No. __-___

IN THE

Supreme Court of the United States

CARL FERRER,
Applicant,

v.

SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
Respondent.

APPLICATION BY CARL FERRER FOR IMMEDIATE STAY AND STAY PENDING APPEAL TO THE D.C. CIRCUIT OF ORDER TO COMPLY WITH SUBCOMMITTEE SUBPOENA

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

STEVEN R. ROSS
STANLEY BRAND
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, D.C. 20036
Telephone: (202) 887-4343

ROBERT CORN-REVERE
Counsel of Record
RONALD G. LONDON
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, D.C. 20006
Telephone: (202) 973-4200
bobcornrevere@dwt.com

Counsel for Carl Ferrer

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Ct. R. 29.6, Applicant states as follows:

Applicant Carl Ferrer is an individual not required to submit a corporate disclosure statement. However, the Senate Permanent Subcommittee on Investigations served a subpoena on Mr. Ferrer in his capacity as Chief Executive Officer of Backpage.com, LLC.

Backpage.com, LLC operates an online website for classified ads and is a Delaware limited liability company that is a subsidiary of and owned by several other privately held companies, respectively: IC Holdings, LLC; Dartmoor Holdings, LLC; Atlantische Bedrijven C.V.; Kickapoo River Investments, LLC; Lupine Investments LLC; and Amstel River Holdings, LLC. No publicly held company owns any interest in Backpage.com, LLC or any of its parent companies.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Applicant Carl Ferrer, Chief Executive Officer of Backpage.com, LLC ("Backpage"), respectfully requests an ***immediate stay*** of the August 5, 2016, Order of the United States District Court for the District of Columbia requiring Mr. Ferrer to produce documents in response to a contested subpoena issued by the Senate Permanent Subcommittee on Investigations ("PSI"). That Order required the production of documents within 10 days, *see Senate Permanent Subcomm. on Investigations v. Ferrer*, _ F. Supp. 3d __, 2016 WL 4179289 (D.D.C. Aug. 5, 2016) ("*PSI v. Ferrer*") (Appendix 1a-14a) (the "Disclosure Order"),[1] but was temporarily stayed by the D.C. Circuit pending review of Mr. Ferrer's motion for an emergency stay pending appeal. *Ferrer v. PSI*, No. 16-5232, *Per Curium* Order (D.C. Cir. Aug. 12, 2016) (22a). The D.C. Circuit later denied the emergency motion for stay and dissolved the temporary stay on September 2, 2016, giving Mr. Ferrer 10 days from the date of that order to comply with the Disclosure Order. *Ferrer v. PSI*, No. 16-5232, *Per Curium Order* (D.C. Cir. Sept. 2, 2016) (Brown and Kavanaugh, J., with Griffith, J., indicating he would grant motion for stay pending appeal) (23a).

Unless it is immediately stayed, the Disclosure Order will cause Mr. Ferrer irreparable injury because he becomes subject to an immediately effective directive to produce documents in violation of his First Amendment rights. Once documents are produced, the harm to Mr. Ferrer could not be remediated – rendering any sub-

[1] The District Court declined to stay its Order. *PSI v. Ferrer*, Misc. Action No. 16-mc-621 (RMC), Order (ECF No. 23) (D.D.C. Aug. 12, 2015) (15a-21a).

sequent victory on appeal before the D.C. Circuit illusory. To preserve Mr. Ferrer's right to meaningful appellate review of an order in violation of his constitutional rights, this Court should stay the District Court's Disclosure Order pending review by the D.C. Circuit. Given the short time the D.C. Circuit afforded to comply with the Disclosure Order, Mr. Ferrer also requests an immediate, interim stay, pending this Court's review of this Application for Stay pending Circuit Court Appeal.

This case presents a question of exceptional nationwide importance involving the protection the First Amendment provides to online publishers of third-party content when they engage in core editorial functions. In its Disclosure Order, the District Court required Mr. Ferrer to comply with a subpoena that struck at the heart of the editorial processes of Backpage – the second largest online classified ad forum in the United States. Backpage produced over 16,000 pages of documents responsive to non-objectionable portions of the subpoena, but objected to portions that burden core editorial functions in violation of the First Amendment.

Mr. Ferrer has sought relief from the courts below, but was denied. He has also telephonically notified counsel for Respondent PSI of this motion and served the motion on PSI by electronic mail, followed by service by hand.

INTRODUCTION

This case highlights a disturbing – and growing – trend of government actors issuing blunderbuss demands for documents to online publishers of content created by third parties (such as classified ads) in a manner that chills First Amendment rights. As the Fifth Circuit recently noted in a case involving a sweeping subpoena issued to Google, that case, "like others of late," reinforces "the importance of

preserving free speech on the internet, even though that medium serves as a conduit for much that is distasteful or unlawful." *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) (citing *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015)). Here, PSI, in coordination with other governmental actors at various levels, asks the judiciary to approve the use of subpoena power as a bludgeon to burden or restrict editorial policies of which PSI disapproves.

The subpoena here explicitly trained on Backpage's core editorial functions, asking for "[a]ny documents concerning," among other things, Backpage's "editing" of ads, including, "but not limited to" related "policies, manuals, memoranda, and guidelines," as well as material involving "reviewing, blocking, deleting … or modifying" ads. Subpoena to Backpage.com by the Permanent Subcomm. on Investigations (Oct. 1, 2015) (24a-32a). The record suggests Backpage would not have been the target of PSI's fishing expedition if did not host ads that some find distasteful. But "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson,* 491 U.S. 397, 414 (1989)). And, as Judge Posner recently noted in a case involving a similarly unconstitutional effort by government officials to drive Backpage out of business, courts must be vigilant in preventing the government from wielding its investigative authority in a manner that "permit[s] unauthorized, unregulated, foolproof, lawless government coercion," *Backpage.com*, 807 F.3d at 237.

This Court should grant an immediate stay to allow meaningful appellate review of the significant First Amendment issues this case presents. The unresolved question of the level of protection that online intermediary publishers enjoy under the First Amendment is of critical importance not only to Backpage, but to *all* online publishers of third-party content, because "whatever affects the rights of the parties here, affects all," *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963). Indeed, even as PSI's application to enforce its Subpoena to Mr. Ferrer was pending, the Senate Committee on Commerce, Science, and Transportation launched an investigation into Facebook's "Trending Topics," based on accounts that it selectively opts not to feature content concerning conservative views.[2] Given the exponential growth of the digital economy in recent years, the question has become ever more pressing.

As discussed below, this case thus not only presents an issue of exceptional importance with national ramifications, it also affords the Court an opportunity to resolve confusion among the lower courts over the related question of whether and, if so, to what extent, journalists and others enjoy protection under the First

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[2] Letter from Sen. John Thune to Mark Zuckerberg, Chairman & CEO, Facebook, May 10, 2016 (claiming to open investigation into Facebook's publishing practices)) (33a-35a). Legal scholars and the press instantly cited the effort as an improper infringement on First Amendment rights. *See, e.g.*, Charles C.W. Cooke, *The Senate Should Leave Facebook Alone*, NATIONAL REVIEW, May 10, 2016; Nick Canasaniti & Mike Isaac, *Senator Demands Answers From Facebook on Claims of 'Trending' List Bias*, N.Y. TIMES, May 10, 2016; Peter Scheer, *Facebook, under attack for choosing "trending" stories, should embrace the 1st Amendment*, First Amendment Coalition, May 11, 2016, *available at* https://firstamendmentcoalition.org/2016/05/facebook-attack-choosing-trending-stories-embrace-1st-amendment/.

Amendment against investigatory government demands. Since this Court last addressed that question over 40 years ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972), an entrenched split among the courts of appeals has widened over the import of that decision, including Justice Powell's "enigmatic concurring opinion," *id.* at 725 (Stewart, J., dissenting). As shown below, there is at least a reasonable probability this Court would grant review of the District Court's Disclosure Order; and that in doing so, the Court would likely reverse.

An immediate stay is therefore warranted. "[T]he 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 op.), and any subsequent reversal of the Disclosure Order – as a practical matter – would be a nullity once documents are disclosed pending further judicial review. As the D.C. Circuit has recognized in cases such as this one, once confidential documents are exposed to public view, "the cat is out of the bag." *CBS Corp. v. FCC*, 785 F.3d 699, 708 (D.C. Cir. 2015). Weighed against the certain and irreparable harm to Mr. Ferrer if documents are released, any harm to PSI pales by comparison. The Subcommittee already has more than 16,000 pages of documents Backpage has produced, and PSI did not dispute below that it is free to move forward with its investigation based on those documents and other documents and information in the public record. As to the documents at issue on this appeal, either Mr. Ferrer or PSI will be vindicated; if PSI prevails, any delay in obtaining the contested documents will be relatively brief.

The public interest overwhelmingly favors a stay pending consideration of the substantial issues that this case raises.

OPINIONS BELOW

The District Court Order requiring Mr. Ferrer to comply with PSI's Subpoena is *PSI v. Ferrer*, 2016 WL 4179289 (1a-14a). The District Court's order denying a stay pending appeal is provided at 15a-21a. The D.C. Circuit's Order denying Mr. Ferrer's Emergency Motion for Stay Pending Judicial Review, *Ferrer v. PSI*, No. 16-5232, Order (D.C. Cir. Sept. 2, 2016), is provided at 23a.

JURISDICTION

This Court has jurisdiction over this Application pursuant to 28 U.S.C. § 1254(1), and has authority to grant the request for immediate stay and a stay pending appeal before the D.C. Circuit under 28 U.S.C. § 2101(f), the All Writs Act, 28 U.S.C. § 1651(a), and Rule 23 of this Court. *See*, *e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183 (2010); *Nken v. Mukasey*, 555 U.S. 1042 (2008); *San Diegans For Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are in relevant part as follows:

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. § 1365(a)-(b):

> **(a)** The United States District Court for the District of Columbia shall have original jurisdiction, without regard to the amount in controversy, over any civil action brought by the Senate or any authorized committee or subcommittee of the Senate to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal or failure to comply with, any subpoena or order issued by the Senate or committee or subcommittee of the Senate … to any natural person to secure the production of documents or other materials of any kind or the answering of any deposition or interrogatory or to secure testimony …. * * * *
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> **(b)** Upon application by the Senate or any authorized committee or subcommittee of the Senate, the district court shall issue an order to an entity or person refusing, or failing to comply with, or threatening to refuse or not to comply with, a subpoena or order of the Senate or committee or subcommittee of the Senate requiring such entity or person to comply forthwith. Any refusal or failure to obey a lawful order of the district court issued pursuant to this section may be held by such court to be a contempt thereof. * * * * Such contempt proceeding shall be tried by the court and shall be summary in manner. The purpose of sanctions imposed as a result of such contempt proceeding shall be to compel obedience to the order of the court. * * * * An action, contempt proceeding, or sanction brought or imposed pursuant to this section shall not abate upon adjournment sine die by the Senate at the end of a Congress if the Senate or the committee or subcommittee of the Senate which issued the subpoena or order certifies to the court that it maintains its interest in securing the documents, answers, or testimony during such adjournment.

STATEMENT OF THE CASE

Recognizing the unprecedented global nature of the Internet, this Court has extended to online speech the highest level of First Amendment protection, because "regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." *Reno v. ACLU*, 521 U.S. 844, 885 (1997). An essential aspect of this unique medium is its platforms created and managed by online intermediaries that allow individuals to communicate to vast audiences

across various fora. Because of this, Congress adopted national policies "to maintain the robust nature of [the] Internet," *Zeran v. AOL, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), and "to promote freedom of speech" online. *Ben Ezra, Weinstein & Co. v. AOL, Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000) (citation omitted). This has not, however, stopped PSI and certain other lawmakers and law enforcement officers from targeting online intermediaries for hosting speech with which they disagree or find offensive.

A. Freedom of Expression and Online Intermediaries

More than 3.2 billion people use the Internet, submitting and viewing hundreds of millions of posts, comments, photos, videos and other content every day.[3] Online intermediaries like Backpage have been essential for the Internet to become and remain a vital medium of free speech for billions of global users.[4] They take many forms, including search engines, social networks, advertising platforms, and content-hosting, all of which offer places to post and/or access user-generated content. The Internet's ubiquity requires intermediaries to handle vast amounts of information.[5] Backpage.com, the second largest online classified ad website in the

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[3] International Telecommunications Union, 2016 ICT Facts & Figures, http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2016.pdf; Pew Research Center, Social Networking Usage: 2005-2015, http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/ (as of 2015, 76% of online adults used social networking sites).

[4] *See Shielding the Messengers: Protecting Platforms for Expression and Innovation*, CENTER FOR DEMOCRACY & TECHNOLOGY (2012), https://cdt.org/files/pdfs/CDT-Intermediary-Liability-2012.pdf.

[5] For example, on the classified advertising website Craigslist seven years ago, "users create[d] and post[ed] over thirty million new classified advertisements each

U.S., hosts millions of ads monthly, all posted by users, in various categories, that include real estate, jobs, buy/sell/trade, automotive, dating, and adult.

Strong First Amendment protections for online speech have prevented most direct efforts to censor online speech, including speech that some find offensive or distasteful. For example, this Court struck down restrictions on "indecent" expression in the Communications Decency Act, *Reno v. ACLU*, 521 U.S. at 868-79, 885, and the Third Circuit voided its successor statute, the Child Online Protection Act. *ACLU v. Mukasey*, 534 F.3d 181, 207 (3d Cir. 2008). Numerous similar state laws have fallen as well. *See*, *e.g.*, *American Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003).

Meanwhile, Congress adopted 47 U.S.C. § 230, to preserve free expression online by creating broad immunity for "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post." *Fair Hous. Council of San Fernando Valley v. Roommates.com*, LLC, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (*en banc*).[6] Particularly relevant here, various federal courts have

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month," and "Craigslist's website, which displays the ads, [was] viewed over nine billion times each month." *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 961 (N.D. Ill. 2009) (internal quotation marks omitted).

[6] *See also, e.g.*, David Post, *A bit of Internet history, or how two members of Congress helped create a trillion or so dollars of value*, WASH. POST, Aug. 27, 2015 ("Virtually every successful online venture that emerged after 1996 – including … Google, Facebook, Tumblr, Twitter, Reddit, Craigslist, YouTube, Instagram, eBay, Amazon – relies in large part (or entirely) on content provided by their users, who number in the hundreds of millions, or billions.… I fail to see how any of these companies, or the thousands more like them, would exist without Section 230. The *potential* liability that would arise from allowing users to freely exchange information with one another, at this scale, would have been astronomical …."); Adam Thierer, *The Greatest of All Internet Laws Turns 15*, FORBES, May 8, 2011 ("Section

invalidated on constitutional and § 230 grounds direct efforts by states to regulate classified ad websites, even when those efforts were undertaken for the stated purposes of targeting online trafficking. *See Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1282-83 (W.D. Wash. 2012); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 827-40 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, at *4-12 (D.N.J. Aug. 20, 2013).

Despite these protections, some government officials have turned to more indirect means restrict disfavored online speech. In 2008, 42 state attorneys general ("AGs"), for example, negotiated with Craigslist various measures purportedly to help detect and prevent ads for illegal services in its "erotic services" section.[7] Though Craigslist took voluntary steps in response, 17 AGs continued to demand that it remove its adult services section entirely. The following year, the Sheriff of Cook County, Illinois, Thomas J. Dart, filed suit to force Craigslist to eliminate its adult category, but the court dismissed the case, holding that an adult category "is not unlawful in itself nor does it necessarily call for unlawful content." *Craigslist*, 665 F. Supp. 2d at 967-69. Various officials persisted, however, and Craigslist dropped its adult "category" in September 2010.

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230 … helped foster the abundance of informational riches that lies at our fingertips today," including "shopping sites, auction services, and online classifieds to satisfy our every desire. * * * * If not for the immunities granted by Sec. 230, online speech and commerce would have been severely stifled because of the threat of legal action.").

[7] Joint Statement of Craigslist, AGs, and Nat'l Center for Missing & Exploited Children, www.azag.gov/sites/default/files/craigslist%20final%20statement.pdf.

Soon, the National Association of Attorneys General ("NAAG") demanded that Backpage likewise drop its adult category, and sent a long list of information requests "in lieu of a subpoena" concerning its posting policies, content screening, cooperation with law enforcement, and other topics (not unlike PSI's Subpoena here).[8] In January 2014, Sheriff Dart sent Backpage a "Request for Information and Site Modification," that sought similar detailed information, and made demands on "how Backpage should operate."[9] Later, as Judge Posner remarked, Sheriff Dart "embarked on a campaign intended to crush Backpage's adult section – crush Backpage, period, it seems – by demanding that … Visa and MasterCard prohibit the use of their credit cards … on Backpage." *Dart*, 807 F.3d at 230. The companies quickly acceded, and continue to withhold service, even after the Seventh Circuit ordered entry of a preliminary injunction against Dart's actions, reversing the refusal below to grant relief. *Id.*, *passim*, *rev'g Backpage.com, LLC v. Dart*, 127 F. Supp. 3d 919 (N.D. Ill. 2015).

Members of Congress soon followed suit. In March 2012, 19 senators wrote to Village Voice Media (then Backpage's parent company) demanding that it remove Backpage.com's adult section. In October 2012, six senators wrote the company

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[8] Letter to Samuel Fifer, Counsel to Backpage, from James E. McPherson, Executive Director, NAAG (Sept. 16, 2011) (36a-43a). The selection of Backpage seemed to be a whim of policymakers – the same campaign could be waged against almost any large online intermediary, as shown by AG Hood's efforts to subpoena Google when it declined to implement the changes he demanded. *Hood*, 822 F.3d at 217-19.

[9] Letter from John Sommerville, Office of the Sheriff, to Samuel Fifer, Counsel for Backpage (Jan. 24, 2014) (44a-56a). The information demand included 159 separate questions, counting it various categories and enumerated subcategories.

that acquired Village Voice's print operations, threatening to continue to hold it "accountable" until "shutting down Backpage's 'adult entertainment' section … has been achieved."[10] A House resolution targeted Backpage and "called on all Internet media providers to immediately eliminate 'adult entertainment' sections and [similar] classified advertising," H.R. Res. 649, 112th Cong. (2012), while the Senate dispensed with even that artifice and demanded outright that Backpage eliminate its adult classified ads. S. Res. 439, 112th Cong. (2012). Congress also amended 18 U.S.C. § 1591 in 2015 via the Stop Advertising Victims of Exploitation Act of 2015 (the "SAVE Act"), Pub. L. No. 114-22, § 118, 129 Stat. 227 (2015), with Senator Kirk, who introduced the law, explaining that, "I intended to go after Backpage.com …. We really ought to be able to charge them." 161 Cong. Rec. S1458 (daily ed. Mar. 12, 2015).

B. The PSI Investigation and Subpoena

The Senate Permanent Subcommittee on Investigations ("PSI") has sought information and documents related to Backpage since April 2015. It first emailed Backpage's General Counsel on April 15, 2015 "to request an interview to discuss Backpage's business practices."[11] Backpage immediately responded, and its General Counsel met with six PSI staff members for a day-long interview on June 19, 2015. On July 7, 2015, PSI issued Backpage a document subpoena for 41

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[10] Letter from Sen. Mark Kirk, et al. to Scott Tobias, former CEO of Voice Media Group, Inc. (Oct. 5, 2012) (57a-58a).

[11] STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, REP. ON RECOMMENDATION TO ENFORCE A SUBPOENA ISSUED TO THE CEO OF BACKPAGE.COM, LLC at 29 (Nov. 19, 2015) ("*PSI Staff Report*") (90a).

categories of material on all aspects of its business, terms of use, and editorial policies.[12] Counting multiple sub-parts for each category, PSI sought documents on approximately 120 subjects, many of which cut to the heart of Backpage's editorial functions.

On July 16, 2015, counsel for Backpage met with PSI staff to raise concerns about the subpoena's scope, the First Amendment issues it posed, and the extent to which it seemed part of the larger governmental effort targeting Backpage. Decl. of Steven Ross in Support of Carl Ferrer's Opposition to Application of PSI to Enforce Subpoena Duces Tecum ¶ 4 (97a) ("Ross Decl."). Backpage submitted written objections on August 6, 2015 and requested the subpoena's withdrawal.[13] On October 1, 2015, PSI rejected Backpage's First Amendment objections, but withdrew its July 7, 2015 Subpoena and instead substituted the revised Subpoena that is at issue in this case. *See* Subpoena to Backpage.com by PSI (Oct. 1, 2015) (24a-32a).

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[12] Subpoena to Backpage.com by PSI (July 7, 2015) (100a-112a). PSI issued the subpoena to Backpage immediately after its staff consulted with members of a team that Sheriff Dart assembled to "crush Backpage." *See supra* 11. *See also infra* 15-16.

[13] Letter from Steven R. Ross, Counsel to Backpage.com, to Sens. Rob Portman and Claire McCaskill, PSI Chairman and Ranking Member (Aug. 6, 2015) (113a-118a). In response, PSI began issuing deposition subpoenas to Backpage employees, *id.* ¶ 8, followed by a letter that generically rejected Backpage's concerns. Letter from Sens. Rob Portman and Claire McCaskill, PSI Chairman and Ranking Member, to Steven R. Ross, Counsel to Backpage.com (Aug. 26, 2015) (119a-122a). Backpage further objected, and asked, as it had before, that the matter be submitted for judicial review under 28 U.S.C. § 1365. Letter from Steven R. Ross, Counsel to Backpage.com, to Sens. Rob Portman and Claire McCaskill, PSI Chairman and Ranking Member (Aug. 26, 2015) (123a-126a). Further meetings and letters followed in which Backpage raised constitutional concerns and urged PSI to initiate judicial processes, with PSI rejecting the concerns. Ross Decl. ¶ 6 (97a).

The revised Subpoena contains eight requests – covering what PSI itself characterizes as "the core" of its investigation – that corresponded to the general categories PSI described as the "seven specific topics" in the withdrawn subpoena's 41 requests. *See* Aug. 26, 2015 PSI Letter (119a), *supra* note 13. But PSI did not narrow the requests so much as reframe them using more general language.[14] Although PSI had reduced the number of categories, it asked broader, more general questions on the same subjects – *e.g.*, all materials concerning review, verification, editorial decisions, and payment for all transactions for a six-year period, and email for all employees engaged in moderation during that time – many of which similarly targeted Backpage's exercise of editorial judgment. *Id.* Meanwhile, PSI expanded its investigation further by issuing series of subpoenas to entities and individuals that are or were affiliated with Backpage. *See* Ross Decl. ¶ 8 (98a).

Even while continuing to object to the Subpoena on constitutional grounds and imploring PSI to subject it to judicial review – as only PSI, and not Mr. Ferrer, could invoke the courts' oversight – Mr. Ferrer produced over 16,000 pages in response to the revised subpoena as part of what it intended to be a rolling production. Ross Decl. ¶ 7 (98a). This included material related to Backpage's

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[14] In addition to the three categories PSI sought to enforce in the District Court, *see infra* 16-17, the Subpoena demanded all documents from January 1, 2010 to the present relating to: (1) human trafficking, sex trafficking, human smuggling, prostitution, or its facilitation or investigation, including any policies, manuals, memoranda, or guidelines; (2) policies related to hashing of images, data retention, or removal of metadata; (3) the number of ads posted, by category, for the past three years, and ads reported to law enforcement agencies; (4) the number of ads for the past three years deleted or blocked at each stage of the reviewing process; and (5) Backpage's annual revenue for each of the past five years, by category. *Id.*

moderation efforts, including, *inter alia*, screenshots of the team's computer interface displaying certain guidelines, a previously used list of guidelines, moderation process documents, a sample moderation log, and a list of banned terms used in manual review. It also included law enforcement referral material that is the best source of information regarding misuse of Backpage for illegal or potentially illegal activity, *i.e.*, PSI's professed interest in, *e.g.*, "human trafficking." *See supra* note 14. And Mr. Ferrer was preparing millions more pages – yet PSI told him to stop production.[15]

When PSI targeted Backpage, it had multiple contacts with law enforcement, including Sheriff Dart's office while he was in the midst of his constitutionally ill-fated extralegal effort to "crush" Backpage. *See supra* note 12. Early on, PSI Counsel contacted the Sheriff's office, which responded that it would be "happy to support" the effort to probe Backpage's "inner workings."[16] Indeed, correspondence between the two sets of government officials disclosed that Sheriff Dart's "dream scenario" was to have Backpage's founders "dragged before a Senate committee."[17]

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[15] *See* Ross Decl. ¶ 7 (98a); E-mail from Matt Owen, PSI Chief Counsel, to Steven Ross *et al.* (Nov. 14, 2015 (127a-128a). On November 19, 2015, coincident with release of the *PSI Staff Report* on why Backpage should be compelled to provide information, PSI held a hearing – not to gather evidence on human trafficking, but to focus on Backpage and the efforts to compel information from it. *Human Trafficking Investigation Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Gov'l Affairs*, 114th Cong. 4 (2015).

[16] E-mail from Andrew Polesovsky, PSI Counsel, to Benjamin Breit, Cook Cty. Sheriff's Office (May 13, 2015) (131a-132a). Over at least the next couple of months, PSI and Cook County staff held conference calls on their Backpage strategies.

[17] E-mail from Benjamin Breit, Cook Cty. Sheriff's Office, to Cara Smith et al., Cook Cty. Sheriff's Office (July 2, 2015) (133a).

Less than a week later, PSI Counsel sought copies of Sheriff Dart's document requests,[18] then promptly issued the initial subpoena – some of which bore a striking resemblance to Sheriff Dart's demands.[19]

C. Procedural History

On February 29, 2016, five months after issuing its revised subpoena, PSI presented the Senate Committee on Homeland Security and Governmental Affairs a resolution directing Senate Legal Counsel to bring a civil action to enforce three of the eight paragraphs in the Subpoena. S. Rep. No. 114-214 (2016). The Subcommittee did not seek to enforce the subpoena's single paragraph requesting documents regarding human trafficking – the purported focus of its inquiry. *Id.* Instead, in an application filed with the District Court on March 29, 2016, PSI sought to enforce the demands going to the heart of Backpage's editorial activities. Specifically, PSI sought to enforce demands for all documents concerning:

1. Backpage's reviewing, blocking, deleting, editing, or modifying advertisements in Adult Sections, either by Backpage personnel or by automated software processes, including but not limited to policies, manuals, memoranda, and guidelines.

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[18] *See* E-mail from Benjamin Breit, Cook Cty. Sheriff's Office, to Mark Angehr, PSI Senior Counsel (July 6, 2015) (134a-135a).

[19] *See* Mem. of P. & A. in Opp'n to Appl. of Senate Permanent Subcomm. on Investigations to Enforce Subpoena Duces Tecum at 8-9, 11, 19-21, 31, 37, n.32, 38-39, n.34, 40, Exs. D, L at 2-3, and T-V (ECF No. 8), *Senate Permanent Subcomm. on Investigations v. Ferrer*, No. 1:16-mc-00621-RMC (D.D.C. Apr. 26, 2016) (discussing and reflecting Dart's "Request for Information and Site Modification" and consultation with PSI) (150a-183a). Despite this, in the District Court briefing in this case, PSI disclaimed any such collusion, a point Mr. Ferrer refuted. *See id.* at 38-41 n.33 (180a-183a) (refuting PSI denials of contact and collusion with Dart).

2. [A]dvertising posting limitations, including but not limited to the "Banned Terms List," the "Grey List," and error messages, prompts, or other messages conveyed to users during the advertisement drafting or creation process.

3. [R]eviewing, verifying, blocking, deleting, disabling, or flagging user accounts or user account information, including but not limited to the verification of name, age, phone number, payment information, email address, photo, and IP address. This request does not include the personally identifying information of any Backpage user or account holder.

Subpoena to Backpage.com by the Permanent Subcomm. on Investigations ¶¶ 1-3 (Oct. 1, 2015) (28a).

The District Court entered an Order enforcing the Subpoena on August 5, 2016. *PSI v. Ferrer*, 2016 WL 4179289 (1a). The court rejected Mr. Ferrer's showing that given the First Amendment implications of PSI's Subpoena, cases like *Bursey v. United States*, 466 F.2d 1059, 1086 (9th Cir. 1972), require PSI to carry its constitutional burden "almost question by question before it can compel answers." *Id.* at 1086. Placing the burden instead on Mr. Ferrer, the court held, despite the record events described above, that because he supposedly failed to search for responsive records, he could not identify any First Amendment burden that outweighed PSI's need for the documents demanded. *PSI v. Ferrer*, 2016 WL 4179289, at *1, *4, *9-14 (1a, 3a, 7-13a). Although compliance with the subpoena called for a review of potentially millions of listings,[20] the Court gave Mr. Ferrer 10 days to comply with the subpoena.

[20] Backpage screens well over 10 million ads per year. The subpoena sought documents during a six-year period. Subpoena to Backpage.com by the Permanent Subcomm. on Investigations (Oct. 1, 2015) ("Except where indicated otherwise, the time period covered by this subpoena is from January 1, 2010 to the present.").

The next business day, Mr. Ferrer filed a notice of appeal with the D.C. Circuit and simultaneously moved for an emergency stay pending appeal. *See* 191a-193a; *see also* 238a-239a. On August 12, 2016, the D.C. Circuit granted a temporary stay pending consideration of Mr. Ferrer's emergency motion, but later denied that motion for a stay pending appeal on September 2, 2016, with Judge Griffith indicating he would grant the stay pending appeal (23a).

STANDARDS FOR GRANTING A STAY

"Three considerations govern a Justice's decision whether to grant an application for a stay pending appeal. First, there must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious to justify notation of probable jurisdiction. Second, there must be a significant possibility of reversal of the lower court's decision. Finally, there must be a likelihood that irreparable harm will result if the lower court's decision is not stayed." *Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers). *Accord Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). Where, as here, a party would suffer irreparable harm absent a stay, this Court has stayed orders of a district court that are presently before (or may be subject to further review by) a court of appeals. *See, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183 (2010); *San Diegans For Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers); *Heckler v. Lopez*, 463 U.S. 1328 (1983) (Rehnquist, J., in chambers); *Chamber of Commerce v. EPA*, 136 S. Ct. 999 (2016) (mem.) (stay of agency order subject to pending review by the D.C. Circuit).

The Court may consider the four traditional factors: (1) likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the prospect that the moving party will be irreparably harmed if relief is withheld; (3) the possibility that others will be harmed if a stay issues; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 426 (2009). This is the same standard as controls issuance of a preliminary injunction. *E.g.*, *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Tesfamichael v. Gonzales*, 411 F.3d 169, 173 (5th Cir. 2005). *See also Nken v. Holder*, 556 U.S. at 443 (Alito, J., in dissent). "In First Amendment cases, the likelihood of success will often be the determinative factor," especially insofar as "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," and "there is always a strong public interest in the exercise of free speech rights otherwise abridged" by constitutional overreach. *Pursuing America's Greatness v. FEC*, _ F.3d __, 2016 WL 4087943 at *7-8 (D.C. Cir. Aug. 2, 2016) (quoting, *inter alia*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

APPLICATION OF THE STAY STANDARD TO THIS CASE

The Court should grant Mr. Ferrer an immediate, interim stay pending its consideration of this Application, and, after such consideration, a stay pending appeal to the D.C. Circuit. This case presents constitutional issues of exceptional importance to a growing sector of the national economy warranting certiorari; the decision below is wrong and likely would be reversed; and denying a stay would injure Mr. Ferrer's First Amendment rights in ways that will be irreparable should he prevail on appeal. A stay is decisively in the public interest and would not cause

PSI any substantial harm. The Court should therefore preserve the status quo pending judicial review of the District Court's Disclosure Order.

I. THE "REASONABLE PROBABILITY" OF GRANTING CERTIORARI

There is a reasonable probability that at least four Justices would grant review of the District Court's erroneous directive to disclose documents in violation of Mr. Ferrer's First Amendment rights. This case presents a question of exceptional nationwide importance involving the scope of protection online publishers of third-party content enjoy under the First Amendment when they engage in core editorial functions, including monitoring user postings and moderating user fora. The last few years have witnessed a tremendous growth of online publishers that host, among other things, content created by third parties. Unfortunately, this proliferation of diverse speakers online has been accompanied by the unsettling trend exemplified by the *Hood* and *Dart* cases described above: efforts by government officials to stifle the speech of unpopular online publishers by issuing extremely burdensome investigative demands designed to intimidate or chill their activities.

This case provides the Court with an opportunity to (1) bring much-needed clarity to the law regarding the scope of First Amendment protection that online publishers of third-party content enjoy in response to investigative demands that target their editorial functions, and (2) to revisit *Branzburg v. Hayes*, 408 U.S. 665 (1972), a case that has divided Courts of Appeals over whether and, if so, to what degree, the First Amendment protects against disclosure of newsgathering information and editorial functions in response to requests for testimony or documents.

A. The Scope of First Amendment Protection for Online Intermediaries is a Recurring Issue of Increasing Importance to the Digital Economy

As this Court has repeatedly made clear, speech that is disseminated online enjoys the same protection as that speech would enjoy in traditional media, such as newspapers or books. *See, e.g., Reno v. ACLU*, 521 U.S. at 868-70. This protection exists even if the speech in question may be distasteful or offensive to some – or the speaker unpopular. "'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" *Snyder v. Phelps*, 562 U.S. at 458 (quoting *Texas v. Johnson,* 491 U.S. 397, 414 (1989)).

Despite the Internet's transformational role as a "vast democratic" medium, *Reno*, 521 U.S. at 868-69, this Court has not had the opportunity to address the level of First Amendment protection online publishers enjoy when they exercise editorial judgment in screening, selectively publishing, or editing content created by third parties. This issue applies to an ever-expanding array of services – from YouTube to Craigslist to Yelp – that increasingly play a major role in the national economy. As online publishers such as Google increasingly find themselves the targets of government efforts to stifle unpopular speech they host, this Court's guidance is necessary to clarify the burden the government must meet before it can obtain documents – especially those sought in scattershot fishing expeditions – that go to publishers' core editorial functions. A nationally uniform answer to that question is particularly necessary given the borderless nature of the Internet itself.

While the Fifth Circuit, for example, has emphasized "the importance of preserving free speech on the internet," *Hood*, 822 F.3d at 220 (citing *Backpage*, 807 F.3d 229), many instances of government overreach – including "government coercion aimed at shutting up or shutting down" unpopular online sources, *Backpage*, 807 F.3d at 233 – unfortunately likely never come to light. As explained in *Backpage*, even large companies may feel the need to "knuckl[e] under" to such threats. *Id.* at 236. Absent a clear and uniform national standard that government officials must meet when imposing burdensome investigative demands targeting the editorial process, a great deal of speech will be suppressed – contrary to the "First Amendment's purpose 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984)).

Citing a case involving a grand jury investigation of *The Black Panther* newspaper, Mr. Ferrer urged the courts below to at least require PSI to establish (1) an immediate, substantial, and subordinating need for the information it sought; (2) a substantial connection between the information sought and an overriding governmental interest; and (3) that there are no less drastic means to obtain the information. *See infra* 30. As explained below, however, the District Court – in a decision the D.C. Circuit declined to stay – wrongly reversed the burden of proof, and held Mr. Ferrer had forfeited his First Amendment rights by failing to show on a document-by-document basis why the voluminous materials sought should not be produced. Given the importance of this increasingly recurring issue, and the risk of

suppression of protected speech unless the Court clarifies the standard to which all government officials must be held when probing the editorial functions of online intermediaries, there is a substantial likelihood at least four Justices would grant review.[21]

B. This Court Should Resolve the Deeply Entrenched Circuit Split That Persists in the Wake of *Branzburg v. Hayes*

Granting certiorari also would provide the Court an opportunity to clarify the precedential effect of *Branzburg* – a case that has spawned a deeply entrenched circuit split concerning whether and, if so, to what extent, the First Amendment affords protection (known in some contexts as the "reporter's privilege") against demands directed to the editorial process, such as for confidential notes or sources. *Branzburg* may be instructive here, particularly because online publishers that exercise editorial functions should enjoy no less protection under the First Amendment than "traditional" media, such as newspapers. *See, e.g.*, *Jian Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014). *Cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (because "[c]able programmers and [] operators engage in and transmit speech," they are "entitled to the protection of the speech and press provisions of the First Amendment"). This case thus presents a perfect opportunity to address the confusion among lower courts that has ensued in *Branzburg*'s wake, especially given that, in the more than 40 years since it was decided, the Court has never clarified the precedential effect of either the majority

[21] If the D.C. Circuit were to agree with the District Court's flawed analysis, that would create a circuit split between the D.C. and Ninth Circuits on these issues of First Amendment law.

opinion or Justice Powell's "enigmatic concurring opinion." *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

The Courts of Appeals are hopelessly divided on the import of the decision – including the fundamental question of whether a reporter's privilege even exists under the First Amendment. In *Branzburg*, the Court addressed the argument by journalists that, under the First Amendment, they could not be forced to testify before a grand jury about confidential sources. The majority held "there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation." *Id.* at 708. But Justice Powell, who joined the majority opinion, wrote a separate concurring opinion "to emphasize … the limited nature of the Court's holding." *Id.* at 709. He explained that a privilege rooted in the First Amendment does indeed exist, and that any assertion of such a privilege "should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony." *Id.* at 710. In subsequent cases, Justice Powell made clear his understanding that the *Branzburg* majority did not categorically reject any privilege grounded in the First Amendment and that, instead, courts must address case-by-case whether the privilege should apply to bar the government's investigative demand.[22]

[22] *See Saxbe v. Washington Post Co.,* 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting) ("[A] fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated."); *Zurcher v. Stanford Daily,* 436 U.S. 547, 570 n.3 (1978) (Powell, J., concurring) (reading his *Branzburg* concurrence as clarifying that "the

To this day, the Courts of Appeals remain deeply divided over whether such First Amendment protection even exists for the media. The Fourth, Sixth, and Seventh Circuits, for example, have held Justice Powell's opinion – even though it was decisive – does not reflect the Court's holding, and that no privilege exists under the First Amendment. *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013); *In re Grand Jury Proceedings,* 810 F.2d 580, 584 (6th Cir. 1987); *McKevitt v. Pallasch,* 339 F.3d 530, 532 (7th Cir. 2003). The majority of circuits, conversely, have understood *Branzburg* – correctly – to establish at least a qualified privilege against investigative demands. *See, e.g., United States v. Ahn,* 231 F.3d 26, 37 (D.C. Cir. 2000); *United States v. LaRouche Campaign,* 841 F.2d 1176, 1182 (1st Cir. 1988); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); *Miller v. Transamerican Press, Inc.,* 621 F.2d 721, 725 (5th Cir. 1980); *Shoen v. Shoen,* 48 F.3d 412, 414-15 (9th Cir. 1995); *Silkwood v. Kerr-McGee Corp.,* 563 F.2d 433, 437 (10th Cir. 1977); *Price v. Time, Inc.,* 416 F.3d 1327, 1343 (11th Cir. 2005).[23]

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court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime.").

[23] The Second Circuit also has recognized a privilege in civil and criminal proceedings, although it has not determined whether the privilege arises under the First Amendment or common law. *See, e.g.*, *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983); *United States v. Treacy*, 639 F.3d 32, 42 (2d Cir. 2011); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8 & n.9 (2d Cir. 1982) (because "Justice Powell cast the deciding vote" in *Branzburg*, his reservations about the Court's opinion "are particularly important in understanding the decision"). In a similar vein, the Eighth Circuit has found a certain amount of protection for confidential sources, but has held that whether its roots lie in *Branzburg* is an "open question." *See Cervantes v. Time, Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997).

Although this case does not involve reporter's privilege, the First Amendment issues that arise when investigative demands intrude on editorial functions are clearly implicated, as discussed in the various opinions in *Branzburg*. Such intrusion into editorial choices was at issue in *Bursey*, 466 F.2d at 1082, where the court held that the First Amendment limited the government's ability to probe such things as "what should be published initially, how much space should be allocated to the subject, or the placement of a story on the front page or in the obituary section." *Id.* at 1087-88. Of particular relevance here, the government sought rehearing, citing the *Branzburg* plurality's reasoning. But the Ninth Circuit denied the government's motion, finding that Justice White's opinion in *Branzburg* does not affect the balancing of First Amendment interests in all contexts, and that "Mr. Justice Powell's reading of Mr. Justice White's opinion reinforces our view of the limited reach of the plurality's rationale." *Bursey*, 466 F.2d at 1090-92 & n.2 (Hufstedler, J.).

The same doctrinal questions that led to the circuit split on the issue of reporter's privilege affect the broader First Amendment questions as well. As a consequence, this case presents a compelling reason for this Court to reexamine the issue presented in *Branzburg* that has so divided the circuit courts on the First Amendment limits on governmental ability to investigate editorial decision-making. In light of ever increasing confusion arising from the scope of First Amendment protection available to online intermediary publishers, this Court may find it instructive to review *Branzburg* – and, in doing so, bring much needed clarity to the law.

II. THERE IS A SIGNIFICANT POSSIBILITY OF REVERSAL OF THE DISTRICT COURT'S DECISION IN THIS CASE

A. The Subpoena Intrudes on Editorial Functions

The District Court misconstrued the nature of Mr. Ferrer's First Amendment claims and undervalued the constitutional interests at stake. First, Mr. Ferrer never claimed a First Amendment "absolute right to be free from government investigation" or an "'unlimited license to talk' or to publish." *PSI v. Ferrer*, 2016 WL 45179289, at *10 (8a-9a) (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 (1961)). That said, the court minimized the First Amendment concerns the subpoena raises, on the assumption that this case does not implicate political speech or associational rights, or the freedoms of speech or of the press.[24] This

[24] *Id.* at *12 & n.6. In doing so, the District Court improperly relied on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (cited *PSI v. Ferrer*, 2016 WL 45179289, at *11) (9a-10a). *Arcara*'s specific holding was that enforcement of a public health regulation of general application against a retailer that happened to sell books did not implicate the First Amendment. 487 U.S. at 705-07. This reflected that enforcement targeting unlawful conduct having nothing to do with books or expression was constitutional even though it incidentally affected protected activity. *Id.* At most, therefore, *Arcara* means the government may investigate and prosecute illegal *activity* conducted on websites, and that incidental consequential effects on First Amendment rights may not preclude investigation and prosecution of illegal activity. But that is not the case when the government targets editorial and hosting functions of online intermediaries, which are not *incidental* to prosecution of illegal conduct, but rather targets speech that *is* the challenged conduct. Further, in *Arcara*, there was no advanced determination about the propriety of any speech – in fact, there was no consideration about the propriety of speech at all – which is why the enforcement avoided acting as an impermissible prior restraint. Burdening activities of online intermediaries based on how their websites operate, conversely, does act as a prior restraint. Indeed, one court has specifically held *Arcara* does not apply, in particular, to analysis of Backpage.com's First Amendment rights. *See Backpage.com, LLC v. Dart*, No. 15-cv-6340, Tr. at 5-8, Aug. 9, 2016 (ECF No. 175) (198a-201a).

ignores the extent to which online forums' ability to host speech of others has become central to preserving Internet freedom.

This Court's cases regarding the Internet – including its ability to facilitate speech by third parties using online services – "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno v. ACLU*, 521 U.S. at 870. The issue here is use of investigatory authority that intrudes on editorial judgments by online intermediaries. *E.g.*, *Google, Inc. v. Hood*, 96 F. Supp. 3d 584, 598 (S.D. Miss. 2015), *reversed on other grounds*, 822 F.3d 212 (5th Cir. 2016). These editorial choices are *precisely* the kind of speech and press functions that enjoy robust First Amendment rights. *See, e.g.*, *Turner Broad. Sys.,* 512 U.S. at 636; *Jian Zhang*, 10 F. Supp. 3d at 438. *See also*, *e.g.*, *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974)), and discussing First Amendment protection afforded search engine editorial selections). The District Court nonetheless ignored that subpoenas targeting online intermediaries – especially those hosting unpopular speech – are ripe for abuse. *See Backpage*, 807 F.3d at 237.

The Subcommittee's subpoena indisputably strikes at the heart of Backpage's editorial decision-making. It demands "[a]ny documents concerning," among other things, Backpage's "editing" of ads, including, "but not limited to" related "policies, manuals, memoranda, and guidelines," and material involving "reviewing, blocking, deleting … or modifying" ads. Subpoena to Backpage.com by the Permanent Subcomm. on Investigations ¶ 1 (Oct. 1, 2015) (28a). It also seeks Backpage's

posting limitations, "including but not limited to," *inter alia*, anything "conveyed to users during [ad] drafting." *Id.* ¶ 2 (28a).

This intrusion into editorial functions is comparable to what was at issue in *Bursey*, which involved grand jury investigation of *The Black Panther* newspaper. 466 F.2d at 1065-68. The District Court's effort to distinguish *Bursey*, by asserting that it involved political speech and associational rights, *PSI v. Ferrer*, 2016 WL 45179289, at *12 (10a-11a), failed to grasp that editorial choices by online intermediaries likewise involve such things as "what should be published initially, how much space should be allocated to the subject." 466 F.2d at 1087-88.

The District Court's view of *Bursey* as involving primarily associational rights is similarly misplaced. *PSI v. Ferrer*, 2016 WL 45179289, at *12 (10a-11a). While certain questions probed the identity of Black Panther Party members, the court separately addressed First Amendment concerns the investigation raised. *Bursey*, 466 F.2d at 1088. It found the First Amendment issues to be of surpassing importance, because if *Black Panther* staff could be compelled to provide information on its internal operations and editorial policies, "any editor, reporter, typesetter, or cameraman could be compelled to reveal the same information about his paper or television station." *Id.* Notably, the *Bursey* court reached these conclusions despite the fact that some content at issue involved advocating illegal acts, such as presidential assassination, with newspaper staff themselves authoring speech that was not constitutionally protected. *See id.* at 1065-68. By comparison, nothing indicates Backpage created unprotected speech, notwithstanding the

District Court's erroneous insinuations, *see PSI v. Ferrer*, 2016 WL 45179289, at *2, *11 (2a-3a, 7a-8a), which mirror claims that Judge Posner rejected. *See Backpage*, 807 F.3d at 234 (rejecting Sheriff's sweeping assertion that Backpage's Adult section contains criminal and hence unprotected speech).

The *Bursey* court held that, because "the Government must use a scalpel, not an ax" in the First Amendment context such as that presented here, *Bursey*, 466 F.2d at 1088, the government must "carr[y] its burden almost question by question before it can compel answers." *Id.* at 1086. Here, by contrast, the District Court inappropriately placed the burden on Backpage to identify "particular [documents] or class[es] of documents" whose production would implicate First Amendment rights. *PSI v. Ferrer*, 2016 WL 45179289, at *9 (7a-8a). This reversed presumption flies in the face of *Bursey*, where the Ninth Circuit explained that "[w]ere we to hold that the exercise of editorial judgments of these kinds raised an inference that the persons involved in the judgments had or may have had criminal intent, we would destroy effective First Amendment protection for all news media." *Id.* at 1087-88.

The District Court nevertheless placed the burden on Mr. Ferrer. It did so based on the erroneous conclusion that he made no specific objections and refused to search for documents, leading to the startling conclusion – which is wrong on both the law and the facts – that Mr. Ferrer forfeited his First Amendment rights by supposedly failing to search for all documents PSI sought. Notably, the District Court cited ***no*** authority holding that a complete, unduly burdensome search must

be conducted before a subpoena target may invoke his First Amendment right to be free from such governmental overreach.

Ultimately, the First Amendment issues here go directly to the "importance of preserving free speech on the internet." *Hood*, 822 F.3d at 220. The focus of PSI's inquiry is whether Backpage does "enough" to screen for potentially non-protected third-party speech – just as in *Hood*. In other words, this case is about nothing *but* editorial judgment – and the First Amendment protection it enjoys – and not, *e.g.*, "organized crime," or any such matter. *See PSI v. Ferrer*, 2016 WL 45179289, at *8 (6a-7a).

B. PSI Thwarted Efforts to Balance First Amendment Burdens

The conclusion below that Mr. Ferrer failed to balance investigative needs against his First Amendment interests also does not acknowledge the extent to which PSI's evolving demands rendered impracticable such steps as question-by-question objections, or production of a privilege log. The Subcommittee substituted its initial lengthy list of specific demands for a shorter list of broadly framed requests, but did nothing to lessen the burden. To the contrary, it *increased* it. The District Court's conclusion that PSI "minimized" the burden is thus fundamentally wrong. *See PSI v. Ferrer*, 2016 WL 45179289, at *14-15 (12a-13a). Moreover, the demand for years of internal emails was made clear nearly two months *after* the revised subpoena issued, and sought email from and between all those employed to provide moderation services for a *six-year period*, as well as documents concerning review, verification, editorial decisions, and payment information. Only after Mr. Ferrer produced documents related to moderation policies – including guide-

lines, moderation process documents and a moderation log, banned terms used in manual review, etc., *see supra* 14-15 – did PSI demand internal moderators' emails. *See* Ross Decl. ¶ 7 (98a).

Nor is there any basis for the District Court's conclusion that Mr. Ferrer refused to conduct a reasonable search and thus did not properly assert his First Amendment rights. *PSI v. Ferrer*, 2016 WL 45179289, at *13 (11a-12a). First, formulating the questions as expansive, blunderbuss demands focused on Backpage's editorial functions, *see supra* 14, 31, comprised "an unduly burdensome fishing expedition," *Hood*, 96 F. Supp. 3d at 599, that rendered question-by-question objections impractical. This burden is particularly acute in the context of online fora for third-party speech; given the undisputed millions of ads at issue, *see PSI v. Ferrer*, 2016 WL 45179289, at *1 (1a-2a), PSI's subpoena – even reduced to three categories it sought to enforce, *id.* at *1, *4-6 (1a-2a, 3a-6a) – is extremely intrusive. Likewise, expanding the demands to include all internal editorial communications for a six-year period, just days before a hearing, makes the claim that Mr. Ferrer failed to provide a privilege log fanciful. Any such complaint misses the point that the Subpoena as revised targeted speech by making broad generic demands.

The recasting of PSI's demands also refutes the erroneous belief by the District Court that Mr. Ferrer did not attempt to "negotiate more favorable terms" with PSI. Order (ECF No. 23) 5 (19a). Mr. Ferrer produced over 16,000 pages in response to part of the subpoena, and those documents addressed, among other

things, Backpage's cooperation with law enforcement.[25] These materials were the best source of information regarding misuse of Backpage for illegal or potentially illegal activity such as trafficking. *Id.* PSI's apparent disinterest in these documents underscores its true purpose as investigating Backpage's editorial decision-making, a topic both at the heart of the First Amendment and that is a convenient lever for pressuring a disfavored intermediary. Given the myriad flaws in the District Court's reasoning, Mr. Ferrer has established, at the very least, a significant possibility of reversal.

III. AS VIOLATION OF FIRST AMENDMENT RIGHTS CONSTITUTES IRREPARABLE HARM, THE BALANCE OF INTERESTS FAVORS A STAY

A. Absent a Stay, Mr. Ferrer Will Suffer Irreparable Harm

To compel production of extensive Backpage documents in violation of the First Amendment would constitute irreparable harm, especially if the D.C. Circuit (or this Court) later rules in Mr. Ferrer's favor. As this Court has recognized, "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. at 373. Moreover, in cases like this, once confidential documents are disclosed in violation of a party's rights, "the cat is out of the bag." *CBS Corp. v. FCC*, 785 F.3d at 709.

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[25] *See supra* 14-15. Assertions of a supposed "refusal" to search rest on a mis-characterization of a statement by Mr. Ferrer's counsel that the material produced did not "constitute … fruits of a complete search of every bit of data possessed by Backpage.com or … its employees over the full (nearly six year) time period." *See* Letter from Steven R. Ross, Counsel to Backpage.com to Sens. Rob Portman and Claire McCaskill, Chairman and Ranking Member of the Subcomm. (Nov. 16, 2015) (235a). As that letter and the foregoing show, a search was undertaken, despite the Subpoena's constitutional infirmities.

Probing the editorial functions of an online intermediary publisher imposes an excessive burden, especially given the nature and volume of materials at issue. Even without users' personally identifying information, the Subpoena requires production of massive amounts of information.[26] By way of comparison, if an investigating committee told the NAACP it could keep its membership lists, *cf. NAACP v. Alabama*, 357 U.S. 449 (1958), but only wanted six years of records reflecting internal policies and employee communications, it would not be plausible to suggest it does not impose a substantial burden on free expression. *See supra* 29-30 (discussing *Bursey*). This is true regardless whether the entity scrutinized is classified as a political dissident, for the First Amendment imposes no such requirement. *See United States v. Stevens*, 559 U.S. 460, 479 (2010) ("*Most* of what we say … lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation.").

Requiring the production of constitutionally protected documents prior to the pending appeal would effectively render meaningless Mr. Ferrer's appeal of the constitutional right to protect documents from congressional review. "Disclosure followed by appeal … is obviously not adequate," as the court before which the appeal is pending has held. *CBS Corp.*, 785 F.3d at 709 (internal quotation marks and citation omitted). *See also*, *e.g.*, *Providence Journal Co. v. FBI*, 595 F.2d 889,

[26] *Cf. PSI v. Ferrer*, 2016 WL 45179289, at *1 (1a-2a) (discussing the millions of records at issue). In fact, the requirement to redact such information adds to the time and effort burdens of complying with the Subpoena (though Backpage agrees it is a necessary step if such documents are to be produced).

890 (1st Cir. 1979) (granting stay pending appeal of order to comply with subpoena because "[o]nce the documents are surrendered pursuant to the … order, confidentiality will be lost for all time.").

These concerns are especially prominent here in that forced compliance with the subpoena would likely mean the documents produced to PSI will be disclosed or distributed to others. *Cf. United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423 n.6 (1983) ("Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have been already disclosed. We cannot restore the secrecy that has [] been lost ….") (quoting *In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1187-88 (9th Cir. 1981)). The Subcommittee already has shown an inclination to publicly disclose previously confidential information and documents, *see generally PSI Staff Report*, and documents and information obtained by PSI have promptly been used by others in their legal (and extralegal) attacks on Backpage.[27] In opposing a stay before the D.C. Circuit, PSI insisted it needed the documents to use them in "depositions, a public hearing, and a final report to the Senate." Opp'n of Appellee Senate Permanent Subcomm. on Investigations to Emergency Mot. of Appellant Carl Ferrer for a Stay Pending Review at 19 (ECF No. 1631269), *Senate Permanent Subcomm. on Investigations v. Ferrer*, No. 16-5232 (D.C. Cir. Aug. 19, 2016) (226a). Those bells cannot be unrung. It is also legally questionable whether

[27] *See, e.g.*, Mot. to Strike Pl.'s Improvidently Filed Summ. J. Mot. at 3-4 (ECF No. 126), *Backpage.com, LLC v. Dart*, Civ. No. 1:15-cv-06340 (N.D. Ill. Mar. 14, 2016).

material in the possession of a congressional committee could later be clawed back by judicial order. *See, e.g.*, *Doe v. McMillan*, 412 U.S. 306 (1973); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 955-56 (8th Cir. 1979). Irreparable harm clearly would befall Mr. Ferrer absent a stay.

B. The Balance of Interests and the Public Interest Both Weigh in Favor of a Stay

Unlike Mr. Ferrer and Backpage, PSI faces no harm if enforcement of the subpoena is stayed pending appeal. In opposing a stay below PSI complained of the delay that could be interposed, but its own delay seeking enforcement of the Subpoena – *five months* after issuance – objectively demonstrates a stay would have no ill effect. *See, e.g.*, *EEOC v. Quad/Graphics, Inc.*, 875 F. Supp. 558, 560 (E.D. Wis. 1995) (finding "delay in [government agency's] receipt of the information that it has requested" does not constitute substantial harm), *aff'd*, 63 F.3d 642 (7th Cir. 1995). Further, PSI has received already a significant production from Backpage – more than 16,000 pages – including various moderation guidelines Backpage used and/or considered, terms used by Backpage employees in the moderation process, and records of subpoena compliance and law enforcement support and assistance. And there has been no dispute that PSI may continue its investigation based on those documents, other materials in the public record, and the fruits of ongoing efforts.[28]

[28] Even during the pendency of the Application before the District Court, PSI continued to request and receive information and documents from third-party sources. Decl. of Steven Ross in Supp. of Mot. to Stay Pending Appeal ¶ 2 (ECF No. 19-2) (238a).

The Subcommittee is thus in no position to claim it is unable to continue its investigation or that it would be substantially harmed by not having more documents at this moment. *See, e.g.*, *Jewish War Veterans of United States, Inc. v. Gates*, 522 F. Supp. 2d 73, 82 (D.D.C. 2007) (concluding that "potential harm from an inability to use any additional documents [non-movant] may acquire" did not counsel against stay pending appeal because already-produced evidence sufficed). As a Senate subcommittee, PSI faces no immediate time constraint,[29] there is no specific legislation pending, and Congress only recently passed the SAVE Act. And because the First Amendment unquestionably forbids legislating editorial discretion, *see, e.g.*, *Tornillo*, 418 U.S. 241; *CBS v. DNC*, 412 U.S. 94 (1973), it cannot be said PSI "needs" documents from Mr. Ferrer to move forward with whatever legislation the Senate may consider consistent with lawful authority. Meanwhile, Backpage will continue to preserve all documents responsive to the Subpoena.

Given the weighty First Amendment implications of this case – for *all* online intermediaries and the American public – the public interest favors a stay. As the D.C. Circuit itself recently reinforced, allowing unconstitutional government action to stand "is always contrary to the public interest," which lies in "protecting First Amendment rights." *Pursuing America's Greatness*, 2016 WL 4087943, at *8 (quoting *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). *Cf. Jewish War Veterans*, 522 F. Supp. 2d at 82-83 ("public interest is best served" by a stay where "compel-

[29] *Compare Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 512 (1975) ("[I]t appears that the Session in which the House subpoenas were issued has expired. Since the House, *unlike the Senate*, is not a continuing body, a question of mootness may be raised.") (emphasis added) (internal citations omitted).

ling the Members to produce documents … may impinge important constitutional rights and could have a very real and immediate impact on the behavior of members of Congress"). *Accord Joelner v. Village of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004); *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009); *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002).

There may be a public interest in Congress' ability to investigate and legislate generally, but neither activity is at issue – nor is the purported focus of PSI's investigation. Rather, the operative balance here must weigh the public's interest in PSI's *immediate* access to the materials in question, which is practically non-existent, against the critical First Amendment interests at stake. Without a stay pending appeal, Mr. Ferrer's ability to vindicate his First Amendment rights on appeal would be illusory, and nothing in the public interest requires that result.

CONCLUSION

As this Court observed in *Nken v. Holder*, "[i]t takes time to decide a case on appeal. Sometimes a little; sometimes a lot. No court can make time stand still while it considers an appeal, and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review." 556 U.S. at 421 (internal quotation marks and citation omitted). "The choice … should not be between justice on the fly or participation in what may be an idle ceremony." *Id.* at 427 (internal quotation marks and citation omitted). These points are particularly apt in this case, where Mr. Ferrer has lodged a well-founded appeal in the D.C. Circuit to safeguard rights provided under the First Amendment and against government overreach. If the documents PSI demands are forced to be produced as

the District Court ordered, before the appellate process can play out, any ability to vindicate those rights will be irretrievably lost.

For this and all of the foregoing reasons, the Court should enter an immediate stay of the order granting the Subpoena's enforcement, and thereafter stay the order pending appeal.

/s/ Robert Corn-Revere

Robert Corn-Revere
bobcornrevere@dwt.com
Counsel of Record
Ronald G. London
ronnielondon@dwt.com
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, D.C. 20006
Telephone: (202) 973-4200
Facsimile: (202) 973-4499

Steven R. Ross
sross@akingump.com
Stanley M. Brand
sbrand@akingump.com
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, D.C. 20036
Telephone: (202) 887-4343
Facsimile: (202) 887-4288

Counsel for Carl Ferrer

CERTIFICATE OF SERVICE

I certify that on this 6th day of September, the foregoing Application by Carl Ferrer for Immediate Stay and Stay Pending Appeal to the D.C. Circuit of Order to Comply with Subcommittee Subpoena was served by hand and by electronic mail to the following:

Patricia M. Bryan
Morgan J. Frankel
Thomas E. Caballero
Office of Senate Legal Counsel
United States Senate
642 Hart Senate Office Building
Washington, DC 20510-7250
Pat_bryan@legal.senate.gov
Morgan_frankel@legal.senate.gov
Thomas_caballero@legal.senate.gov

/s/ Ronald G. London