UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22-10000

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL LACEY, ET AL.,

Defendants–Appellants.

On Interlocutory Appeal from an Order of the
United States District Court for the District of Arizona
D.C. No. 18-CR-00422-PHX-DJH
(Honorable Diane J. Humetewa)

APPELLANTS' OPENING BRIEF (REDACTED)

Thomas H. Bienert, Jr.
Whitney Z. Bernstein
BIENERT KATZMAN LITTRELL WILLIAMS, LLP
903 Calle Amanecer, Suite 350
San Clemente, CA 92673
Telephone: (949) 369-3700
Email: tbienert@bklwlaw.com
Email: wbernstein@bklwlaw.com
Attorneys for Defendant-Appellant James Larkin

Paul John Cambria, Jr.
Erin McCampbell Paris
LIPSITZ GREEN SCIME CAMBRIA LLP
42 Delaware Ave., Suite 300
Buffalo, NY 14202-3857
Telephone: (716) 849-1333
Email: pcambria@lglaw.com
Email: emccampbell@lglaw.com
Attorneys for Defendant-Appellant Michael Lacey

Additional Counsel Listed on Next Page

Bruce Feder
FEDER LAW OFFICE, P.A.
2930 E. Camelback Road, Suite 160
Phoenix, AZ 85016
Telephone: (602) 257-0135
Email: bf@federlawpa.com
Attorneys for Defendant-Appellant Scott Spear

Gary S. Lincenberg
Gopi K. Panchapakesan
BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS, LINCENBERG & RHOW P.C.
1875 Century Park East, Suite 2300
Los Angeles, CA 90067-2561
Telephone: (310) 201-2100
Email: glincenberg@birdmarella.com
Email: gkp@birdmarella.com
Attorneys for Defendant-Appellant John Brunst

David Eisenberg
DAVID EISENBERG PLC
3550 N. Central Ave., Suite 1155
Phoenix, Arizona 85012
Telephone: (602) 237-5076
david@deisenbergplc.com
Attorneys for Defendant-Appellant Andrew Padilla

Joy Malby Bertrand
JOY BERTRAND ESQ LLC
P.O. Box 2734
Scottsdale, Arizona 85252
Telephone: (602)374-5321
joy.bertrand@gmail.com
Attorneys for Defendant-Appellant Joye Vaught

TABLE OF CONTENTS

INTRODUCTION 1

JURISDICTIONAL STATEMENT 9

BAIL STATEMENT 9

ISSUES PRESENTED 9

STATEMENT OF THE CASE 10

I. Appellants' History As Publishers And Defenders Of Free Speech. 10

II. The Government's First Failed Attempt To Prosecute Backpage. 18

III. The Government's Renewed Attempt To Prosecute Backpage. 19

A. The Government Stakes Out The Three Tenets Of Its Case. 21

B. Shortly Before Trial, The Government Learned Its Case Would Fail. 23

1. The Government Learned That The Jury Would Hear Escort Services Are Legal. 23

2. The Government Finally Recognized The First Amendment Applied And Destroyed Its Theory Of The Case. 25

3. The Government Learned It Cannot Prove Specific Intent From Backpage's Publication of Adult-Oriented Ads. 28

C. The Government Sabotaged Its Trial By Repeatedly Injecting Highly-Prejudicial Issues And Evidence, In Violation Of The Trial Judge's Orders, To Provoke The Defense Into Moving For Mistrial. 30

1. The Government Knew How To Cause A Mistrial. 31

2. The Government Used Its Opening Argument To Provoke The First Mistrial Motion..... 32

3. The Government's First Witness Testified All Backpage Adult Ads Were Blatant Prostitution Ads. 33

4. The Government Intentionally And Repeatedly Violated Court Rulings..... 34

a. Prosecutors Solicited Testimony From J.S. About Child Sex-Trafficking..... 35

b. Prosecutors Solicited Testimony From Nacole Svendgard About Child Sex-Trafficking..... 38

c. The Defense Cross-Examination Of Agent Fichtner Eviscerated The Final Tenet Of The Government's Case. 38

d. The Government Shifted To Focus Exclusively On Child Sex-Trafficking. 40

D. The Trial Judge Declared A Mistrial. 45

E. The Motion Judge Denied Dismissal..... 47

F. Retrial Would Severely Prejudice Appellants. 52

IV. The Government's History Of Saying What It Must To Save Its Case Further Undermines The Claimed Lack Of Intent To Provoke The Mistrial. 53

SUMMARY OF THE ARGUMENT 55

STANDARD OF REVIEW 56

ARGUMENT 56

I. The Double Jeopardy Clause Bars Retrial When The Prosecution Intentionally Provoked The Mistrial. 56

II. The Motion Judge Erred In Denying The Motion. 59

III. The Motion Judge Abused Her Discretion In Denying A Hearing. 64

CONCLUSION 66

STATEMENT OF RELATED CASES 68

CERTIFICATE OF COMPLIANCE 69

TABLE OF AUTHORITIES

Cases Page(s)

Abney v. United States,
431 U.S. 651 (1977).....9

Art & Antique Dealers League of Am., Inc. v. Seggos,
394 F.Supp.3d 447 (S.D.N.Y. 2019) 28

Backpage.com v. Dart,
807 F.3d 229 (7th Cir. 2015) 16, 17

Backpage.com, LLC v. Cooper,
939 F.Supp.2d 805 (M.D. Tenn. 2013)..... 12, 15

Backpage.com, LLC v. Hoffman,
2013 WL 4502097 (D.N.J. Aug. 20, 2013) 16

Backpage.com, LLC v. McKenna,
881 F.Supp.2d 1262 (W.D. Wash. 2012) ..... passim

Berger v. United States,
295 U.S. 78 (1935).....1, 48

Bursey v. United States,
466 F.2d 1059 (9th Cir. 1972) 25, 30

Central Hudson Gas & Elec. Corp. v. Public Svc. Comm. of N.Y.,
447 U.S. 557 (1980)..... 26, 27

Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay,
868 F.3d 104 (2d Cir. 2017) 27

Chaplinsky v. State of New Hampshire,
315 U.S. 568 (1942).....15

Dart v. Craigslist,
665 F.Supp.2d 961 (N.D. Ill. 2009).....15

Doe ex rel. Roe v. Backpage.com, LLC,
104 F.Supp.3d 149 (D. Mass 2015) 24
Greater Philadelphia Chamber of Com. v. City of Philadelphia,
949 F.3d 116 (3d Cir. 2020) 27
IMDB.com Inc. v. Bacerra,
962 F.3d 1111 (9th Cir. 2020) 26
In re Aimster Copyright Litig.,
334 F.3d 643 (7th Cir. 2003) 15
Jefferson v. Department of Justice,
284 F.3d 172 47
Lacey v. Maricopa Cty.,
693 F.3d 896 (9th Cir. 2012) 10
Metro Lights, L.L.C. v. City of Los Angeles,
551 F.3d 898 (9th Cir. 2009) 27
Oregon v. Kennedy,
456 U.S. 667 (1982)..... 10, 57, 59, 64
People v. Katrinak,
136 Cal.App.3d 145 (1982) 24
Pittsburgh Press Co. v. Human Relations Comm'n,
413 U.S. 376 (1973)..... 25, 26
Pruett v. Harris Cty. Bail Bond Bd.,
499 F.3d 403 (5th Cir. 2007) 27
State of Arizona v. New Times, Inc.,
20 Ariz. App. 183 (Ariz. 1973).....10
Stephens v. Superintendent,
2008 WL 755278 (N.D.N.Y. Mar. 19, 2008) 47

United States v. Gaytan,
115 F.3d 737 (9th Cir. 1997) 56
United States v. Gibson Specialty, Co.,
507 F.2d 446 (9th Cir. 1974) 23
United States v. Martin,
561 F.2d 135 (8th Cir. 1977) 58
United States v. Padua,
2021 WL 5860653 (W.D.N.Y. Dec. 9, 2021) 58, 59
United States v. Rodriguez,
229 F.App'x 547 (9th Cir. 2007) 56, 66
United States v. Sterba,
22 F.Supp.2d 1333 (M.D. Fl. 1998) 58
United States v. Tateo,
377 U.S. 463 (1964).....58
United States v. Ulbricht,
31 F.Supp.3d 540 (S.D.N.Y. 2014) 24
United States v. Weems,
49 F.3d 528 (9th Cir. 1995) 56
United States v. Zone,
403 F.3d 1101 (9th Cir. 2005) 56
Valle Del Sol Inc. v. Whiting,
709 F.3d 808 (9th Cir. 2013) 27

Statutes

18 U.S.C. § 371 .....3, 20
18 U.S.C. § 1952 .....3, 20
18 U.S.C. § 1956 20

18 U.S.C. § 1957 20

28 U.S.C. § 1291 9

47 U.S.C. § 230 18

A.R.S. § 9-500.10 24

Rules

Federal Rule of Criminal Procedure Rule 16 55

INTRODUCTION

> I'm going to grant the motion for mistrial.
>
> I, at the beginning of this case, gave the government some leeway…Yet ***in the opening***, ***and with every witness thereafter***, it seems, the ***government has abused that leeway***.
>
> The government, as prosecutors, are ***held to a higher standard***, and ***their goal is not to win at any cost, but to win by the rules***, to see that justice is done.…
>
> [T]he cumulative effect of all of that is something that I can't overlook and won't overlook.

23-ER-4814-15 (emphasis added). The Honorable Susan M. Brnovich (the "Trial Judge") said those words when declaring a mistrial after finding that the government repeatedly injected highly-prejudicial, irrelevant evidence into the trial in violation of her clear orders.[1] Subsequently, Appellants moved for dismissal under the Double Jeopardy Clause, the denial of which is the subject of this appeal.

This appeal arises out of the prosecution of former owners and employees of a media conglomerate that, among many other things, formerly operated an Internet-based platform for third parties to create and post public content:

[1] The Trial Judge's remarks allude to the Supreme Court's decision in *Berger v. United States*, reversing a conviction based on "pronounced and persistent" prosecutorial misconduct with "a probable cumulative effect" that "cannot be disregarded as inconsequential." 295 U.S. 78, 88 (1935)("[A] prosecutor's "interest…in a criminal prosecution is not that it shall win a case, but that justice shall be done").

www.backpage.com ("Backpage"). Backpage allowed the public to post classified advertisements in a wide range of categories, such as furniture, household items, real estate sales, rentals, auto sales, and jobs, as well as in adult-oriented categories such as dating, strippers, massage services, and escort services — just as newspapers, yellow pages, and other media have published for decades. Over its fourteen-year history, Backpage published hundreds of millions of classified ads, the vast majority in non-adult categories.

For nearly two decades, adult-oriented classified advertising on the Internet has been a political lightning rod, resulting in significant political and social pressure on website operators to refuse to carry such advertising. The website www.craigslist.com capitulated to that pressure in 2010 and shut down its adult services section. Backpage, owned by a media conglomerate controlled by two First Amendment stalwarts (Appellants Michael Lacey and James Larkin), refused to do the same. Rather than censor lawful adult content like ads for dating, stripping, and escorts, Backpage instead sought to silence those misusing the website to propose illegal transactions. Accordingly, Backpage prohibited ads proposing illegal transactions and invested heavily in software and manpower to detect, review, and remove such content. Lacey and Larkin's dedication to First Amendment values, and refusal to censor lawful content, led to significant pressure to charge Backpage criminally with *something—anything*.

After years of investigating, including a federal investigation in the Western District of Washington ("WDWA") that did not result in prosecution and two failed prosecutions by a state "partnering" with the government, the government charged Appellants in this case with violating the Travel Act, 18 U.S.C. § 1952.[2] The government alleged Appellants intentionally facilitated business enterprises involved in misdemeanor prostitution offenses through Backpage's publication of fifty specific classified ads in its dating, massage services, and escort services categories.

This prosecution is based ***solely*** on Backpage ***publishing third-party speech***. Moreover, the government did not allege, nor intend to prove, that Appellants knew ***anything*** about the fifty ads, any of the people who posted the fifty ads, or any of the activities of those people (whether lawful or unlawful). The government also did not allege, nor intend to prove, that Appellants had any involvement whatsoever with the review or publication of the fifty specific ads. Rather, the government planned to argue that "anybody" could tell that most or all adult-oriented advertising on Backpage, even if facially lawful, related to prostitution—and forty-nine of the fifty charged ads did not propose illegal transactions on their face.[3] As "proof," the

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[2] The indictment also alleges money laundering offenses and a conspiracy charge (18 U.S.C. § 371) premised on the purported Travel Act violations.

[3] From the millions of adult-oriented ads that ran on the website during the many years the government investigated Backpage, the government was able to find

government proffered testimony from representatives of religious organizations, CNN, and other entities saying they "warned" Backpage that most of its adult-oriented ads related to unlawful activities. At trial, the government also would seek to layer its evidence with copious amounts of irrelevant, but emotionally-charged, testimony about heinous crimes with little connection, if any, to an ad on Backpage.[4]

Although prosecuting Appellants based on their purported involvement in ***publishing***, the government insisted the First Amendment did "not apply at all" to this case. 3-ER-399. Instead, for five years, the government pursued a prosecution based on patently incorrect beliefs that (1) escort services are illegal, so escort ads are facially unlawful speech unprotected by the First Amendment, (2) the First Amendment did not protect Backpage's publication of even facially lawful adult-oriented ads because "anyone" (including Appellants) could tell those ads "obviously" related to prostitution, and (3) a jury could find Appellants had the specific intent to promote businesses enterprises engaged in prostitution associated with the fifty charged ads from the mere fact that Backpage published the fifty ads (and others like them).

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just *one* ad proposing a sex for money transaction on the face of the ad. That ad violated the website's terms of service. The website's policy and practice *always* were to promptly delete any such ads. The government knew from its extensive investigation that this one ad was a singular aberration – and that it could not prove any of Appellants had any knowledge of the ad.

[4] *E.g.*, 4-ER-530-39.

Then, weeks before the trial commenced, and with no ability to adjust its case, the government learned the Trial Judge would prohibit the government from telling the jury that escort services were illegal and synonymous with prostitution. Further, the government learned the First Amendment would require the jury to presume that Backpage's publication of each adult-oriented ad was protected by the First Amendment, unless the ad ***necessarily*** proposed a facially unlawful transaction.

Realizing the Trial Judge's ruling and the First Amendment gutted its prosecution, the government needed to regroup and overhaul its case. Provoking a mistrial was the only way to get that opportunity, but the government had to avoid any appearance of seeking to provoke a mistrial. So the government chose, from the outset of the trial, to break the rules at every turn by repeatedly injecting irrelevant and highly-prejudicial issues and evidence into the trial. The seasoned prosecution team's constant violations of evidentiary rulings were no accident—mistrial was both government's goal and the necessary consequence of its repeated misconduct.[5]

[5] The government also knew a mistrial would grievously prejudice the defense, as the government had used civil seizures and forfeiture procedures to seize and restrain nearly all of Appellants' assets, including millions of dollars held in attorney trust accounts intended to fund Appellants' defenses. 15-ER-3149-3154. The government's aggressive tactics already had caused two Appellants to lose their chosen defense lawyers. A mistrial not only would let the government re-tool its case, but the government knew a mistrial might cause more Appellants to lose their chosen counsel and, in any event, would be costly and would seriously prejudice the defense.

As the Trial Judge ultimately ruled, the government's misconduct started "in the opening, and with every witness thereafter," until the mistrial was declared. 23-ER-4814.

Although the government had cause to provoke a mistrial from the outset of the trial, its need for a mistrial increased exponentially after the cross-examination of its first witness, a California law enforcement officer, whose factual admissions fatally undermined the government's case. During direct examination, the witness showed the jury hundreds of Backpage ads, testifying the ads all were blatant prostitution ads. Under cross-examination, however, the officer admitted he could not determine, just by looking, whether ***any*** of the ads pertained to prostitution, a critical admission contradicting the government's theory of the case. He further admitted that a wide range of lawful activities involve sex and money, but are not prostitution, and that he had never made a prostitution arrest based solely on the content of an ad posted to Backpage and did not know anyone who had.

The government used its next witness — a professional expert witness who regularly testifies for the government as a pediatrician specializing in treating victims of child sex-trafficking — to conclusively prompt a motion for a mistrial by poisoning the jury with inappropriate testimony regarding child sex-trafficking.

Following the oral declaration of mistrial, Appellants subsequently moved to dismiss with prejudice on double jeopardy grounds (the "Motion"). Nine days later,

the Trial Judge recused without explanation, after presiding over the case for nearly three years (and after denying a recusal motion the year before). The case was reassigned to the Honorable Diane J. Humetewa (the "Motion Judge"), the ***fourth*** judge to preside over the case. She had the unenviable position of stepping into a three-and-one-half-year-old case with over 1,300 docket entries, on the heels of a mistrial caused by government misconduct.

The Motion Judge denied the Motion, giving short shrift to the grave double jeopardy concerns presented by the government's misconduct and largely ignoring the findings made by the Trial Judge when granting the mistrial. The Motion Judge's finding that the prosecutors did not intend to provoke the mistrial cannot be squared with the Trial Judge's findings that the prosecutors repeatedly violated her orders, "in the opening, and with every witness thereafter," after repeatedly representing they would follow those orders but then immediately violating them. 23-ER-4814-15.

Critically, the Motion Judge also wrongly denied Appellants' request for an evidentiary hearing. She erroneously accepted, without challenge, the prosecutors' unsworn assurances that they had prepared their witnesses in accordance with the Trial Judge's evidentiary rulings. As the Trial Judge found, however, two of the prosecutors repeatedly ***solicited*** testimony on the prohibited topics, including immediately after being told not to and immediately after saying they would not do

so. The Trial Judge also found that one prosecutor interjected improper testimony by repeatedly weaving a witness' inadmissible testimony into his subsequent questions — "emphasiz[ing] the 105 days [she was trafficked] over, and over, and over again" (23-ER-4815), even though the Trial Judge's orders prohibited such details.

The prosecutors never justified (nor could they justify) repeatedly ignoring the Trial Judge's orders. They also never explained why their witnesses — including a professional expert witness who regularly testifies for the government — repeatedly interjected improper testimony, despite claiming they had properly prepared the witnesses. The Motion Judge did not reconcile or even address these inconsistencies in denying the Motion. An evidentiary hearing was the only way to square these glaring inconsistencies.

The government has never accepted even the slightest responsibility for its misconduct and the resulting mistrial.[6] Instead, it has deflected blame for the mistrial onto its witnesses and even the Trial Judge. If the protections afforded defendants under the Double Jeopardy Clause are to mean anything, this Court should order dismissal of this indictment with prejudice. Alternatively, this Court should vacate the order denying the Motion and remand, requiring the Motion Judge to provide

[6] Indeed, the government has gone so far as to move to dismiss this appeal on the grounds that it is "frivolous." Dkt. 2-1, p. 2.

appropriate deference to the Trial Judge's factual findings and instructing the Motion Judge to hold an evidentiary hearing to inquire into the prosecutors' intent.

JURISDICTIONAL STATEMENT

Appellants appeal from a December 29, 2021, order denying their Motion to Dismiss With Prejudice. 1-ER-3-19. Appellants timely filed their Notice of Appeal on January 3, 2022. 21-ER-4820-24. This Court has jurisdiction over the immediate appeal of the denial of the double jeopardy issue because the denial of a motion to dismiss on double jeopardy grounds constitutes a final decision under 28 U.S.C. § 1291. *Abney v. United States*, 431 U.S. 651, 662 (1977).

BAIL STATEMENT

Appellants are not in custody. 23-ER-4849[Dkts.18;19];4850-51[Dkts.30;31];4853-54[Dkts.65;66;84;93];4855[Dkt.109].

ISSUES PRESENTED

1. Given the Trial Judge's findings of pervasive prosecutorial misconduct at trial, did the Motion Judge err in finding the prosecutors engaged in no misconduct and had no intent to provoke Appellants' successful mistrial motion in denying the Motion?

2. Given the Trial Judge's findings that the prosecutors repeatedly solicited inadmissible and highly-prejudicial testimony, including after promising not to do so, did the Motion Judge abuse her discretion by accepting the prosecutors'

unsworn assurances to the contrary and denying Appellants the opportunity to test those avowals at an evidentiary hearing?

STATEMENT OF THE CASE[7]

I. Appellants' History As Publishers And Defenders Of Free Speech.

In 1970, Appellants Lacey and Larkin founded the *Phoenix New Times*, an alternative weekly newspaper. They published hard-hitting, often-controversial articles and editorials concerning people and issues of interest, even when doing so risked their livelihood and resulted in threats to their liberty. *See Lacey v. Maricopa Cty.*, 693 F.3d 896, 916 (9th Cir. 2012) (*en banc*) (reversing dismissal of suit over retaliatory middle-of-the-night arrests of Lacey and Larkin after publishing critical articles about Sheriff Joe Arpaio, recognizing "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out"); *Arizona v. New Times, Inc.*, 20 Ariz. App. 183, 184-85 (Ariz. 1973) (vacating criminal conviction for publishing abortion ad in violation of Arizona law; striking state statute criminalizing publishing abortion ads as unconstitutional). They expanded their journalism nationwide, acquiring sixteen other newspapers, including the iconic *Village Voice*.[8] With other co-owners,

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[7] Because this Court's double jeopardy review requires an objective analysis of the facts (*Oregon v. Kennedy*, 456 U.S. 667, 675 (1982)(plurality opinion)), much of Appellants' brief is devoted to providing this Court with the factual background.

[8] *E.g.*, https://en.wikipedia.org/wiki/Village_Voice_Media.

including Appellants John Brunst and Scott Spear, they operated the newspaper conglomerate under Village Voice Media Holdings ("VVMH").[9] During their operation of VVMH, the newspapers won over 3,800 journalism awards, including a Pulitzer Prize.[10] VVMH circulated its newspapers for free, earning revenue through the sale of classified advertising space located in the back pages of the newspapers.[11]

With the advent of the Internet, and the creation of classified advertising websites like www.craigslist.com, classified ad revenue for print media plummeted.[12] In response, VVMH created Backpage, which operated through a subsidiary.[13] Backpage allowed website users to create and post ads in a wide variety of categories. *Backpage.com, LLC v. McKenna*, 881 F.Supp.2d 1262, 1266 (W.D. Wash. 2012) ("Ads displayed on Backpage.com's website are categorized by state and city, then by topical category, such as local places, community, buy/sell/trade, automotive, musician, rentals, real estate, jobs, forums, dating, adult, and services.").

As Backpage grew into the second largest classified advertising website, it continually evolved its efforts to police the content of the ads its users posted. *Id.*

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9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

Backpage prohibited posting ads for illegal activities, including prostitution, in its rules governing use of the website,[14] and required users to affirm they would adhere to the Terms of Use before posting an ad. *Id*. Backpage prohibited minors from posting ads in its adult section and reported ads suspected to involve juveniles to the National Center for Missing and Exploited Children ("NCMEC"). *Id.* at 1266-67. Backpage included links to phone numbers and tip lines, so users could readily report the exploitation of children or human trafficking. *Id*. When law enforcement sought records for an investigation, Backpage provided near-immediate responses, garnering the appreciation of hundreds of local, state, and federal law enforcement officials, including former FBI Director Robert Mueller. *See Backpage.com, LLC v. Cooper*, 939 F.Supp.2d 805, 814 (M.D. Tenn. 2013).

Backpage also deleted an enormous volume of inappropriate ads from its website. *McKenna*, 881 F.Supp.2d at 1267 ("In April 2012, users posted more than

[14] Websites allowing the public to post content have rules concerning inappropriate content and struggle with how to enforce those rules when faced with millions or billions of user-generated posts. *E.g.*, Zoe Strowzewski, Newsweek, *Twitter Suspended 44K Accounts For Promoting Terrorism, Violent Orgs In First Half of 2021* (Jan. 25, 2022), available at: https://www.newsweek.com/twitter-suspended-44k-accounts-promoting-terrorism-violent-orgs-first-half-2021-1672868. The government's claim that Backpage's rules ***prohibiting*** the posting of ads for unlawful activities evidenced an intent to ***facilitate*** unlawful conduct are nonsensical and naïve, given how commonplace such rules are. E.*g.*, Facebook's Child Sexual Exploitation, Abuse and Nudity Policies, https://transparency.fb.com/policies/community-standards/child-sexual-exploitation-abuse-nudity/.

3.3 million ads on Backpage.com…[and] Backpage.com blocked, banned or removed more than 1 million user submissions and posts and referred approximately 400 posts to NCMEC."). Because of the volume of ads posted to the website, Backpage initially used software to automatically scan all incoming ads and to delete or block inappropriate content. *Id*. at 1266 ("Most posts are filtered through an automated system that scans content for approximately 26,000 'red-flag' terms, phrases, codes, email addresses, URLs and IP addresses."). Backpage's content-moderation department, supervised by Appellants Andrew Padilla and Joye Vaught, then "manually review[ed] 'nearly all content' submitted for posting to the adult and dating categories" "for illegal and other prohibited conduct prior to posting" and then reviewed the ads "a second time once they [we]re posted online." *Id*. These extensive efforts to keep unlawful content off the website explain why the government charged just ***one*** ad offering sex for money on the website, despite its multi-year investigation of Backpage and its claim that Backpage was a hub for prostitution.[15]

[15] With more than three million ads posted to Backpage.com each month, and more than one million ads being deleted or blocked, the fact that the government charged just one ad proposing a facially unlawful transaction is compelling evidence of an extraordinarily effective system for ***preventing*** publication of proposals of illegal transactions such as prostitution—not evidence of criminal *mens rea* or specific intent to facilitate prostitution.

Over time, political pressure arising from the angst of elected officials and religious leaders increased, even though adult entertainment and services are lawful activities and communications about lawful activities are *per se* protected expression. *Id.* (recognizing escort ads as protected expression and noting that "numerous states license, tax and otherwise regulate escort services as legitimate businesses"). Some called for the closure of Backpage when isolated, but high profile, crimes were linked to ads on the website, even though serious crimes often are linked to popular websites, such as Snapchat,[16] craigslist.com,[17] and Facebook.[18]

Calls to close the "adult" section of the Backpage persisted. In 2012, the Washington State Legislature enacted a statute targeting Backpage, creating a new state-law felony for disseminating content online containing, *inter alia*, any "explicit or implicit offer" of sex for "something of value." *McKenna*, 881 F.Supp.2d at 1268.

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[16] Emily Crane, New York Post, *Mom blasts suspect Anna Bella Dukes in son's Snapchat hostage death* (Jan. 22, 2022), available at: https://nypost.com/2022/01/26/mom-blasts-anna-bella-dukes-over-sons-snapchat-hostage-death/.

[17] Amber Stegall, WFAB9 News, *Craigslist killers: 86 murders linked to popular classifieds website* (Apr. 9, 2015), available at: https://www.wafb.com/story/28761189/craigslist-killers-86-murders-linked-to-popular-classifieds-website/.

[18] Emma Woollacott, Forbes, *Facebook Rolls Out New Tools To Stop 'Non-Malicious' Child Exploitation* (Feb. 24, 2021)(NCMEC "reported that Facebook was responsible for 94 per cent of the 69 million child-sex abuse images reported by US technology companies" in 2019), available at: https://www.forbes.com/sites/emmawoollacott/2021/02/24/facebook-rolls-out-new-tools-to-stop-non-malicious-child-exploitation/?sh=57388b057b94.

The district court enjoined enforcement of the statute, rejecting the state's incorrect assumption that all adult ads on Backpage related to prostitution or trafficking and its claim that the law affected only unprotected speech proposing illegal transactions.[19] *Id*. at 1282. Citing the First Amendment, the court enjoined the law because it would have "chill[ed] a substantial amount of protected speech." *Id*. Moreover, while recognizing that the First Amendment does not protect ***first-party*** "offers to engage in illegal activity," the court distinguished the *"**third-party*** publication" of such offers, which it held "do[] not fall 'within well-defined and narrowly limited classes of speech' that fall outside of First Amendment protection."[20] *Id*. (emphasis added) ((citing *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571–572 (1942)).

Shortly thereafter, Tennessee passed a similar law, which was enjoined on the basis that third-party ads, like those found on Backpage, were First Amendment protected speech. *Cooper*, 939 F.Supp.2d at 833-34 (rejecting state's argument that

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[19] *Accord Dart v. Craigslist*, 665 F.Supp.2d 961 (N.D. Ill. 2009) ("The phrase 'adult,' even in conjunction with 'services,' is not unlawful in itself nor does it necessarily call for unlawful content…[Sheriff Dart] is simply wrong when he insists that these terms are all synonyms for illegal sexual services.…A woman advertising erotic dancing for male clients ('w4m') is offering an 'adult service,' yet this is not prostitution.").

[20] *Cf. In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003) ("A retailer of slinky dresses is not guilty of aiding and abetting prostitution even if he knows that some of his customers are prostitutes — he may even know which ones are.").

the statute "[did] not implicate First Amendment scrutiny because it criminalize[d] only offers to engage in illegal transactions"). Despite invalidation of the Washington and Tennessee laws, the New Jersey Legislature enacted a similar statute, which was also struck down, with yet another federal court rejecting arguments that adult-oriented ads on the website were unprotected speech. *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, at *9-11 (D.N.J. Aug. 20, 2013).

After these failed efforts to force Backpage to censor adult-oriented advertising, Cook County Sheriff Thomas Dart came up with a new tack. He threatened Visa and MasterCard with criminal action to coerce them into blocking the use of their credit cards on Backpage. In directing the entry of an injunction, the Seventh Circuit rejected Dart's contention that all ads in the adult section of Backpage were unlawful and, to the contrary, held that First Amendment protections applied. *Backpage.com v. Dart*, 807 F.3d 229, 234 (7th Cir. 2015), cert. denied, 137 S. Ct. 46 (2016) ("Nor is Sheriff Dart on solid ground in suggesting that ***everything*** in the adult section of Backpage's website is criminal, violent, or exploitive.... [N]ot all advertisements for sex are advertisements for illegal sex." (emphasis in original)). Moreover, in recognizing Backpage as a protected "intermediary," Judge Richard A. Posner wrote:

> [A]n intermediary…normally is indifferent to the content of what it transmits. Even entities that know the

> information's content do not become liable for the sponsor's deeds. Does a newspaper that carries an advertisement for 'escort services' or 'massage parlors' aid and abet the crime of prostitution, if it turns out that some (or many) of the advertisers make money from that activity?

Id. at 233-34. Judge Posner also explained that "a public official who tries to shut down an avenue of expression of ideas and opinions through actual or threatened imposition of government power or sanction is violating the First Amendment." *Id.* at 230 (citations and quotations omitted).

In addition to the federal judiciary repeatedly holding that the First Amendment protected Backpage's publication of adult-oriented classifieds, the Department of Justice ("DOJ"), itself, also publicly stated that a ***website operator could not be liable under any federal criminal law*** absent proof it knew of and participated in the illegal conduct of specific individuals who were misusing its website. For example, in Congressional hearings, DOJ's National Coordinator for Child Exploitation, Prevention, and Interdiction, Francey Hakes, was asked: "[W]hat laws apply to Internet providers like craigslist that would make them criminally liable for postings?" She responded:

> I am not aware of any laws that would make them liable [for third-party postings], unless there was evidence that craigslist was a participant…conspiring with those who were misusing their site, that is, knowingly conspiring to violate the laws.…I am not aware of any Federal statutes anyway with respect to neglect being the standard. In

> Federal law, the standard for prosecution would be knowing or willful.

Hearing Before Subcomm. on Crime, Terrorism, & Homeland Security, H. Comm. on the Judiciary, 111th Cong. 215-16 (2010). 2-ER-249.

With this legal backdrop, Backpage continued to publish adult-oriented classified ads, refusing to censor its users simply because politicians, religious leaders, and others demanded that it do so.[21]

II. The Government's First Failed Attempt To Prosecute Backpage.

The government conducted a multi-year federal investigation of Backpage through grand jury proceedings in the WDWA. [redacted]

[21] The prosecutors concluded these decisions were irrelevant to this prosecution because they were decided, in part, under 47 U.S.C. § 230, which does not apply to federal prosecutions. *E.g.*, 3-ER-283 ("the cases Defendants cite were decided under Section 230 of the Communications Decency Act—a statute that has no applicability in this federal criminal prosecution"); 2-ER-87 (same). While each case had aspects involving 47 U.S.C. § 230, each also was predicated on violations of the First Amendment—and the First Amendment ***does*** apply to federal prosecutions.

[redacted] Shortly thereafter, the government closed its investigation.

III. The Government's Renewed Attempt To Prosecute Backpage.

In 2016, the government resumed investigating Backpage in the District of Arizona, resulting in the issuance of an indictment on March 28, 2018. 2-ER-22-82. Days later, the government arrested Appellants. 23-ER-4849-51[Dkts.48-

50;52;53;296].[22] On July 25, 2018, the government obtained the operative superseding indictment ("Indictment"). 2-ER-95-186.

The Indictment charges Appellants with fifty Travel Act violations (18 U.S.C. § 1952), with each count based on Appellants' purported facilitation of a business enterprise involved in prostitution offenses through Backpage's publication of one of the fifty adult-oriented ads, as well as related money laundering (18 U.S.C. §§ 1956, 1957) and conspiracy (18 U.S.C. § 371) violations. 2-ER-95-186. The government claimed the fifty charged ads, which were published in sections of the website dedicated to dating, massage services, and escort services, facilitated misdemeanor prostitution offenses under the laws of various states. 7-ER-1252-61. The fifty charged ads represent an infinitesimal percentage of the ads published during Backpage's operation (about 0.00001%), belying any specific intent to facilitate unlawful activity. *Cf. McKenna*, 881 F.Supp.2d at 1267 (Backpage published approximately 3.3 million ads per month). Moreover, after years of investigating, the government has identified just ***one ad,*** out of the tens of millions

[22] In connection with the arrests, the government executed constitutionally infirm warrants authorizing the seizure of "[e]vidence of wealth," among other things, from the homes of Appellants Lacey and Larkin. *E.g.*, 3-ER-442-44. The government refused to return the items unconstitutionally seized until after the Trial Judge invalidated portions of the seizure warrants. (4-ER-568-571.)

of adult-oriented ads published, involving a purportedly express offer of sex for money. 2-ER-146[¶23].

A. The Government Stakes Out The Three Tenets Of Its Case.

As pre-trial litigation progressed, the government made clear its theory of the case was premised on three tenets.

First, although it seeks to impose criminal liability on Appellants based solely on Backpage's publication of speech, the government claimed the First Amendment had no bearing on its case. *E.g.*, 3-ER-399 ("[T]he First Amendment does not apply at all to the publication at issue."); 3-ER-408 ("[U]nder the First Amendment, these publications aren't protected at all.").[23] With respect to the charged ads posted in the escorts category, the government erroneously claimed escort services were "illegal everywhere in the United States except for a small part of Nevada." 5-ER-913. The government claimed, therefore, that escort ads proposed ***per se*** facially unlawful transactions unprotected by the First Amendment. Indeed, the government understood the publication of escort ads to be "no different than [the publication of]

[23] Notably, prominent civil rights organizations disagreed. *Amici* including the Cato Institute and the A.C.L.U. urged the Trial Judge to dismiss the Indictment because it "threaten[ed] to silence Defendants for offering a forum for protected sexually oriented speech, by simply assuming, without establishing, that the First Amendment does not protect the speech on Backpage.com. The government's prosecution of Defendants as publishers of third-party speech poses a grave threat to individual liberty and the rights guaranteed by the First Amendment." 2-ER-252-273.

ads offering to sell heroin or other illegal goods or services." 3-ER-297. With respect to the remaining charged ads posted in the dating and massage categories, the government claimed the ads "obviously" were associated with prostitution, prostitution advertising is not protected by the First Amendment, and Backpage's publication of those ads was not protected by the First Amendment.

The government's second tenet was that, because adult-oriented ads on Backpage contained words and images the government claimed were "indicative" of prostitution, the vast majority of adult-oriented ads were "obvious" prostitution ads. 2-ER-134[¶160] ("Victim 1's Backpage ads often included words and phrases that were indicative of prostitution.")[24]. According to the government, adult-oriented ads on Backpage were "obvious prostitution ads." 2-ER-115[¶91];116[¶96];125;126. As a result, the government intended to call various witnesses to testify that "anyone could tell" and argued the jury could determine that Backpage ads related to unlawful activities just by looking at the ads, with no need for the government to ***prove*** the ads were associated with unlawful activity — even if the text of an ad proposed no illegal conduct. 3-ER-500-01;503.

[24] *See also* 2-ER-103[¶34];110[¶68];112[¶75];112[¶78];114[¶87];115[¶91];116[¶95];116[¶96];119[¶107];124[¶128];124-26[¶132];129[¶143];134[¶161];135[¶164];135-36[¶167];136[¶170].

The third tenet was that the government could establish Appellants' ***specific intent*** to promote business enterprises engaged in prostitution offenses merely from the fact that Backpage continued to publish adult-oriented advertising after assorted politicians, religious leaders, reporters, and others told Backpage that its website was rife with "obvious prostitution ads." 3-ER-500-01;503. ("[T]o the extent any Backpage owner-executive deliberately ignored the prostitution ads on Backpage's website, knowledge can be inferred from such willful ignorance.").[25]

B. Shortly Before Trial, The Government Learned Its Case Would Fail.

After several pandemic-related continuances, the parties prepared for the trial to commence on September 1, 2021. As the date rapidly approached, the government learned that each of these tenets were contrary to settled law and that its case, in its then-current state, would fail.

1. The Government Learned That The Jury Would Hear Escort Services Are Legal.

During a pretrial conference in June 2021, the government objected to Appellants' proposed reference in the draft jury questionnaire to "escort services." The government said the term "escort" was a misnomer, the use of the term

[25] While staking out this position on generalized intent, the government ignored well-settled authority holding that, for a Travel Act conviction, the government must prove that "the accused formed a specific intent to promote, manage, establish, carry on or facilitate" a business enterprise involved in specified unlawful activity. *E.g.*, *United States v. Gibson Specialty, Co.*, 507 F.2d 446, 449 (9th Cir. 1974).

improperly "suggests that escort services is (sic) somewhat legal," and "as we know, it's only legal in a very a (sic) small county in Nevada, so it's really prostitution services." 5-ER-913. The Trial Judge overruled the government's objection, noting a "distinction between escort services and prostitution services." 5-ER-913-14.[26]

The government therefore learned, after ***five years*** of investigating and prosecuting Appellants and just over two months before trial, that a prosecution it thought was premised on Backpage's publication of advertisements for ***per se unlawful*** escort services, instead was premised on Backpage's publication of advertisements for ***lawful*** escort services.[27] This fundamental misunderstanding of the law explained the government's puzzling and repeated conflation of Backpage with "Silk Road,"[28] a website that openly invited ads for ***per se*** unlawful transactions

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[26] The Trial Judge was correct — "escort services" are lawful, while "prostitution services" are illegal, a rather important distinction in a prosecution based on the publication of escort ads. *E.g.*, *McKenna*, 881 F.Supp.2d at 1282 ("numerous states license, tax and otherwise regulate escort services as legitimate businesses"); *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F.Supp.3d 149, 156-57 (D. Mass 2015)("The existence of an escorts section in a classified ad service, whatever its social merits, is not illegal."); *People v. Katrinak*, 136 Cal.App.3d 145 (1982) (ordinance relating to the licensing of escort bureaus was "not a criminal statute but a licensing scheme for a lawful business enterprise"); A.R.S. § 9-500.10 (escorts must include escort license numbers in advertisements for escort services in Arizona).

[27] The government tellingly refuses to say if it also told the grand jury that escort services were unlawful everywhere except a small county in Nevada, thereby misleading the grand jury to believe Backpage's "escorts" category was no different than a category for "heroin" and ads advertising the sale of heroin. 5-ER-939-56.

[28] *United States v. Ulbricht*, 31 F.Supp.3d 540 (S.D.N.Y. 2014).

(with categories such as "Opioids" and "Ecstasy") and openly advertised the purchase and sale of thousands of kilograms of heroin and cocaine — transactions that always are unlawful. *E.g.*, 3-ER-301.

2. The Government Finally Recognized The First Amendment Applied And Destroyed Its Theory Of The Case.

Four weeks before trial commenced, Appellants submitted their proposed jury instructions addressing the First Amendment's presumptive protection of speech and the government's burden to prove that speech is unprotected. *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir. 1972) ("All speech, press, and associational relationships are presumptively protected by the First Amendment; the burden rests on the Government to establish that the particular expressions or relationships are outside its reach."). 6-ER-1135-54.

The government objected, arguing, as it had since the outset of this case, that adult-oriented ads on Backpage "concern[ed] prostitution advertising (a form of commercial speech that is categorically excluded from First Amendment protection)." 7-ER-1228. The government supported its efforts to prevent the jury from hearing about the First Amendment by citing the familiar *dictum* from *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973) (and various cases citing the *dictum*): "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad…soliciting prostitutes." 7-ER-1322. The government claimed *Pittsburgh Press* meant that adult-oriented

classified ads on Backpage were not entitled to First Amendment protection. 7-ER-1321-23.

Appellants' response to the objections, filed just two weeks before the trial, addressed at length how the government misconstrued the authorities it cited as the government's cases addressed facially ***unlawful*** speech and their narrow holdings did not apply to speech proposing facially ***lawful*** transactions, such as adult-oriented ads on Backpage. 8-ER-1389-98. Appellants explained how *Pittsburgh Press* merely held that the First Amendment did not protect a newspaper's publication of classified ads that were, on their face, *per se* unlawful (because the newspaper's ad categories expressed a ***per se*** unlawful sex preference in employment). *Pittsburgh Press*, 413 U.S. at 391. Of course, *Pittsburgh Press* neither held nor suggested that the government could forbid a newspaper from publishing facially lawful help wanted ads if many such ads nonetheless "related to" unlawful activity (*e.g.*, if employers posted ads, but refused to hire women responding to the ads). Yet that was exactly how the government mischaracterized the holding of *Pittsburgh Press* and related cases, such as *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm. of N.Y.*, 447 U.S. 557 (1980).

As Appellants' response made clear, the government's characterization of the law not only was fundamentally flawed, but its characterization of the law had been rejected repeatedly by this Court and others. *IMDB.com Inc. v. Bacerra*, 962 F.3d

1111, 1123 (9th Cir. 2020) ("*Pittsburgh Press* implicates only those instances when the state restricts ***speech that itself proposes an illegal transaction***.…'[I]t would be quite remarkable to hold that speech…can be suppressed in order to deter conduct by a non-law-abiding third party.'");[29] *Greater Philadelphia Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 142 & n.170 (3d Cir. 2020) (rejecting city's argument that speech "concern[ed] unlawful activity" where the speech ***might*** relate to unlawful activity because "commercial speech should not lose the protection of the First Amendment simply because a legislature has prohibited one of many uses of the regulated speech," unlike restricting "advertising of the sale of cocaine, for example, [which] would present a speech restriction that ***always*** and ***only*** related to illegal activity because there are no other legal uses/purposes behind the sale of cocaine" (emphasis in original)).[30]

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[29] Accord *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 822 (9th Cir. 2013) ("*Central Hudson's* legality requirement [] has traditionally focused on the content of affected speech — ***i.e., whether the speech proposes an illegal transaction*** — instead of whether the speech is ***associated with unlawful activity***." (emphasis added)); *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 904 n.7 (9th Cir. 2009) ("*Central Hudson* asks if the commercial speech is 'related to unlawful activity.' ***Thus, in the context of advertising, one must ask whether the goods or services the party advertises are illegal***." (emphasis added, citation omitted)).

[30] *Accord Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 114 (2d Cir. 2017)("[I]f, as here, there are plausible ways to complete a proposed transaction lawfully, speech proposing that transaction 'concerns lawful activity' and is therefore protected commercial speech."); *Pruett v. Harris Cty. Bail Bond Bd.*, 499 F.3d 403, 414 (5th Cir. 2007) (the "threshold inquiry" asks whether "the product or service spoken about is illegal," not whether a

At the final pre-trial conference, while the government made its pitch to the trial judge to disavow these bedrock First Amendment principles, the trial judge pushed back, asking "why shouldn't I include some instruction, not necessarily as detailed as the defense has suggested, but some instruction regarding the First Amendment protections?" 14-ER-3294. The Trial Judge ultimately decided not to provide preliminary First Amendment instructions and did not settle the jury instructions before trial, but the government knew the law would require the Trial Judge to provide First Amendment jury instructions that would be fatal to its case.

3. The Government Learned It Cannot Prove Specific Intent From Backpage's Publication of Adult-Oriented Ads.

During pre-trial litigation, the Trial Judge undercut the third tenet of the government's case, recognizing that Appellants "were not indicted for facilitating the amorphous notion of 'prostitution.' They were indicted for facilitating (via publishing ads) ***on fifty distinct occasions*** where prostitutes, prostitution-related businesses, or other groups were involved in the business of prostitution." 4-ER-552. The trial judge further ruled that "this case is not about Backpage. Backpage

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commercial solicitation might lead to a violation of the law); *Art & Antique Dealers League of Am., Inc. v. Seggos*, 394 F.Supp.3d 447, 459 (S.D.N.Y. 2019)("Although the First Amendment does not protect speech proposing a transaction that 'necessarily constitute[s] an illegal act,' if 'there are plausible ways to complete a proposed transaction lawfully, speech proposing that transaction 'concerns lawful activity' and is therefore protected commercial speech.'").

was prosecuted in a separate case, entered a plea in a separate case. ***This case is about these individual defendants and whether they had specific knowledge of these ads as facilitating illegal activity***." 5-ER-864 (emphasis added).

The Indictment, however, does not allege that any Appellants had any knowledge of any of the fifty charged ads, nor any knowledge of the people who posted those ads or their activities. 2-ER-95. The government's voluminous disclosures, including the lengthy memoranda documenting its interviews with cooperating witnesses, contain ***no evidence of actual knowledge*** of the fifty charged ads, much less the specific intent to facilitate, through the publication of the ads, a business enterprise involved in prostitution associated with each ad.

When the government learned escort ads were lawful two months before trial, its first path to proving specific intent — showing Backpage knowingly published facially unlawful escort ads — evaporated. When the government learned two weeks before trial that Backpage's publication of facially lawful ads was presumptively protected by the First Amendment, even if the ads related to unlawful activity, its second path to proving specific intent — showing Backpage continued to publish adult ads after being told those ads were "obvious prostitution ads" — also evaporated.

The government also learned at that time that, even with respect to the solitary charged ad proposing an unlawful transaction, the government would be unable to

prove specific intent based on Backpage's publication of the ad, because it learned from Appellants' response to the government's proposed jury instructions (8-ER-1397) that *Bursey v. United States*, 466 F.2d 1059, 1087 (9th Cir. 1972), foreclosed that path. *Bursey* held that the First Amendment requires the government to prove specific intent on the part of the publishers with evidence independent of the act of publishing:

> Printing, publishing, or distributing the speech [] is not criminal unless the persons who did these acts had the specific intent required by the statutes which were the basis of the investigation.…***The act of*** printing, ***publishing***, or distributing the ***speech [] supplies no basis for an inference that the act was done with the proscribed intent***.

Id. at 1087 (emphasis added). The government had no other evidence from which it could prove specific intent, as Appellants knew nothing about that ad or whomever posted it.

C. The Government Sabotaged Its Trial By Repeatedly Injecting Highly-Prejudicial Issues And Evidence, In Violation Of The Trial Judge's Orders, To Provoke The Defense Into Moving For Mistrial.

On September 3, 2021, the jury was empaneled. The government needed to revamp its case, but it had no mechanism to meaningfully do so after submitting its final witness and exhibit lists six months earlier. 4-ER-802.

1. The Government Knew How To Cause A Mistrial.

Before trial, Appellants moved *in limine* to preclude the government from introducing evidence of sex-trafficking, child sex-trafficking, or third-party criminal conduct other than the prostitution offenses Appellants were alleged to have facilitated. 3-ER-506. While the Trial Judge refused to block all references to sex-trafficking or child sex-trafficking, she nonetheless severely constrained the government's ability to inject these highly-prejudicial topics into the trial, ruling:

- **Sex-trafficking:** The government was not permitted to ***"linger on the details of the abuse sex trafficking victims suffered."***

- **Prostitution lifestyle:** "Testimony from people involved in prostitution is only relevant as it relates to their use of Backpage.com and notice to Defendants that prostitutes were using their website. ***Testimony concerning the lifestyle and impact that prostitution had on witnesses' lives is irrelevant to the crimes charged and may unduly prejudice Defendants*.**"

- **Third-party crimes:** "***[T]he specific details of crimes committed by third parties are irrelevant to whether Defendants violated the Travel Act…and the Government will not be allowed to introduce evidence showing the details of the crimes***."

5-ER-880-81 (emphasis added).

- **"Expert" testimony on sex-trafficking:** As modified at trial, the government could present one expert witness to testify about how law enforcement conducts trafficking investigations, with a focus on how investigations shifted from craigslist.com to Backpage, and an explanation of terminology used in trafficking and prostitution. The Trial Judge barred expert testimony about: (a) "***general sex trafficking patterns***;" (b) "***the role Backpage played in causing trauma to victims trafficked through its website***;" or (c) "***the benefits of shutting Backpage down…***"

4-ER-820-21 (emphasis added). The Trial Judge also ruled: "Of course, witnesses will not be allowed to offer reputation testimony untethered to communications with Backpage or Defendants as the reputation evidence, standing alone, would not be relevant to the crimes charged and would be hearsay." 5-ER-889.

The government knew that, by repeatedly violating these rulings, Appellants – who had sought to preclude any introduction of evidence on these topics – would move for a mistrial and the Trial Judge ultimately would be forced to grant a mistrial motion.

2. The Government Used Its Opening Argument To Provoke The First Mistrial Motion.

Before opening statements, Appellants previewed the visual presentation the government planned to show the jury during its opening and raised concerns that the opening would focus on child sex-trafficking and violate the Trial Judge's pre-trial ruling. The Trial Judge cautioned the prosecutors that, while they were not "prohibited from using the word trafficking," they needed "to be careful that [their] whole opening is not focused on this idea that that's all that Backpage was about." 20-ER-4028. The government said it "understood" (20-ER-4028), but then proceeded with an opening heavily-focused on child sex-trafficking and sex-trafficking. 18-ER-4063-4116. The government's opening contained nearly ***fifty references to child sex-trafficking***, twelve references to sex-trafficking, and repeated, conclusory assertions about sex-trafficking and child sex-trafficking being

associated with ads on Backpage (with the government having no ability or intention to prove such assertions). 9-ER-1476; 20-ER4063-4116.

Predictably, and with no other option, Appellants moved for a mistrial. The Trial Judge denied Appellants' mistrial motion, but Appellants' motion confirmed what the government already knew — injecting child sex-trafficking into the trial would prompt Appellants to move for a mistrial.

3. The Government's First Witness Testified All Backpage Adult Ads Were Blatant Prostitution Ads.

The government began its case by calling California D.O.J. Special Agent Supervisor Brian Fichtner, who testified that all "the advertisements in the Adult Escort section" on Backpage "appeared to be blatant prostitution ads." 21-ER-4299. Fichtner showed the jury a video he created displaying hundreds of adult-oriented Backpage ads and testified as it played. 21-ER-4429. The obvious import of the government's questions and Fichtner's responses was that the jury could conclude all the ads shown in the video related to prostitution.[31]

The video showed a fake ad Fichtner posted to Backpage. 21-ER-4397. Fichtner testified that, after posting the ad, he contacted Backpage, identified himself as a law enforcement officer, identified the ad, and claimed the ad related to

[31] The government's reliance on Fichtner was clear from Jones' opening statement (20-ER-4066-70) and the "literally one week" the government spent preparing Fichtner to testify (22-ER-4627).

prostitution. 21-ER-4424. He testified that Backpage promptly removed the purported prostitution ad from the website and blocked his account. 21-ER-4424-25. He further testified that Backpage removed an ad for a sofa posted by the same user account. 21-ER-4419;4425. Although Fichtner's testimony evidenced Backpage's diligence in responding to law enforcement, and efforts to prevent unlawful content, the government again had Fichtner reinforce the "anyone could tell" tenet, when he testified: "gosh, almost all these advertisements just looked like blatant prostitution ads." 21-ER-4426-27.

The government also used Fichtner's direct examination to gratuitously inject the topic of child sex-trafficking, by asking him about the efforts of a non-profit to recover children from pimps through the non-profit's ads on Backpage. 21-ER-4309-10.

4. The Government Intentionally And Repeatedly Violated Court Rulings.

The government repeatedly used its witnesses to introduce irrelevant and unduly prejudicial evidence, over Appellants' objections and despite the Trial Judge often sustaining defense objections.

a. Prosecutors Solicited Testimony From J.S. About Child Sex-Trafficking.

Agent Fichtner's direct examination was adjourned to allow the government to call two witnesses out of turn. The first was a victim of child sex-trafficking, "J.S." Before J.S. took the stand, the Trial Judge reaffirmed her pre-trial ruling that the government could not go into J.S.' life "while she was being trafficked" and also further limited the scope of her testimony. 21-ER-4348-51. The Trial Judge allowed J.S. to testify about being "trafficked by her pimp through Backpage and that she filed suit," but not about anything for which she had no foundational knowledge. 21-ER-4443;4445. An experienced prosecutor assured the court he would comply with the court's rulings and would not "dwell on…the day-to-day life as being pimped out and trafficked." 21-ER-4348.

The prosecutor then promptly elicited testimony violating the Trial Judge's rulings. The prosecutor elicited testimony from J.S. that, when she was 15, she was trafficked at the hands of a pimp and repeatedly "raped." 21-ER-4454-55. The irrelevant and inflammatory rape testimony drew an objection, which the Trial Judge sustained. 21-ER-4454-55. Undeterred, the prosecutor then immediately solicited testimony concerning her "prostitution lifestyle," including details about an altercation with a pimp and an attempt to flee involving hiding under a mattress at a hotel — testimony far outside the bounds of the Trial Judge's rulings. 21-ER-4455. At a sidebar on defense counsel's objection, the Trial Judge reminded the prosecutor

that she "told him not to go into the life of a victim" and that his line of questioning at issue was "beyond" the limited topics of whether J.S. engaged in prostitution and posted ads on Backpage. 21-ER-4455. The prosecutor brazenly defended his questioning, saying:

> MR. RAPP: Well, I have to tell the story.
> THE COURT: Well –
> MR. RAPP: No. Let me -- Let me just finish.…
> She's got to give some type of a story here how she ends up with --
> THE COURT: Actually she doesn't.…I'm not going to allow this.

21-ER-4435-56. The Trial Judge then warned the prosecutor: "you need to be very careful." 21-ER-4456. After the prosecutor yet again tried to defend the inappropriate testimony as being "part of the story," the Trial Judge told the prosecutor in no uncertain terms: "these details are violating my order that you not go into the sort of details of her life as a prostitute." 21-ER-4457.

Undeterred, the prosecutor immediately doubled down in his examination of J.S. First, the prosecutor asked J.S. how long she had been trafficked and she responded "105 days." 21-ER-4458. The prosecutor then incorporated the objectionable "105 days" testimony into numerous questions, so he could repeat and re-emphasize how long she was trafficked. 21-ER-4458-60;4468-69. Then, despite the Trial Judge having sustained an objection to J.S. testifying about being raped just moments before and despite the Trial Judge's unequivocal direction to stay away from such details, the prosecutor again directly solicited the highly inflammatory

topic of rape, with the plain aim of eliciting testimony that she was raped three or more times a day for "105 days:"

> Q. And did you actually meet with these individuals?
> A. Yes. I would either be driven to where they are or they would come to me to a hotel.
> Q. And when you went with them, Jessika, what would happen?
> A. I would be raped for money.
> Q. In the 105 days that you were with Mr. Hopson, how many times would that happen, Jessika?
> A. Three to --
> MS. BERNSTEIN: Objection, Your Honor, relevance.
> THE COURT: The objection's sustained.

21-ER-4460. The prosecutor intentionally solicited this testimony knowing the Trial Judge had already ruled it was impermissible and just after the Trial Judge had cautioned him to "be very careful" because he was "violating my order that you not go into the sort of details of her life as a prostitute." 21-ER-4456-57. Additionally, the prosecutor repeatedly solicited testimony about the prostitution lifestyle. 21-ER-4460-67;4487-88;4525-27.

Defense counsel objected more than 27 times. The Trial Judge repeatedly sustained objections to (a) questions and answers that violated the court's clear orders on the limits of her testimony and (b) testimony for which there was no foundation. 21-ER-4452-66;4357;4526-27.

b. Prosecutors Solicited Testimony From Nacole Svendgard About Child Sex-Trafficking.

Nacole Svendgard, J.S.'s mother, was the next, out-of-turn witness. By the time she took the stand, the Trial Judge had excluded much of her proposed testimony as "irrelevant and hearsay." 21-ER-4392. The Trial Judge ruled she could testify only that: her daughter was trafficked through ads on Backpage (but not about the prosecution of her daughter's trafficker); she met with elected officials and why (but not about the substance of the meetings); she appeared before Congress (but not about the substance of her testimony); and she allegedly had an encounter with Appellant Lacey while at the Senate. 21-ER-4392-93.

Once again, contrary to these clear boundaries, the government repeatedly asked about the prosecution of Mrs. Svendgard's daughter's trafficker (22-ER-4531 -33), an amicus brief filed in a civil case (22-ER-4536), and a course on child sex-trafficking she taught for parents (22-ER-4552). Appellants repeatedly objected to the solicitation of evidence that violated the limits the Trial Judge set earlier that day. 22-ER-4531-32;4535-38.

c. The Defense Cross-Examination Of Agent Fichtner Eviscerated The Final Tenet Of The Government's Case.

When Agent Fichtner returned to the stand several days into the trial, not a single witness had incriminated Appellants or even testified concerning any of the fifty charged ads. On cross-examination, Fichtner dealt the government's case yet

another fatal blow.

During its opening, the government promised the jury that Fichtner would identify the hundreds of ads he reviewed as prostitution ads. 20-ER-4066-70 ("evidence will show" the ads Fichtner reviewed "were nothing less than prostitution ads."). The government's promise fell apart, however, when Fichtner was forced to admit on cross-examination that:

- many adult activities involving sexual activities and money ***are legal*** ;
- all the ads he showed the jury were ***facially lawful***;
- he ***could not determine*** whether ***any*** of the hundreds of ads he showed the jury related to lawful activity or unlawful activity
- he had ***never arrested*** a person for a prostitution offense based only on the content of a Backpage adult ad;
- he ***knew of no law enforcement officer who had done so***; and
- Backpage ***impeded***, rather than promoted, prostitution, because Backpage removed ads proposing illegal transactions, cooperated with law enforcement, blocked website users who violated the website's rules, and created a manual to train law enforcement to use the Backpage website as an investigatory tool.

22-ER-4580-85;4591-92;4653-95. In short, Fichtner testified experienced law enforcement officers could not look at the content of adult-oriented Backpage ads and know whether an ad related to lawful or unlawful activities. That testimony vitiated one of the foundational tenets of the government's case.

The government knew Appellants only became aware of the charged ads after they were arrested, and knew nothing of the charged ads, the people posting them,

or any business enterprises associated with them, effectively precluding the government from proving specific intent. The government's only argument that Appellants specifically intended to facilitate business enterprises involved in prostitution offenses associated with the fifty specific charged ads was that ***anyone could tell*** that Backpage adult ads were ***obvious*** prostitution ads, so merely by publishing adult ads Appellants ***had*** to have intended to facilitate such business enterprises. After Fichtner's testimony, however, even this theory was not viable. If the government's own law enforcement witness could not determine if Backpage adult-oriented ads related to lawful or unlawful activities, the government would never convince the jury, beyond a reasonable doubt, that Appellants could do so. The government therefore redoubled its efforts to provoke a mistrial.

d. The Government Shifted To Focus Exclusively On Child Sex-Trafficking.

Before the government called its next witness – Dr. Sharon Cooper, a self-proclaimed "developmental and forensic ***pediatrician***" (23-ER-4721) – there were extensive discussions about limiting expert testimony on sex-trafficking. The government initially proposed to call a different witness to testify on one of the topics about which Dr. Cooper ultimately testified and assured the Trial Judge, several times, that the government did not "intend to focus on child sex trafficking ***at all***." 21-ER-4354 (emphasis added). The government pledged that, although the expert had experience with child sex-trafficking victims, the expert would "phrase

her testimony in a way that does not highlight children and she can talk about sex trafficking, human trafficking and prostitution as a whole." 21-ER-4355. In that discussion, the Trial Judge ruled that the government's expert witness could "talk about [her] investigation[s] ***without talking about child sex trafficking***" and ordered the government to "direct her to do so." 21-ER-4355 (emphasis added).

When the government subsequently elected to call Dr. Cooper instead, Appellants moved to preclude her testimony altogether. 9-ER-1679-87. The Trial Judge denied that motion, but ruled the government could solicit testimony from Cooper on just two narrow topics: the vernacular affiliated with prostitution and how sex-trafficking occurs on the Internet. 22-ER-4607-08; 23-ER-4725-26.

From the outset, it was clear that Dr. Cooper's testimony was going to focus on the sexual exploitation of children. Defense counsel objected. 23-ER-4724. At a sidebar, the court reiterated that the government could not go into the "relationship between traffickers and pimps and that whole psychology," but could solicit testimony about how "sex trafficking occurs on the internet." 23-ER-4726. After this ruling, the prosecutor still asked about "child pornography," "child sexual abuse," "internet crimes against children," "digital crimes against children," "sex trafficking of children," "child sexual exploitation," "sex trafficking in children," "sex trafficking involving minors," "prostitution of children," and "trafficking of children." 23-ER-4727-30;4732. Over the course of Cooper's highly inflammatory

testimony, Appellants objected more than fifty times.[32] The Court, too, attempted to keep the witness on topic, asking the government at one point whether the question posed had anything to do with the fifty charged ads. 23-ER-4736;4745.

Throughout Cooper's testimony and at many sidebars, defense counsel first objected to her testimony under Rules 401, 403, and 702 (*e.g.*, 23-ER-4724-26;4729-40) and then moved for a mistrial, asserting that:

> [T]he entire direct was geared toward saying children, children, children, children, children. That's all we heard about. I did this with children. I did that, I this, they can't consent, they can't this, that.
>
> I move for a mistrial. I think that we are absolutely prejudiced at this point. These people think that this is a children case, and in—at the very minimum, this Court should instruct the jury that.…[t]here is no charge of trafficking children.…[a]nd that's all she is talking about. And you can tell she's a professional witness. She's got all the, you know, the long narratives. Any kind of question she just goes on, and on, and on, and on…and I think we are prejudiced irretrievably.

23-ER-4742-43.

The court did not immediately rule on the mistrial motion, but instead told the

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[32] Cooper is a highly experienced expert witness, who regularly testifies for the government in child sex-trafficking and sexual abuse cases around the country. 23-ER-4730;4770. The prosecutor who questioned her is a senior trial attorney in DOJ's Child Exploitation and Obscenity section, who would be well-acquainted with Cooper. The government's suggestions that Cooper was properly prepared, but failed to follow instructions, is as absurd as its suggestion that Cooper was examined in a manner aimed at keeping her on point.

government to "move on" from the topics at issue, cautioning the government that it was getting "close to a 403 violation." 23-ER-4744. Further, the Court explained that witnesses could use the phrase "sex-trafficking," but the government and its witnesses must "stay away from the child sex trafficking." 23-ER-4745. The Court, once again, warned the prosecutors to "be careful" and suggested they "direct [their] witness a little bit, because she could very well go off on a tangent into something." 23-ER-4744-45.

The prosecutor examining Dr. Cooper did not seek a recess to provide guidance to his witness, but instead ignored the court's warnings and charged ahead. Like his colleague with the two other out-of-turn witnesses, he continued to solicit testimony falling outside the scope of the topics permitted by the Trial Judge. 23-ER-4747-48;4751-53;4756. The prosecutor questioning Cooper repeatedly asked about the relationships between traffickers and their victims – ***a topic the Trial Court had clearly precluded***. 23-ER-4762 (striking answer); 23-ER-4764 (sustaining objection to testimony about prostitutes viewing themselves as married to their pimps). Further violating the Trial Judge's rulings, the prosecutor intentionally elicited testimony about the so-called "prostitution lifestyle" — another topic that plainly was out-of-bounds. 23-ER-4763 (discussing STDs).

Moreover, because the jurors plainly understood that Dr. Cooper was a ***pediatrician***, and her experience, qualifications, and academic work related to the

sex-trafficking and sexual abuse of ***children***, the prosecutor's questions to her about various aspects of "sex trafficking," coupled with the prosecutor's repeated qualifier "based on your education and experience," plainly telegraphed to the jury that Cooper was testifying about child sex-trafficking or victimization. The government questioned her in this manner for the remainder of her testimony (23-ER-4740-69), meaning her entire testimony was focused on the victimization of ***children***.

Predictably, the defense renewed their motion for a mistrial after the prosecutors' outrageous examination of Dr. Cooper concluded. 23-ER-4783-88. Defense counsel explained that the prejudicial testimony was "snowballing," in that "[e]very single time the government continues to beat the drum of child sex trafficking, the prejudicial effect and the difficulty that – the jurors would have to objectively evaluate the evidence gets tougher and tougher." 23-ER-4783-84. Moreover, in ***all*** the testimony presented, there was "no connection of anything to any defendant or any ad in the indictment." 23-ER-4784.

By that time, the Trial Judge said she had "concerns that the government has crossed that line several times even after at sidebar I warned you not to do it." 23-ER-4790. Further, the Trial Judge expressed "concerns that the testimony elicited from the victim [J.S.] went beyond what it should have," a problem that was compounded by the fact that "the testimony of Dr. Cooper" also "went well beyond what we had talked about prior to her testifying." 23-ER-4790. The Trial Judge

recessed for the day.

D. The Trial Judge Declared A Mistrial.

When the trial reconvened the next morning, the Trial Judge declared a mistrial. Her ruling focused on the government's purposeful actions. She explained that "at the beginning of the case," she gave the government "some leeway" with respect to its references to child sex-trafficking and sex-trafficking, but found that "***in the opening, and with every witness thereafter…the government has abused that leeway***." 23-ER-4814 (emphasis added). She chided the prosecutors, noting that they "***are held to a higher standard, and their goal is not to win at any cost, but to win by the rules***." 23-ER-4814 (emphasis added). The Trial Judge went on to catalogue "just [] a few examples" of their brazen misconduct – by no means an exhaustive list – from the few days of the government's case-in-chief:

- "[J]ust after we had a discussion about [an] expert" the government "agreed to minimize the focus on child sex trafficking and refer to the more general sex trafficking. ***Mr. Jones then proceeded to question Dr. Cooper solely on child sex trafficking***."

- "In addition to Dr. Cooper just ***emphasizing child sex trafficking above everything else***, she talked about the overwhelming majority of victims being trafficked…on Backpage, which…I said would be allowed as long as it was tethered to some communication with the defendants, and that ***was not tethered to any communication with the defendants***."

- "There was an order that the government stay away from the day in the life of a prostitute or victim. With Jessika Svendgard, ***the government solicited answers that went into the abuse by her trafficker***."

- "Also, with Jessika Svendgard, ***the government emphasized the 105 days over, and over, and over again***. She also talked about being ***raped*** more than once, which raises a whole new emotional response from people."

23-ER-4814-15 (emphasis added).

The Trial Judge concluded by making clear there were other instances of the government violating orders and presenting irrelevant and highly-prejudicial testimony. 23-ER-4815 ("And I believe there were other witnesses that also talked about the reputation of Backpage untethered from communications with the defendants" in violation of the Court's pre-trial rulings.").

Paradoxically, despite the Trial Judge repeatedly instructing the prosecutors to do one thing, and the prosecutors doing the exact opposite, the Trial Judge said she did not "see any of these as intentional misconduct," but then ruled "the cumulative effect of all of that is something that I can't overlook and won't overlook. So the motion for mistrial is granted." 23-ER-4815.

Several things are clear about the Trial Judge's comment about "***intentional*** misconduct." First, the trial judge unquestionably thought the prosecutors ***had*** engaged in ***misconduct***, given her statements about "abusing leeway" and prosecutors being held to a "higher standard." Second, the Trial Judge's comment was directed at the numerous individual instances of misconduct (hence the use of the word, "these"), not to the prosecution's conduct in the aggregate. Third, neither Appellants, nor the government, nor the court had raised the issue of double

jeopardy, or whether the government had intentionally provoked the mistrial, so those issues – issues distinct to a double jeopardy claim – were not before the court. Therefore, the Trial Judge's comment cannot be construed as pre-judging a double jeopardy motion she had not yet seen that would address the prosecution's conduct in the aggregate. Moreover, the Trial Judge's comment likely was intended to suggest she did not view the prosecutors' misconduct as needing to be reported to the state bars licensing them by DOJ's Office of Professional Responsibility. *Cf. Jefferson v. Department of Justice*, 284 F.3d 172, 182 fn* (D.C. Cir. 2002) (dissent) ("When a government attorney is found to have engaged in intentional misconduct, OPR notifies the state bar association which has licensed that attorney."). Finally, even if Judge Brnovich had intended her remark as a finding that the prosecutors' overall course of misconduct was unintentional (a finding she plainly did not make), such a finding would be clear error. *See Stephens v. Superintendent*, 2008 WL 755278 (N.D.N.Y. Mar. 19, 2008) (prosecutor's prejudicial comment in closing, after mistrial motion and curative instruction based on the same comment in opening, could "only be viewed as intentional misconduct").

E. The Motion Judge Denied Dismissal.

Shortly after mistrial, Appellants moved for dismissal with prejudice under the Double Jeopardy Clause based on the government intentionally provoking the mistrial, as well as under the Due Process Clause and the court's supervisory

authority based on other prosecutorial misconduct. 10-ER-1690-1726. The Motion set out the substantial objective evidence of why the government desired a mistrial and the government's actions to provoke that mistrial, including the prosecutors repeatedly flouting the Trial Judge's rulings to inject highly-prejudicial issues and evidence into the trial. 10-ER-1690-1726.

Then, unexpectedly, the trial judge recused. 15-ER-3155. The Motion would not be heard by the judge who spent years on the case, tried the case, and made the inconsistent, ambiguous comment about non-intentionality. Instead, a newly assigned judge, who would need to review a complex case record just to begin to understand the issues raised in the Motion, would be ruling on the Motion.[33]

At oral argument on the Motion, the Motion Judge asked the prosecutors what they did to prepare J.S. and Dr. Cooper to stay within the bounds of the Trial Judge's evidentiary rulings. The prosecutors' responses were inconsistent with their actual questioning of those witnesses at trial. Prosecutor Rapp claimed he instructed J.S. not to testify about sexual activities, the harm she suffered from her traffickers, or "day-in-life" issues during the 105 days she was trafficked. 16-ER-3373-76.

[33] Here, as in *Berger*, "[i]t is impossible…without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct." *Berger*, 295 U.S. at 85. The Trial Judge's familiarity with the proceedings, and the Motion Judge's lack of familiarity, readily explain why the Trial Judge found pervasive misconduct while the Motion Judge found none.

However, as discussed above, and as pointed out to the Motion Judge during argument, Rapp repeatedly ***solicited*** testimony about J.S.' interactions with her traffickers, defended doing so even after the Trial Judge warned that he was violating her orders, and then continued to solicit improper testimony even after the Trial Judge unambiguously instructed him not to do so.

Prosecutor Jones claimed he instructed Dr. Cooper to stay away from the victimization of children. 16-ER-3376-77. Yet, as the Trial Judge found when ruling on the mistrial, Jones solicited precisely that testimony the entire time Cooper was on the stand. After soliciting testimony about Cooper's credentials, which focused exclusively on her work with children as a "forensic pediatrician" (23-ER-4721-23), Jones asked Cooper about her credentials with respect to "sex-trafficking" (23-ER-4723-24), from which she launched into a lengthy narrative about child sex-trafficking and sexual abuse (23-ER-4724;4727-29). Jones then asked if she had previously testified in trials concerning child sex-trafficking, if she had ever interviewed children who were trafficked online, and if she was familiar with any vernacular based on her involvement with child victims. 23-ER-4731-33. Cooper then narrated about her most recent publication concerning "child sexual abuse" and "exploitation." 23-ER-4732. Jones asked whether the more than 200 trafficking victims she interviewed included "adults ***and children***." 23-ER-4738.

At a sidebar, showing no remorse, Jones defended his questioning, stating that "children are trafficked through Backpage." 23-ER-4744. When Jones' questioning continued, he asked questions about "sex-trafficking" instead of "child sex-trafficking," but coupled each question with the qualifier "based on your education and experience," which the jurors knew focused almost exclusively on children. 23-ER-4744-69. Therefore, as the Trial Judge found, Jones solicited testimony about the victimization of ***children*** for the duration of Cooper's testimony.

The role of these two prosecutors in forcing the mistrial was not unnoticed by the Trial Judge, who made specific factual findings about instances where each prosecutor sought the very testimony they later told the Motion Judge they instructed their witnesses to avoid. 23-ER-4814-15. Critically, these prosecutors were not under oath when they made their representations to the Motion Judge about witness preparation. The defense had no opportunity to ask the prosecutors or their witnesses questions about their trial preparation or any instructions given to the witnesses.

Shortly after argument, the Motion Judge denied the Motion. 1-ER-3-19. In reaching the conclusion that there was a lack of "intent to goad" a mistrial, the Motion Judge inconsistently applied the Trial Judge's prior rulings. The Trial Judge found the government "abused" the leeway she allowed regarding references to sex-trafficking in its opening and its opening statement ***alone*** "was close to causing a mistrial." 23-ER-4814-15. The Motion Judge found the opposite, saying her

"review of the Government's opening statement does not show Government error" and the government "adhered to" the Trial Judge's "evidentiary ruling." 1-ER-9. The Motion Judge ignored the Trial Judge's finding that, just after a discussion in which the government agreed "to minimize the focus on child sex trafficking," one of the prosecutors "proceeded to question Dr. Cooper ***solely*** on child sex trafficking." 23-ER-4184 (emphasis added). The Motion Judge also ignored the Trial Judge's finding that the government repeatedly "solicited" impermissible testimony, despite: the Trial Judge's earlier ruling that such testimony was out-of-bounds; the Trial Judge repeatedly sustaining objections to questions soliciting such testimony; and the Trial Judge repeatedly warning the prosecutors to be "very careful" because they were violating her orders. While ignoring these specific and well-supported findings, the Motion Judge accepted, and relied heavily on, the Trial Judge's comment about non-intentionality. 1-ER-9-10.

Further, the Motion Judge declined an evidentiary hearing, accepting the government's representations as to witness preparation at face value, without understanding that their representations were inconsistent with their trial conduct, as an in-depth review of the trial transcripts would have made clear. 1-ER-9. The Motion Judge's ruling did not delve into the extensive trial record, relying instead on the prosecutors' unsworn assurances about their preparation of their witness and the Trial Judge's remark about non-intentionality. The Motion Judge made these

findings even though there was no mechanism except an evidentiary hearing to flesh out the government's inconsistent statements.

F. Retrial Would Severely Prejudice Appellants.

Appellants cannot withstand the expense and insecurity of retrial, as the government well-knew when it provoked them, repeatedly, into moving for mistrial. In April 2018, the government seized virtually all of Appellants' assets. When that did not choke the life out of the defense, the government then seized about $10 million from attorney retainer accounts, depriving Appellants of most of the funds that had been set aside for their defense and causing Appellants Padilla and Vaught to lose their counsel of choice. 15-ER-3149-54.

Appellants incurred enormous costs for the aborted trial, which cannot be recouped and most of which would be duplicated in a retrial. 10-ER-1706-07. These wasted expenditures have further choked the defense. 10-ER-1706-07.

Moreover, Appellants, several of whom are elderly and have health issues, have lived under the Indictment's cloud since April 2018, causing strain on them and their relationships and impacting their ability to provide for themselves, their health, and their stability. 10-ER-1707. The Indictment subjects Appellants – who came to the trial expecting the government would fail to establish a single violation of law – to continuing embarrassment, expense, and ordeal. 10-ER-1707.

IV. The Government's History Of Saying What It Must To Save Its Case Further Undermines The Claimed Lack Of Intent To Provoke The Mistrial.

The government's misconduct did not happen in a vacuum. During the three years of litigation preceding the trial, the government had a history of saying one thing when it suited its needs, but then saying the opposite later in a different context. For example, when responding to Appellants' motion to dismiss based on the government invading Appellants' attorney-client privileges by asking its key cooperator about legal advice and memoranda subject to privileges held by Appellants, the government defended its conduct by claiming the advice and memoranda were not privileged because pleadings submitted in various cases around the country asserted the same legal positions set out in the advice and memoranda.[34] 24-ER-5072-96;5099;5108-09. The Trial Judge accepted the government's position in denying Appellant's motion. Then, after Appellants identified some of those purportedly non-privileged memoranda as trial exhibits, the government moved to preclude them, arguing the memoranda "on their face[,]…appear[ed] to be protected by the attorney-client privilege," effectively conceding it had invaded the privilege during its interviews with the cooperator. 9-ER-1462. Appellants responded with a renewed motion to dismiss and requested an evidentiary hearing. In the same underlying order being appealed here, the Motion Judge denied the renewed motion, ignoring the government's new admissions.

Similarly, after Appellants requested *Brady*, *Jencks*, and Rule 16 materials from the government's 2010-2013 investigation of Backpage in WDWA, the government has been a moving target. At various times, the government refused to produce the material claiming it was not subject to production (24-ER-5204-07) and, at other times, claimed it had produced all relevant materials (24-ER-5205-06). Most recently, however, the government admitted it has never even ***seen*** the materials that it earlier claimed were not *Brady* or *Jencks* or already had been produced. 17-ER-3442;3446.

When Appellants requested *Jencks* materials of specific individuals who made statements in the WDWA investigation, the government took those persons off their witness list to obviate their *Jencks* obligations. *E.g.*, 9-ER-1672. At other points in the litigation, the government asserted it had no obligation to produce materials from the WDWA because that investigation covered a different timeframe than this case. 16-ER-3377. In its opening statement at trial, however, the government promised the jury it would see a wide range of evidence from the timeframe covered by the WDWA investigation. 20-ER-4072;4074;4077;4080;4083-87;4093-96;4100-03.

[34] This misguided view of the attorney-client privilege would eviscerate the privilege because, if correct, any time a company asserted legal positions in a court filing, the company would be deemed to have waived privilege for all related legal advice.

The government's say-whatever-it-takes-in-each-moment-to-keep-the-case-alive approach gave the Motion Judge good reason to question the government's claim that it did not intend to provoke the mistrial and is another reason the Motion Judge should have, at the least, held an evidentiary hearing.

SUMMARY OF THE ARGUMENT

The objective facts and circumstances demonstrate the government's intentional goading of a mistrial. As the trial approached, the government learned that escorts were lawful (not unlawful), that Backpage's publication of all the charged ads (save one) and other ads on the website would be presumptively protected by the First Amendment, and that it could not prove specific intent except through evidence independent of mere publishing. The government knew its case would founder as a result. Moreover, the government's need for a mistrial grew during its case-in-chief, when the testimony of its lead witness contradicted its core theory that "anyone" could tell most adult ads on Backpage related to prostitution just by looking at the ads.

The Trial Judge's factual findings when granting the mistrial, and the record, readily establish that the government repeatedly violated the court's orders, without remorse, provoking the mistrial. The Motion Judge, who was brand new to a lengthy and very complex case, erred in denying the Motion and her order cannot be reconciled with the record. Moreover, the Motion Judge should have held an

evidentiary hearing to address the grave issues presented in the Motion, and the government's inconsistencies, as well as to provide a fulsome record for this Court's review.

STANDARD OF REVIEW

This Court reviews the denial of a motion to dismiss on double jeopardy grounds *de novo*. *United States v. Zone*, 403 F.3d 1101, 1104 (9th Cir. 2005). Although a district court's denial of a motion for an evidentiary hearing on a double jeopardy motion generally is reviewed for an abuse of discretion, a less deferential review is appropriate here because the judge denying the hearing was not the judge who presided over the mistrial. *See United States v. Rodriguez*, 229 F.App'x 547, 548 (9th Cir. 2007) ("Generally…a measure of deference is owed to the district court, which 'presided over the entire proceedings and…was uniquely positioned to evaluate the prosecutor's conduct.'").

ARGUMENT

I. The Double Jeopardy Clause Bars Retrial When The Prosecution Intentionally Provoked The Mistrial.

At the core of the Double Jeopardy Clause's prohibition on multiple prosecutions "is denying the prosecution a second opportunity to supply evidence which it failed to muster in the first proceeding." *United States v. Weems*, 49 F.3d 528, 531 (9th Cir. 1995). "Moreover, multiple trials "enhanc[e] the possibility that even though innocent [a defendant] may be found guilty." *United States v. Gaytan*,

115 F.3d 737, 742 (9th Cir. 1997) (alterations in original).

When a trial terminates prior to verdict because of a defendant's request, retrial is barred when the "government conduct in question is intended to goad the defendant into moving for a mistrial." *See Oregon v. Kennedy*, 456 U.S. 667, 673 (1982) (plurality opinion). This protection from bad-faith prosecutorial tactics is important because, when a trial is terminated before verdict, "a second prosecution may be grossly unfair." *Id.* at 682 fn.6 (Stevens, J., concurring). To determine whether the prosecutor goaded the defendant into moving for a mistrial, courts must review the objective facts and circumstances of the case. *See Kennedy*, 456 U.S. at 675 (plurality opinion) (courts can "infer[] the existence or nonexistence of intent from objective facts and circumstances").

In his concurring opinion in *Kennedy* – a case where mistrial resulted from ***one*** improper question from the prosecutor – Justice Powell explained that courts should assess prosecutorial intent by considering: (1) the conduct causing mistrial; (2) whether there was any "sequence of overreaching prior to" the misconduct causing mistrial; (3) whether the prosecutor was "surprised" by the motion for mistrial; (4) whether the prosecutor resisted mistrial; and (5) the prosecutor's testimony at a hearing on the mistrial. *Kennedy*, 456 U.S. at 680 (Powell, J., concurring). Further, evidence that the conviction sought by a prosecutor was at risk supports a finding of intent to goad. *Id.*, 456 U.S. at 673 n.4 (indicia of intent to

goad include whether "there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused" (quoting *United States v. Tateo*, 377 U.S. 463, 468 n.8 (1964)).

In applying those guideposts, courts have found goading. Intent to goad can be inferred from "prosecutorial overreaching," which has been found to occur when the government puts "irrelevant and highly prejudicial material" before the jury. *United States v. Martin*, 561 F.2d 135, 139-40 (8th Cir. 1977). The intent to goad has even been found in a case when the government engaged in a course of secretive conduct, because the government's intent could objectively be inferred from the circumstances. *See United States v. Sterba*, 22 F.Supp.2d 1333, 1343 (M.D. Fl. 1998). Most recently, goading was found in a case where the prosecutor made an improper statement during summation, was ordered to refrain from commentary on that topic, made the comment again, and showed no remorse for violating the court's order upon questioning by the court. *See United States v. Padua*, 2021 WL 5860653, at *2-3 (W.D.N.Y. Dec. 9, 2021). In barring retrial, the court in *Padua* noted the defendant "was not shy" about moving for mistrial, which put the prosecutor on notice that violating the court's order would trigger mistrial, and intent to goad could be inferred – without a hearing – by virtue of the prosecutor violating that order a second time. *Id*. at *4.

II. The Motion Judge Erred In Denying The Motion.

This is one of the rare cases where retrial after a mistrial is barred by the Double Jeopardy Clause under *Kennedy*. The objective factors identified by Justice Powell weigh heavily in favor of finding the intent to goad. First, the misconduct at issue was not accidental. It was not a one-off instance of bad judgment. The seasoned prosecutorial team's goading began during opening argument, continued with each witness, and accelerated with frequency and blatancy during Dr. Cooper's testimony (which followed Agent Fichtner's disastrous cross-examination). The prosecution's extensive rule-breaking was an extreme "sequence of overreaching." *Kennedy*, 456 U.S. at 680 (Powell, J., concurring). If the prosecutors' repeated misconduct here did not amount to intentional goading, it is hard to imagine what would. Affirming the Motion Judge's ruling would encourage further prosecutorial misconduct, signaling that *Kennedy* is a paper tiger.

Second, the prosecutors expressed no surprise at Appellants' motions for mistrial, nor could they. Much like the defendant in *Padua*, Appellants were "not shy" about seeking to preclude inflammatory evidence on child sex-trafficking, repeatedly objected to the government's violation of clear court orders limiting such evidence, and twice moved for mistrial before the mistrial motion that ultimately succeeded.

Third, the government's tepid opposition to mistrial does little to undermine the intent to goad. Like any plaintiff, the government opposed the termination of its trial. But the prosecutors knew they had to make a *pro forma* objection to the mistrial motion. Moreover, they have expressed no remorse for putting the Trial Judge, Appellants, and seventeen jurors through the time and expense of a trial that their misconduct forced to a halt. The government expressed more defiance than remorse for repeatedly violating the court's orders, at sidebars and Motion briefing and oral argument, instead deflecting blame onto their own witnesses and even the Trial Judge. 21-ER-4455-56; 23-ER-4744; 16-ER-3165; Dkt. 2. Indeed, in their motion to summarily dismiss this appeal, the prosecutors claimed they did absolutely nothing wrong and, if they failed to comply with the Trial Judge's orders, that only was because the Trial Judge failed to provide clear direction. Dkt. 2.

Actions speak louder than words. The government's naked claim that it had no intent to goad should be rejected. That claim is belied by the government's entire course of conduct at trial. The government's claim also is dubious given its prior conduct in the case. The government has shown throughout this litigation that it will say what is necessary to keep its case alive, like its inconsistent statements about its invasion of the privilege and its production of *Brady* and *Jencks* material. The government's denial of the intent to goad is reflective of a broader pattern of

misconduct and overreaching, just another example of its say-whatever-it-takes-to-keep-the-case-alive approach to this prosecution.

Ultimately, however, the prosecutors' statements at the hearing on the Motion plainly contradict the Trial Judge's findings about their misconduct during the trial. This inconsistency is objective proof of the intent to goad. If the prosecutors truly instructed J.S. to avoid talking about the prostitution lifestyle, why did the prosecutor specifically ask her about the prostitution lifestyle and then defend his questioning when under fire by the Trial Judge—and then continue that questioning, even after the Trial Judge directed him to stop? If the prosecutors truly advised Dr. Cooper not to discuss the victimization of children, why did the prosecutor solicit that exact information repeatedly throughout Cooper's testimony, again, while defending the right to solicit that evidence despite the Court's orders to the contrary?

Appellants cannot know exactly what triggered the government's intent to provoke a mistrial. The government, however, had ample reason to sabotage the trial to avoid acquittal. The government did not fully understand the case it had brought – or its infirmities – until just before trial. At that time, the Trial Judge disabused the government of its mistaken belief that escorts were illegal everywhere except one "very a small county in Nevada." If escorts been illegal everywhere, every escort ad posted to Backpage would have been an ad proposing an illegal transaction on its face, and not protected by the First Amendment, just like an ad

offering "heroin for sale," just as the government had been arguing. But instead, weeks before trial, the government learned the existence of escort ads did nothing to further its case, one that required proof of the specific intent to facilitate business enterprises involved in prostitution offenses.

Just prior to trial, the Trial Judge also expressed skepticism of the government's position that the First Amendment had no bearing on its case. Although the Trial Judge ultimately declined to provide First Amendment-related instructions in the ***preliminary*** jury instructions, likely because she typically reserves such instructions for the final jury charge, the government knew the inclusion of First Amendment instructions in the final jury charge would be fatal to the case it was intending to present.

Then, the government opened, focusing almost entirely on child sex-trafficking, which goaded Appellants into moving for mistrial the first time. The government continued injecting child sex-trafficking into the trial with each witness. The final blow to the government's case came during the cross examination of Agent Fichtner, who completely undermined the government's years-long foundational premise that all ads in the adult section of the website, including the fifty charged ads, were "obvious prostitution ads." Agent Fichtner admitted that law enforcement officers generally could not make an arrest based solely on an adult-oriented ad because of the inability to determine, based solely on review of an ad, whether the

ad is for lawful activity or relates to prostitution. He conceded he never made an arrest for prostitution based solely on an ad and he knew of no law enforcement officers who had.

With the collapse of each tenet upon which its case was based, the government used Dr. Cooper achieve the mistrial it sought. Each time the government solicited testimony from Cooper on child sex-trafficking, the government knew Appellants would object and, if the government persisted, move for mistrial. The government solicited this evidence over strenuous objections from Appellants and repeated warnings from the Trial Judge. Mistrial was the necessary result of the government's misconduct; after Agent Fichtner's concessions, mistrial was also necessary to stave off acquittal.

The Trial Judge's remark about non-intentionality was squarely at odds with her specific factual findings concerning the government's repeated and blatant misconduct, in addition to being made without legal context, without the question of intent to provoke a mistrial having been raised, and without the benefit of Appellants' Motion framing the intent-to-provoke issue with the government's trial and pre-trial misconduct.

The Motion Judge erred in rejecting the Trial Judge's specific factual findings about the prosecutors' repeated misconduct and in embracing the Trial Judge's comment regarding "intentionality" as the basis to deny the Motion. The Motion

Judge should not have relied upon a finding that was untethered to any identifiable standard, particularly when that finding was at odds with the Trial Judge's own summary of the pervasive misconduct that led to the declaration of mistrial.

III. The Motion Judge Abused Her Discretion In Denying A Hearing.

With respect to assessing the intent to goad, Justice Powell advised courts to conduct hearings – noting that a prosecutor's hearing testimony was one of the factors pivotal to any court's analysis of the intent to goad. *Kennedy*, 456 U.S. at 680 (Powell, J., concurring). In fact, the lower court in *Kennedy* conducted such a hearing, which provided the Supreme Court with a more developed record of the prosecutor's intent than a transcript of the proceedings that led to mistrial (or a prosecutor's self-serving avowal about witness preparation). *Id*. at 669 (noting that the trial judge assessed the double jeopardy claim "[a]fter a hearing at which the prosecutor testified").

Here, the Motion Judge should have held an evidentiary hearing to address whether the government intended to goad mistrial, particularly given its pervasive misconduct. The Motion Judge accepted prosecutors' ***unsworn claims*** about witness preparation at face value, even though those claims were inconsistent with their ***actual conduct*** at trial. If the prosecutors truly instructed J.S. and Dr. Cooper to avoid topics like the prostitution lifestyle or victimization of children, why did they ***repeatedly ask their witnesses about those topics*** and why did the witnesses

repeatedly provide such testimony? Indeed, at trial, when they came under fire for soliciting such testimony, government counsel defended their decisions to ask questions about those specific topics. 21-ER-4455-56; 23-ER-4744. But even if the government had prepared its witnesses as it claimed, a hearing was still necessary, nonetheless, to determine the government's motivation behind its repeated and brazen rule-breaking at trial. It is inconceivable that seasoned prosecutors would engage in that level of misconduct – knowing that the repeated solicitation of testimony on child sex-trafficking would trigger mistrial motions by Appellants – if the prosecutors did not intend to goad a mistrial. The Motion Judge did not address any of these issues in the denial of the Motion, nor did the Motion Judge appreciate the pervasiveness of the misconduct, something that could be gleaned from the Trial Judge's mistrial ruling and a careful review of the trial transcripts.

In addition to the government's inconsistent claims concerning its lack of intent to goad, the unique procedural history of this case further merited the need for a hearing and a more careful review of the government's actions – the judge who ruled on the double jeopardy claim had not presided over the trial. The Motion Judge lacked the knowledge of the parties and issues that the Trial Judge had gained through her years presiding over this case. The Motion Judge unenviably parachuted into this case after more than three years of litigation and faced the daunting task of attempting to come up to speed in a few weeks. Perhaps this is why the Motion

Judge's denial order incorrectly analyzed the conspiracy charges as spanning 2013-2018 (1-ER-3-4), when the Indictment's charges in fact spanned fourteen years from 2004-2018 (2-ER-143[¶196]) (a critical distinction in assessing the government's defense of its refusal to produce WDWA investigative materials from 2010-2013 under *Brady* and *Jencks*). Under these circumstances, this Court has logically and prudently engaged in less deferential review because unlike the Trial Judge, who was "uniquely positioned to evaluate the prosecutor's conduct," *see Rodriguez*, 229 F. App'x at 548, the Motion Judge was in no better position than this Court to assess the intent to goad. A hearing would have provided more meaningful context – not to mention the opportunity to address glaring inconsistencies – than cold transcripts and pleadings.

CONCLUSION

For all these reasons, Appellants respectfully request that this Court reverse the denial of the Motion. Alternatively, Appellants request an order remanding this case for an evidentiary hearing to develop the record on the intent to goad, including, but not limited to, testimony from government counsel and government witnesses, and with direction to provide appropriate deference to the Trial Judge's factual findings.

Respectfully submitted this 15th day of March, 2022.

s/Whitney Z. Bernstein

Thomas H. Bienert, Jr.
Whitney Z. Bernstein
BIENERT KATZMAN LITTRELL WILLIAMS, LLP
903 Calle Amanecer, Suite 350
San Clemente, CA 92673
Telephone: (949) 369-3700
Email: tbienert@bklwlaw.com
Email: wbernstein@bklwlaw.com
Attorneys for Defendant-Appellant James Larkin

Paul John Cambria, Jr.
Erin McCampbell Paris
LIPSITZ GREEN SCIME CAMBRIA LLP
42 Delaware Ave., Suite 300
Buffalo, NY 14202-3857
Telephone: (716) 849-1333
Email: pcambria@lglaw.com
Email: emccampbell@lglaw.com
Attorneys for Defendant-Appellant Michael Lacey

Bruce Feder
FEDER LAW OFFICE, P.A.
2930 E. Camelback Road, Suite 160
Phoenix, AZ 85016
Telephone: (602) 257-0135
Email: bf@federlawpa.com
Attorneys for Defendant-Appellant Scott Spear

Gary S. Lincenberg
Gopi K. Panchapakesan
BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS, LINCENBERG & RHOW P.C.
1875 Century Park East, Suite 2300
Los Angeles, CA 90067-2561
Telephone: (310) 201-2100
Email: glincenberg@birdmarella.com
Email: gkp@birdmarella.com
Attorneys for Defendant-Appellant John Brunst

David Eisenberg
DAVID EISENBERG PLC
3550 N. Central Ave., Suite 1155
Phoenix, Arizona 85012
Telephone: (602) 237-5076
david@deisenbergplc.com
Attorneys for Defendant-Appellant Andrew Padilla

Joy Malby Bertrand
JOY BERTRAND ESQ LLC
P.O. Box 2734
Scottsdale, Arizona 85252
Telephone: (602)374-5321
joy.bertrand@gmail.com
Attorneys for Defendant-Appellant Joye Vaught

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for James Larkin, Michael Lacey, Scott Spear, John Brunst, Andrew Padilla, and Joy Vaught represent that they are not aware of any other related case pending in this Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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