C.A. No. 20-73408

D. Ct. No. CR-18-422-PHX-SMB

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE MICHAEL LACEY, et al.

MICHAEL LACEY, et al., Petitioners

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, Respondent Court,

and

UNITED STATES OF AMERICA,
Real Party in Interest.

UNITED STATES' ANSWER TO PETITION FOR WRIT OF MANDAMUS

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Defendants bear an insurmountable burden in seeking an extraordinary writ that would require replacement of the federal judge who has presided over this case for nearly two years—particularly where Defendants moved for recusal after receiving several adverse rulings and based on facts they have long known. A writ of mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey,* 332 U.S. 258, 259-60 (1947). To obtain this extraordinary relief, Defendants must demonstrate that their "right to issuance of the writ is clear and indisputable," *Kerr v United States Dist. Ct. for N. Dist. of Calif.*, 426 U.S. 394, 403 (1976), and show that the denial of their motion was clearly erroneous as a matter of law. *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). Defendants cannot make these extraordinary showings, and the petition should be denied for several reasons.

First, Defendants' motion for recusal (Motion) was an untimely and meritless attempt to shop for a new judge after receiving rulings they did not like. The Motion was based on published articles, press releases and other publications that have long been known to the internet-viewing public, including widely-known information that defense counsel assert they simply did not "focus on" until after Defendants suffered a series of adverse rulings. Defendants' lawyers even filed a key exhibit to the Motion—an August 16, 2017 letter to Congress that criticized Backpage.com

(Backpage)—in another court *before* this case was transferred to Judge Brnovich. (SER 42-50.)[1] These and other materials put Defendants on notice that Judge Brnovich's husband has served as Arizona's Attorney General (AG) since January 2015, and that the Arizona AG's Office (like nearly all other state AGs in the United States since 2010) had, in the course of its official duties, informed the public of the dangers of human trafficking and that such trafficking has occurred via websites like Backpage. Defendants' filing of the Motion long after these facts became plain, and after suffering substantive losses, leads to the inescapable conclusion that Defendants sat on the basis for their Motion to test the Court's temperament. Such maneuvering is prejudicial to the other parties and denigrates the judicial process. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295-96 (9th Cir. 1992). The petition should be denied on this basis alone.

Second, the notion that recusal is required under 28 U.S.C. § 455(b)(4) and (b)(5)(iii) because Judge Brnovich's husband has an "interest" that "could be substantially affected by the outcome of this proceeding" is absurd. AG Brnovich has no financial or pecuniary interest in any party or the outcome of this case, and his positional or public-policy views are not cognizable "interests" under § 455(b). But even if they were, Defendants cannot show how any such interest "could be

[1] ER refers to the Excerpts of Record, followed by the page number(s). SER refers to the Supplemental Excerpts of Record, followed by the relevant page number(s). CR refers to the Clerk's Record, followed by the Clerk's Record docket number.

substantially affected by the outcome." AG Brnovich is not remotely involved in this case: he is not a party, he is not counsel for a party, and he has played no role in this investigation or prosecution. The district court correctly recognized that any conceivable impact the outcome could have on AG Brnovich's reputation is "remote, contingent [and] speculative"—and cannot support recusal under § 455(b). (ER 10, quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1042 (9th Cir. 2011)).

Third, Defendants come nowhere close to showing that the district court clearly erred in holding under § 455(a) that no objectively reasonable, thoughtful person with knowledge of the facts and the law would reasonably doubt her impartiality *based on her marriage*. In the year 2020, it is anachronistic to suggest that a federal judge with 17 years of judicial experience is unable to preside impartially because of her husband's views. Rather, judges "should be evaluated on their own merits and not judged in any way by the deeds or position in life of their [spouses]." *Perry v. Schwarzenegger*, 630 F.3d 909, 911 (9th Cir. 2011) (Reinhardt, J.). Moreover, Defendants have not identified any public statements by AG Brnovich about Defendants or this case. For these and other reasons, the district court did not clearly err by finding Defendants had failed to justify the "extreme measure" of recusal. *Twist v. U.S. Dep't of Justice*, 344 F. Supp. 2d 137, 142 (D.D.C. 2004).

Defendants cannot establish any other *Bauman* factors. The petition should be denied.

IV. ISSUES PRESENTED

A. Whether this Court has a definite and firm conviction that the district court clearly erred when it denied Defendants' Motion, where: (1) Defendants filed the Motion after suffering several adverse rulings and based on facts they knew before the case was transferred to the district court; (2) Defendants failed to show that Judge Brnovich's spouse has a financial or pecuniary in this case, or any other interest that could be substantially and directly affected by the outcome; (3) Defendants' Motion is premised on the widely-rejected notion that a spouse's views must be imputed to the judge because of their marriage; and (4) Defendants submitted an unauthorized and inadmissible reply "expert declaration" consisting solely of legal argument.

B. Whether Defendants have failed to meet the remaining *Bauman* factors.

V. FACTUAL BACKGROUND

A. After Numerous Adverse Rulings, Defendants Moved for Recusal.

Defendants are former owners, executives and managers of Backpage, the country's leading online marketplace for prostitution advertising from 2010 until April 2018. (ER 357-58, 363-64; Senate Report at 1.)[2] Backpage generated over a half-billion dollars in revenue from those ads. (ER 357, 399.)

[2] "Senate Report" refers to the 50-page report published by the U.S. Senate Permanent Subcommittee on Investigations, BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING (Jan. 2017), available at https://www.hsgac.senate.gov/imo/media/doc/Backpage%20Report%202017.01.10%20FINAL.pdf (last visited Dec. 21, 2020).

On March 28, 2018, a federal grand jury indicted Defendants for knowingly facilitating prostitution. A superseding indictment issued on July 25, 2018. (*See* ER 356-447.) The indictments 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). (*See* ER 356.)

On April 5, 2018, Backpage.com, LLC and Carl Ferrer, its then-CEO and 100% owner, pleaded guilty to federal charges in separate cases and admitted that the "great majority" of Backpage's paid ads were "for prostitution services." (SER 13, 32-33.) Backpage agreed to shut down and cease operations. (SER 8-9, 22-23.)[3]

Judge Logan presided over this case—against the individual Defendants here—from March 28, 2018 to March 1, 2019, when he recused. After the case was reassigned to Judge Brnovich on March 4, 2019, the parties vigorously litigated for the next 17 months and Defendants suffered several adverse rulings. The court denied a motion to dismiss that involved 253 pages of briefing and oral argument (ER 504-17; CRs 561, 624, 625, 641, 649, 697, 700, 728, 793); denied a defense

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[3] *Backpage.com LLC v. Dart*, 807 F.3d 229, 233-34 (7th Cir. 2015), discussed in the petition's background section (Pet. at 2), was decided before the Senate issued its report and Backpage and its CEO pleaded guilty. After those developments, the Northern District of Illinois dismissed *Dart* as moot and sanctioned Backpage for misleading the court about its involvement in prostitution solicitations. (SER 78-85.)

motion to compel after a three-day evidentiary hearing (ER 508-520; CRs 643, 839); denied another motion to dismiss after oral argument (ER 525; CR 946); and denied three other motions to dismiss. (ER 504, 520; CRs 559, 840, 844.)

In September 2020, Defendants moved for recusal based on Judge Brnovich's marriage to AG Brnovich. (ER 15-37.)

B. Defendants' Motion Is Based on Widely-Published Information.

The exhibits that form the basis of the Motion are all on the internet; more than half have been widely-available for years. (*See* ER 38-39.)

1. June 2018 Human Trafficking Booklet

Exhibits 1-3 include different versions of the Arizona AG's Office's booklet, "Human Trafficking: Arizona's Not Buying It," published in June 2018, December 2019 and (in Spanish) June 2020. (ER 40-214.) The booklet provides the public with important public-safety information. The June 2018 version (Exhibit 1) is the only one that references Backpage. That 47-page booklet has an introductory letter from AG Brnovich on page 2. (ER 42.) Its only references to Backpage appear on page 22. (ER 62.) It states traffickers may recruit victims via "[s]ocial media: websites such as Facebook, Backpage, and chatrooms," describes Backpage as "an online classified advertising site used frequently to purchase sex," and discusses "adult services" ads on Backpage. (ER 62.) No version of the booklet discusses Defendants or this case.

2. August 16, 2017 Letter to Congress

Exhibits 8-10 consist of references to the August 16, 2017 letter from the National Association of Attorneys General petitioning Congress to amend Section 230 of the Communications Decency Act. (ER 227-239.) The letter was signed by 50 attorney generals, including AG Brnovich. (ER 232-37.) It is publicly available on the Association's website.[4]

On August 26, 2017, in litigation against the Missouri AG handled by three of the same lawyers who represent Defendants in this case, one of Defendants' lawyers filed a declaration that discussed and attached the *same* August 16, 2017 letter as its sole exhibit. (SER 45-50; ER 232-37); *compare Backpage.com, LLC v. Hawley*, 2017 WL 5726868 (E.D. Mo. Nov. 28, 2017) (listing counsel in that case) *with* ER 448-460 (identifying the same three lawyers as counsel in this case).

Six *different* defense counsel in this case have since admitted that some of them were aware of attorney general correspondence about Backpage at the start of this case, but they simply didn't "focus on" the August 16, 2017 letter or the fact that AG Brnovich had signed it. In a reply "Joint Declaration," they averred:

> When this case began in April 2018, some (but not all) of us were aware that various Attorneys General had written letters to Backpage.com and to Congress. Those of us who were aware of this series of letters did

[4] https://www.naag.org/policy-letter/attorneys-general-ask-for-simple-amendment-to-federal-law-to-fight-sex-trafficking/ (last visited Dec. 21, 2020) (clicking "view letter" leads to https://1li23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/CDA-Final-Letter.pdf).

> not focus on the August 16, 2017 letter (the only letter signed by [AG] Brnovich), as it was sent to Congress (not Backpage.com) and it was not identified as a potential trial exhibit. Likewise, none of us focused on the fact that [AG] Brnovich was one of the dozens of signatories to the August 16, 2017, letter . . . .

(ER 353 ¶ 5.)

In fact, before this case was assigned to Judge Brnovich in March 2019, Defendants actually knew that Backpage had been criticized by most of the country's AGs over the last decade. As set forth in the indictment—which Defendants have had since 2018—a group of 21 AGs notified Backpage in 2010 that "ads for prostitution—including ads trafficking children—are rampant on the site." (ER 372 ¶ 74.) In 2011, a letter ultimately signed by 51 AGs—including Tom Horne, AG Brnovich's predecessor[5]—observed "the site requires advertisements for escorts, and other similar 'services,' to include hourly rates," and "[i]t does not require forensic training to understand that these advertisements are for prostitution." (ER 381 ¶ 111.) Also in 2011, Backpage representatives met with representatives of the Washington State AG to discuss Backpage's prostitution advertising. (ER 379-80 ¶ 105.) From 2012 to 2017, Backpage sued the AGs of Washington, Tennessee, New Jersey, and Missouri, and Lacey and Larkin were prosecuted by the California AG (earlier charges were dismissed, but newer charges remain pending). *E.g.*,

[5] https://www.naag.org/wp-content/uploads/pdfs/sign-ons/Backpage.com-FINAL-9-16-11.pdf (last visited Dec. 21, 2020).

Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); Senate Report at 6, 9-10, 12.

Internal documents showed Defendants were highly attuned to the AGs' criticism. (*See*, *e.g.*, ER 373 ¶ 78 (quoting email from Defendant Padilla to Backpage employees stating "it's the language in ads that's really killing us with the Attorneys General"); ER 381 ¶ 113 (quoting email about "the under aged issue" and state "AG's"); Senate Report at 25-26.)

3. Other Arizona AG's Office Publications or Statements

Exhibits 4 and 6 are "tweets" from "@AZAG_Outreach" promoting webinars on "Suicide Awareness & Prevention," "Human Trafficking Prevention," "E-Cigarette Awareness & Prevention," and "Consumer Scams." (ER 218, 223.) Exhibits 5 and 7 are webinar slides. Defendants do not identify any statements from these webinars discussing Defendants or this case. At most, they complain that one webinar contains a historical reference to Backpage (34:42); identifies two organizations as "trustworthy"—Arizona State University's Office of Sex Trafficking Intervention Research (STIR)[6] and the Polaris Project (which operates the National Human Trafficking Hotline[7]) (5:03); and directs viewers to non-profits

[6] STIR is part of the School of Social Work within ASU's Watts College of Public Service and Community Solutions. https://socialwork.asu.edu/stir (last visited Dec. 21, 2020).

[7] https://polarisproject.org/about-us/ (last visited Dec. 21, 2020).

that provide services for victims, including the National Center for Missing and Exploited Children (NCMEC)[8] and TRUST[9]. (Pet. at 6.)

Exhibits 11 and 12 reference an interview from March 2017. (ER 242, 248.) Exhibit 13 states the AG's Office "is a proud partner of the Arizona Anti-Trafficking Network and the U.S. Department of Homeland Security Investigations-Phoenix on the SAFE Action Project"—a training program for tourism professionals. (ER 252.) Exhibit 19 is a "tweet" that promotes a first-responders event. (ER 291-92.) Exhibits 21-23 are a press release, a newspaper article and a "tweet" that refer to AG Brnovich's human trafficking comments in January 2015. (ER 297-318.) None of these exhibits contains any discussion of Backpage, Defendants, or this case.

4. Third-Party Publications

Defendants' remaining exhibits consist of third-party publications. Only two mention any Defendants. Exhibit 14 truthfully states that Lacey and Larkin have been charged and includes a copy of the first page of the March 2018 indictment. (ER 260-61.) Exhibit 15 is a news blog item on the TRUST website that discusses

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[8] NCMEC is 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).

[9] TRUST (Training and Resources United to Stop Trafficking) is a project of the Arizona Anti-Trafficking Network, a non-profit that provides anti-trafficking services and training. https://aatnaz.org/about-us/ (last visited Dec. 21, 2020).

an amicus brief filed by a different organization in a recently-dismissed civil forfeiture appeal. (ER 263-64.)

C. The District Court Denied Defendants' Motion.

On October 23, 2020, the district court issued a thorough 14-page order denying the Motion. (ER 1-14) (Order). The court carefully reviewed the exhibits and observed Defendants had not identified any statements by AG Brnovich about Defendants or the merits of this case. (ER 2-6.) The court also noted that "AG Brnovich was not involved in the investigation or prosecution of this case" and has "no tie to this case or any of the defendants." (ER 6.) The court found that the Motion was untimely, and rejected Defendants' arguments for recusal under 28 U.S.C. § 455(a)-(b). (ER 7-14.)

VI. ARGUMENT

A. The Order Was Not Clearly Erroneous as a Matter of Law.

A writ of mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey,* 332 U.S. at 259-60; *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011). To obtain this extraordinary writ, Defendants must demonstrate a "clear and indisputable" right to relief. *Kerr*, 426 U.S. at 403.

In evaluating Defendants' petition, this Court considers five factors:

> (1) whether the petitioner has other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order makes an "oft-repeated error," or "manifests a persistent disregard of the federal rules"; and (5) whether the district court's order raises new and important problems, or legal issues of first impression.

Bauman, 557 F.2d at 654-55. The only necessary factor is whether "the district court court's order is clearly erroneous as a matter of law." *Bauman*, 557 F.2d at 654-55. Absent clear error, the petition must be denied. *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. Of Mont.*, 408 F.3d 1142, 1146 (9th Cir. 2005).

This is a highly-deferential standard: To find clear error, this Court must have "a definite and firm conviction" the district court was incorrect. *DeGeorge v. U.S. Dist. Court for Cent. Dist. of Cal.*, 219 F.3d 930, 936 (9th Cir. 2000). The Supreme Court has exhorted Circuit judges to rigorously enforce this requirement. Because "mandamus against a lower court . . . is a drastic and extraordinary remedy reserved

for really extraordinary causes . . . only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380 (2004).

For these reasons, it is not enough for a party seeking mandamus to argue the underlying court was wrong. Indeed, mandamus "will not issue merely because Defendants have identified legal error." *In re Van Dusen*, 654 F.3d at 841; *United States v. Mehrmanesh*, 652 F.2d 766, 770-71 (9th Cir. 1981). Rather, the petitioner must go further and demonstrate the lower court's analysis was indefensible and lacking any support in the case law. For example, in *In re Van Dusen*, 654 F.3d at 845-46, even though this Court concluded that "we favor Petitioners' interpretation over that of the District Court," it denied mandamus relief where "no prior Ninth Circuit authority prohibited the course taken by the district court," and "certain language appearing in the relevant doctrine could be interpreted to lend support to the District Court's position" (citations omitted).

Defendants bore a heavy burden in moving to disqualify Judge Brnovich nearly two years after she was assigned to this case. A federal judge has a "strong . . . duty to sit when there is no legitimate reason to recuse." *Clemens v. U.S. Dist. Ct. for Cent. Dist. of Calif.*, 428 F.3d 1175, 1179 (9th Cir. 2005). Accordingly, "a judge is *presumed* to be impartial and the party seeking disqualification bears the

substantial burden of proving otherwise." *In re Steward*, 828 F.3d 672, 682 (8th Cir. 2016) (emphases added); *accord In re McCarthey*, 368 F.3d 1266, 1269 (10th Cir. 2004). For several reasons, the district court did not clearly err in finding Defendants failed to meet their "substantial burden" in seeking disqualification.

1. Defendants' Motion Was Untimely and Prejudicial.

This Court requires that "[a] party having information that raises a possible ground for disqualification [under 28 U.S.C. § 455] cannot wait until after an unfavorable judgment before bringing the information to the court's attention." *United States v. Rogers,* 119 F.3d 1377, 1380 (9th Cir. 1997); *see also Preston v. United States,* 923 F.2d 731, 733 (9th Cir. 1991) (motions to recuse must be brought with "reasonable promptness after the ground for such a motion is ascertained"). Absent such a requirement, "parties would be encouraged to 'withhold recusal motions, pending a resolution of their dispute on the merits, and then if necessary invoke section 455 in order to get a second bite at the apple.'" *Rogers*, 119 F.3d at 1380 (quoting *E. & J. Gallo*, 967 F.2d at 1295). This would result in "wasted judicial time and resources and a heightened risk that litigants would use recusal motions for strategic purposes." *Preston*, 923 F.2d at 733; *Bivens Gardens Office Building, Inc. v. Barnett Banks of Fla., Inc*., 140 F.3d 898, 913 (11th Cir. 1998) (disqualification cannot be "an insurance policy to be cashed in if a party's assessment of his litigation risks turns out to be off and a loss occurs").

Because the timeliness of recusal motions must be policed to prevent litigants from using them for strategic purposes, federal courts reject such motions as untimely where movants turn a blind eye to facts in their possession or that they could discover through minimal diligence. *See, e.g.*, *Rogers*, 119 F.3d at 1383 n.3 (motion untimely when "the information relied upon" was published several months before defendant sought recusal); *E. & J. Gallo*, 967 F.2d at 1295 (denying relief where movant was aware of judge's former law partnership when the case was transferred to the judge); *United States. v. Kohring*, 334 F. App'x 836, 838 (9th Cir. 2009) (recusal motion untimely where, "with the exercise of slightest amount of diligence, [defendant] could have ascertained the significance [of the facts] long before trial"); *In re Medtronic, Inc., Sprint Fidelis Leads Prod. Liab. Litig.*, 623 F.3d 1200, 1209 (8th Cir. 2010) (motion untimely where "Plaintiffs knew, or with due diligence could have known," facts supporting their motion when the case was transferred); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 525 F.3d 554, 558 (7th Cir. 2008) ("a litigant who lets this opportunity [to investigate possible bases for recusal] pass, then looks up the commissioners in Martindale-Hubbell after the proceedings have concluded, has no one to blame but himself").

Here, the district court correctly observed that Defendants filed their Motion "nearly a year and a half after the Court inherited the case and after several adverse rulings." (ER 6-7.) Defendants asserted in their Motion—without any factual

support—that they did not discover any grounds for recusal until "on or about September 2020." (ER 20.) As the United States pointed out in its Response, this unsupported claim strains credulity. (SER 58-60.) Even a cursory check of publicly-available information would have shown that the district court's spouse is AG Brnovich, AG Brnovich has taken a public stance against human trafficking, and AG Brnovich—like nearly every other state AG in the United States over the last decade—has referred to Facebook, Backpage and Craigslist as places where human trafficking occurs. (*See* ER 12; SER 58-60.) This public information includes a cover story in *Phoenix New Times* (formerly owned by Lacey and Larkin)[10] and an article in *The Arizona Republic* reporting on the court's marriage,[11] and several of Defendants' own exhibits—which reference AG Brnovich's published statements about these issues made as early as January 2015. (*See* Part V.B.1-3, *supra*.)

[10] Stephen Lemons, "Long, Strange Trip: Republican Mark Brnovich Channeled Jerry Garcia to Become AZ's Attorney General," Phoenix New Times (Feb. 4, 2015), available at https://www.phoenixnewtimes.com/news/long-strange-trip-republican-mark-brnovich-channeled-jerry-garcia-to-become-azs-attorney-general-6652765 and http://digitalissue.phoenixnewtimes.com/publication/?i=245280 (last visited Dec. 21, 2020).

[11] Yvonne Wingett Sanchez, "Trump nominates local judge, U.S. attorney to federal bench," *The Arizona Republic/azcentral.com*, Jan. 24, 2018 (reporting that "Susan Brnovich also is the wife of Arizona Attorney General Mark Brnovich"), available at https://www.azcentral.com/story/news/politics/arizona/2018/01/24/trump-nominates-local-judge-u-s-attorney-federal-bench/1061914001/ (last visited Dec. 21, 2020).

Not only were all of the exhibits underlying the Motion published on the internet, but Defendants and their lawyers were keenly aware that nearly all state AGs had criticized Backpage over the past decade. (*See* Part V.B.2, *supra*.) Much of that history is laid out directly in the indictment—which Defendants have had since mid-2018. (ER 372-73, 379-81 ¶¶74, 78, 105, 111, 113.) More is covered in the Senate Report, published in January 2017. (Senate Report 6, 9-10, 12, 25-26.)

Several of Defendants' current counsel represented Backpage, Lacey, Larkin and others in disputes with these AGs. *See, e.g.*, *Hawley*, 2017 WL 5726868, at *1; *McKenna*, 881 F. Supp. 2d at 1265. In a case against the Missouri AG, they filed the August 16, 2017 letter to Congress —and thereby indisputably had actual knowledge of that key recusal exhibit long before September 2020. (*Compare* SER 42-50 *with* ER 232-37.)

Defendants' "Joint Declaration"—filed with their Reply in Support of the Motion (ER 350-55)—further underscores Defendants' lack of timeliness. The six signing attorneys admitted that some of them knew at the start of this case that the AGs had written letters to Backpage and Congress, but they just never "focused on" the August 16, 2017 letter or the fact that AG Brnovich had signed it. (ER 7; ER 353 ¶ 5.) Tellingly, none of the three lawyers who handled the litigation against the Missouri AG (and also represent Defendants here) signed the Joint Declaration. (*Compare* ER 354-55 *with* ER 448-57; *see* SER 42-50.) Also absent from the Joint

Declaration are the signatures of any other counsel of record and any Defendants—who themselves have been highly attuned to criticism from the country's AGs over the last decade. (*See* Part V.B.2, *supra*.)

Under settled law, this record shows that Defendants had actual and constructive knowledge of the basis for their Motion long ago. *See, e.g.*, *Rogers*, 119 F.3d at 1383 n.3; *E. & J. Gallo*, 967 F.2d at 1295; *Kohring*, 334 F. App'x 836, 838; *In re Medtronic*, 623 F.3d at 1209; *Guardian Pipeline*, 525 F.3d at 558. *See also Wells Fargo Bank NA v. Wyo Tech Investment Group LLC*, 2019 WL 4736775, at *9 (D. Ariz. Sept. 27, 2019) ("This is a textbook case of a litigant being aware of information at the start of a case, saying nothing, and then belatedly seeking recusal after becoming dissatisfied with the judge's rulings—a practice that is corrosive to the rule of law and specifically prohibited by Ninth Circuit precedent."). The district court did not clearly err in finding Defendants' Motion untimely (ER 7)—and the petition should be denied on this basis alone.

Defendants' authorities do not support a contrary result. (Pet. at 26-27.) In *Preston*, the government could point to no evidence to controvert an assertion of prior ignorance. 923 F.2d at 733 n.3. Here, Defendants provide self-controverting evidence—the Joint Declaration in which counsel admit they didn't "focus on" the August 16, 2017 letter, and scores of exhibits published before the case was

transferred to Judge Brnovich. Moreover, the indictment and the Senate Report reference years of state AGs' criticism of which Defendants were aware.

Listecki v. Off. Comm. of Unsecured Creditors is also off the mark: its recusal discussion was pure *dicta*. 780 F.3d 731, 750 (7th Cir. 2015) ("Because . . . the case shall be assigned to a new judge on remand, we need not reach the merits of the [recusal] motion."). Moreover, it ignored Seventh Circuit precedent holding a recusal motion untimely where—as here—it was filed after an adverse decision and based on widely-published information. *Guardian Pipeline*, 525 F.3d at 558.

2. The District Court's Spouse Has No Cognizable Interest in this Case Under 28 U.S.C. §§ 455(b)(4) and (b)(5)(iii).

28 U.S.C. §§ 455(b)(4) and (b)(5)(iii) require a judge to recuse where the judge knows that her spouse "has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding," or where the judge's spouse "[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." The district court found §§ 455(b)(4) and (b)(5)(iii) both "require an interest that is financial or proprietary in nature," and recusal is not mandated because AG Brnovich has no such interest in this case. (ER 8-9.) These findings were not clearly erroneous.

In the cases the district court and Defendants cite, § 455(b)(4) has been applied only to "financial or pecuniary interests of some variety." *Melendres v.*

Arpaio, 2009 WL 2132693, at *9 (D. Ariz. July 15, 2009) (*Melendres I*); *Melendres v. Arpaio*, 2015 WL 13173306, at *14 (D. Ariz. July 10, 2015) (*Melendres II*). The statute defines "financial interest" as a legal or equitable ownership interest, 28 U.S.C. § 455(d)(4), and courts have defined "other interest" as something less than ownership, yet still pecuniary, such as a contingent or expectancy interest. *In re Virginia Elec. & Power Co*., 539 F.2d 357, 367-68 (4th Cir. 1976). Accordingly, the Seventh Circuit has held that "interest" within § 455(b)(4) 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)." *Guardian Pipeline*, 525 F.3d at 557. Courts have similarly interpreted § 455(b)(5)(iii) to encompass only financial or commercial interests. *Id*.; *Melendres I*, 2009 WL 2132693, at *11.

While Defendants cite two out-of-Circuit cases for the proposition that "non-economic" interests may be covered by §§ 455(b)(4) and (b)(5)(iii), both cases involved a relative's interest in a law firm's "reputation and goodwill," including the ability "to attract new clients." (Pet. at 16-17, citing *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977), and *Potashnick v. Port City Const. Co*., 609 F.2d 1101, 1113 (5th Cir. 1980).) The district court did not clearly err by recognizing that the connection between a business's reputation and goodwill and the financial wellbeing of its owners is unmistakably "commercial." (ER 9.)

The district court also correctly found that AG Brnovich's positional or public-policy interests fall outside the ambit of § 455(b). *See Perry*, 630 F.3d at 912 (spouse's positions and those of the organization she leads "on numerous social issues, many of which come before the court" do not constitute an "interest" under § 455(b)(5)(iii)); *Melendres I*, 2009 WL 2132693, at *11 ("ideological, political, social and activist interests" are not "actionable" under § 455(b)). A contrary reading would require judges to recuse whenever a relative or an organization they head expresses positions "regarding the subject at issue." *Perry*, 630 F.3d at 912. The district court did not clearly err.

3. AG Brnovich Has No Non-Economic Interest that "Could Be Substantially Affected by the Outcome of this Proceeding."

But the Court need not even resolve the foregoing issue. Even assuming AG Brnovich has a cognizable "interest" under §§ 455(b)(4) and (b)(5)(iii), Defendants' arguments still fail because Defendants cannot show how any such interest "could be substantially affected by the outcome" of this case. (ER 9-10.) Defendants speculate that AG Brnovich's "credibility and political future" could somehow be affected by the outcome, and that he "has staked his own 'reputation and goodwill'" on this prosecution. (Pet at 18-19.) Yet any conceivable impact that the outcome of this case could have on AG Brnovich's reputation, goodwill or "political future" is too speculative, remote and contingent to require recusal under § 455(b).

To the extent the AG or his office have made comments about public-safety risks posed by Backpage, the case against that company is over. Backpage pleaded guilty and ceased operations on April 5, 2018. (*See* SER 3-17.) Nothing that happens in this case can affect Backpage's guilty plea and shut down.

The instant case involves six individual Defendants charged with various federal crimes, and it will rise or fall on the ability of the United States to prove each Defendant's guilt beyond a reasonable doubt. AG Brnovich has no direct or indirect stake in whether any Defendant is convicted or acquitted. Rather, as the district court correctly found, the impact of this case on any reputational or goodwill interest of AG Brnovich "is highly speculative": "As AG Brnovich is not associated with any party in this case, did not aid in the investigation and is not prosecuting the case[,] the outcome of the case is exceptionally unlikely to affect his reputation." (ER 10.)

Applying well-settled law, the court correctly recognized at ER 10 that where—as here—"'an interest is not direct, but is remote, contingent or speculative, it is not the kind of interest which reasonably brings into question a judge's partiality.'" *Nachshin*, 663 F.3d at 1042 (quoting *Sensley v. Albritton*, 385 F.3d 591, 600 (5th Cir. 2004)); *see also*, *e.g.*, *In re Vazquez-Botet*, 464 F.3d 54, 58 (1st Cir. 2006) (denying mandamus where the alleged interest of the judge's wife was "'too remote, speculative, and contingent'"); *Rubashkin v. United States*, 2016 WL

237119, at *30 (N.D. Iowa Jan. 20, 2016) (collecting cases). This is miles away from a "clear error" of law.

4. The District Court Properly Rejected Defendants' 28 U.S.C. § 455(a) Assertions.

a. Defendants Cannot Repackage Their § 455(b) Claims Under § 455(a).

The § 455(a) ruling can be upheld for a threshold reason raised by the United States but not addressed by the district court: If a provision of § 455(b) provides a potential ground for disqualification, a judge cannot be disqualified on that ground under § 455(a). (SER 64); *Liteky v. United States*, 510 U.S. 540, 552-53 (1994). Defendants' § 455(a) assertions are based on the judge's spousal relationship. Because Defendants have failed to show the judge's spouse has an interest under § 455(b) that could be substantially affected by the outcome of this case, Defendants' § 455(a) claim—which is based on the same facts and relationship—should be denied. *Perry*, 630 F.3d at 915; *Baker v. Hostetler LLP v. U.S. Dep't of Commerce*, 471 F.3d 1355, 1357-58 (D.C. Cir. 2006); *Rubashkin*, 2016 WL 237119, at *32.

b. The Premise of Defendant's § 455(a) Claim Is Obsolete.

Even ignoring the effect of § 455(b), Defendants' Motion failed to establish that a reasonable person fully informed of the facts and law would reasonably question the district court's impartiality based on her marriage. As Judge Brnovich recognized, courts apply an "objective" standard to § 455(a) motions. (ER 10-11);

United States v. Holland, 519 F.3d 909, 913 (9th Cir. 2008). This standard "requires recusal if a reasonable third-party observer would perceive that there is a 'significant risk' that the judge will . . . resolve the case on a basis other than the merits." *Holland*, 519 F.3d at 913. The reasonable observer is not a "hypersensitive or unduly suspicious person," *Clemens*, 428 F.3d at 1178-79, nor "a 'partly informed man-in-the-street,' but rather someone who 'understand[s] all the relevant facts' and has examined the record and law." *Holland*, 519 F.3d at 914.

The district court did not clearly err because the premise of Defendants' § 455(a) claim is obsolete: courts now resoundingly reject the notion that a judge must recuse under § 455(a) because her spouse has expressed views or taken positions concerning subject matter that may come before the court. *See, e.g.*, *Perry*, 630 F.3d at 910-15 (Judge Reinhardt declined to recuse from appeal of an order finding unconstitutional California's voter-enacted constitutional amendment barring same-sex marriage, where his spouse had taken prominent positions in favor of same-sex marriage as executive director of the American Civil Liberties Union of Southern California (ACLU/SC), and her organization signed two amicus briefs and represented an unsuccessful intervenor in the district court action); *Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1241 (10th Cir. 2020) ("[i]n present-day society we do not treat a married couple as single-minded on public issues"; denying recusal); *National Abortion Fed. v. Ctr. for Med.*

Progress, 257 F. Supp. 3d 1084, 1089 (N.D. Cal. 2017) (spouse's pro-choice Facebook posts did not warrant recusal), *mandamus denied*, 9th Cir. Case No. 17-73313 (DktEntry 17); *Akins v. Knight*, 2016 WL 127594, at *3 (W.D. Mo. Jan. 11, 2016) (husband "is an independent person . . . [whose] views are his own"; denying recusal based on spouse's public commentary).

In *Perry*, for example, Judge Reinhardt denied a motion to recuse based on his marriage to the ACLU/SC's executive director, after she and the organization she led had taken public positions on the issue pending before him. Judge Reinhardt found the motion was based on "an outmoded conception of the relationship between spouses" that no longer tracks the "the realities of modern marriage"—in which each member may pursue an independent and successful career without being "judged in any way by the deeds or position in life" of their spouse:

> [T]his reflects the status of the law generally, as well as the law of recusal, regardless of whether the spouse or the judge is the male or the female. . . .
>
> In 2011, my wife and I share many fundamental interests by virtue of our marriage, but her views regarding issues of public significance are her own, and cannot be imputed to me, no matter how prominently she expresses them. It is her view, and I agree, that she has the right to perform her professional duties without regard to whatever my views may be, and that I should do the same without regard to hers. Because my wife is an independent woman, I cannot accept Proponents' position that my impartiality might reasonably be questioned under § 455(a) because of her opinions or the views of the organization she heads.

Perry, 630 F.3d at 911-12. Spouses often disagree about all kinds of matters—and one's views and positions cannot be automatically imputed to a spouse. *Id*. at 912 n.3 (citing Mary Matalin and James Carville, *All's Fair: Love, War, and Running for President* 63 (Paperback ed. 1995)).

Defendants' Motion was likewise based on "an outmoded conception" of the law of recusal. The Motion's premise is that reasonable people might reasonably question Judge Brnovich's impartiality because *her husband* has taken a public stance against human trafficking, criticized Backpage in a petition to Congress in 2017, and heads an office that has published public safety information about human trafficking. *Perry* and the other decisions cited above reject that proposition.

Defendants' attempts to distinguish *Perry* are unavailing. (*See* Pet. at 23-24.) First, *Perry* is not limited to appeals, constitutional law or social issues; rather, Judge Reinhardt discussed "the status of the law generally, as well as the law of recusal." *Perry*, 630 F.3d at 911. Second, the purported conflict in *Perry* was sharper than any asserted here. Unlike AG Brnovich, who is not involved in any aspect of this case, Judge Reinhardt's spouse led an organization that had joined two amicus briefs and an unsuccessful motion to intervene in the underlying case—yet that was not enough to warrant recusal. *Id*. at 913-14.

Third, while Defendants assert *Perry* "appears to be of no force or effect" (Pet. at 24), a Westlaw cite check (on December 21, 2020) shows the decision has no reported "negative treatment" and has been cited favorably in 30 subsequent cases.

National Abortion Fed. further supports the district court's analysis. In that case, anti-abortion activists sought recusal based on the judge's spouse's Facebook statements and "likes" expressing support for abortion rights. Denying recusal, the court wrote: "[T]he premise of defendants' argument is the faulty and anachronistic assumption that a wife's communicative activity necessarily represents the views of, or should be attributed to, her husband." 257 F. Supp. 3d at 1090. "No thoughtful or well-informed person would simply assume that one spouse's views should always be ascribed or attributed to the other in the absence of an express disclaimer." *Id*. Judge Orrick ruled that the defendants had failed to "identif[y] a single fact" to show "Mrs. Orrick's Facebook posts may in fact express Judge Orrick's views." *Id*.

Defendants have likewise not identified a single fact to show that AG Brnovich's statements express Judge Brnovich's views. Defendants note that the judge (before she was appointed to the federal bench in 2018) appeared with AG Brnovich in a campaign commercial in 2014 and a "Valentine's Day" local news story in 2016. (Pet. at 23.) Yet these promotional or puff pieces do not contain anything of substance: nowhere in these videos does Judge Brnovich state that she

agrees with her husband's public policy views or substantive positions on any topic. "Valentines' Day" emphasizes that both spouses have separate, independent careers.

Defendants' assertion that the district court "overlooked" *Melendres I* is similarly unavailing; indeed, the court explained why that case supports her analysis. (*Compare* Pet. at 24 *with* ER 11-13.) In a civil rights action alleging then-Sheriff Joe Arpaio and the Maricopa County Sheriff's Office (MCSO) targeted Latino-appearing motorists, the defendants moved to recuse Judge Murguia because her identical twin sister was the President and CEO of the National Council of La Raza (NCLR), a Latino civil rights organization. Judge Murguia found that NCLR had published several articles about the case before her, and those facts presented a "close call" warranting her recusal. *Melendres I*, 2009 WL 2132693, at *15.

As Judge Brnovich correctly found, the same facts are entirely absent here. (ER 11.) First, the NCLR articles personally insulted Sheriff Arpaio and impugned his honesty. *Melendres I*, 2009 WL 2132693, at *15. Defendants point to no similar invective by AG Brnovich or the AG's Office about any Defendants here. (ER 12.) Second, the NCLR articles addressed "the exact issues" before the court, including whether Sheriff Arpaio's deputies "violated the Fourth Amendment rights of detained immigration suspects by predicating traffic stops on 'physical appearance alone.'" *Id.* Here, AG Brnovich has not made any public comments about any

Defendants or this case, and he "has not addressed the viability of charges in this matter or the guilt or innocence of the Defendants." (ER 12.)

While Defendants assert "any informed reasonable person would interpret" the August 16, 2017 letter to Congress as "saying [Defendants] are guilty of the crimes now charged," including conspiracy (Pet. at 25), that letter was written nearly a year before this prosecution. It does not discuss the elements of conspiracy or other charges in this case, or any individual Defendant's guilt or innocence. The notion that AG Brnovich's signing on to that letter in 2017 somehow translates into commentary on charges that did not yet exist against Defendants who had not yet been named in a prosecution that had not yet commenced defies common sense.

Melendres I is inapposite for a third reason: a "prominent picture" of the court's identical twin appeared immediately adjacent to the NCLR articles, causing Judge Murguia to note "a reasonably well-informed and impartial observer might mistake the Court for her identical twin sister" when seeing the articles. *Melendres I*, 2009 WL 2132693, at *15 n.9. Here, Defendants' Motion attaches only two exhibits that identify any Defendants—both from third-party websites. (ER 225-64, Exs. 14-15.) One truthfully refers to the indictment and reproduces its first page. (ER 225-62.) The other is a news blog item that requires some effort to find. (ER 263-64.) It is not published by the organization that the judge's spouse heads, the judge's spouse's picture does not appear anywhere near it, and no reasonable

observer could be confused about whether the judge and/or her husband had authored or published it. Moreover, a thoughtful, well-informed, reasonable person would not reasonably conclude that AG Brnovich has adopted a blanket endorsement of every blog item that could conceivably find its way onto any part of any webpage associated with any of these third-parties. Nor would they reasonably conclude that the views expressed in all such items are automatically those of the AG's *spouse*.

Defendants' remaining arguments are unavailing. For example, Defendants assert that they will need to address in voir dire whether prospective jurors have seen AG Brnovich's statements about Backpage or about organizations with which some of the government's witnesses are affiliated. (Pet. at 21-22.) These concerns—raised for the first time in the Petition—seem particularly remote if Defendants' assertion that *they* had no idea of any purported connection between AG Brnovich and Backpage until 18 months after the case had been transferred to Judge Brnovich is to be believed. (Pet. at 3-4.) If this connection wasn't within defense counsels' understanding, the odds are miniscule that any potential jurors would be endowed with such knowledge. Further, the parties provided the district court with a proposed jury questionnaire on June 26, 2020. If any prospective jurors are aware of any of publications identified by Defendants, they will provide answers that indicate as much. (*See, e.g.*, SER 76 ("Have you, any members of your family, or close friends

ever . . . read, written, discussed . . . anything concerning . . . Prostitution[;] Sex trafficking[;]; Human trafficking[;] Child exploitation.").) If a prospective juror answers in the affirmative, Defendants can follow up with more tailored questions if needed.

Defendants also argue they will seek to exclude testimony from witnesses "associated" with "two organizations" a webinar presenter characterized as "trustworthy"—ASU STIR and the Polaris Project. (Pet. at 22; *see* Part V.B.3, *supra*.) Despite claiming that AG Brnovich has "publicly . . . vouch[ed] for the prosecution's witnesses" (Pet. at 24), Defendants do not point to any evidence showing that AG Brnovich has vouched for any actual witnesses who are "associated" with these two organizations, commented on testimony these individual witnesses are expected to provide, or otherwise expressed any views about them. The court correctly found these "connections are far too attenuated for a reasonable person to question the Court's impartiality in the instant matter." (ER 13.)

5. The District Court Properly Struck the Expert Declaration.

Exhibit A to Defendants' Reply in Support of the Motion for Recusal consisted of a second reply brief signed by a retired judge retained by Defendants. (ER 13.) The "declaration" identified the legal test for recusal under § 455(a), attempted to distinguish cases cited by the United States, and argued about how §§ 455(a) and (b) apply to the facts of this case. (ER 343-49 ¶¶13-29.) The district

court's rules limited Defendants to an 11-page reply. LRCiv 7.2(e)(2). The court did not clearly err by striking the declaration as an additional, unauthorized 10-page reply. *See E.E.O.C. v. Creative Networks, LLC and Res-Care, Inc.*, 2008 WL 5225807, at *3 (D. Ariz. Dec. 15, 2008) (striking additional legal argument); *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 69 (S.D.N.Y. 2001) (second reply disguised as expert declaration is impermissible).

The court's alternative finding that the declaration constituted inadmissible expert opinion on a pure question of law was not clearly erroneous. (ER 13.) In *Melendres II*, Judge Snow rejected, as inadmissible legal opinion, the expert declarations of two law school professors, writing:

> The law of this and every Circuit is that while an expert may provide an opinion to help the jury or judge understand a particular fact, the expert is not permitted to give an opinion as to his legal conclusion. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004); *see also* Fed. R. Evid. 702(a) (requiring that expert opinion evidence "help the trier of fact to understand the evidence or to determine a fact in issue"). The question presented on the recusal motion is whether 28 U.S.C. § 455 requires this Court to disqualify itself. This decision is solely a question of law. *See Jefferson Cnty. v. Acker*, 92 F.3d 1561, 1581 (11th Cir. 1996), *vacated on other grounds*, 520 U.S. 1261 (1997) ("Whether a judge is disqualified, that is, must not take part in deciding a case, is a question of law."); *In re City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984) (same).

2015 WL 13173306, at *9. Because both declarations only "purport[ed] to offer interpretations and analyses of § 455 and express the professors' opinions on whether the Court must withdraw from this case," Judge Snow held "they are not

appropriate for the Court to consider in deciding whether its recusal is appropriate." *Id*. *Accord In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d at 65-66 (citing cases from every Circuit). Here, the reply declaration involved nothing more than interpreting 28 U.S.C. § 455 and applying it to facts the declarant appeared to take as given. (ER 342-43 ¶ 11.) The court did not clearly err by finding it inadmissible.

The district court also did not clearly err in finding the declaration untimely. The rules do not contemplate reply declarations, *see* D. Ariz. LRCiv. 7.2(c) and Fed. R. Civ. P. 6(c)(2), and the court "will not consider affidavits submitted for the first time with [a] reply memorandum." *Rodrigues v. Ryan*, 2017 WL 5068468, at *4 (D. Ariz. Nov. 3, 2017).

B. Defendants Cannot Establish the Remaining Bauman Factors.

None of the other *Bauman* factors supports mandamus relief. Regarding the first two—the availability of a direct appeal and prejudice not correctable on a direct appeal—this Court routinely considers recusal orders on direct appeal. *See*, *e.g.*, *Konarski v. City of Tucson*, 716 F. App'x 609, 611 (9th Cir. 2017); *O'Connor v. State of Nev.*, 27 F.3d 357, 363-64 (9th Cir. 1994); *United States v. Conforte*, 624 F.2d 869, 878 (9th Cir. 1980). Except in cases with truly extraordinary circumstances (such as where direct review is procedurally foreclosed), the Court has "held that a judge's decision not to disqualify his or her self 'cannot be appealed until a direct appeal is taken from a final decision adverse to the moving party.'" *Thompson v.*

Commr. of Internal Revenue, 742 F. App'x 316, 317 (9th Cir. 2018) (quoting *In re Horton*, 621 F.2d 968, 970 (9th Cir. 1980).

Defendants cite a single out-of-Circuit case for the proposition that mandamus is "liberal[ly]" allowed to review disqualification motions (Pet. at 15); yet that decision—which upheld the *denial* of a recusal motion—recognized that in "routine cases in which a party challenges the judge's refusal to recuse himself, mandamus will be denied." *Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710, 712, 717 (7th Cir. 1986). Defendants also suggest that pretrial seizures have hindered their defense (Pet. at 12), but they have never filed a *Monsanto* motion or otherwise demonstrated a genuine need to use seized funds to pay for counsel. *United States v. Unimex*, 991 F.2d 546, 551 (9th Cir. 1993).

As to the fourth *Bauman* factor, Defendants identify no "oft-repeated error." (Pet. at 30.) Nor do they locate any "new or important problems, or issues of law of first impression" to satisfy the fifth factor. This Court need not resolve the only issue of possible first impression Defendants identify—whether AG Brnovich has a "non-economic interest" under § 455(b) (Pet. at 30)—because Defendants cannot show that any such interest "could be significantly affected by the outcome" under well-established precedent. (Part VI.A.3, *supra*.)

VII. CONCLUSION

The petition for writ of mandamus should be denied.

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VIII. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases pending.

IX. CERTIFICATE OF COMPLIANCE

I hereby certify that this answer complies with the type-volume limitations of Circuit Rule 21-2(c) because it contains 8,374 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word-counting feature of Microsoft Word, which when divided by 280, as provided by Circuit Rule 32-3(2), yields a page count less than or equal to 30.

This brief complies with the typeface requirements Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman 14-point font.

December 22, 2020
Date

s/ Peter S. Kozinets
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X. CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2020, I electronically filed the Answer of Real Party in Interest with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Peter S. Kozinets
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