IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-56510

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 INSTITUTE, 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

TABLE OF AUTHORITIES

CASES

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 the Constitution presumptively protects *all* speech from government infringement, and that the government cannot impose penalties on speech—including financial burdens—without first overcoming that presumption in an adversary proceeding. Accordingly, the Court has recognized that, though "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 ignored this admonition, seizing from Appellants publishing proceeds that are presumptively protected by the First Amendment, with neither a pre- nor a prompt post-seizure hearing. The District Court allowed these seizures to stand because it found that Appellants did not show that the publishing proceeds "merit[ed] special protection under the First Amendment." ER 7. But the District Court got the law exactly backwards. Proving that the publishing proceeds 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 to free speech posed by the government's use of civil forfeiture to seize the proceeds of publications the government alleges are illegal. The government confiscated millions of dollars of proceeds not only from an online classified advertising website, but also from Appellants' numerous other publishing ventures—ventures completely unrelated to the alleged criminal activity of the website and indisputably protected by the First Amendment. And the government has done so on nothing more than its say-so that the publication from which the proceeds were earned is not protected by the First Amendment. Absent any meaningful judicial check on the government here, nothing can stop it from going after other publishers—of websites, or anything else—that it deems unworthy of First Amendment protection by seizing their proceeds. Although the government argued below that these seizures were unremarkable because the proceeds were allegedly connected to illegal conduct, the District Court was wrong to take the government at its word: judicial vigilance should be at its height when the First Amendment is at stake.

Publications like newspapers, books, and their internet analogs are presumptively protected by the First Amendment. This presumptive protection extends to monetary proceeds from their dissemination. The First Amendment's protections must reach such proceeds to preserve the integrity of the marketplace of ideas; for if the government can selectively impose financial burdens on speech, then

the government can silence the speakers themselves. The burden for rebutting the presumptive protection that such proceeds receive rests with the government. It is a heavy burden, as it must be to ensure the guarantees of the First Amendment. The government, then, can seize the proceeds from a publication the government claims is illegal only if the government first demonstrates, in an adversarial proceeding, that the publication is unprotected by the First Amendment.

Here, there was no adversarial proceeding, or any proceeding at all. Instead, the government usurped a role meant for an impartial arbiter, by assuming that these proceeds were not protected by the First Amendment—an assumption that the District Court simply rubber-stamped. 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-oriented publications—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—including the founder of one of the *Amici*—into silence. *See United States v. PHE, Inc.*, 965 F.2d 848 (10th Cir. 1992).

The campaign in *PHE, Inc.* involved tactics similar to those the government 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. In this case, the government has sought to more directly bankrupt the publishers by seizing their

bank accounts, making it difficult for them to defend against charges that their publication is not constitutionally protected. In past cases, the government's efforts to impose burdens on publishers and speakers largely have been thwarted by the Supreme Court's clear instruction on the breadth of the First Amendment and its limits on the government's ability to assume speech is unprotected. Rather than follow the District Court's erroneous departure from this instruction, this Court should correct course and deem the government's seizures unconstitutional under the First Amendment.

ARGUMENT

A. The First Amendment Presumptively Protects Publishing 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). Internet websites (including Backpage.com) 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 publications, 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 a library "simply because they dislike" the books' ideas), it cannot punish the publisher or bookseller for having distributed the book by seizing the proceeds from its sales. The First Amendment presumptively protects not only the publications themselves, but also 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 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").

Publishing proceeds are thus inseparable from the published 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)

[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 compelling state interest for it, and because it was not narrowly tailored. *Id.* at 120-21. The government below did not argue that it has a compelling state interest in seizing Appellants' proceeds, or that it even needed to proffer one to justify its seizure. Instead, it simply assumed that it could seize the proceeds because they are not protected speech, without making any showing that the proceeds were, in fact, unprotected. *See infra* at 11-15.

(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 (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 publishing proceeds is anathema to open exchange, because such seizure allows the government to summarily punish past speech: Depriving a disfavored publisher of its investment in its publishing enterprise, and of remuneration for publishing when favored publishers are not, sanctions the disfavored publisher for doing nothing more than speaking. It follows, then, that "content-based financial disincentives" on speech, such as fines on publishers for publishing certain books, 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 or adversarial hearing—seized millions of dollars of 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. This seizure is a severe punishment, and it has been imposed on Appellants for no reason other than their past publications—an abuse of government power that, if unrestrained, will drive the voice of many speakers like Appellants out of the circulation of free and diverse thought.

The government has argued that it has the right to conduct the seizures because it has alleged that the proceeds earned from Backpage.com are all the product of "illegal activity." 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, *see* Appellants Br. at 6-8 & n.3, and its speech cannot be deemed "illegal activity" absent the government's proof otherwise during an adversary proceeding. Moreover, Appellants' 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] Ignoring this presumption, the government has proceeded with

[3] By also seizing the proceeds from publishing newspapers unrelated to Backpage.com, the government has impaired First Amendment activity that it does

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

B. Because the First Amendment Presumptively Protects Publishing Proceeds from Seizure, an Adversarial Hearing Was Required.

The First Amendment's presumptive protection means that a publisher cannot be penalized for "illegal speech" absent a judicial finding, after an adversary proceeding, that the publication was unprotected. The government can only rebut this presumption by "proving the constitutionality" of its action, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816-17 (2000), establishing that the expression at issue is unprotected speech, *Ashcroft v. ACLU*, 535 U.S. 564, 573-74 (2002), and that regulation is narrowly tailored to promote a compelling state interest. *Playboy Entm't Grp., Inc.*, 529 U.S. at 813.

The government must overcome a heavy burden before it may regulate expression because there is no margin for error in such regulation. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be

---

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.

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 in an adversarial proceeding to be unprotected speech. 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 the First Amendment 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 the publications, without prior adjudication of whether they were constitutionally protected, would lead to prior restraint—flipping the presumptive protection of such materials on its head. *Id.* at 63-64. But the threat of "freewheeling censorship," *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), inherent in a government that can suppress speech first and question the legitimacy of doing so later—or not at all—is no less present when the government's method of suppression is a financially-ruining fine for speaking. As a consequence, when the government seeks civil forfeiture of the financial proceeds 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.

Contrary to the District Court's reading, *see* ER 7-8, *Fort Wayne Books*' instruction on the procedural hurdles the government must clear before it can suppress speech does not stop at prior restraints. The mere fact that the government is seizing publishing proceeds, rather than the publications themselves, does not change the calculus: content-based financial burdens on speech impede free expression just as much as seizure itself, and thus are just as constitutionally suspect. *See supra* 7-10. Again, the government cannot accomplish indirectly what it is not permitted to accomplish directly. And here, the government has done exactly what *Fort Wayne Books* forbids: It has seized *all* of the publishing proceeds based solely on *ex parte* assertions of probable cause. Its probable cause showing, moreover, comprises affidavits from only one law enforcement official—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 publishing proceeds demands process far more substantial than this.

C. The Government Is Using Seizure of Publishing Proceeds to Punish Disfavored Speech.

This case is simply the latest chapter in a long history of government attempts to penalize disfavored speech. For decades, the government has been trying to harass 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 Simon & Schuster*, 502 U.S. at 116-23 (finding law requiring escrow of publishing proceeds unconstitutional burden on speech); *see also 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); *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); *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).

The government's overzealous campaign against Backpage.com and its former owners 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 6-8 & 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 proceeds from the website's former owners, as well as proceeds from their weekly newspapers, 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 reverse the District Court's order denying Appellant's Motion to Vacate, and issue an order vacating the seizures.

January 28, 2020

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 January 28, 2020, 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 3,885 words, including footnotes and excluding the parts of the brief exempted under Rule 32(f).

Dated: January 28, 2020

/s/ Jessica Ring Amunson
Jessica Ring Amunson