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**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA**

United States of America,
 Plaintiff,
 vs.
 Michael Lacey, *et al.*,
 Defendants.

NO. CR-18-00422-PHX-DJH

**OBJECTION TO THE COURT'S
 PROPOSED JURY INSTRUCTION
 RELATING TO THE FIRST
 AMENDMENT**

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1 The Court’s proposed jury instruction relating to the First Amendment reads:

2 All speech is presumptively protected by the First Amendment to the United
3 States Constitution. Accordingly, you must presume that speech is protected.
4 *Speech relating to illegal activity, however, is not protected.* Prostitution is illegal in 49
5 states and most of Nevada. *Therefore, advertisements or solicitations for prostitution*
6 *have no protection.* The government has the burden to establish that the
particular expressions of speech at issue are not protected by the First
Amendment. You may consider any direct or circumstantial evidence in
assessing *whether any ads in this case related to illegal activity.* (emphasis added).

7 As discussed below, Defendants object to the italicized portions of the instruction as being
8 inconsistent with decisions of the United States Supreme Court, the Ninth Circuit, and other
9 courts.

10 **1. The Ninth Circuit Uses the Phrase “Speech Relating to Illegal Activity” As a**
11 **Shorthand Reference to Supreme Court’s Decisions, Not As a Constitutional**
Standard To Be Applied to a Publisher of Third-Party Speech.

12 **A. The Supreme Court’s Decisions in *Pittsburgh Press*, *Central Hudson*,**
13 **and *Williams* Apply Narrowly to Speech That Itself Proposes Illegal**
14 **Transactions and to Criminal Solicitation—Not to All Speech “Related”**
to Illegal Activity.

15 In *Pittsburgh Press*, the Pittsburgh Press Co. was charged with violating a city ordinance
16 prohibiting the publication of sex-designated “help wanted” ads, by allowing employment
17 ads to be posted in its daily newspaper under headings designating employment preferences
18 by sex (e.g., “Male Help Wanted,’ ‘Female Help Wanted,’ and ‘Male-Female Help Wanted’).
19 *Pitt. Press Co. v. Pitt. Comm. on Human Relations*, 413 U.S. 376, 377-80 (1973). The Pittsburgh
20 Press asserted that the city ordinance violated the First Amendment by restricting its
21 editorial judgment. The Supreme Court rejected newspaper’s position, saying:

22 “We have no doubt that a newspaper constitutionally could be forbidden to
23 publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor
24 would the result be different if the nature of the transaction were indicated by
25 placement under columns captioned ‘Narcotics for Sale’ and ‘Prostitutes
26 Wanted’ rather than stated within the four corners of the advertisement... Any
First Amendment interest which might be served by advertising an ordinary
commercial proposal... is altogether absent when *the commercial activity itself is*
illegal and the restriction on advertising is incidental to a valid limitation on
economic activity.”

27 *Id.* at 388-89 (emphasis added). The Supreme Court concluded, saying: “We hold only that
28 the Commission’s modified order, narrowly drawn to prohibit placement in sex-designated

1 columns of advertisements for nonexempt job opportunities, does not infringe the First
2 Amendment rights of *Pittsburgh Press*.” *Id.* at 391. The Supreme Court’s holding in
3 *Pittsburgh Press* only goes so far as to say that the First Amendment does not protect a
4 publisher’s knowing publication of classified ads that are *per se* unlawful (whether because the
5 content of the ads proposes facially unlawful transactions or because the ads were posted in
6 *per se* unlawful categories). *Id.* at 388-89, 391. The Supreme Court’s decision cannot be read
7 to suggest that the government could forbid, or prosecute a newspaper or website for,
8 publishing facially lawful advertisements in lawful categories because those ads might be
9 related to unlawful activity—such as an employer soliciting job applications with facially lawful
10 ads but then discriminating based on sex when hiring employees.

11 Later, in *Cent. Hudson Gas & Elec. Corp. v. Pub. Svc. Comm.*, 447 U.S. 557 (1980), the
12 Supreme Court referred to its holding in *Pittsburgh Press* as addressing “speech related to
13 illegal activity,” but those five words of *dicta* in *Central Hudson* merely were a shorthand
14 characterization of *Pittsburgh Press*—not a sweeping expansion of its narrow holding.¹

15 In *United States v. Williams*, 553 U.S. 285, 288 (2008), the Supreme Court considered
16 whether a federal statute criminalizing the “solicitation of child pornography” was
17 unconstitutional for being “overbroad under the First Amendment.” That statute, 18 U.S.C.
18 § 2252A(a)(3)(B), “criminalize[d] only offers to provide or requests to obtain contraband—
19 child obscenity and child pornography involving actual children, both of which are
20 proscribed and the proscription of which is constitutional.” *Id.* at 297. In holding the
21 statute constitutional, the Supreme Court again relied on *Pittsburgh Press*:

22 “Offers to engage in illegal transactions are categorically excluded from First
23 Amendment protection. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human
24 Relations*, 413 U.S. 376, 388 [] (1973)... [T]he rationale for the categorical

25 ¹ Indeed, the entirety of the Supreme Court’s discussion of *Pittsburgh Press* in *Central Hudson*
26 was: “The government may ban forms of communication more likely to deceive the public
27 than to inform it, *Friedman v. Rogers*, *supra*, at 13, 15–16, 99 S.Ct., at 896, 897; *Obralik v. Ohio
28 State Bar Assn.*, *supra*, at 464–465 [], or commercial speech related to illegal activity, *Pittsburgh
Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 388 [] (1973).” *Cent. Hudson*, 447 U.S. at
563-64. As such, the Supreme Court’s five-word, shorthand description of the holding in
Pittsburgh Press must be read as addressing speech proposing a facially illegal transaction.

1 exclusion...is based...on the principle that *offers to give or receive what it is unlawful*
2 *to possess* have no social value and thus, like obscenity, enjoy no First
3 Amendment protection, *see Pittsburgh Press, supra*, at 387–389, 93 S.Ct. 2553.”

4 (emphasis added). The Supreme Court’s holding in *Williams* was narrow and applied only to
5 offers to give or obtain contraband, which *necessarily* is unlawful—not to facially lawful
6 speech “relating to illegal activity.”

7 In sum, *Pittsburgh Press* teaches only that advertisements for a “commercial activity
8 [that] itself is illegal” are unprotected by the First Amendment, *Central Hudson’s dicta* adds
9 nothing to the holding in *Pittsburgh Press*, and *Williams* holds only that criminal solicitations of
10 contraband are unprotected. Nothing in these decisions suggests that speech proposing a
11 lawful transaction—such as a dating ad, a massage ad, or an escort ad—is unprotected if the
12 party proposing the facially lawful transaction ultimately uses such an ad as a prelude to
13 proposing and consummating an unlawful transaction.

14 **B. The Ninth Circuit Has Narrowly Construed *Pittsburgh Press*, *Central*
15 *Hudson*, and *Williams*, Focusing on the Content of the Speech and Not
16 Any Conduct Associated with the Speech.**

17 The Ninth Circuit has narrowly construed *Pittsburgh Press*, *Central Hudson*, and *Williams*
18 as applying to speech expressly proposing illegal transactions. The Ninth Circuit also has
19 expressly rejected the contention that facially lawful speech that might *facilitate* the illegal
20 activity of third parties falls outside the scope of the First Amendment.

21 First, in *Metro Lights, L.L.C. v. City of L.A.*, 551 F.3d 898, 904 n.7 (9th Cir. 2009), a case
22 involving commercial advertising, the Ninth Circuit narrowly construed *Central Hudson’s*
23 language “related to unlawful activity” to mean “whether the goods or services the party
24 advertises are illegal.” In particular, the Ninth Circuit said the district court:

25 “relied in part on the observation that ‘[a]dvertising is undisputably a lawful
26 activity.’ That is not the point, since not all advertisements receive First
27 Amendment protection. *Central Hudson* asks if the commercial speech is
28 “related to unlawful activity.” 447 U.S. at 564. Thus, *in the context of advertising*,
one must ask whether the goods or services the party advertises are illegal.

Id. (emphasis added).

Four years later, in *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013), the Ninth
Circuit again narrowly construed *Pittsburgh Press* and *Central Hudson* as focusing on the content

1 of the speech at issue and whether that content proposes an illegal transaction:

2 “Commercial speech merits First Amendment protection only if ‘the
3 communication is neither misleading nor related to unlawful activity.’ Arizona
4 argues that the day labor provisions are permissible because they regulate
5 speech only when associated with the unlawful activity of blocking or
6 impeding traffic. Arizona’s proposed rule would be a novel extension of
7 *Central Hudson*’s legality requirement, which has traditionally focused on *the*
8 *content of affected speech* - i.e., *whether the speech proposes an illegal transaction* - instead of
9 *whether the speech is associated with unlawful activity*. . . . Some decisions have
10 expressly phrased the legality requirement as whether ‘*the transactions proposed in*
11 *the forbidden [communication] are themselves illegal* in any way.’ . . . However it is
12 formulated, we think it clear that *Central Hudson*’s legality requirement
13 requires us to evaluate *the content of a commercial message* . . . Nothing in *Pittsburgh*
14 *Press* or any other case Arizona cites suggests that we should expand our
15 inquiry beyond *whether the affected speech proposes a lawful transaction* to whether the
16 affected speech is conducted in a lawful manner.”

17 *Id.* at 821-22 (emphasis added).

18 In 2020, the Ninth Circuit reiterated its holdings in *Metro Lights* and *Valle del Sol*,
19 construing *Pittsburgh Press* as applying *only* to speech that *itself* proposes an illegal transaction
20 (*i.e.* speech proposing a facially illegal transaction), while also emphatically rejecting the
21 Screen Actors Guild’s contention that *Pittsburgh Press* applies to facially lawful speech “that
22 facilitates illegal conduct:”

23 *Pittsburgh Press* implicates *only* those instances when the state restricts *speech that*
24 *itself proposes an illegal transaction*. See, e.g., *United States v. Williams*, 553 U.S. 285,
25 297 [] (2008) (“Offers to engage in illegal transactions are categorically excluded
26 from First Amendment protection.” (citing *Pittsburgh Press Co.*, 413 U.S. at 388
27 [])); *Valle Del Sol Inc.*, 709 F.3d at 822 (“Nothing in *Pittsburgh Press* . . . suggests
28 that we should expand our inquiry beyond whether the affected speech
proposes a lawful transaction. . . .”) . . . If accepted, SAG’s interpretation of
Pittsburgh Press would require this court to permit the restriction not only of
speech that proposes an illegal activity but also facially inoffensive speech that
a third-party might use to facilitate its own illegal conduct. But as the
Supreme Court has noted, ‘it would be quite remarkable to hold that speech
by a law-abiding possessor of information can be suppressed in order to deter
conduct by a non-law-abiding third party.’ *Bartnicki v. Vopper*, 532 U.S. 514 []
(2001). . . .”

29 *IMDb.com Inc. v. Bacerra*, 962 F.3d 1111, 1123 (9th Cir. 2020) (emphasis added).²

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² *Accord Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 114 (2d Cir. 2017) (“[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

1 In sum, despite the seemingly broad language in *Central Hudson* (“speech related to
2 illegal activity”) and *Williams* (“offers to engage in illegal transactions”), the Ninth Circuit has
3 held that language must be narrowly construed as applying only to either speech that *itself*
4 proposes an illegal transaction or to speech that constitutes criminal solicitation—not to
5 speech that might be *related to* an illegal transaction. Moreover, in *IMDB* the Ninth Circuit
6 expressly rejected the argument that *Pittsburgh Press* permits the government to criminalize
7 the publication of facially inoffensive speech on the grounds that a third-party might use that
8 speech to facilitate its own illegal conduct—yet that rejected concept is the cornerstone of
9 the government’s case.

10 **C. Even if a Charged Ad Is Construed As a Criminal Solicitation, the First**
11 **Amendment Nonetheless Protects the Publisher of Such Third-Party**
12 **Speech**

13 As the Court will learn at trial, forty-nine of the fifty charged ads propose facially
14 lawful dating, massage, and escorting transactions and, as such, are not themselves “offers to
15 engage in illegal transactions” or criminal solicitations. Nonetheless, even if those ads are
16 construed to be unprotected criminal solicitations made by the persons posting the ads (or
17 unprotected speech incident to their criminal conduct), that does not mean Backpage.com’s
18 publication of those third-party ads was outside of the protection of the First Amendment.
19 *Backpage.com, L.L.C. v. McKenna*, 881 F. Supp. 2d 1262, 1280-81 (W.D. Wash. 2012).

20 In *McKenna*, the State of Washington passed a statute targeting Backpage.com that
21 criminalized the publication of any content containing “any ‘explicit or implicit offer’ of sex
22 for ‘something of value’” depicting a minor. *Id.* at 1268. In defending its statute from a
23 constitutional challenge, the state claimed that “all online advertisements for escort services
24 actually are offers for prostitution” and argued that the statute reached “only offers to
25 engage in illegal conduct.” *Id.* at 1282. The court rejected the state’s claim that the statute
26 reached “only offers to engage in illegal conduct,” holding that the statute did “not fall
27 within the exception for offers to engage in illegal activity” because the statute “prohibit[ed]

28 _____
protected commercial speech.”) (emphasis in original); accord *Greater Philadelphia Chamber of*
Comm. v. City of Philadelphia, 949 F.3d 116, 142 & n.170 (3d Cir. 2020) (similar).

1 not only ‘offers’ to engage in commercial sex acts, but also the direct and indirect
2 publication, dissemination, and display of such offers.” *Id.* at 1280-81. In making the clear
3 constitutional distinction between offers to engage in illegal transactions and the publication
4 of those offers by a third-party website, the court held: “The third-party publication of
5 offers to engage in illegal transactions does not fall within ‘well-defined and narrowly limited
6 classes of speech’ that fall outside of First Amendment protection.” *Id.* at 1281. In other
7 words, even if the poster of an ad would have been unprotected by the First Amendment
8 because the ad constituted an offer to engage in an illegal transaction, a third party website
9 publishing that ad nonetheless would be protected by the First Amendment (absent another
10 exception under the First Amendment, such as publishing the ad in a manner that would
11 constitute aiding and abetting under traditional accomplice liability principles). To be clear,
12 this aspect of the holding in *McKenna* is based on the First Amendment, not the
13 Communications Decency Act. Therefore, this principle articulated in *McKenna* is equally
14 applicable here.

15 Further, the focus in the proposed First Amendment instruction on the *activities*
16 associated with speech, rather than on the *content* of the speech itself, would leave a publisher
17 of third-party speech with no means to distinguish between protected speech and
18 unprotected speech, since that distinction could not be discerned from the *content* of the
19 speech (*i.e.* “whether the speech proposes an illegal transaction”), but instead would require
20 the publisher to have advance knowledge of the *activities* of the person posting each ad (*i.e.*
21 “whether the speech is associated with unlawful activity”). *Valle del Sol*, 709 F.3d at 822. In
22 *McKenna*, the court rejected the idea that the First Amendment allows a publisher to “be put
23 at complete peril in distinguishing between protected and unprotected speech” and struck
24 down a Washington statute that attempted to impose such a quandary on publishers of
25 third-party adult advertising by criminalizing the publication of any content containing “any
26 ‘explicit or implicit offer’ of sex for ‘something of value’” depicting a minor. *Id.* at 1282.
27 The court held that the Washington legislature’s attempt to present such a “Hobson’s choice
28 to website operators like Backpage.com” with the aim of forcing it to “ceas[e] the posting of

1 advertisements for commercial sex acts altogether” was unconstitutional. *Id.* Explaining its
2 reasoning, the court said:

3 “The pimp that publishes the advertisement certainly ‘knows’ whether his
4 offer is for sex, whether explicitly or implicitly. However, what does it mean
5 for the website operator to ‘know’ that an advertisement ‘implicitly’ offers sex?
6 In Washington, ‘a person acts knowingly or with knowledge when ... he or she
7 has information which would lead a reasonable person in the same situation to
8 believe that facts exist which facts are described by a statute defining an
9 offense.’ Wash. Rev. Code Ann. § 9A.08.010(b)(ii). However, where an
10 online service provider publishes advertisements that employ coded language,
11 a reasonable person could believe that facts exist that do not in fact exist: an
12 advertisement for escort services may be just that....[Also] if [an] offer is
13 implicit, how can a third-party ascertain that which is being offered before the
14 transaction is consummated?”

15 *Id.* at 1279; accord *Backpage.com, L.L.C. v. Cooper*, 939 F. Supp. 2d 805, 834 (M.D. Tenn. 2013);
16 *Backpage.com, L.L.C. v. Hoffman*, 2013 WL 4502097, at *10 (D.N.J. Aug. 20, 2013)
17 (“Describing criminal conduct as anything that is ‘implicit’ is inherently vague, because it
18 means ‘[n]ot directly expressed [and] existing [only] inferentially’ and ‘fails to clearly mark the
19 boundary between what is permissible and impermissible.’... [L]aws regulating speech are
20 void for vagueness when they are so ambiguous that a reasonable person cannot tell what
21 expression is forbidden and what is allowed...”).

22 Unlike the statutes held to be facially unconstitutional in *McKenna*, *Cooper*, and
23 *Hoffman*, the Travel Act is a law of general applicability that does not directly target speech.
24 But that does not mean that the Travel Act escapes First Amendment scrutiny if used to
25 target speech, as the government seeks to do here. *People for the Ethical Treatment of Animals,*
26 *Inc. v. N.C. Farm Bureau Fed’n, Inc.*, 60 F.4th 815, 827-28 (4th Cir. 2023) (“[A] State may not
27 harness generally applicable laws to abridge speech without first ensuring the First
28 Amendment would allow it.... Laws cast in broad terms can restrict speech as much as laws
that single it out.... General or not, the First Amendment applies when [a statute] is used to
silence protected speech.”).

1 RESPECTFULLY SUBMITTED this 2nd day of August, 2023,

2
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8 *Pursuant to the District's Electronic Case Filing Administrative Policies and Procedures Manual (Jan.*
9 *2020) § II (C) (3), Paul J. Cambria hereby attests that all other signatories listed, and on whose behalf this*
10 *filing is submitted, concur in the filing's content and have authorized its filing.*

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