

1 Thomas H. Bienert, Jr. (*admitted pro hac vice*)
tbienert@bklwlaw.com
2 Whitney Z. Bernstein (*admitted pro hac vice*)
wbernstein@bklwlaw.com
3 BIENERT KATZMAN LITTRELL WILLIAMS LLP
4 903 Calle Amanecer, Suite 350
San Clemente, CA 92673
5 Telephone: (949) 369-3700
Facsimile: (949) 369-3701
6 *Attorneys for James Larkin*

7 Paul J. Cambria, Jr. (*admitted pro hac vice*)
pcambria@lglaw.com
8 Erin McCampbell (*admitted pro hac vice*)
emccampbell@lglaw.com
9 LIPSITZ GREEN SCIME CAMBRIA LLP
10 42 Delaware Avenue, Suite 120
Buffalo, New York 14202
11 Telephone: (716) 849-1333
12 Facsimile: (716) 855-1580
13 *Attorneys for Michael Lacey*

14 [Additional counsel listed on next page]

15 **UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**

18 United States of America,

19 Plaintiff,

20 vs.

21 Michael Lacey, et al.,

22 Defendants.

CASE NO. 2:18-cr-00422-004-PHX-DJH

**DEFENDANTS' JOINT MOTION
REQUESTING STATUS
CONFERENCE**

Assigned to Hon. Diane J. Humetewa

Trial Date: February 9, 2022

1 Gary S. Lincenberg (*admitted pro hac vice*)
glicenberg@birdmarella.com
2 Ariel A. Neuman (*admitted pro hac vice*)
aneuman@birdmarella.com
3 Gopi K. Panchapakesan (*admitted pro hac vice*)
gpanchapakesan@birdmarella.com
4 BIRD, MARELLA, BOXER, WOLPERT, NESSIM,
5 DROOKS, LINCENBERG & RHOW, P.C.
1875 Century Park East, 23rd Floor
6 Los Angeles, California 90067-2561
7 Telephone: (310) 201-2100
Facsimile: (310) 201-2110
8 *Attorneys for John Brunst*

9 Bruce Feder (AZ Bar No. 004832)
bf@federlawpa.com
10 FEDER LAW OFFICE, P.A.
2930 E. Camelback Road, Suite 160
11 Phoenix, Arizona 85016
12 Telephone: (602) 257-0135
13 *Attorney for Scott Spear*

14 David Eisenberg (AZ Bar No. 017218)
david@deisenbergplc.com
15 DAVID EISENBERG PLC
3550 N. Central Ave., Suite 1155
16 Phoenix, Arizona 85012
17 Telephone: (602) 237-5076
Facsimile: (602) 314-6273
18 *Attorney for Andrew Padilla*

19 Joy Malby Bertrand (AZ Bar No. 024181)
joy.bertrand@gmail.com
20 JOY BERTRAND ESQ LLC
P.O. Box 2734
21 Scottsdale, Arizona 85252
22 Telephone: (602)374-5321
Facsimile: (480)361-4694
23 *Attorney for Joye Vaught*

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1 Defendants Lacey, Larkin, Spear, Brunst, Padilla, and Vaught (collectively,
2 “Defendants”) hereby request that the Court set a status conference at the Court’s earliest
3 convenience, prior to any hearing on pending substantive motions, and preferably whereby out
4 of town counsel have the option of participating by Zoom. The government does not oppose
5 Defendants’ request for a status conference.

6 Defendants request a status conference so that the Court can address the following
7 matters:

8 **1) Inquiry regarding potential appearance of lack of impartiality**

9 As this Court is aware, three judges have recused themselves from this case (for
10 undisclosed reasons, with two recusing after presiding for a significant amount of time). With
11 respect to the immediate past judge, Defendants moved for recusal over a year ago based upon
12 Attorney General Brnovich’s adversity to Backpage.com (Dkt. 1059). In denying Defendants’
13 motion for recusal at that time, Judge Brnovich criticized Defendants for not raising the issue
14 earlier. Because Defendants are aware of some facts that could cause a reasonable person with
15 knowledge of the facts to conclude that Your Honor’s impartiality might reasonably be
16 questioned, Defendants request a status conference to alert the Court in a timely manner.¹

17 Defendants are aware that Your Honor held at least one press conference with various
18 organizations to raise awareness of human trafficking, some of which organization may be
19 affiliated with witnesses on the government’s witness list. Defendants are also aware of Your
20 Honor’s close personal and professional connection with the late Senator John McCain and his
21 wife, Cindy McCain, as well as Your Honor’s significant support for organizations associated
22 with the McCains, including financial contributions to the McCain Institute. The McCains and
23

24 ¹ See *In re Bernard*, 31 F.3d 842, 847 (9th Cir. 1994) (“Counsel for a party who believes a
25 judge’s impartiality is reasonably subject to question has not only a professional duty to his client
26 to raise the matter, but an independent responsibility as an officer of the court. Judges are not
27 omniscient and, despite all safeguards, may overlook a conflict of interest. A lawyer who
28 reasonably believes that the judge before whom he is appearing should not sit must raise the
issue so it may be confronted and put to rest. Any other course would risk undermining public
confidence in our judicial system.”).

1 the McCain Institute have been outspoken critics of Backpage.com² and a driving force behind
2 political efforts to shut down the site. For example:

- 3 • On January 10, 2017, the McCain Institute posted the following message to its
4 website: “The McCain Institute is pleased to share the report of the Senate
5 Permanent Subcommittee on Investigations³ entitled: Backpage.com’s Knowing
6 Facilitation of Online Sex Trafficking. It is the culmination of almost two years
7 of investigation and highlights the reprehensible practice of advertising and
8 selling children online for sex by backpage.com. Hiding behind the
9 Communications Decency Act, backpage.com has caused immeasurable harm,
10 ruined lives, and destroyed families, while profiting handsomely. By using “strip
11 terms from ad” filters, they knowingly advertised underage victims for sale for
12 sex. Mrs. McCain and the McCain Institute have diligently focused attention on
13 the need to shut down backpage.com’s facilitation of sex trafficking and are
14 pleased that the attached report and January 10, 2017, Senate hearing have
15 succeeded.”
- 16 • Following the issuance of the indictment in this case, in connection with an
17 azcentral.com article entitled, “Cindy and John McCain laud Backpage seizure,”
18 Cindy McCain was quoted as saying that the seizure of Backpage means “the
19 federal government means business now.” Former Senator John McCain
20 released a statement that read: “The seizure of the malicious sex marketplace
21 Backpage.com marks an important step forward in the fight against human
22 trafficking.”
- 23 • On January 9, 2020, the McCain Institute posted on Twitter the following
24 statement from Cindy McCain: “We shut down the biggest perpetrator of all,
25

26 ² The McCain Institute is also associated with at least one of the government’s trial
27 witnesses.

28 ³ Senator McCain was a prominent member of the committee.

1 that was an organization called backpage.” On the McCain Institute’s Twitter
2 page, there are nearly 40 tweets regarding Backpage dating back to May 20, 2013.

- 3 • On August 11, 2017, Cindy McCain authored an op-ed for azcentral.com entitled,
4 “My Turn: Why is it OK to sell Kids on websites like Backpage?”
- 5 • On September 27, 2017, in a hearing on “Human Trafficking of American Indian
6 and Alaska Natives” before the Senate Committee on Indian Affairs, Cindy
7 McCain provided a statement that read, in part, “[b]ecause of their exotic beauty,
8 Native girls are also sold for a very high price on websites like backpage.com.
9 Backpage has been found to be complicit in writing ads that vaguely attempt to
10 disguise the selling of these precious children for sex. In other words, Backpage
11 *knowingly* promotes the abuse of our beautiful Native American children along
12 with other ethnicities.” (emphasis in original).
- 13 • During the same hearing, Senator John McCain stated that human trafficking on
14 reservations is “rampant” and that “websites like Backpage.com” are “knowingly
15 exploiting Native Americans and Alaska natives.”

16 Further, Defendants Lacey and Larkin, through their work at the *Phoenix New Times*, have
17 been highly critical of the McCains. For example, in 1989, they published an article entitled,
18 “McCain: the Most Reprehensible of the Keating Five,” criticizing Senator McCain’s
19 involvement in the Keating Five scandal. Then, in 1994, they published an article entitled,
20 “Opiate for the Mrs.,” regarding Cindy McCain’s alleged addiction to prescription painkillers.

21 Finally, there is an acrimonious history between Defendants and Sheriff Arpaio that
22 relates to the *Phoenix New Times* and resulted in Defendants Lacey and Larkin’s false arrest, and
23 consequent lawsuit against Sheriff Arpaio and sizeable settlement with Maricopa County. As
24 Your Honor served in leadership positions in the law enforcement community during Sheriff
25 Arpaio’s tenure, Defendants inquire as to whether the Court had any communications relating
26 to investigations or arrests of any Defendants that could influence the appearance of partiality.

27 In light of the foregoing, Defendants must raise and address the issue of whether the
28 Court’s partiality may reasonably be questioned. *See* 18 U.S.C. § 455. These issues should be

1 addressed before the Court rules on any substantive motions.

2 **2) Adjudication of outstanding motions and other issues**

3 Defendants request that the court set hearing dates for the following pending motions:

- 4 • Defendants' Renewed Motion to Dismiss for Invasion of the Lawyer-Client
5 Privilege (Dkt. 1238).
- 6 • Defendants' Motion to Compel Government to Comply with its *Brady* and *Giglio*
7 Obligations (Dkt. 1281).
- 8 • Defendants' Motion to Partially Vacate Seizure Warrants and Release Funds to
9 Defendants (Dkt. 1366).
- 10 • Consideration of prior rulings (*i.e.* on motions *in limine*) in light of developments
11 at the first trial.
- 12 • Jury instruction conference and consideration of a First Amendment preliminary
13 jury instruction (particularly in light of the evidence the government presented
14 during the prior trial).

15 **3) Jury Questionnaire Schedule**

16 Defendants request that the Court address the scheduling of mailing out the jury
17 questionnaires, distribution of completed questionnaires to counsel with sufficient time to
18 review, and a hearing to review hardships. Defendants further request that the Court address
19 proposed changes to the questionnaire submitted by the parties. Dkts. 1348, 1349, 1352, 1360,
20 1365.

21 **4) Trial Schedule**

22 Should this case proceed to trial as currently scheduled, Defendants seek to clarify
23 whether (i) the Court sits for trial Tuesday through Friday of each week, and (ii) defense counsel
24 Gary Lincenberg's pre-paid travel on March 25-30, 2022, which was accommodated in the trial
25 schedule Judge Brnovich's courtroom deputy clerk previously circulated, will be accommodated
26 in this Court's schedule as well.

27 To discuss all of the foregoing issues, Defendants respectfully request a status
28 conference before the Court.

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DATED: November 4, 2021

Respectfully submitted,

Thomas H. Bienert Jr.
Whitney Z. Bernstein
Bienert Katzman Littrell Williams LLP

By: /s/ Thomas H. Bienert, Jr.
 Thomas H. Bienert Jr.
 Attorneys for James Larkin

Pursuant to the District's Electronic Case Filing Administrative Policies and Procedures Manual (October 2020) § II (C) (3), Thomas H. Bienert, Jr. 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.

DATED: November 4, 2021

Paul J. Cambria
Erin McCampbell
Lipsitz Green Scime Cambria LLP

By: /s/ Paul J. Cambria
 Paul J. Cambria
 Attorneys for Michael Lacey

DATED: November 4, 2021

Gary S. Lincenberg
Ariel A. Neuman
Gopi K. Panchapakesan
Bird, Marella, Boxer, Wolpert, Nessim,
Drooks, Lincenberg & Rhow, P.C.

By: /s/ Gary S. Lincenberg
 Gary S. Lincenberg
 Attorneys for John Brunst

DATED: November 4, 2021

Feder Law Office, P.A.

By: /s/ Bruce S. Feder
 Bruce S. Feder
 Attorney for Scott Spear

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DATED: November 4, 2021

The Law Office of David Eisenberg, PLC

By: /s/ David Eisenberg
David Eisenberg
Attorney for Andrew Padilla

DATED: November 4, 2021

Joy Bertrand Esq. LLC

By: /s/ Joy Malby Bertrand
Joy Malby Bertrand
Attorney for Joye Vaught

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2021, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants who have entered their appearance as counsel of record.

/s/ Toni Thomas
Toni Thomas