IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-56455

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

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

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

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

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INTRODUCTION

The Government's Answering Brief continues its strategy of delay and obfuscation with a disingenuous offer of a "limited remand" based on mischaracterizations of the assets involved in this appeal and the legal issues to be resolved. The assets are bank accounts of Appellants containing millions of dollars earned from publishing enterprises, including alternative news weeklies owned prior to Backpage.com. The Government does not dispute this; in fact, its entire rationale for the seizures is that the proceeds come either from publishing the Government contends is "illegal," or were commingled with such funds. Accordingly, the legal question before the Court is whether the First Amendment permits the Government to assume its conclusion regarding the legality of the publishing activities and to seize proceeds prior to trial, without a judicial finding of guilt.

The Government has long attempted to avoid court review of that issue, and continues that pattern with a last-minute, unexplained epiphany that Appellants were "entitled to a hearing" all along, and by seeking "partial remand" to examine certain "threshold factual questions." This is pure sophistry. The Government seeks to manufacture factual questions by feigning confusion over what seizures are at issue, and by falsely describing them as "the same assets" as those forfeited by Backpage.com and Carl Ferrer. Its assertion of "threshold factual findings necessary to address the First Amendment claims" simply tries to mask a question

of pure law. The requested partial remand is unseemly gamesmanship that should not be tolerated.

The law is clear that the First Amendment prohibits pretrial seizures of publications alleged to be illegal and unprotected by the First Amendment. The Government agrees, and admits this rule governs "non-expressive assets" as well, but claims, without citation to authority, that it applies only to "ongoing publishing businesses." This theory flies in the face of long-settled First Amendment precedent that the Government can neither prevent publications nor exact financial penalties for past publication without the requisite judicial rulings. If the Government's theory were correct, it would be empowered to seize bank accounts of newspapers publishers accused of publishing state secrets on mere probable cause. That is not the law, and the Government cites not a single case supporting its theory.

Ultimately, the Government claims the seizures are justified because it is convinced it will have a strong case at trial. It relies not on information submitted with the seizure warrants, but on untested admissions in plea agreements that came after the seizures, and allegations from various other quarters. As discussed below, those accusations are not all the Government claims them to be. But even if they were, pretrial accusations never suffice to support seizures such as these.

ARGUMENT

I. Seizure of Appellants' Assets Pretrial Violates the First Amendment and Requires Immediate Resolution.

A. The Dispositive Issue is a Purely Legal Question.

The Government suggests a partial remand mainly to address *Franks* issues, which are separate from the main legal question presented. It also suggests partial remand is necessary to address "preliminary factual questions relating to appellants' First Amendment claims," Government's Answering Brief ("Opp.") 44, but this is just another attempt at avoiding the central question:

> Whether the First and Fourth Amendments bar the Government from effecting pretrial *ex parte* seizures of publishing assets and proceeds of publishing activities based on nothing more than a showing of probable cause that the assets are linked to criminal activity.

Appellants' Opening Brief ("AOB") 4.[1]

The legal issue here is straightforward. The Constitution prohibits the Government from seizing assets and proceeds of publishing based on allegations that the publication was "illegal" prior to a judicial determination of guilt. Appellants have maintained ever since filing their Motion to Vacate or Modify Seizure Warrants on August 1, 2018 (ER 490-95), that seizures of their assets based on nothing more than a probable cause showing were invalid from the

[1] Other questions are presented as well, but the appeal's central premise goes to the First Amendment status of publishing assets and proceeds. AOB 4-5.

beginning.[2] Every day the Government retains possession of the assets is an ongoing constitutional violation.

No "preliminary factual questions" bear on this question, and the few the Government suggests are transparent shams. It asks rhetorically "whose First Amendment rights and what 'publishing assets and proceeds' are implicated here?" (Opp. 41), but the *sole premise* underlying the seizures is the allegation that money seized from Appellants' bank accounts was earned from (or commingled with) proceeds from Backpage.com, which the Government alleges was an illegal publishing platform. The Government has never disputed the bank accounts and other assets it seized were proceeds from publishing ventures (including Appellants' prior ownership of a chain of news weeklies). *See* Gov't Remand Mot. at 7 ("Execution of these warrants resulted in the seizure of funds from approximately 89 bank accounts, all of which were related to the prosecution of Backpage and its operators."). Nor has the Government ever claimed the seizures of Appellants' assets rested on anything more than probable cause.

The only other "factual questions" the Government suggests are obvious red herrings. It falsely equates Appellants' own assets with those seized from

[2] Appellants also take issue with the Government's probable cause showing, AOB 40-45, but for purposes of addressing this legal question, the Court may assume probable cause was established.

Ferrer/Backpage and suggests Appellants must somehow demonstrate interests in assets *Ferrer/Backpage* ceded to the Government. It points out, for example, that "Appellants sold their shares in Backpage to Ferrer in 2015, and Backpage is defunct," Opp. 41, but this is *utterly beside the point*. The issue here is whether the Government may seize *Appellants'* bank accounts and assets, which are completely separate from anything seized from Ferrer/Backpage. Despite this clear distinction, the Government repeatedly and falsely describes Appellants' accounts as "the same assets" as Ferrer's.[3] The ultimate ownership of Backpage has no bearing on whether the Government may seize Appellants' earnings as publishers. Appellants have a valid, ongoing First Amendment claim based on seizure of *their* assets, and those seizures are the focus of this appeal. But as the Government seeks to inject this confusion into the proceedings, it is worth noting its constantly shifting positions.[4]

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[3] *E.g.*, Opp. 2 (referring to Backpage and Appellants' accounts as "the same assets"); *id*. 27-28 (equating Ferrer/Backpage assets with those of Appellants); *id*. 54 ("appellants concede the government seized the Backpage.com website pursuant to Backpage's prosecution in Arizona"); *id*. 55-56 (claiming Appellants lack standing as having not shown continuing interests in Backpage's assets).

[4] For purposes of opposing this appeal the Government maintains Appellants have no interest in Backpage assets (and thus no standing to challenge the seizures), Opp. 55, while in the Superseding Indictment, it alleges Appellants only "purported to sell their ownership interests in Backpage," suggests the sale was a sham, and claims Appellants continue to retain a financial interest and control. SI ¶¶ 29-32. Standing has *nothing* to do with Ferrer's or Backpage's assets, but the

Likewise, no factual issue is presented by the claim that Appellants "never offered any facts tending to show … the pretrial seizures included funds linked to the alternative newspaper weeklies that one of appellants' companies spun off in 2013." Opp. 42. The Government essentially concedes this point in arguing it can seize newspaper proceeds as well, *id.* 78-81, but the magnitude of funds seized from non-Backpage sources is not the main issue. It is part of a secondary issue—whether the seizures were overly broad (even by their own terms) and violated Appellants' Sixth Amendment rights. *See* AOB 45-46. This is not a "fact" requiring district court review to assist this Court's assessment of the relevant legal issue—whether pretrial seizure of Appellants' assets alleged to be derived from Backpage violates the First Amendment.

Bottom line, no additional facts are needed to decide the dispositive legal question. The Government's statement that "the district court never made any factual findings regarding … whether any of the seized funds" were used "to operate an *active ongoing* publishing business," Opp. 42, merely reflects misunderstanding of the law. As discussed immediately below, no such requirement exists.

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fact that the Government keeps changing its story might make the Court wonder about its credibility generally.

B. The Government is Wrong on the Law.

The Government's studied confusion about whether this appeal involves questions of fact or law begins with its claim that Appellants "bear the burden of demonstrating, as a threshold matter, that the First Amendment applies." Opp. 41 (citing *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 577 (9th Cir. 2014)). This out-of-context reference to the preliminary injunction standard recited in *Vivid* did not describe some threshold factual hurdle in First Amendment cases.[5] Rather, it is only necessary to establish that a claim implicates the First Amendment under applicable law. *Vivid*, 774 F.3d at 577. *See Doe v. Harris*, 772 F.3d 563, 570, 572-73 (9th Cir. 2014) (court determines as a matter of law that statute implicates First Amendment even where "on its face [it] does not prohibit speech"). For example, when the government imposes a discriminatory tax on newspapers, the taxed party is not required to make a threshold factual showing to bring a First Amendment claim just because the dispute involves only money.[6] The same is true here: Seizure of proceeds from a publishing venture based on allegations the

[5] This discussion in *Vivid* explored the tension in preliminary injunction cases involving First Amendment claims where movants normally must show likelihood of success on the merits but the government bears the burden to justify speech restrictions.

[6] *E.g.*, *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 580 (1983) (newspaper could bring First Amendment challenge to tax on newsprint and ink even though legislative history revealed no censorial motive by lawmakers).

publication was "illegal" automatically implicates the First Amendment under the substantive law discussed below.

The Government misstates the issue in claiming a "factual question" exists of whether the First Amendment even applies because ads proposing illegal activity are unprotected. Appellants are not charged with proposing illegal transactions—they are charged with owning a platform that permitted third parties to do so. Thus, repeated citation to cases that say the First Amendment does not protect ads written *by prostitutes* specifically to advertise sex for money are inapposite. *E.g.*, *Erotic Serv. Provider Legal Educ.& Res. Project v. Bacerra*, 880 F.3d 450, 461 (9th Cir. 2018); *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 604 (9th Cir. 2010). Those cases do not apply to publishers' activities.[7]

[7] The Government is on no firmer ground citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rights*, 413 U.S. 376 (1973). Opp. 6, 45, 61, 65. *Pittsburgh Press* involved a newspaper advertising category that *on its face* violated a municipal anti-discrimination ordinance, and would thus apply here only if Backpage had maintained a "prostitution" category and accepted ads with explicit sex-for-money offers, which was never the case. This Court has cautioned that *Pittsburgh Press* cannot be read to presume that only illegal speech is involved where the government targets commercial speakers. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 822 (9th Cir. 2013) ("Nothing in *Pittsburgh Press* … suggests that we should expand our inquiry beyond whether the affected speech proposes a lawful transaction to whether [it] is conducted in a lawful manner.").

The sale of advertising space is lawful activity unquestionably protected by the First Amendment. AOB 30-33.[8] The Government's argument is based on its *conclusions* (that it hopes to establish at trial) that most third-party ads posted in adult categories on Backpage were for prostitution and that Appellants are criminally culpable for allowing them. *E.g.*, Opp. 1, 45-46, 65-66, 69. The Government may believe it has a strong case, but that is what trial is for—to determine whether actual facts live up to the hype. The Government cannot skip over the trial and seize assets in advance just because it has convinced itself of its position.

1. The First Amendment Restricts Pretrial Seizure of Proceeds Derived From Publishing.

The controlling legal principle here is simple: The Government cannot seize proceeds of a publishing venture based on allegations the publication was "illegal" until *after* the Government has established the speech at issue is unprotected by the First Amendment. AOB 37-40. The Government tries to confuse matters by

[8] "Providing a forum for online publishing is a recognized legal purpose." *People v. Ferrer*, No. 16FE024013 (Super. Ct. Sacramento Cty. Aug. 23, 2017), slip op. at 13; *People v. Ferrer*, 2016 WL 7237305, at *3, *10 (Super. Ct. Sacramento Cty. Dec. 16, 2016) (holding Backpage's provision of "a forum for online publishing" and receiving payments for ads "qualify as services rendered for legal purposes" insufficient to support charges of pimping, facilitating prostitution or money laundering). *See also Backpage.com LLC v. Dart*, 807 F.3d 229, 234 (7th Cir. 2015) (responding to allegations that "a majority" of ads in Backpage's adult section are for sex by observing "a majority is not all, and not all advertisements for sex are advertisements for illegal sex").

misstating the assets at stake and conflating discussion of this First Amendment issue with the separate question of whether a *Franks* hearing should be held. Cutting through this clutter, the only responsive discussion on the question of seizing publishing proceeds is at pages 57-63 of the Answering Brief, where the Government argues there are no First Amendment constraints on seizures of funds derived from a publishing venture that it alleges involved "illegal speech." *Compare* AOB 37-40. The Government's position has wide-ranging implications, and is wrong.

The Government evidently agrees the First Amendment prevents law enforcement from seizing assets that include expressive materials, or, if non-expressive assets, where seizures disrupt "an *active ongoing* publishing business." Opp. 42, 57-58. But it claims—without citing supporting authority—that it can seize publishers' bank accounts without any First Amendment limits whatsoever.

Under this theory, there would be no First Amendment impediment to seizing assets of owners of the *New York Times* (so long as the "ongoing business" is not disrupted) after accusing the paper of "facilitating crime" via its publication. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring) (government might use criminal prosecutions against publication of materials like the Pentagon Papers). *Cf. United States v. Assange*, No. 1:18-cr-00111-CMH, Dkt. 8 (E.D. Va. Mar. 6, 2018) (alleging conspiracy "to collaborate on the acquisi-

tion and dissemination of [] classified records"). A prosecution however, would trigger legal safeguards, whereas here, the Government claims it can skip such niceties and proceed with seizing assets. This is an absurd reading of the First Amendment, and the Government identifies not a single case where such a seizure of publishing proceeds was sanctioned by a court. *See* Br. of Amici DKT Liberty Project, *et al.*, at 5-8 ("What the government cannot do to speech directly, it likewise cannot do indirectly.").

Appellants explained in the opening brief that such seizures violate very basic First Amendment principles even when the issue involves "only money." The First Amendment was adopted to prevent far more than just prior restraints, *Near v. Minnesota*, 283 U.S. 697, 714-17 (1931), and hostile governments throughout history have used financial penalties or confiscations as weapons against publishers. The Framers of the Constitution were quite familiar with the English practice of imposing "taxes on knowledge," and adopted the First Amendment as a hedge against this "long history of hostile misuse against the freedom of the press." *Grosjean v. American Press Co.*, 297 U.S. 233, 247-50 (1936). *See also Timbs v. Indiana*, 139 S. Ct. 682 (2019) (tracing history of use of financial sanctions to punish disfavored speakers).[9]

[9] Appellants cited a number of cases in different contexts showing financial sanctions alone can violate the First Amendment. AOB 37-38 (citing *United States*

No case has ever suggested such financial exactions raise First Amendment claims only if they threaten the existence of "ongoing businesses." The opposite is true—even modest financial burdens can violate the First Amendment, even though the complaint is just about money. *Minneapolis Star*, 460 U.S. at 578-79 (use tax on newsprint and ink); *Grosjean*, 297 U.S. at 240 (two percent gross receipts tax on newspapers). *See Playboy Entm't Grp.*, 529 U.S. at 812 ("The distinction between laws burdening and laws banning speech is but a matter of degree."). The same principles govern seizures of proceeds the government claims come from illegal publishing activities.

The First Amendment was founded on the premise that government actions to control or suppress speech "may operate at different points in the speech process," both before and *after* publication. *Citizens United v. FEC*, 558 U.S. 310, 336-37 (2010). The Supreme Court in *Citizens United* listed representative examples of restrictions found to violate the First Amendment, including requiring permits before speaking, "imposing a burden by impounding proceeds on receipts

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v. National Treas. Emps. Union, 513 U.S. 454, 468-469 (1995); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 812 (2000); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Minneapolis Star*, 460 U.S. at 583-84). The Government tries to distinguish these cases by citing differences in the particular regulations at issue, but this is entirely off-target. Opp. 62. The point of the cases was to show the Government's claim that only prior restraint offends the First Amendment is pure bunk. Financial penalties, before *or* after publication, also are unconstitutional.

or royalties," "seeking to exact a cost after the speech occurs," and "subjecting the speaker to criminal penalties." *Id.* (citations omitted). There simply is no basis in the law for the Government's claim that seizing publishing proceeds implicates the First Amendment only when they threaten an "ongoing business."

2. The Government's Analysis of Seizure Cases Ignores Basic First Amendment Principles.

Appellants' Opening Brief showed how these long-established First Amendment rules apply in the context of seizures. AOB 33-40. The Government says nothing about these overarching principles, and instead tries to chip away at the seizure cases by nitpicking factual differences. It admits that under *Fort Wayne Books* and *Adult Video Ass'n v. Barr* "a prior judicial determination of obscenity is necessary before allegedly obscene items can be removed from circulation" and that probable cause is not enough, Opp. 57-58, but assumes without analysis the answer differs if non-expressive assets are seized. The Government notes the specific holdings of those two cases were limited to expressive materials—as Appellants acknowledged (AOB 37)—but then fails to cite a single case supporting its position that the First Amendment limits only seizures of expressive materials.

The Government misrepresents *Barr*'s holding, citing two sentences at the end declining to invalidate a provision of RICO allowing preservation of assets in obscenity cases. Opp. 58-59 (quoting *Adult Video Ass'n v. Barr*, 960 F.2d 781,

792 (9th Cir. 1992), *aff'd in relevant part*, 41 F.3d 503 (9th Cir. 1994)). But the constitutionality of seizing non-expressive materials was not part of *Barr*'s facial challenge, so this Court did not rule on it. *Barr*, 960 F.2d at 788 n.6 ("Because Adult Video does not challenge the other pre-trial procedures authorized by section 1963(d), we need not address their constitutionality."). Plus, the Government fails to acknowledge the extent to which *Barr* took a much narrower view of forfeiture authority in First Amendment cases, limiting it to materials the government could *prove* were unprotected.[10] Finally, the opinion in *Barr* was superseded on remand in *Adult Video Ass'n v. Reno*, 41 F.3d at 504, where this Court simply reaffirmed its holding invalidating pretrial seizures.

Courts have made clear the First Amendment limitation on pretrial seizures applies to expressive and non-expressive assets alike. *American Library Ass'n v. Thornburgh*, 713 F. Supp. 469, 484 n.19 (D.D.C. 1989) ("pre-trial seizure of non-expressive material [including printing presses, bank accounts, etc.] *ex parte* from

[10] Citing other cases (including *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991)), this Court held "the current breadth of RICO's forfeiture provision cannot pass constitutional muster" and must be limited so that "assets or interests … invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited." *Barr*, 960 F.2d at 791. Also, as *Barr* involved a facial challenge, the Court did not attempt to specify what forfeitures might be permissible, leaving for district courts "the specific formulation of RICO forfeiture orders that are consistent with the First Amendment." *Id*.

a business engaged in distributing expressive material also is unconstitutional"), *rev'd on standing grounds sub nom. American Library Ass'n v. Barr*, 956 F.2d 1178, 1194-96 (D.C. Cir. 1992). In response, the Government argues this principle applies only to "ongoing businesses," but cites no authority for that illogical claim, *see supra* 12-13, which is refuted by the Supreme Court's holding in *Simon & Schuster* that the First Amendment prohibits seizing proceeds derived from past publishing. 502 U.S. at 115-17.

The Government claims *Simon & Schuster* has no application here based on differences between the "61-page indictment" in this case and the escrow provisions of New York's "Son of Sam" law, but those purported factual distinctions miss the point. The seizures here and New York's escrow requirements both rest on the government's expressed desire to ensure defendants "do not dissipate their assets," and both assume the funds encumbered "represent[] fruits of crime." *Id*. at 111, 115. The Court observed that New York's law supplemented its existing statutory scheme, including provisions authorizing forfeiture of proceeds of crime and prejudgment attachment procedures. *Id*. at 111. Assessing those factors, the Court had no difficulty holding the law violated the First Amendment even though it targeted past speech, not ongoing publishing, and the penalty involved encumbering only money, not "expressive assets."

The only other distinction the Government proffers is the content of the speech involved—the law in *Simon & Schuster* penalized "storytelling about an author's criminal past" whereas here the Government targets "speech proposing an illegal transaction," which is unprotected. Opp. 61. But the platform owner does not "propose an illegal transaction." As explained above, this purported distinction confuses the platform owner with the third-party advertiser, *supra* 8-9 & note 8, and depends *entirely* on the Government being able to assume its conclusions about the legality of the publication. Of course, the First Amendment prevents the Government from proceeding on such an assumption—which is the whole point of this line of cases.

C. This Court Should Accept Review and Vacate the Seizures.

Appellants' Opening Brief established this Court's jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1), which governs orders "granting, continuing, modifying, refusing or dissolving injunctions," under Section 1291, as the Stay Order essentially decides the substance of this case and leaves Appellants "effectively out of court," and based on the "collateral order" doctrine under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). AOB 23-28, 54. Where First Amendment rights are implicated, as here, courts have held repeatedly that immediate appeal of stay orders is necessary because "it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of

the press under the First Amendment." *Fort Wayne Books v. Indiana*, 489 U.S. 46, 56 (1989). *See Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977); *United States v. P.H.E., Inc.*, 965 F.2d 848, 857 (10th Cir. 1992).

The Government argues that a stay issued under 18 U.S.C. § 981(g) does not "create or continue an injunction," Opp. 9, but the two out-of-circuit drug cases it cites do not support this conclusion. In *United States v. Section 17 Twp. N., Range 23 E. of IBM*, 40 F.3d 320, 322-23 (10th Cir. 1994), the court held a stay of a forfeiture case not immediately appealable in circumstances where appellants were not denied use of their property due to an occupancy agreement that preserved the status quo, where no constitutional or statutory rights were at stake, and the only question was whether appellants would be able to "defend the forfeiture action immediately, as opposed to later." It suggested where constitutional rights are at stake an appeal could proceed. *Id*. at 322. The unpublished Sixth Circuit opinion in *United States v. Contents of Woodforest Nat'l Bank Account No. XXX0017*, 2011 WL 5373991 (6th Cir. Oct. 31, 2011), merely repeats the finding from *Section 17 Twp.* that a stay "relat[ing] only to the progress of the litigation in the district court" is not immediately appealable—but it also lists exceptions, such as when there is "a sufficiently strong showing of a due-process violation." *Id*. at *1-2. The short opinion doesn't discuss it, but logic suggests it would also adopt the

reasoning in *Section 17 Twp.* that a stay order is immediately appealable when constitutional rights are at stake.

Regardless, neither of those cases comes to grips with Ninth Circuit holdings Appellants cited—but the Government declines to address—that orders having the effect of restraining assets are immediately appealable, particularly where, as here, "denial of interlocutory review might cause the defendants' rights to be irreparably lost or impaired." *United States v. Spilotro*, 680 F.2d 612, 615 (9th Cir. 1982). *See also United States v. Ripinsky*, 20 F.3d 359, 361 (9th Cir. 1994); *United States v. Roth*, 912 F.2d 1131, 1133 (9th Cir. 1990).

On jurisdiction under 28 U.S.C. § 1291, the Government assures the Court that Appellants are not "effectively out of court" because their claims will be heard eventually, after the criminal trial, and that, in any event, the stay has been brief—only six months. However, when constitutional deprivations include First Amendment rights, six months is an eternity. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of First Amendment freedoms, even for minimal periods, unquestionably constitutes irreparable harm). And it has been over a year since the accounts were seized. Plus, as Appellants explained, when the essence of the constitutional violation is that assets were seized before trial, any post-trial remedy is, by definition, no remedy at all. AOB 26-28.

The Government claims Appellants have not shown the Collateral Order Doctrine applies to the "category" of cases that includes asset seizures and forfeitures, Opp. 10-11, but this is just a different way of stating its argument, refuted above, that the First Amendment does not apply to monetary seizures. The Government's request for a remand rests on the same fallacy, seeking a hearing to determine whether seizures of bank funds "implicate appellants' First Amendment rights." *Id*. As explained above, seizure of publishing proceeds based on allegations that the publishing venture was illegal implicates the First Amendment as a matter of law. *See supra* 3-4, 7-8. In this "category of cases," "important right[s] … would be lost, probably irreparably, if review had to await final judgment." *P.H.E., Inc.*, 965 F.2d at 855, 856 (citation and internal quotation marks omitted).[11]

This is a question of law, not fact, and the Government agrees this Court reviews the district court's legal determinations, including constitutional rulings, *de novo*. Opp. 44. This is particularly important in First Amendment cases. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 567

[11] The Government cites *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), but that case involved potential waiver of attorney-client privilege, where the Court found "several potential avenues for review" and "postjudgment review" options that could protect the parties' interests. *Id*. at 110-11. Here, Appellants already are pursuing other avenues for review under Sections 1292(a)(1) and 1291, and postjudgment review is no answer to the problem of *pretrial* seizures.

(1995) ("[W]e must [] decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection."). The Government complains Appellants seek to "bypass the district court and have this Court rule on the Motion to Vacate in the first instance," Opp. 4, but that is entirely appropriate where, as here, this Court can articulate the correct First Amendment test and prevent further harm to Appellants by remanding with instructions to enter an order vacating the unconstitutional seizures. *See AP v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012); *Edwards v. City of Coeur D'Alene*, 262 F.3d 856, 867 (9th Cir. 2001); *Baby Tam & Co. v. City of Las Vegas*, 199 F.3d 1111, 1112-13, 1115 (9th Cir. 2000); *Burch v. Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988).

II. The Request for a "Limited Remand" Has No Bearing on the Central Question and is a Cynical Attempt to Game the System.

The Government seeks to avert this Court ruling on the controlling legal questions and repeats its call for a "limited remand" to determine whether Appellants have demonstrated pretrial seizures of bank accounts pursuant to civil seizure warrants "implicated their First Amendment rights," and to "address [their] sufficiency challenge to the warrants." Opp. 8, 35. Appellants explained in their Opposition to the Motion for Limited Remand that it was a strategic dodge that misstates the issues on review and locks the Government into inconsistent positions. This Court should reject the Motion and hold the Government is

judicially estopped from taking contradictory positions. *See generally* Opp. to Gov't's Mot. for Limited Remand (Doc. 51).

First, no "preliminary facts" need be found, nor would a remand help determine whether pretrial seizures of bank accounts "implicated First Amendment rights." As explained above, this is a purely legal determination that, once made, leaves nothing for the district court to do. *See supra* 3-6, 19-20. The Government tries to confuse the issue by combining the First Amendment question with inquiry into whether the district court should have conducted a *Franks* hearing. It pursues this strategy through the tactical retreat of offering a "limited remand," saying it "now agrees appellants are entitled to a pretrial hearing regarding their challenge to the sufficiency of the warrants." Opp. 4. But "sufficiency of the warrants" under *Franks* Fourth Amendment review is separate from the main First Amendment question—whether publishing proceeds can be seized before trial based on untested *ex parte* allegations that the publication was illegal. If Appellants are correct in their understanding of the law, it does not matter that the warrants were defective for *other* reasons, because the seizures were invalid *per se*. *See* Doc. 51 at 9-17.

Second, the Government's tactical admission of error lays bare its pattern of evasion and gamesmanship. It does not explain why it now agrees Appellants "are entitled to a determination of whether they made the substantial preliminary show-

ing necessary [for] a *Franks* hearing." Opp. 37, 40. What possible reason could have convinced the Government to confess error and offer a hearing (of sorts)? The Government does not say. But its timing is more than a little suspicious—the Government proposed a limited remand only after this Court scheduled oral argument. Doc. 49 at 20. The only consistency in its position has been ongoing and extensive effort to evade review. AOB 14-19, 52-54; Doc. 51 at 2-5, 17-20.

The Government's denial of any effort to delay the matter lacks credibility —it misstates the principal legal question, and illogically asserts this case somehow will be expedited by having the district court rule on "preliminary factual questions relating to appellants' First Amendment claims." Opp. 44. *Compare* Doc. 51 at 15-17. However, it does not "expedite" anything to conduct an unnecessary factual hearing on a question of law this Court reviews *de novo*. As this Court held in *United States v. Liquidators of European Federal Credit Bank*, 630 F.3d 1139, 1148-49 (9th Cir. 2011), the Government is judicially estopped from perpetrating a "shell game" in forfeiture proceedings to forestall judicial review. Doc. 51 at 17-20.

Third, the "remedy" offered is illusory. A *Franks* hearing would examine the extent to which the Government affidavits for the seizure warrants were intentionally misleading and omitted material facts, but not the legal question regarding the constitutional status of publishing proceeds. And the Government does not

even propose a real *Franks* hearing. It suggests only a hearing to determine if Appellants "made the substantial preliminary showing necessary to obtain a *Franks* hearing," which is to proceed *without discovery*, even though the Government states the relevant issues—whether information was deliberately or recklessly excluded from the warrant affidavit—are "quintessentially factual." Opp. 37, 39. In short, the proposed hearing would not address the main issue regarding the seizures' legality, and is inadequate even for the *Franks* issues it supposedly will resolve. The offer of a limited remand is a transparent ploy advanced solely for purposes of avoiding the main issue on appeal.

III. The Government Cannot Satisfy First Amendment Requirements By Improperly Leveling and Repeating Accusations.

The Government devotes most of its brief to repeating its and others' accusations that ads in Backpage.com's adult categories were for prostitution or sex trafficking, and contends that, based on these allegations, Appellants can claim no First Amendment protection. The essence of this argument is that the First Amendment does not apply simply because the Government alleges it does not apply. This tack perverts First Amendment principles by assuming what the Government must prove.

As discussed, *see* AOB 29-30, the First Amendment requires a presumption that speech is lawful and protected, unless and until the government proves other-

wise. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("Protected speech does not become unprotected merely because it resembles the latter."). In all contexts and at all times, the burden of proving speech is unlawful falls to the Government. *See Playboy Entm't*, 529 U.S. at 816. Thus, the Government may never dismiss First Amendment protections simply by *alleging* speech is unprotected or concerned illegal conduct.

If that were so, Government authorities could effect seizures or impose other sanctions or restrictions on publishers or distributors simply by alleging some of their wares are obscene, but the Supreme Court has long held this intolerable under the First Amendment. *See Fort Wayne Books*, 489 U.S. at 65-67; *Smith v. California*, 361 U.S. 147, 153-54 (1959) (bookseller could not be criminally liable for allegedly obscene books in its store absent proof he had knowledge concerning contents of a given book).[12] The Government's position is no stronger here for its repetition of accusations (and mischaracterizations) of others. *See, e.g.*, Opp. 15-24 (alluding to prior accusations by state AGs, the Seattle mayor, NCMEC, and the

[12] The Government cites *Mishkin v. New York*, 383 U.S. 502 (1966), to maintain that the only scienter required is that defendants are "'in some manner aware of the character of the material they attempt to distribute' such that the punished behavior was a 'calculated purveyance of filth' and not innocent behavior." Opp. 68 (quoting *Mishkin*, 383 U.S. at 510-11). This is a gross misreading of the case. In *Mishkin*, the Court found the State's showing of scienter sufficient as to 50 specific books, where the defendant publisher instructed authors about the content to include in the books. 383 U.S. at 504-05.

U.S. Senate Permanent Subcommittee on Investigations ("PSI") that ads on Backpage.com concerned prostitution or sex trafficking).

The Government appears to forget the issues here are the propriety of its *seizures* and the First Amendment proscriptions against *ex parte* proceedings to seize publishing proceeds. Instead, it tries to argue the merits of its prosecution, relying on materials improperly submitted with its answering brief, which do not plausibly support the charges in any event.

For example, the Government submitted with its opposition (and repeatedly cites) Ferrer's pleas on behalf of himself and all Backpage.com entities he owns. *See, e.g.*, Opp. 2, 5-6, 26-27, 50, 54, 67, 74. The Government submitted the plea agreements with its Motion for Judicial Notice, saying it offered these and other pleadings merely to show what has happened in this litigation, while acknowledging the Court cannot consider such materials for disputed fact issues. Doc. 58-1, at 2. However, throughout its brief, the Government cites Ferrer's plea statements as supposed facts. *See, e.g.*, Opp. 2 (referring to Ferrer's statement that the "great majority of Backpage's paid ad[s] were for prostitution" as though this is fact rather than Ferrer's disputed assertion); *id*. 50 (same), *id*. 57 (same).[13]

[13] Ferrer's plea statements unquestionably are disputed—they directly contradict his many sworn statements over a half-decade explaining that Backpage.com took pains to screen, block and remove improper third-party ads and to cooperate with law enforcement. *See, e.g.*, Ferrer Decl., *Backpage.com, LLC v. McKenna*,

This is impermissible. A co-defendant's guilty plea may not be used as substantive evidence of a defendant's guilt. *United States v. Solomon*, 795 F.2d 747, 748-49 (9th Cir. 1986) (citing *United States v. Halbert*, 640 F.2d 1000, 1004 (9th Cir. 1981)). *See United States v. Universal Rehab. Servs. (PA), Inc.*, 205 F.3d 657, 668 (3d Cir. 2000) (*en banc*). This rule is "grounded in … fairness and due process" and helps "ensure the government [] prove[s] every element of an offense …; the government may not borrow proof from another person's conviction." *United States v. Woods*, 764 F.3d 1242, 1246 (10th Cir. 2014) (internal citations omitted), *cert denied*, 135 S. Ct. 1866 (2015). It is especially concerning "if the plea is made in connection with a conspiracy to which the remaining defendants are charged." *Id*. (citation omitted). In addition, a cooperating party's guilty plea "pointing the finger at others" is "inherently unreliable," given the likelihood that a defendant "signing a plea agreement may adopt facts [] the government wants to hear in exchange for some benefit, usually a lesser sentence." *United States v. Vera*, 893 F.3d 689, 692-93 (9th Cir. 2018).[14]

No. 2:12-cv-00954, Doc. 3 (W.D. Wash. June 4, 2012); Ferrer Decl., *Backpage.com, LLC v. Dart*, No. 1:15-cv-06340, Doc. 6 (N.D. Ill. July 21, 2015).

[14] The Government claims *Vera* holds plea agreements may be used against co-defendants if they contain "inculpatory admissions" of a guilty-pleading party, Opp. 50 n.14, but that is the argument *Vera* rejected. *See* 893 F.3d at 692-93.

The apparent point of *all* of the Government's 1,600 pages of supplemental submissions is to argue the Court should treat accusations outside the record as supposed facts.[15] This is improper. The issue here is whether the Government had grounds to seize Appellants' personal assets in the first place, not whether it believes it will prevail at trial.[16]

For example, the Government cites the PSI report over thirty times. *E.g.*, Opp. 11-12, 21-24, 30, *passim*. That report was a continuation of political efforts to shut down Backpage.com after prior attempts were blocked by numerous courts. Recognizing that congressional committee reports are politically motivated, courts

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[15] This includes the Government's submissions and citations of television reports, Opp. 17 & n.4; a documentary about civil plaintiffs who sued Backpage.com, *id.* at 18; arguments by NCMEC in amicus briefs, *id*. 21 & n.6, and the Senate PSI's publicized report castigating Backpage.com, *id*. 21-24, 50, 66, 76, 77-78. The Government provided none of this in support of its applications for warrants to seize Defendants' assets.

[16] The Government admits that "[i]n establishing probable cause, [it] 'may not rely on evidence acquired after the forfeiture complaint was filed.'" Opp. 50 n.14 (quoting *United States v. $405,089 U.S. Currency*, 122 F.3d 1285, 1289 (9th Cir. 1997)). It then argues that, although Ferrer's plea agreements came after the seizure warrant applications at issue, the Court may consider them because the Government filed its forfeiture complaints later, in October 2018. *Id.* Here, the Government confuses the requirement of 19 U.S.C. § 1615 that it must establish probable cause when filing a forfeiture complaint, *see United States v. $493,850 in U.S. Currency*, 518 F.3d 1159, 1168-69 (9th Cir. 2008), which is separate and apart from the issue of whether it had proper grounds to seize assets by way of *ex parte* warrants. Perhaps obviously, the information relevant to each seizure warrant is what the Government presented with its application, not whatever it might like to throw into the record after-the-fact.

generally decline to consider them. *See, e.g.*, *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1199 (11th Cir. 1986) (excluding "heated conclusions of a politically motivated hearing"); *Pearce v. E.F. Hutton Grp., Inc.*, 653 F. Supp. 810, 813-16 (D.D.C. 1987) ("Given the obviously political nature …, it is questionable whether any report by a committee or subcommittee of [Congress] could be admitted … against a private party."); *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22-23 (6th Cir. 1984) (*per curiam*) (excluding House subcommittee report as inadmissible).

In any event, the central accusation of the PSI report, which the Government repeats—that Backpage.com intentionally edited ads to "sanitize" them and "conceal their illegality," Opp. 22—is one-sided and untested. In fact, Backpage.com used automated filters to flag and block ads, words, and images that violated the website's terms of use, were offensive, or potentially improper, followed by two tiers of moderators to further review and block improper user submissions. *See Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1266-67 (W.D. Wash. 2012) (Backpage used automated filters to screen for 26,000 terms, phrases, email addresses, URLs and IP addresses, and employed 100 personnel to review and block ads violating the website's terms of use); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 814 (M.D. Tenn. 2013) (Backpage.com's monitoring blocked or removed one million ads in April 2012). Screening and review practices such as

these are common among websites; Congress has expressly encouraged them; courts have recognized them as editorial actions the First Amendment protects; and several cases have rejected the very same theory of liability against Backpage.com. *See, e.g.*, *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1054 (E.D. Mo. 2011); *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 157 (D. Mass. 2015), *aff'd sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016). The government's outside-the-record accusations are also wrong in other respects, too numerous to detail here.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the decision below and remand with instructions to vacate the seizures.

RESPECTFULLY SUBMITTED this 22nd day of May, 2019.

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Cir. Rule 32, because it is proportionately spaced in Times New Roman 14-point type, and according to the word processing system used to prepare it, and in accordance with Circuit Rule 32(a)(7)(B), the word count of the brief is 6,980.

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