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' REPLY TO APPELLE'S ANSWERING BRIEF

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INTRODUCTION

The government invites the Court to treat this case as an ordinary case, but it is anything but ordinary—for at least six important reasons.

First, the Trial Judge—who presided over the trial, declared the mistrial, and was uniquely positioned to evaluate the government's motivation to cause a mistrial—recused, so Appellants' double jeopardy motion (the "Motion") was decided by a newly-assigned judge who had no history with this complex, multi-year prosecution. Although the Trial Judge found the government had engaged in pervasive misconduct, the Motion Judge rejected the Trial Judge's findings and held the government engaged in ***no*** misconduct (*see* Dkt. 11 at 50-51), giving no deference to the Trial Judge's findings—a clear error. This switch in judges—which resulted in an erroneous application of the facts, among other clear errors—makes this case an anomaly among double jeopardy cases.

Second, although double jeopardy claims commonly fail because defendants cannot plausibly explain why the government would want to provoke a mistrial, here Appellants provided clear reasons why the government knew, even before the jury was empaneled, that it would lose at trial. Even though the government based its prosecution ***solely*** on Backpage publishing third-party speech, the prosecutors insisted the First Amendment "does not apply at all" (3-ER-399), based on their erroneous reading of *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S.

376, 388 (1973), and its progeny. The prosecutors consistently conflated the publication of facially ***unlawful*** prostitution advertisements that the First Amendment does not protect with the publication of facially ***lawful*** dating, massage, and escort advertisements that the First Amendment does protect, even if some—or even many—of those ads ***might relate*** to unlawful activities. Then, the government realized—on the eve of trial—that the First Amendment protects the publishing it had portrayed as criminal activity for the last three years, thereby dooming the prosecution. The record is clear that the government needed a mistrial to regroup and retool its case. Tellingly, the government did not dispute Appellants' summary of the controlling First Amendment principles, its erroneous understanding of the application of the First Amendment to its third-party speech case, or the impact of those principles on the case.

Third, the Motion Judge's order denying Appellants' Motion did not address the government's foundational errors regarding the First Amendment or why those errors would prompt the government to provoke a mistrial. The Motion Judge's silence on this central issue is another clear error.

Fourth, the government provoked a mistrial because the devastating cross-examination of its lead witness, Special Agent Supervisor Fichtner, went to the heart of the government's already fatally flawed theory. Fichtner, an experienced law enforcement officer, admitted that adult-oriented activities such as escort services,

stripping, massage, and dominatrix services were lawful and that he could not tell from ads alone whether they related to those lawful activities or to unlawful activity. Fichtner's admissions not only eviscerated one of the core tenets of the government's prosecution ("anyone could tell" that Backpage adult-oriented ads related to prostitution), but also established that Backpage's publication of the hundreds of adult ads he showed the jury, which were similar to the fifty charged ads, did not propose necessarily unlawful transactions and, therefore, were protected by the First Amendment. There is no witness who could undo the damage Fichtner's concessions inflicted on the government's case.

In finding the government had no reason to provoke a mistrial, the Motion Judge failed to address how Fichtner's admissions on cross-examination eviscerated the prosecution or why his admissions would prompt the government to provoke a mistrial—yet another clear error. Fichtner's testimony cannot be spun as favorable and the government's downplaying of the damage Fichtner's testimony caused further confirms the prosecutors will say whatever they think it takes to keep their case afloat.

Fifth, the government was motivated to seek a mistrial because it learned that it was wrong about the "main thing" in its case, just weeks before trial. Indeed, in June 2021, prosecutor Kevin Rapp unambiguously told the Trial Judge that escort services were unlawful everywhere except for one small county in Nevada (5-ER-

913)—a notion the Trial Judge promptly rejected. Remarkably, the government now claims it always understood that escort services were lawful (Dkt. 25 at 44-45), while leaving unanswered the question of why Rapp told the Trial Judge escort services were unlawful everywhere ***if the entire prosecution team knew that was untrue***. The government's seeming admission that prosecutor Rapp deliberately misrepresented a material point of law to the Trial Judge[1] underscores why the Motion Judge should not have accepted the prosecutors' unsworn avowals that they did not intend to provoke a mistrial—particularly considering the Trial Judge's findings and the Motion Judge's lack of history with this complex case. The denial of an evidentiary hearing was another clear error.

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[1] The government does not suggest prosecutor Rapp's argument that escorts were unlawful was a "misstatement" or "mistake"—nor could it, given the context in which he made the statement. The government had objected to the following question from the proposed jury questionnaire: "63. Do you have strong feelings about escort services or people working in the legal adult entertainment industry or have you or someone close to you ever been affected by this type of service? ___ YES ___ NO [**Government objects to the use of the term "escort services."**]." 1-FER-44. At a hearing on the questionnaire, this colloquy ensued:

> THE COURT:…On page 18, question 63, the government objects to the use of the term escort services. Mr. Rapp, can you tell me why you object to that in the context of this question.
>
> MR. RAPP: Well,…because it suggests that escort services is somewhat legal. And, as we know, it's only legal in a very a small county in Nevada, so it's really prostitution services…

5-ER-913.

Finally, sixth, the Motion Judge's error in finding that the government had no cause to provoke a mistrial is underscored by what the government ***does not say*** in its response brief. Critically, the government does not dispute that the prosecutors learned for the first time, on the cusp of trial, that the First Amendment ***does*** apply to this case and that the millions of adult-oriented advertisements published by Backpage were presumptively protected by the First Amendment, save one aberrant ad. The government also does not dispute Appellants' presentation of controlling First Amendment law. Nor does it dispute that the prosecutors' erroneous understanding of the First Amendment gave them a compelling reason to want to provoke a mistrial: the First Amendment instructions the Trial Judge would be required to provide to the jury would garrote the only case the government had to present. If the government had a response to any of these points, the government could have included it. Its silence on these pivotal issues is nothing less than a concession.

With compelling reasons to provoke a mistrial, the government's highly experienced prosecution team so badly poisoned this case "after ***just two days*** of testimony at a jury trial scheduled to span ***three months***" (Dkt. 25 at 7 (emphasis added)) that the Trial Judge declared a mistrial, criticizing the prosecution team for repeatedly interjecting highly prejudicial evidence irrelevant to the crimes charged and for abusing the "leeway" she had allowed in their opening statement and with

every witness thereafter (saying the government's misconduct was "something that I can't overlook and won't overlook"). 23-ER-4814-15. This Court should not overlook the government's brazen misconduct and evidence of their intent to goad.

1. The Government's Standard of Review Should Be Rejected.

This Court generally reviews the denial of double jeopardy motions *de novo,* and related factual findings for clear error, but the government incorrectly suggests this Court simply must accept the Motion Judge's determination that the prosecution was not failing on the merits and, therefore, the prosecutors had no reason to provoke the mistrial. This is incorrect.

First, the Motion Judge erroneously relied on an unrelated, limited finding of the Trial Judge in reaching this conclusion. In particular, the Motion Judge found:

> The Defendants' last contention, that the Government resorted to goading the Defendants into seeking a mistrial because its case was failing on the merits, is not supported by the record. Indeed, the Defendants raised this same argument at trial. (Doc. 1346 at 68-69). Addressing the Defendants' oral motion for a mistrial because the Government had yet to produce evidence of their "specific intent on any of the counts or things charged in the indictment," the trial judge stated "it's way too early to make that argument because I can envision from the evidence that I've already seen where they're going to get to that…[i]t's way to [sic] early. We're barely, I don't know, ten percent in." (*Id.*). The Court adopts the trial court's finding.

1-ER-10. The Trial Judge was not assessing the broad question of whether the government had reason to provoke a mistrial, but a narrow defense complaint about the government's failure to link any evidence to any of the Appellants:

> MR. BIENERT:…[W]e still have heard no connection of anything to any defendant or any ad in the indictment that is somehow tying the knowledge of any defendant to the ad, the knowledge of any defendant to any child who was peddled in an ad before the ad was done, or even connecting any of the victims…And I just don't understand how this jury is ever going to evaluate whether these guys had specific intent on any of the counts or things charged in the indictment, when they're day, after day, after day just hearing Backpage had prostitution, Backpage had child trafficking, from people who don't identify the particulars and/or tie it to any defendant.
>
> THE COURT: Well, it's way too early to make that argument, because I can envision from the evidence that I've already seen where they're going to get to that. It's way too early. We're barely, I don't know, ten percent in…

23-ER-4784-85. Regardless of whether the Trial Judge's finding on that narrow issue—whether the government had a plausible path to connect some ads to one, some, or all Appellants—is entitled to deference, the Motion Judge erred in misusing the Trial Judge's comment on that narrow issue to determine that the government had no problems of any kind with its case that might cause it to provoke a mistrial.

This finding is problematic because the government had an unrelated, but insurmountable problem that the Motion Judge ignored. At the time the Trial Judge made that comment, no one had asked the Trial Judge whether the First Amendment

arguments Appellants first made just before trial hamstrung the prosecution, whether Fichtner's admissions had seriously damaged the prosecution, or whether either gave the government reason to provoke a mistrial. She also made no such findings. The Motion Judge clearly erred in conflating the Trial Judge's narrow ruling on a different topic with a conclusion that the prosecution was not in trouble.

Second, the Motion Judge's ruling neither mentions nor addresses Appellants' argument that the government had cause to provoke a mistrial because of its erroneous assessment of First Amendment strictures and Fichtner's devastating admissions on cross-examination. The ruling on the Motion said ***nothing*** about the First Amendment, the substance of Fichtner's testimony, or Appellants' argument that the government intended to provoke a mistrial because it knew the prosecution ultimately would fail as a result.[2] The Motion Judge's wholesale failure to address Appellants' evidence and arguments was clear error:

> As an appellate court, we hesitate to overturn a district court's factual findings. But where, as here, we are firmly convinced the district court overlooked key facts, it is our duty to reverse. *See Myers v. United States*, 652 F.3d 1021, 1036 (9th Cir. 2011) (holding that findings of fact

[2] The government claims the Motion Judge made findings beyond those of the Trial Judge, but the Motion Judge merely noted that the trial was in its infancy and the government had yet to call many witnesses, much like the Trial Judge had said. 1-ER-10. Moreover, none of the government's uncalled witnesses could change the fact that the First Amendment protects the publication of third-party speech, unless it necessarily proposes an unlawful transaction—something 49 of the 50 charged ads did not do.

> were clearly erroneous where the district court "simply ignored" contrary evidence in the record).

See Martinez-Gonzalez v. Elkhorn Packing Co. LLC, 25 F.4th 613, 625 (9th Cir. 2022). This Court, therefore, can and should reverse.

Finally, even if the Motion Judge's ruling could be read as implicitly finding that the First Amendment does not protect the publication of third-party speech or that Fichtner's testimony did not establish the ads he showed the jury were protected by the First Amendment, this Court must review *de novo* findings relating to "constitutional facts" in First Amendment cases. *See Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 742 (9th Cir. 2021), *cert. denied sub nom. David v. Kazal*, No. 21-1156, 2022 WL 1131404 (U.S. Apr. 18, 2022).

For example, the defendants in *Thunder Studios* asserted a First Amendment defense to civil claims under California's stalking statute, but the district court found their speech was a "true threat" unprotected by the First Amendment. At trial, a jury rendered a multimillion-dollar judgment against the defendants. On appeal, this Court held that "constitutional facts," including whether speech is unprotected by the First Amendment, are reviewed *de novo*:

> In First Amendment cases, we make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. Therefore, we review constitutional facts *de novo*, including whether speech constitutes a "true threat" and is therefore unprotected by the First Amendment.

Id. (citations and quotation marks omitted).[3] After independently reviewing the record in *Thunder Studios*, this Court rejected the district court's "true threat" finding, held the speech was protected by the First Amendment, and reversed and remanded with instructions to set aside the judgment. *Id*. at 748.

Consequently, because here the government is prosecuting Appellants ***solely*** for the publication of third-party speech, this ***is*** a First Amendment case, and *de novo* review applies to facts concerning whether speech is constitutionally protected. *Id*.

2. The Government Does Not Contest the Key Facts or the Law Relating to the First Amendment.

The government ignores the lead point in Appellants' opening brief—the government had the motivation and intent to goad mistrial after its last-minute realizations that escort services were lawful and that the First Amendment protected Backpage's publication of dating, massage, and escort services ads unless an ad proposed a necessarily unlawful transaction. Fichtner corroborated that protection,

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[3] *Accord Flanigan's Enterprises, Inc. of Georgia v. Fulton Cty., Ga.*, 596 F.3d 1265, 1276 (11th Cir. 2010) ("Ordinarily, we review district court factfindings only for clear error, but First Amendment issues are not ordinary. Where the First Amendment Free Speech Clause is involved our review of the district court's findings of 'constitutional facts,' as distinguished from ordinary historical facts, is *de novo*.…We find these core constitutional facts—the 'why' facts—as though the district court had never made any findings about them.") (citations and quotation marks omitted); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1027 (10th Cir. 2008) ("This court reviews a challenge to the constitutionality of a statute *de novo*. Additionally, First Amendment cases demand our rigorous review of the record. Thus, this court also reviews constitutional facts *de novo*.").

when admitting he could not determine from Backpage adult ads, alone, whether they related to unlawful activities. The government ***never*** addresses the First Amendment, the substantive problems the First Amendment created for the prosecution, or the facts Appellants advanced to establish why the First Amendment protected Backpage's publishing activities. Therefore, the government has waived any opposition it could have raised in its response brief:

> The Government did not contest the merits of Petitioner's case, and has, therefore, waived any opposition. *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (holding that an appellee who did not address an argument in the answering brief had waived that issue).

See Sandoval v. Sessions, 698 Fed. Appx. 902, 903 (9th Cir. 2017).

The facts this Court should accept as uncontested for purposes of this appeal include:

- Backpage always prohibited posting ads for illegal activities, including prostitution. Dkt. 11. at 12.
- Backpage's policy and practice always were to promptly delete any ads proposing illegal transactions. *Id*. at 4, n.3.
- Backpage cooperated extensively with law enforcement and responded near-immediately to law enforcement requests for records. *Id*. at 12.

- Backpage continually evolved its efforts to police the content of the ads its users posted and deleted an enormous volume of inappropriate ads. Dkt. 11 at 11, 12.
- This prosecution is based solely on Backpage publishing third-party speech. *Id*. at 3, 21.
- The government did not allege, nor intend to prove, that Appellants knew anything about the fifty charged ads, any of the people who posted those ads, or any of the activities of those people (whether lawful or unlawful) or had any involvement with the review or publication of those fifty ads. *Id*. at 3.
- The government's voluminous disclosures contain no evidence that any of Appellants had actual knowledge of the fifty charged ads, much less evidence of their specific intent to facilitate, through the publication of those ads, a business enterprise involved in prostitution associated with each ad.[4] *Id*. at 29.
- Forty-nine of the fifty charged ads did not propose illegal transactions on their face. *Id*. at 3.

[4] Although the Trial Judge said she saw a path for the government to connect Appellants to the charged ads, the government does not claim that such a path exists, and its disclosures confirm no such path exists.

- Although Backpage published tens of millions of adult-oriented ads, and the government investigated Backpage for years, the government identified just one ad involving a purportedly express offer of sex for money. Dkt. 11 at 3-4 n.3, 20-21.
- The one charged ad proposing a facially illegal transaction was a singular aberration and the government could not prove any of Appellants had any knowledge of the ad or the person who posted the ad. *Id*. at 3-4 n.3, 30.
- The government premised the prosecution on the jury being able to find Appellants had the specific intent to promote businesses enterprises engaged in prostitution associated with the fifty charged ads because Backpage continued to publish adult-oriented ads even after being "warned" that most of its adult-oriented ads related to unlawful activities. *Id*. at 3-4.
- The government knew a mistrial would grievously prejudice the defense, because the government had used civil seizures and forfeiture procedures to seize and restrain nearly all of Appellants' assets. *Id*. at 5 n.5.

Rather than contest these facts, the government simply slings mud about Backpage, improperly interjects the purported findings of a "report" issued by the staff of the United States Senate Committee on Homeland Security and Governmental Affairs' Permanent Subcommittee on Investigations (the "PSI Report"), and rehashes stale, untested, and unproven allegations from its four-year

old Indictment—all while carefully avoiding making any representations about what its evidence at trial would have shown.[5] The Trial Court did not admit the PSI Report into evidence at trial, nor could it. The PSI Report was an inadmissible polemic, full of hearsay, conjecture, and argument—not a report containing the factual findings of an objective investigation. Such congressional reports are inadmissible. *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1199 (11th Cir. 1986) (House subcommittee report was inadmissible because, *inter alia*, "[t]he subcommittee report did not contain the factual findings necessary to an objective investigation, but consisted of the rather heated conclusions of a politically motivated hearing."); *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22-23 (6th Cir. 1984) (*per curiam*) (House subcommittee report was inadmissible because, *inter alia*, "[m]uch of the proffered evidence comprises the Committee's subjective conclusions regarding Firestone's culpability, rather than factual findings"); *Pearce v. E.F. Hutton Grp., Inc.*, 653 F. Supp. 810, 813-16 (D.D.C. 1987) ("Given the obviously political nature of Congress, it is questionable whether any report by a committee or subcommittee of that body could be admitted under rule 803(8)(C) against a private party."). The government's attempt to interject the plainly inadmissible PSI Report into this appeal merely underscores the weaknesses of its case, particularly given the

[5] The PSI is the subcommittee best known for the activities of its former chairman, Senator Joseph McCarthy.

government did not even mention the PSI Report in its response to Appellants' Motion below.

The government fares no better with its regurgitation of the Indictment's allegations (with no representations about its ability to prove those allegations at trial or supporting citations beyond the Indictment). An indictment is not evidence or proof–that's why it is followed by an adversarial process and a trial–and indictments are notorious rubber stamps for prosecutors. *See United States v. Navarro-Vargas*, 408 F.3d 1184, 1195 (9th Cir. 2005) (critics claim "a Grand Jury would indict a 'ham sandwich'"). The government's mere recitation of the Indictment says nothing about what it could establish with admissible evidence at trial, particularly given the government admitted it presented ***only*** two law enforcement "summary witnesses" to the grand jury (neither of whom were listed as trial witnesses). 1-FER-18.

Moreover, with the government all but admitting to knowingly misrepresenting the legality of escort services to the Trial Judge, this Court should presume the government did the same with the grand jury—misleading it to believe escort services were unlawful everywhere except a small county in Nevada and convincing it Backpage's "escorts" category and ads were no different than offering a category for "heroin" and allowing ads advertising its sale.[6] The Trial Court

[6] The government continues to refuse to disclose what instructions it gave the grand jury to obtain its Indictment, hiding behind grand jury secrecy and arguing Appellants "point[ed] to nothing to suggest that the grand jury was misinformed"

rejected prosecutor Rapp's claim that escort services were unlawful, so the government shifted to claiming "the term 'escort' as used on Backpage was nothing more than a euphemism for prostitution" (5-ER-955)—as if the government could trample First Amendment protected speech simply by claiming it looks like unprotected speech—a position they have distanced themselves from on appeal. But the government cannot undo what it said to the Trial Judge. On the eve of trial, in its objections to Appellants' First Amendment jury instructions, the government told the Trial Judge it would present evidence showing that Backpage adult-oriented ads looked like prostitution ads, which the government said would prove the ads were prostitution ads:

> In addition, the United States anticipates introducing evidence showing what Backpage's "adult" and "escort" webpages actually looked like—evidence demonstrating that, rather than marketing legitimate "escort services," these sections included page after page after page of prostitution ads. Simply put, the term "escort" as used on Backpage was nothing more than a euphemism for prostitution.

7-ER-1335.

The First Amendment does not, however, allow the government to magically transform facially lawful adult ads into unprotected speech simply by labeling them

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(5-ER-955), as if the government misleading the Trial Judge was irrelevant to whether the government did the same with the grand jury. *See* 5-ER-939-56.

"prostitution ads."[7] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) ("Protected speech does not become unprotected merely because it resembles the latter."); *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."). Moreover, even if the First Amendment did not exist, Fichtner's admissions on cross-examination proved that no one, the jury or otherwise, could ***presume*** that Backpage adult-oriented ads related to prostitution simply by looking at them—which, notably, is the opposite of what the government said his testimony would show.

3. The Motion Judge's Finding That the Government Had No Reason to Provoke a Mistrial Starkly Contrasts with the Uncontested Facts.

A. The Government Prepared for Years to Try a Case to Which The First Amendment Would Not Apply.

The government does not and cannot dispute that it spent years preparing to prosecute Appellants for Backpage's publication of adult-oriented ads assuming the First Amendment would have no bearing on the case. For example, in August 2019, the government told the Trial Judge the First Amendment "does not apply at all" to

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[7] The government's lengthy rehash of the Indictment's allegations makes clear that the Indictment simply mislabels ***all*** adult-oriented advertisements on Backpage as "prostitution advertisements," assuming the very conclusion it must prove. Dkt. 25 at 8. As a matter of law, the First Amendment permits no such assumptions.

Backpage's publication of adult-oriented ads. 3-ER-399. As the trial approached, the government's proposed jury instructions did not mention the First Amendment (7-ER-1163-1363), and the government objected to Appellants' proposed First Amendment jury instructions:

> Defendants' comment that the charges are based on "presumptively protected and lawful speech" is misplaced in this case, which concerns prostitution advertising (a form of commercial speech that is categorically excluded First Amendment protection)…

7-ER-1228. Less than three weeks before trial, the government still did not understand that the First Amendment protected Backpage's publication of adult-oriented advertisements, even if they "concerned" prostitution, unless those ads proposed necessarily unlawful transactions (*i.e.,* expressly offered sex for money).

B. By the Time the Government Realized the Trial Judge Would Have to Instruct the Jury that the First Amendment Protected Backpage's Publication of Adult-Oriented Ads, It Could Not Change Its Case.

Appellants filed proposed jury instructions on August 5, 2022 (6-ER-1073-1154), including a First Amendment jury instruction that said:

> A website's publication of a classified ad posted by a third party is protected under the First Amendment unless the transaction proposed in the ad necessarily would be an illegal act (like an ad proposing a sale of cocaine, which always is illegal).

6-ER-1145. Objecting, just weeks before trial, the government insisted "there is no requirement that an advertisement 'necessarily' or explicitly propose an illegal

transaction" and insisted it could convict Appellants for publishing facially lawful dating, massage, and escort ads containing "code words or other indicia of unlawful activity." 7-ER-1347.

Appellants' response to the government's objections (8-ER-1389-98) showed the government both that its claims were wrong and that its case was premised on a fundamental misunderstanding of the strictures of the First Amendment. First, the pertinent question for First Amendment purposes is not whether Backpage ads were "associated with unlawful activity," but rather "whether the goods or services…advertise[d] [we]re illegal"—dating, massage, and escort services are not, *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 904 fn. 7 (9th Cir. 2009), and whether the ads "propose[d] an illegal transaction"—49 of the 50 charged ads did not, *Valle Del Sol Inc. v. Whitin*g, 709 F.3d 808, 822 (9th Cir. 2013).

Second, Appellants' response showed numerous courts had rejected the government's position:

> [T]he First Amendment offers no protection to speech that proposes a commercial transaction if consummation of that transaction would ***necessarily*** constitute an illegal act. However, if, 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.

E.g., *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 114 (2d Cir. 2017) (emphasis in original) (citing *Valle Del Sol*, 709 F.3d

at 821); *Backpage.com, LLC v McKenna*, 881 F. Supp. 2d 1262, 1279 (W.D. Wash. 2012).

When the government learned, just days before the trial began, that the First Amendment would apply and would require the jury to presume the legality of all Backpage adult-oriented ads (except one), the government had no time to adjust its case. The government's final witness and exhibit disclosures had been due more than three weeks earlier.[8] Dkt. 25 at 46.

The government said nothing in its response brief about the First Amendment, except to incorrectly assert that the First Amendment issues raised by Appellants in their opening brief related only to "preliminary jury instructions" and that it "won" that "skirmish." Dkt. 25 at 45. The Trial Judge declined to provide preliminary First Amendment jury instructions (20-ER-4022), saying she "believe[d] it's more appropriate to leave more specific instructions until the final instructions" (16-ER-3300). The Trial Judge never addressed the final jury instructions, however, because the government provoked the mistrial before she could address them.

[8] In its opening brief, Appellants referenced the March 2021 deadline established by the Trial Judge (Dkt. 11 at 30), rather than the July 26, 2021, date to which the parties subsequently agreed (6-ER-1063–64). With either date, the government made its final witness and exhibits disclosures ***before*** it learned that the First Amendment applied, so had no ability to adjust its case.

Appellants premised their First Amendment argument on their proposed ***final*** jury instructions (Dkt. 11 at 25-28), not on the proposed ***preliminary*** jury instructions. The government's attempt to conflate the two (Dkt. 25 at 45) is disingenuous at best. In any event, the substantive First Amendment issues Appellants raised in connection with either the preliminary or final jury instructions were never decided before the mistrial in any ruling on the instructions or on any prior motions. There is nothing in the record to support the government's claim to have "won" the First Amendment issue.

C. The Government's Inability to Change Its Case Is Evident from Its Opening Statement and the Testimony of Its Lead Witness.

The government's opening statement and the testimony of its lead witness, Special Agent Supervisor Fichtner, presented the government's "anyone could tell" case, even though the government learned two weeks earlier that the First Amendment barred that theory. In the government's opening, the prosecutor consistently referred to escorts as "so-called" escorts, implying the jury could conclude escorts and escorts advertising were just prostitutes and prostitution advertising. *E.g.*, 20-ER-4066-68. After showing the jury numerous escort ads from Fichtner's video, none of which expressly proposed an unlawful transaction, the prosecutor told the jury that the facially lawful escort ads all were prostitution ads. 20-ER-4070 ("You looked at the vast amount of prostitution ads in the Sacramento escort section of Backpage.").

The government's "anyone could tell" theory of the case permeated the balance of the government-derailed trial. For example, just minutes into Fichtner's testimony, the prosecutor elicited that all the escort ads on Backpage were "blatant prostitution ads." 21-ER-4299. The government knew that was contrary to the First Amendment, but it was the only case the government had to try.

In its response, the government continues to suggest that the jury could convict Appellants after "determining the true nature of the services offered" in Backpage ads by "consider[ing] the totality of the text *and* context of Backpage's ads." Dkt. 25 at 43. In other words, the government still argues that a jury could conclude that speech is unprotected, simply because it looks like unprotected speech, and that a jury could convict Appellants for publishing facially lawful ads, if it concludes the ads look like they relate to unlawful activities. The government's willingness to intentionally misrepresent the law is particularly outrageous given that: (a) Fichtner admitted Backpage ads could be for lawful services even if they looked like prostitution ads and it was impossible to tell just by looking at Backpage ads whether they related to lawful or unlawful activity (*e.g.*, 21-ER-4299; 22-ER-4663-66); (b) the government chose not to discuss the First Amendment in its

response; and (c) the government knows its claim is foreclosed by First Amendment jurisprudence.[9]

D. Fichtner's Testimony Under Cross-Examination Assured the Prosecution Would Fail.

The government's case also was failing after Fichtner's admissions under cross-examination, because he was forced to admit: many adult-oriented services are legal (*e.g.*, escorts, massages, strippers, dominatrices); the hundreds of ads he showed the jury all were facially lawful;[10] he could not determine whether any of the ads he showed the jury related to unlawful activity; and he never arrested a person for a prostitution offense based only on the content of a Backpage ad and knew of no one who had. *See* Dkt. 11 at 39. The government does not dispute that Fichtner made these admissions or the manner in which Appellants summarized them in its opening brief. Fichtner's testimony contradicted the government's "anyone could

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[9] *E.g.*, *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"); *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir. 1972) ("The Government's argument takes as its premise the conclusion to be proved: The expressions and associational relationships in issue are not protected by the First Amendment….The Government has it backwards. ***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."(emphasis added)).

[10] Those ads were remarkably similar to the charged ads.

tell" theory of the case, as well as underscored that Backpage's publication of all the ads he showed the jury was protected by the First Amendment.

The government tries to downplay the damage Fichtner's admissions caused, claiming Fichtner merely was an inconsequential "introductory witness" called "to show the jury what Backpage's website looked like in 2015" and "did not opine on whether specific ads were solicitations for prostitution." Dkt. 25 at 42. This misleading characterization of Fichtner's testimony contradicts several indisputable facts in the record: the government devoted ten percent of its opening statement (20-ER-4066-70) to Fichtner and told the jury "evidence will show" the ads Fichtner reviewed "were nothing less than prostitution ads" (20-ER-4070); Fichtner's direct testimony that "the advertisements in the Adult Escort section" on Backpage all "appeared to be blatant prostitution ads" (21-ER-4299); and the government representing to the Trial Judge that the ads in Fichtner's video "constitute[d] ***intrinsic evidence of the crimes charged***," were "***part of the scheme to facilitate prostitution*** charged under the Travel Act," and were "***decidedly relevant to the charged conspiracy***" (1-SER 00281) (emphasis added).

Fichtner's cross-examination admissions eviscerated the government's "anybody could tell" theory and destroyed the government's credibility, after its lead witness claimed Backpage escort ads all were blatant prostitution ads and then was forced to recant. Witnesses like pediatrician Dr. Sharon Cooper (Dkt. 25 at 18) or

"victims who had been advertised for prostitution on Backpage" (*id*. at 42) might contradict Fichtner's testimony, as the government suggests, but, if an experienced law enforcement officer who spent "more than a year routinely reviewing [] escort ads on Backpage" (22-ER-4572) could not determine from Backpage adult-oriented ads, alone, whether they related to unlawful activities (*e.g*., 22-ER-4663-66),[11] the government had no hope of convincing the jury Appellants somehow could do so. The government's claim that it "planned to call scores of additional witnesses" to "assist the jury in understanding the nature of Backpage's 'escort' ads" (Dkt. 25 at 19) proves just how damaging Fichtner's admissions were to the government's "anyone can tell" case, which had become an "experienced law enforcement officers cannot tell, but somehow anyone else can" case.

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[11] "Q. (BY MR. BIENERT)…With this language here, which flat out says I like to be pleased and shows a tongue and says ask about my two-girl shows, you don't believe that is sufficient to establish to you under the laws of California that it is prostitution such that you could arrest her, right?

A. Based on this alone?

Q. Right.

A. No.

Q. Right. You need more than the ad, right?

A. Yes.…

Q. Right. And unless you're in the room with Jessica and her friend for the two-girl show, you don't know one way or the other, do you?

A. No."

The government also tries to distract the Court by falsely claiming Appellants made an argument that is contradicted by the record. The government says Appellants "argued below—and continue to press here—that the government decided to call Dr. Cooper after Fichtner because of Fichtner's supposedly devastating cross-examination" (Dkt. 25 at 41), while saying it decided to call Dr. Cooper before Fichtner's cross-examination ended (*id.* at 42). But Appellants made no such argument, either here or below. The government's three citations to Appellants' opening brief point to three places where Appellants said that Cooper testified after Fichtner—a true statement—and that after Fichtner's cross-examination, the government questioned Cooper solely about child sex trafficking—not only true, but also the Trial Judge's finding in her mistrial ruling. The government tries to create a contradiction by pointing to the final sentence of counsel at oral argument, as the Motion Judge cut him off as his time ran out. Counsel said:

> When Judge Brnovich said, enough, I can't do this anymore, they put on the expert who literally every word out of her mouth was child trauma, child trafficking, the psychological effects of children being harmed, none of which had anything to do with these defendants. And they had been warned not to do it. Why'd they do it? They were supposed to put a different witness on, but after Agent Fichtner blew apart on them, they doubled down, and they knew it would be a mistrial.

16-ER-3352.

Counsel's statement was inartful, but accurate. The government ***had*** scheduled a different witness (Tera Mackey) to testify after Fichtner. 1-SER-296. The government did notify Appellants shortly after the end of the first day of Fichtner's cross-examination (22-ER-4576-96) that Dr. Cooper (not Mackey) would follow Fichtner. 1-SER-296. And the government then proceeded to examine Cooper solely about child sex trafficking. 23-ER-4814. Although Fichtner's cross-examination meltdown commenced before the government told Appellants it was changing its witnesses, counsel did ***not*** say the government made the change because of Fichtner, nor did Appellants make that claim below or in their opening brief.

Appellants simply have argued that the government engaged in conduct it knew would cause a mistrial after Fichtner's testimony. The government's argument to the contrary is nothing but an attempt to distract from Fichtner's testimony and why the government would desire a mistrial after it.

E. The Court Should Reject the Government's Improper Attempt to Incorporate First Amendment Arguments into its Brief by Reference.

The government claims that Appellants seek to "relitigate" various issues from which Appellants seek no relief and purports to "stand on" portions of the district court record. The government's claim to "stand on" these arguments is an obvious, improper attempt to circumvent Circuit Rule 28-1(b), by impliedly incorporating by reference its arguments to the district court. If those documents

said anything pertinent to this appeal, the government had to discuss those issues in its response brief. The Court should reject the government's effort to incorporate them by reference. *Stevens v. Davis*, 25 F.4th 1141, 1161 (9th Cir. 2022) ("We limit our review to arguments raised in the…briefs…We do not consider additional arguments that Stevens raised before the district court, because his mere reference to those arguments in his opening brief on appeal does not incorporate them for our review. *See* Ninth Circuit Rule 28-1(b)…"). Moreover, although various aspects of the First Amendment had been briefed in different contexts during this prosecution, Appellants' filings related to the preliminary and final jury instructions presented authorities and arguments that had not been previously raised or decided in any prior motions.

Similarly, the government claims that Fichtner's testimony did not support First Amendment protection for Backpage ads, that discussing the First Amendment would be "beyond the scope" of the appeal, and that it "demonstrated below" that a jury can determine "the true nature of the services offered" in Backpage ads. Dkt. 25 at 43. The government does not develop a cogent argument to support these claims, but merely references its arguments to the district court in various filings and again tries to improperly incorporate those arguments by reference. The Court should reject the government's attempt to incorporate by reference.

The government also cites language from *United States v. Hale*, 448 F.3d 971, 982 (7th Cir. 2006), relating to "coded and disguised language," which is inapposite. *Hale* involved first party speech, not the publication of third-party speech. With first party speech, the speaker knows if coded language has a particular meaning, whereas a publisher of third-party speech does not know and cannot know what the speaker intended. *McKenna*, 881 F. Supp. 2d at 1279 ("[W]here an online service provider publishes advertisements that employ coded language, a reasonable person could believe that facts exist that do not in fact exist: an advertisement for escort services may be just that…. [I]f the offer is implicit, how can a third party ascertain that which is being offered before the transaction is consummated?"). Moreover, *Hale* simply does not address the First Amendment and cannot be read to imply that the First Amendment does not protect the publication of third-party speech using coded language—an issue neither presented nor decided in *Hale*.

4. The Trial Judge's Findings Don't Preclude This Court from Finding the Government Intended to Provoke the Mistrial.

The government greatly overplays the Trial Judge's comment that she did not see the prosecutors' conduct as intentional misconduct. The Trial Judge's comment was aimed at the numerous individual instances of misconduct, not to the prosecution's conduct in the aggregate—the pertinent issue for goading. The issue of whether the government had intentionally provoked the mistrial was not before the Trial Judge. Moreover, the Trial Judge had yet to address the First Amendment

issues raised by the Appellants' jury instructions and the government's objections, so likely was unaware of why the government's case was faltering or why the government had cause to provoke the mistrial. This Court should reject the government's invitation to interpret the Trial Judge's comment as pre-judging an issue not yet before her.

The Trial Judge's "cumulative effect" comment also does not show the prosecutors did not engage in misconduct or provoke the mistrial. To the contrary, the Trial Judge assessed that the government's misconduct in the first two days of trial had so polluted the proceedings that another three months of trial would not eliminate the prejudice. Moreover, any reasonably competent prosecutor needing a mistrial would do exactly what the prosecutors did here—repeatedly stepping over the line from the start of the opening statement and with every subsequent witness, to provide plausible deniability and reduce the odds of an adverse finding under *Kennedy*.

5. The Government Mischaracterizes the Motion Judge's Statements About Scrutinizing the Record.

Twice in its response brief, the government implies that the order on appeal says the Motion Judge "closely examin[ed]" the trial record. Dkt. 25 at 29, 36. The order twice used the words "close examination," but the government's suggestion is misleading, as the uses of that phrase related to allegations of misconduct unrelated to the government provoking the mistrial and plainly referred to reviewing the trial

court ***docket***, not the trial record. 1-ER-7 ("[C]urrently pending before the Court is Defendants' reassertion that the government is withholding Brady and Giglio material…[A] close examination of the record shows that the previously-assigned courts have issued rulings on many of the same assertions brought here."); 1-ER-17 ("The Defendants next ask the Court to exercise its supervisory authority to dismiss the case based on the Governments' privilege invasions…A close examination of the court record reflects that the trial court previously issued a Sealed Order addressing these very same allegations."). The government's claim that the Motion Judge "closely examin[ed]" the trial record has no support in the record.

Moreover, the objective facts show that the Motion Judge lacked a firm grasp of even the most basic facts relating to this complex litigation. The Motion Judge's order denying Appellants' Motion contained a fundamental factual error—characterizing the government's conspiracy charges as spanning five years from 2013-2018 (1-ER-3-4), when the charges spanned fourteen years from 2004-2018 (2-ER-143[¶196]).[12] The Motion Judge's misunderstanding of the facts is entirely

[12] The time span for the conspiracy was not important for Appellants' double jeopardy motion but was pivotal to a portion of Appellants' motion to dismiss that is not presently on appeal—the motion to dismiss under the court's supervisory powers based on the government's concealment of discovery materials from its Western District of Washington investigation, which addressed the period 2004-2012. The Motion Judge denied Appellants' motion and declined to rule on the relevancy or materiality of the documents. The Motion Judge's erroneous belief that the conspiracy allegations in this case spanned just 2013-2018, while the

understandable, given the circumstances, but the error is just one example of why this Court should be skeptical of the Motion's Judge's findings and accord them little deference.

6. The Motion Judge Erred in Denying Appellants' Request for An Evidentiary Hearing.

The government is right that evidentiary hearings ordinarily are not required for double jeopardy motions. That is because double jeopardy motions ordinarily are decided by the judge who presided over the trial, who already is intimately familiar with what transpired. *Cf. United States v. Avenatti*, No. 21-50225, 2022 WL 808143, at *1 (9th Cir. Mar. 16, 2022) (district court did not abuse its discretion by refusing to hold an evidentiary hearing on double jeopardy motion where it "presided over the entire proceedings including extensive discovery practice, conducted both pre-trial and mid-trial motions hearings, and heard fifteen days' worth of trial testimony," "was very familiar with the record underlying" the motion to dismiss, and "was uniquely positioned to evaluate and characterize the conduct of the government"). But that was not the case here.

The government relied primarily on this Court's decision in *United States v. Hagege,* 437 F.3d 943 (9th 2006). In discussing *Hagege*, however, the government failed to disclose the three critical facts that readily distinguish *Hagege* from the

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Washington investigation addressed 2004-2012, likely influenced the Motion Judge's decision and certainly was relevant to it.

circumstances here. First, the judge who decided the double jeopardy motion in *Hagege* had "presided over the entire proceedings" and, therefore, "was uniquely positioned to evaluate the prosecutor's conduct." *Id*. at 953. Second, with the government's opposition to the motion in *Hagege*, the prosecutor submitted an affidavit addressing the key factual issue and subsequently made further avowals to the court at oral argument resolving issues not addressed in the affidavit. *Id.* at 949. Third, the defendant in *Hagege* did not "offer a single reason why the government would have wanted to sabotage" the trial and the district judge found there was "no conceivable reason that the prosecutor would have wanted to trigger a mistrial motion."[13] None of those facts are present here.

The Motion Judge was brand new to this case, having no more familiarity with the record than this Court, and certainly was not "uniquely positioned to evaluate the prosecutor's conduct." *Id*. at 953. Appellants offered more than plausible reasons why the government would want to trigger a mistrial. The Trial Judge—the one familiar with the case history and the trial—found pervasive prosecutorial misconduct.

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[13] The government also said the court in *Hagege* had "survey[ed] precedents of other courts of appeals and conclud[ed] that all but one defer almost entirely to the district court regarding whether a hearing is necessary" (Dkt. 25 at 50), but again failed to mention that the outcomes in those cases were predicated on the fact that the judges deciding the double jeopardy motions had presided at trial and already were well versed in the facts.

The prosecutors submitted no affidavits or other sworn testimony. The government claims the Motion Judge "probed the prosecutors who examined J.S. and Dr. Cooper" (Dkt. 25 at 49), but the Motion Judge merely asked "what did you do" and the prosecutors' unsworn representations raised more questions than they answered. Prosecutor Rapp's avowals suggested he ***solicited*** J.S. to use the term "rape" by telling her not to talk about being raped in a time period that was not relevant, implying she could use the term for the relevant period, and to emphasize the "105 days"—two hot button issues for the Trial Judge. 16-ER-3375-77 ("Jessika, you're not going to talk about the fact that you were raped during that ten-day time frame. That's not relevant to this case. All right. Now let's jump ahead. You were now trafficked for 105 days, and during those 105 days you were posted repeatedly…that comes into evidence…Th[e postings] span that 105 days…What is relevant is the fact that you were posted and reposted for that 105 days…").[14] Moreover, the prosecutors' representations to the Motion Judge were contradicted by their conduct at trial, as they repeatedly solicited testimony on impermissible topics. *See* Dkt. 11 at 7-8, 48-49, 61, 64-65. Given these circumstances, the Motion Judge abused her discretion in refusing to hold an evidentiary hearing.

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[14] When discussing the rape, the 105 days, and elsewhere, the government repeatedly comments that the objections by Appellants' counsel were "unclear," without disclosing that the Trial Judge forbid speaking objections. 1-FER-62 ("there should be no speaking objections").

The government claims Appellants were required to make an "offer of proof" in connection with their request for an evidentiary hearing (Dkt. 25 at 51), but none of the cases the government cites use that term or support that claim. *United States v. Hoang*, 486 F.3d 1156, 1163 (9th Cir. 2007) ("An evidentiary hearing…need be held only when the moving papers allege facts…to enable the trial court to conclude that contested issues of fact exist"); *United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000) (same); *United States v. Zone*, 403 F.3d 1101, 1106 (9th Cir. 2005) ("an evidentiary hearing may be necessary when the factual record does not support a district court's order granting a defendant's motion to dismiss on double jeopardy grounds"). The Motion Judge's denial of the request for an evidentiary hearing was a clear error.

CONCLUSION

The Motion Judge's findings that the government had no reason to seek a mistrial, had engaged in no misconduct, and did not provoke the mistrial each were erroneous, and this Court should reverse. Anything short of reversal would render *Oregon v. Kennedy*, 456 U.S. 667 (1982), toothless. Alternatively, this Court should vacate the Motion Judge's order denying Appellants' double jeopardy motion and remand for a full evidentiary hearing with direction to provide appropriate deference to the Trial Judge's factual findings.

Respectfully submitted this 5th day of May, 2022.

s/ Whitney Z. Bernstein

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