

# Akin Gump

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## **VIA ELECTRONIC DELIVERY**

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

Dear Chairman Portman and Ranking Member McCaskill:

We are in receipt of your letter of January 5, 2017 denying our request that Messrs. Ferrer, Larkin, Lacey, Padilla and Ms. McDougall be excused from appearing at a hearing of the Subcommittee scheduled for today for a variety of reasons concerning the preservation of their constitutional rights and legal privileges. While your continued insistence that the witnesses appear is extremely unfortunate, it comes as no surprise given the Subcommittee's prior pronouncements with respect to Backpage.

Since mid-2015, the Subcommittee has, for reasons unrelated to the legislative responsibilities of the Congress, sought to compel Backpage, an online publisher of third party-created advertisements, to provide a virtually unlimited amount of information regarding the company's core editorial decisions: what material it would publish and what material it would not publish. Backpage strongly believes that this core activity lies at the very heart of the protection against government interference afforded to publishers of both print and on-line speech by the First Amendment. Backpage believes that the Subcommittee's quest for this information is not for the purpose of informing the legislative work of the Senate, but rather is part of a coordinated effort to drive Backpage out of business. As Judge Richard Posner has described efforts by others in government with whom the Subcommittee has coordinated, the goal is to either "suffocate" Backpage out of existence or to use the awesome powers of the government to force Backpage to follow in the footsteps of Craigslist and to abandon its Adult advertising section.

We understand that the Subcommittee disagrees and does not believe that Backpage's publication activities are worthy of the protections against government attack provided by the

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Bill of Rights. In this sense, the Subcommittee has discounted any argument that its investigative activities are subject to constitutional subject-matter constraints. But Backpage's insistence on vindicating its rights—rights that have been upheld in a series of federal court cases across the nation—is simply a proper and appropriate effort to obtain a judicial determination before it capitulates to what it believes to be unconstitutional efforts to harass it out of existence.

And yes, this Subcommittee and those with whom it has coordinated to subvert Backpage's constitutional rights have now achieved their objective. Today, throughout the United States, the entire Adult Section of the Backpage on-line classified advertising website has been censored and shut down. As Judge Posner observed in invoking an email written by a senior member of the staff of Cook County Sheriff Dart—the very same office with which the Subcommittee coordinated in conducting its inquiry—the government has deployed unconstitutional means to crush Backpage by pursuing a campaign of suffocation. The official predicted: “It’s unsustainable for them to maintain all of the lobbying, legal battles and all the money it takes for their server space without revenue coming in.” Judge Posner described such tactics as “a formula for permitting unauthorized, unregulated, foolproof, lawless government coercion ... [i]n other words, Backpage is doomed.” This goal has been achieved.

Before the Subcommittee and others who have worked to do away with the Adult portion of Backpage's published content congratulate themselves and proclaim that the company's legal arguments are without merit, we would urge that one should not discount the decisions of the many courts that have struck down prior efforts to censor Backpage. *People v. Ferrer*, No. 16FE019224 (Cal. Sup. Ct., Dec. 9, 2016); *Backpage.com, LLC v. Dart*, 807 F. 3d 229 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 46 (2016); *Backpage.com, LLC v. McKenna*, 881 F.Supp.2d 1262 (W.D. Wash. 2012); *Backpage.com, LLC v. Cooper*, 939 F.Supp.2d 805, 830 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 (D.N.J. Aug. 20, 2013); *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011). Nor should they overlook the pending expedited appeal of the subpoena enforcement order in this case, soon to be heard and decided by the United States Court of Appeals for the D.C. Circuit. And lest anyone fail to recognize that the First Amendment freedoms at risk are critical not just for this one intermediary to preserve a free and open Internet, they should read the briefs filed in support of Backpage's position in the pending D.C. Circuit Court of Appeals case by the Cato Institute, the DKT Liberty Project, the Reason Foundation, and the Center for Democracy and Technology and the Electronic Frontier Foundation.

The Subcommittee has decided to treat a disagreement on important principles of law as an unlawful affront, even as private citizens are properly seeking a final judicial determination of their rights. Given its history, this Subcommittee should especially recognize and respect the constitutional rights of citizens and the propriety of seeking a final judicial resolution before one

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is ordered to submit to the demands of the government. The Senate has entrusted this Subcommittee with a very broad mandate to conduct investigations intended to inform the body's legislative functions. But when those powers are used without proper respect for the rights of citizens and the confines of Congress's legislative (rather than prosecutorial) role, it poses a great danger to our system of government and greatly undermines the brighter history of this Subcommittee. Unfortunately, the Subcommittee's recent conduct harkens back to the darkest days of its history, when many dozens of witnesses were brought before this Subcommittee during investigations based on the most tenuous of legislative purposes and forced to assert their First and Fifth Amendment rights.

Let us be clear: Backpage and the people who work for the company agree that human trafficking is abhorrent and should be eradicated. This is why Backpage has spent thousands of hours and millions of dollars working with, and at times training, the front lines of law enforcement in seeking to bring to justice those who have impermissibly sought to use the Internet as a platform to commit abhorrent crimes. The importance, and unfortunately the rarity, of this assistance to law enforcement efforts regarding human trafficking is why Backpage's CEO received a commendation from the Director of the FBI, and why the Company has been thanked by front line law enforcement officials around the country. Those law enforcement professionals at the federal and local levels actively engaged in the fight against human trafficking have often praised Backpage for its supportive efforts. For example, an officer from the Denver Police Department stated: "I wanted to personally thank you again for all you have done to assist with this matter. I know your company is vilified nationally because it is an easy target. I have told numerous people that Backpage is law enforcement friendly and does not support human trafficking." Or, as one FBI Special Agent succinctly put it: "Thank you! I appreciate you proactive efforts to protect our children."

Just as importantly, Backpage firmly believes that those who have been unwillingly forced into a life of virtual slavery should receive the assistance they need and deserve. This is why, in addition to its assistance to law enforcement, Backpage has donated to and has worked cooperatively with one of the leading rescue and shelter groups in the nation—the Children of the Night organization. That cooperation has included providing outreach advertising and assisting in numerous interventions.

There is an unfortunate irony to the "success" of the Subcommittee and the others with whom it has worked in closing down Backpage's Adult section. As others have observed, shutting down the Adult section will not end the scourge of human trafficking. Those who posted ads in furtherance of such activities will rapidly find other less transparent avenues on the Internet to pursue their illegal schemes—but both law enforcement and those seeking to help the victims will be deprived of their most active and cooperative partner in mitigating such

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activity. It is unfortunate that the Subcommittee specifically disclaimed any interest in Backpage's cooperation with law enforcement and instructed the company to stop providing information about this important part of the Backpage story. The coercive evil of human trafficking did not start with creation of Backpage or the Internet, and unfortunately it will not end with today's government censorship of Backpage's Adult section.

Although we think they are mistaken, we do recognize that there are those who believe that shuttering Backpage's Adult section will advance the fight against human trafficking, and we certainly understand that demonizing Backpage is a politically popular objective. But, as this very Subcommittee's history vividly demonstrates, it is when the Subcommittee believes it is in pursuit of a righteous and politically popular result that the greatest danger of disregard for the rights of witnesses is presented. Unfortunately, while the Members of the Subcommittee may not today be willing to acknowledge it, we hope that upon further reflection you will recognize that it is unworthy of the Senate and this Subcommittee to compel the appearance of witnesses at a broadcast hearing to publicly assert their constitutional rights under both the First and Fifth Amendments as they face yet another unlawful criminal proceeding in California brought by the newest Member of this Committee. The current Members of this Subcommittee might take the time to review the introduction to a historical collection of this Subcommittee's work in the early 1950's, issued fifty years later in 2003, by former Chairs Senator Carl Levin and Senator Susan Collins. In the Subcommittee's introduction to that extensive historical collection, the Senate Historian observed that "Senator McCarthy explained to witnesses that they could take the Fifth Amendment only if they were concerned that telling the truth would incriminate them, a reasoning that redefined the right against self-incrimination as incriminating in itself."

Perhaps the passage of time will also allow Members of this Subcommittee to recognize that our honest disagreement with your staff about the limitations imposed by the First Amendment deserved to be presented to, and resolved by, the judicial branch, as we urged should be done in a cooperative fashion starting with our first meeting during the summer of 2015. And with respect to a more recent decision, perhaps time will let some Members of the Subcommittee recognize that it was inappropriate to use your senatorial powers to force individual Americans to choose between acceding to your demand that they attend this hearing or attending an already-set court proceeding in an effort to promptly have—for the second time—the unconstitutional charges filed against them thrown out.

But the Subcommittee has determined that the "hearing" must go on, and it has rejected our various objections. The witnesses will indeed appear (though not testify), but we do not accept that the Subcommittee's determinations on its present legal authority under either the Constitution or the Rules of the Senate are correct and we specifically reserve and do not waive any and all objections to the forced appearance and questioning of Messrs. Ferrer, Larkin, Lacey,

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Padilla and Ms. McDougall. This includes, but is not limited to, any and all objections under the Constitution, common law (including the attorney-client privilege and attorney work product doctrine), the Rules of the Senate, the Rules of the Committee and the Subcommittee and any other law applicable to this Subcommittee's proceedings.

Sincerely,



Steven R. Ross  
Stanley M. Brand  
Akin Gump Strauss Hauer & Feld  
Counsel for Backpage.com, LLC; Carl Ferrer;  
James Larkin; Michael Lacey; Andrew Padilla; and  
Elizabeth McDougall

Robert Corn-Revere  
Davis Wright Tremaine, LLP  
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James Larkin; Michael Lacey; Andrew Padilla; and  
Elizabeth McDougall

cc: The Honorable Ron Johnson, Chairman, Committee on Homeland Security &  
Governmental Affairs  
The Honorable John McCain  
The Honorable Rand Paul  
The Honorable James Lankford  
The Honorable Michael Enzi  
The Honorable John Hoeven  
The Honorable Steve Daines  
The Honorable Tom Carper  
The Honorable Jon Tester  
The Honorable Heidi Heitkamp  
The Honorable Gary Peters  
The Honorable Maggie Hassan  
The Honorable Kamala Harris