) the possibility that others will be harmed if a stay issues; and (4) the public interest. *Cuomo v. United States Nuclear Regulatory Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). *See also* Cir. R. 8(a)(1). This is the same standard as controls issuance of a preliminary injunction. *WMATA*, 559 F.2d 841.

The first factor, the movant’s likelihood of success, ordinarily is satisfied if the movant raises “serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation.” *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (quoting *WMATA*, 559 F.2d at 844). The test is a flexible one and “relief may be granted with either a high

likelihood of success and some injury, or *vice versa*.” *Cuomo*, 772 F.2d at 974. *See also Pursuing America’s Greatness v. FEC*, __ F.3d ___, 2016 WL 4087943, at *3 n.1 (D.C. Cir. Aug. 2, 2016). *Accord* PSI Opp. (ECF No. 22) at 3 (“The four factors have typically been evaluated on a ‘sliding scale.’”) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009)). “In First Amendment cases, the likelihood of success will often be the determinative factor,” especially insofar as “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,” and “there is always a strong public interest in the exercise of free speech rights otherwise abridged” by constitutional overreach. *Pursuing America’s Greatness*, 2016 WL 4087943, at *7-*8 (quoting, *inter alia*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

ARGUMENT

I. MR. FERRER HAS PRESENTED SERIOUS FIRST AMENDMENT QUESTIONS AND IS LIKELY TO PREVAIL ON THE MERITS

A. The Subpoena Intrudes on Editorial Functions

The District Court Opinion misstates the nature of Mr. Ferrer’s First Amendment claims and undervalues the constitutional interests at stake. Mr. Ferrer never claimed a First Amendment “absolute right to be free from government investigation” or an “unlimited license to talk’ or to publish.” *PSI v. Ferrer*, at *10 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 (1961)). The court also minimizes the First Amendment concerns raised by the Subpoena,

on the assumption that this case does not implicate political speech or associational rights, or the freedoms of speech or of the press. *Id.* at *12 & n.6.⁷ This ignores the extent to which the ability of online forums to host the speech of others has become a central issue in preserving Internet freedom.

As the Supreme Court explained regarding the Internet – including its ability to facilitate speech by third parties using online services – its 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). The issue here involves use of investigatory authority in a way that intrudes on editorial judgments by online intermediaries. *E.g., Hood*, 96 F.Supp.3d at 598. These online editorial choices are *precisely* the kind of speech and press functions that enjoy robust First Amendment rights.

The intrusion into editorial functions is comparable to what was at issue in *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir. 1972), which involved a grand jury investigation of *The Black Panther* newspaper. *Id.* at 1065-68. The District Court’s effort to distinguish *Bursey*, by asserting that it involved political speech and associational rights, *PSI v. Ferrer*, at *12, failed to grasp that editorial

⁷ The District Court improperly relies on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (cited *PSI v. Ferrer*, at *11), a case which the Northern District of Illinois just found does not apply to an analysis of Backpage.com’s First Amendment rights. *See Backpage.com v. Dart*, No. 15-cv-6340, Transcript of Proceedings, Aug. 9, 2016 (ECF No. 175), at 5-8 (copy provided at Appendix).

choices by online intermediaries likewise involve such things as “what should be published initially, how much space should be allocated to the subject, or the placement of a story on the front page or in the obituary section.” 466 F.2d at 1087–88. As recognized in *Jian Zhang v. Baidu.com, Inc.*, 10 F.Supp.3d 433, 438 (S.D.N.Y. 2014), “a search engine’s editorial judgment is much like many other familiar editorial judgments, such as the newspaper editor’s judgment of which wire-service stories to run and where to place them.” *See also, e.g., Langdon v. Google, Inc.*, 474 F.Supp.2d 622, 629–630 (D. Del. 2007) (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974)), and the First Amendment protection afforded editorial selections of search engines).

The District Court’s characterization of *Bursey* as a case focusing primarily on associational rights is similarly misplaced. *PSI v. Ferrer*, at *12. While certain questions probed the identity of Black Panther Party members, the court separately addressed First Amendment concerns raised by the investigation. *Bursey*, 466 F.2d at 1088. It found the First Amendment issues to be of surpassing importance, because if *Black Panther* staff could be compelled to provide information on its internal operations and editorial policies, “any editor, reporter, typesetter, or cameraman could be compelled to reveal the same information about his paper or television station.” *Id.*

The court in *Bursey* observed that “[w]hen First Amendment interests are at stake, the Government must use a scalpel, not an ax,” *id.* at 1088, and held that the government must “carr[y] its burden almost question by question before it can compel answers.” *Id.* at 1086. Here, by contrast, the District Court inappropriately placed the burden on Backpage to identify “particular [documents] or class[es] of documents” whose production would implicate First Amendment rights. *PSI v. Ferrer*, at *9. This reversed presumption flies in the face of *Bursey*, where the Ninth Circuit explained that “[w]ere we to hold that the exercise of editorial judgments of these kinds raised an inference that the persons involved in the judgments had or may have had criminal intent, we would destroy effective First Amendment protection for all news media.” *Id.* at 1087–88.⁸ For the same reasons, the First Amendment issue at stake here go to the heart of the “importance of preserving free speech on the internet.” *Hood*, 822 F.3d at 220.

B. PSI Thwarted Efforts to Balance First Amendment Burdens

The conclusion below that Mr. Ferrer failed to balance investigative needs against his First Amendment interests does not address the extent to which PSI’s evolving demands rendered impracticable such measures as question-by-question objections or production of a privilege log. The Subcommittee abandoned its

⁸ The District Court’s additional effort to distinguish *Bursey* as a case where the journalists “did not refuse to appear,” *PSI v. Ferrer* at *12, ignores the extent to which Backpage’s GC met with PSI staff. *See supra* 5.

initial lengthy list of specific demands for a shorter list of broadly-framed requests, but did nothing to minimize the demand, and instead expanded it. Thus, the District Court's conclusion that PSI "minimized" the burden misstates the facts. *See PSI v. Ferrer*, at *14-*15. Moreover, the demand for years of internal emails was made clear just days before the November 19, 2015 hearing and sought email from and between all those employed to provide moderation services for a six year period, as well as all documents concerning review, verification, editorial decisions, and payment information. *See Ferrer Opp.* (ECF No. 8) 30-31.

By formulating the questions as expansive blunderbuss demands focused on Backpage's editorial functions, PSI embarked on "an unduly burdensome fishing expedition," *Hood*, 96 F.Supp.3d at 599, that made it impractical to raise question-by-question objections. Likewise, expanding the demands to include all internal editorial communications for a six-year period, just days before the hearing, makes the claim that Mr. Ferrer failed to provide a privilege log fanciful.

Where such demands are specifically focused on editorial decision-making – as here – the burden is on the government to provide some notion of balance. *Bursey*, for example, sets forth a three part test whereby the government's burden for compulsory process for editorial materials is not met unless it can show: (1) an immediate, substantial, and subordinating need for the information; (2) a substantial connection between the information sought and an overriding governmental

interest; and (3) no less drastic means to obtain the information. *Bursey*, 466 F.2d at 1083. Such considerations are not limited to cases involving political speech, as the District Court incorrectly held. In *Hood*, 96 F.Supp.3d at 598, a case involving the same types of editorial judgments as are at issue here, the court enjoined enforcement of a subpoena until a determination could be made on the merits given “the gravity of the rights asserted.” This Court should likewise grant a stay.

C. Mr. Ferrer Raises Substantial Questions Going to the Merits

Even if the Court deems Backpage unlikely to succeed on the merits on this early showing, this case presents difficult and substantial questions that make it a fair ground of litigation. As courts have recognized strong constitutional and statutory protections for online expression, *see supra* 10-12 policymakers and other elected officials have sought to employ an assortment of creative means – legal and otherwise – to restrict disfavored speech. The Subcommittee now seeks to perpetuate such efforts, raising substantial questions regarding the interplay of Congress’s oversight authority – derived from its legislative power – and the First Amendment, the Constitution’s most clearly stated limitation on Congress’ authority to legislate. These and other issues raised by this matter should be afforded a fuller investigation by the D.C. Circuit.⁹

⁹ *See, e.g., Hood*, 822 F.3d at 220; *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008 (per curiam) (granting stay where, among other things, the dispute was “of potentially great significance

In *Miers*, this Court reversed the denial of a stay pending appeal of an order requiring the then White House Counsel and Chief of Staff to comply with a subpoena from the House Committee on the Judiciary for documents related to the purportedly forced resignation of nine U.S. Attorneys in 2006. 542 F.3d at 910. As Judge Tatel explained in his concurrence, where irreparable injury is shown, the movant “need only raise questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.” *Id.* at 912 (Tatel, J., concurring) (internal quotation marks and citation omitted). Similarly, in *Center for International Environmental Law*, the District Court granted a stay pending appeal in a Freedom of Information Act case concerning documents related to the Office of United State Trade Representative’s negotiations of the United States-Chile Free Trade Agreement. 240 F.Supp.2d at 21-22. It explained that “although the Court ultimately did not agree

for the balance of power between the Legislative and Executive Branches”); *Akiachak Native Cmty. v. Jewell*, 995 F.Supp.2d 7, 13 (D.D.C. 2014 (“Though the Court disagrees with Alaska’s position, and finds there to be a low likelihood of success on the merits, it recognizes that the case presented difficult and substantial legal questions regarding the balance between federal and state regulation of Indian land, and that its decision was at times, a close one.”)); *Ctr. for Int’l Env’tl. Law v. Office of U.S. Trade Rep.*, 240 F.Supp.2d 21, 12 (D.D.C. 2003) (staying enforcement of judgment where case presented novel question); *FTC v. Church & Dwight Co.*, 756 F.Supp.2d 81, 84 (D.D.C. 2010 (argument concerning continuing validity of past D.C. Circuit decision was “compelling enough to raise significant questions concerning [movant’s] likelihood of success on appeal”).

with [movants'] position on the merits, it is evident that [movants] [] made out a 'substantial case on the merits.'" *Id.* at 22 (quoting *WMATA*, 559 F.3d at 843).

Both cases illustrate why a stay is warranted here – the First Amendment questions presented are substantial and are a fair ground of litigation. *See Al Maqaleh v. Gates*, 620 F.Supp.2d 51, 56 (D.D.C. 2009) (where “fundamental constitutional questions are presented” it “follows, then, that these cases present ‘serious legal questions ... [that are] so [] substantial, [and] difficult as to make them a fair ground for litigation’”) (citation omitted). Notably, this Court has yet to address whether a government subpoena threatening to chill an online intermediary publisher’s editorial process is permissible under the First Amendment. It is well established, however, that, in addition to its proscription on legislation that limits speech, the First Amendment also stands as a bulwark against investigative and other governmental actions that encroach upon constitutionally protected rights. Given the substantial question presented, a stay pending appeal protecting the status quo is warranted.

II. AS VIOLATION OF FIRST AMENDMENT RIGHTS CONSTITUTES IRREPARABLE HARM, THE BALANCE OF INTERESTS FAVORS A STAY

To compel production of extensive Backpage documents in violation of the First Amendment would constitute irreparable harm, especially if this Court later reverses the decision below. The “loss of First Amendment freedoms, for even

minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. at 373. The government cannot require the production of information that impairs the exercise of these rights, and Mr. Ferrer has detailed the ways in which PSI’s demands would have just such an effect.¹⁰ Nor may the PSI use its power of inquiry in a governmental effort to attack, and ultimately eradicate, an unpopular publisher of constitutionally protected speech.

Requiring the production of constitutionally protected documents prior to the pending appeal also would effectively render meaningless Mr. Ferrer’s appeal of the constitutional right to protect documents from congressional review. As this Court repeatedly has recognized, “[d]isclosure followed by appeal ... is obviously not adequate” because “in such cases ... the cat is out of the bag.” *CBS Corp. v. FCC*, 785 F.3d 699, 709 (D.C. Cir. 2015).¹¹ These concerns are especially prominent here in that forced compliance with the Subpoena would likely mean

¹⁰ See, e.g., Mem. of P. & A. in Opp’n to Appl. of Senate Permanent Subcomm. on Investigations to Enforce Subpoena Duces Tecum (ECF No. 8) at 29-37.

¹¹ See also, e.g., *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (granting stay pending appeal of order to comply with subpoena because “[o]nce the documents are surrendered pursuant to the ... order, confidentiality will be lost for all time.”); Cf. *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 896 (D.C. Cir. 2006) (citing favorably *Providence Journal’s* pronouncement that once documents are produced, “[t]he status quo could never be restored”). Cases that have rejected disclosure-based mootness as irreparable harm on grounds that produced documents may be returned, e.g., *FDIC v. Garner*, 126 F.3d 1138, 1142 (9th Cir. 1997), do not address the violation of First Amendment rights at issue here, an irreversible reality from the moment documents are produced.

that documents produced to PSI will be disclosed or distributed to others. The Subcommittee already has shown an inclination to publicly disclose previously confidential information and documents, *see generally PSI Staff Report*, and documents and information obtained by PSI have promptly been used by others in their legal attacks on Backpage. *See, e.g.,* Mot. to Strike Pl.’s Improvidently Filed Summ. J. Mot. at 3-4 (ECF No. 126), *Backpage.com, LLC v. Dart*, Civ. No. 1:15-cv-06340 (N.D. Ill. Mar. 14, 2016). It is also legally questionable that material in possession of a congressional committee could later be reached by judicial order. *See, e.g., Doe v. McMillan*, 412 U.S. 306 (1973); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 955-56 (8th Cir. 1979).

Conversely, PSI faces no harm if enforcement of the Subpoena is stayed pending appeal. In opposing a stay below PSI complained of the delay that could be interposed, but its own delay seeking enforcement of the Subpoena – *five months* after issuance – objectively demonstrates a stay would have no ill effect. *See, e.g., EEOC v. Quad/Graphics, Inc.*, 875 F. Supp. 558, 560 (E.D. Wis. 1995) (finding that “a delay in [a government agency’s] receipt of information that it requested” does not constitute “substantial harm”). Further, PSI already has received a significant production from Backpage – more than 16,000 pages of documents – including various moderation guidelines Backpage used and/or

considered, terms used by Backpage employees in the moderation process, and records of subpoena compliance and law enforcement support and assistance.¹²

The Subcommittee is in no position to claim that it is unable to continue its investigation or that it would be substantially harmed by not having more documents at this moment. *See, e.g., Jewish War Veterans of United States, Inc. v. Gates*, 522 F.Supp.2d 73, 82 (D.D.C. 2007 (concluding that “potential harm from an inability to use any additional documents [non-movant] may acquire” did not counsel against stay pending appeal because already produced evidence sufficed). PSI faces no immediate time constraint in completing its investigation,¹³ and Backpage will continue to preserve all documents responsive to the Subpoena.

Given the weighty First Amendment implications of this case – for *all* online intermediaries and the American public – the public interest favors a stay. As this Court recently reinforced, allowing unconstitutional government action to stand “is always contrary to the public interest,” which lies in “protecting First Amendment rights.” *Pursuing America’s Greatness*, 2016 WL 4087943, at *8 (quoting *Gordon*

¹² Even during the pendency of the Application before the District Court, the Subcommittee continued to request and receive information and documents from third-party sources. Declaration of Steven Ross ¶ 2 (ECF No. 19-2).

¹³ *Compare Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 512 (1975) (“[I]t appears that the Session in which the House subpoenas were issued has expired. Since the House, *unlike the Senate*, is not a continuing body, a question of mootness may be raised.”) (emphasis added).

v. Holder, 721 F.3d 638, 653 (D.C. Cir. 2013)). *Cf. Jewish War Veterans*, 522 F.Supp.2d at 82-83 (“public interest is best served” by a stay where “compelling the Members to produce documents ... may impinge important constitutional rights and could have a very real and immediate impact on the behavior of members of Congress”).¹⁴

There may be a public interest in Congress’ ability to investigate and legislate, but neither of these activities is at issue in the instant motion – nor is the purported focus of PSI’s investigation. Rather, the operative balance here must merely weigh the public’s interest in PSI’s *immediate* access to the materials in question, which is practically non-existent, against the critical First Amendment interests at stake.

CONCLUSION

For the foregoing reasons, this Court should stay the order granting the Subpoena’s enforcement pending appeal.

¹⁴ *Accord Joelner v. Village of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004); *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009); *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002).

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CERTIFICATE OF SERVICE

I certify that on this 12th day of August, the foregoing Emergency Motion of Appellant Carl Ferrer for a Stay Pending Judicial Review was filed with the U.S. Court of Appeals for the D.C. Circuit via the CM/ECF system and that four paper copies of the same were hand delivered to the Court. In addition, the following have consented to service via ECF and email:

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Senate Permanent Subcommittee, on
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v.

Carl Ferrer, Respondent.

Misc. Action No. 16-mc-621 (RMC)

Signed August 5, 2016

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OPINION

ROSEMARY M. COLLYER, United States District Judge

*1 The Senate Permanent Subcommittee on Investigations applies to this Court for an order requiring Carl Ferrer, Chief Executive Officer of Backpage.com, LLC, an online website for classified ads, to produce certain documents in response to three requests of a subpoena issued on October 1, 2015. The subpoena is part of the Subcommittee's investigation into the use of the Internet for illegal sex trafficking. Mr. Ferrer refuses to comply fully with the October 1, 2015 subpoena. He has failed to conduct a full search for responsive materials and has not provided a privilege log to the Subcommittee.

On March 29, 2016, the Subcommittee filed its Application to enforce three document requests in the subpoena. Mr. Ferrer opposes. He argues that the Court lacks subject matter jurisdiction over the Application and that the subpoena falls outside the Subcommittee's jurisdiction. He also contends that the subpoena lacks a valid legislative purpose and is overly broad and unduly burdensome. Finally, he contends that the subpoena

violates the First Amendment and the Due Process Clause of the Constitution. The Subcommittee replies that Mr. Ferrer's objections lack merit and that he has not articulated a valid legal basis for failing to comply. The matter is fully briefed and ripe for resolution.¹ For the reasons that follow, the Court will grant the Subcommittee's Application to Enforce Subpoena *Duces Tecum*.

¹ The parties have filed the following briefs on this matter: Application to Enforce Subpoena [Dkt. 1] (Mot.); Opp'n [Dkt. 8]; Reply [Dkt. 11]; Surreply [Dkt. 15]; and Response to Surreply [Dkt. 16].

I. FACTS

The Subcommittee on Permanent Investigations is the chief investigative subcommittee of the Committee on Homeland Security and Governmental Affairs, which is one of the standing committees of the Senate and was established in Rule XXV.1(k)(1) of the Standing Rules of the Senate and Senate Resolution 445, 108th Congress (2004), *reprinted in* S. Doc. 114-6, at 131-34 (2015). The Subcommittee, in turn, was established in Rule 7(A) of the Rules of Procedure of the Committee. *See* 161 Cong. Rec. S413 (daily ed. Jan. 22, 2015), *reprinted in* S. Doc. 114-6, at 131, 146 (2015).

Pursuant to the Senate's authorization, the Subcommittee is conducting an investigation into human trafficking, particularly sex trafficking, on the Internet. Sex trafficking is defined in federal law as the unlawful practice of selling the sexual services of minors or adults who have been coerced into participating in the commercial trade. *See* 18 U.S.C. § 1591. The Internet is an attractive medium for sex traffickers to advertise the exploited victims because it is inexpensive and easily accessible. According to the general counsel for the National Center for Missing and Exploited Children (NCMEC), "most child sex trafficking today is facilitated by online classified advertising websites." Statement of Yiota G. Souras, Sr. V.P. and Gen. Counsel for NCMEC, S. Hrg. No. 114-79, at 39.

The Subcommittee commenced its investigation into Internet sex trafficking in April 2015. Since then, the Subcommittee has conducted multiple interviews and briefings with various groups, particularly online commercial marketplaces, to learn more about the

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magnitude of the problem and the measures being taken to prevent sex trafficking. One of those interviewed as part of the investigation was Backpage. Backpage is “an online forum for classified ads” that self-identifies as “an online intermediary for speech of third-party users.” Opp’n at 1. It is the “second largest classified advertising website in the U.S.” and “users post millions of ads monthly in various categories, including real estate, buy/sell/trade, automotive, jobs, data and adult.” *Id.* at 5. “Backpage does not dictate or require any content, though it may block and remove content that violates its rules or that may be improper.” *Id.* at 5 n.2.

*2 Backpage contains an “adult section,” which “is subdivided into escorts, body rubs, strippers and strip clubs, dom[ination] and fetish, ts (transsexual escorts), male escorts, phone [sex], and adult jobs (jobs related to services offered in other adult categories, whether or not the jobs are sexual—not every employee of a brothel is a sex worker).” Backpage.com, LLC v. Dart, 807 F.3d 229, 230 (7th Cir.2015), *petition for cert. filed* (Apr. 28, 2016) (No. 15–1321). A “majority of the advertisements [in Backpage’s adult section] are for sex—but a majority is not all, and not all advertisements for sex are advertisements for illegal sex.” *Id.* at 234 (internal quotation marks omitted). Moreover, “[t]here is no estimate of how many ads in Backpage’s adult section promote illegal activity.” *Id.*

The Subcommittee states 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.” Mot. at 8 (citing PSI Staff Report at 6–7 (S. Hrg. No. 114–179, at 61–62)). As a result, the Subcommittee is interested in learning more about the effectiveness of Backpage’s “moderation” procedures, that is, the practices of screening and reviewing advertisements to avoid posting illegal ads, such as ads for sex trafficking.

On April 15, 2015, the Subcommittee first contacted Backpage to request an interview. On June 19, 2015, members of the Subcommittee staff interviewed Backpage’s general counsel, Elizabeth McDougall. They reported afterwards that Ms. McDougall could not or did not answer several critical questions concerning Backpage’s moderation activities, the statistics reflecting Backpage’s reporting of suspected sex trafficking to law enforcement and NCMEC, and Backpage’s corporate structure and ownership. *See* Letter to Carl Ferrer, CEO of Backpage.com, LLC from Chairman and Ranking Member of PSI, Nov. 3, 2015 [Dkt. 1–10] (Nov. 3, 2015 Ruling on Mr. Ferrer’s Objections) at 2–3. On June 22, 2015, the Subcommittee sent Backpage follow-up

questions and requests for information, which Backpage did not answer. *See id.*

On July 7, 2015, the Subcommittee issued a documentary subpoena to Backpage requesting materials concerning its moderation procedures, interaction with law enforcement, terms of use, data retention policies, and basic corporate structure. July 7, 2015 Subpoena [Dkt. 1–2]. While the subpoena sought information for 41 categories of documents, it did not request any materials concerning the identity of Backpage users. *See id.* On July 16, 2015, Backpage counsel met with Subcommittee staff to raise First Amendment concerns regarding the scope of the July 7 subpoena, as well as concerns regarding a possible connection between the subpoena and the efforts of Cook County, Illinois Sheriff Thomas Dart to close down Backpage. Opp’n, Decl. of Steven Ross at ¶ 4 [Dkt. 8–13] (Ross Decl.). On August 6, 2015, Backpage submitted written objections to the subpoena, asserting that it was overbroad, unduly burdensome, and violated the First Amendment. *See* Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Aug. 6, 2015 [Dkt. 1–3] (Aug. 6, 2015 Letter). Backpage asked that the subpoena be withdrawn or a response to it to be deferred until Backpage could present “a more fulsome discussion of the constitutional infirmities and concerns regarding the Subcommittee’s subpoena.” *Id.* at 5.

On August 13, 2015, the Subcommittee began to issue deposition subpoenas to Backpage employees. Ross Decl. at ¶ 8. On August 26, the Subcommittee wrote to Backpage asking it to submit further legal authority in support of its First Amendment objection. *See* Letter to Steven R. Ross, Esq. from Chairman and Ranking Member of PSI, Aug. 26, 2015 [Dkt. 1–5] (Aug. 26, 2015 Letter to Backpage). The Subcommittee expressed its intention to minimize any resource burden and explained that “its objective is to conduct responsible fact-finding in aid of Congress’ legislative and oversight responsibilities, not to single out Backpage.” *Id.* Backpage counsel wrote back on the same day, reiterating his objections, opposing the subpoenas issued to two employees, and asking the Subcommittee to submit the dispute to federal court pursuant to 28 U.S.C. § 1365. *See* Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Aug. 26, 2015 [Dkt. 8–17]. In both letters, that of August 6 and August 26, 2015, Backpage “asked that [the] subpoena be withdrawn or that, in the alternative, [they] discuss another way in which to proceed” that “fall[s] within the bounds of the Subcommittee’s constitutional authority and [does] not infringe upon Backpage.com’s constitutional rights.” *Id.* at 5.

*3 On August 28, 2015, the Subcommittee refused to

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withdraw the subpoenas issued to Backpage employees and rejected Backpage's objections. *See* Letter to Steven R. Ross, Esq. from Chairman and Ranking Member of PSI, Aug. 28, 2015 [Dkt. 8–18]. The Subcommittee again denied that its subpoena was part of a larger governmental effort targeting Backpage. *See id.* On September 14, 2015, counsel for both sides met to discuss the constitutional objections to the July 7 subpoena. At that meeting, Backpage was clear that it objected to the entire subpoena on First Amendment grounds because of its “breadth” and the “context” in which it was received—namely, “the fact that governmental actors have recently taken an interest in Backpage.” Nov. 3, 2015 Ruling on Mr. Ferrer's Objections at 4–5. At the Subcommittee's exhortation, Backpage counsel agreed to provide in writing legal authorities in support of the company's First Amendment objection, but failed to do so. *Id.* at 5.

On October 1, 2015, the Subcommittee withdrew the July 7 subpoena and issued a new subpoena to Mr. Ferrer, part of which is before the Court. The new subpoena requested eight categories of documents and focused on the core of the Subcommittee's investigation of Internet sex trafficking. In an accompanying letter, the Subcommittee reiterated its rejection of Backpage's objections as meritless and said that, “in the hope of overcoming the current impasse,” it was “seeking a narrower subset of documents.” Letter and Subpoena to Carl Ferrer from Chairman and Ranking Member of PSI, Oct. 1, 2015 [Ex. 1–7] at 2 (Oct. 1, 2015 Letter and Subpoena). The Subpoena instructed Mr. Ferrer to produce responsive documents, or else to appear personally, on October 23, 2015. The eight categories of documents requested by the October 1, 2015 in the Subpoena concerned: (1) Backpage's reviewing, blocking, deleting, editing, or modifying of advertisements in Adult Sections; (2) advertising posting limitations; (3) reviewing, verifying, blocking, deleting, disabling, or flagging user accounts; (4) human and sex trafficking, human smuggling, prostitution, or its facilitation or investigation, and policies, manuals, memoranda, and guidelines; (5) policies related to hashing of images in Adult sections, data retention, and removal of metadata; (6) number of ads posted, by category, for each month in the past three years and ads reported by Backpage to law enforcement agencies; (7) number of ads, by category, for the past three years that were deleted or blocked at each stage of the reviewing process; and (8) Backpage's annual revenue and profit for each of the past five years by category. *See id.* The subpoena stated that information responsive to categories 6, 7, and 8 could be submitted with numbers and without underlying documentation.

The subpoena did not seek any information concerning

Backpage users and the Letter directed that such information be redacted. The Letter also directed Mr. Ferrer 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. *Id.* at 3.

Thereafter, Mr. Ferrer only “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.” Mot. at 12. Mr. Ferrer also indicated that “Backpage would compile certain records ... responsive to request 4 of the subpoena, and would investigate and seek to compile statistical information responsive to requests 6 and 7” *Id.* at 12–13 n.10. No production was made as to requests 5 or 8. Mr. Ferrer objected to the subpoena because it: (1) exceeded the Subcommittee's investigative authority; (2) infringed on First Amendment rights; and (3) did not seek information pertinent to the investigation. Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Oct. 23, 2015 [Dkt. 1–9] (October 23, 2015 Letter).

*4 On November 3, 2015, the Subcommittee issued a comprehensive ruling overruling Mr. Ferrer's objections to the subpoena. It ordered Mr. Ferrer to produce responsive documents by November 12, 2015 and to appear personally at a hearing on November 19, 2015. On November 13, one day after the production deadline, Backpage produced over 16,800 pages of documents, most of which were responsive to request 4; 16,300 of those pages involved Backpage's responses to law enforcement subpoenas, “each response containing numerous repetitive pages of advertisements and photos ... relating to a single Backpage user.” Mot. at 14 n.11. Backpage intended to “prepar[e] millions more pages of documents” responsive to request 4, *see* Opp'n at 15 n.12 (citing Ross Decl. at ¶ 7), but the Subcommittee instructed Backpage to suspend the production of documents responsive to request 4 because it did not need more documents of that nature. *See* E-mail to Steven R. Ross, Esq. from Chief Counsel of PSI, Nov. 14, 2015 [Dkt. 8–23] (“Finally, as we discussed, please hold off on processing or producing what you described as more than five million pages of *law enforcement subpoena related material.*”) (emphasis added). Backpage erroneously interpreted this communication, limited in its focus, as a direction to cease submitting any documents or responses. *See id.* (stating that the Subcommittee “instructed Backpage to cease producing documents”); *see also* Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 18, 2015 [Dkt. 1–14] at 2. There is simply no support in the record for the

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proposition that the Subcommittee “declined to receive, [] or instructed Mr. Ferrer or Backpage not to produce, any materials responsive to requests 1, 2, and 3.” Reply at 4 n.3.

In a November 16, 2015 letter responding to various follow-up inquiries, Backpage counsel told the Subcommittee that “the company’s submissions of information and documents to date [did not] 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.” Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 16, 2015 [Dkt. 1–13] (Nov. 16, 2015 Letter) at 2. Backpage asserted that such a full and complete search would be by itself unconstitutional due to the Subpoena’s “overbreadth and First Amendment infirmities.” *Id.* Backpage never explained the extent or nature of its limited search, did not provide a privilege log, did not object to the production of specified documents, and did not identify any documents being withheld.

Backpage counsel asked that Mr. Ferrer’s personal appearance at the November 19 hearing be waived because Mr. Ferrer would not answer any questions as he intended to assert his Fifth Amended privilege against self-incrimination and invoke his First Amendment rights. *See id.*; Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 16, 2015 [Dkt. 1–14] at 1–2. Counsel added that Mr. Ferrer was on international business travel. The Subcommittee rejected Backpage’s last minute effort to excuse Mr. Ferrer’s appearance. Nonetheless, Mr. Ferrer did not appear before the Subcommittee on November 19, 2015. During that hearing, the Subcommittee received the testimony on Internet sex trafficking from four witnesses, three law enforcement officials, and NCMEC’s general counsel. On the same day, the Subcommittee also issued a Staff Report, which was titled, “Recommendation to Enforce Subpoena Issued to the CEO of Backpage.com, LLC, Staff Report to the Permanent Subcommittee on Investigations” (PSI Staff Report).

On February 29, 2016, the Subcommittee presented a resolution to the Senate Committee on Homeland Security and Governmental Affairs authorizing and directing the Senate Legal Counsel to bring a civil action under 28 U.S.C. § 1365 to enforce the first three requests of the October 1, 2015 subpoena. *See S. Rep. No. 114-214* (2016). On March 17, 2016, the Senate adopted said resolution by a vote of 96-0. *See* 162 Cong. Rec. S1561 (daily ed. Mar. 17, 2016). The Subcommittee asks the Court to enforce the following parts of the subpoena:

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.

*5 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 Letter and Subpoena (emphasis in original). The Subcommittee points out that Backpage has only produced a total of 65 pages of documents responsive to these requests—“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.” Mot. at 14 n.12 (citing October 23, 2015 Letter at 6–7; PSI Staff Report at 30–31 (S. Hrg. No. 114–179, at 85–86)). As a result, the Subcommittee filed the instant Application under 28 U.S.C. § 1365 to enforce its subpoena.

II. ANALYSIS

The Subcommittee moves to enforce the first three requests of its October 1, 2015 subpoena. Mr. Ferrer opposes the Subcommittee’s Application on four different grounds: (1) lack of subject matter jurisdiction; (2) lack of a valid legislative purpose that falls within the scope of the Subcommittee’s authority; (3) violation of the First Amendment because the subpoena intrudes into protected speech, seeks to single out and punish Backpage, and is overbroad and unduly burdensome; and (4) violation of the Due Process Clause.² For the reasons that follow, the Court finds Mr. Ferrer’s objections to be without merit. The Court will address each argument in turn.

² With the exception of the first and last argument, the Subcommittee considered and rejected Mr. Ferrer’s

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objections.

A. Subject Matter Jurisdiction over the Subcommittee's Application

The Subcommittee filed the instant civil action to enforce its subpoena pursuant to 28 U.S.C. § 1365. The statute provides in relevant part:

(a) The United States District Court for the District of Columbia shall have original jurisdiction, without regard to the amount in controversy, over any civil action brought by the Senate or any authorized committee or subcommittee of the Senate to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal or failure to comply with, any subpoena or order issued by the Senate or committee or subcommittee of the Senate to ... any natural person to secure the production of documents or other materials of any kind or the answering of any deposition or interrogatory or to secure testimony or any combination thereof.

(b) Upon application by the Senate or any authorized committee or subcommittee of the Senate, the district court shall issue an order to an entity or person refusing, or failing to comply with, or threatening to refuse or not to comply with, a subpoena or order of the Senate or committee or subcommittee of the Senate requiring such entity or person to comply forthwith ... Nothing in this section shall confer upon such court jurisdiction to affect by injunction or otherwise the issuance or effect of any subpoena or order of the Senate or any committee or subcommittee of the Senate or to review, modify, suspend, terminate, or set aside any such subpoena or order.

*6 28 U.S.C. § 1365(a), (b). The statute strips this Court of its customary authority to modify or quash a subpoena. It allows the Court only to decide whether to enforce the subpoena brought before it.

Mr. Ferrer argues that because the Subcommittee is seeking enforcement of three of the eight requests in the October 1, 2015 subpoena, it is seeking relief outside the Court's jurisdiction. In essence, he contends that enforcement of a subpoena in part is not available under the statute so that the Court has no authority and the Application must be denied. *See* Opp'n at 45 ("Because the Subcommittee has sought enforcement of the

Subpoena in a manner—following modification—which is expressly forbidden under § 1365, such enforcement is not warranted and should not be granted."). The Court disagrees. By its plain terms, the statute imposes no constraint on the Subcommittee's authority to seek partial enforcement of a subpoena or order. 28 U.S.C. § 1365(b).

Mr. Ferrer's argument also ignores the very purpose of the statute, which was to avoid judicial interference with Congress's exercise of its constitutional powers. *See* S. Rep. No. 95-170, at 94 (1977). The statute's legislative history makes clear that "the court's jurisdiction is limited to *the matter Congress brings before it*, that is whether or not to aid Congress is enforcing the subpoena or order." *Id.* (emphasis added). It is the Senate's constitutional prerogative to decide what to bring before the Court. *See* Senate Select Committee on Ethics v. Packwood, 845 F.Supp. 17 (D.D.C.1994), *stay denied*, 510 U.S. 1319, 114 S.Ct. 1036, 127 L.Ed.2d 530 (1994) (Rehnquist, C.J., in chambers) (enforcing a narrower documentary subpoena under § 1365). As the Subcommittee correctly states, "By granting the Application, the Court would not be *modifying* the subpoena in any way, but merely enforcing the parts of the subpoena brought before it." Mot. at 23 (emphasis in original). Accordingly, the Subcommittee's relief is permitted by the statute and the Court has subject matter jurisdiction.

B. The Subcommittee's Authority and the Subpoena's Legislative Purpose

"The power of the Congress to conduct investigations is inherent in the legislative process," *see* Watkins v. United States, 354 U.S. 178, 187, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957), and the capacity to enforce said investigatory power "is an essential and appropriate auxiliary to the legislative function," *see* McGrain v. Daugherty, 273 U.S. 135, 174, 47 S.Ct. 319, 71 L.Ed. 580 (1927). "Absent such a power, a legislative body could not 'wisely or effectively' evaluate those conditions 'which the legislation is intended to affect or change.'" Ashland Oil, Inc. v. FTC, 409 F.Supp. 297, 305 (D.D.C.1976), *aff'd*, 548 F.2d 977 (D.C.Cir.1976) (quoting McGrain, 273 U.S. at 175, 47 S.Ct. 319).

Mr. Ferrer raises a plethora of arguments objecting to the Subcommittee's actions, none of which is persuasive. Mr. Ferrer argues that the subpoena lacks a legislative purpose and does not seek information that is pertinent to an investigation within the Subcommittee's jurisdiction or power. A cursory review of the Subcommittee's investigatory authority and actions in this instance demonstrate that these objections are just wrong. The Subcommittee is authorized to study or investigate, *inter*

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alia: (1) organized criminal activity in interstate or international commerce; (2) the adequacy and need to change Federal Laws targeting organized crime in interstate or international commerce to protect the public; (3) “all other aspects of crime and lawlessness within the United States which have an impact upon or affect the national health, welfare, and safety”; and (4) “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.” S. Res. 73, 114th Cong., § 12(e)(1) (2015), reprinted in S. Doc. No. 114-6, at 137 (2015). Senate Resolution 73 also authorizes the Subcommittee “to require by subpoena or otherwise the attendance of witnesses and production of correspondence, books, papers, and documents.” *Id.* § 12(e)(3).

*7 Undoubtedly, the use of the Internet for human and sex trafficking, as defined by statute, involves organized criminal activity in interstate or international commerce and can affect the national health, welfare, and safety. See, e.g., 18 U.S.C. §§ 1581-1592 (recognizing different forms of human trafficking— *i.e.*, slavery, forced labor, involuntary servitude, and sex trafficking of minors—as federal crimes); 18 U.S.C. § 1961(1) (defining “racketeering activity” under the Racketeer Influenced and Corrupt Organizations Act to include “any act which is indictable under” 18 U.S.C. §§ 1581-1592). The Subcommittee is also authorized to evaluate the effectiveness of existing statutes, programs, and regulatory initiatives addressing the problem of sex trafficking. This can be done, in part, by examining the magnitude of sex trafficking on the Internet. Finally, the power to issue documentary subpoenas is inherent in the Subcommittee’s investigatory authority. See S. Res. 73, § 12(e)(3).

Mr. Ferrer responds in conclusory terms that the subpoena “cannot be enforced based [on] an unlimited legislative mandate, simply because Congress is empowered to legislate about anything involving either organized crime or the Internet.” Opp’n at 32. This generalized statement offers no basis to limit the Subcommittee’s authority to issue the subpoena here. The Constitution authorizes Congress to investigate any issue or subject about which it can enact legislation to the extent that it “would be materially aided by the information which the investigation was calculated to elicit.” *McGrain*, 273 U.S. at 177, 47 S.Ct. 319; see also U.S. Const. art. I, § 8. The Senate granted broad investigatory powers to the Subcommittee, which would include looking into Internet sex trafficking. See *Barenblatt v. United States*, 360 U.S. 109, 111, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959) (stating that “the scope of [Congress’s] power of inquiry ... is as

penetrating and far-reaching as the potential power to enact and appropriate under the Constitution”).³ It is noteworthy that 96 Senators voted to enforce the subpoena, indicating strong agreement with the Subcommittee’s authority.

³ The Subcommittee notes that it has conducted numerous investigations into the use of the Internet to engage in criminal activity, such as identity and securities fraud. See, e.g., *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). Mr. Ferrer does not address the validity of these investigations pursuant to Senate Resolution 73.

Further, Congress has already demonstrated its interest in this area. One example of such interest in Internet protections is found in the Communications Decency Act (CDA), 47 U.S.C. § 230, which provides a safe harbor for website owners or service providers to self-monitor. Specifically, this safe harbor provision establishes “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.” *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir.2006) (internal quotation marks and citations omitted). Courts have held that section 230 of the CDA preempts state statutes prohibiting the use of online marketplaces for advertising the sexual abuse of minors.⁴

⁴ Backpage has invoked successfully this provision to avoid liability. See, e.g., *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F.Supp.3d 149 (D.Mass.2015), *aff’d*, 817 F.3d 12 (1st Cir. Mar. 14, 2016); *Backpage.com, LLC v. Hoffman*, No. 13-cv-3952, 2013 WL 4502097 (D.N.J. Aug. 20, 2013), *appeal dismissed*, No. 13-3850 (3d Cir. May 1, 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).

*8 The First Circuit recently agreed that “aided by the amici, the appellants have made a persuasive case” showing that “Backpage has tailored its website to make sex trafficking easier.” *Doe v. Backpage.com, LLC*, 817

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F.3d 12, 29 (1st Cir.2016). The Circuit added that, since Congress “chose to grant broad protections to internet publishers” in the CDA, “the remedy” to the evils identified by appellants and amici “is through legislation, not through litigation.” *Id.* Given the relevance of section 230 of the CDA and its focus on self-monitoring, the Subcommittee is legitimately interested in investigating the nature and extent of Backpage’s moderation procedures, as well as evaluating the measures taken by other service providers to prevent their websites from becoming sex trafficking havens.

Mr. Ferrer retorts that the Subcommittee cannot rely on Section 230 because it was “mentioned nowhere in the Subcommittee’s authorizing resolution, it is not addressed in the Subpoena or its cover letter, and was never broached in the voluminous correspondence between Backpage and the Subcommittee staff.” Opp’n at 33. He argues that “the Subcommittee cannot retroactively articulate its purpose through lawyers’ arguments made to this Court.” *Id.* Of course, forced to sue, the Subcommittee can present proof of its own authority howsoever it chooses. The Supreme Court has stated that it is not necessary for a Senate resolution authorizing an investigative committee to “declare in advance what the [S]enate meditated doing when the investigation was concluded.” *In re Chapman*, 166 U.S. 661, 670, 17 S.Ct. 677, 41 L.Ed. 1154 (1897). Since Mr. Ferrer was always fully aware of the topic under inquiry, namely, the measures taken by Internet companies to monitor their sites for Internet sex trafficking, his objections must fail.

Moreover, the record belies his assertion. In its November 3, 2015 Ruling on Mr. Ferrer’s objections, the Subcommittee stated that “this [subpoenaed] information will enable Congress to assess how effectively it has encouraged service providers to self-regulate *as Congress intended in the CDA*.” Nov. 3, 2015 Ruling on Mr. Ferrer’s Objections at 17 (emphasis added and quotation marks omitted); *see also id.* at 10 (explaining that the subpoenaed information “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”). In addition, the Subcommittee told Backpage’s counsel in its August 26, 2015 and October 1, 2015 Letters that documents in response to the subpoena were important to evaluate the effectiveness of Backpage’s moderation procedures and to consider the need for new legislation on Internet sex trafficking. For example, the August 26, 2015 Letter stated in part,

[T]he 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.

*9 Aug. 26, 2015 Letter to Backpage at 1 (emphasis added). Similarly, on October 1, 2015, the Subcommittee told Backpage 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 ... that combats human trafficking.” Oct. 1, 2015 Letter and Subpoena at 2. The Court concludes that the Subcommittee expressed a valid legislative purpose.

Mr. Ferrer argues further that the Subcommittee’s subpoena and investigation should not be legitimized because the “goal is more prosecutorial than legislative.” Opp’n at 37. Mr. Ferrer has consistently argued that the actual purpose and intent of the Subcommittee’s inquiry is to condemn and punish Backpage. He cites statements made by Members of Congress and State officials criticizing Backpage as evidence of a larger governmental effort to target the company. Mr. Ferrer misperceives the Court’s role, which is not to determine the validity of the legislative purpose by “testing the motives of committee members” based on public statements. *Watkins*, 354 U.S. at 200, 77 S.Ct. 1173. “Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly’s legislative purpose is being served.” *Id.*

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Finally, Mr. Ferrer has failed to support his accusation that the subpoena seeks documents that are not pertinent to the Subcommittee's investigation and legislative purpose. The "pertinency" of the requested documents "was made to appear with indisputable clarity" to Backpage. Barenblatt, 360 U.S. at 124, 79 S.Ct. 1081 (internal quotation marks and citations omitted). Backpage acknowledged its understanding when it informed the Subcommittee that it "strove to include the documents most relevant to the Subcommittee's professed inquiry concerning potential legislation regarding human trafficking ... or other illegal activities and the investigation of such activities," in the small group of documents it submitted in mid-November 2015. See Nov. 16, 2015 Letter at 2. "Professed" or not, further explanation is unnecessary.

In conclusion, the subpoena before the Court has a valid legislative purpose and seeks pertinent information that falls within the scope of the Subcommittee's authority. See Shelton v. United States, 404 F.2d 1292, 1297 (D.C.Cir.1968) (holding that "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").

C. Mr. Ferrer's First Amendment Objections

A congressional investigation and its use of subpoenas are "subject to the command [of the First Amendment] that the Congress shall make no law abridging freedom of speech or press [or religion] or assembly." Watkins, 354 U.S. at 197, 77 S.Ct. 1173. The underlying rationale of this precept is that "investigation is part of lawmaking" and the "First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking." *Id.* (citations omitted).

Mr. Ferrer makes three arguments in this respect: (1) the subpoena constitutes an abuse of the investigative process that encroaches on his First Amendment rights; (2) the subpoena is part of a concerted effort to target Backpage and punish protected speech; and (3) the subpoena is overly broad and unduly burdensome and produces a chilling effect on speech. The Subcommittee points out that Mr. Ferrer has failed to identify any "particular or class of documents the production of which would implicate, much less violate, his First Amendment rights." Reply at 11. The Subcommittee argues further that Mr. Ferrer's claims that "the First Amendment provides a blanket protection from having to produce *any* documents

responsive to subpoena requests 1, 2, and 3" and from "having even to search for responsive documents and assert privileges on a document-by-document basis" lack merit because "the First Amendment offers no such categorical immunity from government inquiry." *Id.* (emphasis in original).

1. The Subpoena is not an abuse of the investigative process that violates the First Amendment.

*10 The question posed by Mr. Ferrer's argument is actually whether the Subcommittee subpoena, as presented to the Court, represents an effort to intimidate Backpage or shut it down "through 'actual or threatened imposition of government power or sanction' [in violation of] the First Amendment." Dart, 807 F.3d at 230 (quoting American Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1125 (9th Cir.2002)). This test is not directly addressed by Mr. Ferrer.

At the outset, the Court rejects Mr. Ferrer's argument that, as CEO of Backpage, he has a First Amendment right not to conduct a full and comprehensive search for responsive documents and not to file a privilege log. Backpage counsel told the Subcommittee that it had not conducted a "complete search" and that "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." Nov. 16, 2015 Letter at 2. There is simply no legal or factual support for the proposition that being required to search for responsive documents would abridge Mr. Ferrer's protected freedoms of speech or press. Mr. Ferrer does not possess an absolute right to be free from government investigation when there are valid justifications for the inquiry.

The First Amendment does not give Mr. Ferrer an "unlimited license to talk" or to publish any content he chooses. Konigsberg v. State Bar of California, 366 U.S. 36, 50, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961). The Supreme Court has consistently rejected throughout its history "the view that freedom of speech and association ... as protected by the First and Fourteenth Amendments, are 'absolutes,' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment." *Id.* at 49, 81 S.Ct. 997 (internal citation omitted).

In fact, not all speech is subject to the protection of the First Amendment. See Chaplinsky v. State of New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031

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(1942); Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919). Restrictions or limitations on protected speech that are “not intended to control [its] content,” but rather, “incidentally limit[] its unfettered exercise” or expression, do not violate the First Amendment, “when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.” Konigsberg, 366 U.S. at 50–51, 81 S.Ct. 997 (citations omitted). Under such circumstances, it is imperative to balance the nature of the intrusion against the asserted governmental interest—an exercise that Mr. Ferrer simply does not acknowledge, let alone discuss, in his briefs or letters. See *id.* at 51, 81 S.Ct. 997 (“Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.”) (emphasis added).

Mr. Ferrer correctly told the Subcommittee in a letter that “[t]he 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.” Aug. 6, 2015 Letter (quoting Cooper, 939 F.Supp.2d at 813). The problem is that the Constitution also tells us that Mr. Ferrer cannot use the First Amendment as an omnipotent and unbreakable shield to prevent Congress from properly exercising its constitutional authority.

*11 Mr. Ferrer argues that the subpoena violates the First Amendment because it intrudes into Backpage’s editorial decision-making. Some of the documents that the Subcommittee is requesting may contain information that is not subject to First Amendment protection due to its illegal nature, such as the selective editing of an advertisement for sexual relations with a minor. Moreover, it would appear that Backpage has changed its moderation processes for the very purpose of avoiding inquiry, and it has been accused of deliberately structuring “its website to facilitate sex trafficking.” Doe, 817 F.3d at 16.³ Having refused to maintain policies or procedures regarding its current moderation process, Backpage now states that the only way to determine its moderation efforts is to review hundreds of employee emails, which would be burdensome. See October 23, 2015 Letter at 6–7. So be it; Backpage has no recourse but to produce all employee emails concerning moderation activities that would otherwise remain hidden. Backpage cannot proclaim its attention to moderation efforts to avoid ads for sex trafficking and refuse to respond with documentary evidence of how that attention works in practice.

³ For example, “even though the website does require that posters verify that they are 18 years of age or older to post in that section, entering an age below 18 on the first (or any successive) attempt does not block a poster from entering a different age on a subsequent attempt.” Doe, 817 F.3d at 16 n. 2. Another example is that “Backpage also allows users to pay posting fees anonymously through prepaid credit cards or digital currencies.” *Id.*

The claim of protected “editorial policies” rings hollow. First, of course, Backpage has produced only scarce documentation of its previous practices on moderation, some of which was publicly available and not entirely responsive to the Subcommittee’s Subpoena. See, e.g., See Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Esq., Nov. 13, 2015 [Dkt. 8–10] at 1–2 (producing a “previously-used list of moderation guidelines,” moderation process discussions in 2011, a sample moderation log, a list of banned terms, and certain screenshots of the website); October 23, 2015 Letter at 6–7 (producing the website’s Terms of Use, Posting Rules, User Agreement, and Backpage’s general counsel testimony in 2012); PSI Staff Report at 30–31 (S. Hrg. No. 114–179, at 85–86). Backpage has not produced evidence of emails exchanged between employees concerning its moderation efforts, even though the Subcommittee is aware of their existence because some have been obtained from third parties. Second, Backpage has refused to perform a comprehensive search for responsive documents, claiming that such a requirement itself violates the First Amendment. The Court has rejected this argument above because merely searching for responsive documents does not limit or chill First Amendment rights. Third, having failed to perform the customary duties associated with a subpoena, Backpage has no basis in fact to assert that *all* employee emails are protected First Amendment communications. United States v. Williams, 553 U.S. 285, 297, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) (“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”) (citing Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 388, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973)); Flytenow, Inc. v. FAA, 808 F.3d 882, 894 (D.C.Cir.2015) (noting that “the advertising of illegal activity has never been protected speech”) (citing Pittsburgh Press Co., 413 U.S. at 388–89, 93 S.Ct. 2553).

While Backpage may engage in protected activity in some instances, that does not mean that all of its decisions and policies receive First Amendment protection. “The First Amendment does not protect speech that is itself criminal

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because it is too intertwined with illegal activity.” *Conant v. McCaffrey*, 172 F.R.D. 681, 698 (N.D.Cal.1997) (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949)) (other citation omitted). Just as “[b]ookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises,” *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), engaging in editorial decisions on a website used for sex trafficking does not immunize Backpage from its duty to comply with a subpoena aimed at investigating Backpage’s moderation practices. Mr. Ferrer has had ample time to perform the necessary duties of searching for, locating, identifying, and producing either responsive documents or a privilege log with an explanation for any withheld material. Having done none of the above, he is hard put to plead a barren First Amendment claim without underlying facts.

*12 Moreover, enforcement of the subpoena in the instant case does not impose a content-based restriction on any protected activity. The subpoena seeks documents relevant to, *inter alia*, Backpage’s moderation practices and policies. See Oct. 1, 2015 Letter and Subpoena. This is a content-neutral request. While Mr. Ferrer cites various cases where courts ruled in favor of Backpage on First Amendment grounds, these cases are inapposite because they involved content-based restrictions found to be both vague and overbroad. See, e.g., *Hoffman*, 2013 WL 4502097, at *7; *Cooper*, 939 F.Supp.2d at 830–39; *McKenna*, 881 F.Supp.2d at 1277–85. In these cases, different states sought to criminalize certain sex-oriented advertisements, thus directly regulating speech despite federal law. Mr. Ferrer merely cites these cases for the general proposition that the First Amendment has been applied to Backpage, but does not explain why the subpoena at issue imposes a similar content-based restriction as to each and every document that concerns Backpage’s moderation activities.

One might contend that it is unclear whether the Subcommittee’s subpoena, while “not intended to control the content of speech, incidentally limit[s] its unfettered exercise” and is “found [to be] justified by subordinating valid governmental interests, a prerequisite to constitutionality which ... necessarily involve[s] a weighing of the governmental interest involved.” *Konigsberg*, 366 U.S. at 50–51, 81 S.Ct. 997 (citations omitted). While not identifying the relevant legal balancing test, Mr. Ferrer relies on a series of decisions—particularly, *Bursey v. United States*, 466 F.2d 1059 (9th Cir.1972)—to support his objections. *Bursey* involved a grand jury investigation of *The Black Panther*

newspaper after the paper published speeches and articles threatening to assassinate President Nixon, advocating the overthrow of the United States government, and providing instructions on how to use firearms and make Molotov cocktails. 466 F.2d at 1065–68. The grand jury investigated, among other things, the internal management of the paper, the identity of persons who worked on the paper, and their roles in its publication.

Mr. Ferrer’s reliance is misplaced because *Bursey* differs substantively from this case. In *Bursey*, the “[i]nquiries about the identity of persons with whom the witnesses were associated on the newspaper and in the Black Panther Party ... infringed the right of associational privacy” and had a chilling effect on the press. *Id.* at 1085. *Bursey* involved an inquiry implicating political speech, as well as the liberty to decide what to print, to distribute what is printed, and to protect the anonymity of disfavored speakers and political dissenters. *Id.* at 1083–86. These concerns do not apply in this case. The Subcommittee does not seek any “personally identifying information of any Backpage user or account holder.” See Oct. 1, 2015 Letter and Subpoena. Moreover, this case does not involve any editorial judgments concerning political speech, which generally receives heightened constitutional protection. Mr. Ferrer has failed to demonstrate that requesting information on Backpage’s efforts to screen out sex trafficking from commercial advertisements on its website (which would be illegal, even though Backpage would not be liable) would produce an impermissible chilling effect upon freedoms of the press, association, or speech.

Notably absent from Mr. Ferrer’s briefs and letters is the required weighing of the alleged intrusion on his First Amendment rights against the asserted governmental interest in the subpoenaed information for its investigation on Internet sex trafficking. Such a necessary weighing of competing interests is an exercise that is amply discussed in *Bursey* and other First Amendment cases cited by Mr. Ferrer. See, e.g., *Watkins*, 354 U.S. at 198, 77 S.Ct. 1173; *United States v. Rumely*, 345 U.S. 41, 44, 73 S.Ct. 543, 97 L.Ed. 770 (1953); *Bursey*, 466 F.2d at 1083.⁶ In *Bursey*, the journalists did not refuse to appear before the grand jury and did not argue that being required to appear was unconstitutional. Instead, they objected to specific questions on the record, thus allowing the court to weigh the First Amendment interests implicated by each question against the asserted governmental interest. The Ninth Circuit concluded that the government’s interests, while compelling, did not override the First Amendment interests at stake with respect to all questions. *Bursey*, 466 F.2d at 1086 (citing *Watkins*, 354 U.S. at 198–99, 77 S.Ct. 1173). With respect

to some of the questions, the Court found that their impact on “lawful associations and protected expression [was] so slight that governmental interests must prevail.” *Id.* at 1086 n. 20.

⁹ Like *Bursey*, *Watkins* and *Rumely* also involved attempts to uncover the identity of disfavored speakers and political dissenters, efforts that directly implicated the freedoms of speech, press, and associational privacy. See *Watkins*, 354 U.S. at 184–86, 77 S.Ct. 1173 (involving a subpoena seeking witness testimony to identify Communist associates); *Rumely*, 345 U.S. at 42–43, 73 S.Ct. 543 (involving a subpoena seeking documents to identify purchasers of disfavored political books).

*13 Here, Mr. Ferrer not only refused to appear before the Subcommittee and failed to articulate specific objections in a privilege log, but also refused to conduct a full search for responsive documents. Mr. Ferrer merely invokes the First Amendment in general terms and states that the Subcommittee’s need for the information does not automatically override his constitutional rights. He engages in no legal analysis to weigh his rights against the Subcommittee’s asserted interest.

The Subcommittee argues that, since Backpage is a publisher of commercial advertisements, Mr. Ferrer is required to show that the subpoena intrudes on his right to engage in commercial speech, a right to which the Constitution “affords a lesser protection” than “other constitutionally guaranteed expression.” *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993); see also *Pittsburgh Press Co.*, 413 U.S. at 386–87, 93 S.Ct. 2553. Mr. Ferrer disagrees and argues that the Subcommittee “tries to downplay Backpage’s First Amendment interests by incorrectly framing this as a commercial speech case,” when in fact, “Backpage is not an advertiser, but rather is an online intermediary for third-party speech, for whom First Amendment protections are significant.” Opp’n at 28. Whether or not the speech at issue is “commercial,” merely arguing that Backpage enjoys “significant” First Amendment protections proves nothing as a matter of fact or law. “It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones.” *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990). By not attempting to balance the parties’ competing interests and failing to identify the applicable level of First Amendment scrutiny, Mr. Ferrer is essentially saying: The Court should presume that any responsive document that has not been produced contains constitutionally-protected information – that no

governmental need could possibly overcome. His position is untenable and without legal support.

As to some of the specifics, Mr. Ferrer has failed to explain the nature and scope of the subpoena’s alleged intrusion into his First Amendment rights. He claims that requests for information “relating to payment processing ... *can* violate the First Amendment and chill protected speech.” Opp’n at 24 (emphasis added). Even if accurate that this effect “*can*” be true, Mr. Ferrer offers no facts or argument, beyond the conclusory statement, that it *is* true here. The point remains unsupported and unpersuasive.

The Subcommittee attempted to circumscribe the scope of its inquiry by allowing Backpage to redact any personally identifying information on subscribers and advertisers. Information about Backpage’s efforts to avoid sex trafficking ads does not regulate content directly, except that which is concededly illegal. On this record, the Court finds that to the extent the Subpoena implicates Mr. Ferrer’s protected freedoms, it is only in an incidental and minimal fashion. In comparison, the subpoenaed information is highly relevant to the Subcommittee’s investigation and potential legislation on Internet sex trafficking. Understanding the magnitude of Internet sex trafficking and how to stop it substantially outweighs Mr. Ferrer’s undefined interests. Even if Mr. Ferrer’s activities did not involve commercial speech and were entitled to greater scrutiny, the record shows that the subpoena’s impact on Mr. Ferrer’s First Amendment freedoms is “so slight” that the Subcommittee’s interests must prevail. *Bursey*, 466 F.2d at 1086 n. 20.

2. The Subpoena does not seek to punish Backpage and is not so broad and burdensome that it would deter speech or abridge a protected freedom.

*14 Mr. Ferrer makes two additional arguments as to why the subpoena violates the First Amendment: (1) it is part of a “sustained, coordinated, and targeted campaign” that seeks to punish Backpage, see Opp’n at 37; and (2) it is overly broad and unduly burdensome. With respect to the first argument, Mr. Ferrer has failed to show how the fact that “other governmental entities have taken actions adverse to Backpage has [any] bearing on the legitimacy of the Subcommittee’s investigation” or the “Subcommittee’s constitutional authority to investigate Backpage or to obtain information from Mr. Ferrer.” Reply at 18. The Court has found that the subpoena serves a valid legislative purpose and seeks information that is pertinent to an investigation within the Subcommittee’s jurisdiction or power. Thus, while some may have expressed dismay at Backpage’s adult ads and some States have attempted to legislate against it, the CDA

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continues to protect Backpage from liability as an Internet intermediary. In any event, “[s]o long as Congress acts in pursuance of its constitutional power,” as it has in the instant case, “the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.” *Barenblatt*, 360 U.S. at 132–33, 79 S.Ct. 1081; see also *Watkins*, 354 U.S. at 200, 77 S.Ct. 1173.

With respect to the second argument, the Court notes that it is “to be expected” that “some burden” would result from the production of responsive documents to a subpoena; however, such burden “is necessary in furtherance of the [Subcommittee’s] legitimate inquiry and the public interest.” *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C.Cir.1977). “The burden of showing that the request is unreasonable is on the subpoenaed party,” and this “burden is not easily met where, as here, the [Subcommittee’s] inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.” *Id.* Mr. Ferrer simply states that the subpoena requires “production of massive amounts of information, with no explanation of how it relates to the purported topic of the investigation.” Opp’n at 31. His statement is hard to credit, as the topic of the investigation is clear and the “massive amounts of information” are required only because of Backpage’s seeming efforts to avoid inquiry. As the Court has already explained, the information is highly relevant to the stated legislative purpose. In addition, the Subcommittee’s request is more narrow than Mr. Ferrer would admit. The Subcommittee seeks only those emails and communications that concern Backpage’s screening practices against Internet sex trafficking, not all “the email correspondence from and between all those employed to provide moderation services for the past six years.” Opp’n at 30. There is nothing unusual, unreasonable, or overly broad about requiring a party to search for all responsive documents on a specific subject or topic.

Further, Mr. Ferrer’s objections totally ignore the fact that Backpage searched for, identified, and intended to produce millions of documents responsive to request 4, yet failed to make an effort to quantify the number of materials responsive to requests 1, 2, and 3 that would allow consideration of the supposed burden of the subpoena. Moreover, the Subcommittee expressed its willingness to “discuss ways of minimizing any burden ...—such as [] agreeing upon electronic search terms or focusing on particular document custodians or employees.” *Id.* at 22 n. 20 (citing Aug. 26, 2015 Letter to Backpage). Notwithstanding the Subcommittee’s efforts to narrow its document requests and minimize the supposed burden on Backpage, Mr. Ferrer refused to consider such an approach.

Finally, the fact that the Subcommittee also requested similar information from other sources, particularly individuals and entities connected to Backpage, is irrelevant to the question of whether the Subcommittee’s subpoena in this case is overly broad and unconstitutional. Mr. Ferrer does not cite any legal authority to the contrary.

D. Mr. Ferrer’s Due Process Objection

Mr. Ferrer argues that the Subcommittee violated his due process rights by: (1) “failing to define the scope of its inquiry and the relevance of its requests”; and (2) “depriving the company of the opportunity to consider and address the Subcommittee’s ostensibly flexible and evolving objectives” of the investigation. Opp’n at 41. This Court has already found that the scope of the inquiry and the pertinence of the requests “was made to appear with indisputable clarity” to Backpage. *Barenblatt*, 360 U.S. at 124, 79 S.Ct. 1081 (internal quotation marks and citations omitted). In addition, the argument is undeveloped and devoid of legal support.

***15** The Due Process Clause of the Fifth Amendment of the Constitution, which provides that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law,” includes protections for both substantive and procedural due process. *U.S. Const. amend. V*; see *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755–56, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005). It cannot be invoked to protect oneself from a congressional investigation merely because the investigation may be inconvenient or undesirable. It is unclear from the record and from Mr. Ferrer’s briefs whether he is asserting a procedural or substantive due process claim. “Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.” *Zannino*, 895 F.2d at 17 (internal quotation marks and citation omitted). Even if the Court were to consider both claims, Mr. Ferrer has failed to support or establish a valid due process objection to the Subcommittee’s subpoena.

Mr. Ferrer has not asserted a cognizable protected interest under either component of the Due Process Clause. This fact alone is fatal to Mr. Ferrer’s objection. Even if there were a fundamental or cognizable interest at stake, Mr. Ferrer has not alleged, let alone shown, that the deprivation of said interest was “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience”—an essential element of any claim rooted in substantive due process. *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 880 (1st

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Cir.2010) (citation omitted); *see also United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (“So-called ‘substantive due process’ prevents the government from engaging in conduct that ‘shocks the conscience,’ ... or interferes with rights ‘implicit in the concept of ordered liberty.’ ”) (quoting *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952) and *Palko v. Connecticut*, 302 U.S. 319, 325–26, 58 S.Ct. 149, 82 L.Ed. 288 (1937)). With respect to procedural due process, Mr. Ferrer failed to assert that he was deprived of a liberty or property interest for which some process was owed. *See Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). He also does not explain why he was not afforded the appropriate amount of process despite the Subcommittee’s numerous efforts to minimize the burden on Backpage and ensure compliance with the subpoena.

Finally, Mr. Ferrer cannot seriously argue that the Subcommittee’s “shifting demands violate due process,” Opp’n at 42, when the demands have shifted precisely to accommodate Mr. Ferrer’s concerns and facilitate Backpage’s compliance. The Subcommittee tried to minimize the burden on Backpage by issuing a new subpoena that reduced the number of categories from forty-one to eight, pursuing more narrow and targeted requests, offering to agree upon electronic search terms or focus on particular document custodians or employees, and choosing to enforce only three of eight categories.

Backpage’s counsel acknowledged that the categories in the October 1, 2015 subpoena were “more targeted requests.” *See* Oct. 23, 2015 Letter at 1. Mr. Ferrer’s due process argument lacks merit. Accordingly, the Court will reject it.

IV. CONCLUSION

For the foregoing reasons, the Court will grant the Subcommittee’s Application to Enforce Subpoena *Duces Tecum*, Dkt. 1. Mr. 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 Opinion.

A memorializing Order accompanies this Memorandum Opinion.

All Citations

--- F.Supp.3d ----, 2016 WL 4179289

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BACKPAGE.COM, LLC,

Plaintiff,

vs.

THOMAS J. DART, Sheriff of
Cook County,

Defendant.

)
)
)
)
) Docket No. 15 C 6340
)
)
) Chicago, Illinois
) August 9, 2016
) 9:40 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN J. THARP, JR.

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1 (Proceedings heard in open court:)

2 THE CLERK: 15 CV 6340, Backpage v. Dart. One
3 second.

4 MR. GRANT: Hello?

5 THE CLERK: Mr. Grant?

6 MR. GRANT: Yes.

7 THE CLERK: This is Judge Tharp's courtroom. You've
8 been conferenced in for your case for Backpage. Please hold
9 for further instructions. Hello?

10 MR. GRANT: Yes, I'm sorry. Did I miss a lot?

11 THE CLERK: You've been conferenced into
12 Judge Tharp's courtroom for your case. Please hold for
13 further instructions.

14 MR. GRANT: Thank you.

15 THE COURT: All right. Good morning, Mr. Grant. In
16 the courtroom we have a very august assemblage of attorneys.
17 Counsel.

18 MR. CORN-REVERE: Robert Corn-Revere for
19 Backpage.com.

20 MR. HEFTMAN: Your Honor. Larry Heftman also for the
21 plaintiff.

22 MR. KOZACKY: Your Honor, Paul Kozacky, Jerome
23 Weitzel, Jill Ferrara and Alastar Sean McGrath for Sheriff
24 Dart.

25 THE COURT: All right. Good morning.

1 We have a number of motions up and motions that have
2 been pending which I am prepared to rule on. I'm going to
3 rule on them orally.

4 And I'm going to start with Backpage's motion for
5 leave to file a first amended complaint, which is at docket
6 167. That motion will be granted. Backpage is seeking leave
7 to amend, not to add any substance or allegations to its
8 original complaint, but to withdraw its request and demand for
9 damages and prayer for relief for damages. The amended
10 complaint only deletes allegations relating to damages that
11 were included in the original complaint so from that fashion
12 works no prejudice whatsoever to Sheriff Dart, so I see no
13 reason not to grant that motion.

14 The granting of that motion does have some
15 implications for some of the other motions that are before the
16 Court. As a technical matter, it probably moots the issue of
17 the request for leave to amend the sheriff's affirmative
18 defenses since as a, again, strictly technical matter, the
19 amended complaint would need to be responded to. However,
20 given the fact that the amended complaint only deletes
21 material -- as far as I could see there were literally no
22 additions or modifications of the language other than
23 deletions.

24 MR. CORN-REVERE: That is correct, Your Honor.

25 THE COURT: I don't see that the amended complaint in

1 that fashion requires a new answer from the sheriff.

2 All that said, I think that at least some of the
3 arguments asserted for -- in support of the affirmative
4 defenses that the sheriff was seeking to add still have
5 relevance to the proceeding from the standpoint of the
6 discovery disputes that have also been briefed here. So while
7 some of the affirmative defense arguments I think are --
8 particularly those that are predicated on the idea that there
9 is requests for damages, those are clearly moot because now
10 there is no request for damages. And to the extent otherwise,
11 I think they bear on the discovery motion. So I am going to
12 address the issues, some of the issues that were raised by the
13 motion to amend the affirmative defenses and also by the
14 discovery motions.

15 The principal issue in that regard is the issue
16 raised by Sheriff Dart that, you know, sought to raise an
17 affirmative defense based on the Supreme Court's decision in
18 *Arcara v. Cloud Books*, the premise of that defense being that
19 the sheriff -- that solicitation or speech that promotes
20 unlawful activity is not protected by the First Amendment.
21 That's the predicate for the request to amend the affirmative
22 defenses and also the sheriff's motion to compel quote-unquote
23 "illegality discovery," which is at docket 130. I am -- I
24 have given that motion careful consideration.

25 I am going to deny that motion to compel discovery on

1 that basis, and there is no basis to add an affirmative
2 defense on that basis. The premise of, again, that argument is
3 that the enforcement -- as -- and the premise of the reliance
4 on *Arcara* is based on *Arcara*'s holding that the enforcement of
5 the regulation that was at issue in *Arcara* was directed at
6 unlawful conduct having nothing to do with books or expressive
7 activity, so enforcement was proper even though it had the
8 incidental effect of suppressing some protected activity.

9 That is not the case here. I think *Arcara* means at
10 most that Sheriff Dart can investigate and prosecute the
11 illegal activity and that any incidental consequential effect
12 on First Amendment rights that may follow in the wake of that
13 prosecution and the investigation does not preclude the
14 prosecution -- the investigation or prosecution of illegal
15 activity.

16 But, again, that's not what is happening in this
17 case. To the extent this is an affirmative defense,
18 Sheriff Dart would have to establish that he took action to
19 enforce the criminal laws that he is citing. Throughout this
20 case, however, Sheriff Dart has expressly disclaimed that that
21 was what he was doing multiple times. So it's very difficult
22 for me to credit any argument that is premised that
23 Sheriff Dart was trying to pursue his law enforcement
24 responsibilities. That's expressly what he said he was not
25 doing. And in any case, he -- the action that he took was

1 directed against credit card companies, not against Backpage
2 directly. And, you know, I don't see -- and, again,
3 Sheriff Dart has disavowed and I don't see a plausible
4 argument that the credit card companies were violating
5 criminal law.

6 Beyond that, I think that this argument misreads and
7 misunderstands *Arcara*. *Arcara* held the First Amendment -- the
8 specific holding in *Arcara* was the First Amendment is not
9 implicated by the enforcement of a public health regulation of
10 general application against the physical premises in which the
11 respondents happened to sell books. But here the suppression
12 of speech is not incidental to the prosecution of illegal
13 conduct. The speech is the challenged conduct. Dart's action
14 in cutting off the ads in Backpage or seeking to cut off the
15 ads in Backpage does not incidentally affect speech. It is an
16 effort, as according to the Seventh Circuit, to impose a prior
17 restraint on speech. Dart took action to shut down the adult
18 ads section, and when he did so, he directly targeted speech.

19 The theory, the sheriff's theory, completely ignores
20 the law of prior restraint as the Seventh Circuit has
21 interpreted it in this case specifically. The Seventh Circuit
22 has said that the sheriff's conduct constitutes a prior
23 restraint, and we're not free to ignore that. Even if you
24 accept Dart's position that Backpage is committing sanitizing
25 otherwise illegal ads and participating therefore in the

1 posting of illegal ads, the answer to that problem is to
2 investigate and prosecute Backpage. It is not to impose an
3 informal prior restraint on speech. That is the problem with
4 the sheriff's invocation of *Arcara*. The Seventh Circuit is
5 clear and everyone in this case has been clear up to this
6 point that the sheriff's action is appropriately evaluated
7 under the *Bantam Books* informal prior restraint doctrine. I
8 have some disagreement with the Seventh Circuit's
9 interpretation of that doctrine, but at this point that's
10 neither here nor there. The Seventh Circuit has spoken, and I
11 am obligated to adhere to their instruction with respect to
12 that doctrine. And according to the Seventh Circuit, the
13 problem is you can't make an advanced determination that
14 expressive conduct is unlawful and then take informal actions
15 to try to suppress it. If there is some concern by the
16 sheriff that the speech is unprotected and is promoting
17 unlawful activity, the appropriate steps to take which are --
18 which include all kinds of due process protections for the
19 affected party is to investigate and potentially prosecute
20 criminal activity. It is not free to the sheriff to, instead
21 of taking that course to engage in creating some informal
22 prior restraint, to try to suppress that putatively unlawful
23 speech.

24 In *Arcara*, there was no advanced determination about
25 the propriety of speech. In fact, there was no determination

1 about the propriety of speech at all in *Arcara*. And that's
2 why *Arcara* was -- the action by the government in that case
3 was not problematic. The suppression of expressive conduct in
4 that case was purely incidental to the government's action.
5 But, again, and to sum up, that is not the case here. The
6 government action here that is at issue in this lawsuit
7 expressly targeted expressive conduct, and that is what is not
8 permitted.

9 So on that basis, I am denying the motion to compel
10 the illegality discovery. I'll make clear on the record, that
11 says nothing about the sheriff's legal authority to conduct
12 any criminal investigation that the sheriff seeks to do. But
13 in the context of a case where the claim is that the sheriff
14 has imposed an informal prior restraint on speech, the
15 illegality defense isn't a viable defense.

16 The second argument with respect to the affirmative
17 defenses presented is that Backpage is judicially estopped
18 from asserting any First Amendment claims because in some
19 other cases it's invoked the Communications Decency Act for
20 protection as a publisher of unlawful speech. For a couple of
21 reasons, that does not fly.

22 No. 1, I have already ruled several times in this
23 case in I think both the TRO and the preliminary injunction
24 and this part of the ruling was not at issue, or the
25 Seventh Circuit had no problem with, that Backpage is

1 authorized to assert the First Amendment rights of its users
2 without regard to whether it's got its own First Amendment
3 rights at issue. But I think the larger point is the fact
4 that there is a statute out there that gives Backpage some
5 statutory protections against some forms of liability as a
6 publisher does not preclude, does not estop Backpage from
7 asserting a constitutional defense as a publisher. The fact
8 that Backpage as a publisher has some protections under the
9 Communications Decency Act does not mean that it is not a
10 publisher, and it does not mean that it doesn't have First
11 Amendment rights. Statutory defense against liability and a
12 constitutional defense are not necessarily coextensive. So
13 I'm denying -- whether one says I'm denying the motion to
14 amend the affirmative defenses or don't bother filing another
15 motion to amend the affirmative defenses, it's not going to
16 fly on the judicial estoppel ground.

17 The third argument was that the sheriff has immunity
18 under the Communications Decency Act because he used an
19 interactive computer service in the course of conducting sting
20 operations on Backpage. The sheriff -- that argument is an
21 extreme reach and is not persuasive at all. The sheriff is
22 not in this case because he conducted sting operations or
23 otherwise used the Internet. He's in this case because there
24 is a claim which the Seventh Circuit has said has a
25 substantial likelihood of success that he imposed a prior --

1 an informal prior restraint on speech in which Backpage was
2 engaged, and that complaint is unconnected to the sheriff's
3 use of the Internet. That defense simply does not apply in
4 this case. Now, so that I think also takes care of some of
5 the motion to compel discovery. It obviously addresses the
6 illegality discovery.

7 There are other aspects of Sheriff Dart's motion --
8 discovery motion that the withdrawal of the damages claim I
9 think moots. Specifically the sheriff's request to compel
10 Backpage to supply LLC member information and tax returns I
11 think is largely moot in light of the denial for the claim of
12 damages. There's certainly no need for tax returns in light
13 of the withdrawal of that. And to the extent the
14 justification for that request is that the sheriff may seek
15 discovery from some of those people or some of those entities
16 that are removed from the chain of ownership of Backpage, that
17 sounds very much like a goose chase or a fishing expedition or
18 a snipe hunt, or you can pick some other metaphor that you
19 prefer, but I don't think it's been adequately justified. If
20 Backpage -- or if the sheriff hasn't received information from
21 the Backpage principals and Backpage itself who are known with
22 respect to the communications that may have been had with the
23 credit card companies and things like that, if there's not
24 information relevant in that regard from the principals,
25 there's -- I see no reason to think that conducting discovery

1 on tiers of people or entities several layers removed from
2 Backpage itself and the folks who run Backpage, there's no
3 reason to think that that discovery is going to bear fruit
4 either.

5 So I don't think that that discovery is warranted at
6 this stage and certainly not -- and certainly not without some
7 better showing from Backpage -- or excuse me -- from the
8 sheriff that there is a likelihood that that discovery will
9 produce relevant information. Given the burden it imposes, I
10 think it violates the concept of proportionality. So I'm not
11 going to authorize that discovery at this point.

12 If there is ultimately a need for additional
13 discovery, and Backpage -- or excuse me -- the sheriff thinks
14 he can make a showing, I will not preclude a further motion.
15 But in the posture we're in right now, I think you're going to
16 have to do that relatively soon because another one of the
17 pending motions is Backpage's motion to renew its summary
18 judgment motion which I previously denied without prejudice.
19 I'll give the sheriff an opportunity to respond to that
20 motion, but to the extent your response is of the tenor of we
21 still need some kind of discovery, you're going to need to
22 explain to me what discovery is needed, why you haven't been
23 able to get it to this point in time and, you know, as an
24 example, if you're seeking discovery of, you know, information
25 about Backpage owners or whatnot, why there's any reason to

1 think that that discovery is likely to be found. I'll require
2 the sheriff to respond to Backpage's motion to renew its
3 summary judgment motion in one week, and Backpage can reply
4 within one week after that. I'll take the motion up at that
5 point. And if there is -- well, I'll take the motion up at
6 that point and resolve it. If there's something else we need
7 to talk about with respect to discovery, I will let you know.

8 The last motion I think that needs to be addressed is
9 Backpage's motion to compel production of privileged
10 documents. For some of the same reasons, I think that that
11 motion is to some degree likely moot at this point, or at
12 least it doesn't make sense to address this motion
13 substantively at this point. Backpage has asked to renew its
14 summary judgment motion. I would interpret that to mean we
15 think we've got enough to warrant the entry of judgment as a
16 matter of law notwithstanding the fact that we don't have
17 these other documents. So if we're going to go forward on a
18 summary judgment motion, I'm not going to resolve hundreds of
19 privilege claims unnecessarily. If we go forward on a summary
20 judgment motion and if the summary judgment motion is denied,
21 you'll be able to reassert any claim with respect to
22 privileged documents or challenge as to privileged documents
23 at that time, and I'll deal with that if I need to deal with
24 it. But if summary judgment motion is granted, then obviously
25 there's not going to be the need to deal with that. So I'm

1 going to deny that motion to compel production of privileged
2 documents, docket 132, without prejudice to its reassertion if
3 and when that is necessary.

4 I think that is all the motions that are pending
5 presently.

6 MR. McGRATH: Your Honor, just a couple of quick
7 questions for you.

8 THE COURT: Yes.

9 MR. McGRATH: And I think it will just help maybe
10 with the -- what we file with the Court in response in a week.

11 And I'll just say, going back over maybe one of the
12 last hearings where we were before Your Honor and we kind of
13 had a discussion of the appeal and where we stood today. And
14 one of the issues that kind of comes up -- and it's not quite
15 clear in my mind, and I hope maybe Your Honor can help me
16 out -- is the causation idea. Obviously on some level, Judge
17 Posner has found causation during -- at least for purposes of
18 the preliminary injunction. And from the comments Your Honor
19 made in one of our previous hearings, it seems to think on
20 some level Your Honor has said because Judge Posner has made
21 that finding, that carries through to our current proceedings
22 which for purposes of why we're here today, the permanent
23 injunction now. So I guess my question is are we still
24 allowed to preside or present evidence to a jury, or to Your
25 Honor I guess, regarding whether there is causation because

1 obviously there's a different standard. You know, there's
2 only a couple of weeks of evidence that Judge Posner was
3 looking at as opposed to are we allowed to then present other
4 evidence where we can say there's no causation? Because it's
5 just strange without, like, a Rule 65 merger that we --
6 ultimately what would have happened then is for purposes of
7 causation, we've had entry of a permanent injunction based on
8 a preliminary injunction hearing.

9 THE COURT: Well --

10 MR. McGRATH: I guess that's --

11 THE COURT: The only thing I can tell you is there
12 was a preliminary injunction motion filed, denied. The denial
13 of that injunction was reversed by the Seventh Circuit, and
14 the Seventh Circuit issued an opinion. The act -- any court's
15 action on a preliminary injunction motion, to the extent it is
16 predicated on a factual record, isn't necessarily final.
17 There could be additional factual development relevant to the
18 motion that, you know, could in theory change the outcome.

19 That said, the Seventh Circuit's statements about the
20 law are legal issues, and I don't think the same flexibility
21 applies with respect to the Seventh Circuit's statement of law
22 because there's no reason to think that -- I mean, those
23 issues were fully briefed. There's no reason to think that
24 those issues weren't fully considered and addressed by the
25 Seventh Circuit, and we have the benefit of their view of what

1 the applicable law is in the case.

2 So the only thing I can tell you is, in general, if
3 you think there are additional facts that bear on the
4 questions that liability turns on based on the
5 Seventh Circuit's elucidation of the law, then you're free to
6 assert those facts, or you're free to make an argument that we
7 still need discovery about those facts. To the extent you're
8 making an argument that we still need discovery about those
9 facts, you're going to have to explain to me why you don't
10 have discovery of those facts or haven't conducted discovery
11 to obtain that factual information to this point. But
12 that's -- you know, that's sort of an aside.

13 So I'm not precluding you from, you know, raising
14 additional factual issues. That's why there was some
15 additional discovery period. But, you know, I'm not going to
16 prejudge the significance of any of that factual information.
17 I have to see that in context and have the benefit of the
18 briefs.

19 MR. McGRATH: I guess that's part of our issue,
20 Your Honor. So one of the things, obviously we haven't taken
21 depositions of any of the credit card people and some of the
22 individuals for Buckeye -- or sorry -- Backpage, sorry,
23 different case; too many B companies on the other side --
24 against Backpage, and it's because we're waiting for some of
25 Your Honor's ruling, and that's why we had an agreed motion on

1 some of that stuff. And obviously we can address that with
2 Your Honor in our brief, what we've been, you know, waiting on
3 because we don't want to try to pull these executives in twice
4 for different areas that they're going to testify in.

5 But going back I guess, and I think Your Honor has
6 clarified it somewhat, but, again, if I'm belaboring the
7 point, I apologize. Judge Posner made a factual finding that
8 there was causation, meaning the acts the sheriff caused that
9 the credit card companies do what they did. And he made
10 that -- I mean, that was a factual finding which was the
11 causation, and then he said -- I think he says it's beyond
12 doubt that that's what happened. And that's based on a fact
13 record that was elicited from two weeks of testimony. So I
14 guess my question is, can I bring the CEO of Visa in for him
15 to now come in and say, you know, I would like to tell Your
16 Honor, absolutely not. Here's what we're doing. We had all
17 our credit card companies. We had a meeting. We're all
18 cutting Backpage off in two weeks. I don't know if that's out
19 there. I'm just saying, is that the type of testimony I can
20 still get into because that would directly affect causation,
21 or is it now that Judge Posner has said it's without doubt
22 that one caused the other, we're already done?

23 THE COURT: Well, again, the only thing I will say
24 specifically is to the extent that the Seventh Circuit made
25 rulings predicated on fact and the factual record that had

1 been developed in the preliminary injunction hearing, that
2 factual record, I think the law is clear, can be supplemented
3 and is not binding. And if there was additional factual
4 information relevant to the issue, that would appropriately be
5 considered. That's why preliminary injunctive relief is
6 preliminary because it's based on a preliminary factual
7 record, ultimately go to trial, have a full fact development
8 of a full factual record, and the results may change. The
9 findings of fact may change. I think the law is clear with
10 respect to that.

11 I distinguish that from legal issues that the
12 Seventh Circuit has laid out for us in terms of the law that
13 applies in evaluation of a claim of an imposition by the
14 government of a prior restraint. So, you know, you have at
15 least two burdens in terms of, you know, if you think there
16 are or may be more relevant facts, you need to -- you're going
17 to have to -- you know, three burdens. You're going to have
18 to identify those facts. You're going to have to explain why
19 they suggest a different outcome, and you're going to have to
20 explain if you don't have those facts why you don't have them
21 at this point. So that's I think where you're at in terms of
22 responding to Backpage's motion to renew its summary judgment
23 motion. All right.

24 MR. McGRATH: Okay.

25 MR. KOZACKY: Your Honor, just so there is no waiver

1 affected by the sheriff, would it be prudent and would the
2 Court accept a proposed amended answer with affirmative
3 defenses, just for the record?

4 THE COURT: You can file whatever you want that you
5 think is necessary to protect your record. If you want to do
6 that, that's fine, and I'll just enter an order for the
7 reasons that I provided already here today -- well, actually,
8 I guess what you would have to do is file a motion for leave
9 to file an amended answer -- no, I take that back because
10 technically we've got an amended complaint. So you can file
11 your answer, and I'll *sua sponte* strike your affirmative
12 defenses based on what I have said today.

13 MR. KOZACKY: I hope not, Your Honor. There's always
14 room for rethinking about it, but we would like to have the 14
15 days we're permitted under Rule 15(a)(3) --

16 THE COURT: That's fine.

17 MR. KOZACKY: -- to do that.

18 THE COURT: That's fine.

19 MR. KOZACKY: Thank you, Your Honor.

20 THE COURT: You can clarify the record as you see
21 fit. Hopefully everybody understands that you're not -- you
22 know, at this stage you're not going forward on those
23 affirmative defenses. You can preserve your record as you
24 think necessary to do that.

25 MR. KOZACKY: Appreciate that. Not trying to belabor

1 the point but making sure a waiver doesn't occur.

2 THE COURT: No, that's fine.

3 MR. McGRATH: And I apologize. One last thing, Your
4 Honor.

5 I know Backpage has stated that they're waiving their
6 damages claim from this point forward. I guess, Your Honor --
7 and I'm sure that's not the case. We just want to make sure
8 that there's no issues of gamesmanship or things along those
9 lines where at some point at a later time that there's not
10 going to be leave then to, if there is at some point summary
11 judgment granted, then go in and reinstate the request for
12 damages at a later point in time.

13 THE COURT: No, we're moving forward without damages
14 for injunctive relief only, as I had suggested some time ago
15 that that would potentially narrow the issues in the case.
16 And I think it is correct, and it has. And we will take it up
17 in that posture.

18 MR. McGRATH: Thank you, Your Honor.

19 MR. KOZACKY: Thank you, Your Honor.

20 THE COURT: Okay. Thank you.

21 MR. CORN-REVERE: Thank you.

22 (Which were all the proceedings heard.)
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CERTIFICATE

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

/s/Kelly M. Fitzgerald

August 12, 2016

Kelly M. Fitzgerald
Official Court Reporter

Date