No. 20-73408

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re Michael Lacey, James Larkin, Scott Spear, John Brunst, Andrew Padilla, and Joye Vaught,
Petitioners,

Michael Lacey, James Larkin, Scott Spear, John Brunst, Andrew Padilla, and Joye Vaught,
Petitioners,
v.
United States District Court for the District of Arizona,
Respondent.

United States of America, Real Party In Interest.

From the United States District Court
for the District of Arizona
Case: 2:18-cr-00422-SMB

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

In its Answer ("Ans.") to the Petition for Writ of Mandamus ("Pet."), the government does not contest what AGBrnovich, his partners, and the advocacy organizations with whom he aligns (the "Organizations") have said and done, but instead spins those facts inaccurately, while also wrongly claiming Petitioners are advancing "obsolete" Ozzie and Harriett views of judges' obligations under 28 U.S.C. §455(a). No amount of spinning, however, can morph the targeted attacks against Backpage.com and Petitioners by AGBrnovich, his partners, and the Organizations into mere "positional or public policy views." (Ans., p. 2). AG Brnovich has publicly proclaimed: Backpage.com was the source of the "vast majority of all advertisements [] for sex trafficking and sexual exploitation;"[1] Backpage.com "solicit[ed] sex traffickers' ads for its website," "facilitate[ed] child sex trafficking," and "profit[ed] from prostitution and crimes against children;"[2] his office is "the tip of the sword when it comes to [human trafficking] cases;"[3] and his office is "working with local and federal officials on getting the prosecutions done."[4]

Moreover, the government seeks to excise spousal conflicts from 28 U.S.C. §455(a) as "obsolete," while its "modern" reading of 28 U.S.C. §455(a) would leave untouched conflicts arising from a judge's spouse under 28 U.S.C. §455(b)(4) and

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[1] Pet., . 6, fn. 6.
[2] Pet., p. 5, fn. 2/3
[3] https://www.facebook.com/270004956516789/videos/667563003427647, at 6:38.
[4] *Id.* at 3:54.

(b)(5)—an incongruous result. It also would leave untouched conflicts arising from the spouses of the parents, grandparents and great grandparents, children, grandchildren, and great grandchildren, aunts and uncles, and nieces and nephews of both the judge and the judge's spouse under 28 U.S.C. §455(b)(5)—an utterly incongruous result. Although some courts have refused recusal based on spousal views on social or public policy issues, no comparison exists between a judge's spouse stating views on issues of broad public concern and a state's top elected law enforcement officer effectively declaring defendants guilty who will be tried by his district judge spouse.

The government also ignores that, while some spouses stay removed from their spouses' work, Judge Brnovich publicly aligned herself with AGBrnovich's work by personally appearing in campaign videos promoting him as a political candidate, touting their shared "family values," and expressing her satisfaction with his political successes.

These facts cause reasonable people to question whether Judge Brnovich can be impartial, even if she thinks she can and sincerely strives to be so. "Any question of a judge's partiality threatens the purity of the judicial process and its institutions." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). The purity of the judicial process cannot be maintained with this judge presiding over this Case.

II. UNCONTESTED FACTS

The government does not dispute the facts underlying Petitioner's recusal

motion, including:

- In August 2020 AGBrnovich promoted a webinar presented by the "Office of the Arizona Attorney General Mark Brnovich" saying "Backpage.com...[was] where the vast majority of all advertisements were posted for sex trafficking;" identifying several government witnesses' organizations as "two very trustworthy sources we always want to use;" and directing viewers to websites with inflammatory and highly-prejudicial material about Backpage.com/Petitioners. Pet., p. 6.
- In May 2020, AGBrnovich's "partner" TRUST posted "news" claiming: "Backpage.com's exploitation and trafficking of women and children is fairly well known;" "Backpage's erstwhile former owners [] abscond[ed] with millions of dollars in illegal profits [and]...have been caught red-handed attempting to steal away their ill-gotten profits;" "Backpage's then-owners James Larkin and Michael Lacey and their top lieutenants...conceal[ed] and indeed launder[ed] the profits from their criminal enterprise to frustrate the claims of the victims;" "[t]he federal government is now properly attempting to secure the money earned from this illegal operation;" and "[t]he name of the case is United States v. James Larkin, John Brunst, Michael Lacey, and Scott Spear." AGBrnovich repeatedly promoted his "partner" TRUST and, to this day, directs the public to TRUST's website via his website and Booklets. *Id.* at 6-8.
- In June 2018, AGBrnovich published a Booklet decrying Backpage.com as "an

online classified advertising site used frequently to purchase sex" and claiming "over 300 ads are placed each day in Phoenix on Backpage.com for adult services—with an estimated 20% for girls under 18." AGBrnovich's Booklet repeatedly cites the USDOJ and government witnesses' organizations for support and directs readers to government witnesses' websites with inflammatory comments about Backpage.com/Petitioners.

- In August. 2017, AGBrnovich signed a letter to Congress saying Backpage.com was "complicit[]...in soliciting sex traffickers' ads for its website;" "constructed [its] business model[] around advertising income gained from participants in the sex trade; and "[c]learly...[was] facilitating—and profiting from—these illegal activities." In a related press release, AGBrnovich proclaimed Backpage.com a company "profit[ing] from prostitution and sex crimes against children." *Id.* at 5-6.
- By claiming Petitioners conspired with Backpage.com, and through its conspiracy charge and assertion of *Pinkerton* liability,[5] the government seeks to hold Petitioners responsible for Backpage.com's publication of the 50 charged ads *even if they knew nothing of the ads and had nothing to do with publishing them*. *Id.* at 2, 25.
- Judge Brnovich appears in two Internet campaign videos for AGBrnovich in which she praises AGBrnovich's brilliance and says she enjoys watching

[5] *Pinkerton v. United States*, 328 U.S. 640 (1946).

AGBrnovich succeed in politics. *Id.* at 10-11.

III. REASONS THE WRIT SHOULD ISSUE

A. Petitioners Have No Other Adequate Means to Attain Relief and Will Be Prejudiced in a Way That Cannot be Corrected on Appeal.

The government says Petitioners could challenge Judge Brnovich's refusal to recuse in a post-trial appeal, but ignores the resulting damage to the judicial system and to Petitioners from a trial before a judge obligated to recuse—factors of particular importance with a high-profile and lengthy trial. (The government has identified 98 witnesses and expects its case to last three months.)

The government incorrectly claims an order denying recusal cannot be challenged "until a direct appeal is taken from a final decision" (Ans., p. 33), but cites a case addressing jurisdiction to hear an *interlocutory* appeal of a denied recusal motion. *Thompson v. Commissioner of Internal Revenue*, 742 Fed. Appx. 316, 317 (9th Cir. 2018). After rejecting the interlocutory appeal, the Court in *Thompson* nonetheless construed the flawed appeal as a petition for mandamus, but denied the petition because the movant failed to satisfy the *Bauman* factors—not because mandamus relief was precluded because a direct appeal would be possible later. *Id.* at 318.

B. The District Court Clearly Erred As a Matter of Law.

1. The District Court Erred Holding a Non-Economic Interest Cannot Require Recusal Under 28 U.S.C. §§455(b)(4) and 455(b)(5)(iii).

An "interest" under Section 455(b) is not limited to "financial or pecuniary interests of some variety" (Ans., p. 19). First, nothing in the statutory language suggests the term "interest" is so limited. Second, although financial interests are the most common interests causing recusals, both the Fifth Circuit and the Seventh Circuit held Congress crafted the language of Section 455(b) to expressly *include* non-economic interests. *Potashnick*, 609 F.2d at 1113;[6] *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 115-16 (7th Cir. 1977).

Third, the government's cited authorities don't actually hold what the government suggests. In *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir. 1976), the district court recused in a suit brought by Virginia Electric to recover damages from a fabricator of equipment. If Virginia Electric prevailed, the judge, as a customer of Virginia Electric, could benefit, directly or indirectly, by up to $100. The Fourth Circuit held the judge did not have a "financial interest" under the statute (which requires ownership of a legal or equitable interest), but held the potential financial benefit was an "other interest" under §455. *Id.* at 367-68. It did not hold an "other interest" must be pecuniary/commercial. *Id.*

In *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 525 F.3d 554, 557 (7th Cir. 2008), the movant sought to disqualify a commissioner appointed under Fed. R. Civ. P. 71.1 in a pipeline condemnation action, arguing the commissioner had an interest

[6] The government dismisses *Potashnick* as an out-of-circuit case, but this Court has relied on *Potashnick*. *See Preston v. U.S.*, 923 F.2d 731, 733 n.3, 736 (9th Cir. 1991).

requiring recusal—"his hope that pipelines will hire him or his law firm in the future if this proceeding ends favorably." *Id.* The Seventh Circuit held no court had read the word "interest" that broadly and "'interest' means an investment or other asset whose value depends on the outcome, or some other concrete financial effect (such as how much property tax a judge pays)." *Id.* The Seventh Circuit's discussion of the type of *economic* interests qualifying as "interests" under Section 455 cannot be twisted into a holding that non-economic interests can never be an "interest"—particularly since the Seventh Circuit expressly held otherwise. *SCA Services*, 557 F.2d at 115-16.

The court in *Melendres v. Arpaio*, 2015 WL 13173306, *13 (D. Ariz. July 10, 2015) (*Melendres II*), did not hold non-economic interests *cannot* require recusal under Section 455(b), but said: "Courts have *generally* limited the kinds of 'interests' for which recusal is mandatory to those that are somehow pecuniary or proprietary in nature"—merely reflecting that most conflicts requiring recusal are financial. Moreover, the court cited *Virginia Elec.* and *Guardian Pipeline*, neither of which held, or even support, the proposition that non-economic interests cannot require recusal.

The only decision cited by the government actually holding Section 455(b) does not include non-economic interests was *Melendres v. Arpaio*, 2009 WL 2132693, *9 (D. Ariz. July 15, 2009) (*Melendres I*)—but that holding simply was wrong. In *Melendres I*, the respondents mischaracterized *Virginia Elec.*, just as the government does here, and the court adopted the mischaracterization:

> "Plaintiffs respond by arguing that courts have narrowly defined "other interests" to include only financial or pecuniary interests of some variety, s*ee e.g., In re Virginia Elec. & Power Co.,* 539 F.2d 357, 367–68 (4th Cir.1976)...The Court [] agrees with Plaintiffs that the term 'any other interests' should be interpreted as being limited to financial or pecuniary interests, whether by ownership or some other means." *Id.*

Construing Section 455(b) to encompass non-economic interests would *not* "require judges to recuse whenever a relative or an organization they head expresses positions 'regarding the subject at issue'" (Ans., p. 21). If AGBrnovich had merely taken a public stance against human trafficking, or cautioned against the dangers of social media, Petitioners would have no basis to seek recusal.

2. The District Court Erred Holding AGBrnovich's Non-Economic Interests Could Not Be Substantially Affected.

The government argues any interest AGBrnovich may have in the outcome of Petitioners' criminal case is "remote, contingent, or speculative" because he has "no direct or indirect stake in whether any Defendant is convicted or acquitted" and because he "is not associated with any party in this case, did not aid in its investigation and is not prosecuting the case." But AGBrnovich is a politician and Arizona's top *elected* law enforcement officer, who made sex trafficking and child sex trafficking key agenda items in his political campaigns and during his tenure as Attorney General. As part of his high-profile anti-trafficking campaign, he personally and publicly declared Backpage.com facilitated sex trafficking, solicited ads from sex traffickers, and profited from unlawful sex trafficking and prostitution—allegations

at the core of the government's Case. Through social media posts and his website, Booklets, webinars, and public appearances, AGBrnovich also has repeatedly touted his partner AATN/TRUST and the Organizations, which have made similar claims about Backpage.com.

Petitioners need not establish AGBrnovich's interests *will* be affected by the outcome of the Case, nor exactly *how* they will be affected. Petitioners need only establish AGBrnovich's interests "*could* be substantially affected by the outcome" of the Case, 28 U.S.C. §§455(b)(4) and (b)(5)(iii)—and plainly they could. AGBrnovich will reap the rewards from his public excoriation of Backpage.com if Petitioners are convicted. If Petitioners are exonerated, AGBrnovich will suffer the blowback from wrongly accusing Backpage.com of scurrilous charges and partnering with others who did the same. AGBrnovich's interests also could be substantially affected if "facts" AGBrnovich claims already are established are determined at trial to be false or if government witnesses he touts as "trustworthy sources that we always want to use" are determined to be unreliable, whether by Judge Brnovich in the context of a motion or otherwise.

AGBrnovich's interests are different than the speculative and remote interests rejected by courts in the cases the government cites. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1042 (9th Cir. 2011) (judge's husband, one of 50 volunteer attorneys on the Los Angeles Legal Aid Foundation board, did not have interest that could be substantially affected by outcome of proceeding after mediator recommended a

portion of unclaimed class action settlement proceeds be distributed to the Foundation); *In re Vazquez-Botet*, 464 F.3d 54 (2006) (movant's speculation that unindicted co-conspirator might engage the judge's wife to pursue civil claim against him if movant was to be convicted at trial was "too remote, speculative, and contingent" to be substantially affected by the case's outcome).

3. The District Court Erred Holding AGBrnovich's Statements Would Not Cause Reasonable People to Question Its Partiality.

The government claims "[i]f a provision of §455(b) provides a potential ground for disqualification, a judge cannot be disqualified on that ground under §455(a)," citing *Liteky v. United States*, 510 U.S. 540, 552-53 (1994). The government miscites *Liteky*, where the Supreme Court held:

> "§455(a) expands the protection of §455(b), but duplicates some of its protection as well….Within the area of overlap, it is unreasonable to interpret §455(a) (unless the language *requires* it) as implicitly eliminating a limitation explicitly set forth in § 455(b). It would obviously be wrong, for example, to hold that "impartiality could reasonably be questioned" simply because one of the parties is in the fourth degree of relationship to the judge. Section 455(b)(5), which addresses the matter of relationship specifically, ends the disability at the third degree of relationship, and that should obviously govern for purposes of § 455(a) as well."

Id. (emphasis in original). Here, there is no limitation in §455(b) that Petitioners seek to avoid through the application of §455(a).

The government also incorrectly dismisses the recusal motion as "obsolete," while erroneously claiming "courts resoundingly reject the notion that a judge must

recuse under §455(a)" based on positions taken by the judge's spouse. (Ans., p. 24). The government cites cases where courts refused to recuse based on spousal actions, but those cases simply did not present facts where recusal was warranted and *none* held the actions of a spouse could never be the basis for recusal. *Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1241 (10th Cir. 2020) (recusal not required where spouse made charitable contribution to *alma mater* "not specifically tied to activity related to the litigation"); *National Abortion Fed. v. Ctr. for Med. Progress*, 257 F. Supp. 3d 1084, 1089 (N.D. Cal. 2017) (recusal not required in case involving National Abortion Federation because judge's wife "liked" Facebook posts by different pro-abortion organizations and her Facebook profile picture said "I stand with Planned Parenthood"); *Akins v. Knight*, 2016 WL 127594, *3 (W.D. Mo. Jan. 11, 2016) (recusal not required where lobbyist husband criticized petition calling for Supreme Court review of another case decided by the court).

The government makes much of Judge Reinhardt's order in *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011), but it presented just one judge's views—in an appeal subsequently dismissed for lack of jurisdiction. And, as Judge Reinhardt repeatedly said, the issue before him was one of constitutional *law* where his spouse had expressed her views on matters of *social policy*. *E.g.*, *id.* at 916 ("a reasonable person with full knowledge of all the facts would not reasonably believe that I would approach a case in a partial manner due to her independent views regarding social policy"). Here, the issue is not AGBrnovich's views regarding constitutional law or

social policy, but his statements about specific *factual* issues at the core of a hotly-contested criminal case over which Judge Brnovich presides. Moreover, Judge Reinhardt's spouse was the retiring executive director of an advocacy organization, not an elected official with political advertising prominently featured Judge Reinhardt. Finally, Judge Reinhardt's role in reviewing a matter on appeal was very different than Judge Brnovich's role as trial judge, where she would preside over jury selection addressing jurors' knowledge of her husband's statements, and decide repeated evidentiary issues regarding witnesses her husband endorses. Whatever force Judge Reinhardt's order might have in other circumstances, it has little or no application here.

The government tries to deflect the import of AGBrnovich's comments by saying he mentioned no Petitioner by name, only Backpage.com, but ignores the fact that its case centers *completely* on Backpage.com and 50 ads it published. Indeed, the indictment contains more than *600* references to Backpage—far more than all the references to Petitioners combined. ER356-447. Moreover, the government does not dispute it seeks to convict Petitioners of conspiring with Backpage.com, even if they knew nothing of the 50 ads and had nothing to do with publishing them—in other words, the government contends Petitioners are responsible for Backpage.com's purportedly criminal conduct. As such, the government's claim that AGBrnovich's statements about Backpage.com have no bearing on Petitioners is pure sophistry.

The government tries to distance AGBrnovich from the statements of

TRUST specifically mentioning Petitioners, claiming those statements are not on his website and do not bear his name or likeness. AGBrnovich, however, has proudly claimed TRUST as his "partner" and *repeatedly* encourages the public to visit the TRUST website for information on trafficking. Those endorsements would lead reasonable people to conclude they can rely on information on TRUST's website—particularly since that information mirrors AGBrnovich's own statements about Backpage.com. The government encourages the Court to disregard TRUST's inflammatory comments about Petitioners because they "require[d] some effort to find" (Ans., p. 30), but the analysis under §455 assumes a reasonable person with *full knowledge of the facts*.

4. The District Court Erred Finding the Motion Untimely.

This Court requires recusal motions to be filed timely (*i.e.* "with reasonable promptness *after the ground for such a motion is ascertained*"). *Preston*, 923 F.2d at 733. The government wrongly contends Petitioners' recusal motion was untimely and postponed for seventeen months for strategic purposes.

First, the claim that Petitioners sat on information justifying recusal for a year and a half to "test the Court's temperament" is nonsensical. Judge Brnovich denied no fewer than ten substantive motions[7] over that time, long beyond any conceivable "testing period."

Second, several bases for recusal occurred in May and August 2020, long after

[7] Dkts. 559/768/793/839/840/844/870/878/946/1028. ER448-532.

Judge Brnovich was assigned the Case.

Third, lead trial counsel from six different law firms declared, under penalty of perjury, they were not aware of the facts giving rise to Petitioners' recusal motion until September 2020. The government submitted *no* evidence, and the Court held no hearing (much less an evidentiary hearing) on the recusal motion. The government's unsupported speculation cannot support a finding of knowledge or delay by trial counsel. *Preston* 923 F.2d at 733 and n.3 (district court erred in refusing to recuse where "counsel asserts that he did not learn of [the basis for recusal] until ten days before the first recusal motion was filed;" "[t]his allegation is uncontroverted;" and "the government offers us nothing but *speculation* that…disqualification…[was] part of [their] trial strategy.") (emphasis supplied).

Fourth, availability of information on the Internet is irrelevant, unless counsel saw the information and ascertained it provided a basis for recusal. *See id.* (district court erred in holding recusal motion untimely when counsel said he first learned the relevant information reading a profile in the Los Angeles Daily Journal in July 1987—even though the profile originally ran in May 1986).

Fifth, Petitioners had no obligation to investigate Judge Brnovich or her family members. *Listecki v. Official Committee of Unsecured Creditors*, 780 F.3d 731, 750 (7th Cir. 2015):

> "It would be unreasonable, unrealistic and detrimental to our judicial system to expect litigants to investigate every potentially disqualifying piece of information about every judge before whom they appear. '[L]itigants (and, of course,

> their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters....'Both litigants and counsel should be able to rely upon judges to comply with their own Canons of Ethics." *Am. Textile Mfrs. Inst., Inc. v. Limited, Inc.*, 190 F.3d 729, 742 (6th Cir.1999) (quoting *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th. Cir.1995))."

Listecki, 780 F.3d at 750. Petitioners had no obligation to investigate Judge Brnovich and her family, but she should have advised the parties of her husband's positions regarding Backpage.com and the issues in the Case and of her public support of her husband's political campaigns. Had she done so, Petitioners would have raised the recusal issue at that time.

Sixth, Petitioners were not "on notice" of the grounds for recusal, or even just AGBrnovich's August 16, 2017, letter, because "nearly all state AGs had criticized Backpage over the past decade." (Ans., p. 17). The letters from the state AGs to Backpage.com criticizing its operations were written between October 2, 2009, and March 2012. *E.g.,* ER372 ¶74; ER381 ¶111; ER379-80 ¶105. AGBrnovich took office in January 2015—nearly three years after the last letter. The government provides no explanation of how a series of letters as to which AGBrnovich was a stranger would put Petitioners on notice that AGBrnovich sent a letter to Congress 5½ years later—because it can't. Moreover, only *some* of the six counsel who submitted the declaration were even aware of the 2009-2012 letters.

Seventh, the filing of the August 16, 2017, letter in unrelated litigation for an unrelated purpose is of little consequence for several reasons. The letter was filed by

attorneys who are counsel only to Petitioners Larkin and Lacey, not the other four Petitioners. Those lawyers also are not, and have never been, criminal trial counsel for Larkin and Lacey; rather those lawyers have addressed legal issues under the First Amendment, federal statutes, and as regards the Internet. ER533-534. The letter also was filed more than eighteen months before Judge Brnovich was assigned to the Case, at a time when AGBrnovich's comments about Backpage.com were of no significance to recusal. The government makes no showing that, once Judge Brnovich was assigned the Case, those First Amendment lawyers ascertained that the letter provided a basis for recusal in this Case. The government seeks to equate access to a document with ascertaining a basis for recusal, but the latter is the legal standard for timeliness, not the former. And, as set forth in lead trial counsels' declaration, they were not aware of any basis for recusal before September 2020.

5. The District Court Erred in Striking Petitioners' Expert Declaration.

The government incorrectly argues new evidence may *never* be submitted with a reply. Information and evidence rebutting arguments raised in an opposition may be submitted in a reply. *E.g.*, *E.E.O.C. v. Creative Networks. LLC*, 2008 WL 5225807, *2 (D. Ariz. Dec. 15, 2008). Petitioner's expert opinion properly addressed mixed questions of fact and law rebutting the government's opposition. If any portions of the opinion were inappropriate, the court should have disregarded those portions, rather than striking the declaration.

IV. CONCLUSION

Petitioners request a writ of mandamus directing that Judge Brnovich be recused from presiding over this case.

RESPECTFULLY SUBMITTED this 29th day of December, 2020.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 21(d) and Circuit Rules 21-2(c) and 32-3, the attached Petition for Mandamus is 17 pages and contains 3888 words, and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

DATED this 29th day of December, 2020.

BIENERT | KATZMAN PC

By *s/ Thomas H. Bienert, Jr.*
Thomas H. Bienert, Jr.
Whitney Z. Bernstein
Counsel for Petitioner James Larkin

CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this matter are registered with the Court's CM/ECF system and were notified via email regarding the filing of the **Reply in Support of Petition for Writ of Mandamus and Petitioner's Excerpts of Record Volume IV** at the email addresses below.

s/ Thomas H. Bienert, Jr.

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