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United States of America,

Plaintiff,

vs.

Michael Lacey, *et al.*,

Defendants.

NO. CR-18-00422-PHX-SMB

**DEFENDANTS' PROPOSED
PRELIMINARY JURY INSTRUCTION**

(Oral argument requested)

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1 On August 19, 2021, the Court circulated proposed preliminary jury
2 instructions. (See Aug. 19, 2021 Proposed Preliminary Jury Instructions, attached hereto as
3 Exhibit A.) As discussed at the August 20, 2021 hearing, the Court’s instructions did not
4 include any instruction concerning the application of the First Amendment to this case in
5 contravention of fundamental First Amendment law. Preliminary instructions are necessary
6 because First Amendment presumptive protection is as critical as the presumption of
7 innocence: it exists unless the government can prove otherwise. The government’s objections
8 to this cannot assume the very conclusion it must prove at trial. Defense counsel respectfully
9 requests inclusion of the following Proposed Preliminary Jury Instructions:

10
11 **DEFENSE PROPOSED PRELIMINARY INSTRUCTION NO. 1**

12 All speech is presumed to be protected under the First Amendment of the United
13 States Constitution unless the government establishes otherwise. The speech at issue in this
14 case – advertisements – are legally protected speech under the First Amendment.

15 **Authorities:**

16 *See Bursley v. United States*, 446 F.2d 1059, 1082 (1972) (“All speech, press, and associational
17 relationships are presumptively protected by the First Amendment; the burden rests on the
18 Government to establish that the particular expressions or relationships are outside its
19 reach.”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 561,
20 (1980) (“The First Amendment . . . protects commercial speech from unwarranted
21 governmental regulation. . . . Even when advertising communicates only an incomplete
22 version of the relevant facts, the First Amendment presumes that some accurate information
23 is better than no information at all.”); *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997) (“[O]ur
24 cases provide no basis for qualifying the level of First Amendment scrutiny that should be
25 applied to [the Internet].”).

1 **DEFENSE PROPOSED PRELIMINARY INSTRUCTION NO. 2**

2 Advertisements for escort services, strippers, massage services, dominatrix, and dating
3 are presumptively legal and constitutionally protected speech, unless the government proves
4 otherwise, because escorting, stripping, providing massage or dominatrix services, and dating
5 all are legal activities.

6 **Authorities:**

7
8 *See Dart v. Craigslist, Inc.*, 665 F.Supp.2d 961, 968 (N.D. Ill.2009) (Sheriff Dart “is simply wrong
9 when he insists that [craigslist’s adult services category and related subcategories] are all
10 synonyms for illegal sexual services;” craigslist’s “adult services” section “is not unlawful in
11 itself nor does it necessarily call for unlawful content”); *Backpage.com, LLC v. Dart*, 807 F.3d
12 229, 234 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 46 (2016) (rejecting sheriff’s presumption that
13 ads on Backpage.com were illegal: Backpage.com was “an avenue of expression of ideas and
14 opinions” protected by the First Amendment, including its “classified ads for ‘adult’ service;”
15 “Fetishism? Phone sex? Performances by striptease artists? (Vulgar is not violent.) One ad in
16 the category ‘dom & fetish’ is for the services of a ‘professional dominatrix’—a woman who
17 is paid to whip or otherwise humiliate a customer in order to arouse him sexually. It’s not
18 obvious that such conduct endangers women or children or violates any laws, including laws
19 against prostitution. The district judge remarked ‘that the majority of the advertisements [in
20 Backpage’s adult section] are for sex’—but a majority is not all, and not all advertisements for
21 sex are advertisements for illegal sex.”) (internal citations omitted); *Backpage.com, LLC v.*
22 *McKenna*, 881 F. Supp. 2d 1262, 1281-82 (W.D. Wash. 2012) (rejecting similar presumption of
23 state AG defending law targeting Backpage and noting the “third-party publication of offers
24 to engage in illegal transactions does not fall within [the] ‘welldefined and narrowly limited
25 classes of speech’ that fall outside of First Amendment protection.” (quoting *Chaplinsky v. New*
26 *Hampshire*, 315 U.S. 568, 571-72 (1942)); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 833-
27 34 (M.D. Tenn. 2013) (rejecting state’s argument that escort ads on Backpage.com were
28 unprotected speech); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, at *9-11 (D.N.J. Aug.

20, 2013) (same); *M.A. ex rel. P.K v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1049-50 (E.D. Mo. 2011) (rejecting similar presumption in dismissing plaintiff's civil claims based on 18 U.S.C. §§ 2, 1595, and 2255); *People v Ferrer*, 2016 WL 7237305, at *9 (Cal. Super. Ct. Dec. 9, 2016) (dismissing state's pimping charges against Larkin and Lacey; noting that the only "whiff of illegality" in the AG's complaint improperly "require[ed] the presumption that illegal content was contained in the ads," yet the website's actions in posting the ads "would not be illegal").

CONCLUSION

For all these reasons, this Court should read the proposed preliminary instructions.

RESPECTFULLY SUBMITTED this 26th day of August, 2021,

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Pursuant to the District's Electronic Case Filing Administrative Policies and Procedures Manual (Oct. 2020) § II (C) (3), Erin E. McCampbell hereby attests that all other signatories listed, and on whose behalf this filing is submitted, concur in the filing's content and have authorized its filing.

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