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.

From Orders by the U.S. District Court for the District of Columbia
The Honorable Rosemary M. Collyer, Judge Presiding
(Case No. 1:16-mc-00621-RMC)

APPELLANT'S OPENING BRIEF

(Joint Appendix Filed Separately)

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November 16, 2016

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit R. 28(a)(1), Appellant Carl Ferrer certifies that:

A. Parties and *Amici*

The Senate Permanent Subcommittee on Investigations was the Applicant seeking to enforce a legislative subpoena before the District Court, and the Respondent was Carl Ferrer, as Chief Executive Officer of Backpage.com, LLC. *See Senate Permanent Subcomm. on Investigations v. Ferrer*, _ F.Supp.3d __, 2016 WL 4179289 (D.D.C. Aug. 5, 2016). Appellant in this Court is Carl Ferrer. Appellee is the Subcommittee. Mr. Ferrer anticipates that *amici* in support of Appellant will include DKT Liberty Project, Cato Institute, and Reason Foundation, as well as the Center for Democracy and Technology and the Electronic Frontier Foundation. There are no other parties or *amici* at this time.

B. Rulings Under Review

The ruling under review in No. 16-5232 is *Senate Permanent Subcommittee on Investigations v. Ferrer*, _ F.Supp.3d __, 2016 WL 4179289 (D.D.C. Aug. 5, 2016), ECF 17-18, JA1-32, 33-34, in which Judge Collyer granted the Subcommittee's application and ordered Mr. Ferrer to comply with the legislative subpoena. The ruling under review in No. 16-5274 is *Senate Permanent Subcommittee on Investigations v. Ferrer*, No. 1:16-mc-00621-RMC, ECF 29 (D.D.C. Sept. 16, 2016) (unpublished), JA47-54, in which Judge Collyer held, in setting a

schedule for Mr. Ferrer to comply with the subpoena, that he had waived his common law privileges, including attorney-client and attorney work-product privilege.

C. Related Cases

There are no related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule and 26.1, Appellant states as follows:

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

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

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction of this action to enforce a subpoena from the Senate Permanent Subcommittee on Investigations ("PSI") under 28 U.S.C. § 1365 (the "Subpoena"). Mr. Ferrer filed timely notices of appeal of the District Court's August 5, 2016, final Memorandum Opinion and Order in No. 16-5232 on August 9, 2016, and of its September 16, 2016, final Memorandum Opinion and Order in No. 16-5274 on September 20, 2016. JA35-37, 55-57. This Court has jurisdiction of both appeals under 28 U.S.C. § 1291.

ISSUES PRESENTED

The issues on appeal in No. 16-5232 are:

1. Whether the District Court erred in concluding that the Subpoena —which sought hundreds of thousands of pages of documents going to the core editorial functions of an online publisher of third-party content—had no chilling effect on First Amendment rights and that the burden therefore rested on Mr. Ferrer to undertake a complete search of all responsive documents and to assert all First Amendment objections on a document-by-document basis in order to avoid forfeiting those objections.

2. Whether the District Court erred in enforcing the Subpoena over First Amendment objections and a *prima facie* showing of chilling effect, without requiring PSI to establish an immediate, substantial, and subordinating need for the information sought, a substantial connection between that information and the asserted governmental interest, and the absence of less drastic means of obtaining the information, particularly where the Subpoena required massive amounts of information and had a suspect legislative purpose.

3. Whether the District Court erred in holding Mr. Ferrer waived attorney-client and attorney work-product privileges as to an indefinite set of documents responsive to the Subpoena, when he had raised unresolved con-

stitutional objections to the search compelled by the Subpoena that would be forfeited if he conducted the search; when he had not yet identified, evaluated, or withheld for privilege any responsive documents, and thus could not assert the privilege as to any particular document; and when a privilege log was not due until the return date, which was extended by court orders.

INTRODUCTION

Under the pretense of conducting a legislative "investigation," PSI has pursued Backpage.com and Carl Ferrer, its Chief Executive Officer, in a prosecutorial fashion in collaboration with other government entities whose avowed efforts to "crush Backpage" have been invalidated as a violation of the First Amendment. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231, 239 (7th Cir. 2015), *cert. denied*, 2016 WL 1723950 (Oct. 3, 2016). In this case, the District Court erred in enforcing a subpoena demanding, among other things, every document relating to certain editorial decisions by Backpage.com involving third-party content for the past six years. The court wrongly held an online publisher of third-party speech can be compelled to search through terabytes of data, review over a million documents, and produce hundreds of thousands of pages going to core editorial functions (and be required to spend millions of dollars doing so) to respond to a blanket subpoena, and that the publisher may not object on First Amendment grounds unless it *first* conducts the search and review, and itemizes on a privilege log every document with document-by-document objections, including those arising under the First Amendment. This reverses the First Amendment presumption and evidentiary burden that require *the government* to justify investigatory demands that threaten to chill speech.

The District Court compounded its error in holding that, by first seeking a ruling on the First Amendment objections before conducting the vast search and preparing an enormous log of protected documents, Mr. Ferrer waived Backpage.com's attorney-client and work-product privileges. This ruling contradicts the plain terms of the Subpoena, and presents an unlawful Hobson's choice between vindicating constitutional defenses and preserving vital privileges. The decision also ignores the law of this Circuit that a court should first resolve objections to a subpoena's scope before addressing specific objections to particular documents.

STATEMENT OF THE CASE

These appeals arise out of the District Court's grant of an Application to enforce a legislative subpoena issued to Mr. Ferrer, as CEO of Backpage.com, which PSI alleges was necessary to investigate potential legislative responses to sex trafficking on the Internet. *See* JA490-493. The Subpoena is part of a much larger campaign by regulators and government officials to hold online intermediaries responsible for third-party content (in particular, online postings relating to "adult" entertainment and services). *See* JA98-104.

Freedom of Expression and Online Intermediaries

More than 3.2 billion people use the Internet, submitting and viewing hundreds of millions of posts, comments, photos, videos and other content every day.[1] Online intermediaries have been essential for the Internet to become and remain a vital medium of free speech for billions of global users.[2] The Internet's ubiquity requires intermediaries—including search engines, social networks, advertising platforms, and content-hosting sites—to handle vast amounts of user-generated information.[3] In short, online intermediaries such as Backpage.com allow individuals to communicate with vast audiences, as reinforced by our national policies designed "to maintain the robust nature of [the] Internet," *Zeran v. AOL, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), and "to promote freedom of speech" online. *Ben Ezra, Weinstein & Co. v. AOL, Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000) (citation omitted).

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

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

[3] *See, e.g., Dart v. Craigslist, Inc.*, 665 F.Supp.2d 961 (N.D. Ill. 2009) (over thirty million new advertisements per month on Craigslist, which was viewed nine billion times during that period).

Backpage.com, the second largest online classified ad website in the U.S., hosts millions of ads monthly—all posted by users—in categories including real estate, jobs, buy/sell/trade, automotive, and adult. Backpage.com users provide all content for their ads, including text, titles, and photos. Backpage.com's terms of use strictly prohibit illegal content and activity on Backpage.com, and it takes numerous steps to guard against any human trafficking, child exploitation, and other misuse. JA4.

Because the Internet enables anyone to "become a town crier" whose speech "resonates farther than … any soapbox," *Reno v. ACLU*, 521 U.S. 844, 870 (1997), this unique medium facilitates speech that is "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The Supreme Court recognized that regulating online content "is more likely to interfere with the free exchange of ideas than to encourage it," and thus found "no basis for qualifying the level of scrutiny that should be applied to this medium." *Reno*, 521 U.S. at 885. Reviewing courts overwhelmingly have understood "the importance of preserving free speech on the internet, even though that medium serves as a conduit for much that is distasteful or unlawful." *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) (citing *Backpage.com v. Dart*, 807 F.3d 229).

Where, despite a forum's vigilance, some users post offensive or unlawful content, strong First Amendment protection for online speech has prevented most

direct efforts to regulate it. The Supreme Court invalidated, for example, restrictions on "indecent" expression in the Communications Decency Act. *Reno*, 521 U.S. at 868-79, 885. Numerous similar state laws have been voided as well. *See, e.g.*, *PSINet, Inc. v. Chapman*, 362 F.3d 227, 234-35 (4th Cir. 2004) (reviewing cases). *See also Center for Democracy & Technology v. Pappert*, 337 F.Supp.2d 606, 663 (E.D. Pa. 2004) (striking down law allowing state to presume illegality of website content).

In support of these constitutional values, Congress enacted 47 U.S.C. § 230 to preserve free expression online by creating broad immunity for "any activity that can be boiled down to deciding whether to exclude material that third parties … post." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (*en banc*).[4] Various federal courts have applied § 230 and the First Amendment to strike down state laws that attempted to regulate classified ad websites, even when targeting online trafficking. *See Backpage.com, LLC v. McKenna*, 881 F.Supp.2d 1262, 1282-83 (W.D. Wash. 2012); *Backpage.com, LLC v. Cooper*, 939 F.Supp.2d 805, 827-40 (M.D. Tenn. 2013);

[4] *See also, e.g.*, David Post, *A bit of Internet history, or how two members of Congress helped create a trillion or so dollars of value*, WASH. POST, Aug. 27, 2015 ("Virtually every successful online venture that emerged after 1996—including … Google, Facebook, Tumblr, Twitter, Reddit, Craigslist, YouTube, Instagram, eBay, [and] Amazon [that] relies in large part (or entirely) on content provided by their users" could not survive without the protections of Section 230).

Backpage.com, LLC v. Hoffman, 2013 WL 4502097, at *4-12 (D.N.J. Aug. 20, 2013).

Despite—or perhaps because of—this protection, some government officials turned to less direct means of attempting to censor disfavored online speech. Amid unrelenting but unsuccessful pressure from state attorneys general for Craigslist to remove its "erotic services" section, Cook County (Illinois) Sheriff Thomas Dart sued in an effort to force it to shutter the category, but the court dismissed the case, holding that an adult category "is not unlawful in itself nor does it necessarily call for unlawful content." *Dart v. Craigslist*, 665 F.Supp.2d at 967-69. Nonetheless, Craigslist eventually capitulated and removed the "adult" services category from its website in 2010. *See Backpage.com v. Cooper*, 939 F.Supp.2d at 815-16.

Promptly thereafter, state attorneys general began demanding that Backpage.com also drop its adult category, and sent a long list of information requests "in lieu of a subpoena" targeting posting policies, content screening, cooperation with law enforcement, and other topics. *See* JA71-78. Sheriff Dart followed up with his own "Request for Information and Site Modification" asking 159 questions in various categories and subcategories, JA85-97, and later concocted—as Judge Posner put it—a "campaign intended to crush Backpage's adult section—crush Backpage, period, it seems—by demanding that … Visa and MasterCard prohibit the use of their credit cards … on Backpage." *Backpage.com v. Dart*, 807

F.3d at 230. The card companies quickly acceded, but the Seventh Circuit ordered the entry of a preliminary injunction against further such actions by the Sheriff. *Id.* at 238-39, *rev'g Backpage.com, LLC v. Dart*, 127 F.Supp.3d 919 (N.D. Ill. 2015).

Federal officials took aim as well. In March 2012, nineteen senators wrote Village Voice Media, then Backpage.com's parent company, demanding removal of its adult section. That October, six senators wrote the company that acquired Village Voice's print operations, threatening to hold it "accountable" until "shutting down Backpage's 'adult entertainment' section … has been achieved." JA83-84. A House resolution targeted Backpage.com and "call[ed] on all Internet media providers to immediately eliminate 'adult entertainment' sections and [similar] classified advertising," H.R. Res. 649, 112th Cong. (2012), while the Senate simply demanded outright that Backpage.com eliminate adult classifieds. S. Res. 439, 112th Cong. (2012). Senator Kirk sponsored legislative changes, later enacted, "to go after Backpage.com," urging "[w]e really ought to be able to charge them." 161 Cong. Rec. S1456, S1458 (Mar. 12, 2015).

The PSI Investigation and Subpoena

PSI began pursuing information and documents related to Backpage.com in April 2015, when it emailed Backpage.com's General Counsel "to request an interview to discuss Backpage's business practices." JA159. The company immediately responded, and its General Counsel met with six PSI staff members for a

day-long briefing on June 19, 2015. *See* JA583 (¶2). On July 7, 2015, after consulting with Sheriff Dart's team and obtaining his earlier information demand to Backpage.com, PSI subpoenaed forty-one categories of Backpage.com documents on all aspects of its business, terms of use, and editorial policies. JA105-117. Counting multiple subparts, the subpoena covered some 120 subjects, many going to the heart of Backpage.com's editorial functions.

On July 16, 2015, Backpage.com counsel met with PSI staff to raise concerns about the subpoena's scope, the First Amendment issues it posed, and the extent to which it was apparently coordinated with other governmental efforts targeting the site. JA584 (¶4). Backpage.com submitted written objections on August 6, 2015, and requested the subpoena's withdrawal, which PSI denied. JA118-123.

Counsel for Backpage.com met again with PSI staff on September 14, 2015, to discuss its constitutional concerns and requested that PSI initiate the judicial process afforded such subpoenas. JA584-585 (¶6). On October 1, 2015, PSI rejected the First Amendment objections, and any suggestion by Backpage.com that the investigation was "part of a concerted effort, with other unrelated government actors, to engage in harassment." JA135. Nonetheless, PSI withdrew its July 7, 2015 subpoena, issuing in its place the revised Subpoena now at issue. JA135-148.

The new Subpoena contained eight requests—covering what PSI described as "the core" of its investigation, JA135—corresponding to general categories it described as "seven specific topics" from the withdrawn subpoena's 41 requests. *See* JA125, *see infra* note 5. However, PSI did not narrow the requests so much as reframe them using more general language.[5]

The instructions on Schedule A of the Subpoena permitted Mr. Ferrer to withhold documents on the basis of privilege, requiring that he submit a document-specific privilege log by the return date:

> Any document withheld on the basis of privilege shall be identified on a privilege log submitted with response to this subpoena. The log shall state the date of the document, its author, his or her occupation and employer, all recipients, the title and/or subject matter, the privilege claimed and a brief explanation of the basis of the claim of privilege.

JA139. The accompanying cover letter stated that "Backpage must assert any claim of privilege or other right to withhold documents … by October 23, 2015, the return date of the subpoena, along with a complete explanation of the basis of the privilege," and that PSI would rule on any objections. JA136.

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

Although the October 1, 2015 Subpoena had fewer categories than the original subpoena, it made broader, more general demands on the same subjects—*e.g.*, all materials concerning review, verification, editorial decisions, and payment for all transactions for a six-year period, and email for all moderation employees during that time—which just as clearly targeted Backpage.com's exercise of editorial judgment. JA138. On the original return date of October 23, 2015, Mr. Ferrer and Backpage.com objected to the subpoena on First Amendment grounds and expressly reserved their right to assert all other privileges, but nonetheless agreed to determine what responsive material might be produced without infringing constitutional rights. JA150-157.

PSI responded by expanding its investigation and issuing subpoenas and/or requesting interviews and information from at least fifteen different entities and/or individuals (including former Backpage.com employees, contractors, and vendors). JA585 (¶8). Meanwhile, the record reveals extensive ongoing contact and coordination between PSI and law enforcement, including Sheriff Dart. On July 1, 2015, PSI counsel wrote the Sheriff's office regarding the success of the "cease and desist" letters to Visa and MasterCard, exclaiming "What a development!" JA99. Subcommittee counsel told the Sheriff that PSI's investigation "is rapidly progressing down a parallel track." *Id.* As alluded to above, PSI's subpoena

borrowed substantially from Sheriff Dart's informational demands. *Supra* 9. *See* JA85-97, JA138.

Even while continuing his constitutional objections to the Subpoena and imploring PSI to subject the process to judicial review—a process only PSI, not Mr. Ferrer, can invoke—Mr. Ferrer produced over 16,000 pages of responsive documents as part of an anticipated rolling production. JA585 (¶7). These documents included materials related to moderation efforts, such as screenshots of the computer interface displaying posting guidelines, a historic list of posting guidelines, moderation process descriptions, a sample moderation log, and a list of banned terms used in manual review. It also included law enforcement support documentation, particularly law enforcement subpoenas and responses that best demonstrate instances and manners of misuse of Backpage.com for illegal or potentially illegal activity, consistent with PSI's professed interest in use of the Internet for "human trafficking." *See* JA124. Mr. Ferrer was preparing extensive further production relating to cooperation with law enforcement when PSI told him to stop production of such material. JA202, JA585 (¶7).

In making this production, Mr. Ferrer explained that "[c]ertain documents have been withheld on the basis of attorney-client and/or attorney work-product privilege, and certain documents within the submission contain redactions on that same basis," and reiterated his First Amendment and overbreadth objections, as

well as his non-waiver of any other privileges. JA179. The next day, PSI acknowledged by email that documents were withheld on the basis of privilege. *See* JA85. It never objected to the assertions of privilege, however, and never suggested—until after the District Court granted the Application to enforce the Subpoena, *see infra* 52-53—that they were untimely, improper, or defective.

The judicial review that Mr. Ferrer repeatedly asked PSI to initiate was not forthcoming. Instead, PSI held a public hearing—focusing almost exclusively on Backpage.com—that sought not to gather evidence on human trafficking, but to bolster PSI's demand to compel information from Backpage.[6] The hearing coincided with release of the *PSI Staff Report* devoted to the single topic of why Backpage.com should be required to provide the material PSI sought.[7] It was another three months—five months after the revised Subpoena issued—before PSI presented the Senate Committee on Homeland Security and Governmental Affairs a resolution on February 29, 2016, directing Senate Counsel to seek court action enforcing part of the Subpoena. S. Rep. No. 114-214 (2016).

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[6] *See Human Trafficking Investigation Hearing Before Permanent Subcomm. on Investigations of S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 4 (2015) (hereinafter, "Nov. 19 Hearing Rec.") (statement of Sen. Rob Portman, Chairman of Subcomm.).

[7] STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, REP. ON RECOMMENDATION TO ENFORCE A SUBPOENA ISSUED TO THE CEO OF BACKPAGE.COM, LLC at 29 (Nov. 19, 2015), JA283.

PSI's Application to Enforce the Subpoena

In its Application to the District Court PSI sought to enforce Requests 1, 2 and 3 of the Subpoena going to the heart of Backpage.com's editorial activities (the "Requests"). Specifically, it did not seek to enforce the single paragraph seeking documents regarding human trafficking—the purported focus of its inquiry—but rather only three of the eight demands, seeking all documents concerning:

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

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

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

JA487, 497.

The Application claimed PSI was relying upon Senate Resolution 73, which authorized PSI to "investigate matters related to organized criminal activity that operates in or utilizes the facilities of interstate commerce." JA503. This legislative purpose was later characterized as seeking information to aid the Senate in considering legislation targeting online sex trafficking, JA507, for which information on Backpage.com's screening procedures was claimed to be relevant to

"potential legislation," including whether to amend § 230. JA493, 507-508. PSI made no effort to show, however, that it could not obtain the information through less drastic means. Mr. Ferrer filed an opposition demonstrating, *inter alia*, that the Requests imposed far too great a burden, and cut too deeply into editorial functions, to be enforced consistent with the First Amendment, and PSI replied in due course.

Procedural History, Rulings Below, and Subsequent Events

The District Court entered an order enforcing the Requests on August 5, 2016. JA33-34. It rejected Mr. Ferrer's argument that the First Amendment required PSI to carry the constitutional burden to justify an intrusion into editorial decisionmaking. *See Bursey v. United States*, 466 F.2d 1059, 1086 (9th Cir. 1972). The court placed the burden instead on Mr. Ferrer, reasoning that because he supposedly failed to conduct a sufficient search for responsive records and had therefore failed to make document-by-document objections, he could not identify any First Amendment burden outweighing PSI's need for the documents demanded. JA26-28, 30. Although compliance with the Subpoena called for review of potentially millions of documents, JA642 (¶10), the Court gave Mr. Ferrer 10 days to comply. JA33.

After granting a temporary stay, this Court denied Mr. Ferrer's motion to stay the District Court's Order, with Judge Griffith indicating he would grant a

stay, and required Mr. Ferrer to comply with the Subpoena within 10 days. Upon application by Mr. Ferrer to the Supreme Court, the Chief Justice granted a temporary stay, but the full Court ultimately denied the requested emergency motion for stay pending appeal a week later, and the temporary stay was dissolved. *Ferrer v. Senate Permanent Subcomm. on Investigations*, __ S. Ct. ___, 2016 WL 4740416 (Sept. 13, 2016).

Even while pursuing stays pending appeal, from the date the District Court ruled, Mr. Ferrer took steps necessary to produce the documents the Requests required. Thus, immediately on lifting of the last temporary stay, Mr. Ferrer produced to PSI nearly 39,000 documents comprising 111,593 pages, based on processing of over 1.5 million documents from key custodians and corporate records. ECF 37-1 (¶¶10, 18). More than 34 attorneys participated in the document review and production process with discovery counsel dedicating over 2,880 hours in support of the September 13 production. JA616. However, given the enormous volume of data at issue, Mr. Ferrer simultaneously moved for an extension of time to October 28, 2016, to comply fully with the Requests, including production of privilege logs. JA611-612.

On September 16, 2016, the District Court granted Mr. Ferrer an extension, but only until October 10, 2016. *See* JA54. It also held Mr. Ferrer waived his attorney-client and work-product privilege protections, and ordered that he include

privileged documents in the production. JA49-54. In making this finding, the District Court found that "despite numerous opportunities, Mr. Ferrer did not properly invoke any common law privilege to refuse production of responsive materials," JA49-50, and that the privilege assertions in the November 13, 2015, letter to PSI were "insufficient in detail and do not constitute a valid assertion of a common law privilege." JA50. It held the failure to submit a privilege log by October 23, 2015, the original return date of the Subpoena and a mere three weeks after its issuance, "constituted a waiver of the claimed privileges." JA50-51. Mr. Ferrer again appealed, and this Court granted an emergency stay of the waiver decision on October 17, 2016. JA69-70

At the same time, diligent efforts to collect, review, and prepare responsive documents continued. JA635-647. On October 10, 2016, Mr. Ferrer produced an additional 34,298 documents comprising 194,586 pages. As of that time, documents had been collected from 100-plus custodians, comprising more than three terabytes of data, with 275,529 individual documents reviewed out of over six million that were processed.[8] The production team, including 30-60 attorney reviewers at any given time, spent over 6,600 hours reviewing data (and redacting

[8] JA636-645 (¶¶6, 10, 18, 21).

user personal information) with non-attorneys committing another 224 hours, costing Backpage.com over $834,000.[9]

While the October 10, 2016, production included virtually all documents processed, searched, and then available for review, *id.* ¶18, more remained to be completed. The inability to finish by October 10, 2016, reflected the enormity of the task, and not any intentional effort to avoid the obligation or a refusal to comply. Consequently, Mr. Ferrer sought a further extension through November 18, 2016. ECF 36. The District Court, based on this Court's effective extension of the return date to November 10, 2016, denied the motion for extension as moot and ordered Mr. Ferrer, no later than November 10, 2016, to either certify compliance with the Requests "[w]ith respect to all responsive documents for which [he] is not asserting attorney-client privilege," or to show cause why he should not be held in contempt.

On November 8, 2016, Mr. Ferrer sought a further extension from the District Court, again due to the magnitude of the task. By that time, Mr. Ferrer had processed more than 10.7 million documents, engaged over 300 attorneys in the review and production, and prepared another 151,000 documents for production on November 10, 2016. ECF 37-1 (¶¶10, 19, 22). Discovery counsel dedicated over

[9] JA646 (¶23). This does not include the time and cost of document collection, processing, hosting and production.

40,000 hours of attorney time and reviewed 1,466,840 documents at an overall cost of more than $2.8 million. *Id.* As of November 10, 2016, Backpage.com had produced 224,000 documents (more than 550,000 pages), with completion of production expected on or before November 30, 2016.[10]

STANDARD OF REVIEW

This Court exercises *de novo* review over the District Court's conclusions of law, *e.g.*, *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 329 (D.C. Cir. 2011), and conducts an independent examination of the whole record to ensure that the judgment does not constitute a forbidden intrusion on First Amendment rights. *E.g.*, *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)).

De novo review is also required where the application of attorney-client or work-product privileges turn on pure questions of law, *see, e.g.*, *In re Sealed Case*, 223 F.3d 775, 778-79 (D.C. Cir. 2000), and where the issue of privilege waiver is bound up in legal conclusions.

SUMMARY OF ARGUMENT

Applying the wrong First Amendment analysis, the District Court reached the startling conclusion that Mr. Ferrer had forfeited all First Amendment rights to

[10] JA667-668 (¶18-20). At the time, there remained approximately 332,000 documents identified as responsive but not yet ready for production, with additional collections and processing underway.

object to the Subpoena by failing to conduct an exhaustive search of the millions of pages of documents demanded by PSI and to itemize each responsive document on a privilege log. That, however, is precisely the sort of intrusion upon a publisher's protected editorial functions that the First Amendment forbids. The District Court "ha[d] it backwards," *Bursey*, 466 F.2d at 1082, when it placed the burden *on Mr. Ferrer* to establish—on a document-by-document basis—that his First Amendment rights overcome PSI's asserted need for the documents. Whenever government activity intrudes on First Amendment rights, the burden must rest with the government to justify its actions.[11]

Because Mr. Ferrer established a *prima facie* case that the blunderbuss Subpoena chills the free exercise of First Amendment rights, the burden squarely rested *on PSI* to show (1) immediate, substantial, and subordinating need for the information sought; (2) substantial connection between that information and an overriding governmental interest; and (3) no less drastic means of obtaining it. *Bursey*, 466 F.2d at 1083 (citing, *inter alia*, *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963)).

This balancing test reflects the basic principle—acknowledged by the District Court—that "[w]hen First Amendment interests are at stake, the Govern-

[11] *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1452 (2014); *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012); *Sorrell v. IMS Health*, 564 U.S. 552, 566 (2011); *Ashcroft v. ACLU*, 542 U.S. 656, 665-66 (2004).

ment must use a scalpel, not an ax." *Bursey*, 466 F.2d at 1088; *cf.* JA21. Here, however, PSI did not even pretend to take a narrow approach. It did not tailor the Subpoena to address its asserted interests, much less use the *least drastic* means of furthering a compelling government interest. This Court should reverse the District Court and make clear that the extraordinary intrusions upon free speech rights invited by the decision below violate the First Amendment.

The District Court also erred in ruling that, although Backpage.com raised constitutional objections to the search compelled by the Subpoena, it forfeited its attorney-client and work-product privileges by not conducting that search and asserting the privileges document-by-document. The Subcommittee cannot force a respondent to sacrifice its common law privileges in order to safeguard a constitutional challenge. The District Court's embrace of that Catch-22 defies logic, and contradicts both the Subpoena's terms and the established law of this Circuit. This Court should reverse those flawed rulings.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ENFORCING PSI'S SUBPOENA OVER FIRST AMENDMENT OBJECTION

A. The First Amendment Limits PSI's Subpoena Power When it Intrudes on Constitutionally-Protected Activity

The court below "readily recognize[d] that First Amendment rights might be strongly implicated in a congressional investigation and the use of documentary subpoenas," JA41, and for good reason. "Clearly, an investigation is subject to the

command that the Congress shall make no law abridging freedom of speech or press or assembly." *Watkins v. United States*, 354 U.S. 178, 197 (1957); *United States v. Rumely*, 345 U.S. 41, 45 (1953).

The PSI Requests on their face implicate First Amendment interests because they demand "[a]ny documents concerning," among other things, Backpage.com's "editing" of ads, including, "but not limited to" related "policies, manuals, memoranda, and guidelines," and material involving "reviewing, blocking, deleting … or modifying" ads. JA138 (¶1). Such documents concern core editorial functions that are fully protected by the First Amendment. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (cable operators' exercise of editorial discretion in selecting which channels to feature is speech "entitled to the protection of the speech and press provisions of the First Amendment"); *Google, Inc. v. Hood*, 96 F.Supp.3d 584, 598 (S.D. Miss. 2015) (overbroad subpoena to Google violated First Amendment), *reversed on procedural grounds*, 822 F.3d 212; *Jian Zhang v. Baidu.com, Inc.*, 10 F.Supp.3d 433, 438 (S.D.N.Y. 2014) (online search engines, such as Google, engage in protected speech).

Subpoenas targeting such online intermediaries—especially those hosting unpopular speech—are ripe for abuse. *See Backpage.com v. Dart*, 807 F.3d at 237. That is especially so because the Internet, unlike any prior medium, enables the aggregation of vast amounts of information. *E.g.*, *Reno*, 521 U.S. at 870; *Zeran*,

129 F.3d at 330; *Dart v. Craigslist, Inc.*, 665 F.Supp.2d at 961. As a result, subpoenas such as PSI's that require online intermediaries to turn over "all documents" on a broadly framed subject have the potential to cast an extraordinary dragnet over protected speech, and to impose momentous burdens to collect, review, and produce the information (comparable to abusive discovery tactics that courts have condemned). *See, e.g.*, *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008) (recognizing "the 'in terrorem' effect of allowing a plaintiff with a 'largely groundless claim' to force defendants into either costly discovery or an increased settlement value").

B. The District Court Erroneously Placed the Burden on Mr. Ferrer

1. When First Amendment Rights are Implicated the Government Must Employ the Least-Restrictive-Means

The District Court erred by employing the wrong legal standard. It relied on *FTC v. Texaco*, 555 F.2d 862 (D.C. Cir. 1977) (*en banc*)—*not* a First Amendment case—and held erroneously that "[t]he burden of showing [a subpoena's] request is unreasonable" rests "on the subpoenaed party." JA29. This premise overlooked a long line of cases cited by Mr. Ferrer establishing that, once the target of a government investigation has made a *prima facie* showing that its investigation chills his First Amendment rights, "the evidentiary burden … *shift[s] to the government*" to show (1) an immediate, substantial, and subordinating need for the information;

(2) substantial connection between the information and an overriding governmental interest; and (3) absence of less drastic means to obtain it. *Brock v. Local 375*, 860 F.2d 346, 50 (9th Cir. 1988) (emphasis added). *See also Bursey*, 466 F.2d at 1083 (citing *inter alia*, *Gibson*, 372 U.S. at 546).[12]

In *Gibson*, for example, the Supreme Court held a state legislative committee subpoena could not be enforced because "it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that *the State convincingly show* a substantial relation between the information sought and a subject of overriding and compelling state interest." 372 U.S. at 546 (emphasis added); *DeGregory v. Att'y Gen. of N.H.*, 383 U.S. 825, 829 (1966).

This burden-shifting analysis—a familiar hallmark of First Amendment doctrine—applies for obvious reasons. It is beyond question that free speech rights "'are protected not only against heavy-handed frontal attack, but also from … more subtle governmental interference.'" *Gibson*, 372 U.S. at 544 (citation omitted). Thus, "governmental action [that] would have the *practical effect* of discouraging the exercise of constitutionally protected" rights triggers First Amendment scrutiny. *Dole*, 950 F.2d at 1460 (citing *NAACP v. Alabama*, 357 U.S. 449, 461

[12] *Accord Dole v. Serv. Emps. Union*, 950 F.2d 1456, 1461 (9th Cir. 1991); *In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-03 (2d Cir. 1985).

(1958)). The First Amendment in this way guards against government investigations of editorial decision-making because of the chilling effect it may have on protected speech. Indeed, the "practical effect" of government inquiry into such activity "might be as serious as censorship." *Rumely*, 345 U.S. at 57 (Douglas, J., joined by Black, J., concurring).

Bursey perfectly illustrates this point. There, the Ninth Circuit invalidated a contempt sanction imposed on two witnesses—staffers at *The Black Panther* newspaper who, among other things, "edited articles prepared by others and assisted in the various phases of publication"—for refusing to answer a grand jury's questions that probed into their First Amendment-protected activities. 466 F.2d at 1067, 1086-88. "Questions about … who [was] responsible for the editorial content and distribution of a newspaper and pamphlets … cut deeply into press freedom," *id.* at 1084, and "[w]hen governmental activity collides with First Amendment rights, *the Government has the burden* of establishing that its interests are legitimate and compelling" and that the "infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests." *Id.* at 1083 (emphasis added).

Even though the grand jury's questions were designed to investigate violent and potentially criminal conduct—including the identity of individuals who advocated the assassination of President Nixon and forcible overthrow of the federal

government—the court had no difficulty concluding these inquiries burdened the witnesses' free speech and associational rights, thus shifting the burden to the government. *Id*. at 1065-68. Rejecting the argument that *the witnesses* were required to establish that their speech and associational rights were constitutionally protected, the Ninth Circuit explained:

> The Government has it backwards. All speech, press, and associational relationships are presumptively protected by the First Amendment; *the burden rests on the Government* to establish that the particular expressions or relationships are outside its reach.

Id. at 1082 (emphasis added).

Here, the District Court acknowledged that balancing the First Amendment rights invoked against PSI's demands was constitutionally required, JA21, but it attempted to distinguish *Bursey* as a case involving "political speech" by "dissenters." JA25. That misses the mark, as Backpage.com's speech is fully protected by the First Amendment (*see* § I.A, *supra*), and the court cited no cases to the contrary.[13] Furthermore, this case presents the same concerns about burdensome investigations that target disfavored speech. *Cf. Backpage.com v.*

[13] PSI attempted to minimize Backpage.com's First Amendment rights by framing this case as involving only "commercial speech." JA515. The District Court did not endorse that argument, *see* JA27, and rightly so. Backpage.com is not an advertiser, but rather an online publisher of third-party content. When a publisher uses editorial discretion to select and edit advertising placed by third parties, it is not subject to diminished First Amendment protection. *See, e.g.*, *IMS Health*, 564 U.S. at 571-73; *Reno*, 521 U.S. at 870.

Dart, 807 F.3d at 233. Indeed, the record strongly suggests that Backpage.com would not have been the target of PSI's onerous fishing expedition if it did not host ads for adult services. In particular, the evidence showed PSI's collaboration with Sheriff Dart—who, as Judge Posner observed, wanted to "crush Backpage," *id.* at 231, and see it "dragged before a Senate committee." JA102.

The District Court also sought to distinguish *Bursey* on grounds that PSI does not seek any "personally identifying information of any Backpage user or account holder," JA25, while *Bursey* involved the potential disclosure of names of *Black Panther* staff. This argument misstates *Bursey*'s holding, which focused not only upon the compelled disclosure of names and political affiliations, but also on the effects upon editorial decisionmaking. Of its expressed concerns, the court concluded "the deepest cuts were into press freedom." *Bursey*, 466 F.2d at 1087. The court explained that "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 the products of editorial judgment, 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." *Id*. at 1087-88.

Even if *Bursey* was mainly concerned with the disclosure of personally identifiable information, as the District Court erroneously assumed, it does not ameliorate the First Amendment burdens imposed by PSI's Subpoena. Requiring the redaction of personal information of Backpage.com's users for the documents produced in no way mitigates the massive intrusion—and concomitant chilling effect—on the free exercise of editorial discretion, including forced disclosure of the identities of Backpage.com *staff* involved in that decisionmaking, who are directly analogous to the witnesses in *Bursey*.

2. Mr. Ferrer Established a *Prima Facie* Case That the Subpoena Has an Objective Chilling Effect

As the cases cited above show, the burden shifts to the government to meet the least-restrictive-means test once the party asserting First Amendment objections makes "a prima facie showing of arguable first amendment infringement" and that responding to the investigative inquiry "will result in [] harassment … or [] other consequences which objectively suggest an impact on, or chilling" of rights. *Brock*, 860 F.2d at 349-50; *see also Dole*, 950 F.2d at 1459-60. That party "need not prove to a certainty that its First Amendment rights will be chilled," but rather simply "'objective and articulable' facts that disclosure … may chill" them. *In re GlaxoSmithKline*, 732 N.W.2d 257, 271 (Minn. 2007) (citation omitted). The analysis therefore focuses on "whether the governmental action would have the

practical effect of discouraging the exercise of constitutionally protected" rights. *Dole*, 950 F.2d at 1460 (citing *NAACP*, 357 U.S. at 461).

Mr. Ferrer clearly met this requirement. As in *Hood*, the government's "interference with [Backpage's editorial] judgment, particularly in the form of threats of legal action and an unduly burdensome subpoena [] would likely produce a chilling effect on [Backpage's] protected speech, thereby violating [its] First Amendment rights." *Hood*, 96 F.Supp.3d at 598. And the chilling effect is exacerbated here because PSI's action involves an "unduly burdensome fishing expedition into [an online publisher's] operations." *Id.* at 599.

Here, the Requests demanded every scrap of information detailing protected Backpage.com editorial functions. In particular, it sought "[a]ny documents concerning" Backpage.com's "reviewing, blocking, deleting, editing, or modifying of advertisements" over a six-year period. JA138. Given that "mere summoning of a witness and compelling him to testify, against his will, about his … expressions or associations" intrudes on the freedom of speech, *Watkins*, 354 U.S. at 197, intrusion into a publisher's freedom to engage in editorial practices outside the prying eyes of government itself creates obvious chilling effects. And investigations create a particularly acute risk of chilling speech where they concern matters that are "unorthodox" or "unpopular," *id.*—such as Backpage.com's ads

for adult services. *See NAACP*, 357 U.S. at 460 (First Amendment particularly protects controversial speakers).

As courts have recognized, a publisher's awareness that the government is prying into its speech-related activities has a natural tendency to alter how freely the publisher engages in those activities without fear of reprisal:

> A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. True, no legal sanction is involved here. Congress has imposed no tax, established no board of censors, instituted no licensing system. But the potential restraint is equally severe.

Rumely, 345 U.S. at 57 (Douglas, J., joined by Black, J., concurring); *see also Bursey*, 466 F.2d at 1088 (First Amendment forbids compelled disclosure of "the identity of all persons who worked on the paper and the pamphlets, to describe each of their jobs, to give the details of financing the newspaper"); *McLaughlin v. Serv. Emps. Union*, 880 F.2d 170, 175 (9th Cir. 1989) ("[I]nvestigation … of the minutes of union meetings implicates first amendment rights."); *Ealy v. Littlejohn*, 569 F.2d 219, 229 (5th Cir. 1978) (inquiry "into the internal, structural, financial and associational aspects" of an entity implicates its First Amendment rights).

The District Court also gave no consideration to the unique burdens presented by a broadly framed subpoena directed to an online publisher. Here, Backpage.com reasonably understood that the Subpoena called for a search of the documents of *more than 100 custodians*—potentially *millions* of documents over a

six-year period—at a tremendous cost that would cause any publisher to think twice about whether it should continue constitutionally protected activities or simply capitulate in the face of a government probe.

The chilling effect here is compounded by the coordinated campaigns of government coercion directed at Backpage.com and other publishers of online third-party content. Any reasonable publisher in Backpage.com's position would have been acutely aware (as was Mr. Ferrer) of successful government efforts to pressure websites featuring disfavored third-party ads for adult services into dropping those listings. As detailed above, both Craigslist and Google succumbed to pressure from regulators targeting their publishing of third-party content for adult services (and other content, in Google's case)—even though such publications are fully protected by the First Amendment. *See, e.g.*, *Reno*, 521 U.S. at 874 ("'Sexual expression which is indecent but not obscene is protected by the First Amendment.'") (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). These are not isolated examples.[14]

[14] For example, Facebook changed its editorial policies following a Senate Committee investigation of whether its "Trending Topics" section was biased against feature content concerning conservative views, even though its "data analysis indicated that conservative and liberal topics are approved as trending topics at virtually identical rates." *See* Jessica Guynn, *Facebook Makes Changes to "Trending Topics" After Bias Investigation*, USA TODAY.COM, May 24, 2016 (http://www.usatoday.com/story/tech/news/2016/05/23/facebook-says-investigation-found-no-systematic-political-bias/84818560/).

And PSI itself made plain its intent to use the voluminous documents that it sought in "depositions, a public hearing, and a final report to the Senate." JA601; *see also* JA437-445 (disclosing confidential information). As a result, the subpoenaed documents almost certainly will fall into the hands of others who pursue the kinds of "coercion aimed at shutting up or shutting down Backpage[]" that the Seventh Circuit condemned as unconstitutional. *See Backpage.com v. Dart*, 807 F.3d at 233. Any publisher in Backpage.com's position would fear that forced disclosure "will result in [] harassment … or other [] consequences which objectively suggest an impact on, or chilling" of its rights. *Brock*, 860 F.2d at 348-50; *Dole*, 950 F.2d at 1460; *GlaxoSmithKline*, 732 N.W.2d at 271. Yet the District Court brushed aside this evidence, simply observing that PSI "expressed a valid legislative purpose." JA17 (citation and internal quotation marks omitted).

The District Court also relied on the flawed premise that it was incumbent on Mr. Ferrer to show—again, document-by-document—that all of the hundreds of thousands of pages of material constitute "protected First Amendment communications" as opposed to, *e.g.*, "[o]ffers to engage in illegal transactions [that] are categorically excluded from First Amendment protection." JA23 (quoting *United States v. Williams*, 553 U.S. 285, 297 (2008)). It is settled law, however, that Backpage.com's speech is presumptively protected by the First Amendment—unless *the government* carries its burden to show otherwise. *E.g.*,

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002) ("Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.") (citations omitted); *Bursey*, 466 F.2d at 1082 ("All speech, press, and associational relationships are presumptively protected by the First Amendment; the burden rests on the Government to establish that the particular expressions or relationships are outside its reach.") (citations omitted).

In this case, the District Court itself recognized that not all the ads at Backpage.com are "for sex," and "not all advertisements for sex are advertisements for illegal sex." JA3 (quoting *Backpage.com v. Dart*, 807 F.3d at 230); JA22 ("*[s]ome* of the documents … *may* contain information that is not subject to First Amendment protection due to its illegal nature") (emphasis added). The court even acknowledged the series of federal court decisions applying the First Amendment to strike down state laws seeking "to criminalize certain sex-oriented advertisements" on Backpage.com. JA24. Yet it failed to grasp that providing a forum for third-party speech is presumptively protected, and instead shifted the burden to Mr. Ferrer to show the First Amendment applies "*as to each and every document that concerns Backpage's moderation activities*." *Id*. (emphasis added).

Under these circumstances, the dragnet cast by PSI's Subpoena has the "practical effect" of deterring a publisher of reasonable fortitude from exercising its constitutional right to continue to publish third-party content that has engen-

dered the government's disapproval. *See Dole*, 950 F.2d at 1460; *NAACP*, 357 U.S. at 461. That Backpage.com has withstood government pressure to purge its website of adult-oriented listings of course does not eliminate the First Amendment concern. There is no requirement to demonstrate a party's conduct was *actually* chilled; the mere risk that affected speakers no longer feel free to express views "is precisely the sort of 'chilling' of first amendment rights" that satisfies the *prima facie* showing. *Dole*, 950 F.2d at 1460. Consequently, the District Court erred when it characterized the burden imposed as "merely searching for responsive documents" and asserted it "does not limit or chill First Amendment rights." JA23.

3. The District Court Erred in Shifting the Burden to Mr. Ferrer

Because Mr. Ferrer established a *prima facie* case that the Requests chill First Amendment rights, the District Court improperly saddled him with the burden of showing that his First Amendment interests trumped the government's asserted interests—interests that PSI had not even fully articulated, much less tried to show satisfy *Bursey*'s least-restrictive-means test. *See, e.g.*, JA27 (faulting Mr. Ferrer for "not attempting to balance the parties' competing interests"). *See also infra* § I.D. The District Court's analysis "has it backwards," *Bursey*, 466 F.2d at 1082, and must be reversed.

C. No Document-By-Document Showing Was Required to Preserve the First Amendment Objections

The District Court faulted Mr. Ferrer for asserting what it characterized as only a "blanket" objection to the Subpoena, JA42, requiring instead objections on a document-by-document basis in order to avoid forfeiting First Amendment rights.[15] But it cited no authority for the proposition that a party asserting First Amendment rights must make such a showing where, as here, both the substance and breadth of the document demands impose significant constitutional burdens. Here, each document request PSI sought to enforce imposed qualitative and quantitative burdens, as they probed First Amendment-protected editorial functions, and demanded collection and processing of more than ten million documents and review of more than one million individual documents spanning a six-year period. The Subpoena demanded all documents of any kind:

- "concerning Backpage's reviewing, blocking, deleting, editing, or modifying advertisements in Adult Sections;" JA138;
- concerning "advertising posting limitations," such as banned terms *id.*; and
- concerning "reviewing, verifying, blocking, deleting, disabling, or flagging user accounts or user account information."

[15] According to the District Court, Mr. Ferrer was required to "'assert privileges on a document-by-document basis'" only *after* (1) "conduct[ing] a full and comprehensive search" for responsive documents; (2) itemizing all withheld documents on a privilege log; and (3) "balanc[ing] the nature of the intrusion against the asserted governmental interest." JA20-24 (citation omitted).

Neither case law nor common sense supports the proposition that Mr. Ferrer was required to repeat the same objection for each withheld document, where a general objection adequately alerted PSI to the assertion of constitutional rights.[16]

The District Court also erred in failing to consider that PSI made it extraordinarily burdensome—if not practically impossible—for Mr. Ferrer to meet the standard demanded by the Court. It suggested that PSI reasonably accommodated Mr. Ferrer by replacing the original subpoena with the ostensibly narrower October 1, 2015 Subpoena. But this "narrowing" is illusory. While the revised Subpoena reduced *the number* of document requests, it simultaneously *broadened their scope* by framing the requests in even more expansive terms. *See supra* 13.

Meanwhile, PSI expanded its investigation further, by interviewing and issuing subpoenas to entities and individuals affiliated or doing business with Backpage.com. *See* JA585. This sort of reframing hardly lends itself to balancing competing interests or making question-by-question (or document-by-document) objections. *See, e.g., Sweezy v. New Hampshire,* 354 U.S. 234, 245 (1957) ("It is particularly important that the … compulsory process be carefully circumscribed

[16] The District Court held Mr. Ferrer had failed to acknowledge the relevant "balanc[ing]" test under the First Amendment, JA27, but its own opinion refutes that assertion: Mr. Ferrer clearly relied upon *Bursey* and related cases for the governing burden-shifting analysis and standard of constitutional scrutiny, JA25, and claimed no "absolute right to be free from government investigation." JA20.

when [it] tends to impinge upon such highly sensitive areas as … freedom of communication of ideas.").

It is no answer that, in *Bursey*, witnesses were able to object to specific questions on the record. JA26. In that case, the grand jury had asked both witnesses a total of approximately three dozen questions seeking specific information (such as the names of individuals involved in the activity under investigation) that the witnesses refused to answer (while answering many other narrowly tailored questions). *Bursey*, 466 F.2d at 1068-70. Here, by contrast, PSI seeks *hundreds of thousands* of pages of documents going to Backpage.com's core editorial functions. Once again, the unique considerations presented by online media must inform the First Amendment analysis—yet the District Court entirely overlooked this critical difference, and did not even mention the decisions in cases Mr. Ferrer cited, including *Hood*, *Jian Zhang*, *Craigslist*, and *Reno*. JA536-38.

D. PSI Cannot Meet *Bursey*'s Least-Restrictive-Means Test

At no point has PSI even attempted to meet the standard required by *Bursey* and related cases of showing (1) an immediate, substantial, and subordinating need for the information sought; (2) substantial connection between the information sought and an overriding governmental interest; and (3) no less drastic means to obtain the information. *Bursey*, 466 F.2d at 1083; *see also Gibson*, 372 U.S. at 546; *Dole*, 950 F.2d at 1456. This demanding test reflects the proposition that

"when freedom of speech hangs in the balance," the government "may not use a butcher knife on a problem that requires a scalpel to fix." JA21 (quoting *Cooper*). The District Court purported to accept this proposition, *id*., but in fact paid it no more than lip service.

The District Court exacerbated its error of shifting the burden of establishing the Request's constitutionality off of PSI and onto Mr. Ferrer by holding summarily that the asserted legislative interest justified the substantial intrusion, disruption, and cost that complying would entail. The District Court did not attempt any kind of balancing—it simply acknowledged the burden and flatly concluded "[s]o be it." JA22. That flawed analysis does not survive any standard of scrutiny—much less *de novo* review.

1. The Asserted Legislative Purpose Cannot Support the Burden Imposed

The District Court purported to dispose of legislative purpose issues simply by finding Congress could legitimately investigate Internet sex trafficking and the need for possible amendment of the § 230 safe harbor. JA22. But it failed to explain how any subordinating valid governmental interest could justify the sweeping requests at issue, for "any documents" for a six-year period, in the volume the Subpoena required. Instead, the court ratified PSI's reliance on its general mandate to investigate organized crime in interstate or international com-

merce and lawlessness affecting health, safety, and welfare, and to consider the efficacy of existing and potential new laws in that domain. *Id*.

But this did not demand nearly enough. When a congressional inquiry threatens constitutional rights of a party under investigation, committees must act with a higher degree of explicitness and clarity than did PSI here. *See, e.g.*, *Yellin v. United States*, 374 U.S. 109, 143-44 (1963); *United States v. Ballin*, 144 U.S. 1, 5 (1892). Under the expansive mandate the District Court authorized, there is no information that could not be sought, nor any document not made subject to compulsory process, for any online intermediary. In fact, the District Court articulated no limiting principle of any kind.

Such an expansive view cannot be reconciled with cases like *Rumely*, 345 U.S. at 46, where the Supreme Court held the Committee for Constitutional Government could not be compelled to produce information on the buyers of its books and financial records, including information on receipts from the sale of books, pamphlets, and other literature. The Court held that a congressional resolution authorizing the Select Committee on Lobbying Activities to study and investigate (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation, did not empower it to "inquire into all efforts of private individuals to influence public opinion through books and

periodicals." *Id*. To accommodate "contending principles—the one underlying the power of Congress to investigate, the other at the basis of the limitation imposed by the First Amendment," the Court interpreted the mandate to investigate "lobbying activities" narrowly to include only "representations made directly to the Congress, its members, or its committees." *Id*. at 44, 47 (citation omitted).

Attempting to distinguish *Rumely*, PSI argued the committee in that case had special jurisdiction that raised obvious constitutional problems, whereas here, PSI is empowered to investigate "a broad swath of activity" for which no possible narrowing is permissible to address constitutional tensions. JA518. But this fails to address the constitutional issue. The defective resolution in *Rumely* would not have been cured by broadening the committee's mandate to encompass all "governmental operations."

Likewise, PSI's mandate to investigate interstate commerce and crime cannot empower it to probe editorial decisionmaking in that "[v]alidation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual … documentary demands." *Gibson*, 372 U.S. at 545. "It is particularly important that the … compulsory process be carefully circumscribed when the investigative process tends to impinge

on such highly sensitive areas as freedom of speech …." *Sweezy*, 354 U.S. at 245. The District Court ignored these basic principles.[17]

The District Court also brushed aside the Subpoena's punitive and prosecutorial focus, on grounds that its role was not to "test the motives" of PSI's members, because "motives alone would not vitiate [the] investigation." JA18 (quoting *Watkins*, 354 U.S. at 200). But *Watkins* does not hold that motive is irrelevant—rather, it must have a role "from the standpoint of the constitutional limitations upon congressional investigations." *Watkins*, 354 U.S. at 200. The evidence here that the Subpoena is no mere tool of legislative investigation, but rather part of a punitive campaign targeting Backpage.com, is too strong to ignore, and warrants more consideration than the back of the hand it received below.

Complicity between PSI and, *e.g.*, Sheriff Dart is well-documented, *see supra* 13-14; *see also* JA98-104, as are Sheriff Dart's unconstitutional efforts targeting Backpage.com concurrent with his coordination with PSI. *See Backpage.com v. Dart*, 807 F.3d 229. The Subpoena here also came against a backdrop of the PSI Chair and other legislators specifically seeking ways to "go

[17] It does not help that PSI's invocation of potential congressional deliberation on whether and/or how to amend § 230 arose only *post hoc* in seeking to enforce the Requests. JA493-504, JA508-09. Such investigatory purposes cannot be retro-actively articulated, *e.g.*, *Deutch v. United States*, 367 U.S. 456, 467-68 (1961), and must instead be made part of the investigation itself in order to assess its validity, rather than being sanctioned as precisely the kind of *post litem motam* that *Rumely* bars. 345 U.S. at 48.

after" Backpage.com, and to urge prosecutors to "aggressively" investigate and pursue criminal charges. The transcript of PSI's hearing is replete with references to how PSI's investigation would dovetail with other efforts against Backpage.com, and contained multiple calls to action by law enforcement.[18]

All of these efforts are utterly inconsistent with the fact that Congress is not a "law enforcement or trial agency," *Watkins*, 354 U.S. at 187, though they do tend to lay bare the Subpoena's actual underlying objective. As this Court has long recognized, there is "a clear difference between [] legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions." *Senate Select Comm. on Pres. Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974). The Subpoena here transgresses these clearly drawn lines of governmental power, in ways that directly violate the First Amendment.

2. PSI Failed to Show That it Cannot Meet its Needs Through Less Burdensome Means

The District Court dismissed the extraordinary burden inherent in complying with the Requests, and at no point required PSI to justify the volume or breadth of the documents sought. In fact, the District Court *never analyzed* the burden on Backpage.com to produce the massive volume of documents the Requests

[18] *See, e.g.*, Nov. 19 Hearing Rec. at 10; 13-15, 19-20, 23.

demanded, based on its apparent view that all burden claims were unfounded because Mr. Ferrer "refused to perform a comprehensive search." JA23.

In addition to its indifference to the burden, *see supra* 40 ("so be it"), the District Court further suggested—based on non-First Amendment authority—that such burdens are "to be expected." JA29-30 (citing *FTC v. Texaco*, 555 F.2d at 882). The court found "nothing unusual, unreasonable, or overly broad about requiring a party to search for all responsive documents on a specific subject or topic." *Id*. Of course, there is little impediment to reaching such facile conclusions when free speech considerations and the context of making such demands of online third-party intermediaries are ignored. Here, the District Court conducted its entire analysis (not just on the burden) without even once mentioning a single case analyzing the special problems presented by document demands to online intermediaries, such as *Hood*, *Jian Zhang*, or any similar case.

When it comes to "reviewing, blocking, deleting, editing, or modifying" third-party postings hosted by online intermediaries, and/or "verifying, blocking, deleting, disabling, or flagging" the accounts they come from, JA138, even the "usual" requirement to "search for all responsive documents" imposes especially acute burdens. The District Court suggested that production of "massive amounts of information are required only because of Backpage.com's seeming efforts to avoid inquiry," JA29, but it was undisputed that millions of ads were at issue. *Id*.

Backpage.com screens well over 10 million ads per year, and the subpoena sought documents for a six-year period. The Subpoena—even reduced to three Requests—thus calls for a massive amount of material, simply because of the nature of the online medium, its accessibility and use by a broad audience, and the volume of material those users generate. Any suggestion that Mr. Ferrer "failed to … quantify the number of materials" is—at best—a red herring. JA30.

The fact that a website like Backpage.com hosts millions of user postings monthly, *see id*.; *see also, e.g.*, *Hood*, 822 F.3d at 216-17, 219; *Dart v. Craigslist*, 665 F.Supp.2d at 961, means that investigations like PSI's here are unlike past or "usual" cases. Backpage.com does not claim online intermediaries should receive any kind of "categorical immunity," as the District Court erroneously suggested, JA19, but at least *some* consideration must be given the sheer volume of material involved, in assessing the burden imposed by a particular document demand, or set of them, and whether less drastic options exist.

The production the District Court has compelled Backpage.com to endure even as this appeal is pending starkly illustrates the burden. Thus far, more than three terabytes of data were collected from more than 100 custodians and data sources, 10.7 million individual documents were processed and searched, from which Backpage.com's counsel reviewed 1,466,840 individual documents. ECF 37-1 (¶¶10, 17). This reflects work by 300 attorney reviewers (the number

employed at any given time varying depending on the volume of material ready for review), who spent in total as of November 10, 2016, over 40,000 hours reviewing data (with non-attorneys spending another 224 hours), at a total cost to Backpage.com of almost $3 million. To date, production to PSI has totaled more than 224,000 documents, encompassing over 550,000 pages, with more to come. ECF 37-1 (¶¶18, 20). By any measure, the burden is extraordinary.

In undertaking these efforts, Backpage.com prioritized collection and review of data to facilitate prompt response to the Requests and to identify the most relevant information, *i.e.*, that speaking most directly to Backpage.com's moderation efforts and editorial decision-making. The process has been laborious, intrusive, and disruptive, and diverted manpower and resources away from Backpage.com's core publishing efforts. And because the documents sought probe Backpage.com's editorial decision-making, it required the involvement of those most directly involved in the company's publishing and hosting operations. The fruits of the production are also qualitatively sensitive in First Amendment terms, inasmuch as they reflect the "inner thought process" of the speaker targeted.

The District Court's observation that PSI "expressed its willingness to discuss … agreeing [to] electronic search terms or focusing on particular document custodians or employees" is beside the point. JA30. That is how *any* production of material relating to online operations would have to proceed as a matter of

course, given the volume involved. PSI's withdrawal of the original subpoena and replacement with a revised Subpoena that recast forty-one document demands into eight broader, farther-ranging demands in a purported attempt to "minimize" the burden, in fact, did the opposite. *See supra* 13, 16.

The District Court's ruling relieved PSI of the obligation to show this immense burden is justified. And, indeed, it would be hard-pressed to show that requiring compliance with the Requests is the least restrictive means of obtaining the desired information, or that less drastic measures were unavailable. As a threshold matter, PSI demanded documents dating from January 1, 2010, to the present. Given the volume of postings (or even just reviewed postings), PSI necessarily received the same types of information over, and over, and over again. In the face of this reality, PSI never showed that representative sampling would not suffice to meet legitimate legislative purposes. Such duplicative or cumulative investigation cannot be constitutionally sustained. *E.g.*, *Sweezy*, 354 U.S. at 248 ("[I]nvestigators … were not acquiring new information as much as corroborating data already in their possession."). In sum, the search compelled by the Subpoena was unduly broad and did not justify the intrusion upon fundamental First Amendment rights, and Requests 1, 2, and 3 should not have been enforced.

II. MR. FERRER DID NOT WAIVE BACKPAGE'S ATTORNEY-CLIENT OR ATTORNEY WORK-PRODUCT PROTECTIONS

A. The Attorney-Client Privilege and Attorney Work-Product Protection Are Vital to the Administration of Justice and Their Waiver Is Not Lightly Found

As the "oldest of the privileges for confidential communications known to the common law[,]" *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), the attorney-client privilege is one of the most "sacred" and "absolute" privileges recognized by American courts. *SEC v. Gulf & W. Indus., Inc.*, 518 F.Supp. 675, 680 (D.D.C. 1981); *Coplon v. United States*, 191 F.2d 749, 757-58 (D.C. Cir. 1951) ("The sanctity of the constitutional right of an accused privately to consult with counsel is generally recognized and zealously enforced by state as well as federal courts."). Accordingly, "courts should be cautious about finding implied waivers." *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16 (1st Cir. 2003). Likewise, the work-product doctrine, not limited to confidential communications, is afforded even broader protection and "held largely inviolate." *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005); *McNeil-PPC, Inc. v. Procter & Gamble Co.*, 138 F.R.D. 136, 138 (D. Colo. 1991). Work product is discoverable only upon a showing of "substantial need … and an undue hardship" and opinion work product is "virtually undiscoverable." *Dir., Office of Thrift Supervision v. Vinson & Elkins,*

LLP, 124 F.3d 1304, 1307 (D.C. Cir. 1997). Given these principles, the District Court's waiver ruling must be reversed.

B. The Terms of the Subpoena Foreclose the District Court's Finding of Waiver

The very terms of PSI's Subpoena foreclose the District Court's conclusion that Mr. Ferrer was required to collect and review responsive documents and prepare and produce a privilege log by the original October 23, 2015 return date. The Subpoena requires that "[a]ny document *withheld on the basis of privilege* shall be identified on a privilege log submitted *with response* to this subpoena." JA139 (emphasis added). But Mr. Ferrer had not withheld any documents "on the basis of privilege" in October 2015 because he asserted constitutional objections to the search itself, and thus had not yet identified responsive documents that he then could have evaluated and potentially withheld for privilege.

Furthermore, the Subpoena's requirement that any withheld document "shall be identified on a privilege log," *id.*, confirms that a respondent cannot properly assert privilege until he undertakes the search and identifies responsive documents. The Subpoena demands that the log contain specific information for each withheld document in order to claim privilege: "The log shall state the date of the document, its author, his or her occupation and employer, all recipients, the title and/or subject matter, the privilege claimed and a brief explanation of the basis of the claim of privilege." *Id.* Because Mr. Ferrer had not identified responsive

documents that could be logged as privileged in October 2015, his failure to submit a privilege log at that time cannot be a waiver.

Finally, the Subpoena only requires that the privilege log be "submitted with response to this subpoena." *Id.* Mr. Ferrer has not yet "submitted [his] response" to the Subpoena because his fulfillment of Requests 1, 2, and 3 of the Subpoena continues. Following the District Court's August 5 order denying Mr. Ferrer's constitutional objections, Mr. Ferrer, Backpage.com, and their counsel commenced the extensive and ongoing effort to collect, review, log, and produce responsive documents.

Because a privilege log need only be "submitted with response to this subpoena," *id.*, the privilege log identifying "documents withheld on the basis of privilege" would not be due until, at the earliest, the return date, which was extended by orders below, JA54, and by this Court, until November 10, 2016, JA69. Even before the final response date, Mr. Ferrer submitted privilege logs as to all documents withheld on the basis of attorney-client or attorney work-product privileges with the interim productions he has made thus far, and has continued to identify and log any responsive, privileged documents in preparing his response to the Subpoena. Thus, the Subpoena's plain language, together with the District Court's September 16 Order and this Court's October 17 Order, make clear that Mr. Ferrer's window to submit a privilege log remained open until at least

November 10, 2016, and the court erred in preemptively finding waiver. *See Tuite v. Henry*, 98 F.3d 1411, 1416-17 (D.C. Cir. 1996) (privilege log is not required "at the time the initial objection is asserted" and may be provided "within a reasonable time [after production], such that the claiming party has adequate opportunity to evaluate fully the subpoenaed documents and the requesting party has ample opportunity to contest that claim").

This procedure, which comports with the terms of the Subpoena and common practice, was not news to PSI. Mr. Ferrer's correspondence with PSI both on and after the original return date made clear his intent to withhold documents on the basis of privilege once his constitutional objections to the search itself were resolved. JA157, 178-79. He specifically notified PSI that documents were withheld from his production in November 2015 based on privilege. JA179. The Subcommittee affirmatively acknowledged the assertion of privilege in an email the next day and never objected to this notice. JA185. In fact, PSI never contested Mr. Ferrer's right to assert attorney-client or work-product privileges in its application for enforcement—despite its current contention, accepted by the District Court, that these privileges had been waived more than five months earlier. It was not until *after* the District Court rejected the constitutional objections and Mr. Ferrer moved for an extension of the return date to complete compliance with

the Subpoena that PSI raised for the first time any objection to the assertion of privilege. JA624-25.

The Subcommittee was clearly on notice of Mr. Ferrer's intent to withhold and identify privileged documents at the appropriate time—when he could assert privilege as to specific documents whose details could be logged so as to allow PSI and the court to assess the merit of the assertions—and that notice was sufficient to preserve the opportunity for any future adjudication of any contested privilege claim. The District Court's holding that Mr. Ferrer failed to raise the privilege issue at the appropriate time in this litigation is wrong.[19]

C. A Party Does Not Waive Privilege by Raising a Constitutional Challenge to the Search Compelled by the Subpoena

The District Court never explained how it would be possible for Mr. Ferrer to preserve his constitutional objections to the scope of the compelled search and also assert privilege as to the documents that would be uncovered by that search. This omission is not surprising, because there is no plausible answer to this question: A respondent cannot perform the compelled search without impinging

[19] *See Tuite*, 98 F.3d at 1416-17. Contrary to the District Court's ruling, Mr. Ferrer's actions did not "preclude[] the Subcommittee from considering the applicability of his common law privileges to the congressional subpoena." JA63. Now that the constitutional objections have been decided (pending appeal), Mr. Ferrer has been systematically logging privileged documents discovered in the search, and PSI will have ample opportunity to determine the applicability of the privilege to each document.

upon constitutionally protected rights, and thus cannot identify what documents are responsive and privileged. The most a subpoena respondent can do before identifying and evaluating responsive documents is to reserve claims of privilege, which is exactly what Mr. Ferrer did. JA157.

Because common-law privileges turn in large part on whether the document in question was authored by or sent to an attorney, a party cannot effectively assert such privileges *before* performing the search for responsive documents: A blanket invocation of attorney-client privilege or work-product protection for all responsive documents would not suffice. Not only does the Subpoena specifically require a document-by-document assertion of privilege in a privilege log, JA139, courts uniformly have found that general assertions of these privileges are ineffective. "[T]he attorney-client privilege may not be tossed as a blanket over an undifferentiated group of documents. The privilege must be specifically asserted with respect to particular documents." *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982) (citations omitted).[20] Parties that make such improper assertions may *forfeit* privilege if they had the ability to claim privilege on a

[20] *See also, e.g.*, *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983) ("The claim of privilege must be made and sustained on a question-by-question or document-by-document basis; a blanket claim of privilege is unacceptable"); *In re Grand Jury Subpoena (Mr. S)*, 662 F.3d 65, 71 (1st Cir. 2011) (same); F.R.C.P. 26(b)(5)(A)(ii) (requiring description of to "the nature of the documents, communications, or tangible things not produced or disclosed …—[to] enable other parties to assess the claim").

document-by-document basis. *See, e.g., United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473-74 (2d Cir. 1996); *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 541-42 (10th Cir. 1984) (*per curiam*).

Conversely, if Backpage.com had performed a search sufficient to preserve the privilege as to responsive documents, it effectively would have sacrificed its asserted First Amendment right to resist the search. The Subcommittee cannot impose on Mr. Ferrer the Hobson's choice of "waiv[ing] the [attorney-client] privilege in order to effectively assert his [constitutional] rights." *United States v. Khan*, 309 F.Supp.2d 789, 798-99 (E.D. Va. 2004), *remanded on other grounds by* 461 F.3d 477 (E.D. Va. 2006). It is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968); *cf. In re Grand Jury (Impounded)*, 138 F.3d 978, 983 (3d Cir. 1998) (McKee, J., concurring) ("Surely, one need not waive the protections embedded in the Fifth Amendment in order to preserve a work product privilege."). This is precisely the dilemma that the law forbids.

Forcing Mr. Ferrer to choose between asserting his constitutional rights and his common law privileges not only tramples these rights, it would be pointless. Had Mr. Ferrer prevailed on his First Amendment claims, the entire question of whether a particular subset of documents was also protected by the attorney-client and work-product privileges would have been moot. Backpage.com would have

been spared an unconstitutional (and extremely burdensome and costly) intrusion, and the court would have been spared the need to adjudicate disputes over common law privileges subsumed within overarching constitutional questions. The District Court's holding of waiver defies common sense, demeans the attorney-client privilege, and impermissibly punishes good faith exercise of constitutional rights.

D. A Party Does Not Forfeit the Right to Assert Privilege When Objections to the Subpoena Itself Are Pending

Beyond offending basic constitutional principles, the District Court's decision directly conflicts with this Court's precedent. In *United States v. Philip Morris, Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003), this Court held that a court should first resolve any objections to the scope of a subpoena before addressing objections to a particular document. *Id.* (citing Fed. R. Civ. P. 26 1993 Adv. Comm. Notes). If a court overrules the objection, it must then give the party an opportunity to list the document on a privilege log. *Id.* "'In short, if a party's pending objections apply to allegedly privileged documents, *the party need not log the document until the court rules on its objections*.'" *Id.* (emphasis added).

With respect to document-specific privileges, "[*w*]*aiver is not automatic*, particularly if the party reasonably believed that its [overarching] objections applied to the document." *Id.* (emphasis added). The District Court's September 16 Order contravenes this Court's unambiguous holding in *Philip Morris*, which has been confirmed both by this Court and others. *See, e.g., United States v.*

British Am. Tobacco (Invs.) Ltd., 387 F.3d 884, 892 (D.C. Cir. 2004); *Tumbling v. Merced Irrigation Dist.*, 262 F.R.D. 509, 518 (E.D. Cal. 2009) (citing *Philip Morris* and allowing a party to update its privilege log *after* the court rules on its objection); *ASPCA v. Ringling Bros. & Barnum & Bailey Circus*, 233 F.R.D. 209, 213 (D.C. Cir. 2006) ("[D]efendants were not required to assert any privilege for the documents … until after their objection was ruled on.").

Philip Morris fully applies here. Mr. Ferrer lodged a First Amendment objection to the search and disclosure of responsive documents, as well as an objection that the Subpoena was overly broad; he reasonably believed that the documents covered by the privileges fell within the scope of those objections. Mr. Ferrer expressly preserved the right to assert any applicable privileges, including those based on attorney-client communications and attorney work-product, in the event that they became relevant following a court's review of his overarching objections. *See* JA157, 178-79. Once the court overruled his objections and ordered responses to Requests 1, 2, and 3 of the Subpoena, Mr. Ferrer immediately began performing the relevant searches, producing responsive documents, and preparing privilege logs.

Mr. Ferrer followed exactly the right path and nothing he did or failed to do constitutes a waiver. Because of the importance of the attorney-client privilege and the attorney work-product protection, courts will not generally find waiver

based simply on the timing of the privilege assertion. "'[W]aiver of a privilege is a serious sanction most suitable for cases of *unjustified* delay, inexcusable conduct, and bad faith.'" *Philip Morris*, 347 F.3d at 954 (emphasis added) (citation omitted); *Moe v. Sys. Transp., Inc.*, 270 F.R.D. 613, 623 (D. Mont. 2010). Thus, in the *British American Tobacco* case, this Court rejected a finding of waiver of privilege based solely on delay in making an objection, where the defendant had a good-faith belief that its pending objections (if successful) would have obviated the need to produce the documents at issue. 387 F.3d at 892. This Court reasoned that "waiver of attorney-client privilege is a serious sanction that requires, at the very least, a showing that [defendant] failed to log the memorandum without reasonable belief that its objections applied to it." *Id.*

Mr. Ferrer need not prevail on the constitutional objections he raised; it is enough that he believed in good faith (as he did) that the success of his constitutional objections would have relieved him of any obligation to produce the documents in question. The District Court never found to the contrary. It put the cart before the horse, and its aberrant waiver ruling, which punishes the good-faith assertion of constitutional rights, cannot be reconciled with *Philip Morris*. *See also In re Grand Jury (Impounded)*, 138 F.3d at 983.

E. PSI Is Not the Sole Arbiter of Whether It Violated Backpage's Constitutional Rights

The District Court ruled that Mr. Ferrer could not refuse to produce documents until his constitutional objections were heard in court; rather, he had to abide by *PSI*'s take on his constitutional challenge; perform the search; and still assert privilege, with the required log, by the original return date of October 23, 2015 (three weeks after issuance of the Subpoena). JA62-65. It is passing strange to suppose that the Constitution would place the fox in charge of the henhouse, and make PSI (the alleged *violator* of Backpage.com's constitutional rights) the sole *arbiter* of what the Constitution required. The District Court's reasoning is not just strange—it is fundamentally flawed: The determination of constitutional rights is the province of the court, *Marbury v. Madison*, 5 U.S. 137, 178 (1803), and "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (internal quotation marks and citation omitted).

The District Court's approach turns this principle inside out. No private individual could ever obtain judicial review of an objection to the scope or burden of a search compelled by a legislative or administrative agency subpoena without, at a minimum, forfeiting his common law privileges. Our system of justice provides for judicial enforcement of legislative and administrative subpoenas.

28 U.S.C. § 1365; U.S. Department of Justice, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities Pursuant to Public Law 106-544*, § (I)(A) (2001) (noting a "complex proliferation" of "approximately 335 existing administrative subpoena authorities held by various executive branch entities under current law," all of which are enforced by the courts). And respondents commonly contest the authority to compel a search or the scope of the search commanded by a subpoena. *See, e.g.*, *McPhaul v. United States*, 364 U.S. 372, 382 (1960). The District Court could not make waiver of attorney-client privilege and work-product protection the table stakes for securing judicial resolution of Mr. Ferrer's constitutional challenges.[21]

[21] Because Mr. Ferrer had no obligation to assert privilege until there was judicial resolution of his constitutional challenges, and until he subsequently had searched for and withheld documents on the basis of privilege, Mr. Ferrer did not miss "'numerous opportunities'" to assert the privileges previously, as the District Court suggested. *See* JA52 (citation omitted). Mr. Ferrer's first production after the court's order enforcing the Subpoena constituted his initial production of documents within the scope of his constitutional objections. Accordingly, that September 2016 production constituted the first possible opportunity to assert, in a manner that was not facially deficient, privileges with respect to specific documents to which his constitutional objections applied. Mr. Ferrer timely, expressly, and unequivocally asserted the attorney-client and attorney work-product privileges as bases for withholding documents from the September 13, 2016, and future productions. *See* JA609, 620-621; *see also* Letter from Steven R. Ross, Counsel to Backpage.com to Sens. Rob Portman and Claire McCaskill, PSI Chairman and Ranking Member (Nov. 10, 2016). And Mr. Ferrer's prior correspondence with PSI made clear his intent to withhold documents on the basis of privilege at a later date, *which PSI acknowledged and to which it did not object*. *See* JA157, 178-79, 185.

F. Any Waiver Is Limited to Documents that were Identified as Responsive and Privileged at the Time

Even if the court's waiver holding were correct (it was not), any finding of waiver cannot extend beyond those specific documents that would have been withheld as part of any pre-October 23, 2015 production. In other words, the District Court improperly found Mr. Ferrer generally waived his right to assert privileges over documents that would have been discovered and produced after October 23.

It strains logic to find a general waiver of privileges over the entire body of documents that may be produced when those privileges were not asserted as to documents that, at the time the District Court said the privilege log was due, were uncollected, unidentified, and unexamined—and, in some instances, not even in existence. *In re Honeywell Int'l, Inc. Secs. Litig.*, 230 F.R.D. 293, 300 n.3 (S.D.N.Y. 2003); *Hoot Winc, LLC v. RSM McGladrey Fin. Process Outsourcing, LLC*, 2010 WL 2404664, at *3 (S.D. Cal. June 11, 2010). There can be no cate-

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Mr. Ferrer's supposed failure to include a privilege log with his production of responsive documents on November 13, 2015, is also of no moment. That production constituted the first in what was intended to be a series of productions that did *not* implicate Backpage.com's constitutional rights. *See* JA179. Mr. Ferrer expressly asserted common law privileges, made clear that certain documents were withheld on that basis, and preserved his right to assert such privileges. *See id.* That sufficiently preserved his rights, and Mr. Ferrer had no obligation to produce a privilege log until the entire production is due. *See Tuite*, 98 F.3d at 1416-17; *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005).

gorical waiver of privilege over all potentially responsive documents for the failure to file a privilege log on a subset of such documents.

CONCLUSION

For the foregoing reasons, this Court should vacate the District Court's order compelling Mr. Ferrer to comply with PSI's Subpoena, and should reverse that court's finding of waiver of the attorney-client privilege and work-product protections.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 13,951 words.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on November 16, 2016.

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