ORAL ARGUMENT NOT YET SCHEDULED

No. 16-5232, consolidated with No. 16-5274

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARL FERRER,
Appellant-Respondent,

v.

SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
Appellee-Applicant.

On Appeal from the United States District Court
for the District of Columbia
Case No. 1:16-mc-00621-RMC (Judge Collyer)

BRIEF OF *AMICI CURIAE* CENTER FOR DEMOCRACY & TECHNOLOGY AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPELLANT-RESPONDENT AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties. All parties, intervenors, and *amici* appearing before the district court are listed in the Brief of Appellant Carl Ferrer. All parties and intervenors before this Court are listed in the Brief of Appellant Carl Ferrer, and *amici* are identified herein.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amici* Center for Democracy & Technology and Electronic Frontier Foundation certify as follows:

The Center for Democracy & Technology ("CDT") is a nonprofit advocacy organization that works to ensure that the human rights we enjoy in the physical world are realized online and that technology continues to serve as an empowering force for people worldwide. Integral to this work is CDT's representation of the public interest in the creation of an open, innovative, and decentralized Internet that promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

The Electronic Frontier Foundation ("EFF") is a member-supported civil liberties organization working to protect free speech and privacy rights in the online world. With more than 30,000 dues-paying members nationwide, EFF

represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age.

2. Rulings Under Review. References to the rulings at issue appear in the Brief of Appellant-Respondent Carl Ferrer.

3. Related Cases. This case has not previously been before this Court or any other court other than the United States District Court for the District of Columbia, from which the appeal is taken.

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Backpage	Backpage.com
Mr. Ferrer	Appellant-Respondent Carl Ferrer
Section 230	47 U.S.C. § 230
Subcommittee	Senate Permanent Subcommittee on Investigations

INTEREST OF *AMICI CURIAE*[1]

Amicus 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 has participated in a number of cases addressing First Amendment rights and 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 comply with requests issued by the Pennsylvania Attorney General to block access to websites containing child pornography), and as amicus curiae in First Amendment challenges including *Backpage.com, L.L.C., v. Dart*, 807 F.3d 229 (7th Cir. 2016) (holding campaign by sheriff's office to pressure pressuring financial intermediaries to cease payment processing for online classified advertising website to be an unconstitutional prior restraint).

[1] Pursuant to Rule 29(a), *amici* state that all parties consent to the filing of this brief. Pursuant to Rule 29(c)(5), *amici* state that no party's counsel authored this brief, in whole or in part; no party or its counsel contributed money intended to fund preparing or submitting this brief; and no person—other than *amici curiae* or their counsel—contributed money intended to fund preparing or submitting this brief.

Amicus the Electronic Frontier Foundation ("EFF") is a nonprofit, member-supported civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF's mission is to ensure that the civil liberties and due process guaranteed by our Constitution and laws do not diminish as communication, commerce, government, and much of daily life move online. Founded in 1990, EFF has nearly 26,000 members from across the United States. EFF has participated as amicus curiae in many cases involving claims against Internet intermediaries.

The present case concerns *amici* because the Subcommittee's investigation of Carl Ferrer and Backpage.com poses a grave threat to the First Amendment rights of Ferrer and Backpage and sets a dangerous precedent for government intrusion into the editorial practices of website operators.

SUMMARY OF ARGUMENT

The subpoena issued by the Senate Permanent Subcommittee on Investigations imposes a significant burden on Mr. Ferrer's First Amendment rights. Website operators like Mr. Ferrer create and implement content policies and moderation procedures that reflect their values and editorial views. These editorial judgments are protected by the First Amendment; the importance of shielding these editorial judgments from onerous scrutiny by the government is reflected in and reinforced by Section 230 of the Communications Act of 1934. This framework of protections for intermediaries, in turn, enables individual speakers to identify online services that will host their own First-Amendment protected speech. The Subcommittee's invasive, burdensome inquiry into Backpage.com's editorial practices creates an intense chilling effect, not only for Backpage but for any website operator seeking to define their own editorial viewpoint and moderation procedures for the third-party content that they host. The precedent set by this subpoena will create a chilling effect on operators' willingness to host controversial but wholly protected speech, out of fear that doing so could subject them to similar, potentially ruinous, scrutiny.

ARGUMENT

I. Legal protections for Internet intermediaries are essential for promoting freedom of expression online.

Internet intermediaries provide the technical foundation for individuals' freedom of speech online. All online communication depends on an interconnected network of backbone network operators, Internet access providers and telecommunications carriers, content delivery networks, and remote hosting providers. Individuals can use a variety of applications, such as email and instant messaging, and online services, such as web hosting and social media networks, to share information and opinions. Websites that host user-generated content, including video-hosting services such as YouTube, social media networks such as Facebook and Twitter, online review sites such as Yelp and TripAdvisor, and classified advertisement services such as Backpage and Craigslist, enable millions of Americans to publish their speech to a worldwide audience. In a 2015 survey, the Pew Research Center found that nearly two-thirds (65%) of Americans use social media sites.[2] Of people

[2] Andrew Perrin, Social Networking Usage: 2005-2015, Pew Research Center (Oct. 2015), *available at*: http://www.pewinternet.org/2015/10/08/2015/Social-Networking-Usage-2005-2015.

who use the Internet, more than 60% have created or shared photos and video online,[3] 79% use Facebook, and more than half use multiple social media platforms.[4]

A. Congress has shielded intermediaries from liability for user-generated content in order to foster freedom of speech online.

This dynamic environment for freedom of expression online is no accident. In 1996, Congress passed an amendment to the Communications Act of 1934 that shielded interactive computer services from liability for their hosting, distribution, and moderation of speech provided by third parties. *See* 47 U.S.C. § 230. In passing Section 230, Congress noted that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). Further, "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4).

Congress chose to protect and foster the Internet as a forum for unrestrained and robust communication by shielding from liability "companies that serve as

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[3] Maeve Duggan, Photo and Video Sharing Grow Online, Pew Research Center (Oct. 2013) (finding that 62% of adults who use the Internet have posted original photos and videos or shared material they found online with a wider audience), *available at*: http://www.pewinternet.org/2013/10/28/photo-and-video-sharing-grow-online/.

[4] Shannon Greenwood, Andrew Perrin, and Maeve Duggan, Social Media Update, Pew Research Center (Nov. 2016), *available at*: http://www.pewinternet.org/2016/11/11/social-media-update-2016/.

intermediaries for other parties' potentially injurious messages." *Zeran v. Am. Online*, 129 F.3d 327, 330-331 (4th Cir. 1997)*; see also Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) (explaining that Section 230 was intended to encourage "the unfettered and unregulated development of free speech on the Internet[.]")

By design, Section 230 operates to "protect [online service providers] from taking on liability" and hence helps encourage the development of forums to host speech of all types in "what is right now the most energetic technological revolution that any of us has ever witnessed." 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (Rep. Christopher Cox speaking in support of Section 230). As the Fourth Circuit later noted, "It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted." *Zeran*, 129 F.3d at 331. Congress recognized, in other words, that the risk of a potential lawsuit over intermediaries' editorial decisions would have a chilling effect on their willingness to host lawful speech.

To ward off this risk, Section 230 provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). On its face, and in interpretation by courts across the country, this

provision is understood broadly to shield intermediaries from publisher liability for their interactions with content provided by third parties, with limited exceptions. *See Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1174-75 (9th Cir. 2008) ("We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content."); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.") (internal quotation marks omitted).

B. Section 230's protections reinforce First Amendment values by protecting content hosts' ability to develop and implement their own editorial judgments.

Section 230 also broadly protects intermediaries who make efforts to edit or moderate the material that is posted to their sites. *Zeran*, 129 F.3d at 331 ("Congress enacted § 230's broad immunity 'to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material.' In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.") (internal citation omitted). Specifically, Section 230(c)(2) protects intermediaries from liability for

good-faith efforts to restrict access to "material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." This provision "insulates service providers from claims premised on the taking down of a customer's posting such as breach of contract or unfair business practices." *Batzel* at 1030 n.14 (9th Cir. 2003). Along with Section 230(c)(1) and the First Amendment, Section 230(c)(2) reinforces the protections for website operators to articulate and enforce their own editorial standards. *Green v. Am. Online*, 318 F.3d 465, 472 (3d Cir. 2003) ("Section 230(c)(2) does not require AOL to restrict speech; rather it allows AOL to establish standards of decency without risking liability for doing so.").

To express these editorial standards, website operators, from the individual running her own homepage to the company that runs a massive social media site, create "Terms of Service" or "Community Guidelines" that reflect the operator's values and describe the conditions under which another user may post his own speech. For example, the popular discussion forum Reddit begins its content policy with a description of the site as "a platform for communities to discuss, connect, and share in an open environment, home to some of the most authentic content anywhere online," noting that "[t]he nature of this content might be funny, serious, offensive, or anywhere in between" and asking its users to "show enough respect to others so

that we all may continue to enjoy Reddit for what it is."[5] Facebook calls its content policy its "Community Standards," and emphasizes that "We want people to feel safe when using Facebook."[6] Facebook explicitly links its content moderation activity to this goal, advising its users that "you may encounter opinions that are different from yours, which we believe can lead to important conversations about difficult topics. To help balance the needs, safety, and interests of a diverse community, however, we may remove certain kinds of sensitive content or limit the audience that sees it."[7] These types of statements, and the content policies and posting guidelines that accompany them, convey the editorial perspective of the website operator.

In addition to setting these policies, website operators can choose to enforce their guidelines through content moderation processes that can take a variety of forms. These include pre-publication review[8] (which significantly constrains the

[5] Reddit.com, Reddit Content Policy, https://www.reddit.com/help/contentpolicy.
[6] Facebook.com, Community Standards, https://www.facebook.com/communitystandards.
[7] Id.
[8] *See, e.g.*, New York Times, Help: Comments: Why Are Comments Closed on an Article?, http://www.nytimes.com/content/help/site/usercontent/usercontent.html ("The vast majority of comments are reviewed by a human moderator. Because of this, the number of comments that we are capable of moderating each day is limited.")

amount of content that can be posted),[9] automated filtering,[10] community-led moderation,[11] and, most commonly, human review of content that is reported to the operator as a violation of the site's Terms of Service.[12]

Courts, in applying Section 230, have consistently acknowledged that the decisions that intermediaries make regarding whether and how to moderate user-provided content are editorial decisions. *See Zeran* at 330 (4th Cir. 1997) ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's

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[9] *See, e.g.*, Bassey Etim, "Approve or Reject: Can You Moderate Five New York Times Comments?", NY Times, Sep. 20, 2016, http://www.nytimes.com/interactive/2016/09/20/insider/approve-or-reject-moderation-quiz.html ("Times readers have spoken, and we've been listening: You want the chance to comment on more stories, and you want your comments approved more quickly.").

[10] For example, many hosts use Microsoft's PhotoDNA software to identify whether a newly uploaded image matches one previously identified as likely child pornography by the National Center for Missing and Exploited Children. Microsoft, PhotoDNA Cloud Service: FAQ, https://www.microsoft.com/en-us/PhotoDNA/FAQ.

[11] *See, e.g.*, Owen Hughes, *Periscope to combat trolls and online abuse with new user-led moderation system*, Int'l Bus. Times (Jun. 2, 2016), http://www.ibtimes.co.uk/periscope-combat-trolls-online-abuse-new-user-led-moderation-system-1563372 ("Periscope is rolling out a moderation system that will let users report comments and vote on whether a flagged comment should be removed. Offenders who repeatedly post abusive material or spam risk being blocked from broadcasts.").

[12] *See* James Grimmelmann, Article: The Virtues of Moderation, 17 Yale J. L. & Tech. 42, 48-49 (2015) ("For example, on YouTube, Google owns the infrastructure; video uploaders are authors; video viewers are readers; and the moderators include everyone who clicks to flag an inappropriate video, the algorithms that collate user reports, and the unlucky YouTube employees who manually review flagged videos.")

traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred."); *Universal Commc'n. Sys. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) ("Lycos's decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting."); *Doe v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016) (rejecting as barred by Section 230 claims that "challenge features that are part and parcel of the overall design and operation of the website (such as the lack of phone number verification, the rules about whether a person may post after attempting to enter a forbidden term, and the procedure for uploading photographs). Features such as these, which reflect choices about what content can appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions."). As this Court has noted, "the very essence of publishing is making the decision whether to print or retract a given piece of content." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (finding that the conduct for which Klayman sought to hold Facebook liable – failure to promptly remove a page containing anti-Semitic statements – "falls within the heartland meaning of 'publisher.'").

II. Content moderation decisions by Internet intermediaries are editorial judgments protected by the First Amendment.

Editorial judgments about what to include and exclude from a website based on the site's content guidelines, and how to enforce these guidelines, are part of the

website operator's expression protected under the First Amendment. Website operators review content and respond to the activity of their users for a variety of reasons: promoting engagement, discouraging harassment, shaping an online community, and reinforcing their own values. Ultimately, the decisions that comprise a platform's content moderation regime are editorial decisions.

A. The First Amendment protects editorial decisions about whether to publish third-party speech.

The exercise of editorial control and judgment – which includes decisions over what material to include or exclude and how this material will be displayed – is protected by the First Amendment. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974). In *Tornillo*, the Miami Herald newspaper refused to print the reply of Pat Tornillo, a candidate for the Florida House of Representatives, after the paper published an editorial critical of his candidacy for state office. Tornillo brought suit in Florida state court under Florida's "right of reply" statute, which required newspapers that publish stories critical of a political candidate to also publish the candidate's response. *Id.* at 244. On review, the Supreme Court held that the statute violated the First Amendment because of its intrusion into the function of editors. "[T]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and the content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* at 258.

Operators of user-generated content sites make similar kinds of determinations about the content they host. Though they are not the authors of the speech that appears on their sites, website operators create and enforce their content policies as a way to communicate a message, which may be considered "speech" itself. (*See supra* Section I.B.) In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, the Supreme Court upheld a parade organizer's First Amendment rights in the selection of parade participants. 515 U.S. 557 (1995). The Court noted that parades and protest marches are inherently expressive and that their "overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." *Id.* at 577. Moreover, "a private speaker does not forfeit constitutional protection simply by combining [many] voices, or by failing to edit their themes to isolate an exact message." *Id.* at 569-70.

Backpage's moderation of content reflects its editorial position in the same manner as the parade council in Hurley. The Subcommittee's subpoena demands any documents concerning Backpage's "advertising posting limitations" and other guidelines for "reviewing, blocking, deleting, editing, or modifying advertisements in Adult Sections." *Senate Permanent Subcomm. on Investigations v. Ferrer*, 2016 US Dist. LEXIS 103143, *15 (D.D.C. Aug. 2016). These documents embody choices that Mr. Ferrer and Backpage have made about what to include and exclude

from publication on their website—precisely the sort of decisions the Court deemed protectable forms of expression under the First Amendment in *Tornillo* and *Hurley*. Exercising this sort of editorial discretion over the content posted on Backpage.com renders Backpage similar, in this regard, to "[a] newspaper . . . [which] 'is more than a passive receptacle or conduit for news.'" *Tornillo* at 258. *See also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994) (discussing the application of the First Amendment to cable operators' selection of third-party speech: "Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable programmers and operators seek to communicate messages on a wide variety of topics and in a wide variety of formats.") (internal citations omitted); *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 214 (1997) (noting that the must-carry provisions at issue "have the potential to interfere with protected speech [by] restrain[ing] cable operators' editorial discretion.").

As this Court emphasized, in distinguishing the conduit function of broadband Internet access providers from that of entities such as newspapers and cable companies that engage in editorial discretion, "[those] entities are not engaged in indiscriminate, neutral transmission of any and all users' speech." *United States Telecomm. Ass'n v. FCC*, 825 F.3d 674, 742 (D.C. Cir. 2016). Neither is Backpage.

B. The First Amendment prohibits the government from intruding upon publishers' editorial practices.

The Subcommittee's demand to Backpage to produce information concerning its editorial judgments is analogous to the impermissible government intrusion found in *Tornillo* and *Bursey v. U.S.* In *Tornillo*, the Supreme Court emphasized that government interference into the editorial judgments about the choice of material to go into the newspaper undermined the guarantees of a free press under the First Amendment. *See also Nelson v. Mclatchy Newspapers*, 936 P.2d 1123, 1132 (Wash. 1997) (discussing the importance of editorial control in a newspaper's right to freedom of the press.).

In *Bursey v. U.S.*, the Ninth Circuit noted the harms of exposing private groups to intrusive subpoenas when it refused "to issue a carte blanche to a grand jury to override First Amendment rights simply because the questions . . . might have something vaguely to do with conduct that might have criminal consequences." 466 F.2d 1059, 1091 (9th Cir. 1972). The Black Panther newspaper was under grand jury investigation after it published material pertaining to an assassination threat directed at President Nixon, a call for the overthrow of the Unites State government, and a description on how to make a Molotov cocktail. When a federal grand jury issued a subpoena that demanded information about the paper's editorial decision-making, the Ninth Circuit held that this type of inquiry would eviscerate the freedom of the press. *Id.* at 1088. Although the government had legitimate and compelling

interests in protecting the President's life and shielding him from threats, the court concluded that the newspaper's "decisions about 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" were editorial judgments, and "[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." *Bursey* at 1088.

Bursey establishes that intrusive document demands by the government about a protected type of speech are equally improper. *Bursey* reflects the limitations on investigations and how they can run the risk of being impermissible government interference when the investigation stifles fundamental personal liberties. In this case, compelling Backpage to provide information on its internal editorial decisions will have a chilling effect on its speech and will expose other website operators to the same risk and the same chill. As the court in *Bursey*, noted, describing the broad impact of the decision in that case: "[A]ny editor, reporter, typesetter, or cameraman could be compelled to reveal the same information about his paper or television station." *Id*. at 1088.

III. Government scrutiny of the editorial policies of website operators will have a chilling effect on the development of intermediaries' content policies and on their willingness to host lawful speech.

The scope of the Subcommittee's subpoena is dangerously broad and creates an enormous burden on Mr. Ferrer's First Amendment rights. In ordering Mr. Ferrer to produce any documents that concern Backpage's "reviewing, blocking, deleting, editing, or modifying of advertisements in Adult Sections . . . including but not limited to policies, manuals, memoranda, and guidelines," "advertising posting limitations, including but not limited to the 'Banned Term List,' the 'Grey List,' and error messages, prompts, or other messages conveyed to users during the advertisement drafting or creation process," and activities involving "reviewing, verifying, blocking, deleting, disabling, or flagging user accounts"[13] the subpoena attempts to conduct a searching inquiry into Backpage's editorial practices—but for the ultimate purpose of targeting the speech posted by Backpage's users.

The threat of ruinous litigation expenses will encourage hosts of third-party content to be more restrictive in the creation and enforcement of their content policies. The expense incurred thus far by Backpage in responding to the subpoena demonstrates the extraordinary burden this type of inquiry places on a website operator: Mr. Ferrer estimates that the cost of responding to the subpoena during this litigation has already reached $2.8 million. *Appellant's brief*, Document #1646520, at 47. At even a fraction of this amount, the costs associated with responding to this type of subpoena would be enough to put a smaller website operator out of business.

[13] *Senate Permanent Subcomm. on Investigations*, 2016 U.S. Dist. LEXIS at *15.

As a result of invasive government scrutiny of editorial standards and practices, individuals will find that their lawful, constitutionally protected speech is prohibited by or removed from an increasing number of online services.

Indeed, Congress recognized this risk, and its concomitant chilling effect, in the early days of the commercial Internet and designed Section 230 to provide intermediaries not only with a shield not only from ultimate liability but also from suit: "*[n]o cause of action may be brought* and no liability may be imposed under any State or local law that is inconsistent with this section." (emphasis added). 47 U.S.C. § 230(e)(3); see, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3D 1119, 1125 (9th Cir. 2003) ("Congress intended that service providers . . . be afforded immunity from suit"); *Ben Ezra, Weinstein & Co. v. AOL, Inc.*, 206 F.3d 980, 983 (10th Cir. 2000) (holding Internet service provider "immune from suit under § 230"). Legal protections that take hold only at a later stage of a case would undermine the essence of the protections themselves. *See, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254-55 (4th Cir. 2009) ("[I]mmunity is an immunity from suit rather than a mere defense to liability and it is effectively lost if a case is erroneously permitted to go to trial.") (citation and internal quotation marks omitted). This immunity from suit is an essential part of Section 230's function: by enabling website operators not only to defeat lawsuits over user-provided content but to avoid protracted litigation and associated expenses, Section 230 ensures that

content hosts and other intermediaries remain willing and able to host a wide range of individuals' speech.

The Subcommittee's investigation creates the very risk Section 230 seeks to prevent, by targeting a website operator on the basis of the operator's exercise of editorial discretion over user-generated content. Further, as discussed in the brief of *amici curiae* DKT Liberty Project et al, the Subcommittee's investigation does not reflect a legislative intent to study the structure and function of Section 230's immunity provisions. *See* Brief of *amici curiae* DKT Liberty Project, Document #1647369, 7-8. But this effort to subvert Section 230 nevertheless runs afoul of the First Amendment.

Moreover, the Subcommittee's subpoena is an example of a growing trend of government actors seeking to pursue allegedly unlawful third-party content by targeting not the users themselves, but rather the websites and other platforms for speech. In late 2014, for example, Mississippi Attorney General Jim Hood issued a 79-page subpoena seeking information from Google about its content hosting and moderation practices.[14] In May 2016, after reports that Facebook employed moderation practices for its Trending Topics section that evinced a bias against conservative news outlets, Senator John Thune, Chairman of the Senate Commerce

[14] See *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016). The Fifth Circuit struck down the district court injunction of the subpoena because it was not self-executing and therefore was not ripe for review. *Id.* at 226.

Committee, sent a letter to Facebook CEO Mark Zuckerberg demanding an explanation.[15] Asserting that he was writing "[p]ursuant to the Commission's oversight authority," Thune instructed Facebook to provide a complete copy of its internal guidelines for prioritizing news stories and "a list of all news stories removed from or injected into the Trending Topics section since January 2014."[16]

Backpage itself has faced repeated efforts by state and federal legislators and law enforcement officials to drive it offline – whether by litigation[17] or other means. Condemning the actions of the law enforcement official who pursued extra-legal censorship against Backpage, Judge Posner wrote for the Seventh Circuit:

> The suit against [classified-ads website] Craigslist having failed, the sheriff decided to proceed against Backpage not by litigation but instead by suffocation, depriving the company of ad revenues by scaring off its payments-service providers. The analogy is to killing a person by cutting off his oxygen supply rather than by shooting him.

Backpage.com, LLC v. Dart, 807 F.3d 229, 231 (7th Cir. 2015), cert. denied, 2016 WL 1723950 (Oct. 3, 2016). The Subcommittee's extremely broad subpoena of

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[15] Letter from Sen. John Thune, Chairman, Senate Comm. on Commerce, Sci., and Transp., to Mark Zuckerberg, Chairman and Chief Executive Officer, Facebook, Inc. (May 10, 2016), http://www.commerce.senate.gov/public/_cache/files/fe5b7b75-8d53-44c3-8a20-6b2c12b0970d/C5CF587E2778E073A80A79E2A6F 73705.fb-letter.pdf.

[16] *Id*.

[17] *See, e.g., Backpage v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); *Backpage v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage v Hoffman*, 2013 U.S. Dist. LEXIS 119811 (Dist. NJ 2013) (each striking down state law criminalizing the hosting of trafficking advertisements as violations of both Section 230 and the First Amendment).

information concerning all of Backpage's editorial activity represents yet another avenue of attack, one that risks crushing website operators beneath inordinate investigatory demands.

CONCLUSION

Congress has long recognized that fostering freedom of speech online requires shielding intermediaries from invasive, burdensome inquiry into the choices they make to host and remove user-generated content. Website operators' content moderation policies and decisions are editorial judgments that are protected by the First Amendment. The Subcommittee's broad subpoena of information about these editorial judgments places an extraordinary burden on Mr. Ferrer's constitutional rights and sets a dangerous precedent for government intrusion into the editorial practices of online publishers. *Amici* respectfully urge this Court to reverse the decision below.

Dated: November 23, 2016

Respectfully submitted,

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CIRCUIT RULE 29(d) CERTIFICATION

Pursuant to Circuit Rule 29(d), counsel for *amici curiae* the Center for Democracy & Technology and Electronic Frontier Foundation herein states that it would not be practical for all *amici* supporting Appellant-Respondent Ferrer to file a single brief. Each *amicus* intends to address a discrete set of important and complex issues from a distinct perspective. *Amici* could not give these issues appropriate attention in a single brief. *Amici* Center for Democracy & Technology and Electronic Frontier Foundation have significant experience in working to safeguard free speech online. This brief is focused on the ways in which the Subcommittee's investigation constitutes an impermissible violation of First Amendment and jeopardizes the framework for promoting freedom of speech that is articulated in 47 U.S.C. § 230. Other *amici* in this case wish to focus on the ways in which the Subcommittee's investigation constitutes an abuse of the legislative investigatory power. This brief thus makes a unique contribution that will assist the Court in resolving the instant matter.

Dated: November 23, 2016

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CERTIFICATE OF COMPLIANCE

I, Emma J. Llansó in reliance on the word count of the word processing system used to prepare this brief, certify that the foregoing complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) because it contains 5,288 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: November 23, 2016

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CERTIFICATE OF SERVICE

I, Emma J. Llansó, hereby certify that on this 23rd day of November 2016, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system pursuant to Circuit Rule 25, causing a true and correct copy to be served on all counsel of record.

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