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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Michael Lacey, *et al.*, Defendants.	CASE NO. 2:18-cr-00422-PHX-SMB **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR RECUSAL** (Oral Argument Requested)

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I. INTRODUCTION

Responding to Defendants' recusal motion, the government posits the recusal motion is premised on the Court's inability to "preside impartially because of her husband's views" and that the recusal motion would require the Court "to recuse in every case involving subjects that the AG's Office or Attorney General Mark Brnovich [] have addressed." Resp. at 1. Neither is correct.

Defendants have *not* moved for recusal on the grounds the Court has been or will be biased.

Nor have Defendants moved for recusal because Judge Brnovich is married to the Arizona Attorney General or because AG Brnovich and the Arizona Attorney General's Office have taken public stances on matters of public policy (white collar crime, prostitution, sex trafficking, etc.) or prosecuted other cases involving those areas of the law. Those facts alone would *not* require recusal.

Instead, Defendants have moved for recusal because AG Brnovich has interests that may be substantially affected by the outcome of this case and based on the *appearance* of a lack of impartiality arising from AG Brnovich's statements and actions that bear *directly on this case and these Defendants*—statements and actions the government does not contest in its response. On either ground, it is irrelevant whether Judge Brnovich subjectively believes she is capable of impartially presiding over the case. If AG Brnovich has an interest and it could be substantially affected, Judge Brnovich must recuse, even if she believes she can be impartial. As to appearances, the standard is objective: whether "a reasonable person with knowledge of the facts would conclude that the judge's impartiality might reasonably be questioned." *Blixseth v. Yellowstone Mountain Club, LLC*, 742 F.3d 1215, 1219 (9th Cir. 2014). Section 455 "clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify [herself] in a questionable case" and "any inconvenience which does arise [from recusal] is more than outweighed by the need to protect the dignity and integrity of the judicial process."[1] *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1112 (5th Cir. 1980)*; accord United States v.*

[1] The government claims the Court has a "strong duty to sit," but cited a Ninth Circuit decision out of context, when the Court actually held that a judge has "as strong a duty to sit *when there is no legitimate reason to recuse* as [s]he does to recuse when the law and facts require." *Clemens v. U.S. Dist. Court for Cent. Dist. of Cal.*, 428 F.3d 1175, 1179 (9th Cir. 2005) (emphasis added). The government also claims prejudice from a recusal, but identifies none. Even if the government would be prejudiced, the prejudice would be outweighed by the need to protect the judicial process. The government suggests

Holland, 519 F.3d 909, 912 (9th Cir. 2008) ("If it is a close case, the balance tips in favor of recusal.").

The undisputed facts show AG Brnovich (and others acting on his behalf): have railed against the particular business at the core of this case (Backpage.com, LLC); have made public statements that reasonable people would conclude mean AG Brnovich believes Defendants are guilty of the crimes charged in this case; have directed the public to websites making similar claims and containing inflammatory and highly prejudicial statements about Backpage.com and Defendants; and have directly or indirectly vouched for the credibility of many of the government's witnesses in this case. These statements and actions targeting Backpage.com and Defendants make this case unlike any the government cites in its response and provide ample basis for a reasonable person to question Judge Brnovich's impartiality—particularly given the political implications of AG Brnovich's positions relating to Backpage.com and Judge Brnovich's involvement in AG Brnovich's political campaigns.[2] AG Brnovich's statements and actions require the Court to recuse a) under 28 U.S.C. §§ 455(b)(4) and 455(b)(5)(iii) because AG Brnovich has interests that could be substantially affected by the outcome of this proceeding and b) under 28 U.S.C. § 455(a) because AG Brnovich's interests, and public statements and actions, create an appearance of partiality. *See* Declaration of Vaughn R. Walker, Exh. A.

II. ARGUMENT

A. The Government Does Not Dispute That AG Brnovich Has Made Statements and Taken Actions Targeting Backpage.com and Defendants.

In its response, the government does not dispute the core facts underlying the recusal motion:

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that recusal is an "extreme measure," but, again, quotes those words out of context. *Twist v. U.S. Dep't of Justice*, 344 F. Supp. 2d 137, 142 (D.D.C. 2004) ("Recusal is an extreme measure that is required *only in circumstances specified in 28 U.S.C. § 455(b).*") (emphasis added).

[2] To this day, AG Brnovich has campaign photos and videos online that prominently feature Judge Brnovich. *See, e.g.*, https://www.mark4az.com/photos-videos/; https://www.youtube.com/watch?v=UhIP3GCB6GI; https://www.youtube.com/watch?v=ALrAoygmcnY. AG Brnovich also has publicly touted Judge Brnovich's elevation to the Federal bench at his campaign events. *See, e.g.*, https://m.youtube.com/watch?v=OJSRn4F6zV8. Defendants do not suggest there is anything untoward with Judge Brnovich having an interest in her spouse's success, political or otherwise, or *vice versa* with respect to AG Brnovich—only that AG Brnovich's statements and actions mean that Judge Brnovich should not preside over this particular case.

- On August 16, 2017, AG Brnovich wrote a letter to Congress "highlighting the potential complicity of online classified-ad company Backpage.com in soliciting sex traffickers' ads" and claiming Backpage.com "constructed [its] business model[] around advertising income gained from participants in the sex trade," "facilitate[ed]—and profit[ed] from—these illegal activities," "profit[ed] from prostitution and crimes against children," and used "the CDA as a shield" to keep it beyond "the reach of law enforcement." Motion for Recusal ("Mot.") (Dkt. 1059), Exh. 9. AG Brnovich issued a press release making similar claims (Mot., Exh. 8) and promoted both via Twitter. Mot., Exh. 10.

- AG Brnovich has published several booklets on human trafficking saying that human trafficking is one of "the most dangerous and growing threats to children in Arizona," one of which decried Backpage.com as "an online classified advertising site used frequently to purchase sex," claiming "over 300 ads are placed each day in Phoenix on Backpage.com for adult services—with an estimated 20% for girls under 18." Mot., Exh. 1. The booklets' claims are supported with citations to the United States Department of Justice and to organizations whose current or former leadership are listed as government witnesses in this case. The booklets also direct readers to the websites of numerous advocacy groups, many of which are associated with the government's trial witnesses in this case, on which readers will find inflammatory and highly prejudicial comments about Backpage.com and some Defendants.[3] *Id.*

- AG Brnovich, via his Twitter account and his website, promoted a webinar, presented under his name, that: claimed there were "so many websites that are dedicated to posting advertisements for sex with underage children;" said "Backpage.com . . . [was] where the vast majority of all advertisements were posted for sex trafficking and sexual exploitation;" identified organizations associated with two of the government's witnesses as "the two very trustworthy sources that we always want to use;" and told viewers they could obtain more information from four organizations whose websites include inflammatory and highly prejudicial material about Backpage.com and Defendants—organizations associated with at least seven of the government's witnesses. Mot. at 3.

- AG Brnovich, via his Twitter account and his website, directed the public to the website of a "partner" organization containing inflammatory and highly prejudicial material relating to Backpage.com and Defendants. That website trumpets the purportedly "infamous story of Backpage.com's exploitation and trafficking of women and children" and claims four Defendants sought to "abscond[] with millions of dollars in illegal profits from their now-shuttered sex business," but were "caught red-handed attempting to steal away their ill-gotten

[3] The government did not dispute that it intends to put at issue during the trial of this case many of the claims in AG Brnovich's booklets and on the websites to which AG Brnovich directs the public, nor did it dispute those claims "will be hotly contested at trial." Mot. at fn. 5. The government suggests these references in the booklets and on the websites are of no consequence, because few identify Defendants individually, but the government plainly intends to vilify Backpage.com at trial and, whether through its conspiracy claims or otherwise, claim that Defendants individually are responsible for whatever Backpage.com may have done. The government does not bother to contend otherwise. As such, it is of no consequence whether AG Brnovich, his booklets, or the websites to which he refers the public vilify Backpage.com or Defendants individually.

profits to prevent victims from ever recovering a penny's worth of compensation." *The website expressly references this criminal case.* Mot., Exh. 15.

- AG Brnovich, via his Twitter account and his website, directed the public to the website of an organization claiming "Backpage.com [is] widely viewed as responsible for the explosion of sex trafficking in the United States" and promoting its conferences that regularly featured as presenters one of the lead prosecutors on this case (DOJ Trial Attorney Reginald Jones) (as well as other representatives of the Department of Justice) and law enforcement officers and fact witnesses the government says it will call as witnesses in this case. Mot., Exhs. 17 & 18.

The government dismisses these statements and actions, and AG Brnovich's resulting interests, as "remote," "indirect" and "speculative" (Resp. at 2 and 12-13), but AG Brnovich's statements and actions directly target Backpage.com and Defendants and are part of AG Brnovich's high-profile public stance on trafficking—a high-profile stance that the government acknowledges (Resp. at 8).

B. The Recusal Motion Was Timely.

In the Ninth Circuit, "no per se rule exists regarding the time frame in which recusal motions should be filed," but "recusal motions should be filed with reasonable promptness *after the ground for such a motion is ascertained*." *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991) (emphasis supplied). In *Preston*, the district court denied as untimely a recusal motion filed shortly after the court denied a request to extend the cutoff date for discovery and "approximately eighteen months" after the transfer of the cases to the court. *Id.* The Ninth Circuit reversed, holding that the recusal motion was timely, notwithstanding the government's claim that the movants sat on their knowledge of the grounds for recusal until after the district court denied the discovery motion. *Id.* at 733 and n.3. The Ninth Circuit said "counsel asserts that he did not learn of [the basis for recusal] until ten days before the first recusal motion was filed;" "[t]his allegation is uncontroverted;" and "the government offers us nothing but speculation that the heirs were 'utiliz[ing] a disqualification issue as part of [their] trial strategy.'" *Id.* at 733 and n.3 (citing *Potashnick,* 609 F.2d at 1115).

The timeliness of Defendants' recusal motion cannot be judged by when they knew that AG Brnovich was Arizona's Attorney General or when they knew his political platform included a strong anti-trafficking agenda—as those are not the grounds for their recusal motion. Rather, the recusal motion is based on AG Brnovich's statements and actions that bear *on this case and these Defendants*. The government does not controvert Defendants' assertion that they first learned of AG Brnovich's

booklets on September 10, 2020, less than two weeks before filing their recusal motion, or that Defendants' discovery of the booklets caused them to investigate further and learn the remaining facts on which their recusal motion is based.[4] As in *Preston*, the government offers only speculation that Defendants must have known these facts—because they were available on the Internet—but that assumes, of course, that Defendants had scavenged the Internet to learn those facts. They did not do that until after stumbling across AG Brnovich's booklet on September 10, 2020.[5] *See* Declaration of Counsel, Exh. B.

[4] The government suggests the Court can "make credibility determinations" and "contradict the evidence with facts drawn from [her] own personal knowledge," citing *United States v. Balistrieri*, 779 F.2d 1191, 1202 (7th Cir. 1985), but a) the case is an out-of-circuit decision, b) the case is contrary to *Preston*, 923 F.2d at 733, and c) the holding was limited to 28 U.S.C. § 455(b)(1) (actual bias), which Defendants have not moved under here.

[5] The government claims Defendants turned a "blind eye" to facts alerting them to grounds for recusal, but cites no facts beyond AG Brnovich being Arizona's Attorney General and having an anti-trafficking agenda—and those facts are not the grounds upon which the Defendants have moved for recusal and those facts neither justify recusal nor put Defendants on notice of AG Brnovich's statements and actions related to Backpage.com and this case. The government cites no authority holding parties have an affirmative obligation to ferret out recusal grounds, as the law imposes no such obligation. *Listecki v. Official Committee of Unsecured Creditors*, 780 F.3d 731, 750 (7th Cir. 2015) ("[A] party does not have an obligation to discover any potentially disqualifying information that is in the public record. The onus is on the judge to ensure any potentially disqualifying information is brought to the attention of the litigants. . . . It would be unreasonable, unrealistic and detrimental to our judicial system to expect litigants to investigate every potentially disqualifying piece of information about every judge before whom they appear. '[L]itigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters. . . .'"); *Preston*, 923 F.2d at 732 & 733 n. 3 (recusal motion timely even though the underlying information had been published in the newspaper the prior year, as counsel averred he had not seen it).

The government's cases are readily distinguished by their facts. *E.g. Drake v. Birmingham Bd. of Educ.*, 476 F. Supp. 2d 1341, 1347 (N.D. Ala. 2007) (defendant school board's disqualification motion based on judge becoming a deacon at a mega-church where the plaintiff also was a deaconess was untimely because a school board member also was a deaconess and knew the plaintiff was a deaconess and also knew the judge was a prospective deacon, providing constructive notice to the school board and presenting the "classic case" of counsel seeking "to use the disqualification issue as part of a trial strategy" by "turning a blind eye to these facts"); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 525 F.3d 554, 558 (7th Cir. 2008) (Fed. Civ. P. "Rule 71.1(h)(2)(C) provides that litigants may examine a proposed commissioner at the outset; a litigant who lets this opportunity pass, then looks up the commissioners in Martindale–Hubbell after the proceedings have concluded, has no one to blame but himself.").

The government argues that a party who "moves for recusal after adverse ruling [sic] is presumed to be filing for manipulative purposes," Resp. at 1-2, but that is not the law and the case the government cited said nothing of the sort. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295-96 (9th Cir. 1992). To the contrary, the court in *Gallo* held "there is no per se rule that recusal motions must be made at a fixed point in order to be timely," but such motions "should be filed with reasonable promptness after the ground for such a motion is ascertained."' *Gallo*, 967 F.2d at 1295 (citing *Preston*, 923 F.2d at 733). The Ninth Circuit ultimately concluded that "the recusal statute [was] being misused for strategic purposes" in that case, because, after losing at trial, defense counsel repeatedly told the district court he would file a recusal motion but never did so.[6] *Id.* at 1296. And, in any event, the government's suggestion that Defendants "strategically" sat on facts justifying recusal for a year and a half, while the Court denied no fewer than eight substantive motions, is absurd—and wrong.[7] *See* Declaration of Counsel, Exh. B.

The government claims some courts "impose an automatic waiver" if "a party moves for recusal after suffering adverse rulings" (Resp. at 7), but, yet again, the case to which the government cites held nothing of the sort. *Bivens Gardens Office Building, Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 913 (11th Cir. 1998). Instead, the case held, rather unremarkably, that a party cannot sit on knowledge of grounds for removal in a gambit to use recusal for a second bite at the apple: "Plaintiffs' attorneys were aware a full three months before this case went to trial [of the basis for recusal], [y]et they made a strategic decision not to raise the issue until they saw how the trial came out. They . . .

[6] The government also cites *Melendres v. Arpaio*, 2015 WL 13173306, at *13 (D. Ariz. July 10, 2015) (*Melendres II*), but the court in *Melendres II* cited only *Gallo* to support the proposition—and *Gallo* not only provides no support, but is contrary. Moreover, later in *Melendres II* the court cited the actual holding of *Gallo*: "The Ninth Circuit has cautioned that a party that unduly delays the filing of a recusal motion is presumed to be filing it for manipulative purposes." *Id.* at *15.

[7] Dkt. 793 (Order Denying Motion to Dismiss on First Amendment Grounds) (Oct. 24, 2019); Dkt. 839 (Order Denying Motion to Compel Discovery Regarding Servers) (Jan. 7, 2020); Dkt. 840 (Order Denying Motion to Dismiss Based on Section 230) (Jan. 8, 2020); Dkt. 844 (Order Denying Motion to Dismiss for Grand Jury Abuse) (Jan. 9, 2020); Dkt. 870 (Order Denying Motion for Bill of Particulars) (Feb. 6, 2020); Dkt. 878 (Order Denying Motion to Sever) (Feb. 10, 2020); Dkt. 946 (Order Denying Motion to Dismiss for Failing to Allege Necessary Elements of Travel Act) (May 4, 2020); Dkt. 1028 (Order Denying Motion to Compel Production of Brady Material) (Jun. 26, 2020).

made a carefully thought out, coldly calculated, eyes open decision not to raise the issue and instead to gamble on winning anyway." *Id.* The facts in *Bivens* are not remotely like the facts here, where Defendants filed their motion within two weeks of discovering facts supporting the motion.[8]

C. AG Brnovich Has Interests Under §§ 455(b)(4) & (5) That May Be Affected By This Litigation.

The government claims that Section 455(b)(4) applies only to "financial or pecuniary interests of some variety" (Resp. at 9), but that is wrong. First, nothing in the statutory language suggests the term is so limited. Second, although financial interests are, far and away, the most common interests causing recusals, both the Fifth Circuit and the Seventh Circuit have held that an "interest" under Section 455 does not have to be a financial interest. *Potashnick*, 609 F.2d at 1113 ("The language of section 455(b)(5)(iii) referring to 'an interest' does not require that the interest of the judge's lawyer-relative be financial . . . . [T]he congressional drafters recognized that noneconomic interests may affect a judge's bias or prejudice."); *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 115-16 (7th Cir. 1977) ("The language of the amended statute [Section 455], in contrast to its predecessor, does not require that the interest be financial . . . . [T]he Congressional drafters recognized that non-economic interests

[8] The government cites other cases holding recusal motions were untimely, but those cases also are inapposite, as their facts differ markedly. *United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997) ("[I]t is clear that Rogers was aware of the asserted grounds for Judge Tevrizian's disqualification as early as March 11, 1994. His failure to make any formal motion until more than one and one-half years after he was aware of the grounds for disqualification—and almost nine months after his resentencing—renders his motion untimely."); *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir. 1997) (denying motion to disqualify as untimely where "[b]oth Summers and his counsel were present when the circumstances underlying [Summers'] motion arose," but they "did not raise the issue until after an adverse decision"); *United States v. Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990) ("Even prior to the time of his plea, Owens already knew all the essential facts on which he based his recusal motion. Yet, he chose to wait to seek Judge Haden's recusal until after he learned what sentence the judge imposed. This is manifestly too late."); *Lyman v. City of Albany*, 597 F. Supp. 2d 301, 307-09 (N.D.N.Y. 2009) ("the Motion for recusal was made, not only more than 20 months after all relevant information was available to the Plaintiff, but shortly after the Court issued an order dismissing parts of Plaintiff's Amended Complaint"); *Wells Fargo Bank NA v. Wyo Tech Investment Group LLC*, 2019 WL 4736775, at *9 (D. Ariz. Sept. 27, 2019) ("This is a textbook case of a litigant being aware of information at the start of a case, saying nothing, and then belatedly seeking recusal after becoming dissatisfied with the judge's rulings . . .").

may affect a judge's bias or prejudice.").[9] Third, with the exception of the *Melendres* cases, none of the cases the government cites even considered whether noneconomic interests might require recusal or actually held that only financial interests can require recusal under Section 455.

In *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir. 1976), the district court recused in a suit brought by Virginia Electric to recover damages from a fabricator of equipment for a nuclear power plant. If Virginia Electric prevailed in the suit, the judge, as a customer of Virginia Electric, stood to benefit, whether directly or indirectly, by an amount estimated to be $70-$100. The Fourth Circuit held that the judge did not have a "financial interest" as defined in the statute (as that required ownership of a legal or equitable interest), but held that the potential financial benefit the judge might receive was an "other interest" under the statute. *Id.* at 367-68. The Fourth Circuit did not say (much less hold) that an "other interest" had to be pecuniary. *Id.*

The Seventh Circuit's decision in *Guardian Pipeline,* 525 F.3d at 557, was similar. The movant sought to disqualify a commissioner appointed under Fed. R. Civ. P. 71.1 in a condemnation action brought by a pipeline company. The movant argued that the commissioner had an interest requiring recusal—"his hope that pipelines will hire him or his law firm in the future if this proceeding ends favorably" (an economic interest). *Id.* The Seventh Circuit held that no court had read the word "interest" that broadly and that "'interest' means an investment or other asset whose value depends on the outcome, or some other concrete financial effect (such as how much property tax a judge pays)." *Id.* The Seventh Circuit's discussion of the type of economic interests that qualify as "interests" under Section 455 cannot be twisted into a holding that noneconomic interests can never be an "interest" under the statute—particularly in the face of Seventh Circuit law expressly holding

[9] The government tries to distinguish AG Brnovich's interests, by claiming they have no economic component, while characterizing reputation and goodwill as economic or commercial interests, but the Fifth and Seventh Circuits both held reputation and goodwill are *noneconomic* interests. *Potashnick*, 609 F.2d at 1113 ("The outcome of any proceeding handled by a law firm may affect the partners' financial interests as well as certain noneconomic interests, including the reputation and goodwill of the firm."); *SCA Services*, 557 F.2d at 115 ("It is also arguable that Donald A. Morgan has other non-pecuniary interests in this litigation, for example, his interest in his and his firm's reputation and goodwill."). Regardless, AG Brnovich has economic interests in his reputation and goodwill, as those greatly impact his ability to raise campaign funds and to keep his office and salary.

otherwise. *SCA Services*, 557 F.2d at 115-16. The government's citation of *In re New Mexico Nat. Gas Antitrust Litig.*, 620 F.2d 794, 796 (10th Cir. 1980), is equally off-base, as the Tenth Circuit there held nothing more than "an interest not entailing direct ownership falls under 'other interest,' and requires disqualification only if the litigation could substantially affect it." *Id.* (the judge, as a potential class member in an antitrust suit seeking refunds for residential customers, had an "other interest" under Section 455). The Tenth Circuit said nothing about whether noneconomic interests also might require recusal under Sections 455(b)(4) & 5. *Id.*

The government also cites *Melendres II*, but that decision did not hold that noneconomic interests *cannot* require recusal under Section 455(b). Rather, the court said: "Courts have *generally* limited the kinds of 'interests' for which recusal is mandatory to those that are somehow pecuniary or proprietary in nature." *Melendres II*, 2015 WL 13173306, at *13 (emphasis added). Moreover, when making that statement, the court cited only the three decisions above, none of which held, or even supports, the proposition that noneconomic interests cannot require recusal. Finally, the government cites *Melendres I*, but the respondents there mischaracterized *In re Virginia Elec.,* 539 F.2d at 367-68, just as the government does here:

> "Plaintiffs respond by arguing that courts have narrowly defined "other interests" to include only financial or pecuniary interests of some variety, *see e.g., In re Virginia Elec. & Power Co.*, 539 F.2d 357, 367–68 (4th Cir.1976) . . . The Court [] agrees with Plaintiffs that the term 'any other interests' should be interpreted as being limited to financial or pecuniary interests, whether by ownership or some other means."

Melendres v. Arpaio, 2009 WL 2132693, at *9 (D. Ariz. July 15, 2009) (*Melendres I*). For support, the court in *Melendres I* cited the same three decisions cited by *Melendres II* (which do not support the ruling) and one district court decision, *E. & J. Gallo Winery v. Encana Energy Serv., Inc.*, 2004 U.S. Dist. LEXIS 29380, *13-15 (E.D. Cal. Feb. 20, 2004), which likewise mischaracterized *In re Virginia Elec.*

Here, AG Brnovich has staked his own "reputation and goodwill" on this prosecution—particularly when viewed in the context of his high-profile anti-trafficking agenda—through his *ongoing* public castigation of Backpage.com and Defendants (whether directly or by directing his constituents to the websites of his "partners" and others), by his *ongoing* vouching (directly and indirectly) for the credibility of the prosecution and many of its witnesses, and by his public declarations that, in essence, say Defendants are guilty. AG Brnovich's public excoriations of Backpage.com are particularly

troublesome when contrasted with his campaign videos touting the Brnovichs' "Family Values" and saying the Brnovichs "Live [Their] Values, Do the Right Thing"—videos prominently featuring Judge Brnovich and the young children of Judge and AG Brnovich. *See supra* at fn. 2. Rulings by the Court favorable to Defendants not only would be inconsistent with AG Brnovich's public pronouncements about Backpage.com, but also with the "family values" image *both* AG Brnovich and Judge Brnovich have presented in AG Brnovich's political campaign videos. An outcome adverse to the government in this case, whether from a jury or from the Court's rulings, may substantially affect AG Brnovich's interests and image—and to a much greater degree than a *de minimis* financial interest of the sort that would mandate recusal.

D. A Reasonable Person With Knowledge of the Facts Would Question the Court's Impartiality.

The government argues the "central premise" of the recusal motion is "obsolete" because "[c]ourts now resoundingly reject the notion" that a judge's spouse's views on a subject require recusal. Resp. at 14. Not so. First, "section 455(a) claims are fact driven, and as a result, the analysis of a particular section 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue." *Clemens*, 428 F.3d at 1178. As such, that a few courts refused to recuse based on their spouses' actions or opinions is of little relevance. Moreover, the facts in most cases the government cites are not remotely similar and are readily distinguished.[10] The

[10] *Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1241 (10th Cir. 2020) (judge not required to recuse where his spouse made a charitable contribution to her *alma mater* that was "not specifically tied to activity related to the litigation"); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1042 (9th Cir. 2011) (judge not required to recuse because her husband was one of 50 volunteer attorneys on the Los Angeles Legal Aid Foundation board after a mediator recommended that a portion of unclaimed class action settlement proceeds be distributed to the foundation, where her husband had no role in the mediator's decision); *National Abortion Fed. v. Ctr. for Med. Progress*, 257 F. Supp. 3d 1084, 1089 (N.D. Cal. 2017) (judge not required to recuse in a case involving the National Abortion Federation because his wife "liked" Facebook posts by two different pro-abortion organizations and her Facebook profile picture said "I stand with Planned Parenthood"); *Akins v. Knight*, 2016 WL 127594, at *3 (W.D. Mo. Jan. 11, 2016) (judge not required to recuse based on allegations that her lobbyist husband criticized someone who was promoting a petition calling for the U.S. Supreme Court to review another case decided by the court).

exception is *Melendres I*, where the court *recused*. *Melendres I*, 2009 WL 2132693, at *9.

On the surface, Judge Reinhardt's order in *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011), appears similar, but the issues there were matters of constitutional law before an *appellate* court and his spouse had expressed views on broad matters of social concern and law. *Id.* at 916 ("a reasonable person with full knowledge of all the facts would not reasonably believe that I would approach a case in a partial manner due to her independent views *regarding social policy*") (emphasis added).[11] The order makes clear that Judge Reinhardt's order is circumscribed and limited to situations such as a "public interest or advocacy organization that takes positions or supports legislation or litigation or other actions of local, state, or national importance." *Id.* at 911-12; *accord* Declaration of Vaughn R. Walker, Exh. A. There is a dramatic difference between an appellate judge's spouse expressing views on social issues of broad public concern and a trial judge's spouse publicly proclaiming that individual defendants being tried by his spouse on serious criminal charges are guilty and publicly vouching for the prosecution and its witnesses who will testify at the trial, particularly where the spouse is a state's top, elected law enforcement officer. Reading the order in *Perry* in a sweeping manner, as the government suggests, would gut the recusal statute.

III. CONCLUSION

Judge Brnovich should recuse herself from this case, with directions that the case be randomly assigned.

[11] The government repeatedly cites *Perry*, 630 F.2d at 909, as if it was a decision of the Ninth Circuit, but it merely was the order of one judge explaining his decision not to recuse—not binding Ninth Circuit precedent. Moreover, the U.S. Supreme Court subsequently held that the Ninth Circuit "was without jurisdiction to consider the appeal" and remanded with instructions to dismiss the appeal for lack of jurisdiction. *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). As such, Judge Reinhardt's order would appear to be of no further force or effect.

Respectfully submitted,

DATED: October 14, 2020

Thomas H. Bienert, Jr.
Whitney Z. Bernstein
BIENERT | KATZMAN PC

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

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

DATED: October 14, 2020

Paul J. Cambria, Jr.
Erin McCampbell
LIPSITZ GREEN SCIME CAMBRIA LLP

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

DATED: October 14, 2020

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

DATED: October 14, 2020

Bruce Feder
FEDER LAW OFFICE, P.A.

By: *s/ Bruce Feder*
Bruce Feder
Attorneys for Scott Spear

DATED: October 14, 2020

David Eisenberg
DAVID EISENBERG, P.L.C.

By: *s/ David Eisenberg*
David Eisenberg
Attorneys for Andrew Padilla

DATED: October 14, 2020

Joy Bertrand
JOY BERTRAND, ESQ.

By: *s/Joy Bertrand*
Joy Bertrand
Attorneys for Joye Vaught

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants who have entered their appearance as counsel of record.

/s/ Toni Thomas
Toni Thomas

Exhibit A

DECLARATION OF VAUGHN R WALKER

I, Vaughn R Walker, declare as follows:

1. **I am an attorney admitted to practice before the Supreme Court of the United States and all courts in California and various federal courts in the United States. In 2011, I retired as a United States District Judge for the Northern District of California, having served on that court from 1990 and as Chief Judge of that court from 2004 through year-end 2010.**
2. **During my twenty plus years as a federal judge, I presided over thousands of cases and hundreds of trials involving disputes under United States federal law and the laws of several states, predominantly California. I also sat by designation as an appellate judge with the United States Courts of Appeals for the Ninth Circuit and the Federal Circuit. From 2006 to 2011, I served on the Civil Rules Advisory Committee of the Judicial Conference of the United States.**
3. **Prior to serving as a judge, I practiced law in San Francisco from 1972 to 1990. My practice principally involved complex civil litigation, including securities, antitrust, environmental, land use and sports law.**
4. **Since retiring from the federal court, I have served as a mediator and arbitrator in private law practice in San Francisco and elsewhere. I have also taught courses in law as an adjunct instructor at the University of California Berkeley School of Law, Stanford University School of Law and, most recently at the University of California Hastings College of Law in San Francisco. In 2014 and 2015, I co-taught an Introduction to American Law course with Geoffrey Hazard at Hastings that, among other topics, touched upon the rules of professional conduct and ethics for judges and lawyers in the United States.**
5. **I am familiar with 28 USC §455 governing judicial recusal in the federal courts and have a working knowledge of analogous provisions of state law, in particular such law in**

California. I am also familiar with the principles which govern disqualification of arbitrators and mediators in private dispute resolution.

6. **My office address is 4 Embarcadero Center, Suite 2200, San Francisco, California 94111, United States of America.**
7. **I have been retained by the defendants in the above matter to render an opinion whether the court in the above-entitled proceeding is under a duty to recuse or whether the court in the appropriate exercise of its discretion should recuse. I formed the opinion that the commands of the statute governing recusal of United States judges warrants recusal because under certain provisions recusal is required and, even if not required, recusal is warranted as a matter of appropriate judicial discretion.**
8. **In forming this opinion, I have reviewed the following materials:**
    a. **Superseding Indictment ("SI") (Doc 1);**
    b. **Defendants' Motion for Recusal (Doc 1059), and the exhibits attached thereto;**
    c. **United States' Response to Defendants' Motion for Recusal (Doc 1067);**
    d. **Human Trafficking: Arizona's Not Buying It, a publication of the Office of Attorney General of Arizona, https://www.azag.gov/sites/default/files/publications/2018-06/Human_Trafficking_Not_Buying_It.pdf;**
    e. **Arizona Attorney General's Office Combatting Human Trafficking, https://www.azag.gov/criminal/trafficking**
    f. **A letter dated August 16, 2017 signed by the court's husband to the chairs and ranking members of the Senate and House communications and technology committees urging Congress to enact amendments to the Communications Decency Act of 1996 to affirm the authority of state attorneys general and others to prosecute the website Backpage.com and persons associated with it; and**
    g. **Webinar offerings by the Arizona Attorney General's Office, including titles such as "Human Trafficking for Parents" and "Student Presentations: Human Trafficking – Grades 7-12" https://www.azag.gov/outreach/webinars.**
9. **In my opinion, the court has a duty under 28 USC §455 to recuse. The reasons for this opinion are:**
    a. **This case relates to the defendants' alleged involvement in the Backpage.com web site;**

b. The SI herein makes 661 specific references to Backpage;

c. All of the defendants are referred to in the SI as "BACKPAGE DEFENDANTS," a defined term in the SI in ¶8 at 3;

d. According to the SI, the BACKPAGE DEFENDANTS allegedly intended to facilitate prostitution through advertisements on the Backpage website, SI ¶9 at 3;

e. The SI uses the terms "prostitution" and related terminology and "trafficking" interchangeably, see, e g, SI at ¶13 at4 ("pimps trafficking children"); ¶14 at 5; ¶74 at 17; ¶100 at 23; ¶111 at 26; ¶131 at 30; ¶136 at 33; ¶ 144 at 36; ¶151 at 37; ¶160 at 40; ¶168 at 42;

f. A letter described in the SI refers to Backpage as a "'hub for' human trafficking" and goes on to state that "forensic training" is not required to understand that Backpage advertisements "are advertisements for prostitutions," SI ¶111 at 26;

g. The SI alleges: "Many of the ads published on Backpage depicted children who were victims of sex trafficking," SI ¶13 at 4;

h. The Attorney General's publication identified in ¶8.a., above, specifically mentions Backpage as fostering and facilitating human trafficking, including trafficking in underage sex; and

i. All defendants are charged in the SI with violation of 18 USC §1952(a)(3)(A), travel to facilitate prostitution, among other offenses arising out of prostitution-related activities.

10. **Recusal is mandatory in the following situations:**

a. The judge's "impartiality might reasonably be questioned," 28 USC §455(a);

b. The judge knows that her spouse has "an interest that could be substantially affected by the outcome of the proceeding," 28 USC §455(b)(4); and

c. The judge's spouse has "an interest that could be substantially affected by the outcome of the proceeding," 28 USC §455(b)(5)(iii).

11. **Each of the foregoing grounds for recusal apply in this case and each such ground individually warrants recusal. The facts relevant to my opinion do not appear to be disputed, except with respect to the timeliness of the defendants' filing their motion for**

recusal. With respect to the facts of timeliness, I am unable to offer an opinion. As set forth below, I can assume that the defendants were untimely in seeking recusal and opine whether that untimeliness should affect the court's decision to recuse.

12. **Of the three grounds for recusal set forth ¶10, above, the relevant facts do not neatly fit under each ground. To a degree, they overlap and apply to more than one of the grounds for recusal. This makes the basis for recusal compelling. Suffice to say, that if any one of these three statutory grounds for recusal is met, recusal is required.**
13. **When the circumstances described in §455(b) (4) or (5) are present, recusal is required as a matter of express statutory command and not subject to judicial discretion. Application of the more nuanced recusal provisions of §455(a) are reviewed for abuse of discretion. Section 455(a) was enacted in 1974 and displaced the court's duty to sit in a case except upon a showing of bias or prejudice. See 28 USC §144. Under §455(a) recusal is required where a "reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v Studley*, 783 F 2d 934,939 (9 Cir 1986). Proof of actual bias or prejudice is not, however, required for recusal under §455(a).**
14. **Impartiality being a core attribute of the judiciary, judges are reluctant to find grounds for recusal under §455(a), because of the implication that the judge lacks an essential component of what it means to act as a judge. Context, however, is crucial. Recusal under §455(a) in one case in no way suggests deficiency in the qualifications to act as a judge in other cases. Indeed, recusal under §455(a) more likely reflects the judge's accurate perception of how judges are perceived by the relevant observers.**
15. **The standard under §455(a) is not, however, the judge's state of mind about the case. Instead, what matters is the standard of the "reasonable person with knowledge of all the facts." And the "reasonable person" in this context is not necessarily an omniscient or entirely detached individual. The reasonable person is one "with knowledge of all the facts" and knowledge requires understanding or appreciation of the facts. Thus, the reasonable person for the recusal motion directed to the late Judge Stephen Reinhardt in *Perry v Schwarzeneger*, 630 F 3d 909 (9 Cir 2011), a case upon which the government**

places considerable reliance, is a person familiar with the role of an appellate judge, the appeals process and involvement of public interest groups seeking to vindicate or oppose a voter initiative. By contrast, this case involves a criminal proceeding whose facts would be decided by lay jurors untrained and inexperienced in law or the judicial process and who likely would be exposed to the actions of the Attorney General directed at Backpage.com with which the defendants were allegedly involved. The reasonable person here is not the reasonable person of the *Perry* context.[1]

16. **The reasonable person here could be expected to appreciate that both the court and the Arizona Attorney General hold public office, discharge duties to the public generally and are charged to protect the public interest in the fair and impartial administration of justice. The fact that the court administers justice under federal law and the Arizona Attorney General does so at the state level would for the reasonable person here appear to be an immaterial difference. The reasonable person in this context would more likely be sensitive to fundamental considerations of fairness than to principles of federalism.**
17. **In the situation at bar, the appearance of partiality does not arise from the court's actions in the conduct of these proceedings. An appearance that a trial judge's rulings or demeanor favors one side or the other is routinely cured by appropriate curative instructions. Instead, in this case the appearance of partiality would stem from extrajudicial facts and circumstances. This presents a compelling ground for recusal as opposed to a situation in which the court's rulings or demeanor in court is cited as a basis for recusal. Cf: *In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation*, 623 F 3d 1200, 1209 (8 Cir 2010).**

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[1] At any rate, the vitality of *Perry* decision on recusal is doubtful as the Ninth Circuit lacked jurisdiction in that case and its judgment was vacated. *Hollingsworth v Perry*, 520 US 693 (2013). Because I was the trial judge in the *Perry* case, I am familiar with its history. No recusal motion was brought against me in that case although after losing and after I retired from the bench, the proponents of the voter initiative sought to vacate that judgment on the ground that I failed to disclose my sexual orientation and a personal relationship. Another judge determined that disclosure was not warranted under those facts and declined to set aside the judgment. *Perry v Schwarzeneger*, 790 F Supp 2d 1119 (N D Cal 2011).

18. **This also distinguishes the situation at bar from a situation in which the spouse of the court has taken a public position on a policy matter that is brought to court. That was obviously the situation with Judge Reinhardt and his spouse. Spouses may obviously differ in their political, policy, religious and social views. The view of one spouse may or may not reflect the views of the other. Even similar spousal views may not preclude a judge's impartiality in a case where those views are tested in court.**
19. **Judges frequently are called upon to decide cases involving issues on which they hold opinions, involving parties or attorneys whom they know or have had dealings with and involving matters of which they have studied or acquired knowledge or experience. These circumstances alone do not usually raise a question about the judge's impartiality. But the government overreaches in arguing that because the Attorney General takes positions on a variety of matters that also find their way into federal court, the court would be disqualified from a broad range of cases if it acknowledges that her impartiality would be questioned in this case.**
20. **The problem here stems not from the Attorney General's enforcement of state laws against prostitution and sex trafficking. Instead, the problem is that in doing so Attorney General has expressly targeted an entity with which these defendants are identified. This makes it impossible to dissociate the views of the Attorney General from the issues in this case. Where those views are general and not specifically pointed as here, recusal might generally not be required. This situation differs.**
21. **The Attorney General, the chief law enforcement official of the state in which this court sits, has in effect opined on the criminal liability of the website with which the SI alleges the defendants were involved. The Attorney General's allegation of criminal lability of Backpage does not automatically translate to criminal liability of the defendants, but it sends a signal that the reasonable observer in this context is unlikely to miss.**
22. **Because recusal under §455(a) is discretionary, a recusal decision does not depend on the court's determination that it is, in fact, not impartial. A decision to recuse under this section does not amount to a confession of partiality. Rather, it is simply an appreciation that a reasonable person – in this case from the perspective of a lay juror – would likely**

associate the court with the views of the Attorney General. Discretion and sensitivity to such considerations would seem especially warranted when, as here, the subject matter of the charges against the defendants touch highly charged issues, such as prostitution and sex trafficking. Whether same-sex couples should be accorded the right of civil marriage, the underlying issue in *Perry,* while controversial at the time, lacked the emotional content of the issues in this prosecution. Sensitivity to this circumstance is an appropriate component in the exercise of the court's discretion under §455(a).

23. **Turning to the grounds identified under 28 USC §455(b), it is important to note that these grounds cannot be waived. 28 USC §455(e). An objective viewer of the public statements of the Arizona Attorney General and his office, cited above, would conclude that the court could not dissociate herself from the views of the Attorney General. First, those views relate directly to the Backpage website with which all defendants are allegedly associated. Second, the state laws that the Attorney General in his statements seeks to vindicate condemn essentially the same conduct that the federal laws under which defendants are charged also condemn. Hence, the Attorney General has, in essence, publicly expressed views on the outcome of the proceedings in this case. Third, as a public official charged with knowledge of and enforcement of the laws, the Attorney General has, in effect, expressed an interest in the outcome of these proceedings.**

24. **The Attorney General is presumed to have knowledge of the facts on which his office undertakes official action. While, of course, in a large law enforcement agency, such as that of the Attorney General of Arizona, the Attorney General himself may not have actual personal knowledge of the facts on which every enforcement action is taken. The present situation appears to differ from the routine, however. It appears that the Attorney General's office has commented on facts pertaining to Backpage. Second, the Attorney General has specifically undertaken action to route out sex trafficking and prostitution in Arizona. While almost certainly these measures enjoy widespread public support, the Attorney General's singling out Backpage with which the defendants here are allegedly associated bespeaks "personal knowledge of disputed evidentiary facts" in**

this proceeding. The Attorney General's personal knowledge does not translate to the court's knowledge, but it does connote an interest in the outcome of the proceedings.

25. **The Attorney General is an elected official of the State of Arizona whose continuance in office and influence on public policy depends upon maintenance of credibility in the realm of his responsibilities which centers on law enforcement. The Attorney General's interest in his reputation makes that interest subject to and directly affected by the successful prosecution of the defendants here, implicating the ground for recusal under 28 USC §4555(b)(4). An acquittal of the defendants in this case would draw into question the campaign against internet-related sex trafficking and prostitution that the Attorney General has undertaken. Such a rebuke to an important policy endeavor of the Attorney General would affect his reputation in a way that is analogous to the impact on financial interests for which recusal is mandated under 28 USC §455(b)(4). To be sure, the Attorney General holds office in his own name and his successes or failures only derivatively affect the court, if at all. But the same is true in a situation in which the judicial spouse holds financial interests separate and apart from the judge. Recusal is nonetheless required in that situation.**

26. **Given the notoriety of the Attorney General's campaign against internet-related sex trafficking and prostitution, it is implausible that the court is unaware of the Attorney General's endeavors in this regard. Furthermore, having taken the position that he has, it is impossible for the Attorney General to divest himself of the conflict his actions create for the court, divestment sometimes being a possible remedy when a spouse's financial interest is minimal and only discovered after prolonged proceedings in a case. Here, by contrast, one must assume that the Attorney General's views on internet-related sex trafficking and prostitution are genuine expressions of his views on the best interests of Arizonans and not undertaken lightly or solely for political advancement. Nor can the Attorney General be expected to cast these views aside as one might divest ownership of securities. Whether the Attorney General's sentiments are shared by the court, the adverse effect on the Attorney General's reputation or standing that acquittal or dismissal of all or many of the charges in the present case would be palpable and**

mandates recusal under 28 USC §455(4). Relatedly, therefore, it is inappropriate for the court to rule on substantive matters while the recusal motion remains pending.

27. **Closely related to the grounds for recusal under 28 USC §455(b)(4), recusal under 28 USC §455(b)(5)(iii) is required in this situation because of the interests of the Attorney General would be substantially and adversely affected by rulings of the court favorable to the defendants. The partiality that the Arizona Attorney General's pronouncements betoken and the similarity of the Arizona laws that the Attorney General invokes and the laws under which the defendants here are charged demonstrate that the Attorney General's reputation would suffer from rulings of this court favorable to the defendants. The substantial effect test under 28 USC §455(b)(5)(iii) is not limited to financial or monetary effects. The interest described in §455(b)(5)(iii) includes noneconomic as well as economic interests. *Potashnick v Port City Const Co,* 609 F 2d 1101, 1113 (5th Cir), *cert denied,* 449 US 820, 101 SCt 78, 66 LEd2d 22 (1980). These interests include the Attorney General's prospects for re-election, political advancement and stature in the legal community. Recusal is required. 28 USC §455(e).**

28. **Although the grounds for recusal described in ¶10, above, are separately applicable and each individually would require recusal, the facts here create a mosaic that makes recusal unavoidable. The tension between the Attorney General's prominent public campaign against internet-related sex trafficking and prostitution and the court's obligation both to avoid the actuality and appearance of partiality and "to administer justice without respect to persons," 28 USC §453, makes it necessary for the court to grant the motion for recusal.**

29. **Finally, the government argues that the defendants waited too long to bring their motion to recuse. A party's right to seek recusal can sometimes be deemed waived by delay if the grounds for recusal are insubstantial, such as ownership of an insignificant financial interest, and the case has long proceeded before a recusal motion is submitted. Those circumstances do not apply here. Pursuing enforcement of Arizona laws against prostitution and sex trafficking is a major priority of the Attorney General. Furthermore, there are numerous other judges without any connection to these proceedings and who**

are fully able to preside in these proceedings. Waiver of recusal through untimeliness does not apply in these facts.

Date: October 14, 2020

Vaughn R Walker

United States District Judge (Ret)

Exhibit B

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Whitney Z. Bernstein (CA Bar No. 304917, admitted *pro hac vice*)
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Additional counsel listed on next page

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Michael Lacey, *et al.*,

Defendants.

CASE NO. 2:18-cr-00422-PHX-SMB

DEFENDANTS' JOINT DECLARATION IN SUPPORT OF DEFENDANTS' REPLY TO MOTION FOR RECUSAL

[Filed Concurrently with Defendants' Reply In Support of Motion for Recusal (Doc. 1059)]

(Oral Argument Requested)

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Attorney for Joye Vaught

We, Thomas H. Bienert, Jr., Paul Cambria, Jr., Bruce Feder, Gary Lincenberg, David Eisenberg, and Joy Bertrand, declare as follows:

1. We are counsel for the Defendants in this matter. We submit this joint declaration in support of the Motion to Recuse ("Motion") (Dkt. 1059), to address a matter raised by the government in its opposition.

2. Prior to September 2020, we had not seen any information that led us even to consider a recusal motion. As stated in the Motion, in September 2020, we first became aware of the booklet (as defined in the Motion). The discovery of the booklet led to an investigation of other statements and actions by Arizona Attorney General Mark Brnovich relevant to this case. That investigation was conducted with the utmost haste, and uncovered virtually all the facts set forth in the Motion.

3. Once we examined those facts, and the pertinent law, we concluded not only that we were ethically obligated to raise the issue with the Court but also that there were abundant reasons to believe that AG Brnovich had an interest that might be affected and that the Court's impartiality might reasonably be questioned. *See In re Bernard*, 31 F.3d 842, 847 (9th Cir. 1994). After determining that a motion seeking recusal was warranted, we worked diligently to draft and file the Motion at the earliest possible date.

4. When this case was assigned to the Hon. Susan M. Brnovich, we were either aware or were made aware that her spouse is Attorney General Mark Brnovich. We did not conduct any investigation into Attorney General Mark Brnovich's views, statements, or actions regarding Backpage.com or this case. We know of no affirmative obligation to investigate a judge's spouse and we had no reason to suspect that he had made statements, issued written materials, or otherwise associated himself with this case in the manner set forth in the motion.

5. When this case began in April 2018, some (but not all) of us were aware that various Attorneys General had written letters to Backpage.com and to Congress. Those of us who were aware of this series of letters did not focus on the August 16, 2017 letter (the only letter signed by Attorney General Mark Brnovich), as it was sent to Congress (not Backpage.com) and it was not identified as a potential trial exhibit. Likewise, none of us focused on the fact that Attorney General Mark Brnovich was one of the dozens of signatories to the August 16, 2017, letter (at the time, he

had no connection to this case). During our trial preparations, which have included sifting through millions of documents produced by the government, none of us focused on this one letter.

6. After discovering the booklet, the defense conducted targeted searching for Attorney General Brnovich's public statements relating to Backpage.com. One of those searches hit on the August 16, 2017, letter. After reviewing the letter following that search, we first realized the pertinence of the letter to the issue of recusal, seeing that Attorney General Brnovich had signed the letter and made the claims he did about Backpage.com in the letter.

7. Before discovering the booklet and conducting our ensuing investigation, we never believed we had a basis to seek recusal nor were we aware of facts that caused us to believe we might even have a basis to seek recusal. When we first became aware of facts that might provide a basis for recusal, in September 2020, we promptly investigated further and filed the Motion less than two weeks later. We never postponed investigating or pursuing recusal, whether for strategic reasons or otherwise.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this 14th day of October, 2020, at San Clemente, California.

s/Thomas H. Bienert, Jr.
Thomas H. Bienert, Jr.
Attorney for James Larkin

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this 14th day of October, 2020, at Buffalo, New York.

s/ Paul J. Cambria, Jr.
Paul J. Cambria, Jr.
Attorney for Michael Lacey

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this 14th day of October, 2020, at Phoenix, Arizona.

s/ Bruce Feder
Bruce Feder
Attorney for Scott Spear

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this 14th day of October, 2020, at Los Angeles, California.

s/ Gary S. Lincenberg
Gary S. Lincenberg
Attorney for John Brunst

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this 14th day of October, 2020, at Flagstaff, Arizona.

s/ David Eisenberg
David Eisenberg
Attorney for Andrew Padilla

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this 14th day of October, 2020, at Scottsdale, Arizona.

s/ Joy Bertrand
Joy Bertrand
Attorney for Joye Vaught