No. 18-56455

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES LARKIN, JOHN BRUNST, MICHAEL LACEY, AND SCOTT SPEAR,
Movants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CV 18-06742-RGK-PJW, ET AL.

GOVERNMENT'S ANSWERING BRIEF

NICOLA T. HANNA
United States Attorney

L. ASHLEY AULL
Assistant United States Attorney
Chief, Criminal Appeals Section

JOHN J. KUCERA
Assistant United States Attorney
Asset Forfeiture Section

1400 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012
Telephone: (213) 894-1435
Email: john.kucera@usdoj.gov

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

DESCRIPTION **PAGE**

TABLE OF CONTENTS (continued)

DESCRIPTION **PAGE**

TABLE OF AUTHORITIES

DESCRIPTION **PAGE(S)**

Federal Cases

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

State Cases

Federal Statutes

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

Federal Rules

No. 18-56455

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

JAMES LARKIN, JOHN BRUNST, MICHAEL LACEY, AND SCOTT SPEAR,
Movants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CV 18-06742-RGK-PJW, ET AL.

GOVERNMENT'S ANSWERING BRIEF

I

INTRODUCTION AND SUMMARY OF ARGUMENT

Offering the sale of adults for sex is illegal in every jurisdiction in the United States except parts of Nevada; advertising child prostitution is illegal throughout the country. *See Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 603-04 (9th Cir. 2010) (The Thirteenth Amendment "enshrines the principle that people may not be bought and sold as commodities."). Notwithstanding, Backpage.com, LLC ("Backpage")

dominated the online market for illegal prostitution advertising in the United States for most of its 14-year existence. Michael Lacey, James Larkin, John Brunst and Scott Spear ("appellants") owned Backpage (through holding entities) until 2015, when they sold Backpage to entities controlled by Carl Ferrer for around $600 million.

In March 2018, an Arizona federal grand jury indicted appellants and others on charges arising from their operation of Backpage, and the indictment included criminal forfeiture allegations. In early April 2018, Backpage and Ferrer (Backpage's then-CEO and 100% owner) pleaded guilty, admitted that the great majority of Backpage's paid advertisements were for prostitution, and consented to shut down Backpage and forfeit all Backpage assets traceable to or involved in the crimes.

On a parallel track, magistrate judges in the Central District of California issued civil seizure warrants for the same assets, resulting in the seizure of funds from numerous bank accounts. Appellants moved to vacate or modify the seizure warrants ("Motion to Vacate"). After the government filed civil forfeiture complaints in the Central District of California against the funds at issue here, the district court granted the

government's motion to stay the civil forfeiture proceedings pursuant to 18 U.S.C. § 981(g) pending the conclusion of appellants' criminal case and ordered the parties to file a status report in six months.[1] (ER 1-2 (the "stay order").)[2] As a result, the district court did not rule on appellants' Motion to Vacate.

Appellants now appeal the stay order. Appellants argue that in entering the stay, the district court ignored (1) their right to a pretrial hearing concerning their challenge to the sufficiency of the seizure

---

[1] Appellants' criminal case in Arizona is currently set for trial on January 15, 2020. (MJN 2).

[2] "ER" refers to appellants' Excerpts of Record, "MJN" refers to the government's motion for judicial notice, "CV" refers to the district court docket sheet entries, "AOB" refers to Appellants' Opening Brief, and "Amicus" refers to the brief filed by The DKT Liberty Project and other parties as *amici curiae* in support of appellants.

"SR" or "Senate Report" refers to the Senate Permanent Subcommittee on Investigations January 2017 report, BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING, available at https://www.hsgac.senate.gov/imo/media/doc/Backpage%20Report%202017.01.10%20FINAL.pdf.

"SApp." refers to the Senate Report Appendix, available at https://www.hsgac.senate.gov/imo/media/doc/Final%20Appendix%2020170.01.09.pdf.

warrants based on alleged omissions from the supporting affidavits (AOB 41-44), and (2) their claim that the First Amendment "bar[s] the Government from effecting pretrial *ex parte* seizures of assets and proceeds of publishing activities based on nothing more than a showing of probable cause that the assets are linked to criminal activity" (AOB 4). Regarding appellants' first claim, and as discussed in the government's Motion for Limited Remand filed on March 21, 2019, the government agrees appellants are entitled to a pretrial hearing regarding their challenge to the sufficiency of the warrants, to the extent the hearing does not involve civil discovery under 18 U.S.C. § 981(g). (*See* Dkts. 49 and 52.) Thus, the stay is premature and the government does not seek to defend it at this time.

The crux of the parties' dispute centers on appellants' second argument. Most of appellants' Opening Brief addresses the merits of their Motion to Vacate—on which the district court never ruled—and essentially requests that this Court grant the motion. (AOB 54.) The government disagrees with appellants' proposal to bypass the district court and have this Court rule on the Motion to Vacate in the first instance. First, the only order on appeal is the stay order, which the

government agrees should be vacated as premature. Second, whether and to what extent appellants have any First Amendment interests affected by the bank account seizures at issue involves partly factual questions, and only the district court can make those factual findings.

Accordingly, the government seeks a limited remand to (1) address appellants' sufficiency challenge to the warrants (*i.e.*, their request for a *Franks* hearing), (2) make threshold factual findings necessary to address their First Amendment claims, and (3) determine in light of those findings whether a renewed 18 U.S.C. § 981(g) stay is warranted. The government submits that a limited remand is the most expeditious route to developing the relevant record and permitting appellate review. (*See* Dkts. 49 and 52.)

If this Court does not remand and chooses to address appellants' First Amendment claims and other challenges on the present undeveloped record, those claims must be rejected. While appellants attempt to portray Backpage as a "publication" protected by the First Amendment that merely hosted classified ads by third parties, the internal documents underlying appellants' indictment and Backpage's and Ferrer's guilty pleas demonstrate the opposite—namely, that

appellants knowingly operated the country's leading online marketplace for prostitution and profited handsomely as a result. Speech proposing an illegal transaction—including prostitution solicitation—is "categorically excluded from First Amendment protection." *United States v. Williams*, 553 US. 285, 297 (2008); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973); *Erotic Service Provider Legal Ed. and Research Project v. Gascon*, 880 F.3d 450, 459-60 (9th Cir. 2018). Backpage and its operators had *no* First Amendment right to advertise adult and underage prostitution solicitations, let alone to alter the contents of unprotected ads to mislead law enforcement or facilitate their customers' illegal ventures.

Moreover, the primary legal tool Backpage successfully relied upon in the past to shield its activities was not the First Amendment but rather the Communications Decency Act, a statute that expressly does not apply to federal criminal prosecutions. And even courts that formerly accepted Backpage's free-speech justifications are now rejecting those claims based on the compelled disclosures of internal documents that Backpage stonewalled for years, and Backpage and Ferrer's guilty pleas.

Furthermore, appellants—whose corporate entities are creditors of the now defunct Backpage—have failed to demonstrate that *their* First Amendment rights are implicated by the seizures. Seizure of the *bank accounts* at issue here does not impede any protected expressive activity, nor were appellants even involved in Backpage's advertising activities at the time the seizures were executed (indeed, Backpage and its owner consented to shut down Backpage's operations). To the extent appellants claim that their corporate entities are creditors of Backpage, appellants lack standing to assert any alleged injury suffered by these corporate entities. Finally, appellants' claim that the seizures required a heightened showing beyond the usual probable cause standard fails. Appellants' authorities do not support imposing such requirements here.

Appellants' *Franks* challenge to the seizure warrants is meritless. Appellants have made no effort to demonstrate that any omissions were deliberate or reckless. In any event, they have not shown any material omissions or falsehoods.

Appellants also assert that the seized property includes assets unconnected to Backpage. The district court did not rule on that issue and this Court should not do so in the first instance.

II

ISSUES PRESENTED

A. Whether this matter should be dismissed for lack of jurisdiction or remanded pursuant to the government's Motion for Limited Remand (Dkts. 49 and 52).

B. If this Court instead chooses to address appellants' claims that were never ruled upon by the district court, whether (1) appellants have demonstrated that the government's pretrial seizures of bank accounts pursuant to civil seizure warrants implicated their First Amendment rights, (2) appellants have made a substantial preliminary showing necessary to trigger a *Franks* hearing regarding the warrant affidavits, and (3) the civil seizures were overbroad because they included allegedly untainted assets.

III

STATEMENT OF THE CASE

A. Jurisdiction and Timeliness

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1345, 1355. The district court entered the stay order on October 23, 2018, and ordered the parties to submit a status report in six months. (CV 85; ER 2.) Appellants filed a timely notice of appeal on October 29, 2018. (CV 86.) Fed. R. App. P. 4(a)(1)(B)(i).

Ordinarily, a stay order is not an appealable final decision. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983). Appellants contend the stay is appealable under 28 U.S.C. § 1292(a)(1), but a stay issued pursuant to 18 U.S.C. § 981(g) does not create or continue an injunction. (AOB 23-24.) *United States v. Section 17 Twp. 23 N., Range 22 E. of IBM, Delaware Cty., Okl.*, 40 F.3d 320, 322-23 (10th Cir. 1994) (stay of civil forfeiture proceeding "relates only to the internal progress of the forfeiture litigation" and therefore is not an injunction under §1292); *see also United States v. Contents of Woodforest Nat. Bank Account No. XXX0017*, 2011 WL 5373991, *2 (6th

Cir. 2011) (dismissing appeal of order staying civil forfeiture action under § 981(g), citing *Section 17 Twp.*).

Next, appellants contend the stay order is an appealable final order under 28 U.S.C. § 1291 because it leaves them "effectively out of court." (AOB 24-25, citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 9). However, that exception does not apply where, as here, the "district court clearly foresees and intends that proceedings will resume after the stay has expired." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1103 (9th Cir. 2005) (citing *Cofab, Inc. v. Philadelphia Joint Bd.*, 141 F.3d 105, 109 (3d Cir. 1998) (*Moses H. Cone* did not apply where district court had no intention to "'deep six' the suit")). Defendants also assert that the *Moses H. Cone* doctrine extends to stay orders that impose "lengthy" delays, but the stay here has only been in effect for six months. (ER 1-2); *Blue Cross & Blue Shield of Alabama v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007) (delay had already lasted longer than 18 months).

Finally, appellants rely on the collateral order doctrine. Application of that doctrine rests on "the entire category to which a claim belongs." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107

(2009). Appellants cite no authority holding that a stay issued pursuant to § 981 falls within the category of claims subject to the collateral order doctrine. Instead, they argue that the doctrine applies to cases involving First Amendment rights. (AOB 27.) But that argument merely underscores the necessity for a remand, because the government contends the seizures of bank funds at issue here do not implicate appellant's First Amendment rights, appellants contend they do, and the district court never made any findings on the issue.

Accordingly, this Court should dismiss this appeal for lack of jurisdiction, or, to facilitate expedited appellate review, issue a limited remand as described in the government's Motion for Limited Remand (Dkt. 49).

B. Statement of Facts

1. Overview of Backpage

Backpage was the leading source for online prostitution advertising in the United States from approximately 2010 to 2018. (*See* ER 117-18.) For most of its existence, Backpage charged users for posting "adult" ads—and generated more than 90% of its revenue from those ads. (*See* ER 65 and n.1, 93, 122; SR 44.) The great majority of

Backpage's "adult" ads consisted of offers to sell adults or children for sex. (*See, e.g.*, ER 65, 67, 92-93, 127-29, 134, 141-45; SR at 2, 6; MJN 302-303, 337.) By one estimate, Backpage netted more than 80% of all revenue from online prostitution advertising in the United States. (SR 6 and n.22.)

The "adult" section was a profit-making machine: Backpage generated approximately a half-billion dollars in revenue from that section from 2004 to 2018. (ER 65 and n.1; ER 118, 152.) In May 2011, for example, Backpage earned $4,519,153 from sales of "adult" ads; in comparison, its automotive ads generated $5,468. (SApp. 719.) Backpage's "adult" ads also received disproportionately more page views than other ads on the website. In May 2011, for example, when its automotive ads received 580,000 page views, Backpage's "adult" ads received over *one billion* page views (SR 44):

Pageviews by Sub-Category

Sub-Category	Pageviews Month of May 2011 #	%
Female Escorts	800,584,310	79.67%
Body Rubs	89,257,296	8.88%
Transsexual Escorts	76,215,799	7.59%
Domination	11,270,311	1.12%
Male Escorts	3,636,899	0.36%
Strippers	2,496,346	0.25%
Adult Jobs	2,254,129	0.22%
Datelines	725,747	0.07%
Fetish	489,806	0.05%
General Adult Category	17,891,525	1.78%
Total Adult	1,004,822,168	100.00%

(SApp 839.) "Escorts" and "body rubs" collectively accounted for approximately 97% of the "adult" section's traffic. (*See* SApp 839.) These ads featured "[n]early naked persons in provocative positions" and "hourly rates." (ER 134.)

Appellants Lacey and Larkin co-founded Backpage in 2004 with Ferrer in response to declining revenue experienced by Lacey and Larkin's alternative newspaper conglomerate. (ER 121-22; *see also* AOB 6.) Lacey and Larkin oversaw Backpage's policies and strategic direction from 2004-15. (ER 65, 118.) Appellant Spear served as Executive Vice President of one of Backpage's parent companies. (ER

118.) Appellant Brunst served as Chief Financial Officer of Backpage and several Backpage parent companies. *(Id.)*

When Craigslist—Backpage's primary competitor—closed its "adult" section in 2010 after learning that many of the ads in that section were for prostitution, Backpage expanded its "adult" category. (ER 122.) Backpage's annual profits then skyrocketed from $26 million in 2010 to over $52 million in 2011, $78 million in 2012, $112 million in 2013, and $134 million in 2014. (ER 122-123.)

In November 2012, Backpage's owners spun off their chain of alternative news weeklies, then-called Village Voice Media Holdings (VVMH), to focus on Backpage. Lacey held an ownership interest in Backpage's new corporate parent, Medalist Holdings, Inc., of approximately 45%, Larkin held approximately 43%, Brunst held approximately 6%, and Spear held approximately 4%. (ER 123.)

In April 2015, appellants (through non-party corporate entities) sold their ownership shares in Backpage and related entities for around $600 million to entities controlled by Ferrer. (ER 123; AOB 7.)[3] Ferrer

[3] The Indictment, Superseding Indictment, and other pleadings set forth that appellants continued to exert control over certain aspects

borrowed most of the purchase price from appellants' corporate entities. (ER 65-66, 123-24.)

2. Backpage's Knowing Facilitation of Prostitution

a. Law enforcement and others notify Backpage of the prevalence of prostitution ads on its website

Backpage faced withering public criticism from several sources as it grew its prostitution business. First, law enforcement officials presented Backpage with evidence that an overwhelming portion of its "adult" ads were for prostitution. In September 2010, 21 state attorneys general wrote that "ads for prostitution—including ads trafficking children—are rampant on the site." (ER 86, 125-26.) In August 2011, Seattle's mayor informed Backpage that "Seattle Police have identified an alarming number of juvenile prostitutes advertised on Backpage.com," and explained that Backpage was dissimilar from other companies whose services are "occasionally or incidentally" utilized by criminals because "[y]our company is in the business of

---

of Backpage's operations post-sale, including management of Backpage's counsel and Backpage's response to the Senate investigation. (*See, e.g.*, MJN 404 ¶ 32.) Appellants held a financial interest in the company as creditors, and put certain restrictions on Backpage (by for example, requiring the company to provide the lenders with access to Backpage's books and records). (ER 123-24.)

selling sex ads" and "your services are a direct vehicle for prostitution." (ER 133.) The same month, 46 state attorneys general described Backpage as a "hub" of "human trafficking, especially the trafficking of minors." (ER 134.) The attorneys general wrote: "Nearly naked persons in provocative positions are pictured in nearly every adult services advertisement on Backpage.com and the site requires advertisements for escorts, and other similar 'services,' to include hourly rates. It does not require forensic training to understand that these advertisements are for prostitution." (ER 134.)

In August 2015, Backpage was served with an affidavit from a Seattle Police Department detective avowing that "Backpage.com has become the primary website in Seattle/Washington State for those looking to solicit a prostitute, post prostitution ads or traffic prostitutes and minors," and "every time the Seattle Police Department's Vice/High Risk Victims Unit has responded to an ad in the adult section of Backpage.com, we have found that the ad was a posting for illegal activity." (ER 94, 143.) A Boston Police Department detective similarly avowed that "Backpage.com is the number one site in Boston for prostitution and sex trafficking" and "nearly all the cases we find

associated with [Backpage] involve pimp controlled prostitution." (ER 95-96, 143.)

Second, news organizations widely reported on the prevalence of prostitution and underage sex trafficking ads on Backpage. In early 2011, CNN broadcast "Underage sex trade still flourishing online," a report tracing the migration of such advertising from Craigslist to Backpage.[4] Responding to objections to the report from VVMH, CNN wrote:

> After receiving your letter, in which you essentially challenged CNN to find an actual current backpage.com ad anywhere in the country that could involve trafficking of an underage girl, CNN ran just such a search. The search pulled up over 12,000 postings in the escort category for that day alone…. [T]he vast majority of these ads appeared to be for illegal prostitution.

(SApp 764-65.) CNN notified Backpage that "[m]any of the ads also contained an identification number for a separate web site called The Erotic Review" "where men rate the sexual performance of the women

[4] http://www.cnn.com/2011/CRIME/01/20/siu.selling.girl.next.door.backpage/index.html#. *See also* http://thecnnfreedomproject.blogs.cnn.com/2012/05/10/a-lurid-journey-through-backpage-com/ (describing Backpage as "a hub for the sex trade").

they buy. The inclusion of Erotic Review numbers on backpage.com ads offers strong evidence that these current ads are in fact for illegal prostitution." (SApp 764-65.)[5] The documentary *I Am Jane Doe* (2017) (available on Netflix) likened the ease of using Backpage to buy children for sex to "shopping on Amazon." *See* https://www.iamjanedoefilm.com/.

Third, the National Center for Missing and Exploited Children ("NCMEC")—designated by Congress as the "official national resource center and information clearinghouse for missing and exploited children," 34 U.S.C. § 11293(b)(1)(B)—repeatedly notified Backpage of the prevalence of prostitution ads on its website. (*See, e.g.*, ER 128, 131.) For example, in March 2011, Larkin, Lacey and other Backpage representatives met with NCMEC and were advised that a large portion of the ads on Backpage were for prostitution. (ER 131.) NCMEC provided a PowerPoint detailing how The Erotic Review links were inserted into Backpage ads featuring underage sex trafficking

[5] Backpage established a reciprocal link business relationship with The Erotic Review in 2007, and paid thousands of dollars to The Erotic Review's owner, David Elms. (MJN 197-231, 148-149.)

victims. (MJN 149, 197-219.) Illustratively, one of the slides involved an ad for L.M., "Sexy Petite Asian Playmate NEXT FEW DAYS ONLY," referencing The Exotic Review (TER):

> heyy fellas!
> my name is l__ m___ nd I am here for ur enjoyment!
> beautiful, charming, nd so much fun!
> I am here for tha week so come have some fun with me!
> It's getting cold out . . . maybe I can warm yu up?
> looking good nd smelling pretty just for yu!
> 5'1"
> 108lbs
> 34b
> [phone number]
>
> *yu can also check out my reviews on TER, nd other review sites!*
> hope to hear from yu soon!
>
> serious callers only!
> no blocked calls, txts, or emails!
> by calling yu are agreeing that yu are not affiliated with any form of law enforcement!
> all donations are for time and companionship only!
>
> Wanna double tha fun?!
> Ask about my two girl!

(MJN 209 (emphasis added).) NCMEC provided a corresponding post from The Erotic Review:

> CRAZLUVIN'S REVIEW OF L___ M___
>
> appearance[:] VIP only
>
> performance[:] VIP only

> attitude[:] VIP only
>
> atmosphere[:] VIP only
>
> . . .
>
> services offered [:] I had been watching this *girl* for awhile and finally decided to give her a go. Called from my hotel, she picked up right away and was able to see me just about an hour later. She came alone to the room, but her girlfriend drove her to the room and apparently stayed in the car. She made one phone call after getting to the room, I guess to say things were cool. She did not kiss but was willing to hug. *She was super cute and tiny*. The original agreement was for less than I paid her because I decided if she was going to be a bit detached, then I wanted a little something extra. Non-VIP you should know this *girl* is something special and worth every penny—VIP read on to see just how far this *girl* will go.

(MJN 210 (emphasis added).)

In June 2013, Backpage received a letter from NCMEC recommending the adoption of several measures to prevent the trafficking of children. Backpage declined to follow any of them. (ER 140-41.)

By 2014, NCMEC publicly denounced Backpage and repudiated any suggestion it was somehow an ally in the fight against child sex trafficking. In an amicus brief, NCMEC wrote: "Backpage's stated interest in doing something meaningful to stop child sex trafficking ads

on its site is apparently overridden by the enormous revenue it generates from its escort ads, including ads selling children for sex."[6]

b. The Senate compels Backpage to produce documents

In April 2015, the U.S. Senate Permanent Subcommittee on Investigations commenced an investigation into internet sex trafficking and issued a subpoena to Backpage for documents concerning Backpage's "screening and reviewing [of] advertisements to avoid posting illegal ads, such as ads for sex trafficking." *Senate Permanent Subcommittee v. Ferrer*, 199 F. Supp. 3d 125, 129 (D.D.C. 2016). Invoking the First Amendment, Backpage objected to producing any documents. *Id.* By a vote of 96-0, the Senate in March 2016 directed the Senate Legal Counsel to file suit to enforce the subpoena. (SR 12 and nn.61-62.)

In August 2016, the district court ordered compliance, writing that "[t]he First Amendment does not protect speech that is itself criminal because it is too intertwined with illegal activity." *Ferrer*, 199

[6] http://www.missingkids.com/content/dam/pdfs/legal-briefs/amicusncmecbackpage.pdf.

F. Supp. 3d at 140. Backpage unsuccessfully sought a stay in the district court, the D.C. Circuit and the Supreme Court. *Ferrer v. Senate Permanent Subcommittee*, 137 S. Ct. 28 (2016). Backpage then produced 552,983 documents in response to the subpoena. (SR 16.)

Based on its review of Backpage's documents, the Subcommittee issued a 50-page report, BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING. According to the report, Backpage's documents revealed that nearly all of Backpage's "adult" advertisements were solicitations for illegal prostitution, Backpage was fully aware of the true nature of these ads, and Backpage had taken an array of affirmative steps to help its customers (pimps and traffickers) "sanitize" these ads and conceal their illegality—"even as Backpage represented to the public and the courts that it merely hosted content others had created." (SR 1.) Other notable findings included:

- For approximately two months after Craigslist closed its adult section in September 2010, Backpage instructed moderators to reject ads suggesting sex for money: "But that policy soon collided with the company's profit motives, and Backpage abandoned it. By late October 2010, the new default response to ads proposing illegal

transactions was simply to edit out the evidence of illegality and approve the ad." (SR 28.)

- "The terms that Backpage has automatically deleted from ads before publication include 'lolita,' 'teenage,' 'rape,' 'young,' 'amber alert,' 'little girl,' 'teen,' 'fresh,' 'innocent,' and 'school girl.' When a user submitted an adult ad containing one of these 'stripped' words, Backpage's Strip Term From Ad filter would immediately delete the discrete word and the remainder of the ad would be published." (SR 2.) The filter "changed nothing about the true nature of the advertised transaction or the real age of the person being sold for sex." (SR 2; *see also* SR 22-24.)

- The Subcommittee obtained sworn testimony from current and former Backpage moderators. (SR 31-37.) One former moderator testified that all of the employee-moderators knew that the ads they reviewed offered sex for money, and that moderators "'went through the motions of putting lipstick on a pig, because when it came down to it, it was what the business was about." (SR 36-37.) Another testified "everyone" knew that Backpage's adult advertisements were for

prostitution, and "[a]nyone who says [they] w[ere]n't, that's bullshit." (SR 37.)

- The Subcommittee found the language of Backpage's ads left little doubt regarding the illegal nature of the transactions proposed:

> For example, a March 2016 internal email reminded moderation supervisors that the following terms "are allowed" but were being wrongly removed: "PSE (porn star experience)[,] Porn Star[,] Full Pleasure[,] Full Satisfaction[,] Full Hour." In March 2016, Backpage also decided to begin allowing users to use a term—"GFE," which stands for "girlfriend experience"—it had previously identified as a code word for prostitution. Another March 2016 email clarified that the term "quickie"—which Ferrer, in a 2010 email, called a "code" for a sex act—"is ok to leave [live on the site] even with a price" accompanying it.

(SR 38-39.)

c. Arizona grand jury proceedings

In 2016, an Arizona federal grand jury commenced an investigation to determine whether Backpage and its officials knowingly published advertisements for prostitution services, knowingly published advertisements involving underage sex-trafficking victims, or otherwise intentionally facilitated their customers' crimes (*e.g.*, by editing pimps' ads to reduce the risk of detection). The grand jury issued a subpoena for the same documents Backpage produced to

the Senate. Citing the First Amendment, Backpage refused to comply. The Arizona district court ordered compliance, and this Court unanimously affirmed on June 29, 2017. (*See* MJN 89, 91, 95.)

3. Appellants' Indictment

On March 28, 2018, an Arizona federal grand jury returned an indictment charging appellants and others with knowingly facilitating prostitution through Backpage by utilizing various strategies to make it appear that the ads on Backpage were for escort services, adult companionship, or other lawful activities rather than illegal prostitution. (*E.g.*, ER 118.) The indictment charged violations of 18 U.S.C. § 371 (Conspiracy), § 1952 (Travel Act—Facilitation of Prostitution), § 1956 (Money Laundering), and § 1957 (Financial Transactions Involving Illicit Proceeds), and included criminal forfeiture allegations pursuant to 18 U.S.C. §§ 981 and 982. (ER 117-77.)

The indictment summarized a raft of incriminating internal emails and contained 17 victim summaries. (ER 124-63.) Five of these victims were juveniles when trafficked on Backpage. (ER 147-51.) Many were raped repeatedly; one was forced to perform sex acts at

gunpoint, choked to the point of having seizures, and gang-raped. (ER 148-49.) Three were murdered by Backpage customers; another was killed when, attempting to escape her trafficker, she jumped out of a vehicle on a freeway and was hit by several other vehicles travelling at high speeds. (ER 149-51.)

The indictment also described Backpage's money laundering operations, which were designed to conceal misconduct and evade law enforcement. (ER 120-21.) For example, in late 2016, Lacey asked an Arizona bank for advice on moving assets "offshore" to protect them from seizure by the government. Soon after, $16.5 million in Backpage-derived cash was wired from Lacey's accounts in the United States to a bank account in Hungary. (ER 121.)

4. Backpage and Ferrer Plead Guilty and Agree to Forfeitures

On April 5, 2018, in the District of Arizona, Backpage pleaded guilty to an information charging one count of money laundering. (MJN 326.) In the plea agreement, Backpage admitted it "derived the great majority of its revenue from fees charged in return for publishing advertisements for 'adult' and 'escort' services," and "[t]he great majority of these advertisements are, in fact, advertisements for

prostitution services." (MJN 337.) Backpage also agreed to forfeit all assets it owned or controlled that were traceable to or involved in its crime, including shutting down the Backpage.com website. (MJN 332-333.) The district court entered a Preliminary Order of Forfeiture identifying a non-exhaustive list of assets Backpage would forfeit, including all of the assets at issue in this appeal. (MJN 347.)

That same day, Backpage CEO Ferrer pleaded guilty to an information charging one count of conspiracy and agreed to the same forfeitures. (MJN 297-299.) Ferrer admitted that to "create a veneer of deniability for Backpage," he worked with co-conspirators "to create 'moderation' processes through which Backpage would remove terms and pictures that were particularly indicative of prostitution and then publish a revised version of the ad." (MJN 303.)

On April 6, 2018, the government seized the Backpage.com website and affiliated websites pursuant to Backpage's guilty plea and plea agreement. (MJN 332-333; *see* AOB 9-10 and n.4.)

The factual section of appellants' Opening Brief discusses Backpage's litigation history predating these developments. (AOB 7-9.) As discussed *infra* at section IV.B.2, Backpage's and Ferrer's

admissions, and the extensive evidence underlying their convictions, undermine the premise of the cases cited—that Backpage was merely a passive conduit of third-party content. In addition, several of the cases appellants cite involve the Communications Decency Act of 1996, which does not apply to federal criminal cases. 47 U.S.C. § 230(e)(1) ("Nothing in this section shall be construed to impair the enforcement of . . . [any] Federal criminal statute.").[7]

5. The Civil Seizure Warrants and Civil Forfeiture Actions

Between March 28 and June 4, 2018, magistrate judges in the Central District of California found probable cause to issue warrants to seize essentially the same assets covered by the forfeiture allegations in the Arizona criminal cases. (CV 53.) Execution of these warrants resulted in the seizure of the assets at issue in this appeal—funds from

[7] On July 25, 2018, the Arizona grand jury returned a superseding indictment adding additional forfeiture allegations and describing other business practices that Backpage used to facilitate prostitution. (MJN 396.) On August 13, 2018, Backpage Sales and Marketing Director Dan Hyer pleaded guilty to Count 1 of the superseding indictment and detailed many of these practices in his plea agreement. (MJN 126-127.)

approximately 89 bank accounts. (CV 53.)[8]

The probable cause determinations were based on an affidavit from U.S. Postal Inspector Lyndon Versoza that canvassed an array of evidence, including the Senate Report, law enforcement reports, and internal Backpage documents. (ER 59-177.) The affidavit also attached and incorporated the indictment. (ER 98; *see* ER 117-77.) Moreover, the affidavit explained how Backpage facilitated prostitution by assisting pimps in evading law enforcement detection, while at the same time helping pimps and individuals seeking commercial sex communicate through an ever-evolving list of coded terms. These terms included "in-call" (where the customer goes to the prostitute's location), "outcall" (where the prostitute goes to the customer's location), "GFE" (girlfriend experience), and "PSE" (porn star experience). (ER 92-93.) Examples of the prostitution ads reviewed by Inspector Versoza include:

- "Exotic Latina . . . ready to play, INCALLS, 30 min specials!!! – 19";

[8] This appeal does not involve any of the items seized during search warrants executed at the homes of appellants Lacey and Larkin. (*See* AOB 9.)

- "Young SEXY PUERTO RICAN – 19," "I do half hour sessions that vary in donation prices, 80 for head, 120 for hooking up without head and 150 for hooking up with head";
- "G F E Provider – 44," "You can find a few current reviews at T3R xxxxxx#" and "I have been EROS authenticated";
- "UpScale New In Town! Call ME now for an unforgettable visit – 20," "100% GFE with 100% no Pimps".[9]

(ER 158-63.) Inspector Versoza averred that Backpage contained thousands upon thousands of similar ads. (ER 91-98.) The Versoza affidavit, the indictment, and the referenced reports contained additional supporting facts. (*See* ER 62-177; SR *passim*.)

Between October 5-11, 2018, the government filed 27 civil forfeiture complaints seeking to forfeit the assets seized pursuant to these warrants. All 27 case numbers are listed on the stay order underlying this appeal. (ER 1.)

[9] "New in town" often indicates a trafficked child being shuttled from city to city. (*See* ER 150, 159, 162-63.)

6. Motions in the Civil Forfeiture Proceedings

a. Motion to vacate the seizures and discovery motion

On August 1, 2018 (after the seizures but before the government filed the civil forfeiture complaints), appellants filed a motion to vacate or modify the seizure warrants ("Motion to Vacate"). (ER 3-384.) Appellants argued the First Amendment prohibits pre-conviction seizures of publishing assets or proceeds, or requires heightened procedural protections. (ER 25-32, 41-48.) They also contended they were entitled to a *Franks* hearing because the warrant affidavits contained material misstatements and omissions. (ER 34.)

In opposition, the government argued the Motion to Vacate was in reality a Federal Rule of Criminal Procedure 41(g) motion to return property (which was improper as the government had already instituted criminal forfeiture proceedings against the property),[10] or a motion asserting a Sixth Amendment violation pursuant to *United States v. Monsanto*, 491 U.S. 600 (1989). The government did not

[10] Once property is included in an indictment, a defendant may seek its return in the forfeiture phase of the trial, but not in a pre-trial Rule 41(g) motion. *See United States v. Sims*, 376 F.3d 705, 708 (7th Cir. 2004).

dispute that appellants would be entitled to a *Monsanto* hearing if they made the requisite showing, but argued appellants had failed to show they lacked sufficient unrestrained assets for legal counsel. (ER 389-91.)

Before the court ruled on the Motion to Vacate, appellants filed a discovery motion seeking to use in litigating the Motion to Vacate various privileged materials the government had inadvertently produced in the criminal case. (ER 396-421.)

b. Motion to stay civil proceedings

In response to appellants' discovery motion, and after filing civil forfeiture complaints relating to the seized assets, the government moved to stay the civil proceedings pending the conclusion of appellants' criminal case pursuant to 18 U.S.C. § 981(g). (ER 432-36.) Section 981(g)(1) requires a stay upon motion of the government where the district court "determines that civil discovery will adversely affect . . . the prosecution of a related criminal case." The government argued that responding to appellants' motion to permit use of privileged or work product-protected documents would disclose the government's legal strategy in appellants' criminal case, where the discovery matter

should be addressed. (ER 396-420, 433-35.) Appellants' claims to the assets could be heard at the conclusion of the criminal case. (ER 435-36.) Appellants opposed the stay. (ER 438-444.)

The district court granted the stay and required the parties to file a status report regarding the criminal matter in six months. (ER 1-2.) The court noted that a decision on the pending motions could have preclusive effect on the criminal matter, which would prejudice the government. (ER 2, citing *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1152 (9th Cir. 2011).) The court also reasoned that the pending motions could be brought in the Arizona criminal case. (*Id.*)

7. Ancillary Proceedings in Arizona

Following Ferrer's and Backpage's guilty pleas and agreements to forfeit assets, ancillary proceedings are pending in Arizona to determine third-party interests in the forfeited property. *See United States v. Lazarenko*, 476 F.3d 642, 648 (9th Cir. 2007) (ancillary proceedings under 21 U.S.C. § 853(n) are only means for third parties to vindicate their interests in forfeited property). Appellants have filed claims in the ancillary proceedings, which the parties have jointly moved to

continue (for different reasons). (MJN 372, 308.) Most recently, appellants sought to continue those proceedings in favor of proceedings in the Central District of California. (MJN 372.) *See* 18 U.S.C. § 981(b)(3) (any motion for return of property "shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized"). The next hearings in the Arizona ancillary proceedings are set for June 2019. (MJN 387, 324.)

8. Additional Proceedings in the Central District of California

Appellants refer to funds held in attorney trust accounts allegedly needed to fund defense of the criminal charges. (AOB 1, 16-19.) No monies seized from attorney trust accounts are involved in this appeal. Separate from this appeal, as appellants concede (AOB 18, 43 n.31), on October 31, 2018, a different magistrate judge in the Central District of California found probable cause to seize additional assets involved in or traceable to Backpage's illicit conduct. C.D. Cal. Case No. 2:18-mj-02880. Appellants asked the district court in Arizona to exercise its jurisdiction to stay these California seizure warrants, but the court declined to do so. (MJN 131.) Appellants then filed similar motions

before the magistrate judge in the Central District of California, which remain pending.

During the hearing in Arizona, in response to a question from the court, the government expressed its view that any attack on the warrants or the affidavits supporting the warrants should be brought in California, while any request for relief in the form of a *Monsanto* hearing (to determine whether non-forfeitable funds were necessary for attorneys' fees) should be heard in Arizona. (MJN 139.) Appellants have never moved to release seized funds for their defense of the Arizona criminal case.

IV

ARGUMENT

A. The Government's Motion for Limited Remand Should Be Granted

On March 21, 2019, the government moved this Court for a limited remand to the district court to address appellants' sufficiency challenge to the warrants, and to make findings and determine whether a renewed stay is appropriate in light of appellants' First Amendment claims. (Dkt. 49.) Appellants opposed the remand, arguing that this appeal raises a pure question of law that should be decided by this

Court. (Dkt. 51.) The motions panel referred the motion to the merits panel. (Dkt. 53.) This panel should grant the motion.

1. The Stay is Premature Because Appellants Are Entitled to Challenge the Sufficiency of the Warrants

The government may simultaneously seek civil and criminal forfeiture of the same property, and the "forfeiture statutes permit the government to seek a stay of the civil forfeiture proceedings while the government conducts a criminal prosecution or investigation." *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1152 (9th Cir. 2011). "[I]f the government's criminal forfeiture action fails, it may then pursue civil forfeiture." *Id.* The civil forfeiture statute provides that upon the government's motion, "the court *shall* stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect . . . the prosecution of a related criminal case." 18 U.S.C. § 981(g)(1) (emphasis added). This language reflects a 2000 amendment that "broadened the stay relief significantly" and removed the requirement that the Government show good cause. *United States v. One 2008 Audi R8 Coupe Quattro*, 866 F. Supp. 2d 1180, 1183 (C.D. Cal. 2011).

Appellants contend the stay is improper because they are entitled to a pretrial hearing to challenge the sufficiency of the warrants. Appellants' sufficiency challenge is based on *Franks*—specifically, they claim the warrant affidavits omitted material information about alleged First Amendment concerns governing seizure of the bank accounts at issue. The government agrees appellants are entitled to a determination of whether they have made the substantial preliminary showing necessary to obtain a *Franks* hearing, and if so, to a *Franks* hearing itself.

"Generally, a pretrial seizure of forfeitable assets has been held not to violate the defendant's Fifth and Sixth Amendment rights," but some exceptions for specific instances of abuse may apply. *United States v. Unimex, Inc.*, 991 F.2d 546, 550-51 (9th Cir. 1993);[11] *see also United States v. One 1985 Mercedes*, 917 F.2d 415, 420 (9th Cir. 1990) ("by contrast with the constitutional requirements applicable to most traditional civil cases, in a civil forfeiture proceeding, due process does

[11] Upon a proper showing, a defendant has a due process right to an adversary hearing to demonstrate that seized funds are non-forfeitable and should be made available to hire counsel. *Unimex,* 991 F.2d at 551. Appellants have not requested such a hearing.

not require an immediate post-deprivation hearing, at least where judicial review of the forfeiture is available within a reasonable time. Civil due process in forfeiture cases requires little more than forfeiture proceedings be commenced without unreasonable delay"). Furthermore, once the government has filed a civil forfeiture complaint, courts have rejected a party's assertion of a right to a pretrial hearing challenging the constitutionality of the seizure. *See United States v. Any & all Funds on Deposit in Account No. 0139874788*, 2015 WL 247391, *13-14 (S.D.N.Y. 2015) (citing *Kaley v. United States,* 571 U.S. 320 (2014)). Litigation of the forfeiture action provides the aggrieved party with an adequate remedy at law to challenge the propriety of the seizure, including claims based on the constitutionality of the seizure itself. *Id.* This is true even when a party alleges due process violations. *In Re Return of Seized Prop. (Chandler and Bobel)*, 270 F.R.D. 576 (S.D. Cal. 2010).

However, the government agrees that the general prohibition on pretrial challenges to a judicial officer's determination of adequacy should not apply to appellants' *Franks* challenge of intentional or reckless material misrepresentations or omissions that allegedly would

have allowed the magistrates to determine that the government sought to seize assets protected by the First Amendment. Reliance on such material omissions would frustrate the judicial officer's decision-making process in the first instance.

A *Franks* hearing is only required if the allegedly omitted information was deliberately or recklessly excluded from the seizure warrant affidavit. *Franks v. Delaware*, 438 U.S. 154, 171 (1978) (negligence or innocent mistake insufficient to warrant hearing). These are quintessential factual findings that are made in the first instance by the district court, subject to clear error review on appeal. *See, e.g.*, *United States v. Martinez-Garcia*, 397 F.3d 1205, 1215 n.5 (9th Cir. 2005) (this Court reviews for clear error a district court's finding that a warrant affidavit "did not contain purposefully or recklessly false statements or omissions"). The district court made no findings regarding appellants' *Franks* challenge. Accordingly, there is nothing yet to review regarding whether the affidavit involved any intentional or reckless material misstatements or omissions.

Remand for a *Franks* determination would provide appellants the opportunity to make the "substantial preliminary showing," *Franks*,

438 U.S. at 170, necessary to obtain a *Franks* hearing. Making that determination (including the relevant factual findings) would not require discovery from the government, and is properly within the purview of the district court, not this Court. Thus, a limited remand to consider appellants' challenge to the sufficiency of the warrants, including whether they are entitled to a *Franks* hearing (and if so, to conduct a *Franks* hearing), is appropriate.

2. This Court Cannot and Should Not Rule in the First Instance on Appellants' First Amendment Claims

With respect to their First Amendment claims, appellants argue that this appeal presents purely legal issues and therefore this Court should reach the merits and order the district court to vacate the seizures. (AOB 54.) The government disagrees.

First, the only order on appeal is the district court's order staying the civil forfeiture proceedings. (ER 449-453.) Appellants contend that the district court failed to take into account appellants' alleged First Amendment interests in issuing the stay. (AOB 46-49.) The government agrees. But that does not mean that this Court should decide the motions pending before the district court in the first instance. All that appellants can achieve by prevailing on their appeal

of the stay order is a reversal of that order, which would return the case to the district court for further proceedings. That is essentially what the government now proposes (and proposed in its Motion for Limited Remand), to the extent that it does not involve civil discovery that would adversely affect the pending criminal prosecution. *See* 18 U.S.C. § 981(g).

Second, whether and to what extent appellants' First Amendment rights are implicated by the seizures is not purely a question of law. A party asserting a First Amendment claim bears the burden of demonstrating, as a threshold matter, that the First Amendment applies. *Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 577 (9th Cir. 2014) ("the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed"). Appellants contend that pretrial seizure of publishing assets and proceeds based on a probable cause showing violates the First Amendment. (*E.g.*, AOB 28-40.) But whose First Amendment rights and what "publishing assets and proceeds" are implicated here? Appellants sold their shares in Backpage to Ferrer in 2015, and Backpage is defunct—both Backpage and Ferrer agreed to shut down the Backpage website in connection

with their guilty pleas. (ER 123-124; MJN 219, 297-299, 332-336.) Backpage and Ferrer have already conceded to forfeiture. (*Id.*)

Appellants' single out-of-circuit case invalidating the pretrial seizure of funds or assets involving a business allegedly engaged in First Amendment-protected activity involved funds being used to operate an *active ongoing* publishing business. *See Am. Lib. Ass'n v. Thornburgh*, 713 F. Supp. 469, 484 n.19 (D.D.C. 1989), *vacated sub nom. Am. Lib. Ass'n v. Barr*, 956 F.2d 1178 (D.C. Cir. 1992). However, appellants have made no showing—and the district court never made any factual findings regarding—whether any of the seized funds fall into that category. Furthermore, appellants repeatedly assert, but never offered any facts tending to show (nor did the district court make any findings) that the pretrial seizures included funds linked to the alternative newspaper weeklies that one of appellants' companies spun off in 2013. (AOB 7, 11-12, 45-46.) At most, appellants offered a declaration from appellant Brunst that described certain distributions from that business. (ER 775-76, Brunst Decl. ¶¶ 7-14.)

Similarly, appellants assert that their corporate entity (via unidentified subsidiaries) holds promissory notes secured with liens on

Backpage's assets (AOB 5, 7 n.2, 36 n.24) and that some assets involve proceeds unrelated to Backpage's operations (AOB 2.) Again, the record is full of unsupported assertions, but no evidence or findings, on these issues.

The need for further factual development makes appellants' First Amendment claim unripe for review. *See United States v. Lazarenko*, 476 F.3d 642, 652 (9th Cir. 2007) (appeal of order denying motion to set immediate hearing on third-party's motion to vacate criminal seizure warrants not ripe where claim involved unresolved factual issues).[12]

3. The Remand Motion is Not A Delaying Tactic

In opposing the government's remand motion, appellants asserted that the motion was a ploy to evade or delay indefinitely judicial consideration of their claims. (Opposition at 1, 18.) This turns reality on its head. The crux of this appeal is appellants' claim that they've

[12] Ripeness also involves considering whether a party will suffer "direct and immediate hardship" if the Court withholds decision at this time. *Lazarenko*, 476 F.3d at 652. Conclusory assertions are insufficient. *Id.* at 653. A limited remand to address whether the seizure warrants and stay infringe appellants' First Amendment interests will redress their claim that the stay order "ignores the First Amendment context" of this case. (AOB 50.)

been denied an opportunity to be heard in the district court concerning the issues they now seek to advance in this appeal. (*E.g.*, AOB 2 (the "stay order—which is the subject of this appeal—is the key to the Government's effort to escape constitutional oversight").) Far from foreclosing any hearing, the government's motion seeks immediate remand to address appellants' challenge to the sufficiency of the warrants and preliminary factual questions relating to appellants' First Amendment claims.

For all the forgoing reasons, the government's motion for a limited remand should be granted.

B. If this Court Addresses the Merits in the First Instance, Appellants' First Amendment Rights Are Not Implicated

Appellants assert the civil seizures violate their First Amendment rights and should be vacated. (AOB 28-40, 54.) For several reasons, appellants' First Amendment claims lack merit.

1. Standard of Review

Because the district court did not rule on appellants' First Amendment claims, "standard of review" is somewhat of a misnomer here. In any event, this Court reviews a district court's legal determinations, including constitutional rulings, de novo. *Thompson v.*

Hebdon, 909 F.3d 1027, 1033 (9th Cir. 2018). "When the issue presented involves the First Amendment ... [h]istorical questions of fact (such as credibility determinations or ordinary weighing of conflicting evidence) are reviewed for clear error." *Id.*

This Court should only reach any constitutional issues if doing so is "unavoidable." *Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017).

2. Backpage's Recent Litigation History Undermines Appellants' Claim that Backpage Activities Were Protected By the First Amendment

It is black-letter law that the First Amendment "extends no protection" at all to speech that "concerns illegal activity or is misleading." *Erotic Service Provider,* 880 F.3d at 459-60 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-64 (1980)). Thus, speech proposing an illegal transaction is "categorically excluded from First Amendment protection." *United States v. Williams*, 553 US. 285, 297 (2008). This exclusion applies to all types of illegal transactions, including prostitution. *Pittsburgh Press*, 413 U.S. at 388 ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad…soliciting prostitutes."); *Coyote Pub.*, 598 F.3d at 604 (upholding Nevada ban on

prostitution advertising); *Erotic Service Provider*, 880 F.3d at 459-60 (rejecting First Amendment challenge to ordinance outlawing prostitution solicitations).[13]

Nevertheless, appellants cite a string of cases for the proposition that Backpage's "adult" advertisements were presumptively protected by the First Amendment and the government cannot "presume" otherwise. (*See, e.g.*, AOB 7-9.) In most of these cases, Backpage invoked Section 230 of the Communications Decency Act of 1996 (CDA), which courts construed to provide near absolute *civil* and *state criminal* law immunity for websites that publish content created by third-parties. *See, e.g.*, *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1058 (E.D. Mo. 2011) (dismissing civil case filed by a minor sex trafficking victim; "Congress has declared such websites to be immune from suits arising from such injuries."); *People v. Ferrer*, 2016

[13] *See also, e.g., United States v. Meredith*, 685 F.3d 814, 819-20 (9th Cir. 2012) (First Amendment inapplicable to defendants who coached and assisted others on defrauding the IRS); *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004) (same); *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1119 (11th Cir. 1992) (murder-for-hire ads unprotected by First Amendment).

WL 7237305 (Cal. Super. Ct. Dec. 16, 2016) (dismissing California state law pimping-related criminal charges against Lacey, Larkin and Ferrer pursuant to CDA immunity; recognizing "it is for Congress, not this Court, to revisit" the CDA's scope) (ER 296, 308-09); *People v. Ferrer*, No. 16FE024013 (Cal. Super. Ct. Aug. 23, 2017) (after Lacey, Larkin and Ferrer were indicted on new pimping and money laundering counts, the court again found itself compelled to dismiss the pimping-related charges "until Congress sees fit to amend…the broad reach of section 230 of the [CDA]") (ER 311, 328).

Appellants also heavily rely on a Seventh Circuit case finding Backpage's "adult" section protected by the First Amendment—premised largely on the notion that Backpage merely served as a passive "intermediary between the advertisers of adult services and visitors to Backpage's website." *Backpage.com LLC v. Dart*, 807 F.3d 229, 233-34 (7th Cir. 2015). (*See* AOB 8 n.3, 30, 39, 54.) Moreover, appellants cite cases that used similar CDA and First Amendment rationales to invalidate state laws that attempted to regulate the online advertising of minors for sex. *See, e.g.*, *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); (AOB 8 n.3).

These cases are of no help to appellants here. First, nearly all of these decisions involved the CDA's broad immunity provision, which does not apply to the federal criminal prosecutions of Backpage and its operators. 47 U.S.C. § 230(e)(1) ("Nothing in this section shall be construed to impair the enforcement of…[any] Federal criminal statute.").

Second, since these cases were decided, there has been a sea-change in the availability of evidence concerning Backpage's website and operations. This evidence includes hundreds of thousands of internal documents that Backpage was compelled to disclose pursuant to Senate and Arizona grand jury subpoenas in 2016 and 2017. These documents reveal that Backpage knowingly facilitated prostitution ventures pursued by its customers and business partners through:

- "moderation" practices that sanitized ads (removed the most overt references to prostitution) without changing the ads' underlying purpose and meaning;
- establishing a referral and cross-linkage relationship with *The Erotic Review*, a known prostitution website where "Johns" posted

reviews of adults and children they had purchased for sex on Backpage;

- implementing "aggregation," a practice where Backpage employees copied ads from other prostitution websites (including *The Erotic Review*), posted the ads on Backpage for free, and then contacted pimps or prostitutes in an attempt to convert them to paying Backpage clients;
- establishing financial relationships with (and paying commissions to) affiliates or "super-pimps" (including an individual known as "Dollar Bill") who purchased large numbers of prostitution ads on Backpage; and
- to conceal Backpage's receipt of proceeds from prostitution, engaging in a variety of concealment money laundering activities.

(*See generally* ER 59-177; *see also* MJN 142, 237, 439-457.) Backpage's documents reveal that the company misrepresented itself in the above-referenced cases as merely a passive "conduit" for content created by third-parties, *cf. Dart*, 807 F.3d 229, 233-34, and exposed its supposed efforts to police unlawful content on its site as a fiction, *cf. McKenna*,

881 F. Supp. 2d at 1266-67. (*See, e.g.*, SR 1-2, 9-10 and n. 49, 22-24, 36-39.)

Third, all of the cases cited in appellants' brief were decided before Backpage and its CEO pleaded guilty in 2018 and admitted the "great majority" of Backpage's revenue-generating ads were "advertisements for prostitution services." (MJN 302-303. 337.)[14]

---

[14] Appellants cannot rely on case law limiting the admissibility of plea agreements at trial or sentencing to preclude considering the pleas here. (*Cf.* AOB 35 n.22.) This is particularly true where, as here, the plea agreements contain inculpatory admissions by Backpage and Ferrer regarding the characteristics of Backpage.com, and those admissions were corroborated by evidence obtained by the Senate and the Arizona grand jury. *Cf. United States v. Vera*, 893 F.3d 689, 692-95 (9th Cir. 2018) (plea agreements generally deemed reliable when they inculpate the pleading defendant or are corroborated by other sources).

In establishing probable cause, "the government may not rely on evidence acquired after the forfeiture complaint was filed." *United States v. $405,089 U.S. Currency*, 122 F.3d 1285, 1289 (9th Cir. 1997) (citation and quotation omitted); *see also* AOB 35 n.23. However, the government obtained the April 5, 2018 guilty pleas and plea agreements months before it filed the civil complaints on October 5, 9, 10 and 11, 2018. (*See* AOB 15; ER 433.) Even if viewed from the time of the government's applications for the civil seizure warrants, appellants concede that the seizures were effected through warrants obtained on March 28, April 4, 9 and 26, June 4 and July 27, 2018. (AOB 11.) As to warrants obtained on or after April 9, 2018, the government may properly rely on the April 5, 2018 guilty pleas and plea agreements. For

Following these developments, the Northern District of Illinois dismissed *Dart* as moot and imposed $250,000 in sanctions on Backpage for perpetuating a fraud on the district court and the Seventh Circuit. (MJN 388, 390.) The district court held Backpage and Ferrer's admissions provide "incontrovertible" proof that Backpage misled the Seventh Circuit about whether "speech on the site was protected, whether Backpage.com policed, rather than promoted, unlawful solicitations, and otherwise merely published, rather than authored, content on its site." (MJN 390-391); *see id.* at 394 ("Backpage knowingly and repeatedly made false representations of fact concerning relevant aspects of its operations.").[15]

The Seventh Circuit now recognizes that Backpage's website "contained an adult section advertising different categories of sex work." *United States v. Jackson*, 865 F.3d 946, 949 (7th Cir. 2017), *cert.*

---

warrants predating April 5, 2018, the government had ample probable cause even without the guilty pleas and plea agreements.

[15] *See also R.O. and K.M. v. Medalist Holdings, Inc., et al*, Wash. Super. Ct., Pierce County, No. 17-2-04897-1, June 28, 2018 Order at 7-12 (filed in MJN 102) (imposing $200,000 sanction on Lacey, Larkin and others for perpetuating a fraud on the court).

granted, judgment vacated on other grounds, 138 S. Ct. 1983 (2018). Other courts have reached similar conclusions. *See, e.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 17, 29 (1st Cir. 2016) (finding appellants—minor girls who had been raped more than 1,900 times as a result of being trafficked via Backpage—"made a persuasive case" that "Backpage has tailored its website to make sex trafficking easier," but dismissing civil claims under CDA); *J.S. v. Village Voice Media Holdings, Inc.*, 359 P.3d 714, 715-16 (Wash. 2015) (denying motion to dismiss civil claims due to Backpage's involvement in victims' ads).

In sum, Backpage's recent litigation history does not support appellants' assertion that Backpage's "adult" section consisted of lawful classified advertising. It shows the opposite.

3. This Is Not a Prior Restraint Appeal

a. Appellants challenge the seizure of funds, not expressive materials

Appellants also cite several classic prior restraint cases involving, *inter alia*, orders requiring the removal of books and films from public circulation, *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 56 (1989), and injunctions preventing public demonstrations, *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977). (*See, e.g.*, AOB 25-

28, 33-34, 51.) A prior restraint freezes speech and requires a would-be speaker to obtain government approval before speaking. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). It is the "core abuse against which [the First Amendment] was directed." *Thomas v. Chicago Park District*, 534 U.S. 316, 320 (2002); *accord Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).

As appellants' Opening Brief and Opposition to the Government's Motion for Limited Remand ("Opposition," Dkt. 51) make clear, however, this is not a prior restraint appeal—rather, it's an appeal about the government's pretrial seizure of *funds*. (*See, e.g.*, AOB 11 ("All told, the Government obtained at least 24 civil seizure warrants . . . through which it seized many millions of dollars from Appellants"); Opposition 7 (appellants' First Amendment claim is based on the pretrial seizure of "*their* assets—all proceeds from publishing activities").) Appellants specifically assert that the government's pretrial seizure of funds from the 89 bank accounts identified in the challenged warrants violated their First Amendment rights. (Opposition 7, 9.)

Moreover, appellants concede the government seized the Backpage.com website pursuant to Backpage's prosecution in Arizona. (AOB 9-10 and n.4.) Backpage pleaded guilty and the district court accepted its guilty plea. (MJN 326, 342, 346.) Backpage's guilty plea took the place of a criminal trial. *Florida v. Nixon,* 543 U.S. 175, 187 (2004) ("[T]he plea is…itself a conviction."). In connection with its guilty plea, Backpage agreed to cease operations and forfeit its websites and domain names. (*See* MJN 332-333.) Backpage's forfeiture is not a prior restraint. *See Alexander v. United States*, 509 U.S. 544, 551-52 (1993) (the post-conviction forfeiture of expressive material is not a prior restraint).

b. Appellants lack standing to challenge Backpage's forfeiture

In all events, appellants lack standing to challenge Backpage's forfeiture of Backpage's assets. To establish Article III standing, appellants must demonstrate: (1) they have each suffered an injury in fact; (2) the injury is traceable to the government's conduct; and (3) the injury can be redressed by a favorable decision in this case. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Appellants cannot satisfy the first requirement. They assert "disposition of the website and related asserts remains a live issue because Appellants' corporate entities hold a lien on all of the assets of Backpage.com and its affiliates." (AOB 36 n.24; *see also* AOB 5, 7 and n.2.) Yet appellants provide no factual citations to support these assertions. Moreover, none of the corporate entities that hold any asserted lien rights is a party to this appeal. Appellants lack standing to assert claims belonging to these companies. "Generally, a shareholder does not have standing to redress an injury to the corporation." *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593, 595 (9th Cir. 1983); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1036–37 (9th Cir. 2010) (same regarding LLCs). Appellants cannot seek relief based on the rights of these non-parties. *See Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) ("a litigant must assert his own legal rights and interests"). Perhaps for this very reason, appellants concede the seizures of assets from Backpage.com, LLC and Carl Ferrer are "not germane to the core issues" on appeal. (Opposition 14-15.)

Appellants also cannot satisfy the third standing prong: redressability. They concede the Backpage.com website was seized

pursuant to Backpage's Arizona prosecution. (AOB 9-10 and n.4.) No ruling on the status of the California civil seizure warrants can or would affect the validity of Backpage's guilty plea and plea agreement in Arizona. For this independent reason, appellants' assertions about *Backpage's* assets (including its websites and domain names) fail on both standing and mootness grounds. *See In re Natl. Mass Media Telecommunication Sys., Inc.*, 152 F.3d 1178, 1180 (9th Cir. 1998) (standing and mootness both focus "on the inability of the court to grant effective relief").[16]

[16] *City of Erie v. Pap's A.M.* is not to the contrary. 529 U.S. 277, 288 (2000). (*See* AOB 36 n.24.) The Supreme Court found that case wasn't moot because Pap's A.M. might someday want to reopen its nude dancing establishment. *Id.* The record is devoid of similar facts here. Backpage pleaded guilty to a felony and has ceased operations; its CEO and 100% owner also pleaded guilty. Backpage faces an array of civil suits by victims who were trafficked via the website, and Delaware Attorney General Matthew P. Denn recently filed proceedings to dissolve its corporate status. (*See Denn v. Backpage.com, LLC, et al.*, Del. Chancery Ct. No. 2018-0838, Verified Complaint, filed Nov. 19, 2018.) Unlike Pap's A.M., there is no indication that Backpage might (or even could) resume its prior operations.

4. Seizure of Funds is Not Subject to "Special Rules"

Appellants assert the government's pretrial seizures of funds "penalized speech" and therefore triggered the use of "special rules" under the First Amendment. (AOB 28, 37.) Appellants are incorrect.

First, appellants' reliance on cases involving the pretrial seizure of allegedly obscene books and films is misplaced. Contrary to appellants' assertions, the government's seizures of *funds* did not contravene *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), *Adult Video Ass'n v. Barr*, 960 F.2d 781 (9th Cir. 1992) (readopted in *Adult Video Ass'n v. Reno*, 41 F.3d 503 (9th Cir. 1994)), or similar cases holding that a prior judicial determination of obscenity is necessary before allegedly obscene items can be removed from circulation. (AOB 33-40.) *See Miller v. California*, 413 U.S. 15, 24 (1973) ("obscenity" inquiry requires assessing whether the work (a) under "contemporary community standards…appeals to the prurient interest"; (b) depicts sexual conduct "in a patently offensive way"; and (c) "lacks serious literary, artistic, political, or scientific value").

In *Fort Wayne Books*, the Supreme Court held that the pretrial seizure of allegedly obscene books and films, based merely on probable

cause and "without a prior adversarial hearing on their obscenity," constituted a prior restraint. 489 U.S. at 63. Because the seizure "interrupt[ed] the flow of expressive materials" by halting their sale or dissemination, it triggered unique "special rules applicable to removing First Amendment materials from circulation." 489 U.S. at 65-66. Appellants concede, as they must, that the Court "limited its specific holding to" pretrial bans on allegedly obscene "expressive materials." (AOB 37.) The Court expressly did "not hold" that "the pretrial seizure of petitioner's nonexpressive property was invalid" or subject to "special rules." 489 U.S. at 67 n.12.

Three years later, in *Barr*, this Court applied *Fort Wayne Books* to invalidate a portion of the federal RICO statute (18 U.S.C. § 1963(d)) that permitted pretrial seizures of allegedly obscene films or videotapes without a hearing. *Barr*, 960 F.2d at 788. However, this Court "uph[e]ld § 1963(d)'s provision for the pre-trial preservation of assets." *Id*. at 792. *See also id*. at 792 ("In sum, we hold that RICO's provisions permitting the pre-trial preservation of assets for forfeiture are not facially unconstitutional in obscenity cases. Only that part of section 1963(d) that authorizes pre-trial seizures of obscene materials on the

basis of probable cause is unconstitutional."). The Court noted the unique place of obscenity prosecutions and the need to take a "more delicate approach to forfeiture" in such cases in order to protect the public's right to receive protected expressive material. *Id.* at 792. Nothing in *Barr*, however, prohibits the seizure of *funds* based on probable cause.[17]

Second, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Bd.*, 502 U.S. 105 (1991), decided before *Barr*, does not require a different outcome. (*Cf.* AOB 38.) *Simon & Schuster* invalidated as facially overbroad New York's "Son of Sam" statute, which required that a "criminal" place into an escrow account any income from works that he authored "on *any* subject, provided that they contained the author's thoughts or recollections about his crime, however tangentially or incidentally." 502 U.S. at 121. The Court had no trouble affirming that

[17] Appellants' single out-of-circuit case to the contrary involved the seizure of assets and funds being used to operate an active ongoing publishing business. *Am. Lib. Ass'n*, 713 F. Supp. at 484 n.19; (AOB 37). Here, Backpage is defunct; it ceased operations when it pleaded guilty. (MJN 337-338.) Appellants have not identified any ongoing publishing business that may be jeopardized by the monetary seizures at issue.

"the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them." *Id.* However, as the Court observed, a person never accused or charged, "but who admits in a book or other work to having committed a crime, is within the statute's coverage." *Id.* Had the statute been in effect at an earlier time, it would have applied to *The Autobiography of Malcom X* and Thoreau's *Civil Disobedience*. *Id.* at 122. The Court invalidated the statute as "significantly overinclusive" and confined its holding to that statute. *Id.* at 121-23.

Simon & Schuster has no application here. In contrast to the New York statute, which required escrowing funds based on even the most remote reminiscences of unlawful behavior (including youthful pranks that never resulted in criminal charges), *id.* at 123, the pretrial seizures here were based on a 61-page indictment charging multiple federal felonies, and probable cause affidavits reviewed and approved by neutral magistrates. Moreover, the seizures involve monies derived from or traceable to Backpage, an enterprise that has admitted criminal liability, forfeited its assets and ceased operations.

More importantly, *Simon & Schuster* involved content-based regulation of storytelling about an author's criminal past—what *amici* characterize as "inarguably…constitutionally protected expressive activity." (Amicus at 7 n.2.) Such regulation is typically subject to "strict scrutiny." *Vivid Ent.,* 774 F.3d at 578. In contrast, speech proposing an illegal transaction is "categorically excluded from First Amendment protection." *United States v. Williams*, 553 US. 285, 297 (2008). This exclusion applies to prostitution advertising. *Pittsburgh Press*, 413 U.S. at 388; *Coyote Pub.*, 598 F.3d at 604 (upholding Nevada ban on prostitution advertising); *Erotic Service Provider*, 880 F.3d at 459-60 (approving ordinance outlawing prostitution solicitations). Because the seizures concern funds derived from or traceable to prostitution advertising—speech devoid of First Amendment protection—*Simon & Schuster* and similar state cases are inapposite. (AOB 39 n.27.)[18]

[18] The single sentence of *Citizens United v. FEC*, 558 U.S. 310, 336-337 (2010), cited by appellants (AOB 37-38 and n.25), merely refers back to *Simon & Schuster*.

Appellants remaining cases are likewise unavailing. For example, *United States v. Natl. Treas. Employees Union*, 513 U.S. 454, 468-69 (1995), invalidated a law that prohibited federal employees from accepting compensation for speeches or articles; *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 812 (2000), involved a law requiring cable operators to scramble sexually explicit channels; *Minneapolis Star & Trib. Co. v. Minnesota Comm're of Revenue*, 460 U.S. 575, 582 (1983), invalidated a special use tax on the press. These cases have nothing to do with speech integral to criminal conduct, let alone the pretrial seizure of funds derived from prostitution advertising. Other cases cited by appellants and *amici*, including *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), involve prior restraints or do not address restrictions on speech proposing illegal transactions—and shed no light on the warrants at issue.

In their Rule 28(j) letter, appellants cite *Timbs v. Indiana*, 139 S. Ct. 682 (2019), for the proposition that excessive fines can be used to retaliate against or chill the speech of political opponents. The government does not dispute that general proposition, but it does not apply here for the reasons discussed above. Moreover, any review of

whether the forfeitures here are "grossly disproportionate" to appellants' offenses, *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), is an inherently fact-bound exercise.

5. The Affidavit Is Based on Far More than Generalized Knowledge

Appellants assert the government's seizures were based merely on "allegations of generalized knowledge" and "the Government must prove scienter as to each ad that it claims relates to unlawful conduct." (AOB 31-33; *see also* AOB 44-45.) These assertions are flatly wrong.

First, the government's theory has never been one of "generalized knowledge." Rather, the government's prosecution is based on the fact that Backpage—after learning its customers' ads were illegal—kept knowingly running those ads, took affirmative steps to "sanitize" the ads and knowingly engaged in other business practices calculated to facilitate its customers' prostitution crimes.

During the grand jury proceedings, Senior District Judge David Campbell recognized that 18 U.S.C. § 1952 "criminalize[s] the knowing publication of an advertisement for illegal prostitution or other illegal activity." (MJN 80.) Even Backpage's counsel conceded that "if there is actual knowledge," "that's a prosecutable crime." (MJN 52.) Indeed, 18

U.S.C. § 1952(a)(3) makes it a crime to "[1] use[]…any facility in interstate or foreign commerce, [2] with intent to…facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and [3] thereafter perform[] or attempt[] to perform an act [of facilitation]." Section 1952(b)(i) defines "unlawful activity" to include "any business enterprise involving…prostitution offenses in violation of the laws of the State in which they are committed or of the United States."

The Versoza affidavit and the indictment discuss ample evidence showing that after learning its customers' ads were illegal, Backpage kept knowingly running those ads and/or took affirmative steps to "sanitize" the ads and attract similar ads, and thus facilitate its customers' crimes. (*See, e.g.*, ER 124-51, 157-63.) The Arizona court properly determined—and Backpage conceded—this is a valid theory of prosecution. *See also Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 108-09 (D.D.C. 2016) (if "Backpage…knowingly host[ed] advertisements for sex trafficking…it could not argue that such speech is arguably affected with a constitutional interest").

That analysis was correct. Long ago, the Supreme Court recognized that the First Amendment does not protect speech "integral to" criminal conduct. *See, e.g., United States v. Stevens*, 559 U.S. 460, 468-69 (2010) ("[f]rom 1791 to the present…the First Amendment has permitted restrictions upon the content of speech in a few limited areas" including "speech integral to criminal conduct"). As discussed above, speech proposing an illegal transaction is "categorically excluded from First Amendment protection." *Williams*, 553 US. at 297. This exclusion applies to prostitution advertising. *Pittsburgh Press*, 413 U.S. at 388.

Moreover, a website operator may be prosecuted for knowingly publishing offers to sell illegal goods or services. For example, the founder of the "Silk Road" website was prosecuted for "knowingly and intentionally construct[ing] and operat[ing] an expansive black market for selling and purchasing narcotics and malicious software," separating his conduct "from the mass of others whose websites may—without their planning or expectation—be used for unlawful purposes." *United States v. Ulbricht*, 31 F. Supp. 3d 540, 556 (S.D.N.Y. 2014). *See also United States v. Omuro*, N.D. Cal. No. 14-CR-336, Doc. 70 at 1-3

(founder of www.myRedBook.com, which hosted thousands of ads posted by prostitutes, convicted of violating 18 U.S.C. § 1952—the same statute that forms the basis of the Backpage prosecutions); *United States v. Hurant*, E.D.N.Y No. 16-CR-45, Doc. 117 at 6, Doc. 107 at 39 (www.Rentboy.com founder pleaded guilty to § 1952 charge and admitted he "was well aware…that the escort ads he posted…were thinly-veiled proposals of sexual services in exchange for money").

Here, Backpage and its executives weren't indicted or charged simply because Backpage's customers occasionally, and unexpectedly, happen to post illegal ads in violation of Backpage's terms of service. The law enforcement community, NCMEC, news organizations, the Senate and the Arizona grand jury all concluded the overwhelming majority of Backpage's "adult" ads were for prostitution; Backpage's employees testified before the Senate "that everyone at the company knew the adult-section ads were for prostitution and that their job was to 'put[] lipstick on a pig' by sanitizing them" (SR 36-37); Backpage's documents showed its executives and employees knew these ads were being edited to remove too-obvious words or images indicative of prostitution, and the revised ads were then posted; and Backpage and

its CEO both pleaded guilty and admitted the "great majority" of Backpage's "adult" ads were for prostitution. (MJN 302-303, 337.)

Even putting aside the guilty pleas, the government had more than sufficient evidence to show Backpage knowingly published ads that offered sexual activity for hire, edited pimps' and prostitutes' ads to facilitate such activity, and published links to reviews of prostitutes being advertised on Backpage. If this wasn't sufficient probable cause, it's difficult to imagine what would be.

Appellants' reliance on obscenity cases to support the notion the First Amendment requires the government to "prove scienter as to each ad that it claims relates to unlawful conduct" is misplaced. (*Cf.* AOB 31-32.) In *Smith v. California*, the Supreme Court held an ordinance imposing criminal sanctions on selling obscene books must require the seller to have some knowledge of the books' contents. 361 U.S. 147, 153 (1959). In *Mishkin v. State of New York*, the Court noted the constitution requires proof of scienter to "avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." 383 U.S. 502, 511 (1966). The Court declined to set a firm rule on what scienter was

required under *Smith*, and found more than sufficient the scienter required by the New York Court of Appeals in interpreting the state law at issue: namely, that defendants were "in some manner aware of the character of the material they attempt to distribute" such that the punished behavior was a "*calculated purveyance* of filth" and not innocent behavior. *Id.* at 510-11. The knowledge established by the Versoza affidavit and the indictment falls comfortably within the scienter definition approved by the Supreme Court in *Mishkin*.

Defendants' other authorities are unavailing. (*Cf.* AOB 31-32 and n.18.) In *United States v. X-Citement Video, Inc.*, the Court rejected a reading of a child obscenity statute that would have required only that a defendant knowingly sent the prohibited materials, regardless of whether he knew the age of persons shown. 513 U.S. 64, 78 (1994). The Court held that a defendant must know that those depicted were minors because that "was the crucial element separating legal innocence from wrongful conduct." *Id.* at 73. This commonsense holding does *not* mean that the operator of a website designed to facilitate unlawful transactions must know that each and every item posted on the website concerns illegal activity. If the website's revenue

is based almost entirely on speech integral to illegal conduct, and the website is knowingly operated to promote such conduct, the constitution does not impose the near-impossible burden of proving that every ad sold on the website proposed an illegal transaction. Under that interpretation, posting even one licit ad—among millions of illicit ones—would immunize the website from prosecution.

That is not, and cannot be, the law. Rather, just as "[b]ookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises," *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986), so too may the government seek to prosecute a website whose revenue-generating business model consisted of operating an online marketplace for prostitution—even if the website also gave away free ads for legal goods and services. *Ferrer*, 199 F. Supp. 3d at 140; *see also Ulbricht*, 31 F. Supp. 3d at 556 (unlike other online businesses, defendant "knowingly and intentionally constructed and operated an expansive black market for selling and purchasing narcotics and malicious software"); *Jackson*, 865 F.3d at 949 (Backpage "advertis[ed]…sex work"); *Jane Doe*, 817 F.3d at 28 ("Backpage has

tailored its website to make sex trafficking easier"); ER 133 (Backpage is "a direct vehicle for prostitution").

Appellants' remaining cases are inapposite. *Elonis v. United States* stands for the general proposition that criminal offenses generally require mens rea. 135 S. Ct. 2001, 2009 (2015). Here, the crucial element separating innocence from guilt was Backpage's knowledge that the overwhelming majority of its paying customers were offering the sale of adults and children for sex, and its affirmative steps to facilitate such prostitution solicitations. Backpage and its principals were put on notice—over and over again—that nearly all of the ads appearing in its "adult" section were for prostitution; Backpage took pains to "sanitize" the contents of those ads to remove the most overt prostitution terms and images (both to deceive law enforcement and facilitate its customers' ventures), and then posted the ads without changing their essential purpose—offering sex with adults or children for money; and Backpage entered into business relationships with The Erotic Review and others to facilitate prostitution. (ER 83-98, 118-63; SApp. 764; *see also* MJN 398-401, 404-457.) *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992), did not involve an

enterprise—like Backpage—engaged in the calculated purveyance of illegal offers to sell adults and children for sex. The plaintiffs in *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185 (D.D.C. 2018), which involved a separate statute and was dismissed on standing grounds, did not create a massive online marketplace for prostitution.

C. Appellants Have Failed to Make the Substantial Preliminary Showing Necessary to Obtain a *Franks* Hearing

The district court did not rule on appellants' request for a *Franks* hearing; instead, it issued the stay order. If this Court addresses the issue, the present record establishes that appellants failed to make the substantial preliminary showing required to trigger a *Franks* hearing—and the district court may be affirmed for that reason.

1. Standard of Review

This Court reviews the denial of a *Franks* hearing *de novo*, and reviews supporting factual determinations for clear error. *United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002).

The Court may affirm for any reason supported by the record. *United States v. Mayweather*, 634 F.3d 498, 504 (9th Cir. 2010).

2. Legal Standard for Obtaining a Franks Hearing

A party has a heavy burden when seeking a hearing to challenge the validity of a seizure warrant. Generally, "[t]here is…a presumption of validity with respect to the affidavit supporting [a] search warrant." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). Under limited circumstances, a defendant may challenge the truthfulness of factual statements made in the affidavit. *Id.* at 164-72. To obtain a hearing on such a challenge, the defendant must "make[ ] a substantial preliminary showing that [1] a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and [2] the allegedly false statement is necessary to the finding of probable cause." *Id.* at 155-56.

Conclusory assertions are insufficient; the defendant must make specific allegations of deliberate falsehood or reckless disregard for the truth, accompanied by an offer of proof. *Franks*, 438 U.S. at 171.

Whether a misstatement is material depends on whether the affidavit, "once corrected and supplemented, would provide a [reviewing judge] with a substantial basis for concluding that probable cause existed." *United States v. Meling*, 47 F.3d 1546, 1554 (9th Cir. 1995).

Appellants have failed to make the required "substantial showing" necessary trigger a *Franks* hearing.

3. Appellants Made No Showing of Intentional or Reckless Omissions

To obtain a *Franks* hearing, the movant must show that the affiant intentionally or recklessly omitted material information from the affidavit. *United States v. Collins*, 61 F.3d 1379, 1384 (9th Cir. 1995) (mere fact that agent failed to include certain information in warrant application "does not establish that the omission was the result of anything other than negligence or innocent mistake"); *United States v. Tham*, 960 F.2d 1391, 1396 (9th Cir. 1991) (defendant not entitled to *Franks* hearing where he offered no proof omission was intentional or reckless, rather than negligent). Here, appellants have not even attempted to demonstrate that any alleged omissions were deliberate or reckless. Their request for a *Franks* hearing fails for that reason alone.

4. Appellants Have Not Shown Material Misstatements

Appellants complain the Versoza affidavit improperly failed to: (1) discuss decisions in which Backpage defeated civil claims or successfully challenged state legislative or law enforcement actions; (2) show anything other than the "mere presence of third-party ads related

to unlawful conduct"; and (3) discuss Backpage's purportedly extensive cooperation with law enforcement. (AOB 13.) Appellants assert various other complaints. (AOB 12-13.)

a. Failure to cite cases/insufficient showing of illegal content

Appellants assert the government didn't sufficiently demonstrate Backpage's "adult" ads were for prostitution, asserting that "a Government investigator['s] belie[f] that they 'look like' ads for illegal prostitution" is not enough, particularly where "every court to address this question has held the Government cannot presume adult-oriented ads are unprotected." (AOB 29-30.)

First, appellants ignore the flood of evidence Backpage was compelled to release to the Senate and the Arizona grand jury. *Dart, McKenna*, *M.A.* and similar cases (AOB 30 n.17) were decided before Backpage was ordered to disclose that evidence in 2016 and 2017; before the Senate issued its 50-page Report in 2017 detailing Backpage's knowing facilitation of prostitution; and before Backpage and its CEO admitted in 2018 that Backpage "derived the great majority of its revenue from fees charged in return for publishing advertisements for 'adult' and 'escort' services," and "the great majority

of these advertisements are, in fact, advertisements for prostitution services." (MJN 302-303, 337.) These developments undermined the basic assumptions on which Backpage's cases were based; *Dart* was even dismissed—and Backpage sanctioned—based on Backpage and Ferrer's guilty pleas. Moreover, most of these cases involved the CDA—which is inapplicable to appellants' federal prosecution. *See* Section IV.B.2, *supra*.

Second, appellants disregard other decisions recognizing that Backpage's website "contained an adult section advertising different categories of sex work," *Jackson*, 865 F.3d at 949, "Backpage has tailored its website to make sex trafficking easier," *Jane Doe No. 1*, 817 F.3d at 28, and Backpage engaged in content creation, *J.S.*, 359 P.3d at 715-16. In view of Backpage's overall litigation history, there was no requirement that the Versoza affidavit discuss the (predominately CDA-based) cases Backpage cites.

Third, appellants' attempt to discount the Versoza's affidavit as presenting one investigator's "belief" is belied by the record. The affidavit built on years of scrutiny of Backpage from state and local law enforcement agencies, the U.S. Senate, and the Arizona federal grand

jury. (ER 59-177.) It explained how Backpage facilitated prostitution by deploying an ever-evolving language of coded terms familiar to the organizations, pimps and prostitution customers who utilized Backpage to match sellers of adults and children for sex with willing buyers. (ER 92-93.) Internal Backpage documents summarized in the Senate Report and the indictment illustrated this process. (*See, e.g.*, SR 38-39; ER 86-98, 124-51, 157-63.) Inspector Versoza found thousands of Backpage "adult" ads that used these coded terms, and other ads that featured sexually provocative images (including women "in sexual positions wearing lingerie" or bending over revealing "naked buttocks") not normally associated with legitimate "escort" and "massage" ventures. (*See* ER 92-93.) The Versoza affidavit and the indictment were more than sufficient to demonstrate that Backpage's "adult" section was rife with prostitution advertising.

b. Remaining criticisms of the affidavit

Backpage's alleged law enforcement cooperation is a red herring. (*See* AOB 13.) In the ordinary course, Backpage complied with subpoenas, court orders and other requests for information about particular cases. Yet Backpage consistently stonewalled requests for

documents that would shed light on its operations, ultimately necessitating Senate and grand jury litigation to compel production of Backpage's internal documents. *See* Section III.B.2(b), (c), *supra*. Had this "missing information"—which revealed Backpage's extensive efforts to assist pimps and prostitutes in evading law enforcement—been added to the warrant affidavit, the magistrate judge's probable cause determination would not have been any different.

Appellants also erroneously assert the affidavit selectively quoted two emails out-of-context. (AOB 41-42 and n.29.) First, they reference an October 16, 2010 email from defendant Padilla directing moderators to "intensify our efforts in cleaning Escorts" and other "adult" categories. (ER 290.) Padilla asked moderators to delete "if an ad makes a clear reference to sex for money or an image displays a sex act"; however, he wrote "I'd still like to avoid Deleting ads when possible," "we're still allowing phrases with nuance," and "in the case of lesser violations, editing should be sufficient." (ER 290.) The affidavit's discussion of the email as targeting only the most overt references to prostitution was not misleading or inaccurate. Moreover, the Senate Report (which the affidavit also cites) is replete with additional

incriminating Padilla emails. (*See, e.g.*, SR 28 (describing October 25, 2010 email to a moderation supervisor in which Padilla wrote: "[Your team] should stop Failing ads…. Your crew has permission to edit out text violations and images and then approve the ad."); SR 28-31.) In all events, by late October 2010, Backpage's default response to ads proposing illegal transactions was simply to edit out the evidence of illegality and approve the ad. (SR 28.)

Appellants also assert an April 3, 2008 email from Ferrer "said nothing about prostitution ads, but discussed whether ads containing certain terms (none of which reference prostitution or sex for money) should be deleted from an ad or whether an entire ad should be deleted." (AOB 42 n.29.) The email, however, is highly incriminating. Ferrer writes he is "under pressure to clean up Phoenix's adult content," and asks about blocking several terms indicative of prostitution, including "Oral, Back-door, FS [Full Service], Blow." (ER 284-85.)

D. This Court Should Not Address In the First Instance Appellants' Claim that the Seizures Included Funds Not Derived from Backpage

Appellants argue that the seizures improperly included monies not derived from Backpage. (AOB 45-46.) The district court did not

rule on this claim; therefore, there is nothing to review and this Court should not address the claim in the first instance.

The seizure warrants rest on 18 U.S.C. § 982(a)(1), pursuant to which property "involved in" an offense "in violation" of 18 U.S.C. § 1956 is subject to forfeiture. Under the facilitation theory, numerous courts have held that property is "involved in" money laundering if it is used to facilitate the laundering, such as where mixing untainted money with illegal proceeds facilitates money laundering by making the illegal proceeds look innocent or more difficult to trace. *United States v. Real Prop. Located at 1407 N. Collins St., Arlington, Texas*, 901 F.3d 268, 274-75 (5th Cir. 2018) ("Facilitation occurs when the property makes the prohibited conduct less difficult or more or less free from obstruction or hindrance.") (quotation and citation omitted); *United States v. Huber*, 404 F.3d 1047, 1061 (8th Cir. 2005) ("facilitation under section 982(a)(1)'s 'involved in' clause is geared at the forfeitability of instrumentalities, including funds in some cases, that facilitate (or promote) the money-laundering transactions"); *United States v. Puche*, 350 F.3d 1137, 1154 (11th Cir. 2003) (upholding forfeiture of commingled legitimate proceeds that facilitated the illegal proceeds "by

acting as a 'cover' and hence reduc[ing] suspicion of the latter's source"); *United States v. McGauley*, 279 F.3d 62, 76-77 (1st Cir. 2002) (laundering of $55,296.28 in proceeds of unlawful activities permitted forfeiture of $243,087.42 contained in the defendant's bank accounts at the time of the proscribed transactions under facilitation theory); *United States v. Baker*, 227 F.3d 955, 970 n.4 (7th Cir. 2000) ("even legitimate funds that are commingled with illegitimate funds can be forfeited if the legitimate funds were somehow involved in the offense, such as by helping to conceal the illegal funds"); *United States v. Bornfield*, 145 F.3d 1123, 1138 (10th Cir. 1998) (under facilitation theory that the non-tainted funds assisted the money laundering scheme by hiding the tainted money, "all of the money contained in the account at the time of the offense is forfeitable pursuant to § 982(a)(1)").

Appellants' Motion to Vacate contained no factual support for appellants' claims. If, consistent with the Sixth Amendment, untainted funds are needed to obtain counsel of choice for defense of the criminal case, *see Luis v. United States*, 136 S. Ct. 1083 (2016), appellants are free to bring such a motion at any time notwithstanding any stay of the civil forfeiture proceedings—to date, they have never done so. This

Court need not and should not now consider these arguments in the first instance.

V

CONCLUSION

For the reasons set forth above, this Court should vacate the stay and issue a limited remand to the district court to address appellants' sufficiency challenge to the seizure warrants and make findings relevant to their First Amendment claims.

DATED: May 1, 2019

Respectfully submitted,

NICOLA T. HANNA
United States Attorney

LAWRENCE S. MIDDLETON
Assistant United States Attorney
Chief, Criminal Division

L. ASHLEY AULL
Assistant United States Attorney
Chief, Criminal Appeals Section

/s/ John J. Kucera

JOHN J. KUCERA
Assistant United States Attorney
Asset Forfeiture Section

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

STATEMENT OF RELATED CASES

The government states, pursuant to Ninth Circuit Rule 28-2.6, that it is unaware of any cases related to this appeal.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 18-56455

I am the attorney or self-represented party.

This brief contains 14,815 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ◉ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ◉ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ John J. Kucera **Date** May 1, 2019

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov