

Calendar No. 375

114TH CONGRESS }
2d Session }

SENATE

{ REPORT
114-214 }

RESOLUTION DIRECTING THE SENATE
LEGAL COUNSEL TO BRING A CIVIL
ACTION TO ENFORCE A SUBPOENA OF THE
PERMANENT SUBCOMMITTEE ON
INVESTIGATIONS

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ON

S. Res. 377



FEBRUARY 29, 2016.—Ordered to be printed

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Mr. JOHNSON, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany S. Res. 377]

The Committee on Homeland Security and Governmental Affairs, having considered an original resolution (S. Res. 377) directing the Senate Legal Counsel to bring a civil action to enforce a subpoena of the Permanent Subcommittee on Investigations, reports favorably thereon without amendment and recommends that the resolution do pass.

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I. PURPOSE

Backpage.com, LLC (Backpage) owns and operates the largest commercial sex services advertising platform in the United States, Backpage.com. Backpage officials have publicly acknowledged that criminals use the website for sex trafficking, including trafficking of minors.

On October 1, 2015, as part of an investigation of businesses that directly or indirectly facilitate criminal sex trafficking, the Permanent Subcommittee on Investigations (the Subcommittee)¹ issued a subpoena *duces tecum* to Carl Ferrer, Chief Executive Officer of Backpage. The subpoena required the production of documents con-

¹The Permanent Subcommittee on Investigations is a subcommittee of the Homeland Security and Governmental Affairs Committee (the Committee). Pursuant to 2 U.S.C. §288d, this report recommending adoption of a resolution authorizing the Senate Legal Counsel to bring a civil action compelling production must be made by the Homeland Security and Governmental Affairs Committee on behalf of the Permanent Subcommittee on Investigations.

cerning: Backpage’s policies and practices with respect to reviewing, blocking, editing, and modifying advertisements; the extent to which Backpage cooperates with law enforcement investigations of sex trafficking; Backpage’s removal of unlawful advertisements in its “adult” sections; the number of advertisements Backpage deletes or blocks; and revenue generated by Backpage’s adult advertisements. Backpage has not complied with the subpoena. Fact-finding in this area will assist Congress in its consideration of potential legislation in a number of areas of legislative interest, including interstate and international human trafficking and the federal law-enforcement policies and resources devoted to combatting it.

The Senate possesses constitutional and statutory authority to require witnesses to provide evidence. A mechanism for enforcing those rights is supplied under section 705(c) of the Ethics in Government Act of 1978, 2 U.S.C. 288d(c), which requires that a proposed resolution to authorize the Senate Legal Counsel to bring a civil action to compel Mr. Ferrer to comply with certain of the document requests in the Subcommittee’s subpoena, be accompanied by a report on the following subjects:

- (A) the procedure followed by the Subcommittee in issuing the subpoena to Mr. Ferrer;
- (B) the extent to which Mr. Ferrer has complied with the subpoena;
- (C) the objections raised by Mr. Ferrer; and
- (D) the comparative effectiveness of bringing a civil action compared to other remedies.

To place the Committee’s request for civil enforcement of its subpoena in proper context, this report first provides the background to the Subcommittee’s October 1, 2015, subpoena and its relevance to the Subcommittee’s investigation.

II. BACKGROUND

A. Sex Trafficking on the Internet

Human trafficking is a crime generating billions of dollars each year in illegal proceeds, making it more profitable than any transnational crime except drug trafficking.² Under United States law, human trafficking includes, among other things, the unlawful practice of selling, soliciting, or advertising the sexual services of minors or of adults who have been coerced into participating in commercial sex.³ Precise empirical data concerning this black-market trade are scarce. But, in 2013, social scientists estimated that there were as many as 27 million victims of human trafficking worldwide,⁴ including 4.5 million people trapped in sexual exploitation.⁵ In the United States, over eight in ten suspected incidents of human trafficking involve sex trafficking.⁶

²U.S. Dep’t of Homeland Security, *Blue Campaign: What is Human Trafficking?* (Sept. 14, 2015), <http://www.dhs.gov/blue-campaign/what-human-trafficking>.

³See 18 U.S.C. § 1591(a); 27 U.S.C. § 7102(10).

⁴U.S. Dep’t of State, *Trafficking in Persons Report 2013*, at 7 (June 2013), <http://www.state.gov/documents/organization/210737.pdf>.

⁵Polaris Project, *Sex Trafficking*, <http://www.polarisproject.org/sex-trafficking>.

⁶U.S. Dep’t of Justice, Bureau of Justice Statistics, *Characteristics of Suspected Human Trafficking Incidents, 2008–2010*, at 1 (Apr. 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf>.

Too often, the victims of sex trafficking are minors. The Department of Justice has reported that more than half of sex-trafficking victims are 17 years old or younger.⁷ In the last five years, the National Center for Missing and Exploited Children (NCMEC) reported an 846 percent increase in reports of suspected child sex—trafficking—an increase the organization found to be “directly correlated to the increased use of the Internet to sell children for sex.”⁸ Children who run away from home are particularly vulnerable to this crime; “[i]n 2014, one in six endangered runaways reported to NCMEC was likely a child sex-trafficking victim.”⁹

Online advertising has transformed the commercial sex trade and in the process has contributed to the explosion of domestic sex trafficking.¹⁰ Sex trafficking previously took place “on the streets, at casinos and truck stops, and in other physical locations.”¹¹ Now it appears that “most child sex trafficking currently occurs online.”¹² Sex trafficking has thrived on the Internet in part because of the high profitability and relatively low risk associated with advertising trafficking victims’ services online in multiple locations.¹³ With the aid of online advertising, traffickers can maximize profits, evade law-enforcement detection, and maintain control of victims by transporting them quickly within and between states.

B. Commercial Sex Advertising and Backpage.com

Sex traffickers have made extensive use of websites that serve as marketplaces for ordinary commercial sex and escort services. These sites may facilitate the sex trade by providing an easily accessible forum that matches buyers of sex with anonymous traffickers selling minors and adults.

⁷ U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, *Literature Review: Commercial Sexual Exploitation of Children/Sex Trafficking*, at 3 (2014) (citing Bureau of Justice Statistics data), <http://www.ojjdp.gov/mpg/litreviews/CSECSEXtrafficking.pdf>.

⁸ Testimony of Yiota G. Souras, Senior Vice President & General Counsel, National Center for Missing & Exploited Children, before Permanent Subcommittee on Investigations, at 2 (Nov. 19, 2015); Br. of National Center for Missing & Exploited Children, *J.S. v. Village Voice Media Holdings, LLC*, No. 4492-02-II, at 3 (Wash. Sup. Ct. Sept. 15, 2014). Congress designated NCMEC to be the “official national resource center and information clearinghouse for missing and exploited children.” 42 U.S.C. § 5773(b)(1)(B). Among its 22 statutorily authorized duties, NCMEC assists law enforcement in identifying and locating victims of sex trafficking and operates a “cyber tipline,” which collects reports of Internet-related child sexual exploitation, including suspected child sex trafficking. *Id.* §§ 5773(b)(1)(P)(3), (b)(1)(V).

⁹ Testimony of Yiota G. Souras, Senior Vice President & General Counsel, National Center for Missing & Exploited Children, before Permanent Subcommittee on Investigations, at 3 (Nov. 19, 2015).

¹⁰ Urban Institute, *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities*, at 234 (March 2014) (“The overall sex market has expanded . . . and law enforcement detection has been reduced.”), <http://www.urban.org/uploadedpdf/413047-underground-commercialsex-economy.pdf>; *id.* at 237–38 (“The results presented here corroborate [previous] findings that the use of the Internet is not necessarily displacing street-based sex work, but is likely helping to expand the underground commercial sex market by providing a new venue to solicit sex work.”).

¹¹ *Backpage.com, LLC v. Dart*, No. 15-cv-6340, Doc. 88–4, at 3 (N.D. Ill. Oct. 6, 2015), *rev’d.*, *Backpage.com, LLC v. Dart*, No. 15–3047 (7th Cir. Nov. 30, 2015).

¹² *Id.*

¹³ Urban Institute, *supra* n.15, at 218 (reporting on multiple studies concluding Internet-facilitated commercial sex transactions are “not as easily detected by law enforcement”); U.S. Dep’t of Justice, *National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress*, at 33 (Aug. 2010) (noting the increase in profitability of trafficking children with the aid of the Internet and explaining how the movement of sex trafficking victims from city to city, with the help of online advertisements, makes building criminal cases more difficult), <http://www.justice.gov/psc/docs/natstrategyreport.pdf>; Michael Latonero, *Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds*, at 13 (Sept. 2011) (quoting former NCMEC president and CEO Ernie Allen as stating, “[o]nline classified ads make it possible to pimp these kids to prospective customers with little risk”), https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking_FINAL.pdf.

One such site, Backpage.com, is similar in look and layout to the online marketplace Craigslist.com. It displays advertisements in sections such as “community,” “buy/sell/trade,” “jobs,” as well as “adult.” Advertisements in the “adult” section typically consist of a headline, a photo or photos, video, and a brief description of the services being offered. Backpage’s classified listings are localized by city or region; as of November 2015, Backpage had sites in 431 cities in the United States and 444 other cities around the world.¹⁴

Backpage is a market leader: in 2013, it reportedly netted more than 80 percent of all revenue from online commercial sex advertising in the United States.¹⁵ NCMEC has reported that of the suspected child trafficking reports it receives from the public, 71 percent involve Backpage.¹⁶ According to the Massachusetts Attorney General, “[t]he vast majority of prosecutions for sex trafficking now involve online advertising, and most of those advertisements appear on Backpage.”¹⁷ A Federal court in Seattle echoed those findings, concluding in 2012 that “[m]any child prostitutes are advertised through online escort advertisements displayed on Backpage.com and similar websites.”¹⁸

The National Association of Attorneys General has sounded similar alarms concerning Backpage’s facilitation of sex trafficking. On August 31, 2011, 45 state attorneys general sent a letter in which they described Backpage as a “hub” of “human trafficking, especially the trafficking of minors.”¹⁹ Pointing to more than 50 cases over the previous three years involving individuals trafficking or attempting to traffic minors on Backpage, the attorneys general argued that Backpage’s screening efforts were “ineffective.”²⁰ They requested documents from Backpage concerning the company’s public claims that it screens and removes advertisements linked to sex trafficking. Backpage provided no substantive response to that request.²¹

¹⁴ Backpage’s predecessor company was an alternative news weekly, *The New Times*, founded in 1970 in Phoenix by James Larkin and Michael Lacey. In 2005, New Times Media acquired The Village Voice, based in New York, and the new entity, still owned by Mr. Larkin and Mr. Lacey, renamed itself Village Voice Media. Richard Siklos, *The Village Voice, Pushing 50, Prepares to Be Sold to a Chain of Weeklies*, *The New York Times* (Oct. 24, 2005), available at http://www.nytimes.com/2005/10/24/business/the-village-voice-pushing-50-prepares-to-be-sold-to-a-chain-of-weeklies.html?_r=0. In response to public pressure regarding its adult advertisements and the alleged connection to sex trafficking, Village Voice Media is reported to have spun off its media holdings into Voice Media Group. In the wake of that spinoff, Village Voice Media, and its owners Mr. Larkin and Mr. Lacey, retained ownership of Backpage. Mallory Russell, *Village Voice Management Buyout Leaves Backpage.com Behind*, *Advertising Age* (Sept. 24, 2012), available at <http://adage.com/article/media/village-voice-management-buyout-leaves-backpage/237371/>.

¹⁵ Advanced Interactive Media Group, *Prostitution-ad revenue up 9.8 percent from year ago* (Mar. 22, 2013), <http://aimgroup.com/2012/03/22/prostitution-ad-revenue-up-9-8-percent-from-year-ago/>.

¹⁶ Testimony of Yiota G. Souras, Senior Vice President & General Counsel, National Center for Missing & Exploited Children, before Permanent Subcommittee on Investigations, at 3 (Nov. 19, 2015). This 71% figure does not include reports to the cyber tipline made by Backpage itself.

¹⁷ Br. of Commonwealth of Massachusetts, *Doe ex rel. Roe v. Backpage.com, LLC et al.*, No. 14–13870, Dkt. No. 30, at 7 (D. Mass. Feb. 20, 2015) (“In Massachusetts, seventy-five percent of the cases that the Attorney General has prosecuted under our state human trafficking law, plus a number of additional investigations, involve advertising on Backpage.”).

¹⁸ *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1267 (W.D. Wash. 2012).

¹⁹ Letter from the Nat’l Ass’n of Attorneys General to Samuel Fifer, Esq., Counsel for Backpage.com, LLC (Aug. 31, 2011), http://www.ct.gov/ag/lib/ag/press_releases/2011/083111backpageletter.pdf.

²⁰ *Id.*

²¹ *Id.*

C. Victim lawsuits

Backpage has also faced a number of civil lawsuits brought by trafficking victims. In September 2010, Backpage faced its first civil lawsuit, brought in the Eastern District of Missouri by a minor who was sold for sex and advertised on Backpage by her trafficker.²² She alleged that Backpage “had a strong suspicion” that the crimes of facilitating prostitution, exploitation of children, and child pornography were being committed on its site “yet was so indifferent that it failed to investigate for fear of what it would learn.”²³ She further alleged that Backpage “had a desire that [the] posters would accomplish their nefarious illegal prostitution activities so that the posters would return to the website and pay for more posting.”²⁴ The plaintiff sought a civil remedy pursuant to 18 U.S.C. § 2255, which creates a private right of action for child victims of sexual exploitation. Backpage persuaded the district court to dismiss the case on the ground that it was entitled to immunity under Section 230 of the Communications Decency Act (CDA),²⁵ which shields web publishers from civil liability for content to which they do not materially contribute.²⁶

Backpage also faces an ongoing civil suit by minor sex-trafficking victims in Massachusetts.²⁷ Unlike the plaintiff in the Missouri case, the Massachusetts plaintiffs allege that Backpage’s platform, categories, and filters actually “assist[ed] in the crafting, placement, and promotion of illegal advertisements offering plaintiffs for sale.”²⁸ But again, Backpage prevailed. The district court held that Backpage was immune from civil liability under the CDA.²⁹ The plaintiffs’ appeal is pending.

The Supreme Court of Washington State, however, has reached a contrary conclusion. That court held, in a suit brought by underage sex-trafficking victims, that Backpage would not be immune from suit if, as the plaintiffs alleged, Backpage “helped develop the content of [the offending] advertisements.”³⁰ The Washington plaintiffs allege that Backpage helped with ad-content creation through its posting rules, screening process, and content requirements.³¹ The court held these allegations warrant additional factual development, explaining that “[i]t is important to ascertain whether in fact Backpage designed its posting rules to induce sex trafficking to determine whether Backpage is subject to suit under the CDA because ‘a website helps to develop unlawful content, and thus falls within the exception to [CDA immunity], if it contributes materially to the alleged illegality of the conduct.’”³² The Washington case is now entering civil discovery.

²² Complaint, *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, No. 10–cv–01740, Dkt. No. 1, ¶9 (E.D. Mo. Sept. 16, 2010).

²³ *Id.* at ¶ 12.

²⁴ *Id.*

²⁵ 47 U.S.C. § 230.

²⁶ *M.A. ex rel. P.K. v. Village Voice Media Holdings*, 809 F.Supp.2d 1041, 1052, 1058 (E.D. Mo. 2011).

²⁷ *Doe ex rel. Roe v. Backpage.com, LLC*, 2015 WL 2340771 (D. Mass. Oct. 16, 2014).

²⁸ Amended Complaint, *Doe ex rel. Roe v. Backpage.com, LLC*, No. 14–cv–13870, Dkt. No. 9, ¶ 4 (D. Mass. Nov. 6, 2014).

²⁹ See *Doe ex rel. Roe*, 2015 WL 2340771, at *7–*11.

³⁰ *J.S. v. Village Voice Media Holdings*, 2015 WL 5164599, at *2 (Wash. Sup. Ct. Sept. 3, 2015).

³¹ *Id.*

³² *Id.* at *3.

III. DISCUSSION

A. *The procedure followed by the committee in issuing the subpoena to Mr. Ferrer*

Under Rule XXV(k)(1) of the Standing Rules of the Senate, the Committee is a duly authorized Senate committee. Under Rule 7(a) of the Rules of Procedure of the Committee, the Subcommittee is a duly authorized subcommittee of the Committee. Therefore, under Rule XXVI(1) of the Standing Rules of the Senate, both the Committee and the Subcommittee are authorized “to require by subpoena [sic] or otherwise the attendance of such witnesses.”

On May 22, 2015, the Subcommittee Chairman and Ranking Member notified all Subcommittee members by memorandum that the Subcommittee was investigating “businesses that directly or indirectly facilitate criminal sex trafficking conduct, including trafficking in minors.”³³ The investigation was authorized by Senate Resolution 73, Section 12(e), 114th Congress, which empowers the Subcommittee to investigate “all other aspects of crime” within the United States that affect the “national health, welfare, and safety,”³⁴ and the Subcommittee is specifically tasked with examining “organized criminal activity which may operate in or otherwise utilize the facilities of interstate or international commerce.”³⁵ Human trafficking is a Federal crime,³⁶ and human trafficking offenses are predicates to liability under the Racketeer Influenced Corrupt Organizations (RICO) Act.³⁷ The Subcommittee’s authority to investigate crime, its effects on public welfare and safety, and how the facilities of interstate commerce are used to commit it places this investigation squarely within its jurisdiction.³⁸

The Subcommittee’s investigation has not been limited to Backpage. To the contrary, the Subcommittee has been engaged since April 2015 in a broad investigation of the problem of human trafficking on the Internet. The Subcommittee has conducted interviews and briefings with over fifty relevant parties, including victims’ rights groups, nonprofit organizations, technology companies, financial institutions, academic researchers, and Federal, state, and local law-enforcement officials. The Subcommittee has also conducted interviews with—and received documents from—several websites in the commercial sex advertising industry that are similar to Backpage.

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

³³Memorandum from Sen. Rob Portman & Sen. Claire McCaskill to Members of Subcommittee Re: Notification of Pending Investigations (May 22, 2015) (on file with Committee staff).

³⁴S. Res. 73 § 12(e)(1)(D), 114th Cong.

³⁵*Id.* at § 12(e)(1)(C).

³⁶*See* 18 U.S.C. §§ 1581–1592.

³⁷*See* Pub. L. 108–193, 117 Stat. 2875, 2879, § 5(b); 18 U.S.C. § 1961(1).

³⁸The Subcommittee is also authorized to investigate “the efficiency and economy of operations of all branches of the Government.” S. Res. 73 § 12(e)(1)(A). This provision provides an additional, independent jurisdictional basis for the present investigation. Congress funds an array of government agencies and programs that are engaged in anti-trafficking efforts, and has an interest in determining whether these programs are operating efficiently and effectively.

During the interview, Ms. McDougall could not answer several critical questions about Backpage’s ownership, statistics on reporting to law enforcement and to NCMEC, and the “moderation” procedures Backpage uses to review and screen advertisements. After the interview, on June 22, 2015, the Subcommittee sent Backpage follow-up questions and requests for information.³⁹ Despite initially indicating that it would do so, Backpage failed to provide answers or documents.⁴⁰

On July 7, 2015, after providing the required notice to the Committee Chairman and Ranking Member, the Subcommittee issued a duly-authorized subpoena (the July 7 subpoena) to Backpage requesting documents related to Backpage’s basic corporate structure, the steps it takes to review advertisements for illegal activity, its interaction with law enforcement, and its data retention policies, among other relevant subjects.⁴¹ The subpoena was returnable August 7, 2015. On August 6, Backpage informed the Subcommittee by letter that it would not produce any documents in response to the subpoena.⁴² It contended that the subpoena violated the First Amendment, on the ground that Backpage is a publisher of protected speech.

After carefully considering Backpage’s position, the Subcommittee Chairman and Ranking Member sent a letter to Backpage explaining that the First Amendment cases on which Backpage relied were inapposite.⁴³ The Subcommittee invited Backpage to submit further explanation of its position.⁴⁴ Despite committing to do so in a September 14, 2015, meeting with Subcommittee staff, Backpage never submitted a further explanation of its refusal to produce documents pursuant to the July 7 subpoena.

In an attempt to continue its fact-finding, the Subcommittee issued subpoenas for the depositions of two Backpage employees on August 13, 2015.⁴⁵ The two employees retained individual counsel and, invoking their Fifth Amendment privilege, declined to answer any questions on the ground that their testimony might tend to incriminate them.⁴⁶ In addition, Mr. Ferrer declined to be voluntarily interviewed by Subcommittee staff.

On October 1, 2015, after providing the required notice to the full Committee Chairman and Ranking Member, the Subcommittee withdrew its original subpoena and issued a new, more targeted subpoena directly to Mr. Ferrer.⁴⁷ This subpoena requested, among other items, documents concerning Backpage’s review of advertisements, commonly referred to within the company as “moderation,” including information related to editing or modifying ads before publishing. The subpoena also requested documents concerning metadata, document retention, basic corporate information, and

³⁹ Email from Senior Counsel of Subcommittee to Backpage (Jun. 22, 2015) (on file with Committee staff).

⁴⁰ Email from Backpage to Subcommittee (July 1, 2015) (on file with Committee staff).

⁴¹ Subcommittee Subpoena, Oct. 1, 2015 (on file with Committee staff).

⁴² Letter from Backpage to Subcommittee (Aug. 6, 2015) (on file with Committee staff).

⁴³ Letter from Subcommittee to Backpage (Aug. 26, 2015) (on file with Committee staff).

⁴⁴ *Id.*

⁴⁵ Subcommittee Subpoena to Backpage Employee A, Aug. 13, 2015 (on file with Committee staff); Subcommittee Subpoena to Backpage Employee B, Aug. 13, 2015 (on file with Committee staff).

⁴⁶ Letter from counsel for Backpage Employee A and Employee B to Subcommittee (Sept. 3, 2016) (on file with Committee staff).

⁴⁷ Letter from Subcommittee to Backpage (Oct. 1, 2015) (on file with Committee staff); Subcommittee Subpoena, Oct. 1, 2015, (on file with Committee staff).

revenue derived from adult advertisements. The subpoena required Mr. Ferrer to produce the documents named in the subpoena schedule by October 23, 2015, or else to appear personally on that date. The Subcommittee later continued Mr. Ferrer's personal appearance to November 19, 2015—the date of the Subcommittee's hearing.⁴⁸

B. The extent to which Mr. Ferrer has complied with the subpoena

On the return date of October 23, 2015, Mr. Ferrer produced twenty-one pages of publicly available documents.⁴⁹ The company also submitted a letter objecting to the subpoena on the grounds that it violated the First Amendment and contained document requests that were not pertinent to a proper legislative investigation.⁵⁰

On November 3, 2015, the Subcommittee overruled Backpage's objections and ordered and directed Mr. Ferrer to comply with the subpoena by November 12, 2015.⁵¹ On November 13, 2015,⁵² Backpage attorneys wrote to the Subcommittee to explain that the company maintained its First Amendment and pertinence objections to the subpoena, but as a "gesture of good faith," it would produce *some* documents in response to certain of the subpoena's eight document requests.⁵³ The bulk of Backpage's November 13 production consisted of records that the company had previously provided to law-enforcement entities pursuant to subpoena. Based on the nature of that production, however, and the dearth of documents produced in response to requests concerning the review of adult advertisements, the Subcommittee is confident that Backpage is withholding a substantial volume of responsive documents. Indeed, counsel for Backpage has acknowledged that the company did not conduct a complete search for responsive documents.⁵⁴

Apart from publicly available documents, Mr. Ferrer produced no more than twenty pages of documents responsive to the core of the Subcommittee's request—the review and editing of adult advertisements—embodied in Requests One, Two, and Three. Importantly, Backpage failed to produce *any* internal emails concerning the moderation of ads—the subject of Request One ("[a]ny documents concerning Backpage's reviewing, blocking, deleting, editing, or modifying advertisements in Adult Sections, either by Backpage personnel or by automated software processes . . ."). As for Request Two, which concerned Backpage's "Banned Terms List," (*i.e.*, terms not permitted in adult advertisements), Backpage provided a one-page list of banned terms, but failed to provide any internal documents relating to the creation or modification of the list, as required by the subpoena.⁵⁵ Nor did it provide any internal emails concerning the blocking or flagging of user accounts—the subject of

⁴⁸ Letter from Subcommittee to Mr. Ferrer (Oct. 20, 2015) (on file with Committee staff).

⁴⁹ Submission from Backpage to Subcommittee (Oct. 23, 2015) (on file with Committee staff).

⁵⁰ Letter from Backpage to Subcommittee (Oct. 23, 2015) (on file with Committee staff).

⁵¹ Subcommittee Ruling, Nov. 3, 2015 (on file with Committee staff). In that ruling the Chairman and Ranking Member also continued Mr. Ferrer's appearance to November 19, 2015. *See supra* Part III.C.

⁵² Despite the order to comply with the subpoena by November 12, Backpage did not file any response until the following day, November 13. Backpage neither sought an extension of the deadline nor did it furnish any excuse for its tardy submission.

⁵³ Letter from Backpage to Subcommittee (Nov. 13, 2015) (on file with Committee staff).

⁵⁴ Letter from Backpage to Subcommittee (Nov. 16, 2015) (on file with Committee staff).

⁵⁵ Backpage also produced twenty pages of publicly available "error messages" in response to Request Two.

Request Three (“[a]ny 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.”).

With respect to Request Five, which covers documents relating to image hashing, metadata, and data retention,⁵⁶ Backpage produced no documents, claiming that it did not maintain formal data retention policies and was “unaware of non-privileged documents responsive to the remainder of the request[.]” Backpage failed to articulate the type of privilege to which it was referring; it also failed to provide a log of privileged items that it was withholding, as the subpoena requires.

The company’s response to the rest of the subpoena was similarly inadequate, as it produced incomplete information in response to Requests Six and Seven relating to advertising volume and reporting, and no documents at all in response to Request Eight concerning financial information.⁵⁷

While Backpage produced virtually no non-public documents concerning moderation, which is the core of the Subcommittee’s request, it did make a production of law-enforcement related documents that are of marginal value to the Subcommittee. That production consisted of 16,838 pages of documents, more than 16,000 of which, or some 96 percent, constituted the entire production of Backpage’s responses to law-enforcement subpoenas. Just one file produced in this category contained more than 750 pages of documents—including hundreds of pages of ads and photos from 2013 and 2014—responsive to a single government subpoena requesting information relevant to one Backpage user. Although Backpage explained that it believed this material was responsive to Request Four and that the company had “five million” additional pages of this material to produce, Subcommittee staff informed Backpage it had no need for that submission. Backpage also produced an additional 350 pages of emails from law enforcement officials thanking Backpage employees for responding to police inquiries.

Accordingly, Backpage’s production cannot properly be described as a “gesture of good faith,” as the company claimed in its November 13 letter. For example, Backpage produced eight pages of email correspondence with a third-party consultant who voiced concern about potentially underage children advertised for sex on Backpage.com. Despite producing these emails exchanged with a third party, Backpage failed to produce any internal emails about the same or similar subjects—that is, the company’s efforts to combat the problem of human trafficking on its site. As the Sub-

⁵⁶ Subcommittee staff has learned that image hashing and the collection of metadata are important anti-trafficking tools available for reviewing commercial sex advertisements. “Hashing” gives photos a unique fingerprint that enables one to search for identical photos in other places, including on different web pages. Similarly, the “metadata” contained in electronic files is another important law-enforcement tool. A file’s “metadata” may include author, date and time created, date modified, and file size. Image metadata may also include geographic coordinates for location at the time the image was created.

⁵⁷ By letter dated November 13, 2015, Backpage produced incomplete statistics with respect to subparts (a) and (b) of Request Six, and failed to address subpart (c) concerning the number of adult advertisements directly reported to law enforcement. Instead, Backpage provided statistics concerning the company’s reporting to the National Center for Missing and Exploited Children. As for Request Seven, the company produced no statistics in response to subpart (a), and incomplete statistics in response to subparts (b) and (c).

committee’s November 19, 2015, report⁵⁸ demonstrates, many such emails have been exchanged between Backpage employees during the time period covered by the subpoena. Indeed, by the company’s own admission,⁵⁹ a significant majority of Backpage employees are engaged in the review of adult advertisements; it is therefore highly likely that the company has more than twenty internal pages relevant to the review of adult advertisements.

Not only has Backpage failed to produce responsive documents, but it has also failed to describe them in a privilege log that would enable the Subcommittee to assess individualized objections to producing them. A privilege log is required by the subpoena’s terms, and the failure to produce one despite the Subcommittee’s repeated requests is further evidence of the company’s default.⁶⁰ In addition, by Backpage’s own admission, it did not conduct a “complete search” of its records for responsive documents, claiming that to be required to do so would be “constitutionally inappropriate.”⁶¹ Indeed, Backpage counsel was unable to tell the Subcommittee which data sources or custodian email accounts, if any, the company searched for responsive documents. By all indications, Backpage produced a self-selected subset of documents to support a pretense of cooperation, and nothing more.

In addition to Mr. Ferrer’s failure to produce documents responsive to the Subcommittee’s subpoena, he also defaulted on his obligation to appear personally before the Subcommittee at the November 19, 2015, hearing. On November 16, 2015—three days before the hearing—Backpage attorneys informed the Subcommittee that Mr. Ferrer would decline to answer questions based on a First Amendment objection and his Fifth Amendment privilege against self-incrimination.⁶² In the same letter, Backpage requested that the Subcommittee waive Mr. Ferrer’s personal appearance. The Subcommittee promptly rejected the request.⁶³

On November 18, 2015, the day before the hearing, counsel for Backpage informed the Subcommittee that Mr. Ferrer was out of the country on “important international business travel” and would therefore not appear.⁶⁴ Mr. Ferrer subsequently failed to appear before the Subcommittee at the November 19, 2015, hearing.

C. *Objections to the subpoena*

Throughout the Subcommittee’s dealings with Mr. Ferrer and Backpage, the company has argued that most of the document requests in the subpoena were impermissible under the First Amendment. In particular, Backpage objected that “First Amendment tensions” inherent in requesting information from a “publisher” coun-

⁵⁸ Subcommittee Report, *Recommendation to Enforce a Subpoena Issued to the CEO of Backpage.com, LLC*, (Nov. 19, 2015), available at <http://www.hsgac.senate.gov/subcommittees/investigations/hearings/human-trafficking-investigation>.

⁵⁹ In a June 19, 2015 interview with Backpage General Counsel Elizabeth McDougall, she explained that 120 of 180 total employees worked in Backpage’s “moderation” section. It is unclear how many employees are still engaged in the review of adult advertisements.

⁶⁰ See Subcommittee Subpoena, Oct. 1, 2015 (on file with Committee staff); see also Letter from Subcommittee to Backpage (Aug. 26, 2015) (on file with Committee staff); Letter from Subcommittee to Backpage (Aug. 28, 2015) (on file with Committee staff).

⁶¹ See Part III.C.

⁶² Letter from Backpage to Subcommittee (Nov. 16, 2015) (on file with Committee staff).

⁶³ Email from Chief Counsel of Subcommittee to Backpage (Nov. 16, 2015) (on file with Committee staff).

⁶⁴ Letter from Backpage to Subcommittee (Nov. 18, 2015) (on file with Committee staff).

seled in favor of reading the Subcommittee’s authorizing resolution not to encompass the power to issue the October 1 subpoena.⁶⁵

In its objections, Backpage relied principally on cases in which courts have invalidated investigative demands for information about disfavored political dissenters—for example, Alabama seeking the identities of NAACP members in the 1950s,⁶⁶ or a House committee trying to discover who is reading “books of a particular political tendentiousness.”⁶⁷ Although Backpage asserted that several items in the subpoena violate the First Amendment, it did not attempt to show either (i) that any request for documents sought information that infringed recognized First Amendment rights; or (ii) that any such request was not supported by an adequate legislative interest—as required to sustain a First Amendment objection in this context.⁶⁸

After carefully considering the proffered objections, the Chairman and Ranking Member overruled them in a detailed ruling dated November 3, 2015.⁶⁹ Unlike the cases cited by Backpage, in which investigative demands were used to further the official suppression of ideas, the Subcommittee’s subpoena infringed no First Amendment rights. And unlike the demands for membership lists 60 years ago, the October 1 subpoena proactively instructed Backpage to *redact* any personally identifying information of its users. Finally, the mere fact that Backpage is a publisher of commercial speech does not immunize it from legitimate investigations into the unprotected, unlawful activity that undisputedly *also* occurs on its facilities.⁷⁰

The Chairman and Ranking Member also overruled Backpage’s jurisdictional objection, finding that the investigation fit squarely within the Subcommittee’s authorizing resolution.⁷¹ As noted above, the Subcommittee is authorized to investigate “all other aspects of crime” within the United States that affect the “national health, welfare, and safety,”⁷² as well as “organized criminal activity which may operate in or otherwise utilize the facilities of interstate or international commerce.”⁷³ Human trafficking is a federal crime.⁷⁴ Importantly, Congress has specifically recognized human trafficking as an activity of *organized* crime; the Trafficking Victims Protection Reauthorization Act of 2003 declared that human trafficking offenses are predicates to liability under RICO.⁷⁵ And the Internet, an important facility of interstate commerce, has become an increasingly central marketplace for human trafficking in the United States.⁷⁶ The Subcommittee is therefore empowered to investigate how individuals utilize the Internet, including commercial sex advertising websites like Backpage.com, to further their il-

⁶⁵ Letter from Backpage to Subcommittee (Oct. 23, 2015) (on file with Committee staff).

⁶⁶ *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁶⁷ *United States v. Rumely*, 345 U.S. 41, 42 (1953).

⁶⁸ See *NAACP*, 357 U.S. at 463.

⁶⁹ Subcommittee Ruling, Nov. 3, 2015 (on file with Committee staff).

⁷⁰ *Cf. Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (“[T]he First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.”).

⁷¹ Subcommittee Ruling at 7–10, Nov. 3, 2015 (on file with Committee staff).

⁷² S. Res. 73 § 12(e)(1)(D), 114th Cong.

⁷³ *Id.* at § 12(e)(1)(C).

⁷⁴ See 18 U.S.C. §§ 1581–1592.

⁷⁵ See 18 U.S.C. § 1961(1).

⁷⁶ See generally Mark Latonero, *supra* n.13.

licit trafficking schemes, as well as examine the mechanisms websites can use to prevent such abuse of interstate facilities.

The Chairman and Ranking Member further rejected Backpage’s entirely unexplained contention that the document requests in the October 1 subpoena were not pertinent to a proper investigation.⁷⁷ The Subcommittee’s ruling articulated clearly why each request relates to its efforts to understand online sex trafficking, what companies like Backpage can do to prevent it (and may be doing to facilitate it), and what further steps the government might take to combat it. Having considered and rejected Backpage’s objections as unfounded, the Chairman and Ranking Member ordered and directed Mr. Ferrer to comply with the subpoena by November 12, 2015.⁷⁸

Despite the ruling dismissing his objections, Mr. Ferrer has continued to defy the Subcommittee’s lawful process. After Mr. Ferrer’s failure to appear on November 19, 2015, Backpage attorneys wrote in a November 24, 2015, letter that it was standing by its First Amendment, overbreadth, and pertinence objections to the subpoena.⁷⁹ The company’s lawyers had previously stated that the company’s submissions of information 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.”⁸⁰ Instead, Backpage took the position that even “to be required to conduct such a search and review” would be “constitutionally inappropriate.”⁸¹ Backpage encouraged the Subcommittee to “present[] this issue to the courts for resolution” by invoking the statutory mechanism for civil enforcement of Senate subpoenas.⁸² The Subcommittee, through the present report prepared pursuant to § 288d, is taking the necessary action to enable Senate Legal Counsel to file such an action.

In an attempt to focus on information of highest priority, the Subcommittee is only seeking to enforce Requests One, Two, and Three of the subpoena. The Subcommittee has obtained sufficient information responsive to the remaining requests—Four, Five, Six, Seven, and Eight—from either third-party sources or Backpage itself.

By contrast, Requests One, Two, and Three, concern the moderation practices at the core of the Subcommittee’s inquiry, as evidenced by the Staff Report that examined Backpage’s screening and editing practices using information obtained from third parties.⁸³ By Backpage’s own admission, the screening of adult advertisements is a key function of its business. And the Subcommittee has information, in the form of emails from third parties, indicating that Backpage possesses significant records responsive to these requests. Nevertheless, Mr. Ferrer has withheld those records based on a vague and undeveloped First Amendment claim. The Subcommittee therefore seeks authorization to obtain from the

⁷⁷ Subcommittee Ruling at 15–18, Nov. 3, 2015 (on file with Committee staff).

⁷⁸ *Id.* at 19.

⁷⁹ Letter from Backpage to Subcommittee (Nov. 24, 2015) (on file with Committee staff).

⁸⁰ Letter from Backpage to Subcommittee (Nov. 16, 2015) (on file with Committee staff).

⁸¹ *Id.*

⁸² *Id.*

⁸³ Subcommittee Report, Recommendation to Enforce a Subpoena Issued to the CEO of Backpage.com, LLC, (Nov. 19, 2015), available at <http://www.hsgac.senate.gov/subcommittees/investigations/hearings/human-trafficking-investigation>.

district court an order directing Mr. Ferrer's compliance with the Subcommittee's October 1, 2015, subpoena.

D. Comparative effectiveness of a civil action or invoking inherent contempt

The Subcommittee has considered the effectiveness of a civil action to enforce the Subcommittee's subpoena compared to an immediate referral to the United States Department of Justice for criminal prosecution. Although the Subcommittee continues to consider whether to refer Mr. Ferrer's failure to comply with the subpoena and failure to appear at the November 19 hearing for criminal prosecution, the Subcommittee has concluded that a civil action is the most effective and expeditious means to enforce the subpoena.

In a civil action under 28 U.S.C. § 1365, the Subcommittee would apply to the United States District Court for the District of Columbia for an order requiring Mr. Ferrer to produce the subpoenaed documents. If the district court determines that Mr. Ferrer has no valid reason to refuse, the court would direct him to produce the subpoenaed documents. Disobedience of that order would subject Mr. Ferrer to sanctions to induce compliance. Mr. Ferrer could free himself of sanctions by producing the subpoenaed documents.

In a criminal referral under 2 U.S.C. §§ 192–194, the Senate would direct the president *pro tempore* to certify to the U.S. Attorney for the District of Columbia the facts concerning the witness's refusal to produce the subpoenaed documents. If convicted, the witness could receive a sentence of up to one year in prison and a \$100,000 fine.

The Subcommittee and Committee recommend that the Senate proceed at this time with a civil action to enforce the Subcommittee's subpoena to Mr. Ferrer. The Subcommittee has a continuing interest in obtaining the subpoenaed documents as part of its ongoing investigation into sex trafficking. That goal is best advanced by the civil remedy—an order to produce—rather than the purely punitive remedies available through criminal prosecution. In addition, the Subcommittee believes a civil enforcement action will be more expeditious. The Subcommittee has an interest in speedy adjudication of Mr. Ferrer's legal obligations so that it may proceed with its investigation and potential future hearings or reports in the current Congress. Such fact-finding is urgently needed for potential legislation in this important area. The Subcommittee notes, however, that its recommendation to pursue a civil enforcement action at this time does not preclude a later determination to refer the matter to the Department of Justice for criminal prosecution of Mr. Ferrer for contempt of Congress.

IV. LEGISLATIVE HISTORY

The Committee considered the original resolution at a business meeting on February 10, 2016. With a majority of the Members of the Committee present, constituting a quorum under Committee Rules for the purpose of reporting measures, matters or recommendations, the Committee ordered the original resolution reported favorably by a roll call vote of 15 in favor and none opposed. Members voting in the affirmative were: Ron Johnson (R-WI), John McCain (R-AZ), Rob Portman (R-OH), Rand Paul (R-KY), James Lankford (R-OK), Kelly Ayotte (R-NH), Joni Ernst (R-IA),

Ben Sasse (R-NE), Thomas R. Carper (D-DE), Claire McCaskill (D-MO), Jon Tester (D-MT), Tammy Baldwin (D-WI), Heidi Heitkamp (D-ND), Cory A. Booker (D-NJ), and Gary C. Peters (D-MI). For the record only, Senator Michael B. Enzi (R-WY) voted “aye” by proxy. There were no votes cast in the negative.

