UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

BACKPAGE.COM, LLC, Plaintiff,	)	
v.	)	Case No. 4:17-cv-01951
JOSHUA D. HAWLEY, Defendant.	)	

MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) AND 12(b)(6) AND MEMORANDUM IN SUPPORT

Compelling evidence indicates that Backpage.com both creates and controls content of online ads for the sexual exploitation and rape of human-trafficking victims, including minors. Federal law does not protect this abhorrent conduct. Backpage's complaint is frivolous.

On July 11, 2017, Backpage filed its federal complaint alleging that Missouri Attorney General Joshua D. Hawley's investigation proceeds in "bad faith" because Backpage supposedly only provides a forum for *others* to post content on its website. The very same day—July 11, 2017—the Washington Post published a stunning exposé concluding that Backpage *does* in fact create and control the content of human-trafficking ads on its website, and that Backpage's attorneys have deceived federal courts on this issue for years. Doc. 21-10. A Subcommittee of the U.S. Senate likewise concluded that Backpage deliberately conceals the sexual exploitation of children by scrubbing "words indicative of child sex trafficking" from online ads for commercial sex—including terms such as "Lolita," "teenage," "rape," "young," "little girl," "teen, "fresh," "innocent," "school girl," and "Amber Alert." Doc. 21-8, at 8-9. And documents obtained by Attorney General Hawley—during the very investigation that Backpage seeks to block here—decisively confirm that Backpage's claim to be a mere passive forum for third-party content is a sham, and that Backpage is a knowing creator and promoter of online ads for the commercial sexual exploitation and rape of human-trafficking victims, including minors.

BACKGROUND

I. Attorney General Hawley Has Made Combatting Human Trafficking a Top Priority of His Administration.

Attorney General Hawley has made combatting human trafficking a top priority of his administration. In April 2017, he announced the creation of a new anti-trafficking unit within the Attorney General's Office ("AGO"), and he issued first-of-their-kind regulations against human trafficking under the Merchandising Practices Act ("MMPA"), Missouri's consumer-protection and unfair-business-practices statute. *See AG Josh Hawley Announces Missouri Crackdown on Human Trafficking* (April 3, 2017), https://ago.mo.gov/home/news-archives/2017-news-archives/ag-hawley-announces-missouri-crackdown-on-human-trafficking. The MMPA prohibits a wide range of deceptive, unfair, and otherwise illegal business practices, and it authorizes the Attorney General to pursue both civil and criminal penalties for violations. *See* Mo. Rev. Stat. §§ 407.020, 407.100.

II. Substantial Evidence Indicates That Backpage Has Played a Direct Role in the Creation and Development of Advertisements for Illegal Commercial Sex, Including the Exploitation and Rape of Minors.

Backpage hosts a website, www.backpage.com, that ostensibly allows users to post advertisements for goods, services, and other commercial transactions. *See* http://www.backpage.com. For years, both law enforcement and victim-advocacy groups have recognized that an immense amount of human trafficking and commercial sexual exploitation is conducted over Backpage. In particular, human traffickers and pimps often post advertisements on Backpage promoting the illegal sexual services of their victims, including underage victims. "Backpage is involved in 73% of all child trafficking reports that the National Center for Missing and Exploited Children (NCMEC) receives from the general public." U.S. Senate, Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental

Affairs, *Backpage.com's Knowing Facilitation of Online Sex Trafficking*, Doc. 21-8, at 65.[1] Backpage is "the leading online marketplace for commercial sex." *Id.* "The National Association of Attorneys General has aptly described Backpage as a 'hub' of 'human trafficking, especially the trafficking of minors.'" *Id.*

Backpage has garnered extraordinary profits from its role in facilitating sex trafficking and child sexual exploitation. Recognizing the potential for windfall profits from sexual exploitation, Backpage long "required payment for ads featuring content related to commercial sex acts" but "allowed users to post ads for free in non-Adult sections of the site." *Id.* A law-enforcement review of Backpage's financial records revealed that, from January 2013 to March 2015, ***99 percent of Backpage's revenues*** were attributable to the site's "Adults" section, which consisted entirely or almost entirely of advertisements for illegal commercial sex. Doc. 21-9, at 11. Those revenues were enormous. Backpage's financial records indicate that the company's revenues from the "Adults" section of its website exceeded $3,000,000 ***per week.*** *Id.* at 12.

Despite the clear appearance of knowingly profiting from commercial sex, Backpage has repeatedly claimed that it has no direct role in the illegal sexual activity conducted through its website. Backpage "has long claimed that it is a mere host of content created by others," Doc. 21-8, at 65, and Backpage's Complaint here repeatedly parrots this contention, *see* Doc. 1. Based on this façade of neutrality, Backpage has largely avoided any legal responsibility for its central role in the American commercial-sex trade.

But that façade has crumbled over the past few months. Explosive public revelations have demonstrated Backpage's direct involvement in the creation and development of the illegal

[1] Exhibit page numbers correspond to the actual number of pages contained in a document, not to the document's internal pagination. For example, here, page 65 of the exhibit is designated as page 59 by the Senate Report.

advertisements for commercial sex posted on its website—including sexual exploitation of minors. On January 9, 2017, a Permanent Subcommittee on Investigations of the United States Senate released a report detailing how Backpage's "moderation" practices actually amount to direct involvement in the creation and development of illegal advertisements. *See* Doc. 21-8. The Report describes how Backpage implemented a sophisticated and wide-ranging system by which the company (1) identified posts involving patently illegal commercial sex, including sexual exploitation of minors; (2) revised the content of those posts to avoid attention from law enforcement, but without preventing potential buyers from realizing that the posts involve illegal commercial sex; and then (3) re-posted the advertisements on Backpage's website rather than blocking them or contacting law enforcement. *Id.* at 85-100. The search terms used by Backpage to identify and scrub posts for this process highlight the depraved nature of the "services" that Backpage actively concealed, including numerous buzzwords associated with sex trafficking of minors. "Starting in 2010, Backpage automatically deleted words including 'Lolita,' 'teenage,' 'rape,' 'young,' 'little girl,' 'teen,' 'fresh,' 'innocent,' 'school girl,' and even 'Amber Alert'—and then published the edited versions of the ads on their website." *Id.* at 9-10. Rather than reporting this criminal activity to law enforcement, Backpage took steps to conceal the posts' illegality and then published them, earning tens of millions of dollars in the process. *Id.* at 85-100; Doc. 21-9, at 11-12.

In short, though Backpage "has long claimed that it is a mere host of content created by others and therefore immune from liability under the Communications Decency Act (CDA)," documents obtained in the Senate investigation "conclusively show that that Backpage's public defense is a fiction." Doc. 21-8, at 65. The Subcommittee concluded that "Backpage has maintained a practice of altering ads before publication by deleting words, phrases, and images

indicative of criminality, including child sex trafficking . . . even as Backpage represented to the public and the courts that it merely hosted content others had created." *Id.*.

Attorney General Hawley's investigation has also obtained extensive evidence of wrongdoing by Backpage. As the Washington Post's recent exposé explained, "Backpage hired a company in the Philippines to lure advertisers—and customers seeking sex—from sites run by its competitors." Doc. 21-10, at 1. Evidence from General Hawley's investigation shows how that contractor—Avion—implemented several initiatives at the direction of Backpage to generate and control illegal content on Backpage's website. The evidence includes a photograph of Backpage CEO Carl Ferrer posing with Avion executive Von Ryan Nagasangan. Doc. 21-24.

Some of Backpage's initiatives, implemented through Avion, were designed to steer advertisements for illegal commercial sex away from Backpage's competitors and to its own site. *See id.* For example, Backpage's contractors would scour competitors' websites for sex-trafficking advertisements to harvest. *See, e.g.*, Docs. 21-13, 21-16, 21-19; 21-26. In searching for such advertisements, the contractors were encouraged to use search terms such as "Escort name." Doc. 21-15, at 22. Backpage's contractors were specifically encouraged to harvest "Escort" ads, which necessarily imply *payment* for the sexual "services" advertised, and the contractors were expressly discouraged from harvesting adult-oriented ads that potentially did not involve illegal commercial sex, such as "Dating/Personal" ads. Doc. 21-26, at 2. Once Backpage's contractors had identified advertisements on competing websites, they would then contact the sex-traffickers who had posted the advertisements and request permission to re-post the advertisements on Backpage. Backpage's contractors often made contact by phone, and Backpage apparently created a detailed script for such calls. Doc. 21-15, at 34 (instructing callers to introduce themselves as "Mark from backpage.com" and to explain that they were

"calling from Backpage.com . . . to give you the opportunity to post your ad for FREE"); *see also* Doc. 21-18. After making contact with the poster, the contractor would then *create* a Backpage posting and send it to the sex-trafficker to approve. Doc. 21-15, at 22 (instructing contractors to say "Please check your inbox or spam folder from an email from Backpage.com. Once you click the link from our email, your ad is live, ok?"). Backpage leadership evidently pressured contractors to increase the number of ads harvested via this process, claiming that competitors' sites "will have 30-60+ new profiles in a single day that can be called," and instructing contractors that "[t]he more booked ads you get daily the better results you will have long term." Doc. 21-25, at 1.

In similar instances, the Backpage contractor would contact the advertisement poster via email, using a form letter created by Backpage. *See* Doc. 21-13 (instructing contractors to "[h]it up one ad at a time and send the canned message provided by BP"); Doc. 21-16 (instructing contractors to "Send an email with your [agentName].backpage@gmail.com email using the template below," and providing a form letter (brackets in original)). In these instances, the Backpage contractor might not even wait to contact the original poster before creating an advertisement for Backpage. For example, in one instruction document, Backpage's contractors were directed to "[s]end the pre-boarded ad first," and to follow up with a scripted email to the poster stating that "[i]f you'd like to see the free ad I've already created for you look at the next email from Backpage.com." Doc. 21-16. In other words, these documents indicate that Backpage's contractors created and originated the content of ads to post on Backpage's website, and then actively solicited advertisers to post their "pre-boarded ads."

The documents obtained by Attorney General Hawley strongly indicate that Backpage used these processes to create and solicit ads involving illegal commercial sex. As noted above,

when identifying advertisements to target, contractors were instructed to use search terms such as "Escort name." Doc. 21-15, at 22. A training manual explains that one team of Avion employees using these approaches "focuses on mature sites (adult) category." *Id.* at 5. Another team conducting similar work focused on the "massage" section. *Id.* Both the adult and massage sections of Backpage ordinarily consisted largely or entirely of advertisements for illegal commercial sex. In addition, the same training manual instructed contractors to "crop or blur the genital parts" of posts and to avoid images containing "[p]enetration" or "ejaculation." *Id.* at 10, 22. In one email, a Backpage employee provided examples of ads that contractors could harvest from competitors' sites. *See* Doc. 21-25. These ads appeared in the "Escort" section of the competitors' websites—thus indicating *payment* for advertised services was expected—and they include titles such as "all-service-for-you," "i-need-a-man-to-touch-my-bobbies-and-make-me-wet," and "hot-and-sexy-for-you." *Id.*, at 1. There can be little doubt that ads that Backpage's contractors were soliciting, creating, and posting to Backpage involved sex trafficking.

Attorney General Hawley's investigation has obtained an audio recording that vividly illustrates these practices. The audio file records a phone call between a Backpage contractor and a woman who posted a sex-trafficking ad in the "Adult" section of a competitor's website using the moniker "Lolita." *See* Doc. 21-27 (audio file) & Doc. 21-28 (transcript of audio file). In the phone conversation, the Backpage contractor introduces herself as "Joanna from Backpage.com" and asks to speak to the owner of an ad posted in the "Adults" section of a competitor's website. *Id.* The title of the ad is "Sexy, Naturally Super-Busted, Discreet South Kensington Lolita." *Id.* The contractor addresses the owner of the ad as "Lolita" and states, "I would like to invite you to re-post your advertisement in our site on Backpage for free." *Id.* The contractor repeatedly seeks to convince the advertiser to provide her personal email address over

the phone for Backpage to contact her directly, in order to send her a pre-boarded ad for posting on Backpage. *Id.* "Lolita," of course, is a universal signal word for the commercial sex trafficking of *underage* victims.

In addition to these efforts to steer illicit advertisements to its website, Backpage also sought to direct prospective buyers of commercial sex to its website. As the Washington Post aptly explained, Backpage's contractors "created phony sex ads [on competitor websites], offering to 'Let a young babe show you the way' or 'Little angel seeks daddy,' adding photos of barely clad women and explicit sex patter." Doc. 21-10, at 1. "Then, when a potential customer expressed interest, an email directed that person to Backpage.com, where they would find authentic ads . . . ." *Id.*

For example, one document seized from Avion explains how two employees—"Vina" and "Kevin Lester"—worked together to implement this strategy. *See* Doc. 21-17. Vina, responsible for "Profile Creation," would "post ads to the discussed target sites with the goal of receiving many responses." *Id.* Lester would then "[s]end an email to each new email address acquired by Vina in the profile creation task" and "[c]ompile all escort category user email addresses." *Id.* Lester would then send a second email to those who responded to Vina's fake advertisements that included a link to Backpage. *Id.* A spreadsheet seized from Avion provides a snapshot of this process, listing email addresses obtained by Lester, the URL of posts on the websites of Backpage's competitors, and the follow-up message sent by Lester redirecting the recipient to Backpage. Doc. 21-14; *see also* Doc. 21-29 (providing a flowchart of this process).[2]

[2] Attorney General Hawley's investigation has also obtained additional materials that appear to corroborate the conclusion that Backpage has taken steps to conceal the illegality of posts on its website by "scrubbing" words signaling illegal human trafficking from Backpage's ads. *See, e.g.*, Docs. 21-20, 21-21, 21-22, 21-23.

III. Based on Substantial Evidence of Illegal Activity by Backpage, Attorney General Josh Hawley Launched a Formal Investigation of the Company pursuant to Missouri Law, Which Has Uncovered Additional Evidence of Backpage's Involvement in Illegal Human Trafficking.

In early 2017, after the release of the Senate Subcommittee Report, the AGO opened an investigation into whether Backpage had engaged in deceptive, unfair, or otherwise unlawful business practices that may have violated the MMPA. Doc. 21-1 ("Morris Dec."), ¶ 4. Over the course of this investigation, the AGO has obtained credible and substantial evidence indicating that Backpage has engaged in illegal activity, including the materials described above. *Id.*, ¶ 6.

In the course of this investigation, on May 10, 2017, the AGO issued two separate Civil Investigative Demands ("CIDs") to Backpage and to its CEO, Carl Ferrer, pursuant to Mo. Rev. Stat. § 407.040. *Id.*, ¶ 9. The CIDs sought information and documents relating to advertisements posted in the adult section and related sections of Backpage for Missouri markets, as well as materials relating to the content-revision practices outlined in the Senate Subcommittee Report, and other related matters. *See* Doc. 1-1 (CID to Ferrer); Doc. 21-2 (CID to Backpage). The deadline for complying with the two CIDs was June 7, 2017. *Id.* at 3.

Ferrer was served by special process server on May 11, 2017. Doc. 21-4. On May 19, attorney Jim Grant called Assistant Attorney General Mary Delworth Morris and stated that he represented Ferrer with regard to the CID. Morris Dec., ¶¶ 15-16. Grant requested an extension until July 7 of the deadline for Ferrer to comply with the CID, and Morris consented to that extension. *Id.*, ¶ 18. During that call, Grant did not state that he represented Backpage, nor did he request an extension on behalf of Backpage. *Id.*, ¶¶ 17, 19. Indeed, Backpage's registered agent informed the process server that Backpage was represented by a different attorney, Jason Brookner. *Id.*, ¶ 12.

Backpage's June 7 deadline to comply with the CID came and went without any production or correspondence from Backpage. *Id.*, ¶ 20. On June 15, 2017, the State filed a state-court action to enforce the CID against Backpage pursuant to Mo. Rev. Stat. § 407.090. *See State ex rel. Hawley v. Backpage.com, LLC*, Case No. 1711-CC00589 (pending in the Circuit Court of St. Charles County, Missouri).[3] The AGO did not file such an action against Ferrer, because the deadline for him to comply with the CID had not yet expired. *See id.*

On June 19, Grant again contacted AAG Morris. In that call, Grant stated for the first time that he represented Backpage with regard to the CID, and he insisted that the extension granted by the State to Ferrer must also apply to Backpage. Morris Dec., ¶¶ 25-26. Grant further demanded that the State dismiss the pending state-court proceeding to enforce the CID. *Id.*, ¶ 27. Morris refuted Grant's claims and reminded him that the State had agreed to an extension only as to Ferrerr, not as to Backpage. *Id.*, ¶ 28.

On July 7, 2017, attorneys representing both Ferrer and Backpage served purported responses to the CID. *Id.*, ¶¶ 29-30; Doc. 21-7. Ferrer and Backpage produced no responsive documents or information but instead simply asserted objections to the entirety of the CID. *Id.* Four days later, Backpage filed this federal lawsuit. *See* Doc. 1.

ARGUMENT

This case represents a frivolous attempt by Backpage to avoid the production of documents that may demonstrate that it has knowingly engaged in illegal human trafficking, including the sexual exploitation of minor children. Backpage seeks an injunction and declaratory judgment that would halt an ongoing state-court enforcement action and an active

[3] The Petition was served on Backpage on June 27, 2017. Doc. 21-6. In its Complaint—filed on July 11, 2017—Backpage asserts that the State did not serve the Petition on Backpage. Doc. 1, ¶ 44. That allegation is false, and Backpage and its attorneys lack a good-faith basis for the allegation. *See* Fed. R. Civ. P. 11(b).

law-enforcement investigation. The *Younger* abstention doctrine bars such relief. Moreover, even if the entire suit were not barred by *Younger*, each of Backpage's claims is plainly meritless as a matter of law. The Court should dismiss this case in its entirety.

I. *Younger* Abstention Bars All of Backpage's Claims, and Backpage's Argument that Attorney General Hawley Lacks a Good-Faith Basis to Investigate its Human-Trafficking Activities Is Frivolous.

Under the *Younger* abstention doctrine, federal courts will not grant equitable or declaratory relief that would interfere with ongoing state enforcement proceedings. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* reflects "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex Cnty. Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). Here, the State has instituted a state-court proceeding against Backpage to enforce the CID, and Backpage seeks a federal-court order to halt that state-court proceeding. This case falls squarely within the *Younger* doctrine.

Younger abstention implicates the Court's subject-matter jurisdiction. *See Geier v. Mo. Ethics Comm'n*, 715 F.3d 674, 678 (8th Cir. 2013). Part I of this Motion presents a factual challenge to the Court's subject-matter jurisdiction. *See Faibisch v. Univ. of Minnesota*, 304 F.3d 797, 801 (8th Cir. 2002); *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). Thus, the Court may consider evidence outside the pleadings on whether *Younger* abstention applies. *Osborn*, 918 F.2d at 730. The Court should dismiss this case pursuant to *Younger*.

A. This case falls within the scope of the *Younger* abstention doctrine.

"The *Younger* abstention doctrine provides that courts should not exercise federal jurisdiction where (1) there is an ongoing state proceeding, (2) which implicates important state interests, and (3) there is an adequate opportunity to raise any relevant federal questions in the

state proceeding." *Geier v. Mo. Ethics Comm'n*, 715 F.3d 674, 678 (8th Cir. 2013) (quotation omitted). This case satisfies each of these three requirements.

This case satisfies the first and second *Younger* requirements, because there is an ongoing state-court enforcement proceeding that implicates important state interests. As Backpage concedes, the State has filed a state-court action against Backpage to enforce the CID. *See* Doc. 1, ¶ 43; *id.*, p.14 n.10; *see also State of Missouri ex rel. Hawley v. Backpage.com LLC*, Case No. 1711-CC00589 (pending in the Circuit Court of St. Charles, Missouri). The State filed that enforcement action to enforce Missouri's consumer-protection laws. *See* Doc. 21-2. It is well established that enforcing a state's consumer-protection laws constitutes an important state interest under *Younger*. *See, e.g., See, e.g., In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 410 (S.D.N.Y. 2014) (collecting numerous cases). Moreover, "[w]here the state is in an enforcement posture in the state proceedings, the 'important state interest' requirement is easily satisfied." *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 883 (9th Cir. 2011). For that reason, federal courts routinely abstain under *Younger* when there is a pending state-court action to enforce state CIDs and administrative subpoenas. *See, e.g., Lupin Pharmas., Inc. v. Richards*, Case No. 15-1281, 2015 WL 4068818, at *4 (D. Md. July 2, 2015) (holding that a state-court action to compel compliance with CID triggered *Younger* abstention); *Cuomo v. Dreamland Amusements, Inc.*, No. 08-civ-7100, 2008 WL 4369270, at *10 (S.D.N.Y. Sept. 22, 2008) (holding that a state-court action to compel compliance with administrative subpoenas triggered *Younger* abstention); *see also, e.g., Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981) (holding that the issuance of a subpoena by a local prosecutor triggered *Younger* abstention). Thus, this case satisfies the first two requirements of *Younger* abstention.

This case also satisfies the third *Younger* requirement, because the state-court enforcement proceeding provides Backpage ample opportunity to raise its federal-law arguments in opposition to enforcement of the CID. Backpage bears the burden of demonstrating that the state-court enforcement proceedings do not provide a sufficient opportunity to raise its federal-law arguments. *Geier*, 715 F.3d at 678-79. "[A] federal court should abstain unless state law clearly bars the interposition of the [federal] claims." *Middlesex Cnty.*, 457 U.S. at 432 (quotation omitted). "[A]ll that is required is that the federal plaintiff ha[s] the opportunity to raise federal issues in the state-court actions." *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1249 n.2 (8th Cir. 2012).

Here, Missouri law permits a person served with a CID to raise federal-law objections to enforcement of the CID. *See, e.g., State ex rel. Koster v. Charter Communications, Inc.*, 461 S.W.3d 851, 855-57 (Mo. App. W.D. 2015) (considering a federal statutory objection to a CID); *State ex rel. Ashcroft v. Goldberg*, 608 S.W.2d 385, 388-89 (Mo. banc 1980) (considering federal constitutional objections to a CID). Thus, the ongoing state-court enforcement proceeding provides Backpage an opportunity to raise its federal-law objections to the CID. For these reasons, this case satisfies the prerequisites for *Younger* abstention. *See Geier*, 715 F.3d at 678.

B. The bad-faith exception to *Younger* does not apply in this case, because the State has an appropriate basis for believing that the CDA does not bar all potential claims against Backpage.

As described above, this case satisfies the three requirements for *Younger* abstention. Despite this, Backpage alleges that the "bad faith" exception to *Younger* applies in this case, because—Backpage claims—the federal Communications Decency Act ("CDA") supposedly bars all potential claims against it. *See* Doc. 1, ¶¶ 36-47. This argument is meritless.

As an initial matter, the procedural posture of the state-court case bars Backpage's claims. The State has instituted a state-court enforcement action to compel compliance with a lawful CID, but it has not yet brought any civil claims or criminal charges against Backpage. In considering the propriety of the CID, the "Court is not concerned with the merits of the underlying claim. Furthermore, when making such determinations, courts should not consider defenses to the merits of the underlying proceeding." *NLRB v. Fortune Bay Resort Casino*, 688 F. Supp. 2d 858, 876 (D. Minn. 2010) (internal citation omitted); *see also, e.g., Assoc. Container Trans. Ltd. v. United States*, 705 F.2d 53, 60 (2d Cir. 1983) (rejecting an invocation of *Noerr-Pennington* immunity against a CID, and explaining that "[o]nly when permitted to utilize its investigatory authority will the Division be able to exercise its expertise to determine whether the antitrust laws have been violated or whether the *Noerr-Pennington* doctrine immunizes appellees' conduct"); *EEOC v. Univ. of Pa.*, 850 F.2d 969, 980 (3d Cir. 1988) ("Courts must refrain from allowing the subpoena enforcement proceeding to develop into a full-blown trial of the underlying claim."), *aff'd by* 493 U.S. 182 (1990). An agency issuing an administrative subpoena "need not make any factual showing that a law has been violated as a condition precedent to enforcement." *Donovan v. Shaw*, 668 F.2d 985, 989 (8th Cir. 1982). Instead, at most the State merely must show a reasonable basis for conducting an investigation. *See United States v. Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 817 (8th Cir. 2012). That standard is clearly satisfied here.

Backpage bears the burden of demonstrating that one of the *Younger* exceptions applies. *See, e.g., Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002). "For purposes of *Younger*, 'bad faith' means a showing that the statute was enforced with no expectation of convictions, but only to discourage a plaintiff's exercise of protected rights."

Phelps-Roper v. Heineman, 710 F. Supp. 2d 890, 903 (D. Neb. 2010) (citing *Kugler v. Helfant*, 421 U.S. 117, 124 (1975); *Cameron v. Johnson*, 390 U.S. 611, 621 (1968)). This "exception must be construed narrowly and only invoked in 'extraordinary circumstances.'" *Aaron v. Target Corp.*, 357 F.3d 768, 778 (8th Cir. 2004) (quoting *Younger*, 401 U.S. at 53-54). "[I]t is the plaintiff's 'heavy burden' to overcome the bar of *Younger* abstention by setting forth more than mere allegations of bad faith or harassment." *Phelps v. Hamilton*, 122 F.3d 885, 889 (10th Cir. 1997).

As an initial matter, the Eighth Circuit has "only recognized [use of the bad-faith exception] in the criminal context," and has expressed significant doubt that the bad-faith exception even applies where the state-court proceeding is ***civil***, as it is here. *See Tony Alamo*, 664 F.3d at 1254 (quoting *Aaron v. Target Corp.*, 357 F.3d 768, 778 (8th Cir. 2004)). This fact alone undermines Backpage's invocation of the bad-faith exception. But even if the bad-faith exception were to apply to civil cases, that exception plainly does not apply here.

Backpage alleges that the Communications Decency Act ("CDA") would necessarily bar any conceivable claim against Backpage, and thus that the State has no reasonable expectation of pursuing a valid claim against Backpage. That position is meritless. The State has a strong evidentiary basis for concluding that the CDA does not apply to Backpage's conduct. The CDA does not protect an entity involved in the "creation and development" of online content, and there is compelling evidence that Backpage has engaged in the "creation and development" of online ads for human trafficking and commercial sexual exploitation of children.

As relevant here, the CDA prescribes that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1); *see also* 47 U.S.C. § 230(e)(3)

("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). The CDA defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). "Today, the most common interactive computer services are websites." *Fair Housing Council v. Roomates.com, LLC*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) (en banc). The CDA further defines "information content provider" as "any person or entity that is responsible, ***in whole or in part***, for the ***creation or development*** of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3) (emphases added).

Taken together, these statutory provisions demonstrate that the CDA's "grant of immunity applies only if the interactive computer service provider is not also an 'information content provider.'" *Roomates.com*, 521 F.3d at 1162. "A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content." *Id.* "But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider." *Id.* "Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content." *Id.* at 1162-63. "The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Id.* at 1164.

There is substantial reason to believe that Backpage "is responsible, in whole or in part, for the creation or development" of unlawful content, 47 U.S.C. § 230(f)(3), and thus the CDA does not immunize Backpage as to that content. *See id.* at 1162-63. Indeed, there are at least four primary bases supported by substantial evidence for concluding that Backpage does not

enjoy CDA protection for the content under investigation. First, as the documents seized from Backpage's contractor in the Philippines demonstrate, Backpage actively and aggressively solicited the posting of illegal advertisements on its website, and its own employees actively participated in the creation of those advertisements. *See* Background Part II, *supra*. Where an interactive computer service ("ICS") provider has solicited or induced others to post illegal content, that ICS provider cannot invoke § 230's immunity. *See, e.g., Roommates.com*, 521 F.3d at 1165 ("The CDA does not grant immunity for inducing third parties to express illegal preferences."); *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016) (explaining that the CDA does not bar a claim against an ICS where the ICS "induc[ed] another to post" unlawful content); *Small Justice LLC v. Xcentric Ventures LLC*, 99 F. Supp. 3d 190, 200 (D. Mass. 2015) (holding that the CDA did not bar claims arising from a defendant's "own solicitations"). The materials seized from Backpage's contractor strongly indicate that Backpage actively solicited and induced the posting of advertisements for commercial sex on Backpage. *See* Docs. 21-10, 21-13. 21-15, 21-16, 21-17. Similarly, as described above, Backpage's own agents actually created advertisements for posting on its website. *See, e.g.*, Doc. 21-16 (Backpage template email) ("If you'd like to see the free ad ***I've already created for you*** look at the next email from Backpage.com . . . .") (emphasis added). Because Backpage's own agents created the content in advertisements posted on its website, Backpage cannot invoke the CDA's protections as to those advertisements. *See, e.g.*, 47 U.S.C. § 230(f)(3); *Huon*, 841 F.3d at 742 (holding that the CDA did not apply where it was alleged that an ICS's employees may have authored some of the website's content); *Anthony v. Yahoo Inc.*, 421 F. Supp. 2d 1257, 1262 (N.D. Cal. 2006) (holding that the CDA did not bar claims against a dating website for posting fake ads on its own site).

Second, as the Senate Subcommittee Report demonstrates, Backpage specifically designed its website's operations to facilitate and conceal known criminal activity. In particular, Backpage implemented a sophisticated system by which it identified posts likely involving illegal commercial sex, revised the content of those identified posts to limit law-enforcement attention, and then posted them to Backpage's website. *See* Doc. 21-8, at 62-114. Backpage *specifically* designed its website processes to conceal and facilitate illegal activities. *Id.* As numerous courts have recognized, where an ICS provider designs its website for the purpose of facilitating unlawful activity, that ICS provider cannot invoke CDA immunity. *See, e.g.*, *J.S. v. Village Voice Media Holdings, LLC*, 359 P.3d 714, 718 (Wash. 2015) (holding that the CDA did not bar claims against Backpage where it was alleged that Backpage had developed a website "aimed at helping pimps, prostitutes, and Backpage.com evade law enforcement by giving the false appearance that Backpage.com does not allow sex trafficking on its website"); *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008) (explaining that § 230 does not apply where the ICP's "system is designed to help people" engage in unlawful activity); *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010) (noting that, under *Craigslist*, § 230(c) does not apply to "ISPs that intentionally designed their systems to facilitate illegal acts," and finding that the CDA applied only because there was "no evidence that InMotion designed its website to be a portal for defamatory material or do anything to induce defamatory postings"); *Roommates.com*, 521 F.3d at 1170 (holding that the CDA did not apply, because a website was "being sued for the predictable consequences of creating a website deigned to solicit and enforce housing preferences that are alleged to be illegal"). Substantial evidence supports the conclusion that Backpage specifically designed its website for the purpose of facilitating unlawful activity and thus it cannot invoke the CDA immunity.

Third, Backpage's protocols for revising the content of posts advertising illegal commercial sex make Backpage "responsible, in whole or in part, for the creation or development" of those posts. 47 U.S.C. § 230(f)(3). The CDA does not immunize revisions of content created by another unless "the edits are unrelated to the illegality" of the content. *Roommates.com*, 521 F.3d at 1169. As described above, Backpage has instituted wide-ranging mechanisms for revising the content of posts involving unlawful activities. *See* Background Part II, *supra*. Under those revision policies, Backpage identifies posts that likely involve illegal activity, it edits the content of the posts to mask the illegal nature of the advertised services, and it does so for the purpose of concealing the illegality of those transactions. *See* Doc. 21-8, at 85-100. Thus, Backpage's content revisions are plainly related to the illegality of that content, and the CDA does not immunize that conduct. *See J.S.*, 359 P.3d at 722 (Wiggins, J., concurring) (concluding that the CDA did not apply where "Backpage.com guided pimps to craft Invitations to prostitution that appear neutral and legal so that pimps could advertise prostitution and share their ill-gotten gains with Backpage.com"); *Roommates.com*, 521 F.3d at 1173 (holding that the CDA immunized a website for content in user-posted essays where the website did "not provide any specific guidance as to what the essay should contain").

Fourth, Backpage has repeatedly represented that it plays no role in the illegal commercial sex sold on its website. For moral, reputational, or other reasons, many third parties would hesitate to transact business with a company that knowingly facilitates human trafficking and sexual exploitation, and thus Backpage's representations of innocence likely have induced third parties—such as persons advertising legitimate goods or services on its website, credit-card companies providing payment services for Backpage transactions, and others—to enter into transactions with Backpage, who otherwise would not have done so. *See State ex rel. Nixon v.*

Beer Nuts, Ltd., 29 S.W.3d 828, 838 (Mo. Ct. App. 2000) (holding that a company's failure to disclose that its products involve illegal activity violates the MMPA). Liability under this theory would rest entirely on Backpage's ***own*** public representations. "[A]n interactive computer service provider remains liable for its own speech." *Universal Communication Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007). This theory would not treat Backpage "as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Instead, this theory would address Backpage's own false and deceptive representations. Thus, the CDA's immunity does not apply. 47 U.S.C. § 230(e)(3).

For these reasons, the State has strong reasons to believe that the CDA will not immunize Backpage against claims for possible violations of Missouri law. Thus, it is plainly inaccurate to claim that the State has no good-faith basis for investigating Backpage. To the contrary, the State has a strong basis—supported by substantial evidence—for believing that Backpage has engaged in unlawful activity that is not immunized by the CDA. The bad-faith exception to *Younger* does not apply. *See Phelps-Roper*, 710 F. Supp. 2d at 903.

C. None of Backpage's other allegations supports a finding of bad faith.

In addition to its general—and false—claim that it enjoys blanket immunity under the CDA, Backpage also claims that several alleged facts further indicate bad faith on the part of the AGO. *See* Doc. 1, ¶ 47. None of these allegations supports a finding of bad faith, and several of them are downright false.

1. Statements by former Attorney General Chris Koster regarding the CDA.

Backpage claims that former Attorney General Chris Koster conceded that the CDA bars all claims against Backpage. Doc. 1, ¶ 47(a). As explained in Part I.B above, however, significant evidence supports the conclusion that the CDA does not immunize Backpage for

substantial portions of its business. Much of this evidence has come to light since former AG Koster made his statements, and thus those statements would have no relevance even if Koster were still Attorney General. But given that Koster is no longer Attorney General, they are entirely irrelevant to AG Hawley's good faith. *See Phelps-Roper*, 710 F. Supp. 2d at 903.

2. Alleged Public Statements by AG Hawley.

Backpage's bad-faith argument relies on several alleged public statements attributed to AG Hawley. *See* Doc. 1, ¶ 47(b), (d). First, Backpage claims that AG Hawley has "acknowledge[d] that the State is not investigating any representations or advertisements of Backpage.com under the MMPA, but instead is questioning ads posted by third-party users." Doc. 1, ¶ 47(b). On the contrary, as explained in Part I.B above, the State is investigating content and conduct for which Backpage is legally responsible. No public statement by the AGO or AG Hawley has suggested otherwise.

Second, Backpage claims that AG Hawley has made "public statements that he is seeking to shut down Backpage.com, with the view that the MMPA provides an easier way to accomplish this censorial purpose without having to deal with the protections of criminal laws or constitutional proscriptions about actions infringing free speech rights." Doc. 1, ¶ 47(d). As an initial matter, this allegation flatly mischaracterizes AG Hawley's public statements. AG Hawley has repeatedly explained that the AGO intends to determine ***whether*** Backpage has violated state law, and that the office intends to seek civil or criminal penalties against Backpage ***if*** that investigation provides an appropriate evidentiary basis for doing so. For example, AG Hawley has emphasized that "[t]he nature of our investigation . . . is focused on trying to discern" whether Backpage has engaged in unlawful conduct. Doc. 21-11, cited at Doc. 1, p. 12 n.7. Referring to the conclusions of the United States Senate, AG Hawley stated that "[w]e want

to find out if that is what happened." Doc. 21-12, cited at Doc. 1, p. 11 n.6. AG Hawley alluded to the possibility of a civil or criminal action against Backpage only if the State's investigation yielded evidence of unlawful activity. *Id.* ("Any violations of the law ***we may find***, we can prosecute." (emphasis added)). Far from a "censorial purpose," these public statements reflect the proper care and deliberation of a prudent prosecutor.

Moreover, even if the Attorney General *had* made the statements falsely attributed to him by Backpage, extensive authority demonstrates that such statements would not establish bad faith under *Younger*. For example, in *Postscript Enterprises, Inc. v. Peach*, 878 F.2d 1114 (8th Cir. 1989), the Eighth Circuit held that the bad-faith exception did not apply where a local prosecutor had publicly announced his intent to "run [the state-court defendant] out of business." *Id.* at 1116. The public statement in *Postscript Enterprises* is nearly identical to the alleged public statement here, and the Eighth Circuit held that such a statement does not trigger the bad-faith exception. *Id.* Numerous other cases have similarly held that public statements by state officials expressing hostility toward a state-court defendant do not demonstrate bad faith under *Younger*. *See, e.g.*, *Phelps-Roper*, 710 F. Supp. 2d at 903; *Phelps*, 122 F.3d at 890; *Jackson Hewitt Tax Serv. Inc. v. Kirkland*, 455 F. App'x 16, 19 (2d Cir. 2012). Thus, the alleged public statements simply do not establish bad faith.

3. MMPA exception for publishers.

Backpage claims that any investigation of it must be made in bad faith, because "§ 407.020.2(1)[] expressly exempts publishers and their owners for claims of misrepresentations by third-party advertisers." Doc. 1, ¶ 47(c). Backpage has mischaracterized the statute. Section 407.020.2(1) exempts from liability certain publishers who have "***no knowledge of the intent, design or purpose of the advertiser***." Mo. Rev. Stat. § 407.020.2(1)

(emphasis added). But as described above, extensive evidence indicates that Backpage ***does*** know that certain advertisements involve illegal activity. *See* Background Part II. Thus, the content and conduct under investigation plainly would not fall within the statutory provision cited by Backpage. *See* Mo. Rev. Stat. § 407.020.2(1).

4. Filing state-court proceeding allegedly before compliance deadline

Backpage claims that the State filed "its state-court petition to compel responses from Backpage.com when the State had agreed that responses were not yet due." Doc. 1, ¶ 47(e). This allegation is false, and Backpage lacks a good-faith basis for it. The State agreed to an extension of the deadline for ***Ferrer*** to respond to the CID. Morris Dec., ¶¶ 18-19. However, Mr. Grant requested an extension only for Ferrer and did not request a similar extension for Backpage. *Id.* The State never agreed to an extension of the deadline for Backpage to comply with the CID. *Id.* Thus, the filing of the state-court action simply does not support a finding of bad faith. Moreover, Backpage's untimely CID response, served four days before the filing of this action, was plainly deficient and included no responsive documents or information. *Id.*, ¶¶ 29-30. Thus, the State would have filed a state-court enforcement action even if it had delayed until July 7. *Id.*, ¶ 31

5. MMPA limitations on the dissemination of CID materials.

Finally, Backpage claims that the CID reflects an intent to violate the MMPA by sharing materials produced under the MMPA with other law-enforcement agencies. Doc. 1, ¶ 47(f). The CID states that "this demand will be subject to disclosure to other state and federal law enforcement agencies pursuant to an information sharing agreement." Doc. 21-2, at 1. The MMPA expressly authorizes such information sharing, providing that the AGO "may use the [materials obtained under the CID] . . . by disclosure to law enforcement agencies of this state,

another state or the United States for enforcement of the laws of such other state or the United States." Mo. Rev. Stat. § 407.060.1. Thus, the CID does not evidence an intent to violate the MMPA but instead plainly complies with the statute.

For the reasons stated, the Court should dismiss this action under the *Younger* abstention doctrine.

II. The Eleventh Amendment Plainly Bars Count IV.

The Eleventh Amendment plainly bars Count IV of the Complaint, which purports to bring suit against the Attorney General under the MMPA. *See* Doc. 1, ¶¶ 67-71. For more than three decades, it has been well established that "[t]he Eleventh Amendment precludes a federal court from ordering a state, including its agencies or officials, to conform their conduct to state law." *Randolph v. Rodgers*, 170 F.3d 850, 859 (8th Cir. 1999); *see also, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Greene v. Dayton*, 806 F.3d 1146, 1149 (8th Cir. 2015). Thus, the Eleventh Amendment bars Backpage from seeking a federal-court injunction purporting to enforce the MMPA. *See id.*

III. The Court Should Dismiss All Claims Pursuant to Rule 12(b)(6).

As described above, the Court should not reach the merits of Backpage's claims but instead should dismiss this case pursuant to the *Younger* abstention doctrine. Even if the Court reaches the merits, it should dismiss all of Backpage's claims under Rule 12(b)(6).

A. The Court should dismiss Count I, which raises a claim under the CDA.

The Court should dismiss Count I, which claims that the CDA bars any investigation of or action against Backpage. As described in detail in Part I.B, § 230 of the CDA does not immunize Backpage for the conduct that the AGO is investigating. This fact alone warrants dismissing Count I.

B. The Court should dismiss Count II, which raises a claim under the First Amendment.

Count II contends that the CID violates Backpage's First Amendment rights. In considering Backpage's First Amendment claim, the Court must "balance the nature of the intrusion against the asserted governmental interest." *Senate Permanent Subcommittee v. Ferrer*, 199 F. Supp. 3d 125, 139 (D.D.C. 2016) (citing *Konigsberg v. State Bar of Ca.*, 366 U.S. 36, 51 (1961)), *vacated as moot by* 856 F.3d 1080.[4] Here, this balance plainly tips in favor of the State.

1. The CID does not implicate the First Amendment.

As an initial matter, the CID does not actually implicate the First Amendment at all. Advertisements for illegal activity are not protected under the First Amendment. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."); *Flytenow, Inc. v. FAA*, 808 F.3d 882, 894 (D.C. Cir. 2015) ("[T]he advertising of illegal activity has never been protected speech."). Moreover, a publisher has no First Amendment right to publish advertisements promoting illegal activity, even if created by a third party. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-89 (1973); *id.* at 388 (explaining that there is "no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."). Thus, the First Amendment does not protect the advertisements for illegal activity that the State seeks to investigate, nor does it protect Backpage's posting of such advertisements.

[4] *Senate Permanent Subcommittee* involved litigation to enforce a subpoena issued to Backpage CEO Carl Ferrer by the United States Senate. The Court of Appeals dismissed Ferrer's appeal as moot after he complied with the subpoena and the Subcommittee completed hearings and issued a final report. 856 F.3d at 1084, 1088-89.

2. The CID imposes negligible burdens on Backpage.

Even if the CID were to implicate some plausible First Amendment interests, the CID imposes at most a minimal burden on those interests. First, the CID does not impose any penalty on Backpage or restrict its activities. Instead, the CID simply requires Backpage to search and produce certain business records. *See* Doc. 21-2; *compare* Doc. 1-1. "[M]erely searching for responsive documents does not limit or chill First Amendment rights." *Senate Permanent Subcommittee*, 199 F. Supp. 3d at 140. Thus, the CID imposes no cognizable burden on Backpage. *See id.*; *United States v. Womack*, 509 F.2d 368, 382 (D.C. Cir. 1972) (holding that First Amendment was not implicated where a warrant authorized the seizure of "business records and other correspondence relating to the publication, sale and distribution of [adult] magazines").

Second, the CID carefully avoids intrusion into potential privacy interests of Backpage users. The CID expressly states that the request for documentation regarding individual postings "does not include the personally identifying information of any Backpage user or account holder." Doc. 21-2, at 4; *compare* Doc. 1-1, at 4. This limitation ensures that the CID does not plausibly implicate any privacy or expressive interests of Backpage users. *See Senate Permanent Subcommittee*, 199 F. Supp. 3d at 141 (finding that subpoena to Ferrer did not violate First Amendment where the subpoena did "not seek any 'personally identifying information of any Backpage user or account holder'").

Third, the conduct of Backpage and its users belies the claim that disclosure of the materials sought by the CID would chill their First Amendment activities. Backpage has repeatedly discussed its alleged moderation practices in public, thereby demonstrating that it has little legitimate interest in keeping those practices secret. "Backpage cannot proclaim its attention to moderation efforts to avoid ads for sex trafficking and refuse to respond with

documentary evidence of how that attention works in practice." *Id.* at 140. Similarly, by submitting posts for publication on the Internet, Backpage's users have demonstrated that they have no privacy or confidentiality interest in those materials. *See Barrett v. Acevedo*, 169 F.3d 1155, 1166 (8th Cir. 1999) (en banc).

Finally, the CID seeks exclusively commercial materials. *See* Doc. 21-2; *compare* Doc. 1-1. The requested materials relate only to Backpage's business practices, and the underlying advertisements and posts involve invitations to commercial transactions. "The Constitution . . . affords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993). The commercial nature of the materials at issue here further demonstrates that the CID imposes at most a minimal burden on legitimate First Amendment interests.

3. The CID advances critical governmental interests.

The minimal burden imposed by the CID is decisively outweighed by the State's interests in investigating Backpage and enforcing Missouri law. As explained in Part I.B, substantial evidence indicates that Backpage has played a direct role in unlawful activity, including human trafficking and commercial sexual exploitation of minors. Thus, the State has a compelling interest in investigating whether Backpage has, in fact, violated Missouri law and, if so, seeking to remedy and deter those violations. *See, e.g., Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1317 (9th Cir. 2015) (explaining that "the Attorney General has a compelling interest in enforcing the laws of [the State]"); *United States v. Institute for College Access & Success*, 27 F. Supp. 3d 106, 115 n.8 (D.D.C. 2014) (presuming that a compelling interest exists to enforce an administrative subpoena "where the agency seeking the information is conducting an investigation pursuant to its statutory authority"); *see also Lachman v. Sperry-Sun Well*

Surveying Co., 457 F.2d 850, 853 (10th Cir. 1972) (noting that "[i]t is the public policy . . . everywhere to encourage the disclosure of criminal activity"). The State plainly has a critical and compelling interest in enforcing the CID, and this interest decisively outweighs any plausible burden that the CID might impose on legitimate First Amendment interests.

C. The Court should dismiss Count III, which raises claims under the Fourth Amendment and the Due Process Clause.

Count III raises a claim under both the Fourth Amendment and the Due Process Clause. Both theories are meritless as a matter of law.

1. The CID does not violate the Fourth Amendment.

Backpage claims that the CID violates the Fourth Amendment because it involves conduct that is immunized by the CDA and because it allegedly is overbroad. Both contentions lack merit. "It is well established that [an administrative] subpoena is properly enforced if (1) issued pursuant to lawful authority, (2) for a lawful purpose, (3) requesting information relevant to the lawful purpose, and (4) the information sought is not unreasonable." *Whispering Oaks*, 673 F.3d at 817.

The CID here satisfies all four requirements. First, the State issued the CID pursuant to Mo. Rev. Stat. § 407.040. *See* Doc. 21-2; *compare* Doc. 1-1.

Second, the AGO issued the CID for a lawful purpose. The MMPA authorizes the Attorney General to issue a CID "[w]hen it appears to the attorney general that a person has engaged in or is engaging in any [conduct that violates the MMPA] or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has [violated the MMPA]." Mo. Rev. Stat. § 407.040.1. As described in the Background and in Part I.B, there is substantial evidence suggesting that Backpage may have engaged in unlawful

conduct that is not immunized by the CDA. Moreover, the AGO has made the determination that an investigation of potential unlawful conduct by Backpage is "in the public interest." *Id.*

Third, all of the information and materials sought by the CID are relevant to the AGO's lawful investigation. *See* Doc. 21-2; *compare* Doc. 1-1. "[T]he question of an administrative subpoena's relevance is not a question of evidentiary relevance." *Whispering Oaks*, 673 F.3d at 818 (quotation omitted). "The standard for determining the relevance of a subpoena's requests is not particularly burdensome, and indeed, a subpoena should be enforced when the evidence sought by the subpoena is not plainly incompetent or irrelevant to any lawful purpose of the agency in the discharge of its duties." *Id.* (quotation omitted). Here, all items sought by the CID relate to and are directly relevant to the State's investigation of Backpage. *See* Doc. 21-2; *compare* Doc. 1-1.

Fourth, the CID's requests are not unreasonable. Backpage apparently contends that the CID is overly broad and unduly burdensome. The Eighth Circuit "has held [that] broadness alone is not sufficient justification to refuse enforcement of a subpoena so long as the material sought is relevant." *Tax Liabilities of John Does*, 866 F.2d 1015, 1021 (8th Cir. 1989) (quotation and brackets omitted). "The burden of proving that an administrative subpoena is unduly burdensome is not easily met. The party subject to the subpoena must show that producing the documents would seriously disrupt its normal business operations." *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513 (4th Cir. 1996) (quotation and alteration omitted). "The mere fact that compliance with the subpoenas may require the production of thousands of documents is insufficient to establish burdensomeness." *Id.* (quotation and ellipsis omitted). Here, Backpage has not alleged facts showing that compliance with the CID "would seriously disrupt its normal business operations," *id.*, and thus it has failed to show that the CID is unreasonable,

see Whispering Oaks, 673 F.3d at 819 (concluding that administrative subpoenas were not unreasonable where the recipient could not "argue that enforcement of the subpoenas will interfere with care at the facility"). Thus, the CID does not violate the Fourth Amendment.

2. The CID does not violate the Due Process Clause.

Backpage also claims that the CID violates the Due Process Clause in that the CID "is not reasonably related to any legitimate investigative purpose and is overly burdensome." Doc. 1, ¶ 66. This argument is clearly meritless. The State has a compelling interest in enforcing its consumer-protection and criminal laws, and the CID directly advances this interest. *See* Part III.B.2, *supra*. Thus, the CID easily satisfies the due-process requirement that government action advance a legitimate governmental purpose.

The purported burdens imposed by the CID also do not violate due process. As an initial matter, a subpoena does not violate due process merely by being unduly burdensome. *See, e.g.*, *United States v. Empire Gas Corp.*, 419 F. Supp. 34, 37 (W.D. Mo. 1976) ("[R]espondents' assertion of the burden inherent in providing the subpoenaed documents and the resulting interruption in Empire's business operations fails to demonstrate a deprivation of due process of law . . . ."). Moreover, for the reasons stated in Part III.C.1, the CID is not unduly burdensome in any way. Backpage has failed to plausibly allege a due-process violation.

D. Count IV, which purports to raise a claim under the MMPA, fails to state a claim for relief.

As noted in Part II above, the Eleventh Amendment plainly bars Count IV of the Complaint. Moreover, that claim is meritless for at least three additional reasons. First, the MMPA does not create a private right of action against the State to enjoin enforcement of a CID. Under Missouri law, a court must "not interpret a statute to establish a private cause of action without clear implication of the legislature's intent to do so." *Byrne & Jones Enters., Inc. v.*

Monroe City R-1 Sch. Dist., 493 S.W.3d 847, 856 (Mo. banc 2016). That principle applies with particular force "[w]hen the legislature has established other means of enforcing its statutes." *Bierkes v. Blue Cross & Blue Shield*, 991 S.W.2d 662, 667 (Mo. banc 1999). Here, nothing in the text of Chapter 407 evidences any legislative intent to create a private claim against the State to enjoin a CID or the enforcement of a CID. *See, e.g.*, Mo. Rev. Stat. § 407.040; *see also Phillpott v. Anco Indus. Inc.*, No. 94-4193, 1996 WL 344502, at *2 (E.D. La. June 24, 1996) (discussing a substantially similar federal CID statute, and explaining that "[c]learly, this statute does not create a cause of action for a private citizen"). Moreover, the MMPA expressly provides an alternate mechanism for CID recipients to challenge a CID by filing a petition to modify or set aside the CID. Mo. Rev. Stat. § 407.070. "In such a petition, the recipient may state its objections to the CID, and why it believes that the CID is unreasonable." *State ex rel. Koster*, 461 S.W.3d at 858. The existence of this express statutory mechanism for challenging a CID further demonstrates that there is no implicit cause of action to enjoin enforcement of a CID. *See Bierkes*, 991 S.W.2d at 667.[5]

Second, for similar reasons, Backpage cannot obtain injunctive or declaratory relief under the MMPA, because it has adequate alternate remedies at law. Under Missouri law, a party seeking an injunction or declaratory relief must establish that she lacks an adequate remedy at law. *See, e.g.*, *Farm Bureau Town & Country Ins. Co. v. Angoff*, 909 S.W.2d 348, 354 (Mo. banc 1995); *Foster v. State*, 352 S.W.3d 357, 359 (Mo. banc 2011). As described above, Mo.

[5] Backpage did not invoke § 407.070, nor did it request the relief authorized by § 407.070. *See* Doc. 1, at 22 (Prayer for Relief). Thus, Count IV does not constitute a claim under § 407.070. Moreover, if Backpage *had* brought Count IV under § 407.070, that claim would be untimely. A party must file such an action "before the return date specified in [the CID], or within twenty days after the [CID] has been served, whichever period is shorter." Mo. Rev. Stat. § 407.070. Backpage filed this case on July 11, 2017—46 days after service of the CID, 34 days after its deadline for compliance with the CID, and four days after Ferrer's extended deadline.

Rev. Stat. § 407.070 provides Backpage an adequate alternate remedy to challenge the propriety of the CID. *See State ex rel. Koster*, 461 S.W.3d at 858. Moreover, Backpage can also assert its objections to the CID in the ongoing state-court enforcement proceeding. *See id.* at 855-57; *State ex rel. Ashcroft*, 608 S.W.2d at 388-89. Thus, under Missouri law, Backpage cannot obtain injunctive or declaratory relief challenging the CID.

Third, the CID fully complies with the MMPA's procedural requirements. Section 407.040 sets forth the requirements for CIDs. *See* Mo. Rev. Stat. § 407.040.2. The CID complies with each of these requirements, *see* Doc. 21-2; Doc. 1-1, and Backpage does not clearly identify any deficiencies in the CID, *see* Doc. 1. The Court should dismiss Count IV.

E. The Court should dismiss Count V, which raises a claim under the Declaratory Judgment Act.

Count V purports to raise a claim under the federal Declaratory Judgment Act, 28 U.S.C. § 2201. *See* Doc. 1, at 21-22. Count V apparently relies on the underlying merits of Counts I-IV. *See id.*, ¶¶ 72-74. The Court should dismiss Count V for the same reasons as it should dismiss Counts I-IV.

CONCLUSION

For the reasons stated, this Court should dismiss the complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2017, the foregoing was served on counsel of record for Plaintiff by operation of the Court's electronic filing system.

/s/ D. John Sauer