No. 15-3047

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BACKPAGE.COM, LLC,

Plaintiff-Appellant,

v.

THOMAS J. DART, Sheriff of Cook County, Illinois,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
No. 1:15-cv-06340
The Honorable John H. Tharp, Jr.

Amicus Curiae Brief of the Center for Democracy & Technology, Electronic Frontier Foundation, and Association of Alternative Newsmedia in Support of Plaintiff-Appellant and Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, *amici curiae* the Center for Democracy & Technology, *et al.*, hereby submit the following corporate disclosure statements:

The Center for Democracy & Technology ("CDT") is a non-profit, non-stock corporation organized under the laws of the District of Columbia. CDT has no parent corporation, and no company owns 10 percent or more of its stock.

The Electronic Frontier Foundation ("EFF") is a nonprofit organization recognized as tax exempt under Internal Revenue Code § 501(c)(3). EFF has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

Association of Alternative Newsmedia ("AAN") is a private, non-stock corporation that has no parent.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTERESTS OF *AMICI*

Amici curiae are non-profit public interest organizations and a trade association seeking to protect the rights and ability of individuals to express themselves and access information on the Internet.

The Center for Democracy & Technology ("CDT") is a non-profit public interest organization that advocates for individual rights in Internet policy. CDT represents the public's interest in an open, innovative, and decentralized Internet that promotes constitutional and democratic values of free expression, privacy, and individual liberty. CDT advocates for policies that protect Internet intermediaries from liability for third-party content and from obligations to police such content, in order to expand opportunities for online expression and innovation. CDT has participated in a number of cases addressing issues of intermediary liability and free expression on the Internet, including as litigants in *CDT v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004) (striking down as unconstitutional a statute that imposed criminal liability on Internet service providers who failed to heed informal notices issued by the Pennsylvania Attorney General to block access to websites containing child pornography), and as *amicus curiae* in *Google v. Hood*, No. 15-60205 (5th Cir. filed July 28, 2015) (seeking declaration that a search engine cannot be held liable under Mississippi law for content created by third parties and seeking an injunction against enforcement of a subpoena issued in retaliation for intermediary's publication of third-party content).

EFF is a San Francisco-based, donor-supported, nonprofit civil liberties organization working to protect and promote free speech, privacy, and openness in the

digital world. Founded in 1990, EFF now has almost 23,000 dues-paying members throughout the United States. EFF represents the interests of technology users in both court cases and broader policy debates regarding the application of law in the digital age, and is a recognized leader in privacy and technology law. Through direct advocacy, impact litigation, and technological innovation, EFF's team of attorneys and technologists encourage and challenge industry and government to support free expression, privacy, and transparency in the information society.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for approximately 120 alternative newspapers in North America, including weekly papers like *Illinois Times* and *The Chicago Reader*. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

RULE 29(c)(5) & RULE 37.2(a) STATEMENTS

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure and Circuit Rule 29(c)(5), no counsel for a party authored this brief in whole or in part and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. In accordance with Rule 32.2(a), counsel for *amici* provided notice to counsel for Appellant and Appellee of *amici*'s intent to file a brief. Appellant consented to the filing; Appellee objects to the filing. A motion for leave to file accompanies the brief.

INTRODUCTION

Amici curiae submit this brief because the implications of this case go far beyond the particular burden of Sheriff Dart's campaign to starve Backpage.com off of the Internet. The record demonstrates that Sheriff Dart intended his public campaign against Visa and MasterCard – to "demand" and "compel" those card companies to "defund[]" Backpage.com – as part of his ongoing efforts to remove the classified advertising website from the Internet. *See Backpage.com v. Dart*, 2015 U.S. Dist. LEXIS 112161 (N.D. Ill. Aug. 24, 2015). Such tactics, which have traditionally been used against distributors such as bookstores and movie theaters to suppress the dissemination of information and ideas, present a grave danger in an era of online bookstores and ad-supported platforms for individuals' speech.

The district court found that Sheriff Dart had intermixed First Amendment-protected "advocacy" with threatening statements intended to coerce the credit card companies into a course of action ultimately aimed at censoring Backpage.com. While government officials certainly retain a First Amendment right to express their opinion as private individuals, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). And in cases where an official conveys his opinion in the same communication to the same recipients on the same topic as where he issued an implied or explicit threat of government sanction, such "opinion," for all practical purposes, becomes indistinguishable from the threat. By improperly insulating Sheriff Dart's threats within the protective cloak of the First Amendment, the district court has sanctioned extralegal government tactics to suppress not only an entire

category of protected expression, but an entire platform dedicated to the exchange of information and ideas. This turns the First Amendment on its head and deprives entities such as Backpage.com of due process of law.

The ramifications of the district court's ruling go well beyond Backpage.com. Government coercion of technological and financial intermediaries in order to suppress lawful speech and to shut down hosts of third-party content is a major threat to free expression in the digital age. It is a particularly insidious form of government censorship, as it occurs through informal channels that circumvent due process protections and judicial oversight.

Any judicial decision affirmatively allowing government actors to use their official position to suppress disfavored speech via extralegal threats will be a devastating blow to online speakers who rely on technological and financial intermediaries in order to express their opinions and ideas and to access information online.

ARGUMENT

I. INDIVIDUAL SPEAKERS' ABILITY TO USE THE INTERNET AS A PLATFORM FOR THEIR PROTECTED SPEECH IS JEOPARDIZED WHEN INTERMEDIARIES ARE VULNERABLE TO THREATS AND COERCION

A. All speakers who use the Internet to express themselves and to access information necessarily rely on a series of third-party intermediaries.

The global Internet has become an indispensable medium for the freedom of expression. Billions of people around the world use the Internet to exchange ideas and information; gather and disseminate news and research; discuss and debate social and economic policy; create, share, and preserve art and literature; purchase goods and services; conduct business; contact loved ones and meet new people; organize their lives

and record their private thoughts. Out of technical necessity, all of this online expression relies on the use of the equipment and services of a series of third-party intermediaries.[1]

Internet users depend on the interconnected network of technical intermediaries, including backbone network operators, Internet service providers (ISPs) and telecommunications carriers, content delivery networks, and remote hosting providers to exchange and store data. They also rely on the millions of websites, online services, and applications that run on this infrastructure to access forums for searching for and sharing information and ideas, and for connecting with other Internet users around the world.[2] These intermediaries facilitate access to content predominantly created by others.

The ability of end-users to express themselves and to seek out information online depends not only on their access to technological Internet intermediaries, but also on those entities' ability to access the electronic payments system. Website operators use financial service providers such as credit cards to buy domain names and rent server space for their speech, to purchase Internet access services, and to pay their staff. These financial service providers, including banks, credit card networks, and third-party payment processors, function as "financial intermediaries" that facilitate the exchange of funds between speakers (including website operators and users) and providers of

[1] For an overview of technical intermediaries, see Center for Democracy & Technology, Shielding the Messengers: Protecting Platforms for Expression and Innovation (2012) *available at* https://cdt.org/files/pdfs/CDT-Intermediary-Liability-2012.pdf.

[2] Online service providers, including blog platforms, email service providers, social networking websites, and video and photo hosting sites, provide access to user-generated content or allow user-to-user communications.

technical infrastructure. A website operator whose bank or credit card account is cut off loses the ability to complete those transactions that are necessary to keep his or her site online.[3]

An operator who is cut off from financial services also loses the ability to receive payments from ad networks and direct advertisers for hosting advertising on his or her site. This is a particularly important consideration given the wealth of online services and hosts of third-party content that are provided at no direct cost to users and depend on revenue from advertising. News sites such as the Chicago Tribune[4] and the Chicago Reader[5] allow users to read and comment on articles and features without a subscription. Social discussion platforms such as Goodreads[6] allow users to rate and review books and discuss them with other readers without charge. People interact with others on ad-supported social networks such as Facebook and Twitter or dating sites such as

[3] A news site, for example, that cannot make electronic payments will be unable to continue publishing. A newspaper with a website such as the New York Times must pay an ISP to provide the service of connecting to the Internet in order to transmit its stories to subscribers and other readers. The New York Times must pay a domain name registrar, such as MarkMonitor, Inc., to obtain its domain name (nytimes.com), and it must purchase and maintain its own servers or transact with a website hosting company that rents server space to host the site and its ever-changing content.

[4] Businesses can purchase ads on ChicagoTribune.com and affiliated news sites through its online advertising services portal. *See Advertise with Chicago Tribune*, placeanad.chicagotribune.com/ (last visited Oct. 26, 2015).

[5] Advertisers can purchase classifieds on ChicagoReader.com via its online portal, chicagoreader.com/classifieds (last visited Oct. 25, 2015).

[6] Goodreads offers publishers and authors a platform to advertise book launches and readings alongside customer reviews of their books. Advertisers can place ads via goodreads.com/advertisers (last visited Oct. 26, 2015).

OkCupid,[7] and use essential tools like search engines such as Bing and free email service providers such as Gmail – all because of third-party advertising.

B. Because of their fundamental role in enabling and supporting online expression, Internet intermediaries and their financial counterparts are vulnerable pressure points for those governmental actors who seek to censor content and silence speakers online.

Internet intermediaries face pressure to control or police user content and activity in a wide range of circumstances, including in response to claims of defamation, obscenity, intellectual property infringement, invasion of privacy, or because content is critical of the government.[8] (Recognizing the threat to free expression posed by holding intermediaries liable for third-party speech, Congress passed Section 230 of the Communications Act of 1934. See discussion *infra* Section II.A.) Because technological intermediaries such as website operators are themselves reliant on other upstream intermediaries such as ISPs, who may face their own content pressures, the intermediated Internet is structurally vulnerable to censorship pressures.[9]

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[7] Businesses can place self-serve ads to OkCupid.com and a number of other dating websites through the dating service lead generator and online marketer Match Media Group, LLC, online at matchmediagroup.com (last visited Oct. 26, 2015).

[8] *See* Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. Penn. L. Rev. 11, 31-32 (2006).

[9] *Id*. at 29 ("Even where they propound their own views, speakers [such as website operators] who use the facilities of an upstream intermediary with a policy of proxy censorship will themselves engage in self-censorship as a means of assuring uninterrupted access if doing so is less costly than seeking out a new and permissive intermediary.").

Financial intermediaries are also vulnerable to pressure from government and private actors seeking to suppress user speech.[10] Those who disagree with the opinions and information expressed on a website, or whose true target is the unlawful conduct of some of the website's users, may find a pliant pressure point in banks and lenders, credit card networks, and third-party payment processors that facilitate financial transactions for the site or service. As the facts in the case before this Court demonstrate, threatening financial intermediaries with legal action and reputational injury can lead these entities to terminate their services to a website operator, cutting off the operator's access to the financial system in order to remove it from the web.

Indeed, certain financial intermediaries play a near-existential role in online expression. Like access to Internet connectivity, access to the financial system is a necessary precondition for the operations of nearly every other Internet intermediary, including content hosts and platforms. The structure of the electronic payment economy –which is concentrated in two major payment systems, Visa and MasterCard, accounting for nearly 80 percent of online transactions – make these payment systems a natural choke point for controlling online content.[11] Moreover, because most distribution of books, film, song, and other speech is neither exclusively "online" nor "offline," electronic payment systems play an increasingly important role in facilitating speech outside of the Internet. Brick-and-mortar booksellers and Amazon.com alike rely on the

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[10] Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. _ (forthcoming 2015), Arizona Legal Studies Discussion Paper No. 15-16, *available at* http://ssrn.com/abstract=2581705; *see also* Derek E. Bambauer, *Orwell's Armchair*, 79 U. Chi. L. Rev. 863 (2012).

[11] Annemarie Bridy, *Internet Payment Blockades* at 4, Fla. L. Rev. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494019.

electronic payment networks to process transactions; distribute books and articles; pay bills and employees; and promote writers, content, and events.

Financial intermediaries, like technological intermediaries, thus function as gatekeepers for online speech. Such gatekeepers present tempting targets for censors who cannot reach, through lawful means, the speech they wish to silence. This is especially true for today's Internet intermediaries who are often further removed from the speech interests at stake, or who are more vulnerable to the prospect of reputational harm, than the theater owners, book publishers, and distributors who have litigated the classic First Amendment cases challenging informal prior restraints.

Extralegal censorship enacted through pressure on technological and financial intermediaries is no mere speculative threat. Consider the following examples of government influence over Internet intermediaries:

i. Content censorship through website operators and content hosts

- In late 1999, an Assistant U.S. Attorney and an FBI agent contacted a web host operator to request the removal of a website featuring Michael Zieper's short film, "Military Takeover of New York City," which officers feared could inspire violence during the upcoming millennium celebrations in Time Square.[12] In response, the owner of the hosting company deleted all files related to the website and removed Zieper's domain name from the company's servers, blocking Internet access to the site for approximately ten days.[13] The website was ultimately reinstated

[12] C.J. Chivers, *Filmmaker Says U.S. Suppressed His Work*, N.Y. Times (Dec. 23, 1999), http://www.nytimes.com/1999/12/23/nyregion/filmmaker-says-us-suppressed-his-work.html.

[13] Larry Neumeister, *NY Court: FBI May Have Coerced Filmmaker*, Assoc. Press (Jan. 19, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/01/19/AR2007011901340.html; *see also* Complaint, *Zieper v. Metzinger,* 392 F. Supp. 2d 516 (S.D.N.Y. 2005) (No. 00-5595 (PKC)).

after the owner of the web hosting company learned there was no legal basis for the federal officers' takedown request.[14]

- In the weeks before the 2000 election, the Secretary of State for California sent a letter threatening criminal prosecution to the operators of several websites, including Voteswap 2000, established as fora for voters seeking to influence swing states by making informal agreements to "swap" votes for Presidential candidates Ralph Nader and Al Gore.[15] Immediately after receiving the letter, the operators of Voteswap 2000 disabled features of the site and restricted user access; upon learning of the threat of prosecution sent to Voteswap, the operators of a similar site, VoteExchange2000, also disabled their vote-swapping platform even though they had not received a letter directly. Both sites remained inactive for the remainder of the 2000 election.[16]

- In 2005, Pennsylvania State Police sent a notice to a Canadian web hosting company stating that they were investigating charges of "criminal harassment" and requesting that the company remove from its servers a political message board associated with the alleged harassment.[17] The hosting company complied, and the message board became inaccessible to its Scranton user base. Joseph Pilchesky, who maintained the board, subsequently learned that lawful comments criticizing a Scranton official

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[14] *See Zieper,* 392 F. Supp. 2d 516, *aff'd*, 474 F.3d 60 (2d Cir. 2007). On appeal, the Second Circuit Court of Appeals found a violation of the First Amendment had been made out for summary judgment purposes, but granted immunity to the federal agents involved. *Zieper v. Metzinger,* 474 F.3d 60 (2d Cir. 2007).

[15] Nate Anderson, *Internet Vote-Swapping Legal, Court Finds*, Ars Technica (Aug. 7. 2011), http://arstechnica.com/tech-policy/2007/08/internet-vote-swapping-legal-court-finds/.

[16] Assoc. Press, *Court: Calif. Wrong to Shut Down Vote-swapping Sites in 2000* (Aug. 7, 2007), http://www.firstamendmentcenter.org/court-calif-wrong-to-shut-down-vote-swapping-sites-in-2000. In 2007, the Ninth Circuit ruled that the Secretary of State's actions had violated the website operators' First Amendment rights. *Porter v. Bowen*, 496 F.3d 1009, 1011 (9th Cir. 2007).

[17] *Couple Settle Suit Against Police, DA*, Wilkes-Barre Times Leader (Aug. 15, 2007), http://archives.timesleader.com/2007_25/2007_08-_15_Couple_settle_suit_against_police__DA_-Local.html. *See also* Amended Complaint, *Pilchesky v. Miller*, No. 3:05-CV-2074 (M.D. Pa. Dec. 21, 2005).

had led the official's sibling, a local judge, to complain to the state police.[18]

- In 2009, the online classified ads site Craigslist replaced its "erotic services" section with a restricted "adult services" page, shortly after the New York Attorney General reportedly warned Craigslist of an impending prostitution case that involved the erotic section.[19] After indicating that Craigslist's efforts to police the "adult services" page were inadequate, seventeen attorneys general issued a letter to Craigslist demanding that it abandon adult content completely.[20] In 2010, Craigslist closed its "adult services" page to U.S.-based users, replacing the section's banner with the word "censored" in block letters.[21]

ii. Content censorship through Internet service providers

- In 2002, Pennsylvania's then-Attorney General Gerald Pappert authorized hundreds of informal notices to ISPs, demanding that they disable access to IP addresses and citing the "ISP Liability Law," a recently enacted statute that mandated blocking of child abuse-related content from Internet services offered in Pennsylvania.[22] Fearing criminal penalties and negative

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[18] Pilchesky sued in federal court. *Pilchesky v. Miller*, No. 05-2074, 2006 U.S. Dist. Lexis 73681 (M.D. Pa. 2006). The District Court for the Middle District of Pennsylvania denied the state defendants' motion to dismiss in large part, but the parties settled and the case dismissed before a ruling on the First Amendment claims. *Id.; Couple Settle Suit Against Police, DA*, Wilkes-Barre Times Leader (Aug. 15, 2007), http://archives.timesleader.com/2007_25/2007_08_15_Couple_settle_suit_against_police__DA_-Local.html.

[19] Brad Stone, *Under Pressure, Craigslist to Remove 'Erotic' Ads*, N.Y. Times (May 14, 2015), http://www.nytimes.com/2009/05/14/technology/companies/14craigslist.html?_r=0.

[20] CNN, *Adult Services Censored on Craigslist* (Sept. 25, 2010), http://www.cnn.com/2010/CRIME/09/04/craigslist.censored/index.html?hpt=T2; *see also* Letter from Richard Blumenthal, Connecticut Attorney General, to Jim Buckmaster, CEO, and Craig Newmark, Founder, Craigslist (Aug. 24, 2010), *available at* http://www.oag.state.md.us/press/craigslist_sign_on.pdf.

[21] Chris Matyszczyk, *Craigslist Censored: Adult Section Removed*, CNET (Sept. 24, 2010), http://www.cnet.com/news/craigslist-censored-adult-section-removed/.

[22] *See* Center for Democracy & Technology, The Pennsylvania ISP Liability Law: An Unconstitutional Prior Restraint and a Threat to the Stability of the Internet 4-5 (2003), *available at* https://cdt.org/files/speech/pennwebblock/030200pennreport.pdf.

publicity for challenging the informal notice procedure, local and national Internet providers removed more than 200 websites from the Internet. Only one ISP refused to comply with the informal notice process.[23]

- In 2008, New York's then-Attorney General Andrew Cuomo targeted Verizon, Sprint, Time Warner, Comcast and other ISPs and cable operators with a series of investigations and threats to bring charges of fraud and deceptive business practices unless they agreed to block newsgroups on the popular Usenet service that were alleged to contain child abuse images.[24] Though the Attorney General purported to identify child pornography in only 88 specific newsgroups, Sprint decided to block all groups in the "alt.*" subgroup, and Time Warner Cable stopped offering access to Usenet entirely.[25] Comcast, which had initially resisted the blocking campaign, finally acceded after the Attorney General threatened the cable company with imminent and brand-damaging litigation.[26]

iii. Content censorship through financial intermediaries

- In 2012, WikiLeaks revealed that Senator Joseph Lieberman and Representative Peter King had pressured MasterCard and possibly Visa to stop processing payments to the anti-secrecy organization.[27] Senator Lieberman also reportedly pressured Amazon.com, publicly and privately,

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[23] *Id*.; *CDT*, 337 F. Supp. at 660-61 (holding the notices constituted an involuntary informal prior restraint). The *Pappert* Court rejected the state's argument that the predictable collateral damage regarding access to innocent websites "does not violate the First Amendment because it resulted from decisions made by ISPs, not state actors." *Id*. at 651, 661.

[24] Declan McCullagh, *N.Y. Attorney General Forces ISPs to Curb Usenet Access*, CNET (June 12, 2008), http://www.cnet.com/news/n-y-attorney-general-forces-isps-to-curb-usenet-access/.

[25] *Id*.

[26] Mike Masnick, *Andrew Cuomo Threatens to Sue Comcast if It Doesn't Sign Up for His Plan to Pretend to Fight Child Porn*, Techdirt (July 22, 2008), https://www.techdirt.com/articles/20080721/1545501748.shtml.

[27] Michael Tennant, *Documents Show Lieberman, King Behind Financial Blockade of WikiLeaks*, New American (Nov. 28, 2012), http://www.thenewamerican.com/usnews/congress/item/13762-documents-show-lieberman-king-behind-financial-blockade-of-wikileaks.

to terminate its hosting services for WikiLeaks.[28] Ultimately, most of the major banks, credit card networks, and money transfer companies, including Bank of America, Visa, MasterCard, Western Union, and PayPal, discontinued service to WikiLeaks, cutting it off from 95 percent of its revenues from donations.[29] WikiLeaks stopped publishing and went offline for months while it sought to raise funds through alternative channels.[30]

- In 2013, the Federal Deposit Insurance Corporation warned banks and payment processors against processing transactions on behalf of online short-term or cash-advance lenders and other categories of online businesses that posed potential legal and reputational risks.[31] The warning came after the Justice Department announced a new investigation, "Operation Choke Point," focused on high rates of charge reversals it considered indicative of consumer fraud.[32] A number of banks terminated accounts with dating and escort websites, online credit repair services, gambling sites, "racist" discussion forums, and pornographic websites.[33]

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[28] *Id*.; Ewen MacAskill, *WikiLeaks Website Pulled by Amazon After US Political Pressure*, Guardian (Dec. 1, 2010), http://www.guardian.co.uk/media/2010/dec/01/wikileaks-website-cables-servers-amazon.

[29] John P. Mello, *WikiLeaks Suspends Publication Because of Financial Boycott*, PCWorld (Dec. 7, 2010), http://www.pcworld.com/article/242470/wikileaks_suspends_publication_because_of_financial_boycott.html.

[30] *Id*. WikiLeaks, which published classified diplomatic cables and documents in connection with the ongoing wars in Afghanistan and Iraq, was never charged with or prosecuted for committing any United States crime. *Cf*. Charlie Savage, *U.S. Prosecutors Study WikiLeaks Prosecution*, N.Y. Times (Dec. 7, 2010), http://www.nytimes.com/2010/12/08/world/08leak.html?_r=0.

[31] Frank Minter, *FDIC Admits to Strangling Legal Gun Stores' Banking Relationships*, Forbes (Jan. 30, 2015), http://www.forbes.com/sites/frankminiter/2015/01/30/fdic-admits-to-strangling-legal-gun-stores-banking-relationships/.

[32] Alan Zibel & Brent Kendall, *Probe Turns Up Heat on Banks*, Wall St. J. (Aug. 7, 2013), http://www.wsj.com/articles/SB10001424127887323838204578654-411043000772.

[33] Minter, *supra* note 31. In response to public outcry and internal and congressional investigations into government censorship through financial intermediaries, the Federal Deposit Insurance Corporation amended its policy and urged banks to consider actual risk on a case-by-case basis. *Id*.

Together, these examples illustrate the range of intermediaries that are involved in providing speakers and audiences a means to communicate online – and the range of pressure tactics available to government actors who seek to remove websites or platforms from the Internet.

In the "Military Takeover of New York" and VoteExchange2000 examples, government officials implied that website operators would be responsible for violence or unlawful vote-buying tied to their websites. While the California Secretary of State did not directly threaten to prosecute VoteExchange2000,[34] and while the FBI agent used "a polite tone" when contacting the "Military Takeover" website host,[35] the implication of responsibility for the conduct of their users was sufficiently chilling for the website operators to deactivate lawful political content.

The examples of threats aimed at Internet access providers show the potential scale of informal censorship through technological intermediaries. The Attorney General for Pennsylvania was able to bring down 200 websites through informal notices to ISPs, simply by invoking an "ISP Liability Law" that was ultimately struck down as an unconstitutional violation of their users' freedom of expression.[36] In like fashion, the Attorney General for New York was able to coerce ISPs and cable operators to drop service for some 100,000 Usenet newsgroups, hastening the demise of one of the

[34] Assoc. Press, *supra* note 16.

[35] Neumeister, *supra* note 13.

[36] *CDT*, 337 F. Supp. 2d at 660-61.

original computer network communication systems that pre-dated the public Internet by a decade.[37]

Finally, the high-profile campaigns against WikiLeaks and escorts, pornographers, and short-term lenders demonstrate the censorship threat of coercive pressures directed at the electronic payments system. In "Operation Choke Point," bank regulators sought unambiguously to place disfavored categories of businesses on a bankers' blacklist.[38] In the case of WikiLeaks, members of Congress waged a concerted campaign incorporating threats of reputational harm and legal sanction against many components of the financial system to effectuate a financial blockade that disabled supporters around the world and temporarily deactivated a journalistic website and whistleblowers' tool from the Internet.[39]

II. FIRST AMENDMENT LAW AND POLICY PROTECTS AGAINST GOVERNMENT ACTION TO CENSOR SPEECH BY ISSUING THREATS TO SPEAKERS AND THEIR INTERMEDIARIES

A. U.S. law recognizes the crucial role of intermediaries in supporting communication and expression and the need for safeguards to bolster their independence from improper government influences.

Concern that technological intermediaries could be manipulated to suppress speech or punish speakers has long guided communications policy in the United States. From telephone non-discrimination rules to Section 230 immunities for Internet

[37] Declan McCullagh, *Cuomo Strong-arms Comcast over Usenet*, CNET (July 23, 2008), http://www.cnet.com/news/cuomo-strong-arms-comcast-over-usenet/.

[38] Minter, *supra* note 31.

[39] Kim Zetter, *WikiLeaks Wins Icelandic Court Battle Against Visa for Blocking Donations*, Wired (July 12, 2012), http://www.wired.com/2012/07/wikileaks-visa-blockade/.

providers, U.S. law has implemented First Amendment protections through standards for strengthening the independence of essential communications services.

Courts have considered and rejected government interference with communications intermediaries dating back to telephone and telegraph companies, the recipients of mid-20th century suspension requests. *See, e.g., Whyte v. New York Tel. Co.,* 73 N.Y.S. 2d 138 (N.Y. Sup. Ct. 1947); *Dees Cigarette Automatic Music Co., Inc., v. New York Tel. Co.*, 53 N.Y.S. 651 (N.Y. Sup. Ct. 1945) (ordering recipient telephone company to reinstall customers' telephones after service cancellation following police request). Authorities were barred from requesting that accounts be suspended based on "a mere suspicion or mere belief that they may be or are being used for an illegitimate end," *Shillitani v. Valentine*, 184 Misc. 77, 81 (N.Y. Sup. Ct. 1945), and telephone utilities were forbidden from delegating suspension decisions to police commissioners and other officials, *Shillitani v. Valentine*, 296 N.Y. 161, 164 (N.Y. 1947).

Telephone companies' independence was considered necessary both to ensure customers' access to an essential communication service and to discourage efforts to circumvent customers' constitutional rights by zealous law enforcement officers or resourceful political opponents. *See People v. Brophy*, 120 P.2d 946, 955-56 (Cal. App. 1942) ("Public utilities and common carriers are not the censors of public or private morals, nor are they authorized or required to investigate or regulate the public or private conduct of those who seek service at their hands."). A contrary policy would promote "[t]he unconstitutional and extrajudicial enlargement of coercive governmental power" – a "frightening" development in a constitutional democracy and an existential

threat to the "body politic." *Pike v. Southern Bell Telephone & Telegraph Co.*, 81 So. 2d 254, 258 (Ala. 1955).

The same goals would animate Congress to enact the landmark statutory protections for Internet communication services in Section 230 of the federal Communications Act, 47 U.S.C. § 230 ("Section 230"). Section 230 implements the goals of encouraging access to a diversity of Internet services and deterring the circumvention of First Amendment rights by preserving intermediaries' independence in deciding what user-generated content they would and would not support. Specifically, Section 230's protections for "interactive computer services" bar vicarious liability in state enforcement actions and prosecutions, and shield intermediaries from the "heckler's veto of private litigation." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014). Without such protection from liability, state officials and private parties could pressure intermediaries into removing objectionable content or restricting access to platforms and other communication services simply by invoking the time and resource expenditures of litigation. Section 230 shields intermediaries both from liability for user content and from the costs and uncertainty associated with defending a lawsuit.[40]

The Supreme Court has long recognized in First Amendment cases that intermediaries are vulnerable to improper censorship pressures, especially from law enforcement. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 n.8 (1963) (collecting

[40] Thus, when Sheriff Dart brought a lawsuit against the classified-ads site Craigslist in 2009, the district court dismissed the suit, finding that "Sheriff Dart may continue to use Craiglist's website to identify and pursue individuals who post allegedly unlawful content. But he cannot sue Craigslist for their conduct." *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. Oct. 20, 2009).

cases). This vulnerability derives both from the limited incentives for many intermediaries to willingly defend First Amendment interests not their own, and the practical barriers preventing most speakers and audiences from being able to do so.

Courts have noted that the intermediary recipient of a censorship request will often lack strong economic incentives to resist the request or, if need be, to challenge it in court. *See Bantam Books*, 372 U.S. at 64 n.6 ("The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it."); *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) ("Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation."). At the same time, speakers and audiences may not have sufficient awareness of coercive government action aimed at remote intermediaries to enable them to vindicate their own First Amendment rights. *Bantam Books*, 372 U.S. at 66 ("It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments.").

Because of intermediaries' attenuated business relationship to content creators, publishers, and audiences, courts have been solicitous of interested parties seeking to challenge indirect censorship, finding, for instance, that publishers and trade associations must have standing to intercede even where they are not direct recipients of threats of legal or economic consequence. *See Bantam Books*, 372 U.S. at 64, n.6 ("[P]ragmatic considerations argue strongly for the standing of publishers . . . . Unless

[the publisher] is permitted to sue, infringements of freedom of the press may too often go unremedied."); *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) (recognizing overbreadth challenge on behalf of interested speakers because "there is a possibility that, rather than risk punishment for his conduct in challenging the statute, [a speaker] will refrain from engaging further in the protected activity. Society as a whole then would be the loser.").

But these protections, designed to shield communications intermediaries and the speakers they enable from the chilling effects of government threats, are all for naught if indirect censorship is allowed to run unchecked.

B. The district court erroneously concluded that a law enforcement official may combine First Amendment-protected "advocacy" with threats to intermediaries.

The district court's conclusion that Sheriff Dart was exercising his First Amendment right to "advocate for particular results, criticize conduct, and even threaten others with public embarrassment," *Backpage.com*, 2015 U.S. Dist. LEXIS 112161, at *20, is at odds with case law holding that official threats of sanction may give rise to First Amendment harms.[41] Courts have recognized as threats any coercive acts reasonably calculated to chill speech or to punish the facilitation of First Amendment

[41] There is no question that public employees retain the First Amendment right to speak as private citizens on matters of public concern. *See Garcetti*, 547 U.S. at 412. However, where those employees issue statements pursuant to their official duties, such as "writing in [their] official capacity, requesting a 'cease and desist,' invoking the legal obligations of financial institutions to cooperate with law enforcement, and requiring ongoing contact with the companies, among other things," *Backpage*, 2015 U.S. Dist. LEXIS 112161, at *22, those statements are not private speech, but government action that may itself give rise to a constitutional violation. *Bantam Books*, 372 U.S. at 71.

activity. *Bantam Books*, 372 U.S. at n.8 (collecting cases). Threats of further warnings, *LSO Ltd. v. Stroh*, 205 F.3d 1146, 1151 (9th Cir. 2000), and threats to injure an intermediary's reputational or economic interests are considered coercive if they could reasonably chill an intermediary's facilitation of speech. *See Okwedy v. Molinari*, 333 F.3d 339, 343 (2nd Cir. 2003) (considering "not only the threatened use of official power . . . but also the threatened use of other coercive means (*i.e.*, a boycott led by the members of the village council)" in determining whether Borough President's conduct constituted an unconstitutional threat) (citing *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991)); *see also Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581, 584 (D.D.C. 1986) (noting magazine seller's request to pornography commission that, "[i]n view of our decision to modify our policy and withdraw [named] magazines, we urge that any reference to Southland or 7-Eleven be deleted from your final report.").

Threatened action may fall within the person's duties and powers of office, but may also exceed those powers as *ultra vires* actions. *Bantam Books*, 372 U.S. at 69 n.9 (state action threatened "immaterial [of] whether in carrying on the function of censor, the Commission may have been exceeding its statutory authority") (citing *Ex parte Young*, 209 U.S. 123 (1908)); *Okwedy,* 333 F.3d. at 344 (clarifying that "a public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights even if the public-official defendant lacks direct regulatory or decisionmaking authority over the plaintiff or a third party that facilitates the plaintiff's speech."). *See also Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965) (holding justiciable "threats to enforce the statutes . . . not made with any

expectation of securing valid convictions" but rather "to harass appellants and discourage them and their supporters" from engaging in First Amendment activity).

Most importantly, obscuring a threat through exhortation to moral imperative does not void its coercive purpose and effect. It is the nature of informal censorship regimes to operate indirectly and by implication, combining tactics of "coercion, persuasion, and intimidation" in sufficient proportion that intermediaries are compelled to engage in censorship on behalf of the state. *Bantam Books*, 372 U.S. at 67; *CDT*, 337 F. Supp. at 660-61 (holding informal notices to ISPs constituted prior restraint).

In this case, Sheriff Dart's cease and desist letters, invoking legal and reputational risk for Visa and MasterCard, were threats of future sanctions intended to coerce the credit card companies into a course of action ultimately aimed at censoring Backpage.com. Indeed, as the court found, "Dart's letter to the credit card companies could reasonably be interpreted as an implied threat to take, or cause to be taken, some official action against the companies if they declined his 'request' to stop providing a method to pay for advertising on Backpage.com." *Backpage.com*, 2015 U.S. Dist. LEXIS 112161, at *21.

But the court errs in attempting to distinguish between statements within the letter, i.e., that, even though "the Court does not quarrel with the premise that the ***letter*** precipitated the companies' actions . . . it is far from clear that any ***threat*** the letter may have contained caused the companies' action." *Id*. at *41. The same error underlies the court's failure to acknowledge that Craigslist's decision to eliminate its adult advertising

[42] As the district court notes, Craigslist is the largest online classified ads site; it is able to retain this position because it is still able to process credit card payments for other advertisements on its site, something that Backpage can no longer do due to Sheriff Dart's coercive actions against the credit card companies.

services in 2010 was the product of a sustained "advocacy" campaign by state Attorneys General and other law enforcement officials, including a lawsuit and public attacks on the site's reputation by Sheriff Dart. (See discussion in Section I.B *supra*, and *Dart v. Craigslist*, Inc., 665 F. Supp. 2d 961 (N.D.Ill. 2009)). Craigslist serves rather as an example of the most likely outcome of government-led "advocacy" that seeks to undermine an Internet intermediary's reputation: capitulating to the pressure, engaging in self-censorship, and permanently closing a forum for user speech.

CONCLUSION

Permitting law enforcement and other government officials to combine threats of criminal sanction with promises of reputation-damaging actions under the guise of First Amendment-protected "advocacy" would give the government unprecedented ability to suppress speech that it disfavors – particularly online. The threat of sanction can exert a powerful chilling effect on a speaker or intermediary's willingness to confront government censorship actions. If left undisturbed, the district court's ruling denying relief in this case will signal that officials are free to issue threats against speech intermediaries without recourse, provided they couch their words in the rhetoric of advocacy. Intermediaries will in turn have fewer incentives to stand up for the speech rights of users, thwarting critical constitutional and statutory frameworks that have enabled the Internet to serve as a platform for content that "is as diverse as human thought." *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 870 (1997).

First Amendment rights are extremely fragile. It is actions such as those of Sheriff Dart that the Supreme Court meant when it observed, "The loss of the freedoms

protected by the First Amendment, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Courts must be vigilant to prevent all attempts by government officials to suppress ideas or expressions with which they disagree. Sheriff Dart's actions demonstrated by the record in this case are the very kind of governmental intimidation which the First Amendment was designed to prohibit. They cannot be tolerated.

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