

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5232

SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,

Appellee,

v.

CARL FERRER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**OPPOSITION OF APPELLEE SENATE PERMANENT
SUBCOMMITTEE ON INVESTIGATIONS TO
EMERGENCY MOTION OF APPELLANT CARL FERRER
FOR A STAY PENDING JUDICIAL REVIEW**

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**CERTIFICATE OF APPELLEE
AS TO PARTIES, RULINGS, AND RELATED CASES**

A. Parties and Amici

This appeal arises from a civil action in the district court, No. 16-mc-00621-RMC. The applicant-appellee is the Senate Permanent Subcommittee on Investigations. The respondent-appellant is Carl Ferrer. No *amici curiae* appeared, and no parties intervened, below or, to date, in this Court.

B. Ruling Under Review

The ruling under review on this appeal, issued by District Judge Rosemary M. Collyer on August 5, 2016, granted the applicant-appellee's motion to enforce its subpoena *duces tecum*. *Permanent Subcomm. on Investigations v. Ferrer*, --- F. Supp. 3d ---, 2016 WL 4179289 (D.D.C. Aug. 5, 2016).

C. Related Cases

This appeal has not previously been before this Court. There are no related cases pending in this Court or in any other court.

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* Cases and authorities chiefly relied upon are denoted with an asterisk.

INTRODUCTION

Appellant Carl Ferrer, CEO of Backpage.com, LLC, refuses to comply with a valid subpoena issued by the Senate Permanent Subcommittee on Investigations (“Subcommittee” or “PSI”). He claims that the First Amendment shields him from producing *any* responsive documents – and even from searching for responsive materials and identifying them in a privilege log. The district court correctly rejected that position and ordered Mr. Ferrer to comply “forthwith” with the Subcommittee’s subpoena.

Mr. Ferrer’s application for a stay should be denied. He cannot establish likelihood of success on the merits of his appeal. The Subcommittee is investigating the serious problem of human trafficking on the Internet – much of which takes place on Backpage’s website – and has subpoenaed Mr. Ferrer for documents relating to Backpage’s screening for illegal trafficking. It is important for the Subcommittee’s investigation of Internet sex trafficking to understand what methods the leading on-line marketplace for sex advertisements employs to screen out illegal sex trafficking on its website. Mr. Ferrer has no First Amendment right to ignore a subpoena for documents about Backpage’s business practices related to that topic. He has refused to identify his First Amendment interests except in sweeping generalities, and failed even to attempt to show that any such interests outweigh important governmental interests served by the Subcommittee’s investigation. Indeed, Mr. Ferrer cannot make any balancing argument because he refused to search for responsive documents or

produce a privilege log describing them, claiming that the First Amendment gave him blanket immunity from having to carry out these basic duties of all subpoena respondents. The court below held there was “no legal or factual support” for that proposition, Opinion, *PSI v. Ferrer*, 16-mc-621, ECF No. 17, at 20 (D.D.C. Aug. 5, 2016), 2016 WL 4179289 (“Op.”), and this Court is not likely to reverse that conclusion.

The other stay factors similarly favor the Subcommittee. Without articulating any specifics about the documents withheld, Mr. Ferrer cannot establish any actual and non-theoretical irreparable injury likely to result from their production. Further, the balance of equities strongly favors prompt enforcement of the subpoena, as a stay would hamper completion of the Subcommittee’s investigation before the end of this Congress, undermining the public interest in the Subcommittee’s ability to report to the Senate its findings for legislative consideration of this serious problem. Mr. Ferrer’s “dilatory” conduct, Order, *PSI v. Ferrer*, 16-mc-621, ECF No. 23, at 6 (D.D.C. Aug. 12, 2016) (“Stay Order”), has stymied the Subcommittee’s investigation for over a year and should not be countenanced further.

STATEMENT OF THE CASE

1. The Senate Permanent Subcommittee on Investigations is empowered to issue subpoenas for documents as part of its authority to investigate “organized criminal activity which may operate in or otherwise utilize the facilities of interstate or international commerce” and to assess “whether any changes are required in the laws of the United States in order to protect the public against such [organized criminal]

practices or activities,” as well as “all other aspects of crime and lawlessness within the United States which have an impact upon or affect the national health, welfare, and safety.” S. Res. 73, § 12(e)(1)(C), (D), & (e)(3), 114th Cong. (2015).

2. Since April 2015, the Subcommittee has been investigating the serious and growing problem of Internet sex trafficking. Its investigation seeks to learn what measures online commercial marketplaces take to prevent use of their websites for sex trafficking and whether those measures are effective. Backpage dominates the online market for commercial sex, and numerous instances of child sex trafficking have occurred through its website. *See* Recommendation to Enforce Subpoena Issued to the CEO of Backpage.com, LLC, Staff Report to the Permanent Subcommittee on Investigations, Nov. 19, 2015, at 6-7 (“PSI Staff Report”), *reprinted in Human Trafficking Investigation: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Homeland Security and Governmental Affairs*, S. Hrg. No. 114-179, 114th Cong., at 53-248 (2015).¹ The Subcommittee seeks to understand how Backpage reviews and screens advertisements – a practice called “moderation” – that Backpage touts as effective in combatting online trafficking.

Following unsuccessful attempts to gather information from Backpage through voluntary means, in July 2015, the Subcommittee issued a subpoena to Backpage for materials concerning, *inter alia*, its moderation practices, interactions with law

¹ A copy of the hearing record was lodged with the district court, and is also available at www.gpo.gov/fdsys under “Congressional Hearings.”

enforcement, data retention policies, and its corporate structure, *see* Letter and Subpoena to Backpage, schedule A, Jul. 7, 2015 [Ex. A, ECF No. 1-2]² – all of which are relevant to evaluating Backpage’s moderation practices. Cognizant of the First Amendment interests of Backpage’s legitimate users, that subpoena expressly permitted redaction of all personally identifying user information. *Id.* at 1.

Backpage refused to produce any responsive documents, asserting that the subpoena was overbroad and infringed on Backpage’s First Amendment rights. Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Aug. 6, 2015, at 5 [Ex. B, ECF No. 1-3]. Backpage did not identify any particular documents (or even categories of documents) that it believed were shielded from production by the First Amendment. Rather, it argued that the subpoena as a whole was invalid and asked that it be withdrawn. *See id.* In response, the Subcommittee made clear that it was willing to discuss ways to minimize any resource burden that the subpoena might impose. Letter to Steven R. Ross from Chairman and Ranking Member of PSI, Aug. 26, 2015, at 3 [Ex. D, ECF No. 1-5]. In addition, the Subcommittee noted that Backpage “has not explained its legal rationale for its categorical assertion of [a First Amendment] privilege,” and that any objections should be asserted as to particularized documents. *Id.* at 4.

² All exhibits cited accompanied the memorandum supporting the Subcommittee’s application to enforce the subpoena (ECF No. 1), and are referenced with their ECF number from the district court docket. A copy of each is provided in an Addendum to this Opposition.

3. On October 1, 2015, the Subcommittee withdrew its subpoena and issued a new, narrower subpoena to Carl Ferrer, CEO of Backpage. Op. at 22; Stay Order at 5. The Subcommittee explained that it “continue[d] to see no legal merit in Backpage’s explanation for its categorical refusal to comply with the Subcommittee’s subpoena,” but that, in “a good-faith effort to address Backpage’s expressed concerns,” it was withdrawing its subpoena and issuing a new subpoena seeking a narrower subset of documents. Letter and Subpoena to Carl Ferrer, CEO of Backpage.com, LLC from Chairman and Ranking Member of PSI, Oct. 1, 2015, at 2 [Ex. F, ECF No. 1-7]; *see* Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Oct. 23, 2015, at 1 [Ex. H, ECF No. 1-9] (Mr. Ferrer’s counsel describing new subpoena as “more targeted”). The October 1 subpoena required Mr. Ferrer to produce eight categories of documents by October 23 or appear personally before the Subcommittee on that date. Only the first three of the subpoena’s specifications are the subject of this enforcement action.³

The subpoena explicitly provided that Mr. Ferrer should exclude any personally

³ Those requests sought documents concerning: (1) “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) “advertising posting limitations, including but not limited to the ‘Banned Terms List,’ the ‘Grey List,’ and error messages, prompts, or other messages conveyed to users during the advertisement drafting or creation process;” and (3) “reviewing, verifying, blocking, deleting, disabling, or flagging user accounts or user account information, including but not limited to the verification of name, age, phone number, payment information, email address, photo, and IP address. *This request does not include the personally identifying information of any Backpage user or account holder.*” Subpoena to Carl Ferrer, schedule A [Ex. F, ECF No. 1-7].

identifying information concerning Backpage users. Subpoena to Carl Ferrer, schedule A [Ex. F, ECF No. 1-7]. The Subcommittee informed Mr. Ferrer that, in responding to the subpoena, he was required to “assert any claim of privilege or other right to withhold documents from the Subcommittee by October 23, along with a complete explanation of the basis of the privilege or other right to withhold documents” in a privilege log. Oct. 1, 2015 PSI Letter at 3 and Subpoena to Carl Ferrer, schedule A [Ex. F, ECF No. 1-7].⁴

On October 23, Mr. Ferrer objected, contending that the Subcommittee lacked jurisdiction to issue the subpoena, the subpoena sought information not pertinent to a valid investigation, and the subpoena infringed on his First Amendment rights. Oct. 23, 2015 Ross Letter [Ex. H, ECF No. 1-9]. Mr. Ferrer voluntarily produced 21 pages of publicly available documents in response to requests 1, 2, and 3, but objected to producing any other documents responsive to those requests. *See id.* at 6.

4. On November 3, after careful consideration, the Chairman and Ranking Member jointly overruled Mr. Ferrer’s objections on behalf of the Subcommittee. Nov. 3, 2015 Letter Ruling [Ex. I, ECF No. 1-10]. The Subcommittee found that the investigation fell squarely within its investigative jurisdiction, *id.* at 7–10, the subpoena sought information pertinent to the Subcommittee’s investigation, and the subpoena

⁴ As Mr. Ferrer’s counsel agreed to submit a complete explanation for any non-compliance by October 23, the Subcommittee continued Mr. Ferrer’s personal appearance to a later date “to permit the Subcommittee to consider any objection [he] wish[ed] to submit.” Letter to Carl Ferrer, CEO of Backpage.com, LLC from Chairman and Ranking Member of PSI, Oct. 20, 2015 [Ex. G, ECF No. 1-8].

did not infringe on Backpage's or Mr. Ferrer's First Amendment rights. *Id.* at 10–15. The Subcommittee explained that the requested documents were directly pertinent to its investigative focus on actions by online commercial marketplaces to prevent their websites from being used for sex trafficking. *Id.* at 15–18. The Subcommittee directed Mr. Ferrer to produce all responsive documents by November 12, and continued his personal appearance to a hearing on November 19. *Id.* at 19.

On November 13 – one day *after* the date by which Mr. Ferrer had been ordered to produce documents – Mr. Ferrer's counsel responded to the Subcommittee's ruling. Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Nov. 13, 2015 [Ex. K, ECF No. 1-12]. Mr. Ferrer informed the Subcommittee that, while he was not waiving his First Amendment objection, he was “provid[ing] particular documents in response to some of the Subpoena's requests.” *Id.* at 5. He produced an additional 44 pages of documents responsive to requests 1, 2, and 3 – for a total of 65 pages, 21 of which were publicly available.⁵ Mr. Ferrer did not submit a privilege log.

The Subcommittee then asked Mr. Ferrer what documents were being withheld pursuant to his objections. In response, Mr. Ferrer's counsel informed the Subcommittee that neither he nor Backpage had even conducted a full and complete search for documents – because, in their view, being required to conduct such a search

⁵ Mr. Ferrer also produced over 16,000 pages in response to request 4 – which is not at issue here – about Backpage's cooperation with law enforcement, with many pages of repetitive advertisements and photos. Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Nov. 16, 2015, at 2 [Ex. L, ECF No. 1-13]; Op. at 7-8.

would violate the First Amendment. Nov. 16, 2015 Ross Letter at 2 [Ex. L, ECF No. 1-13]. Mr. Ferrer declined to identify any specific documents protected by the First Amendment or even to describe the searches by which he identified the documents he did produce. On November 19, the Subcommittee held a hearing concerning online sex trafficking. S. Hrg. No. 114-179, 114th Cong. (2015). Despite being under subpoena, Mr. Ferrer failed to appear.⁶

5. In light of Mr. Ferrer's refusal to comply with the subpoena (or even to search for documents and produce a privilege log), the Subcommittee sought authority from the Committee on Homeland Security and Governmental Affairs and from the Senate to enforce the subpoena. On March 17, 2016, the Senate, by a vote of 96-0, adopted a resolution, S. Res. 377, 114th Cong. (2016), directing the Senate Legal Counsel to initiate this action to enforce the Subcommittee's subpoena. 162 Cong. Rec. S1561-68 (daily ed. Mar. 17, 2016). On March 29, the Subcommittee filed this action under 28 U.S.C. § 1365 to enforce requests 1, 2, and 3 of the subpoena.

6. On August 5, the district court granted the Subcommittee's application to enforce the subpoena. The court found that "the Subcommittee is legitimately

⁶ On November 16 and 18, days before the November 19 hearing, Mr. Ferrer's counsel belatedly advised the Subcommittee that Mr. Ferrer was on business travel and asked that Mr. Ferrer's personal appearance be waived, as he intended to refuse to answer questions based on his privilege against self-incrimination and the First Amendment. Nov. 16, 2015 Ross Letter at 2 [Ex. L, ECF No. 1-13]; Letter to Chairman and Ranking Member of PSI from Steven R. Ross, Nov. 18, 2015 [Ex. M, ECF No. 1-14]. The Subcommittee declined to excuse Mr. Ferrer's appearance, Letter to Steven R. Ross from Chairman and Ranking Member of PSI, Nov. 18, 2015 [Ex. N, ECF No. 1-15], but nevertheless he failed to appear.

interested in investigating the nature and extent of Backpage’s moderation procedures,” Op. at 16, and that the subpoena “has a valid legislative purpose and seeks pertinent information that falls within the scope of the Subcommittee’s authority.” *Id.* at 18.

The court rejected Mr. Ferrer’s First Amendment objections, including his claim of “a First Amendment right not to conduct a full and comprehensive search for responsive documents and not to file a privilege log.” *Id.* at 20. The court found that “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” and, “[h]aving done none of the above, he is hard put to plead a barren First Amendment claim without underlying facts.” *Id.* at 24.

Further, the court held, “Mr. Ferrer has failed to demonstrate that requesting information on Backpage’s efforts to screen out sex trafficking from commercial advertisements on its website . . . would produce an impermissible chilling effect upon freedoms of the press, association, or speech.” *Id.* at 25. Noting that Mr. Ferrer “engages in no legal analysis to weigh his rights against the Subcommittee’s asserted interest,” the court held that “[h]is position” – “essentially” that “[t]he Court should presume that any responsive document that has not been produced contains constitutionally-protected information that no governmental need could possibly overcome” – was “untenable and without legal support.” *Id.* at 27. Moreover, the Court found that “to the extent the Subpoena implicates Mr. Ferrer’s protected

freedoms, it is only in an incidental and minimal fashion,” and “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.” *Id.* at 28 (citation omitted). The court rejected Mr. Ferrer’s claims that the subpoena was overly broad or burdensome or that it violated the First Amendment by seeking to punish Backpage. *Id.* at 28-30.

Having rejected each of Mr. Ferrer’s objections, the court granted the Subcommittee’s application and ordered Mr. Ferrer to “comply forthwith” 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.” *Id.* at 32.

7. On August 12, 2016, the district court denied Mr. Ferrer’s motion for a stay pending appeal. The court found that Mr. Ferrer’s “likelihood of success on the merits is not very high.” Stay Order at 5. The court rejected Mr. Ferrer’s argument that complying with the subpoena would impose irreparable harm, noting that, “since Mr. Ferrer has not conducted a full search for responsive documents, any showing of harm would be ‘theoretical’ and comprised of ‘unsubstantiated and speculative allegations.’” *Id.* The court also found that “Mr. Ferrer’s refusal to comply with the subpoena has stymied the Subcommittee’s investigation,” and “grant[ing] a stay would further delay the Subcommittee’s efforts, interfere with the investigation, and reward Mr. Ferrer’s dilatory conduct.” *Id.* at 6. The court concluded that a stay would “undermine the public interest,” and thus that “the balance of equities weighs against the issuance of a stay in this case.” *Id.*

STANDARD FOR STAY PENDING APPEAL

A stay pending appeal is an “extraordinary remedy” and it is “the movant’s obligation to justify” such relief. *See Cuomo v. Nuclear Regulatory Comm’n*, 772 F.2d 972, 978 (D.C. Cir. 1985). Whether to issue a stay pending appeal depends on four factors: “(i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (4) the public interest.” D.C. Cir. R. 8(a); *WMATC v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

ARGUMENT

I. Mr. Ferrer Cannot Show Any Likelihood of Success on the Merits.

Mr. Ferrer cannot carry his burden of establishing a likelihood of success on the merits. This Court has long held that a movant must make a “strong showing that it is likely to prevail on the merits of its appeal,” or else “there would be no justification for the court’s intrusion into the ordinary processes of administration and judicial review.” *Holiday Tours*, 559 F.2d at 843 (quoting *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir 1958)). Although Mr. Ferrer argues that this factor can generally be satisfied by showing only the existence of substantial merits questions, *see* Emergency Motion of Appellant Carl Ferrer for a Stay Pending Judicial Review (“Mot.”) at 8, this Court has said that argument “misread[s] our precedent.” *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). That “less[e]r likelihood of success might suffice” only if “each of the other

three factors ‘clearly favor[]’ granting the injunction.” *Id.* (citation omitted). As explained below, here they do not.

Mr. Ferrer’s chances of prevailing on appeal are remote under any standard. Mr. Ferrer contends, Mot. at 9-12, that the First Amendment provides categorical protection from the subpoena for documents about Backpage’s moderation practices – regardless of the content of any responsive document (which he refused to search for or describe) and no matter the comparative strength of the speech interests in those documents and the competing governmental interests in obtaining them (which he refused to address). *See* Op. at 26-27. As the district court recognized, Mr. Ferrer is exceedingly unlikely to persuade this Court on appeal to accept that position, which would allow unsupported and undefined assertions of constitutional privilege to defeat valid subpoenas. “To be frank, in the face of such intransigence and the blanket nature of his objections, the Court cannot find that Mr. Ferrer has made a strong showing on likelihood of success.” Stay Order at 5.

To be sure, documentary subpoenas can raise First Amendment concerns under circumstances not applicable here – for example, where they are used to discover the identity of disfavored speakers. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958); *Gibson v. Florida Legislative Investig. Comm.*, 372 U.S. 539, 544-49 (1963); *see also Bursey v. United States*, 466 F.2d 1059, 1068-71 (9th Cir. 1972) (grand jury seeking information about staff of Black Panther Party publication). In stark contrast to those cases, however, the Subcommittee explicitly directed Mr. Ferrer to redact

personally identifying information about Backpage's users. Oct. 1, 2015 PSI Letter at 2 and Subpoena to Carl Ferrer, schedule A [Ex. F, ECF No. 1-7].

Even if the subpoena triggered First Amendment scrutiny, that would not aid Mr. Ferrer. Under the Supreme Court's cases, courts must balance the "restraint upon the exercise" of First Amendment interests against the governmental interests in obtaining the information sought. *See NAACP*, 357 U.S. at 462-63. The Subcommittee has a powerful legislative interest in documents regarding Backpage's purportedly market-leading efforts to screen for illegal advertisements on its website. As the district court found, any impact on Mr. Ferrer's "undefined" speech interests would be "so slight," "incidental and minimal" that the Senate's manifest interest in "[u]nderstanding the magnitude of Internet sex trafficking and how to stop it . . . must prevail." *Op.* at 28.

Mr. Ferrer cannot successfully challenge that conclusion because he failed to make any argument below to the contrary. Mr. Ferrer "engage[d] in no legal analysis to weigh his rights against the Subcommittee's asserted interest." *Id.* at 27.⁷ Rather than engage in the interest-balancing required by precedent, Mr. Ferrer asked the district court "essentially" to "presume that any responsive document that has not

⁷ Citing *Bursey*, 466 F.2d at 1086-88, Mr. Ferrer argues that the government carries the burden of demonstrating compliance with the First Amendment. *Mot.* at 12. *Bursey*, however, does not relieve a subpoena respondent from having to object to particular information requests. To the contrary, as the district court recognized, unlike Mr. Ferrer, the subpoena respondents in *Bursey* "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." *Op.* at 26.

been produced contains constitutionally-protected information that no governmental need could possibly overcome.” Op. at 27. The court termed that argument “untenable and without legal support.” *Id.*

Mr. Ferrer’s failure to address the strength of his asserted First Amendment interests in the withheld documents is not surprising because he “refused to conduct a full search for responsive documents” and “failed to articulate specific objections in a privilege log” – refusals for which he could cite no legal authority and that render interest-balancing analysis impossible. *Id.* at 26.⁸ As the district court held, “[t]here is simply no legal or factual support for” the novel proposition that Mr. Ferrer enjoys a special right not to search for responsive documents and articulate specific objections to producing them. *Id.* at 20. “Mr. Ferrer does not possess an absolute right to be free

⁸ Mr. Ferrer claims, for the first time here, that the reason he did not submit a privilege log was that “just days before the hearing” the Subcommittee “expand[ed] the demands to include all internal editorial communications,” rendering his ability to produce such a log “fanciful.” Mot. at 13. What is truly fanciful is this claim. The notion that the Subcommittee prevented him from submitting a privilege log by “expanding the demands” is belied by Mr. Ferrer’s failure even so much as to *mention* this problem – either then or in the nine months since. Mr. Ferrer told the Subcommittee, as he told the court below, that he did not prepare a log, or even begin a comprehensive search for responsive documents, because the First Amendment immunized him from doing so. Mr. Ferrer had been fully on notice of the scope of the Subcommittee’s document requests for six weeks, as the October 1 subpoena explicitly covered “interoffice and intra office communications” and “electronic mail (e-mail).” Subpoena to Carl Ferrer [Ex. F, ECF No. 1-7] (definition of “document”). The Subcommittee never expanded the scope of the subpoena. His startling claim that discussions with the Subcommittee days before the November 19 hearing prevented him from preparing a privilege log is not credible. *See* Op. at 24 (“Mr. Ferrer has had ample time . . . [for] searching for, locating, identifying, and producing either responsive documents or a privilege log . . .”).

from government investigation when there are valid justifications for the inquiry.” *Id.*⁹

In lieu of making specific objections, Mr. Ferrer contends that the subpoena intrudes generally on “editorial policies” or “functions.” Mot. at 2, 10. But he provides no information whatsoever about those “editorial decisions,” *id.* at 9-11, nor does he explain why they are constitutionally protected. Merely affixing the “editorial” label to Backpage’s business practices does not imbue them with constitutional protection. In any case, evidence suggests, *see* PSI Staff Report at 17-21, that Backpage’s editing practices – for example, editing out incriminating material from advertisements for illegal transactions – enjoys no constitutional protection. “Offers to engage in illegal transactions are categorically excluded from First Amendment protection.” *United States v. Williams*, 553 U.S. 285, 297 (2008).

Mr. Ferrer also argues that the Subcommittee is acting “in coordination with other governmental actors” to use its subpoena power “as a bludgeon to burden or restrict editorial policies of which it disapproves.” Mot. at 2. As the district court found, those allegations are factually wrong and legally irrelevant. Op. at 28. The Subcommittee’s investigation has a well-defined legislative purpose. “So long as

⁹ Mr. Ferrer claims special status as an “online intermediar[y]” who exercises “editorial judgments.” Mot. at 10. Even traditional newspapers and political associations must engage in interest-balancing to defeat a governmental subpoena. *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972) (explaining the “prevailing constitutional view” that “First Amendment interest asserted by [a journalist] was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses”). Applying a special rule to “online intermediaries” would preclude government investigation into online activity even though much conduct today occurs online.

Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.”

Barenblatt v. United States, 360 U.S. 109, 132 (1959).

Equally misplaced is Mr. Ferrer’s reliance on cases “of potentially great significance for the balance of power between the Legislative and Executive Branches,” and other close cases involving weighty constitutional questions. Mot. at 14-15 n.9. *This* case is not close. “Put simply,” Mr. Ferrer “has provided no compelling legal or factual support for [his] claim[s]” demonstrating a likelihood of success on the merits. *McCammon v. United States*, 588 F. Supp. 2d 43, 48 (D.D.C. 2008). Because Mr. Ferrer cannot demonstrate any likelihood of success on appeal, his motion for a stay should be denied.

II. Mr. Ferrer Has Not Shown Actual, Non-theoretical Irreparable Injury.

Nor has Mr. Ferrer shown he will suffer irreparable harm absent a stay.¹⁰ It is a “well known and indisputable principle[]” that “unsubstantiated and speculative allegations” cannot constitute “irreparable harm” sufficient to justify injunctive relief. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying stay motion grounded on speculative allegations of economic injury). Mr. Ferrer must establish an “injury [that is] both certain and great; it must be actual and not theoretical.” *Id.* He

¹⁰ Because a stay “intru[des] into the ordinary processes of administration and judicial review,” it “is not a matter of right, even if irreparable injury might otherwise result to the appellant.” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations and internal quotation marks omitted).

cannot possibly carry that burden. As the district court found, because Mr. Ferrer “has not conducted a full search for responsive documents, any showing of harm would be theoretical and comprised of unsubstantiated and speculative allegations.” Stay Order at 5 (citation and internal quotation marks omitted).

Mr. Ferrer argues that the irreparable injury he will suffer is the loss of First Amendment rights. But just as Mr. Ferrer is “hard put to plead a barren First Amendment claim without underlying facts,” Op. at 24, he cannot show any actual, non-theoretical injury to his concrete First Amendment interests. As the Fifth Circuit recently stated, “invocation of the First Amendment cannot substitute for the presence of an imminent, non-speculative irreparable injury.” *Google, Inc. v. Hood*, 822 F.3d 212, 228 (5th Cir. 2016). The district court described Mr. Ferrer’s asserted speech interests as “undefined,” Op. at 28, and recognized that his argument amounted to a hypothetical. *Id.* at 27 (describing Mr. Ferrer’s position as “essentially” that “[t]he Court should presume that any responsive document that has not been produced contains constitutionally-protected information that no governmental need could possibly overcome”); *id.* at 28 (“Even if accurate that this effect [infringement on First Amendment liberties] ‘*can*’ be true, Mr. Ferrer offers no facts or argument, beyond the conclusory statement, that it *is* true here.”). Even if the subpoena did implicate Mr. Ferrer’s First Amendment interests, the district court found that the subpoena’s impact on Mr. Ferrer’s “undefined” speech interests would be “so slight,” “incidental and minimal” that the Subcommittee’s interest in “[u]nderstanding the magnitude of

Internet sex trafficking and how to stop it . . . must prevail.” *Id.*¹¹

Mr. Ferrer also claims that the extraordinary remedy of a stay is justified to allow him to maintain an effective appeal of the district court’s order. But he “cannot be permitted to manufacture irreparable harm by simply stating a legal principle with no precedential support whatsoever, and then claiming irreparable harm if [he] believe[s] a court order violates that principle.” *United States v. Judicial Watch, Inc.*, 241 F. Supp. 2d 15, 17 (D.D.C. 2003) (citation omitted). The last time a Senate committee had to resort to the courts to compel compliance with a subpoena for documents, which was 23 years ago, the respondent’s motion to stay the order requiring production was denied by the district court, a unanimous panel of this Court, and the Chief Justice in chambers, *see Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319-20 (1994) (Rehnquist, C.J., in chambers) (noting court of appeals’ denial of stay), notwithstanding the respondent’s claim that compliance with the subpoena prior to adjudication of his appeals would cause irreparable injury to his Fourth and Fifth Amendment rights.

III. The Subcommittee Would Suffer Serious Harm From A Stay.

Unlike Mr. Ferrer’s speculative claims of injury, the Subcommittee will suffer

¹¹ Mr. Ferrer’s comparison, Mot. at 3-4, 13-14, of the Subcommittee’s three document requests to the “unduly burdensome” subpoena in *Google v. Hood* is wholly inaccurate. In denying Mr. Ferrer’s stay motion, the district court found that “[t]he Subcommittee spent months in discussions and negotiations with Backpage in an effort to obtain compliance with the subpoena and minimize its burden.” Stay Order at 1. By contrast, Attorney General Hood refused to modify an “expansive[]” 79-page subpoena, including 69 interrogatories and 141 document requests. *Google*, 822 F.3d at 219.

considerable, actual harm from delays attending a stay. A stay will almost certainly frustrate the Subcommittee's ability to complete this investigation – which requires the Subcommittee to receive and review these documents for use in anticipated depositions, a public hearing, and a final report to the Senate – before the adjournment of the 114th Congress.

The Subcommittee first contacted Backpage sixteen months ago and first subpoenaed Backpage over a year ago. Despite the Subcommittee's significant efforts to accommodate Mr. Ferrer's and Backpage's concerns in an effort to avoid the instant proceeding, "Mr. Ferrer's refusal to comply with the subpoena has stymied the Subcommittee's investigation." Stay Order at 6. "To grant a stay would further delay the Subcommittee's efforts, interfere with the investigation, and reward Mr. Ferrer's dilatory conduct." *Id.*¹²

IV. The Public Interest Would Not Be Served By a Stay.

The public interest also strongly favors denial of a stay. Under the public interest prong, the views of "Congress, the elected representatives of the entire

¹² Mr. Ferrer argues that the Subcommittee will suffer no harm from a stay because, in his view, it waited too long to enforce the subpoena. Mot. at 18. Mr. Ferrer's default occurred in November 2015, shortly before adjournment of the first session of the 114th Congress. When Congress reconvened in 2016, the Subcommittee began the process of initiating this action. After considering whether to pursue criminal contempt against Mr. Ferrer for his refusal to appear at the November 19 hearing, the Subcommittee (i) drafted a Senate resolution; (ii) drafted a committee report to accompany the Senate resolution; (iii) scheduled a mark-up vote to gain approval for the resolution by the Homeland Security and Governmental Affairs Committee; and (iv) scheduled a vote of the full Senate to authorize this action.

nation,” are “another sense by which public interest should be gauged.” *Cuomo*, 772 F.2d at 978. “[A] court sitting in equity cannot ‘ignore the judgment of Congress, deliberately expressed in legislation.’” *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 497 (2001) (internal quotation marks and citation omitted).

Here, the Senate’s unanimous vote of 96 to 0 authorizing the Subcommittee to enforce the subpoena reflects the entire body’s considered judgment of the importance of the information sought to the Subcommittee’s investigation of the serious and growing problem of online sex trafficking. It is the constitutional duty of the Congress to serve the public interest through timely and effective legislation addressing serious national problems.

Recently, the First Circuit noted that “a persuasive case” had been made that “Backpage has tailored its website to make sex trafficking easier,” and suggested the “remedy [for that problem] is through legislation.” *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016). “[G]iven the seriousness of the inquiry’s subject (illegal sex trafficking), a stay would undermine the public interest in ensuring that the Subcommittee is able to complete its investigation promptly and make informed recommendations to the Senate on potential legislation addressing the use of the Internet for illegal sex trafficking.” Stay Order at 6.

CONCLUSION

For the foregoing reasons, the Court should deny Appellant Carl Ferrer’s Emergency Motion for a Stay Pending Judicial Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on August 19, 2016, I filed electronically the foregoing
Opposition of Appellee Senate Permanent Subcommittee on Investigations to
Emergency Motion of Appellant Carl Ferrer for Stay Pending Judicial Review and
accompanying Addendum with the Clerk of the Court using the CM/ECF system,
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