IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-56455

In re: ANY AND ALL FUNDS HELD IN REPUBLIC BANK OF ARIZONA ACCOUNTS XXXX1889, XXXX2592, XXXX1938, XXXX2912, AND XXXX2500,

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES LARKIN, Real Party in Interest Defendant; JOHN BRUNST, Real Party in Interest Defendant; MICHAEL LACEY, Real Party in Interest Defendant; SCOTT SPEAR; Real Party in Interest Defendant,
Movants-Appellants.

On Appeal from United States District Court for the Central District of California
The Honorable R. Gary Klausner, United States District Judge

BRIEF OF THE DKT LIBERTY PROJECT, THE CATO INSTITUE, AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

Jessica Ring Amunson
Counsel of Record
Tassity Johnson
Jenner & Block LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6023
jamunson@jenner.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that The DKT Liberty Project, Cato Institute, and Reason Foundation have no parent corporations and that no publicly held corporation owns 10 percent or more of their stock.

/s/ Jessica Ring Amunson
Counsel for *Amici Curiae*

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

A. The First Amendment Presumptively Protects Publishing Assets and Proceeds from Seizure. 6

B. Because the First Amendment Presumptively Protects Publishing Assets and Proceeds from Seizure, an Adversarial Hearing Was Required to Test the Government's Assertion of Probable Cause. 11

C. The Government Is Using Seizure of Publishing Assets and Proceeds to Silence Disfavored Speech. 15

CONCLUSION 18

CERTIFICATE OF SERVICE 19

CERTIFICATE OF COMPLIANCE 20

TABLE OF AUTHORITIES

CASES

A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) 12, 16

Alexander v. United States, 509 U.S. 544 (1993) 13

Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 8-9

Ashcroft v. ACLU, 535 U.S. 564 (2002) 11

Backpage.com, LLC v. Dart, 807 F.3d 229 (7th Cir. 2015) 6

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 16, 18

Bd. of Educ., v. Pico, 457 U.S. 853 (1982)...7

Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010) 7-8

Dombrowski v. Pfister, 380 U.S. 479 (1975)...16

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 3, 12, 13, 14, 15

Leathers v. Medlock, 499 U.S. 439 (1991) 9

Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968)..16

Marcus v. Search Warrants of Prop., 367 U.S. 717 (1961) 15, 16

Matal v. Tam, 137 S. Ct. 1744 (2017) 6

New York v. P.J. Video, Inc., 475 U.S. 868 (1986) 14

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 6

Reno v. ACLU, 521 U.S. 844 (1997) 6, 10

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995)...................8

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991)...6, 7, 8, 9

Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011) 8

Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)..13

United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n,
389 U.S. 217 (1967)....................7

United States v. PHE, Inc., 965 F.2d 848 (10th Cir. 1992)....................5, 17

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000)....................11

INTERESTS OF *AMICI CURIAE*[1]

Amici are nonprofit organizations dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against all forms of government interference. *Amici* have a particular interest in this case because the government's use of its civil forfeiture powers to silence disfavored speakers poses a grave threat to individual liberty and the rights guaranteed by the First and Fourth Amendments.

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and protecting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance over regulation of all kinds, but especially those that restrict individual civil liberties. The Liberty Project has filed several briefs as *amicus curiae* in the United States Supreme Court and the courts of appeals on issues involving constitutional rights and civil liberties, including First Amendment rights, freedom from unreasonable searches and seizures, and the right to own and enjoy property.

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *amici* states that all parties have consented to the filing of this brief. Counsel further affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as *amicus curiae* in cases raising significant constitutional or legal issues.

SUMMARY OF ARGUMENT

This case presents questions of critical importance under the First and Fourth Amendments that are of great concern to *amici*. The Supreme Court has held that although "the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause . . . it is otherwise when materials presumptively protected by the First Amendment are involved." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989). In the case below, the government has ignored this admonition, seizing defendants' assets and other materials that are presumptively protected by the First Amendment with neither a pre- nor a prompt post-seizure hearing. The government's position appears to be that it is entitled to effect these seizures because the materials at issue are not actually protected by the First Amendment. But the government has it backwards. Proving that the materials are not protected by the First Amendment through an adversarial hearing is what the government must do *before* it is entitled to take them.

Amici write to amplify the danger that the government's use of civil forfeiture to seize the assets and proceeds of expressive material poses to free expression. The government has shut down a major internet site and confiscated millions of dollars of assets and proceeds not only from that site, but also from defendants' numerous other publishing ventures—ventures completely unrelated to the alleged criminal

activity of the site and indisputably protected by the First Amendment. And the government has done so on nothing more than its say-so that the site and the assets and proceeds are not protected by the First Amendment. Absent any meaningful judicial check on the government here, nothing can stop it from going after other internet sites that it deems unworthy of First Amendment protection, as well as any assets held by those who own the sites. Although the government attempts to evade judicial review of its actions by this Court, judicial vigilance should be at its height when the First Amendment is at stake.

Expressive materials—such as newspapers, books, and their internet analogs—are presumptively protected by the First Amendment. And this presumptive protection extends to the assets for producing such material, as well as the proceeds from their dissemination. The First Amendment's protections must reach such assets and proceeds to preserve the integrity of the marketplace of ideas; for if the government can selectively deprive certain speakers of the financial incentive to speak, then the government can silence the speakers themselves. The burden for rebutting the presumptive protection that all expression enjoys rests with the government. It is a heavy burden, as it must be to ensure the protections of the First Amendment. The government, then, can only seize expressive materials—including the assets and proceeds associated with expressive materials—if they are

unprotected by the First Amendment. And the government must first demonstrate that the materials are not protected, as a matter of law, in an adversarial proceeding.

The government did not seize the defendants' assets and proceeds after an adversarial proceeding—or any proceeding at all. Instead, it usurped a role meant for an impartial arbiter, by simply assuming that these assets and proceeds were not protected by the First Amendment. Unfortunately, the government's conduct here is not new. The history of government efforts to suppress and censor disfavored speakers, particularly speakers who offer sexually explicit expressive materials, is long. Along with overseeing censorship boards and organizing adult bookstore raids, the government has previously mounted a multistate prosecutorial campaign designed to intimidate the adult entertainment industry into silence. *See United States v. PHE, Inc.*, 965 F.2d 848 (10th Cir. 1992). This campaign involved tactics similar to those employed here, designed to bankrupt speakers by forcing them to litigate on multiple fronts to prove that their speech is protected by the First Amendment. Throughout this history, however, the government's efforts to silence these speakers largely have been thwarted by the Supreme Court's clear instruction on the breadth of the First Amendment and the limits of government censorship over protected speech. This Court should follow the Supreme Court's instruction and deem the government's seizures unconstitutional under the First and Fourth Amendments.

ARGUMENT

A. The First Amendment Presumptively Protects Publishing Assets and Proceeds from Seizure.

"[I]t is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys." *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017). The First Amendment shields traditional and nontraditional forms of expression alike from government censorship. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997). Backpage.com and other Internet websites are as protected from content and viewpoint discrimination as newspaper companies and book publishers. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 46 (2016) (finding violation of Backpage.com's First Amendment rights). Government regulation that targets the content of expressive material, on and off the Internet, is presumptively unconstitutional. *See Matal*, 137 S. Ct. at 1766; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("The First Amendment presumptively places [content-based burdens on speech] beyond the power of the government.").

What the government cannot do to speech directly, it likewise cannot do indirectly, for "[t]he First Amendment would . . . be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as

no law is passed that prohibits free speech . . . ." *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). Accordingly, just as the government cannot seize a book because it disapproves of the viewpoints therein, *see Bd. of Educ., v. Pico*, 457 U.S. 853, 872 (1982) (schools cannot remove books from library "simply because they dislike" the books' ideas), it cannot indirectly seize a disfavored book by seizing the assets for and proceeds from producing the book. The First Amendment presumptively protects not only the expressive materials themselves, but also the assets used to produce expressive materials and the proceeds from their dissemination.

The Supreme Court made this explicit in *Simon & Schuster*, overturning the "Son-of-Sam" law, which required escrow of proceeds from publication of works describing an accused or convicted criminal's crime. *Id*. at 116-23. The government, the Court found, could not "single[ ] out income derived from expressive activity for a burden the State places on no other income," and place that burden only on "works with a specified content," without running afoul of the Constitution.[2] *Id.* at 116; *see also Citizens United v. Federal Election Comm'n*, 558

[2] The Court's holding assumed that the proceeds were the "fruits of crime." 520 U.S. at 119. The mere fact that the proceeds might be *associated* with "illegal" activity, then, was not dispositive, because the proceeds were inarguably derived from constitutionally protected expressive activity. *Id.* at 119-20. The Son-of-Sam law was invalidated on the same grounds as laws restraining expressive activity with no connection to illegal activity—it was overturned because the government lacked a

U.S. 310, 336-37 (2010) (citing *Simon & Schuster* in observing that unconstitutional suppression of speech may involve "imposing a burden by impounding proceeds on receipts or royalties").

The assets for and proceeds from publishing expressive material are thus inseparable from the expressive material itself. And as the Court has long recognized, the First Amendment cannot tolerate financial burdens on speakers when the burdens are motivated by the content of their speech, no more than it tolerates non-financial burdens. *Simon & Schuster*, 502 U.S. at 115 ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); *see also Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 557, 564, 571-72, 580 (2011) (invalidating, under First Amendment, law restricting, in part, sale of pharmacy records); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830-31, 836, 845-46 (1995) (finding First Amendment violation in university's denial of funds to newspaper with religious viewpoint); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30

---

compelling state interest for it, and because it was not narrowly tailored. *Id.* at 120-21. The government here has not argued that it has a compelling state interest in seizing defendants' assets and proceeds, or that it even needs to proffer one to justify its seizure. Instead, it has simply assumed that it can seize the assets and proceeds because they are not protected speech—the conclusion to a legal question that only a judge in an adversarial hearing can reach. *See infra* 11-15.

(1987) (finding selective taxation of magazines based on their content "repugnant" to the First Amendment).

These cases demonstrate that the First Amendment's guarantee of free speech has an economic dimension. Only when all speakers, both favored and disfavored, can participate in the marketplace of ideas can that marketplace truly thrive. Seizing the assets for and proceeds from publishing expressive materials is anathema to open exchange, because such seizure makes it financially infeasible to speak, and thus effectively acts as a restraint on the speech itself. If a disfavored publisher is deprived of its investment in its publishing enterprise, and deprived of remuneration for publishing when favored publishers are not, the disfavored publisher simply cannot afford to publish any longer. "Content-based financial disincentives" on speech can silence speakers just as effectively as proscribing access to the speech itself; for this reason, they are no more constitutional, absent a compelling state interest, than government-sponsored book-burnings. *Simon & Schuster*, 502 U.S. at 117, 118.

The instant proceeding highlights how much "content-based financial disincentives," *id.* at 117, risk "distort[ing] the market for ideas," *Leathers v. Medlock*, 499 U.S. 439, 448 (1991). Here, the government has—without notice, adversarial hearing, or any opportunity for defendants to be heard—seized millions of dollars of assets and proceeds, including advertising revenue, earned from

decades of publishing not only Backpage.com, but also more than a dozen weekly newspapers that had absolutely nothing to do with Backpage.com. The government's seizure has led Backpage.com, the second largest online classified advertising platform, to shut down completely. The government has silenced Backpage.com—leaving the marketplace of ideas with one less voice—by arguing that the seized assets and proceeds are all the product of "illegal activity,"—*i.e.*, defendants' publication of Backpage.com. But Backpage.com, as one of the Internet's "vast democratic forums" for speech, *Reno*, 521 U.S. at 868, is presumptively protected by the First Amendment and its speech cannot be deemed "illegal activity" absent the government's rebuttal of this presumption. And certainly, defendants' former publishing ventures that are not connected at all to the alleged "illegal activity"—including 17 weekly newspapers published throughout the country—are presumptively protected by the First Amendment.[3] The government has offered no rebuttal of this presumption, and has instead proceeded with forfeiture before any adjudication of the illegality of the speech on Backpage.com has been made, on the apparent belief that the website is unprotected

[3] By also seizing the proceeds from publishing newspapers unrelated to Backpage.com, the government has impaired First Amendment activity that it does not even claim is illegal. The government's conduct here, then, means that *any* publication's proceeds are subject to seizure, so long as those proceeds are held by an entity that also owns a *different* publishing enterprise engaged in allegedly illegal activity.

speech simply because the government thinks it is. The circular logic of this is plain, and it has had profound consequences—the government has forced a speaker out of the public arena without first establishing any authority to do so.

B. Because the First Amendment Presumptively Protects Publishing Assets and Proceeds from Seizure, an Adversarial Hearing Was Required to Test the Government's Assertion of Probable Cause.

The First Amendment's presumptive protection means that expressive materials, and the assets for and proceeds from such materials, are presumed to be immune from government regulation. The government can only rebut this presumption by "proving the constitutionality" of its regulation, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816-17 (2000), either by establishing that the regulation is narrowly tailored to promote a compelling state interest, *id.* at 813, or that the expression at issue is unprotected speech, *Ashcroft v. ACLU*, 535 U.S. 564, 573-74 (2002).

The government must overcome a heavy burden before it may regulate expression because there is no margin for error in such regulation, especially when, as with civil forfeiture, the regulation is an absolute bar on speech. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn . . . . Error in marking that line exacts an extraordinary cost." *Playboy Entm't Grp.*, 529 U.S. at 817 (internal quotation marks and citation omitted). That cost is the "abridgment of the right of

the public in a free society to unobstructed circulation" of constitutionally protected expression. *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 213 (1964).

To guard against the risk that the government will abuse its civil forfeiture authority to suppress protected speech, the Supreme Court has held that the government can only seize expressive material if the material has been found to be unprotected obscenity in an adversarial proceeding. In *Fort Wayne Books*, prosecutors brought a civil racketeering complaint against Fort Wayne Books and two other book and video stores allegedly selling obscene materials. 489 U.S. at 51. After an *ex parte* determination of probable cause, everything in the stores was seized, including books, videos, and the proceeds from the sale of books and videos. *Id.* at 51-52. Shortly thereafter, the trial court held an adversarial hearing to determine whether there was, in fact, probable cause to believe that the bookstores' contents were the proceeds of racketeering crimes and thus subject to forfeiture. *Id.* at 52. The defendants maintained that their materials were protected by the First Amendment. *Id.* at 52-53. The case went to the Indiana Supreme Court, which held that the seizure was constitutional and the First Amendment was not relevant because the books and films had been found to be the proceeds of racketeering crimes. *Id.* at 53, 64-65.

But the United States Supreme Court overturned the Indiana Supreme Court's decision. The U.S. Supreme Court held that the seizure was unconstitutional, even

though the trial court conducted a post-seizure, pretrial, adversarial hearing to determine probable cause. *Id.* at 64-67. Although the Court agreed that, in general, books and videos could be forfeitable like any other assets used in or derived from racketeering, the Court nonetheless held "that the special rules applicable to removing First Amendment materials from circulation" applied because the whole purpose of the prosecution was to "put an end to the sales" of the books and videos. *Id.* at 65. As a result, the books and films could not be seized until they were first adjudged to be obscene and unprotected by the First Amendment. Mere "probable cause to believe a legal violation ha[d] transpired" was "not adequate." *Id.* at 66.

The *Fort Wayne Books* decision was motivated by the Court's concerns that seizure of expressive materials, without prior adjudication of whether such materials were constitutionally protected, would lead to prior restraint—flipping the presumptive protection of such materials on its head. *Id.* at 63-64; *see also Alexander v. United States*, 509 U.S. 544, 551 (1993) ("The constitutional infirmity in nearly all of our prior restraint cases involving obscene material . . . was that the Government had seized or otherwise restrained materials suspected of being obscene *without a prior judicial determination that they were in fact so*." (emphasis added)). A system of prior restraint—wherein the government may suppress speech first and question the legitimacy of doing so later, or not at all—threatens "freewheeling censorship." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). When the

prior restraint is civil forfeiture of expressive materials, only an adversarial hearing, where the protected status of the materials can be fully adjudicated, can sufficiently allay the dangers of censorship. *Fort Wayne Books*, 489 U.S. at 63. And when forfeiture is sought to "put an end" to the distribution of expressive materials, probable cause for the seizure "is insufficient to interrupt" the sale of such presumptively protected materials.[4] *Id.* at 65-66. Because seizure of expressive materials removes them in their entirety from circulation, mere probable cause of their illegality cannot adequately ensure that the public will not be wrongfully deprived of access to protected expression. *Id.* at 63 (noting that a "publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing").

That the government is seizing the assets and proceeds from the sales of expressive materials and not just the expressive materials themselves does not change the calculus because, as explained above, content-based financial burdens on speech threaten free expression just as much as seizure itself, and thus are constitutionally suspect. *See supra* 7-10. The government, again, cannot

---

[4] In *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986), the Court held that an *application* for a warrant authorizing seizure of expressive materials could be evaluated under a probable cause standard. 475 U.S. at 875. This holding, however, was based on the Court's understanding that the warrant authorized only seizure of materials for evidentiary purposes, and that large-scale seizures that threatened prior restraint still could only occur after an adversarial process. *Id.*; *see also Fort Wayne Books*, 489 U.S. at 63 (citing *P.J. Video*).

accomplish indirectly what it is not permitted to accomplish directly. And here, the government here has done exactly what *Fort Wayne Books* forbids: It has seized *all* of the assets and proceeds of expressive activity based solely on *ex parte* assertions of probable cause. Its probable cause showing, moreover, comprises factually and legally incomplete, and misleading, affidavits from only one witness—precisely the scenario that the Court found unconstitutional over fifty years ago. *See Marcus v. Search Warrants of Prop.*, 367 U.S. 717, 731-33 (1961) (finding unconstitutionally deficient seizure of publications based only on "the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of the materials considered by the complainant to be obscene."). As *Fort Wayne Books* made clear, a consequence as dire as seizure of presumptively protected materials demands process more substantial than this.

C. The Government Is Using Seizure of Publishing Assets and Proceeds to Silence Disfavored Speech.

This case is simply the latest chapter in a long history of government attempts to suppress disfavored speech. For decades, the government has been trying to silence disfavored speakers by abusing its prosecutorial powers—including through civil asset forfeiture—to drive the speakers out of both the market economy and the marketplace of ideas. And the Supreme Court has long recognized that such attempts are invidious to the First Amendment, and intolerable in a free society. *See, e.g.*, *Fort Wayne Books*, 489 U.S. at 63, 65-66 (finding seizure of thousands of adult

bookstores' "presumptively protected books and films," without adversarial hearing, unconstitutional); *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636, 636-67 (1968) (finding seizure of films for alleged obscenity, without adversarial hearing, unconstitutional); *Dombrowski v. Pfister*, 380 U.S. 479, 493-94 (1975) (finding law permitting criminal prosecution for "subversive activities" chilling of protected speech and unconstitutionally overbroad); *A Quantity of Copies of Books*, 378 U.S. at 207, 210-11 (finding seizure of thousands of novels for burning or other destruction due to alleged obscenity, without adversarial hearing, unconstitutional); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61-63, 64, 70-71 (1963) (finding obscenity commission's practice of notifying book distributors of "objectionable" material within their books, alluding to prosecution in their notice, and circulating lists of "objectionable" publications to local police departments, unconstitutional); *Marcus*, 367 U.S. at 723, 731-33 (finding seizure of tens of thousands of copies of publications for destruction due to alleged obscenity, without adversarial hearing, unconstitutional).

Despite the Supreme Court's clear instruction on the breadth of speech protected by the First Amendment, the government's overzealous and overbroad efforts to prosecute obscenity continue to target protected speech as well. The campaign against Backpage.com in recent years—particularly the government's unwillingness to acknowledge that Backpage.com publishes protected speech—is

reminiscent of the government's "Project PostPorn" campaign in the 1980s. As detailed in *United States v. PHE*, the government in the 1980s undertook a "coordinated, nationwide prosecution strategy against companies that sold obscene materials," aimed at driving the adult entertainment industry to extinction by undermining its profitability. 965 F.2d at 850. In executing this "strategy," prosecutors attempted to extort plea agreements from defendants by threatening them with "multiple prosecutions" if they did not cease distribution "of all sexually oriented materials, not simply those that were obscene"—prosecutions that would bankrupt the defendants. *Id.* at 851. The prosecutors made these threats with full knowledge that, if the defendants took the plea, they would be required to "stop sending material that was protected by the First Amendment." *Id.* Defendants did not take the plea; as a consequence, they were subjected to costly prosecutions, "intrusive and intimidating" investigations, and "harass[ing]" subpoenas—all in an effort to stop defendants from distributing materials that the government knew were, in part, constitutionally protected. *Id.* at 851-52 (citation omitted). Thus, as the Court found, the government was "motivated by a desire to discourage expression protected by the First Amendment." *Id.* at 853, 854, 860-61.

The campaign against Backpage.com is quite similar. Backpage.com has been repeatedly subjected to prosecutorial attempts to impose criminal liability for what courts have repeatedly recognized is constitutionally protected expression. *See*

Appellant's Br. at 7-8 & n.3. The government, however, has not stopped with prosecuting Backpage.com. Instead, it appears that the government intends to bankrupt anyone who has ever had anything to do with Backpage.com. The government's unconstitutional seizure of assets and proceeds from Backpage.com and weekly newspapers, then, is simply one more attempt to erode the First Amendment's carefully erected bulwarks around free expression. *See Bantam Books*, 372 U.S. at 67. This Court should not countenance this attempt.

CONCLUSION

For the forgoing reasons, *amici* respectfully requests that this Court vacate the stay below and order the District Court to vacate the seizures or, in the alternative, issue an order vacating the seizures.

February 13, 2019

Respectfully submitted,

/s/ Jessica Ring Amunson

Jessica Ring Amunson
Counsel of Record
Tassity Johnson
Jenner & Block LLP
1099 New York Ave., NW, Suite 900
Washington, DC 20001
(202) 639-6023
jamunson@jenner.com

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2019, the foregoing Brief of the DKT Liberty Project, the Cato Institute, and the Reason Foundation as *Amici Curiae* in Support of Appellants was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

/s/ Jessica Ring Amunson
Jessica Ring Amunson

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally-spaced font. I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, based on the "Word Count" feature of Microsoft Word 2013, it contains 4,158 words, including footnotes and excluding the parts of the brief exempted under Rule 32(f).

Dated: February 13, 2019

/s/ Jessica Ring Amunson
Jessica Ring Amunson

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 18-56455

I am the attorney or self-represented party.

This brief contains 4,158 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ________ .
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Jessica Ring Amunson **Date** Feb 13, 2019

(use "s/[typed name]" to sign electronically-filed documents)