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

BACKPAGE.COM, LLC, Plaintiff, v. THOMAS J. DART, Sheriff of Cook County, Illinois Defendant.	No. 1:15-cv-06340 Judge John J. Tharp, Jr. Magistrate Judge Young B. Kim

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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For more than six years, Cook County Sheriff Thomas Dart has pursued a campaign against online classified advertising services—first Craigslist and then Plaintiff Backpage.com, LLC—demanding they shut down portions of their sites where users can post adult-oriented ads. At every turn, the Sheriff has been stymied by the Constitution, federal law, and court cases holding that such ads are protected speech and that websites are immune from state-law civil or criminal liability for content provided by users. Notably, in *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009), this Court dismissed an action brought by Sheriff Dart seeking to enjoin "adult services" ads on Craigslist, making clear that the Sheriff could use the website "to identify and pursue individuals who post allegedly unlawful content," "[b]ut he cannot sue Craigslist for their conduct." *Id.* at 969.

When Sheriff Dart's efforts to proceed under the law failed and Backpage.com refused to censor speech at his direction, he hit on the "out-of-the-box" idea of pressuring the credit card companies to cut off use of their cards on Backpage.com. On June 29, 2015, Sheriff Dart sent "cease and desist" letters to Visa and MasterCard, demanding that they stop processing digital payments for and terminate all dealings with Backpage.com. From the thinly-veiled threats in his letters, Dart's message was clear—the card companies would be subject to investigation and sanctions if they did not comply with the Sheriff's "request." Perhaps not surprisingly, Visa and MasterCard buckled to the pressure, cutting off Backpage.com within 48 hours and admitting they did so because of Sheriff Dart's letters.

Sheriff Dart's actions are plainly unconstitutional. His "out-of-the-box" approach amounts to an informal and extralegal prior restraint of speech in violation of the First and Fourteenth Amendments barred under the Supreme Court's decision in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Prior restraints are presumptively illegal, and "the most serious

and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Moreover, prior restraints caused by *informal* pressure and insinuation—as Sheriff Dart has done here—are the most pernicious of all because the censor's target (Backpage.com in this case) is deprived of all due process and protections of the First Amendment. The Constitution does not allow censorship by a vigilante with a badge seeking to impose his views of what is or is not permissible speech.

Immediate injunctive relief is critically important in this case. Sheriff Dart admits he aims to starve Backpage.com of all revenues and thereby shut down the website. His actions not only infringe and threaten Backpage.com's rights to publish, but also the rights of the website's millions of users to speak and receive speech. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

Accordingly, in this motion, Backpage.com requests the Court to (1) enter an immediate temporary restraining order directing Sheriff Dart to cease and desist his coercive actions; (2) hear and decide Backpage.com's request for preliminary injunctive relief on or before July 24, 2015; and (3) enter a preliminary injunction finding Sheriff Dart's actions likely unconstitutional and unlawful, prohibiting him from further such actions, and directing him to retract his letters to Visa and MasterCard as well as any similar communications.

I. BACKGROUND

A. Background Regarding Backpage.com

Backpage.com is an online classified advertising website, available to users throughout the United States and organized geographically by states and municipalities. Declaration of Carl Ferrer ("Ferrer Decl.") ¶ 2. Backpage.com is the second-largest classified ad website in the United States, after Craigslist. *Id.* ¶ 3. Users post more than six million ads every month in a

variety of categories, including, for example, local places, buy/sell/trade, automotive, rentals, real estate, jobs, dating and adult. *Id.*

Users provide all the content for ads using an automated interface; Backpage.com does not dictate or require any content. *Id.* ¶ 4. Users may post ads for free in most categories, although until Sheriff Dart's actions at issue here, Backpage.com charged for certain ads and services. *Id.* ¶ 5. For example, Backpage.com charged for ads in the adult and dating categories, payable by major credit cards—a practice that has been ***requested*** by law enforcement officials (including Sheriff Dart) because credit cards provide identifying data authorities can use to track and prosecute individuals if they engage in illegal activities. *Id.*[1] Additionally, for all types of ads, Backpage.com also charged users for those posted nationally or in multiple markets and for more prominent or repeat-ad placement. *Id.* For eleven years, from 2004 to 2015, the three major credit card companies—American Express, Visa, and MasterCard—allowed their cards to be used on Backpage.com. *Id.* ¶ 6. As discussed below, as of July 6, 2015, Backpage.com stopped charging and offered all ads for free because of Sheriff Dart's actions that caused the three major credit card companies to ban use of their cards on the website.

Backpage.com goes to great lengths to prevent misuse of its site or illegal content, especially to guard against any human trafficking or child exploitation. *Id.* ¶ 7. The company's protective screening and monitoring measures and its cooperation with law enforcement are unparalleled. The website's Terms of Use and Posting Rules (which users must accept to post or view adult or dating ads) prohibit ads for illegal services or posting "any material … that exploits minors in any way." *See* Ferrer Decl. Exs. B, E. Backpage.com provides links throughout the

[1] *See also* Ferrer Decl. Ex. K (June 14, 2011 letter from Sheriff Dart's office to Backpage.com); Ex. M (January 24, 2014 letter from Sheriff Dart's office to Backpage.com); Declaration of Lisa Zycherman ("Zycherman Decl.") Ex. A (Joint Statement between Craigslist, National Center for Missing and Exploited Children and NCMEC, and all states' AGs).

site for users to report improper ads; links to the Cybertipline of the National Center for Missing and Exploited Children ("NCMEC"); a User Safety page (addressing trafficking and providing resources); and ads from a national support and rescue organization, Children of the Night. Ferrer Decl. ¶¶ 12, 13, Ex. G, H.

Backpage.com also takes extensive measures to police user posts. *Id.* ¶ 14. Backpage.com has a multi-tiered system to screen, block and remove posts, which includes automated filtering for more than 100,000 terms, URLs, and email and IP addresses, and two levels of manual review by over 100 personnel. *Id.* Backpage.com also regularly works with local, state and federal law enforcement officials to assist investigations and prosecutions, including by responding to subpoenas and other requests (generally within 24 hours), providing training, voluntarily doing additional online research to aid authorities, and removing and blocking posts at their request. *Id.* ¶ 16. Law enforcement officials have often commended Backpage.com for its support and cooperation, and this includes statements from Cook County officials. *Id.*¶ 17.

B. Defendant's Crusade Against Online Adult-Oriented Advertising

Sheriff Dart has been engaged in a crusade against classified advertising websites for at least six years, and apparently longer. Zycherman Decl. Ex. B (Mar. 6, 2009 Craigslist press release stating that Sheriff Dart's office initially contacted Craigslist in 2007).

In March 2009, Sheriff Dart filed a civil action in this Court against Craigslist, claiming its adult services category constituted a public nuisance and "Craigslist itself violates criminal laws prohibiting prostitution and related offenses." *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 962-63, 967 (N.D. Ill. 2009). The Sheriff sought an injunction to force Craigslist to eliminate the category and adult-oriented ads. *Id.* at 963. This Court dismissed the suit under Fed. R. Civ. P. 12(c), holding Craigslist was immune from liability under Section 230 of the Communications

Decency Act ("CDA"), 47 U.S.C. § 230, which provides that online services cannot be treated "as the publisher or speaker of any information provided by another information content provider," *id*. § 230(c)(1), *i.e*., users who post ads on Craigslist. *Dart*, 665 F. Supp. 2d at 967-69. The Court held that online services do not "cause" postings except "in the sense of providing a place where people can post," that websites "are not culpable for 'aiding and abetting' their customers who misuse their services to commit unlawful acts," and that having an adult services category "is not unlawful in itself nor does it necessarily call for unlawful content." *Id.* at 966, 968-69. The Court concluded: "Sheriff Dart may continue to use Craigslist's website to identify and pursue individuals who post allegedly unlawful content. ***But he cannot sue Craigslist for [its] conduct***." *Id.* at 969 (internal citations and footnote omitted; emphasis added).

C. Craigslist Succumbed to Pressure, and Sheriff Dart Shifted His Focus to Backpage.com.

In September 2010, despite the failure of Sheriff Dart's suit, Craigslist shut down its adult services category, bowing to pressure from a group of state AGs. *See* Zycherman Decl. Ex. C (Michael A. Lindenberger, *Craigslist Comes Clean: No More 'Adult Services,' Ever*, TIME (Sept. 16, 2010)). Shortly thereafter, Sheriff Dart's office announced it had "focused on Backpage.com as the new battleground." Zycherman Decl. Ex. D (Jason Meisner, *Online Prostitution Battle Shifts from Craigslist to 'Copycat' Sites, Police Say*, CHI. TRIB. (Apr. 20, 2011)).

In January 2011, Sheriff Dart's office wrote Backpage.com stating that it had been "conducting undercover investigations" of the website, and based on its views of ads on the site, demanded that Backpage.com be brought "into legal compliance" by "remov[ing] the Personals and Adults sections." Ferrer Decl. ¶ 18 & Ex. I (Jan. 20, 2011 letter). The Sheriff repeated this theme in a March 2011 letter. *Id.* ¶ 19 & Ex. J (Mar. 2, 2011 letter from Sheriff Dart's office to

Backpage.com, insisting "the only way to ensure the public safety would be to shut down the Adults and Personals sections").

When Backpage.com offered to meet with Sheriff Dart, his office responded by demanding, among other things, that Backpage.com "[r]equire posts in the Adults section be paid using credit cards" and provide customers' "identifying information to law enforcement agencies upon request." *Id.* Ex. K (June 14, 2011 letter). At the meeting, Backpage.com explained its screening procedures, its cooperation with law enforcement, and that it ***did*** require payment by credit or debit cards and routinely provided such information in response to law enforcement requests. *Id*. ¶ 21. Following the meeting, Sheriff Dart's representative wrote: "We all came away impressed not only with the work done so far by [Backpage.com], but also with [your] candor and sincerity, not to mention [your] interest in doing more work to secure the website." *Id.* ¶ 21.

Nonetheless, just a few months later, Sheriff Dart returned to his demand that Backpage.com eliminate its adult category. In a January 2012 letter, his office threatened prosecution under Illinois's human trafficking statute if Backpage.com did not "immediately cease and desist[]." Ferrer Decl. Ex. L (Jan. 31, 2012 letter from Sheriff Dart's office to counsel for Backpage.com). More recently, in January 2014, his office insisted Backpage respond to a twelve-page "Request for Information and Site Modification," demonstrating, among other things, that the website "[r]equire user[s] to pay fees with major credit card." Ferrer Decl. Ex. M (Jan. 24, 2014, Letter from Sheriff Dart's office to counsel for Backpage.com). At the same time, Sheriff Dart has continued to make public statements that "Backpage is a conduit to criminality" and "need[s] to be held accountable." Zycherman Decl. Ex. E (Feb. 1, 2014 Twitter post from Sheriff Dart); Complaint Ex. A.

D. Cases Establish that Advertisements on Backpage.com Are Protected Speech Under the First Amendment and CDA Section 230

While Sheriff Dart continued his vendetta, legislatures in three other states (Washington, Tennessee, and New Jersey) passed criminal laws targeting Backpage.com. In each instance, federal courts enjoined the laws, finding them unconstitutional under the First Amendment and contrary to and preempted by Section 230 of the CDA. *See Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 (D.N.J. Aug. 20, 2013). The courts in these cases held that escort ads are protected speech, *see, e.g., McKenna*, 881 F. Supp. 2d at 1282, that state efforts to ban or chill such ads were overbroad and could not withstand strict scrutiny, *see, e.g.*, *Hoffman*, 2013 WL 4502097, at *8, and, fundamentally, that the states' efforts to censor or chill an entire category of speech on a website failed because, "when freedom of speech hangs in the balance—the state may not use a butcher knife on a problem that requires a scalpel to fix," *Cooper*, 939 F. Supp. 2d at 813.

More recently, a federal court in Massachusetts dismissed claims against Backpage.com by plaintiffs who claimed they were victimized because of ads that appeared on the site. *Doe v. Backpage.com, LLC*, 2015 U.S. Dist. LEXIS 63889 (D. Mass. May 15, 2015) (dismissing under Fed. R. Civ. P. 12(b)(6)). Consistent with *Dart v. Craigslist* and *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), the court held Backpage.com immune under Section 230.

Sheriff Dart is well aware of the law prohibiting him from pursuing official actions to censor or shut down Backpage.com—beginning with his own failed suit against Craigslist and confirmed by many cases since. He has admitted this by stating that "[c]ourts continue to follow antiquated laws to the point of nonsensical outcomes" and "absurdity," and "Congress is too

hamstrung to act" to change "outdated language in the Communications Decency Act." *See* Complaint Ex. B (June 29, 2015 letter from Sheriff Dart to Visa CEO Charles W. Scharf; "Visa Letter").[2] Indeed, as further acknowledgement that federal law bars his censorship campaign, Sheriff Dart has urged the law be changed, with the specific intent of targeting Backpage.com. *See* Zycherman Decl. Ex. F (Juan Perez Jr., *Kirk Joins Cook Officials in Push to Fight Internet Sex Trade*, CHI. TRIB. (Mar. 24, 2014) (joint press conference in which Senator Kirk and Sheriff Dart stated the purpose of the legislation was to "target" and "go after" Backpage.com)). The proposed legislation Sheriff Dart supported raised "thorny free speech concerns," *see id.*, and was not enacted.

E. Sheriff Dart Continued His Campaign Using Extralegal Means By Coercing Visa and MasterCard to Terminate Services to Backpage.com.

Sheriff Dart's office was "frustrated" "[a]fter the legislative and litigious efforts failed," and was "used to disappointment" based on its prior efforts to pursue Backpage.com. Zycherman Decl. Ex. G (Kim Bellware, *Credit Card Companies Abandon Backpage.com Over Sex Trafficking Complaints*, HUFFINGTON POST (July 1, 2015), reporting statements of Sheriff Dart's spokesman), Ex. H (Aamer Madhani, *Under Pressure, MasterCard Stops Doing Business with Backpage.com*, USA TODAY (July 1, 2015)). Sheriff Dart therefore "[came] up with an out-of-the-box idea" and "looked to the financial route," recognizing transactions on Backpage.com "would simply not be possible if Visa and MasterCard would say 'no more.'" Zycherman Decl. Ex. G (Bellware, HUFFINGTON POST (July 1, 2015)). Sheriff Dart and his staff then "moved 'full speed ahead' and devoted a team to working 'almost full-time' on the effort." *Id.*

[2] In this letter, Sheriff Dart specifically referenced and decried the recent Massachusetts decision, *Doe v. Backpage.com*. *See* Complaint Ex. B, n. iii (calling *Doe* a "nonsensical" outcome).

On June 29, 2015, Sheriff Dart sent letters to the CEOs of Visa and MasterCard, their boards of directors, and "investors" (banks and other financial institutions subject to government regulation) demanding that they "defund" Backpage.com and "cease and desist" providing services to the company. Complaint Ex. B (Visa Letter), Ex. C (June 29, 2015 letter from Sheriff Dart to MasterCard President and CEO Ajaypal Banga; "MasterCard Letter"). Sheriff Dart left no doubt about his intentions to demand and compel the card companies to block—or "defund"—all transactions through Backpage.com, as the headline on his website made clear:

> **SHERIFF DART'S DEMAND TO DEFUND SEX TRAFFICKING COMPELS VISA AND MASTERCARD TO SEVER TIES WITH BACKPAGE.COM**

Complaint Ex. A (July 1, 2015 press release from Sheriff Dart).

Writing in his capacity as Cook County Sheriff, *see* Complaint Ex. B, at 1, 3 (Visa Letter on letterhead of the "Office of Sheriff" and signed by Dart as the "Cook County Sheriff"), *see also id.* Ex. C (same for MasterCard Letter), Dart insisted the companies "immediately cease and desist from allowing your credit cards to be used to place ads on … Backpage.com." *See* Complaint Ex. B at 1. Sheriff Dart noted the card companies' merchant agreements "clearly give [them] the right to cancel or block any transactions if the customer 'indirectly engages in or facilitates any activity that is illegal.'" *Id.* at 2. He wrote that his office "ha[d] objectively found" that Backpage.com "promote[s] prostitution and facilitate[s] sex trafficking." *Id.* at 1.[3] Reminding the companies he is the county authority "charged with eradicating such trafficking," he alluded to their "legal dut[ies]" to file "Suspicious Activity Reports," and suggested they might have even greater legal obligations "to alert law enforcement authorities" of possible problems. *Id.* at 1, 2. He underscored his message by citing statutes imposing criminal penalties

[3] Sheriff Dart did not mention in the letters that his office has commended Backpage.com for its work to combat sex trafficking and its assistance with investigations and prosecutions.

for money laundering, allowing for termination of a financial institution's status as an insured depository institution, and permitting investigations and enforcement actions. *Id.* at 2 & n. iv. Thus, in thinly veiled language, Sheriff Dart made plain that Visa and MasterCard could face investigation and criminal penalties for aiding and abetting Backpage.com.

The letters were only the first step of a "larger campaign Cook County planned to launch [to] pressure the credit card companies," as the Sheriff's office has stated publicly. Zycherman Decl. Ex. I (Tierney Sneed, *Under Pressure, Major Credit Cards Cut Ties With Backpage.com Over Sex Ads*, TALKING POINTS MEMO (July 1, 2015)). Sheriff Dart said as much in the letters, indicating his department would follow up with the card companies concerning his demand in short order. *Id.* at 3 (requesting each company identify a contact person "I can work with on this issue" within a week).

Within 48 hours, MasterCard and Visa each announced it was terminating card services and would cease doing business with Backpage.com. Zycherman Decl. Ex. H (Madhani, USA TODAY (July 1, 2015)), Ex. J (Mathew Zeitlin, *Backpage.com Cut Off From Credit Card System Over Sex Trafficking Claims*, BUZZFEED (July 1, 2015)). Sheriff Dart immediately issued a press release taking credit for the terminations. Complaint Ex. A (July 1, 2015 press release). Both of the companies stated that they terminated because of Sheriff Dart's letters. MasterCard issued a press statement that it terminated Backpage.com "[b]ased on a request from the Cook County Sheriff's office," regarding the Sheriff's letter as having "confirmed" "illegal or brand-damaging activities." Zycherman Decl. Ex. H (Madhani, USA TODAY (July 1, 2015)). Visa stated it could no longer process transactions because it had "received allegations from US law enforcement

that the merchant backpage.com is linked to child prostitution and human trafficking." Ferrer Decl. ¶ 25. *See also* id. Ex. J (Zeitlin, BUZZFEED (July 1, 2015)).[4]

Backpage.com received notice from its acquiring banks and credit card processors on July 1 and 2, 2015, that, at the direction of Visa and MasterCard, they could no longer process transactions and were terminating their merchant agreements for Backpage.com effective immediately. Ferrer Decl. ¶ 24. MasterCard also listed Backpage.com as a terminated merchant on the list jointly maintained and used by the card companies, thereby preventing processing of credit card payments for Backpage.com by any financial institution worldwide. *Id.* ¶ 26. The termination affects not only charges for ads in the adult category, but also precludes use of MasterCard or Visa cards for any charges, thus affecting all content on the site, whether it be ads for dating, housing, services, employment, or anything else. *Id.* ¶ 27. Thus, Sheriff Dart's coercion and the card companies' acquiescence have cut off nearly all revenue to Backpage.com. *Id*. ¶ 27.

Sheriff Dart's campaign to "defund" Backpage.com did not end with his letters to Visa and MasterCard. On July 8, 2015, he wrote to the Chief Postal Inspector of the United States Postal Service, in an apparent attempt to urge enforcement action to block users from sending funds to Backpage.com through the mails to buy credits for use on the site. Zycherman Decl. Ex. K (Aamer Madhani, *Backpage.com Thumbs Nose at Sheriff After Visa, MasterCard Cut Ties*, USA TODAY (July 9, 2015)) .

[4] Sheriff Dart's office previously contacted American Express and pressured it to terminate use of its cards on Backpage.com as well. Zycherman Decl. Ex. G (Bellware, HUFFINGTON POST (July 1, 2015) ("Dart's office had previously reached out to American Express, which already complied.") American Express informed Backpage.com it was disallowing use of its cards for any purchases in the adult category of the website on April 30, 2015, but did not give a reason for its decision. Ferrer Decl. ¶ 24.

As a result of Sheriff Dart's actions and in an attempt to minimize injury to the website's goodwill and users, Backpage.com stopped charging for ads effective July 6, 2015. Ferrer Decl. ¶ 28. Sheriff Dart's spokesman responded by calling Backpage.com's move an "act of desperation," and, reflecting the Sheriff's purpose, stated: "They know their business model is on the brink of destruction and are gasping for air." Zycherman Decl. Ex. K (Madhani, USA TODAY (July 9, 2015)). Admittedly, providing services for free is a temporary measure (that need last only so long as necessary to obtain relief from this Court for Sheriff Dart's actions and the termination of card services). Like all publishers, Backpage.com needs revenues to survive, and the company can withstand coercive informal censorship only so long. Ferrer Decl. ¶ 28. In the meantime, Sheriff Dart's actions have also harmed and will continue to harm Backpage.com's efforts to police and preclude improper ads, *see id.* ¶ 29 (without credit card charges, spam and other improper ads increase significantly, requiring the company to commit resources and personnel to these issues and detracting from efforts to monitor ads and assist law enforcement). Moreover, in addition to harming Backpage.com as a publisher, the Sheriff's actions threaten and harm the website's users and their rights to speak and receive speech.

II. ARGUMENT

This Court should grant immediate injunctive relief in this case because the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod*, 427 U.S. at 373. The standards for preliminary injunctive relief under Federal Rule 65 are no doubt familiar to the Court.[5] In First Amendment cases like this one, the

[5] The standards for a temporary restraining order and a preliminary injunction are the same. *Long v. Bd. of Educ., Dist. 128*, 167 F. Supp. 2d 988, 990 (N.D. Ill. 2001). Injunctive relief is warranted when plaintiffs demonstrate: "(1) they are reasonably likely to succeed on the merits; (2) no adequate remedy at law exists; (3) they will suffer irreparable harm which, absent injunctive relief, outweighs the irreparable harm the respondent will suffer if the injunction is granted; and (4) the injunction will not harm the public interest." *Joelner v. Vill. of Wash. Park*,

likelihood of success on the merits is usually the determinative factor. *Wis. Right to Life, Inc. v. Barland*, 751 F.3d at 830-31. Here, Backpage.com's likelihood of success is apparent—Sheriff Dart's actions constitute a *per se* unconstitutional prior restraint of speech. At the same time, the irreparable harm to free speech rights of Backpage.com and its users is enormous—the Sheriff's actions threaten to shut down the entire website, and indeed that is his aim—and they will continue every day absent emergency relief from the Court.

A. Backpage.com is Likely to Prevail on Its Claims That Sheriff Dart's Informal Scheme of Prior Restraint Violates the First and Fourteenth Amendments.

Sheriff Dart's "cease and desist" letters to the credit card companies used the power of his office and not-subtle threats to accomplish indirectly what the law prohibits him from doing directly. Six years ago, this Court rebuffed his attempt to use the law to close down adult-oriented online classifieds, stating in no uncertain terms that "he cannot sue Craigslist for their conduct." *Dart v. Craigslist*, 665 F. Supp. 2d at 969. He knows as well that state legislative efforts targeting Backpage.com have been invalidated under Section 230 of the CDA and the First Amendment, *McKenna*, 881 F. Supp. 2d at 1275; *Cooper*, 939 F. Supp. 2d at 824-825, 828-840; *Hoffman*, 2013 WL 4502097, at *5-11, and that courts have barred tort claims against Backpage.com because federal immunity under Section 230 preempts state laws (or state authorities) from imposing liability on websites for third-party posts, *see Doe v. Backpage.com, LLC*, 2015 U.S. Dist. LEXIS 63889, at *1; *M.A. v. Village Voice Media Holdings*, 809 F. Supp. 2d at 1049-50. Sheriff Dart admits his censorship efforts have been and are blocked by the Constitution and federal law. *See* Section II.A.2, *infra*. Yet, because he believes the law is

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378 F.3d 613, 619 (7th Cir. 2004). The factors are evaluated on a sliding scale so that "the greater the likelihood of success on the merits, the less heavily the balance of harms must tip in the moving party's favor." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014) (internal quotation marks and citation omitted).

"absurd" and "antiquated," Sheriff Dart concluded he could pursue "an out-of-the-box" idea to evade it. Under the Constitution and longstanding precedent, he cannot.

1. Sheriff Dart's Actions Constitute an Informal, Extralegal Prior Restraint of Speech.

Sheriff Dart's approach to censorship is nothing new. His ploy to accomplish informally what the law precludes him from doing formally is merely "a scheme of state censorship effectuated by extralegal sanctions," of the sort the Supreme Court rejected over fifty years ago in *Bantam Books*, 372 U.S. at 72.

Bantam Books concerned an informal scheme of censorship similar in many respects to Sheriff Dart's actions except that, if anything, the Sheriff's conduct is more egregious. In that case, the Rhode Island "Commission to Encourage Morality in Youth" sent letters to distributors entreating them to prevent the circulation of certain books the commission deemed "objectionable." *Id.* at 59, 61. The letters were phrased as requests seeking distributors' "cooperation," and the commission had no authority to commence prosecutions or take other legal action, although it suggested it would provide its views to police and the state attorney general. *Id.* at 62-63 & n.5. The Supreme Court held that this informal coercive innuendo violated the First Amendment: "We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." 372 U.S. at 67.[6] The Court also rejected the state's argument that the letters were not unlawful because distributors were "free to ignore" them, finding instead that they were "thinly veiled threats to institute criminal proceedings against [the distributors] if they

[6] Although *Bantam Books* was the first time the Supreme Court invalidated an informal censorship scheme, the decision was based on constitutional principles that were not new, even in 1963. The Court listed numerous cases in which "[t]hreats of prosecution or of license revocation, or listings or notifications of supposedly obscene or objectionable publications or motion pictures, on the part of chiefs of police or prosecutors, have been enjoined." *Id*. at 67 n.8 (collecting cases).

do not come around." *Id.* at 68. The Court concluded Rhode Island's scheme was unconstitutional, as it constituted an informal "system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned." *Id.* at 70.

Bedrock First Amendment law teaches that prior restraints are "the essence of censorship," *Near v. Minnesota*, 283 U.S. 697, 713 (1931), and are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559. Accordingly, "[a]ny system of prior restraints of expression comes to [the courts] bearing a heavy presumption against its constitutional validity." *Bantam Books*, 372 U.S. at 70. In fact, the presumption against prior restraints "is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) ("Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.").

Prior restraints are permissible only in "the most exigent circumstances," *ACLU v. City of Pittsburgh*, 586 F. Supp. 417, 423 (W.D. Pa. 1984) (citing *Near*, 283 U.S. at 697), if they (1) "fit within one of the narrowly defined exceptions to the prohibition against prior restraints," ***and*** (2) the government provides requisite "procedural safeguards that reduce the danger of suppressing constitutionally-protected speech," *Southeastern Promotions*, 420 U.S. at 559; *see also Bantam Books*, 372 U.S. at 70-71. Sheriff Dart's tack fails on both counts. His actions fall into none of

the few exceptions where a prior restraint may be allowed,[7] and his off-the-books approach provided no process whatsoever (as discussed below).

It is well established in this Circuit that unconstitutional prior restraints may occur by direct or indirect government action, *Admiral Theatre v. City of Chicago*, 832 F. Supp. 1195, 1204 (N.D. Ill. 1993), and "the mere threat of the imposition of sanctions is sufficient present infringement to justify redress," *Muller v. Conlisk*, 429 F.2d 901, 903 (7th Cir. 1970). Consistent with these principles, many cases have followed *Bantam Books* and found that informal censorship schemes violate the First Amendment.[8] For example in *Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228 (4th Cir. 1970), the Fourth Circuit upheld an injunction against a sheriff who had threatened theatre owners for showing X- or R-rated movies. Similarly, in *Corsican Productions v. Pitchess*, 338 F.2d 441 (9th Cir. 1964), the Ninth Circuit reversed dismissal of a complaint against a sheriff who threatened distributors for exhibiting certain films. In *City of Pittsburgh*, 586 F. Supp. at 425, the court granted injunctive relief against a mayor who sent a letter urging magazine vendors not to distribute an edition of *Hustler* magazine the mayor

[7] This case does not involve time, place or manner regulations, protection of a captive audience, an attempt to balance equities based on competing claims of rights, or a temporary bar pending judicial resolution. *City of Pittsburgh*, 586 F. Supp. at 423 (holding that mayor's letter seeking "cooperation" to prevent sales of *Hustler* magazine "does not fall within a recognized judicial exception to the doctrine of prior restraint").

[8] *See e.g.*, *Okwedy v. Molinari*, 333 F.3d 339, 343-44 (2d Cir. 2003) (reinstating First Amendment claim against borough president who had written to billboard company urging withdrawal of an offensive billboard); *Rossignol v. Voorhaar*, 316 F.3d 516, 526 (4th Cir. 2003) (reinstating First Amendment claim challenging informal actions of sheriff to remove critical newspaper articles from circulation); *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991) (reinstating claim against village trustee who sent letter complaining about a political ad in a chamber of commerce publication); *Council for Periodical Distribs. Ass'n v. Evans*, 642 F. Supp. 552, 560-562 (M.D. Ala. 1986), *vacated in part on other grounds*, 827 F.2d 1483 (11th Cir. 1987) (enjoining local prosecutor based on his "thinly veiled threats" about distribution of sexually explicit magazines); *HMH Publ'g Co. v. Garrett*, 151 F. Supp. 903, 904-06 (N.D. Ind. 1957) (enjoining prosecutor based on letter containing an implied threat of prosecution and attaching a list of "pernicious" magazines).

believed would be offensive. And in *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581, 585-89 (D.D.C. 1986), the court enjoined and ordered retraction of a letter sent by the Attorney General's Commission on Pornography to retailers suggesting the commission might list them as distributors of pornography.

In this case, Sheriff Dart's press statement that his cease and desist letters "compel[led]" Visa and Mastercard to "defund" Backpage.com" is tantamount to a signed confession. Based on his actions and public statements, there can be no doubt the Sheriff "deliberately set about to achieve the suppression of [Backpage.com] and succeeded in [his] aim." *Bantam Books*, 372 U.S. at 67. As *Bantam Books* and its progeny attest, the fact that he used threats and exhortations as opposed to legal process does not matter, but rather makes his conduct and infringement of free speech rights worse.

Sheriff Dart cannot seriously argue that the letters merely expressed his personal views or only requested voluntary cooperation from the credit card companies (based on his moral views). In the first sentence of the letters, the Sheriff says he is "a father and a caring citizen," but also says he is writing "[a]s the Cook County Sheriff," and everything else in the letters threatens expressly and implicitly that he would seek and pursue sanctions against the card companies if they did not comply with his demands to "defund" Backpage.com. *See* Complaint Ex. B. Writing on official Cook County stationary, he emphasized that he is a law enforcement official and supposedly "ha[d] objectively found" that Backpage.com "facilitate[s] sex trafficking" (without mentioning that the website takes extensive measures to prevent and combat trafficking and that his office has commended the company for its efforts and assistance), and he stressed the card companies should block all Backpage.com transactions because of his allegations the website "indirectly engages in or facilitates [an] activity that is illegal." *Id.* at 1, 2. To drive his

point home, the Sheriff pointed to the card companies' "legal dut[ies]" and statutory provisions permitting criminal penalties and allowing for investigations and license revocations. *Id.* at 2 & n. iv; *see* Section I.E, *supra.* Sheriff Dart not only threatened the credit card associations but also their directors and "investors," *i.e.*, other financial institutions subject to government regulation and investigation. *Id.* at 3. At bottom, Sheriff Dart demanded MasterCard and Visa "immediately cease and desist from allowing your cards to be used to place ads on … Backpage.com," and said, if they did not, his office would follow up within the week. *Id.* at 1, 3.

There is nothing subtle about Sheriff Dart's letters, his demands, or the repercussions he threatened. "People do not lightly disregard public officers' thinly veiled threats … against them if they do not come around," and the card companies' reactions were "no exception to this general rule." *Bantam Books*, 372 U.S. at 68. Many courts have found actions like this to be coercive and unconstitutional despite officials' protestations that they were merely seeking "cooperation" or offering "advice." In *Bantam Books* itself, the Supreme Court held that book vendors had been coerced despite that they were "'free' to ignore the Commission's notices, in the sense that ... refusal to 'cooperate' would have violated no law." 372 U.S. at 68. In *Okwedy*, 333 F.3d at 344, the Second Circuit found an official's letter seeking "dialogue" could be interpreted as a threat when he invoked his authority as "Borough President of Staten Island" to complain about an offensive billboard and pointed out that he was aware that the billboard company "owns a number of billboards on Staten Island and derives substantial economic benefits from them." *Id.* at 342. In another case, the same court concluded that a letter from a village trustee questioning a chamber of commerce publication and hinting at a boycott "may reasonably be viewed as an implicit threat." *Rattner*, 930 F.2d at 210. In case after case—and

even without anything like Sheriff Dart's history of failed enforcement efforts—courts routinely have rejected officials' assertions that they merely meant to be persuasive but not coercive.[9]

Nor can Sheriff Dart credibly claim his demand to "defund" Backpage.com was not censorship. Adverse government action need not amount to an express prohibition to violate the First Amendment. "The distinction between laws burdening and laws banning speech is but a matter of degree." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000). As the Supreme Court has recognized, financial burdens on publishers or unpopular speakers are akin to the obnoxious taxes that led to adoption of the First Amendment, and government attempts to censor by imposing financial pressure also amount to an unconstitutional form of prior restraint. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 583-584 & n.6, 586 n.9 (1983). As the Fourth Circuit held in *Huskey*, where a mayor tried to informally censor X- and R-rated movies: "[T]he public, faced with a steady diet of 'G' movies, stayed away [from the theaters] in droves, and … the effect of the ban would have been to put the plaintiff out of business." *Huskey*, 435 F.2d at 229.

Sheriff Dart's actions have also denied Backpage.com due process and, for that matter, any process at all. The Sheriff's branding of Backpage.com as "facilitat[ing] sex trafficking" based on his accusations (which are no different from the allegations he leveled and this Court

[9] *See Rossignol*, 316 F.3d at 526 (implicit threat found where police officers purchased all copies of a newspaper while off duty); *City of Pittsburgh*, 586 F. Supp. at 425 (rejecting argument that the "Mayor acted with great restraint by seeking voluntary compliance instead of instituting civil or criminal proceedings against the vendors"); *Evans*, 642 F. Supp. at 563 (rejecting prosecutor's claim that he sought only voluntary cooperation where "his words and deeds avow[ed] a calculated scheme to provoke retreat by those who dared to sell sexually explicit magazines"). Exceptions to such findings generally occur only in cases where the public official's correspondence suggested no adverse official action, *see, e.g.*, *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 36-37 (2d Cir. 1983), or prior insinuations were moot, *see e.g.*, *Penthouse, Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1018 (D.C. Cir. 1991) (letter retracted in compliance with preliminary injunction).

rejected in *Dart v. Craigslist*) without any judicial determination, notice, or opportunity to be heard, is unconstitutional by itself. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951) (Attorney General's designation of certain organizations as communist without notice or hearing violated due process because the designations "cripple the functioning and damage the reputation of those organizations in their respective communities and in the nation"). Many of the constitution's core liberties are premised on the notion that "procedural safeguards constitute the major portion of our Bill of Rights." *Id*. at 164 (Frankfurter, J., concurring); *see also Palko v. Connecticut*, 302 U.S. 319, 326-327 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969).

The denial of due process has special significance when a government official tries to impose a prior restraint by informal means, as *Bantam Books* and many other cases have held. Even in the rare circumstances when a prior restraint may be permissible (none of which is present here), such a restraint nonetheless violates the First Amendment if it lacks "procedural safeguards designed to obviate the dangers of a censorship system." *Southeastern Promotions*, 420 U.S. at 559, 560. The essential due process safeguards are:

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to a judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Id. at 560; *see Freedman v. Maryland*, 380 U.S. 51, 58 (1965). But, when a prior restraint is imposed using informal pressure, as it was here, there is no way these requirements can be met, because the censor completely evades due process. Thus, the Supreme Court found in *Bantam Books* that actions such as Sheriff Dart's have a far greater "capacity for suppression" than formal measures such as government licensing schemes, because there is "no provision whatever

for judicial superintendence before notices issue or even for judicial review." *Bantam Books*, 372 U.S. at 71.

Here, by design, Sheriff Dart set out to avoid due process protections and any judicial determination about whether adult-oriented ads on Backpage.com are prohibited or protected speech. The Sheriff lost on this score long ago—this Court rejected his contention that adult services ads on Craigslist necessarily were unlawful, *Dart v. Craigslist*, 665 F. Supp. 2d at 968, and many cases have since confirmed that such ads on Backpage.com are protected speech, *see McKenna*, 881 F. Supp. 2d at 1282; *Cooper*, 939 F. Supp. 2d at 831-32; *Hoffman*, 2013 WL 45029087, at *9-10, *see generally* Section II.A.2, *infra.* Contrary to the Supreme Court's requirements, Sheriff Dart did not want to preserve the status quo—*i.e.*, the credit card companies would continue allowing use of their cards pending a judicial determination—but to destroy it. Sheriff Dart's actions are as blatant a violation of due process protections attendant to First Amendment rights as could be. The need for immediate relief for Backpage.com and its users is patent.

2. Sheriff Dart's Actions Violate Essentially All First Amendment Principles.

Sheriff Dart's actions not only transgress prohibitions against prior restraints, but many other fundamental First Amendment principles, including that the government must prove it is serving a compelling interest using the least restrictive means possible, *Playboy Entertainment Group, Inc.*, 529 U.S. at 813, and that speech restrictions are narrowly-tailored and precisely defined, *Reno v. ACLU*, 521 U.S. 844, 871-874 (1997).

Specifically, Sheriff Dart is seeking to evade this Court's finding in the case he brought (and lost) that "Plaintiff is simply wrong when he insists that these terms [*i.e.*, the "adult services category and subcategories on Craigslist] are all synonyms for illegal sexual services," and its

ruling that federal law bars holding online providers like Backpage.com liable as publishers. *Dart*, 665 F. Supp. 2d at 967-68 ("Intermediaries are not culpable for 'aiding and abetting' their customers who misuse their services to commit unlawful acts."). He also ignores First Amendment holdings in subsequent cases that barred legislative efforts in Washington, New Jersey, and Tennessee to accomplish much the same thing the Sheriff is attempting to do here.

McKenna, *Cooper*, and *Hoffman* enjoined the state laws targeting Backpage.com because they would have "chill[ed] a substantial amount of protected speech." *McKenna*, 881 F. Supp. 2d at 1282-83 (noting that ads for escort services are protected speech and, because websites would have strong incentives to shut down any section allowing escort ads or require blanket age verification, "[t]his kind of restriction could cause dangerous chilling effects across the Internet"); *Cooper*, 939 F. Supp. 2d at 831 (finding law "likely substantially broader than required for its regulatory purpose to protect the health and safety of minors trafficked in Tennessee and would likely include constitutionally protected speech"); *Hoffman*, 2013 WL 4502097, at *9-11 (finding New Jersey law "likely both unconstitutionally overbroad and vague"). The courts held that the state laws were content-based restrictions on speech and, as such, failed to satisfy strict First Amendment scrutiny. *See Cooper*, 939 F. Supp. 2d at 837-838 ("Defendants have failed to address [less restrictive] alternatives, much less have they shown that the state's current solution has any effect on reducing sex trafficking."); *McKenna*, 881 F. Supp. 2d at 1283-84 ("Defendants do not acknowledge that the statute reaches protected speech, and therefore fail to show that SB 6251 is the least restrictive means available to forward their compelling interest.").

Sheriff Dart may feel it is unfair to saddle him with the constitutional deficiencies of the prior state laws that tried to achieve his objective of shutting down Backpage.com. After all, he

is not implementing any law at all. But therein lies the problem. Sheriff Dart chose to take matters into his own hands because he wanted to avoid the constitutional scrutiny necessarily associated with proceeding via formal legal channels. However, his actions still must conform to First Amendment commands even where he attempts to function as an "instrument[] of regulation independent of the laws." *Bantam Books*, 372 U.S. at 68-69. "[I]t is immaterial whether in carrying on the function of censor, [Sheriff Dart] may have been exceeding [his] statutory authority" or proceeding entirely without legal sanction. *Id*. at 69 n.9. To the extent he wants to restrict speech or a particular speaker based on content, his actions must satisfy strict scrutiny, and any such regulation must be narrowly-tailored and precisely defined.

But there is no way a local official can meet these constitutional requirements when he simply imposes his personal predilections, as Sheriff Dart has done. It is a basic premise of our system that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Sheriff Dart targeted Backpage.com generally, and the ads carried in its "adult" sections specifically, because of his distaste for their content. This, the First Amendment does not permit. *Playboy Entm't Grp.*, 529 U.S. at 812 (First Amendment protects against efforts "designed or intended to suppress or restrict expression of specific speakers"); *Schultz v. City of Cumberland*, 228 F.3d 831, 840 (7th Cir. 2000) ("[N]or can the government suppress an entire category of speech, even if the regulation is viewpoint-neutral within that category of speech, because the First Amendment bars 'prohibition of public discussion of an entire topic.'"). Accordingly, his actions must be enjoined.

3. Sheriff Dart's Actions Impose a Standardless and Unbounded Restriction on Protected Speech

There is an even deeper constitutional problem here. Sheriff Dart's actions to censor all of Backpage.com because of his objection to ads in its adult section impose grossly overbroad restrictions on speech protected by the First Amendment. Although Sheriff Dart may dislike that Backpage.com has sections reserved for adults, the Supreme Court has made clear that such expression is fully protected by the Constitution. *Reno*, 521 U.S. at 874. Moreover, the First Amendment does not permit the government to impose overly broad restrictions on such speech, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002), nor does it vest local officials with discretion to pick and choose what speech deserves constitutional protection, *City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987). "The Constitution tells us that – when freedom of speech hangs in the balance – the state may not use a butcher knife on a problem that requires a scalpel to fix." *Cooper*, 939 F. Supp. 2d at 812.

No principle in First Amendment jurisprudence would permit Sheriff Dart to treat all of Backpage.com as illegal based on his allegations that some ads on the site may concern trafficking. Quite the contrary, "[t]he Constitution requires the reverse"; the government "may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter." *Free Speech Coalition*, 535 U.S. at 255. The First Amendment presumes that "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Id*. (quotation omitted).

Flaunting these well-established principles, Sheriff Dart's actions in this case were even more extreme. He did not just target ads in the adult categories as he had in the Craigslist case, but compelled MasterCard and Visa to immediately "cease and desist" allowing use of their

cards for any purpose on Backpage.com. This is tantamount to a government closure of a bookstore because the sheriff suspects the store might sell an obscene book. The First Amendment does not allow elimination of an entire forum of speech in this way. *See Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-17 (1980) (Texas law allowing authorities to close movie theatres as public nuisances based on objections to movies shown in the past held unconstitutional); *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 138-39 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981) (Washington law allowing closure of bookstore because obscene materials may have been sold was impermissible under the First Amendment). Censoring the entire website—not merely adult ads but all other adds as well—eliminates a vast amount of speech that "has no connection to prostitution, much less child sex trafficking." *Cooper*, 969 F. Supp. 2d at 831-32. *See also McKenna*, 881 F. Supp. 2d at 1281-82; *Hoffman*, 2013 WL 4502097, at *9-10. [10]

Once again, Sheriff Dart's approach is exacerbated by the fact that he is proceeding not under the law, but as a vigilante with a badge. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988) (government actors do not have unlimited discretion to penalize speech they disfavor). His tactics mirror those of the North Carolina sheriff who decided that no X- or R-rated movies could be shown in his county – based on "his considered opinion that all films except those rated for general audiences" were obscene – and threatened to prosecute and confiscate films if exhibitors showed them. *Huskey*, 435 F.2d at 229. The Fourth Circuit held

[10] The extreme overbreadth of Sheriff Dart's actions is illustrated by the statistics cited in his letters to the credit card companies. He asserted that users posted 1,461,227 escort ads on Backpage.com in one month, while "in 800 instances" over the last five years his department had used the website "to arrest for crimes from prostitution to child trafficking." Complaint Ex. B, at 2. He failed to mention that almost all of the arrests were for prostitution rather than trafficking or that his office used the Backpage.com website for sting operations. Regardless, even accepting the Sheriff's accusations, they reflect that the improper ads his office found amounted to less than .0000095% of the adult ads on the website.

that the sheriff's approach "cannot be tolerated in a free society" because it left the determination of what was obscene to the sheriff's unreviewable discretion. *Id*. at 229-30 (the sheriff acted in the mistaken belief "that he was himself authorized by law to make the determination of obscenity in any manner he saw fit"). The same can be said of Sheriff Dart's actions.

This, of course, affects not just the First Amendment interests of Backpage.com, but those of the millions of individuals who use the website to post ads to communicate with others. *Schultz*, 228 F.3d at 848; *Shirmer v. Washington*, 100 F.3d 506, 508 & n.1 (7th Cir. 1996). It also affects those who use Backpage.com to obtain information because "[f]reedom of speech is not merely freedom to speak; it is also freedom to read." *Kroger v. Dart*, 2015 WL 4079807, at *4 (N.D. Ill. July 6, 2015) (quoting *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 638 (7th Cir. 2005). Accordingly, injunctive relief is essential to preserve First Amendment rights in this case.

B. Injunctive Relief is Necessary to Prevent Continuing Irreparable Injury to Backpage.com and Its Users.

The irreparable injury suffered by Backpage.com in this case is obvious. Sheriff Dart expressly targeted Backpage.com to suppress all speech on the website and persuaded the credit card companies to go along. Such suppression of First Amendment rights inherently causes irreparable harm. *Elrod*, 427 U.S. at 373; *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012). But even if this case lacked a constitutional dimension, and Sheriff Dart merely set out to destroy Backpage.com's business for reasons unrelated to speech, his actions still would support injunctive relief. *See Stuller, Inc. v. Steak N Shake Enters.*, 695 F.3d 676, 680 (7th Cir. 2012) (finding irreparable harm and affirming preliminary injunction against franchisor's demand that franchisee follow new pricing policy where franchisee presented evidence the policy would be a significant change to its business model and would negatively affect revenues).

Backpage.com has already lost significant revenues due to Sheriff Dart's actions and continues to lose more every day. The vast majority of Backpage.com's revenues come from digital credit card payments. Absent an injunction, Backpage.com faces the risk of going out of business. Sheriff Dart knows this and, in fact, it is the whole purpose of his scheme to "defund" Backpage.com; he believed he could shut down the websites "if Visa and MasterCard would say 'no more.'" Zycherman Decl. Ex. G (Bellware, HUFFINGTON POST (July 1, 2015)).

Backpage.com has continued to offer services by allowing users to post ads for free, as shutting down even temporarily would harm the website's goodwill and, more importantly, would deprive millions of users of a forum for speech. Ferrer Decl. ¶ 28. But this obviously can only be temporary. Like any publisher, Backpage.com needs revenues to survive, which underscores the need for immediate relief. Sheriff Dart recognizes the immediacy too; as reflected by his spokesman's statement that the Sheriff's actions have already brought Backpage.com to "the brink of destruction." Zycherman Decl. Ex. K (Madhani, USA TODAY, (July 9, 2015)).

Immediate injunctive relief is even more important here because Sheriff Dart has effected an informal prior restraint bypassing the constitutional mandates for procedural safeguards, including a prompt judicial determination of whether speech is unlawful. *Southeastern Promotions*, 420 U.S. at 559-60, *see* Section II.A.1 *supra.* Whatever the government's reasons or process for restraining speech, the Constitution requires "prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances." 420 U.S. at 562. Sheriff Dart bypassed all the required due process protections. He has accomplished a prior restraint with no judicial determination that all (or any) speech on Backpage.com is unlawful (though it is his burden to institute such proceedings and prove unlawfulness), and he

has destroyed the status quo to accomplish his aims. *See id.* at 560. A temporary restraining order and preliminary injunction will not fully remedy Sheriff Dart's trampling of due process and First Amendment rights. *Id.* at 561-62 (district court's prompt hearing on theatrical producer's preliminary injunction motion challenging ban on performing the musical "Hair" was "commedabl[e]" but did not cure unconstitutional lack of prior procedural safeguards). But this is the best and only means left available to stop and remedy Sheriff Dart's unconstitutional actions. Otherwise, "if judicial review is made unduly onerous, by reason of delay or otherwise, [Sheriff Dart's] determination in practice may be final." *Id.* at 561.

Backpage.com and its users cannot wait for relief until the conclusion of trial, and such a delay cannot be countenanced under the Constitution. Backpage.com has no adequate remedy at law. The harm being suffered – unlawful prior restraint – cannot be remedied by an award of damages after the fact. As the Seventh Circuit and other courts have long recognized, for First Amendment violations "quantification of injury is difficult and damages are therefore not an adequate remedy." *Alvarez*, 679 F.3d at 589 (quoting *Flower Cab. Co. v. Pettit*, 685 F.2d 192, 195 (7th Cir. 1982)). Moreover, an ultimate award of damages would be "seriously deficient as a remedy for the harm suffered." *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 (7th Cir. 1984). A damages remedy is inadequate where it "may come too late to save the plaintiff's business," and "may be inadequate even if the plaintiff leaves the business without becoming insolvent." *Id.* Backpage.com is not required to show that a damages award would be wholly ineffectual, but only that it would be "seriously deficient," *id.*, and that is certainly true here. Given the prior restraint, threat, and chilling effect to the First Amendment rights of Backpage.com and its users, no eventual damages award could ever suffice.

Conversely, immediate injunctive relief can help redress the ongoing actual and threatened First Amendment harms. Injunctive relief declaring that Sheriff Dart's actions likely (actually, patently) imposed an unlawful, unconstitutional, and overbroad prior restraint of speech can reinstate the status quo that should have been preserved if he had not acted precipitously and outside the law. The Court should direct the Sheriff to immediately retract his letters to Visa and MasterCard (and any other similar communications), providing a copy of this Court's order so the card companies understand they need not and should not terminate services to Backpage.com and its users based on his pressure, accusations or innuendo. Other cases involving unlawful informal prior restraints have required officials' retractions such as this as a preliminary remedy. *See, e.g., Playboy Enters.*, 639 F. Supp. at 588 (requiring Attorney General's Commission on Pornography to retract letters to retailers asking them to respond to accusations that they distributed pornography and suggesting they would be identified in commission's report). Such immediate corrective relief is necessary to ensure the credit card companies and the First Amendment rights at issue here are "free of coercion and without prior restraint." *Evans*, 642 F. Supp. at 560 (M.D. Ala. 1986).

C. The Public Interest Favors Immediate Injunctive Relief

"[I]njunctions protecting First Amendment freedoms are always in the public interest." *ACLU of Ill. v. Alvarez*, 679 F.3d at 590 (internal quotation omitted); *accord Personal PAC v. McGuffage*, 858 F. Supp. 2d 963, 969 (N.D. Ill. 2012). "[T]he public … has an undeniable interest in seeing that the First Amendment is enforced to protect free expression," *Entertainment Software Ass'n v. Chicago Transit Auth.*, 696 F. Supp. 2d 934, 949 (N.D. Ill. 2010), and "the public interest is not harmed by preliminarily enjoining the enforcement of [regulation] that is probably unconstitutional," *Alvarez*, 679 F.3d at 590. The public interest inquiry thus

"collapses" into the issue of likelihood of success on the merits, *id.* at 589, and, as shown above, the likelihood of success in this case is exceedingly high.

Where First Amendment rights are at issue, the balance of equities inherently favors injunctive relief because "no substantial harm to others can be said to inhere" in allowing a constitutional violation to continue. *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001); *see also Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004) (preliminary injunction necessary to protect First Amendment rights because "speakers may self-censor rather than risk the perils of trial"). On the other hand, the harm to First Amendment rights and Backpage.com is severe and potentially crippling if immediate injunctive relief is denied. Sheriff Dart seeks to shut down the entire website, hoping Backpage.com cannot obtain relief in time, and he may succeed if this Court does not act.

Sheriff Dart's illegal actions not only burden and threaten to eliminate protected speech on Backpage.com, they also undermine his purported objective to combat sex trafficking. Experts and many law enforcement officials have recognized that trying to censor or shut down websites because they may be misused for trafficking is a misguided and ineffective "whack-a-mole" technique, and that the better approach is to work with online providers and use technology to identify, pursue and prosecute traffickers (as Backpage.com has done). *See McKenna*, 881 F. Supp. 2d at 1284 (finding Washington statute targeting Backpage.com underinclusive under strict scrutiny analysis because ads would migrate elsewhere).[11]

[11] *See also, e.g.*, D. Boyd, *Combating Sexual Exploitation Online: Focus on the Networks of People, not the Technology* (Oct. 19, 2010), http://www.danah.org/papers/talks/2010/CombatingSexualExploitationOnline.pdf ("Going after specific sites where exploitation becomes visible and attempting to eradicate the visibility does nothing to address the networks of supply and demand—it simply pushes them to evolve and exploiters to find new digital haunts and go further underground."); M. Latonero, *et al.*, *The Rise of Mobile and the Diffusion of Technology Facilitated Trafficking* (Nov. 2012), at 26-27, https://technologyandtrafficking.usc.edu/files/

As for the requirement that the Court consider the balance of harms as between plaintiff and defendant, there is no contest. Sheriff Dart will suffer no harm if his informal prior restraint attempting to shut down Backpage.com is enjoined. He can still enforce state prostitution and anti-trafficking laws and use the website "to identify and pursue individuals who post allegedly unlawful content." *Dart v. Craigslist*, 665 F. Supp. 2d at 969. He can do this with the cooperation and assistance of Backpage.com, as before.[12] Indeed, if credit card services are reinstated, Backpage.com can provide better assistance to Sheriff Dart's office and other law enforcement authorities than it can now, *i.e.*, identifying information based on card usage that Sheriff Dart previously demanded Backpage.com should provide and it had provided. *See* Ferrer Decl. ¶ 21 & Exs. K, M. On the other hand, if the Sheriff's actions are left to stand without immediate relief from the Court, free speech protections will suffer by the day. Finally, an injunction would not "impose significant burdens" or any burdens, for that matter, on Sheriff Dart. *Cf. Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011).[13]

2011/08/HumanTrafficking2012.pdf; Letter from Attorney General Harris, *Human Trafficking*, http://oag.ca.gov/human-trafficking (technology can provide a digital trail, prevent and disrupt trafficking, and provide ways to reach victims and raise public awareness).

[12] While Backpage.com remains committed to assist law enforcement, Sheriff Dart's actions have made that more difficult, as the volume of adult ads on the website have increased significantly and Backpage.com has had to divert resources to deal with spam and other issues, thus diverting personnel and attention from law enforcement support. *See* Ferrer Decl. ¶ 29.

[13] Backpage.com urges that no bond should be required in support of the injunction. "[T]he Seventh Circuit has recognized that there is no reason to require a bond in cases where the Court is satisfied that there is no danger that the opposing party will incur any damages from the injunction." *Planned Parenthood of Ind. & Kty., Inc. v. Commissioner, Ind. State Dept. of Health*, 984 F. Supp. 2d 912, 931 (S.D. Ind. 2013) (citing *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010)). Similarly, courts in the circuit recognize that an injunction bond may be excused when claims affect a plaintiff's and the public's exercise of constitutional rights. *See, e.g.*, *Ogden v. Marendt*, 264 F. Supp. 2d 785, 795 (S.D. Ind. 2003); *Smith v. Board of Elections Comm'rs for Chicago*, 591 F. Supp. 70, 71-72 (N.D.Ill.1984) (waiving bond requirement for case involving First Amendment freedoms).

III. CONCLUSION

Sheriff Dart's actions are a blatantly unconstitutional prior restraint of speech. His coercive pressure on credit card companies to terminate services for the Backpage.com website burdens and chills vast amounts of constitutionally protected speech now and threatens to eliminate it altogether if the Court does not act quickly. Backpage.com thus respectfully urges that immediate emergency injunctive relief in this case is paramount to correct, prevent and preclude infringement of First Amendment and due process rights.

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Respectfully submitted,

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