

1 Robert Corn-Revere (D.C. Bar No. 375415, admitted *pro hac vice*)
2 DAVIS WRIGHT TREMAINE LLP
3 1919 Pennsylvania Avenue NW, Suite 800
4 Washington, DC 20006-3401
5 Telephone: (202) 973-4225
6 Facsimile: (202) 973-4499
7 Email: robertcornrevere@dwt.com

8 James C. Grant (Wash. Bar No. 14358, admitted *pro hac vice*)
9 DAVIS WRIGHT TREMAINE LLP
10 920 Fifth Ave, Suite 3300
11 Seattle, WA 98104-1610
12 Telephone: (206) 757-8096
13 Facsimile: (206) 757-7096
14 Email: jamesgrant@dwt.com

15 *Counsel for Michael Lacey and James Larkin*

16 Additional counsel listed on following pages

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

19 United States of America,
20
21 Plaintiff,
22
23 v.
24 Michael Lacey, *et al.*,
25
26 Defendants.

No. CR-18-422-PHX-SMB
**DEFENDANTS' MOTION
TO DISMISS INDICTMENT**

1 Paul J. Cambria, Jr. (Cal. Bar No. 177957, admitted *pro hac vice*)
2 Erin E. McCampbell (N.Y. Bar No. 4480166, admitted *pro hac vice*)
3 LIPSITZ GREEN SCIME CAMBRIA LLP
42 Delaware Avenue, Suite #120
Buffalo, NY 14202
4 Telephone: (716) 849-1333
5 Facsimile: (716) 855-1580
6 Email: pcambria@lglaw.com
emccampbell@lglaw.com

7 *Counsel for Defendant Michael Lacey*

8 Thomas H. Bienert, Jr. (Cal. Bar No. 135311, admitted *pro hac vice*)
9 Whitney Z. Bernstein (Cal. Bar No. 304971, admitted *pro hac vice*)
10 BIENERT KATZMAN, PLC
903 Calle Amanecer, Suite 350
11 San Clemente, CA 92673
12 Telephone: (949) 369-3700
13 Facsimile: (949) 369-3701
14 Email: tbienert@bmkattorneys.com
wbernstein@bmkattorneys.com

15 *Counsel for Defendant James Larkin*

16 Gary S. Lincenberg (Cal. Bar No. 123058, admitted *pro hac vice*)
17 Ariel A. Neuman (Cal. Bar No. 241594, admitted *pro hac vice*)
18 Gopi K. Panchapakesan (Cal. Bar No. 279586, admitted *pro hac vice*)
19 BIRD, MARELLA, BOXER, WOLPERT, NESSIM,
20 DROOKS, LINCENBERG & RHOW, P.C.
1875 Century Park East, 23rd Floor
21 Los Angeles, CA 90067-2561
22 Telephone: (310) 201-2100
Facsimile: (310) 201-2110
Email: glincenberg@birdmarella.com
aneuman@birdmarella.com

23 Michael Kimerer (Ariz. Bar No. 002492)
24 KIMERER & DERRICK, P.C.
1313 E. Osborn Road, Suite 100
25 Phoenix, AR 85014
26 Telephone: (602) 279-5900
27 Facsimile: (602) 264-5566
Email: mdk@kimerer.com

28 *Counsel for Defendant John Brunst*

1 Bruce Feder (Ariz. Bar No. 004832)
2 Feder Law Office, P.A.
3 2930 E. Camelback Road, Suite 160
4 Phoenix, AR 85016
5 Telephone: (602) 257-0135
6 Facsimile: (602) 954-8737
7 Email: bf@federlawpa.com
8 fl@federlawpa.com

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25
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Counsel for Defendant Scott Spear

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I. INTRODUCTION

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2 The government seeks to prosecute the former publishers of an online classified
3 advertising service, Backpage.com, under a novel theory of vicarious liability never
4 embraced by any federal court. The government is seeking to punish the providers of
5 the platform because of the content of ads posted by its users, and is claiming it may
6 accomplish this objective without *any* consideration of the First Amendment
7 implications of its actions. Beginning with the premise that it can close down the
8 website and criminally prosecute all who were involved with it, the government has
9 attempted to build a case based on broad generalizations and invective that starts with
10 the improper assumption the First Amendment does not apply and fails to allege any
11 criminal acts by the Defendants.¹

12 This case is the culmination of a decade's worth of efforts by law enforcement
13 officials and policymakers at various levels of government to prohibit adult-oriented
14 online advertising. It began with actions by state attorneys general and other officials
15 to intimidate the website Craigslist, which succumbed to the pressure and closed its
16 erotic services section in 2010. The campaign immediately turned to Backpage.com,
17 then the second-largest classified ad website, with similar demands to shutter
18 categories for adult content. Backpage.com, however, challenged the government's
19 unconstitutional claims that equate advertising for escorts and other adult services with
20 prostitution, and won a series of court victories affirming that providing such a
21 platform for third-party speech is protected by the First Amendment. Federal courts
22 struck down state legislation that sought to prohibit such advertising, enjoined
23 governmental use of nuisance suits and veiled threats to close down adult ad sections,
24 and dismissed state prosecutions based on the same vicarious liability theory upon
25 which this federal case is based.

26
27
28 ¹ Movants Michael Lacey, James Larkin, John Brunst, and Scott Spear are referred to here as "Defendants."

1 These decisions only led authorities to escalate their efforts to “crush
2 Backpage.” *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015), *cert.*
3 *denied*, 137 S. Ct. 46 (2016). Here, federal prosecutors are proceeding under the same
4 flawed vicarious liability theory that California courts rejected twice in dismissing
5 criminal charges against two of the Defendants. The 100-count Indictment² starts from
6 the erroneous assumption that all ads on the platform are constitutionally unprotected,
7 that government may presume the ads relate to unlawful conduct simply by looking at
8 them and by parroting accusations often repeated (and rejected) in previous cases, and
9 that the government can prosecute based on a theory of generalized awareness that
10 does not depend on specific knowledge or intent. The government’s conduct of this
11 case reflects an alarming disregard for the rule of law and constitutional norms. It
12 seized Defendants’ assets presumptively protected by the First Amendment without a
13 hearing, has sought to deprive the Defendants of assistance of counsel, has distorted
14 the record and refused to disclose exculpatory information, and has resisted efforts to
15 subject its overreaching to judicial oversight.

16 The Indictment must be dismissed because it fails to set forth facts constituting
17 the offenses charged, as required by the Fifth and Sixth Amendments. Additionally,
18 because this prosecution targets publishing activities, the government must more
19 specifically identify the precise conduct alleged to fall outside the First Amendment’s
20 protection. Rather than allege specific requisite facts to meet this obligation, the
21 Indictment is a tapestry of generalized claims, recycled accusations, and miscellaneous
22 assertions regarding activities that are constitutionally protected. The Indictment
23 charges Defendants with crimes that require a showing of specific intent (even in cases
24 not implicating the First Amendment), yet utterly fails to allege *mens rea*. The
25 absence of this essential element is especially remarkable because the government
26 previously has acknowledged the specific intent requirements applicable to publishers

27
28 ² The operative pleading in this case is the superseding indictment (Doc. 230), which,
for simplicity, is referred to in this motion as the “Indictment” and is cited as “SI.”

1 of third-party content in numerous other settings – including in other pending litigation
 2 where it currently is touting those requirements as the controlling standard for Travel
 3 Act prosecutions implicating the First Amendment. These defects in the Indictment
 4 are fatal; it must be dismissed.

5 **II. BACKGROUND**

6 **A. History of Backpage.com.**

7 Defendants are former owners of a newspaper conglomerate that, at one time,
 8 published and distributed 17 weekly papers across the country, including the *Phoenix*
 9 *New Times*, the *SF Weekly*, and New York’s *Village Voice*. Lacey and Larkin founded
 10 and built the *Phoenix New Times*, SI ¶ 18, which began publication in 1970 to “ke[ep]
 11 the Valley of the Sun’s feet to fire” through independent investigative journalism, *see*
 12 *Lacey v. Maricopa Cty.*, 693 F.3d 896, 907 (9th Cir. 2012) (*en banc*) (upholding Civil
 13 Rights Act complaint against Sheriff Joe Arpaio and special prosecutor for pursuing
 14 and arresting Larkin and Lacey in retaliation for publishing critical articles). The
 15 newspapers featured articles on political and cultural issues not typically covered by
 16 mainstream media sources and received numerous awards for excellence in journalism,
 17 including the Pulitzer Prize.³

18 Lacey and Larkin are the majority owners of the corporate parent of Village
 19 Voice Media Holdings, LLC (“VVMH”),⁴ and Brunst and Spear hold minority
 20 interests in the company. Lacey served as Chief Editor of the VVMH papers, Larkin
 21 was CEO of VVMH, Scott Spear was an Executive Vice President, and John Brunst
 22 was the CFO. SI ¶ 18.

23 Like other alternative weeklies, the VVMH papers were free to readers, so they
 24 depended on advertising revenues, including from classified ads. By the early 2000s,
 25 the Internet – and particularly Craigslist – was undermining the economic viability of
 26 _____

27 ³ *See* https://en.wikipedia.org/wiki/Village_Voice_Media#Philosophy_of_journalism.

28 ⁴ The company is now known as Camarillo Holdings, LLC, but is referred to here (as it is in the Indictment) as “VVMH” for clarity.

1 newspaper classified advertising. SI ¶ 20. In response, in 2004 VVMH launched a
2 website (“Backpage.com”) to publish third-party classified ads online. *Id.* ¶ 21.
3 Categories of advertisements on the site spanned the full spectrum – including for
4 auto sales, real estate, apartment rentals, and jobs, as well as adult categories
5 including dating, massage, and escort services – as had been published in newspapers,
6 yellow pages and other media for decades. *See Backpage.com, LLC v. McKenna*, 881
7 F. Supp. 2d 1262, 1282 (W.D. Wash. 2012) (noting “numerous states license, tax and
8 otherwise regulate escort services as legitimate businesses”). Over time,
9 Backpage.com grew to become the second largest online classified advertising
10 website in the United States (after Craigslist), with users posting millions of ads each
11 month. *See id.* at 1266.

12 In 2013, VVMH sold its interests in the newspapers to a group of long-time
13 executives from the papers. In April 2015, VVMH sold its interests in Backpage.com
14 to entities owned by Carl Ferrer (Backpage.com’s CEO). SI ¶ 29-30. Both of these
15 transactions were seller-financed. VVMH ceded ownership and control of the papers
16 and the website, respectively, to the new owners, and in return VVMH received (and
17 holds) installment promissory notes for the purchase prices of the sales, secured by
18 security interests in the businesses and assets sold. *See SI* ¶ 30-31.

19 **B. Court Decisions Rejecting Government and Other Challenges to**
20 **Adult-Oriented Advertising on Craigslist and Backpage.com.**

21 As Internet advertising grew, various government authorities and interest
22 groups attacked adult-oriented advertising, first targeting Craigslist.org (“Craigslist”)
23 and then Backpage.com. Cook County Sheriff Thomas Dart brought a nuisance suit
24 against Craigslist, alleging that all adult services ads on the site were for prostitution
25 or sex trafficking and that Craigslist violated federal and state laws prohibiting the
26 facilitation of prostitution, including the Travel Act. *Dart v. Craigslist, Inc.*, 665 F.
27 Supp. 2d 961, 963 (N.D. Ill. 2009). The U.S. District Court for the Northern District
28 of Illinois rejected the sheriff’s claims under Section 230 of the Communications
Decency Act, 47 U.S.C. § 230 (“CDA”), but also because websites are intermediaries

1 like phone companies and ISPs, which “are not culpable for ‘aiding and abetting’ their
2 customers who misuse their services to commit unlawful acts.” *Id.* at 967.

3 Nonetheless, a group of state attorneys general continued to pressure Craigslist
4 to eliminate its adult services category, and in September 2010 Craigslist relented,
5 removing the category from the website and declaring that it had been “censored.”⁵
6 Less than a week later, the AGs targeted Backpage.com, demanding that it too shut
7 down its adult category.⁶ Backpage.com attempted to work with the attorneys general
8 – explaining its review and moderation of user content and cooperation with law
9 enforcement – but the AGs continued to make publicized demands that the website
10 eliminate all adult services ads, as Craigslist had done.⁷ Backpage.com was unwilling
11 to succumb to censorship, and its position was upheld repeatedly in a number of
12 lawsuits.

13 In 2012, the Washington State legislature enacted a statute targeting
14 Backpage.com and creating a new state-law felony for disseminating content online if
15 it contained a “depiction of a minor” and any “explicit or implicit offer” of sex for
16 “something of value.” *McKenna*, 881 F. Supp. 2d at 1268. The U.S. District Court
17 for the Western District of Washington enjoined enforcement of the statute, rejecting
18 the state’s arguments that the law affected only unprotected speech proposing illegal
19 transactions based on the assumption that all adult ads on Backpage.com were for
20 prostitution or trafficking. *Id.* at 1282. The court struck down the law under the First
21 Amendment because it would have “chill[ed] a substantial amount of protected
22 speech.” *Id.* at 1282.

23
24 ⁵ Claire Miller, “Craigslist Says It Has Shut Its Section for Sex Ads,” N.Y. TIMES
25 (Sept. 15, 2010), <https://www.nytimes.com/2010/09/16/business/16craigslist.html>.

26 ⁶ See Connecticut Attorney General press release (Sept. 21, 2010),
<https://portal.ct.gov/-/media/AG/Other/Backpageletterpdf.pdf?la=en>.

27 ⁷ See Letter of National Ass’n of Attorneys General (Aug. 31, 2011), [https://agportal-
28 s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2011/NAAG_](https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2011/NAAG_Backpage_Signon_08-31-11_Final.pdf)
[Backpage_Signon_08-31-11_Final.pdf](https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2011/NAAG_Backpage_Signon_08-31-11_Final.pdf).

1 Tennessee passed a similar law shortly after Washington, but the U.S. District
2 Court for the Middle District of Tennessee enjoined enforcement of that statute as
3 well, likewise holding that third-party ads on Backpage.com were protected speech
4 under the First Amendment. *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805,
5 833-34 (M.D. Tenn. 2013) (rejecting state’s argument that the statute “[did] not
6 implicate First Amendment scrutiny because it criminalize[d] only offers to engage in
7 illegal transactions”). Despite invalidation of the Washington and Tennessee laws,
8 the New Jersey legislature enacted a similar statute, which the U.S. District Court for
9 the District of New Jersey struck down, again rejecting arguments that adult-oriented
10 ads on the website were unprotected speech. *Backpage.com, LLC v. Hoffman*, 2013
11 WL 4502097, at *9-11 (D.N.J. Aug. 20, 2013).

12 At the same time, the DOJ also pursued a grand jury investigation of
13 Backpage.com in the Western District of Washington, but the U.S. District Court
14 there quashed a number of grand jury subpoenas premised on the government’s novel
15 theory of vicarious liability.⁸

16 After Washington, Tennessee, and New Jersey failed in their efforts to censor
17 Backpage.com, Sheriff Dart came up with a new tack, threatening Visa and
18 MasterCard to cut off use of their cards on the website.⁹ The Seventh Circuit directed
19 entry of an injunction against the sheriff, holding that he imposed an unconstitutional
20 informal prior restraint. *Backpage.com v. Dart*, 807 F.3d at 231 (citing *Bantam*

22
23 ⁸ The court’s orders in that case, *In re Grand Jury Subpoenas to Backpage.com, LLC*
24 *and Village Voice Media Holdings, LLC*, No. GJ12-172RAJ (W.D. Wash.), are
provided in an accompanying submission under seal.

25 ⁹ The Indictment alleges that the “credit card companies stopped processing payments
26 for Backpage ... out of concern they were being used for illegal purposes,” SI ¶ 15, but
27 fails to mention the Seventh Circuit found that Visa and MasterCard blocked use of
28 their cards “within days of receiving the [Sheriff Dart’s] letter,” and “were victims of
government coercion aimed at shutting up or shutting down Backpage’s adult section
[or] more likely aimed at bankrupting Backpage” *Backpage.com v. Dart*, 807 F.3d
at 233.

1 *Books, Inc. v. Sullivan*, 372 U.S. 58, 64-72 (1963)). Again in that case, the court
2 rejected the contention that all ads in the adult section of Backpage.com were
3 unlawful and held, to the contrary, that First Amendment protections applied. *Id.* at
4 234 (“Nor is Sheriff Dart on solid ground in suggesting that *everything* in the adult
5 section of Backpage’s website is criminal, violent, or exploitive.... [N]ot all
6 advertisements for sex are advertisements for illegal sex.”) (emphasis in original). As
7 Judge Posner wrote, “a public official who tries to shut down an avenue of expression
8 of ideas and opinions through actual or threatened imposition of government power or
9 sanction is violating the First Amendment.” *Id.* at 230 (citation and internal quotation
10 marks omitted).

11 Private plaintiffs also sued Backpage.com for tort claims premised on the
12 website’s alleged violation of federal criminal law, asserting that all adult ads on the
13 website were for prostitution or sex trafficking and that the site’s design and practices
14 were meant to promote such unlawful activity. Courts summarily rejected these
15 claims too. In *M.A. ex rel. P.K v. Village Voice Media Holdings, LLC*, 809 F. Supp.
16 2d 1041 (E.D. Mo. 2011), the U.S. District Court for the Eastern District of Missouri
17 dismissed the plaintiff’s claims (based on alleged violations of 18 U.S.C. §§ 2, 1595,
18 and 2255) asserting that Backpage.com’s posting rules and editorial practices were
19 designed to veil illegal ads, that Backpage.com was “made aware of minors being
20 trafficked on their website,” and that it therefore “facilitated” trafficking. 809 F.
21 Supp. 2d at 1044-45, 1050 (plaintiff alleged “no reasonable person could review the
22 postings in the adult categories and deny prostitution was the object of almost each
23 and every ad”). Even under liberal civil pleading standards, the court held that the
24 plaintiff’s allegations failed to “describe the specific intent required for aiding and
25 abetting,” *i.e.*, that a defendant acted with the intent to bring about “a *certain crime*”
26 and “participated in an unlawful venture ... to bring it about.” 809 F. Supp. 2d at
27 1054 (internal quotation marks omitted; emphasis in original).

1 In *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass.
2 2015), *aff'd sub. nom., Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir.
3 2016), *cert. denied*, 137 S. Ct. 622 (2017), the U.S. District Court for the District of
4 Massachusetts reached a similar result in dismissing plaintiffs' claims brought under
5 18 U.S.C. § 1595 attacking Backpage.com's practices (including as to review and
6 editing of ads), stating: "Singly or in the aggregate, the allegedly sordid practices of
7 Backpage ... amount to neither affirmative participation in an illegal venture nor
8 active web content creation." 104 F. Supp. 3d at 157.

9 And, most recently, the California Attorney General's Office – which has been
10 working in concert with the DOJ for many years to pursue Backpage.com for many
11 years – twice brought criminal charges against Defendants Larkin and Lacey (and
12 Ferrer) for promoting and receiving proceeds from prostitution, but two different state
13 judges dismissed the charges on demurrer. *People v. Ferrer*, 2016 WL 7237305 (Cal.
14 Super. Ct. Dec. 9, 2016); *People v. Ferrer*, No. 16FE024013 (Cal. Super. Ct. Aug. 23,
15 2017).¹⁰ These courts rejected the same presumptions (*e.g.*, that all ads on
16 Backpage.com were for prostitution) and the same vicarious liability theory that other
17 courts rejected before, and held that the defendants could not be prosecuted for
18 facilitating or promoting prostitution or for money laundering based on users'
19 payments for ads. As the courts held, "[p]roviding a forum for online publishing is a
20 recognized legal purpose" and "charg[ing] money for the placement of advertisements
21 ... qualif[ies] as services rendered for legal purposes." 2016 WL 7237305, at *10; *see*
22 *also id.* at *3 (court's rulings enforcing Section 230 implicate and enforce First
23 Amendment rights).

24 **C. Criminal Prosecution in Arizona and Asset Seizures in the Central**
25 **District of California.**

26
27 ¹⁰ The second of these opinions is unpublished, and so is provided with the
28 attachments to this motion as Exhibit A.

1 Undeterred by the numerous rulings discussed above, the government
2 commenced a prosecution against Defendants and three other individuals for their
3 respective roles with Backpage.com.¹¹ On March 28, 2018, the government obtained
4 a 93-count grand jury indictment charging these defendants with violations of the
5 Travel Act (18 U.S.C. § 1952), money laundering (18 U.S.C. §§ 1956, 1957), and
6 conspiracy (18 U.S.C. § 371), all based on the defendants' prior involvement, in
7 general, with Backpage.com (Doc. 3).

8 At the same time, the government negotiated and entered into a plea agreement
9 with Backpage.com's owner and CEO, Carl Ferrer. On April 5, 2018, Ferrer pled
10 guilty to one count of conspiracy to launder money and violate the Travel Act, *see*
11 *United States v. Ferrer*, No. CR-18-464-PHX-DJH (Doc. 7), and caused
12 Backpage.com and his other corporate entities to plead guilty to one count of money
13 laundering, *see United States v. Backpage.com, LLC, et al.*, No. CR-18-465-PHX-
14 DJH (Doc. 8). Ferrer agreed to cooperate with the government in its prosecution of
15 Defendants.

16 On April 6, 2018, the government seized and shut down the Backpage.com
17 website, *see* <http://www.backpage.com> (government's notice of seizure). Also on that
18 day, the government arrested Defendants and searched Lacey's and Larkin's homes,
19 seizing computers, jewelry, artwork and other assets (using warrants authorizing the
20 seizure of, among other things, any "evidence of wealth"). On a parallel track, in the
21 Central District of California, the government obtained *ex parte* warrants to seize
22 bank accounts and personal assets of Defendants and their families. Through multiple
23 waves of such warrants (issued from March 28 through November 2018), the
24 government has seized many millions of dollars from Defendants and has encumbered
25

26
27 ¹¹ The other individuals named as defendants in the Indictment are Andrew Padilla
28 (Backpage.com's former operations manager), Joye Vaught (its former assistant
operations manager), and Dan Hyer (its former sales and marketing manager). SI ¶¶ 5-
7. Hyer has since entered into a plea agreement with the government (Doc. 271).

1 their real property through *lis pendens* filings. The government's theory for its vast
2 seizures is that any and all revenues of Backpage.com (and any assets directly or
3 indirectly connected to those revenues) constitute criminal proceeds.

4 On July 25, 2018, the government filed a superseding indictment, which added
5 seven counts (making the total now 100 counts) and additional forfeiture allegations
6 (Doc. 230). The Indictment now runs to 92 pages, containing 211 paragraphs of
7 allegations and additional forfeiture allegations. It purports to rely on documentary
8 evidence, but the government has not identified the documents cited. The Indictment
9 asserts 50 counts of alleged violations of the Travel Act premised on 50 user-
10 submitted ads that appeared on Backpage.com (most of which the government alleges
11 were posted *after* VVMH sold Backpage.com to Ferrer), but the overnment does not
12 allege that any Defendant ever saw or knew of any of those ads, that any Defendant
13 ever had anything to do with any of the ads, or that any Defendant knew anything
14 about the persons who posted the ads. *See* SI ¶ 201 (counts 2-51). Similarly, the
15 Indictment's money laundering counts merely (which are predicated on the Travel Act
16 counts) allege that funds were transferred from one party to another, with no alleged
17 knowledge, participation or involvement of any Defendant in any specific unlawful
18 activity. *See* SI ¶¶ 205, 207, 209, 210.

19 **D. Progress of the Prosecution and Litigation to Date.**

20 Since commencing this prosecution, the government has pursued a number of
21 actions that have occupied Defendants, requiring them to devote considerable efforts
22 to preserve their rights and ability to defend the case. This is discussed in more detail
23 in Defendants' Joint Status Report (Doc. 527), but it is relevant to note here that,
24 among other things, the government has (1) seized nearly all of Defendants' assets
25 and used procedural machinations to prevent judicial review of the First Amendment
26
27
28

1 and other constitutional violations of the seizures;¹² (2) also seized retainer funds held
 2 by counsel for Defendants (and others);¹³ (3) sought to disqualify Defendants'
 3 longstanding counsel for First Amendment and Internet speech issues (motion denied
 4 by the Court, Doc. 338); (4) repeatedly sought to invade Defendants' attorney-client
 5 privileges by accessing privileged communications and joint representation
 6 agreements (largely rejected by the Court, *see* Docs. 345, 441); and (5) refused to
 7 provide any *Brady* or *Giglio* material or all of the *Jencks* Act materials in its
 8 possession (including, notably, the statements of its key cooperator, Ferrer), despite
 9 court deadlines, requiring Defendants to pursue such disclosures (*see, e.g.*, Doc. 273).

10 With the recent reassignment of this case following Judge Logan's recusal,
 11 Defendants bring the present motion, because, before addressing issues of *how* this
 12 case might proceed (*e.g.*, resolving the government's disclosure obligations, delaying
 13 tactics, and other issues) it is logical to address, first, *whether* the case can proceed at
 14 all.

15 III. LEGAL STANDARDS

16 A. Motion to Dismiss Indictment.

17 "In all criminal prosecutions, the accused shall enjoy the right ... to be
 18 informed of the nature and cause of the accusation," and a defendant may be charged
 19 based only on matters actually presented to the grand jury. U.S. CONST. amends. V,
 20 VI. The Federal Rules implement these guarantees by requiring an indictment to set
 21 forth "a plain, concise and definite written statement of the essential facts constituting
 22 the offense charged." Fed. R. Crim. P. 7(c)(1). Pursuant to Rule 12, a defective
 23 _____

24 ¹² These issues are pending before the Ninth Circuit in *In re: Any and All Funds Held*
 25 *in Republic Bank of Arizona Accounts XXXX1889, XXXX2592, XXXX1938,*
 26 *XXXX2912, and XXXX2500*, No. 18-56455 (9th Cir.), in which the court has ordered
 expedited argument for July 2019.

27 ¹³ These seizures are also subject to pending motions, in *In re: The Seizure Up to and*
 28 *Including \$10,000 in Bank Funds Held in JP Morgan Chase Account #XXXXX9285,*
etc., No. 18-MJ-02875 (C.D. Cal.).

1 indictment must be dismissed if: (1) it fails to allege a crime on its face, taking into
2 account statutory elements and constitutional requirements; or (2) there is grave doubt
3 that the grand jury's decision to indict was based on errors in the process, such as
4 where the government's instruction on the law was wrong or misleading, or the
5 prosecutor's conduct improperly sought to infringe speech rights. *See United States v.*
6 *Buddenberg*, 2010 WL 2735547, at *2-6; Fed. R. Crim. P. 12(b)(3)(A)-(B).¹⁴ "It is
7 perfectly proper, and in fact mandated, that the district court dismiss an indictment if
8 the indictment fails to allege facts which constitute a prosecutable offense." *United*
9 *States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983).

10 To be sufficient, an indictment must "set forth the elements of the offense
11 charged and contain a statement of the facts and circumstances that will inform the
12 accused of the specific offense with which he is charged." *United States v. Cecil*, 608
13 F.2d 1294, 1296 (9th Cir. 1979); *see United States v. Keith*, 605 F.2d 462, 464 (9th
14 Cir. 1979) ("The failure of an indictment to detail each element of the charged offense
15 generally constitutes a fatal defect."). The indictment "must furnish the defendant
16 with a sufficient description of the charges against him to enable him to prepare his
17 defense, to ensure that the defendant is prosecuted on the basis of facts presented to
18 the grand jury, to enable him to plead jeopardy against a later prosecution, and to
19 inform the court of the facts alleged so that it can determine the sufficiency of the
20 charge." *Cecil*, 608 F.2d at 1296. It is thus essential "that every ingredient of the
21 offense charged must be clearly and accurately alleged in the indictment" so that the
22 court can decide "whether the facts alleged are sufficient in law to withstand a motion
23

24
25 ¹⁴ *See Russell v. United States*, 369 U.S. 749, 764 (1962); *Wayte v. United States*, 470
26 U.S. 598, 608 (1985) ("[T]he decision to prosecute may not be 'deliberately based
27 upon an unjustifiable standard' ... including the exercise of protected statutory and
28 constitutional rights."); *United States v. P.H.E., Inc.*, 965 F.2d 848, 857-58 (10th Cir.
1992) (indictment dismissed where it was a step in a "pattern of prosecutorial conduct
dating back some five years that suggests a persistent and widespread campaign to
coerce the appellants into surrendering their First Amendment rights").

1 to dismiss the indictment or to support a conviction in the event one should be had.”
2 *Russell*, 369 U.S. at 768 n.15. To be sufficient, an indictment must set forth what
3 each defendant is alleged to have done in violation of a specified statute, to whom,
4 and where or when it occurred. *Buddenberg*, 2010 WL 2735547, at *3.

5 In addition to Fifth and Sixth Amendment requirements set forth above, it is
6 also necessary under Rule 12(b)(3)(B) to review the sufficiency of an indictment in
7 light of First Amendment considerations. *United States v. Stock*, 728 F.3d 287, 301
8 (9th Cir. 2013). While the court cannot evaluate the evidence upon which an
9 indictment is based, it must review whether the alleged statements at issue constitute
10 unprotected speech. It is not enough for an indictment merely to claim speech is
11 unprotected; it is “incumbent on the Government to make that context clear in such an
12 indictment.” *United States v. Landham*, 251 F.3d 1072, 1080 (6th Cir. 2001). Where
13 charges have First Amendment implications, as they do here, the government must
14 “more specifically identify the precise conduct” alleged to fall outside constitutional
15 protection. *Buddenberg*, 2010 WL 2735547 at *9; accord *United States v. Cassidy*,
16 814 F. Supp. 2d 574, 582-83 (D. Md. 2011). And, given the government’s theory of
17 prosecution, the Court must consider whether the stated charges render the statute at
18 issue unconstitutional facially or as applied. *E.g.*, *Packingham v. North Carolina*, 137
19 S. Ct. 1730, 1737-38 (2017); *Watts v. United States*, 394 U.S. 705, 707 (1969) (charge
20 “must be interpreted with the commands of the First Amendment clearly in mind”).

21 **B. First Amendment Requirements Governing Prosecution of**
22 **Publishers.**

23 The Indictment in this case requires particular First Amendment scrutiny
24 because government is seeking to prosecute Defendants for their roles as publishers of
25 third-party speech. The government is *not* prosecuting the individuals who authored
26 and posted ads on Backpage.com for unlawful activities they might have committed,
27 but is instead seeking to impose vicarious liability on the parties who owned the
28 online forum where the ads were posted. No reported (or contested) case has ever
accepted such a theory of vicarious criminal liability, while many courts have rejected

1 it, including numerous cases concerning Backpage.com (as discussed below).

2 In the context of a prosecution such as this – seeking to impose criminal
3 liability on a publisher for publishing – several fundamental First Amendment
4 principles apply and govern the Court’s role in determining whether the Indictment
5 impermissibly challenges protected speech rights. More specifically:

- 6 • Adult-oriented online ads, including escort ads, are presumptively legal and
7 constitutionally protected speech. *See McKenna*, 881 F. Supp. 2d at 1282;
8 *People v. Ferrer*, 2016 WL 7237305, at *10.
- 9 • The government may not presume that protected speech is unprotected
10 “merely because it resembles the latter. The Constitution requires the
11 reverse.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).
12 Whether made by the government or by third-parties, claims that adult-
13 oriented ads are “obviously” prostitution ads fall far short of this First
14 Amendment standard.
- 15 • The government cannot base criminal liability on a publisher’s exercise of
16 “editorial control and judgment,” including decisions about whether to
17 allow, block or edit third-party content, as this is protected conduct under
18 the First Amendment. *See Miami Herald Publ’g Co. v. Tornillo*, 418 U.S.
19 241, 258 (1974); *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL
20 2210029, at *4 (M.D. Fla. Feb. 8, 2017).
- 21 • The government cannot impose vicarious liability based on allegations that
22 a publisher had notice that third parties had misused a website for unlawful
23 conduct. *See Backpage.com v. Dart*, 807 F.3d at 231; *Doe v. GTE Corp.*,
24 347 F.3d 655, 659 (7th Cir. 2003). The First Amendment does not permit
25 civil or criminal liability based on allegations of generalized knowledge of
26 illegal third-party conduct.
- 27 • To hold a party liable for publishing a third-party’s speech, the First
28 Amendment requires that the government allege (and ultimately prove) the
defendant knew the specific speech involved illegality, the defendant
nonetheless published that speech, *and* that the defendant intended to
participate in and further the illegality. *See Smith v. California*, 361 U.S.
147 (1959).
- The government cannot satisfy its obligation to allege specific facts
sufficient to satisfy First Amendment pleading standards by repeating
conclusory claims made by politicians, advocacy organizations, and some
law enforcement officials asserting that Backpage.com was “known” for
promoting prostitution.

The Indictment in this case violates each and all of these principles.

1 ***1. Impermissibly Presuming that Ads Are Illegal.***

2 The Indictment assumes from the outset – and throughout – that all
3 advertisements in the adult or escort categories on Backpage.com were illegal and
4 unprotected by the First Amendment. This ignores the principle that speech must be
5 presumed to be protected unless and until the government proves otherwise. “The
6 government may not suppress lawful speech as the means to suppress unlawful speech.
7 Protected speech does not become unprotected merely because it resembles the latter.”
8 *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002); accord *Packingham*, 137
9 S. Ct. at 1738. The burden of proving that speech is unlawful *always* falls to the
10 government. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000)
11 (“When the Government restricts speech, the Government bears the burden of proving
12 the constitutionality of its actions.”); *id.* at 818 (“When First Amendment compliance
13 is the point to be proved, the risk of nonpersuasion ... must rest with the Government,
14 not with the citizen.”); *Bd. of Trs. v. State Univ. of N.J. v. Fox*, 492 U.S. 469, 480
15 (1989) (“the State bears the burden of justifying its restrictions”). Just as the
16 government cannot assume books are obscene if they are sold in an adult bookstore, it
17 cannot presume escort ads are for prostitution.¹⁵

18 The government simply cannot assume its conclusion that speech is unlawful or
19 unprotected, nor can an Indictment based on such an unconstitutional presumption
20 survive. The Indictment does not allege that any specific ads on Backpage.com were
21 facially illegal.¹⁶ Instead it offers the government’s characterizations (scores of times)

22
23
24 ¹⁵ This is true regardless of the form of regulation or proscription of speech the
25 government pursues – whether enacting legislation, *see, e.g., Cooper*, 939 F. Supp. 2d
26 at 837; threatening punishment because of published speech, *see Backpage.com v.*
Dart, 807 F.3d at 229; or pursuing criminal charges, *see, e.g., People v. Ferrer*, 2016
WL 7237305, at *3.

27 ¹⁶ The Indictment alleges that ads on Backpage.com contained “provocative” photos of
28 women showing “buttocks” or “breasts” (albeit clothed) or terms such as “sexy,”
“fun,” “young,” and “exotic,” *see, e.g., SI ¶¶* 163, 168, 173, 174, 175, 176. Perhaps

1 that all ads in adult categories on Backpage.com were for “prostitution” or “obviously
 2 for prostitution” or “indicative of prostitution.” *See, e.g.*, SI ¶¶ 1, 9, 34, 68, 74, 78, 86,
 3 87, 90, 91, 95, 96, 97, 104, 107, 109, 111, 128, 131, 132, 136, 141, 143, 144, 151, 152,
 4 153, 154, 159, 160, 161, 162, 164, 167, 170, 177.¹⁷

5 The First Amendment prohibits the government from declaring that online
 6 classified ads for adult services or escorts are unprotected simply because it thinks they
 7 “look like” ads for illegal prostitution. Yet that is the mistaken premise of the
 8 government’s case. *Every court* to address this question – and this includes eight
 9 courts addressing Backpage.com – has held that the government cannot presume such
 10 ads are unprotected. As the Seventh Circuit put it: Backpage.com was “an avenue of
 11 expression of ideas and opinions” protected by the First Amendment, including its
 12 “classified ads for ‘adult’ services.” *Backpage.com v. Dart*, 807 F.3d at 230-31, 234.
 13 As the court recognized in *McKenna*, 881 F. Supp. at 1282, escort ads have long been
 14 permitted, and escort services are licensed and regulated in many states.¹⁸ Having an
 15 escorts section in a classified ad service is legal. *Doe v. Backpage.com LLC*, 104 F.
 16 Supp. 3d at 156-57.¹⁹ “Providing a forum for online publishing” and “charg[ing]
 17 money for the placement of advertisements,” as Backpage.com did, are “services
 18 rendered for legal purposes.” *People v Ferrer*, 2016 WL 7237305, at *10; *accord*
 19 *People v. Ferrer*, No. 16FE024013, slip op. at 13.

20 _____
 21 obviously, speech containing sexual references or innuendo has been protected for
 22 decades.

23 ¹⁷ *Cf. United States v. Perkins*, 850 F.3d 1109, 1118 (9th Cir. 2017) (vacating
 24 conviction after *Franks* hearing, holding that search warrant affidavit was deficient and
 25 misleading where agent described his conclusion that images found on defendant’s
 computer were child pornography but withheld the images, thus “usurp[ing] the
 magistrate’s duty to conduct an independent evaluation of probable cause”).

26 ¹⁸ *See, e.g.*, Tenn. Code Ann. §§ 7-51-1102(11) & (12); 7-51-1116; Utah Code Ann.
 27 §§ 59-27-101 to 108; Ariz. Rev. Stat. § 13-1422; Ala. Code § 13A-6-184; Kan. Stat.
 Ann. § 12-770(a)(8), (9); Ark. Code Ann. § 14-1-302(9), (10).

28 ¹⁹ *See also Dart v. Craigslist*, 665 F. Supp. 2d at 968 (Craigslist’s “adult services”
 section “is not unlawful in itself nor does it necessarily call for unlawful content”).

1 In sum, courts have uniformly held that escort and other adult ads on
2 Backpage.com were protected under the First Amendment, providing a forum for such
3 ads is likewise protected, and *the government cannot presume otherwise*. See
4 *Backpage.com, LLC v. Dart*, 807 F.3d at 234 (rejecting sheriff’s presumption that ads
5 on Backpage.com were illegal); *McKenna*, 881 F. Supp. 2d at 1281-82 (rejecting
6 similar presumption of state AG defending law targeting Backpage, and noting that
7 publication of third-party ads – even if they concern illegal transactions – “does not
8 fall within [the] ‘well-defined and narrowly limited classes of speech’ that fall outside
9 of First Amendment protection” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568,
10 571-72 (1942)); *Cooper*, 939 F. Supp. 2d at 816, 833-34 (rejecting state’s argument
11 that escort ads on Backpage.com were unprotected speech); *Hoffman*, 2013 WL
12 4502097, at *9-11 (same); *M.A.*, 809 F. Supp. 2d at 1049-50 (rejecting similar
13 presumption in dismissing plaintiff’s civil claims based on 18 U.S.C. §§ 2, 1595, and
14 2255); *People v Ferrer*, 2016 WL 7237305, at *9 (dismissing state’s pimping charges
15 against Larkin and Lacey; noting that the only “whiff of illegality” in the AG’s
16 complaint improperly “require[ed] the presumption that illegal content was contained
17 in the ads,” yet the website’s actions in posting the ads “would not be illegal”).²⁰

18 Despite that courts have uniformly rejected the government’s presumption that
19 all (or the “vast majority”) of escort ads on Backpage.com must have been illegal ads
20 for prostitution, the Indictment trots out the same theory again. This is a direct and
21 impermissible attack on First Amendment-protected speech and publishing activities.

22 **2. Repeating Others’ Accusations.**

23 The Indictment recycles and repeats government officials’ and others’
24 condemnations of Backpage.com in years past. See, e.g., SI ¶ 74 (2010 letter from
25

26
27 ²⁰ The presumption the government offers now was also addressed in the earlier
28 decision of the U.S. District Court of the Western District of Washington in *In re
Grand Jury Subpoenas*, No. GJ12-172RAJ (W.D. Wash.), at 19-20, which is submitted
with this motion under seal.

1 state AGs); ¶ 109 (letter from Seattle mayor); ¶ 111 (letter from National Association
2 of Attorneys General); ¶ 140 (amicus brief filed by NCMEC); ¶ 131 (ASU
3 publication). Such assertions are improper and, in any event, cannot constitute fact
4 allegations necessary to satisfy First Amendment standards.

5 For many years, government officials have made publicized accusations about
6 online content they dislike, for example, attacking Craigslist²¹ and then Backpage
7 about adult ads,²² and more recently pressuring Facebook and Twitter about violent
8 videos, allegations of fake news, liberal bias, and other charges.²³ If merely repeating
9 officials' accusatory press releases about online content could provide bases for a
10 criminal indictment, speech across the Internet would be at risk.

11 Indeed, the same public accusations noted in the Indictment (including,
12 specifically, the 2010 letter from state AGs, *see* SI ¶ 74) have been cited before by
13 government authorities seeking to impose criminal penalties on Backpage. *See, e.g.,*
14 *Cooper*, 939 F. Supp. 2d at 815-16. But courts have rejected such "evidence" and
15 struck down state efforts aimed at Backpage.com as being inconsistent with the First
16 Amendment, *see id.* at 831-32, *McKenna*, 881 F. Supp. 2d at 1280-83. Politicians'
17 denunciations cannot substitute for allegations of fact sufficient to satisfy First
18 Amendment scrutiny that charges do not target or infringe protected speech.

19
20 ²¹ *Attorneys General Want Craigslist 'Adult Services' Shut Down*, Reuters (Aug. 26,
21 2010), [https://www.reuters.com/article/urnidgns002570f3005978d80025778b004b29ff/
22 attorneys-general-want-craigslist-adult-services-shut-down-idUS419264813320100826](https://www.reuters.com/article/urnidgns002570f3005978d80025778b004b29ff/attorneys-general-want-craigslist-adult-services-shut-down-idUS419264813320100826);
see also Craigslist, Inc. v. McMaster, 2010 WL 11640195 (D.S.C. 2010).

23 ²² *Attorney General Leads 21 States In Calling On Backpage To Close Adult Services*
24 *Section* (Sept. 21, 2010), [https://portal.ct.gov/AG/Press-Releases-Archived/2010-
25 Press-Releases/Attorney-General-Leads-21-States-In-Calling-On-Backpage-To-Close-
26 Adult-Services-Section](https://portal.ct.gov/AG/Press-Releases-Archived/2010-Press-Releases/Attorney-General-Leads-21-States-In-Calling-On-Backpage-To-Close-Adult-Services-Section).

27 ²³ *See, e.g.,* Zach Wichter, *2 Days, 10 Hours, 600 Questions: What Happened When*
28 *Mark Zuckerberg Went to Washington*, N.Y. TIMES (Apr. 12, 2018),
<https://www.nytimes.com/2018/04/12/technology/mark-zuckerberg-testimony.html>;
Cecilia Kang, et al., *Twitter's Dorsey Avoids Taking Sides in Partisan House Hearing*,
N.Y. TIMES (Sept. 5, 2018),
<https://www.nytimes.com/2018/09/05/technology/facebook-twitter-congress.html>.

1 **3. Attacking Traditional, Protected Publisher Functions.**

2 The Indictment contains numerous allegations attacking Backpage.com’s efforts
3 to screen, block or edit content – attempting to cast these practices as nefarious and
4 criminal. However, screening and editing third-party content is common among
5 websites; Congress has expressly encouraged such self-policing (by enacting the
6 CDA). More importantly, website’s editorial decisions about what third-party content
7 to allow, block or edit are recognized publisher functions protected under the First
8 Amendment. Here again, the Indictment fails because it attacks First Amendment-
9 protected conduct.

10 The Supreme Court long ago made clear that the First Amendment protects
11 “editorial control and judgment.” *Tornillo*, 418 U.S. at 258. This principal applies to
12 speech on the Internet. *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997) (“[O]ur cases
13 provide no basis for qualifying the level of First amendment scrutiny that should be
14 applied to this medium.”). Such protection is particularly important for online
15 publishers, which have millions of users and cannot possibly be charged with an
16 obligation to screen “each of their millions of postings for possible problems.” *Zeran*
17 *v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). As has become well
18 recognized, editorial activities of online intermediaries are protected by the First
19 Amendment. *See, e.g., Washington Post v. McManus*, 355 F. Supp. 3d 272, 300 (D.
20 Md. 2019) (enjoining Maryland statute that required social media and news websites to
21 self-publish information about political ads, holding that the statute infringed editorial
22 judgments; “This respect for a publisher’s right to exercise ‘editorial control and
23 judgment’ ... applies with equal force to outlets that publish content on the Internet”)
24 (quoting *Tornillo*, 418 U.S. at 258), *appeal filed*, No. 19-1132 (4th Cir. Feb. 4, 2019);
25 *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014) (“a ‘search
26 engine’s editorial judgment is much like many other familiar editorial judgments,’
27
28

1 such as the newspaper editor’s judgment of which wire-service stories to run and
2 where to place them in the newspaper”).²⁴

3 A website’s “decisions relating to the monitoring, screening, and deletion of
4 content [are] actions quintessentially related to a publisher’s role.” *Green v. Am.*
5 *Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003). “[D]eciding whether to publish,
6 withdraw, postpone, or alter content” is the “exercise of a publisher’s traditional
7 editorial functions.” *Zeran*, 129 F.3d at 330; *accord Jones v. Dirty World Entm’t*
8 *Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (“a publisher’s traditional editorial
9 functions” include “deciding whether to publish, withdraw, postpone or alter content”);
10 *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009) (“removing content is
11 something publishers do”). In fact, 23 years ago, Congress set out not only to protect
12 but to encourage online providers to engage in such editorial practices of monitoring,
13 limiting, and/or editing user-submitted content, with the intent that self-policing would
14 better “maintain the robust nature of Internet communication, and ... keep government
15 interference in the medium to a minimum.” *Batzel v. Smith*, 333 F.3d 1018, 1027-28
16 (9th Cir. 2003) (quoting *Zeran*, 129 F.3d at 330).²⁵

17
18
19 ²⁴ See also *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, at *4 (M.D.
20 Fla. Feb. 8, 2017) (“A search engine is akin to a publisher, whose judgments about
21 what to publish and what not to publish are absolutely protected by the First
22 Amendment”; holding that “Google’s actions in ... determining whether certain
23 websites are contrary to Google’s guidelines and thereby subject to removal are the
24 same as decisions by a newspaper editor regarding which content to publish, which
25 article belongs on the front page, and which article is unworthy of publication. The
26 First Amendment protects these decisions, whether they are fair or unfair, or motivated
27 by profit or altruism.”); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-630 (D.
28 Del. 2007) (First Amendment protects decisions about placement, ranking, or rejection
of online advertisements); *Search King, Inc. v. Google Tech., Inc.*, 2003 WL 21464568
*4 (W.D. Okla. 2003) (“Google’s PageRanks are entitled to ‘full constitutional
protection.’”).

²⁵ See *Bennett v. Google, Inc.*, 2017 WL 2692607, at *2 (D.D.C. June 21, 2017)
 (“holding Google liable for establishing standards and guidelines would ultimately
create a powerful disincentive for service providers to establish any standards or ever

1 The government ignores all of this established law to allege that protected
 2 editorial practices for reviewing and blocking user-submitted content should instead be
 3 the basis for criminal liability. In terms of fact allegations, the Indictment alleges that
 4 “Backpage periodically used computerized filters and human ‘moderators’ to edit the
 5 wording of (or block) ads,” but then adds the conclusory assertion that this was done to
 6 “remov[e] particular terms that were indicative of prostitution.” SI ¶¶ 11, 68. This is a
 7 mischaracterization contrary to the very documents upon which the government
 8 purports to rely.²⁶ See *McKenna*, 881 F. Supp. 2d at 1266-67 (Backpage used
 9 automated filters to screen for 26,000 terms, phrases, email addresses, URLs and IP
 10 addresses, and employed 100 personnel to review and block ads violating the website’s
 11 terms of use); *Cooper*, 939 F. Supp. 2d at 814 (Backpage.com’s monitoring blocked or
 12 removed one million ads in April 2012). But, regardless, these and similar allegations
 13 of the Indictment²⁷ reflect that the government impermissibly disregards First

14 _____
 15 decide to remove objectionable content, which the CDA was enacted to prevent”),
 16 *aff’d sub nom.*, *Bennett v. Google, LLC*, 882 F.3d 1163 (D.C. Cir. 2018).

17 ²⁶ For example, the Indictment refers to an April 2008 email from Ferrer as allegedly
 18 stating that “he was unwilling to delete prostitution ads” and so instructed staff to “edit
 19 the wording of such ads, by removing particular terms that were indicative of
 20 prostitution, and then allow the remainder of the ad to be featured on Backpage’s
 21 website.” SI ¶ 68. However, the actual email does not say this, does not refer to
 “prostitution ads” nor that the terms to be blocked were “indicative of prostitution,”
 but rather stated that blocking ads could lead to user complaints and chargebacks. See
 DOJ-BP-0000192778.

22 Additionally, the Indictment’s allegations about Backpage.com editing ads (to eliminate
 23 words and photos that violated the website’s terms of use) concern only a period of
 24 months at the end of 2010, see SI ¶¶ 72-87 (allegations all from September 1, 2010 to
 25 December 2010), which was immediately after Craigslist removed its category for
 26 “adult services” in response to pressure from government officials, and Backpage.com
 significantly expanded its moderation efforts to deal with an influx of submissions.
 Significantly, none of the ads that are the bases for the Indictment’s Travel Act counts
 were published during this time period.

27 ²⁷ The Indictment similarly casts aspersions that Backpage.com failed to adopt other
 28 rules or review practices for user content. See, e.g., SI ¶¶ 14, 90, 100, 101, 106, 131.
 But, deciding *not* to implement practices are protected editorial decisions every bit as

1 Amendment principles to base charges on editorial practices that are common among
2 websites²⁸ and constitutionally protected.

3 In fact, courts have expressly rejected the government's theory in others'
4 attempts to ascribe criminal liability to Backpage.com. In *M.A.*, 809 F. Supp. 2d at
5 1041, the court dismissed outright the plaintiff's claims against Backpage.com
6 predicated on 18 U.S.C. § 2 (for allegedly aiding and abetting sex trafficking by users
7 who posted ads on the site). *Id.* at 1054. Rejecting accusations that Backpage.com
8 was designed to promote prostitution and sex trafficking, *id.* at 1044, the court held
9 that Backpage.com could not be liable based on users' misuse of its services, and
10 merely asserting that such misuse occurred could not establish that the website had the
11 requisite specific intent, *i.e.*, that it knew of and shared the user's intent to commit
12 specific sexual offenses, *id.* at 1054. In *Doe v. Backpage.com*, the court rejected
13 claims based on the federal Trafficking Victims Protection Act (18 U.S.C. § 1591, *see*
14 18 U.S.C. § 1595), noting that allegations about Backpage.com's editorial practices
15 (much the same as the Indictment's allegations here), whether viewed "[s]ingly or in

16 _____
17 much as decisions to implement practices. *See Doe v. MySpace, Inc.*, 528 F.3d 413,
18 420 (5th Cir. 2008) (allegations seeking to hold MySpace liable for not adopting safety
19 measures were merely another way of improperly claiming the website operator was
20 liable for its "role as a publisher of third-party-generated content"); *accord Jane Doe*
No. 1 v. Backpage.com, LLC, 817 F.3d 12, 21 (1st Cir. 2016).

21 ²⁸ For example, Craigslist's posting rules for adult ads were essentially the same as
22 Backpage.com's, prohibiting terms that "suggest or imply an exchange of sexual favors
23 for money" including use of "any and all code words" (providing examples) or any
24 "attempt to avoid detection of forbidden language by using spelling variations" (again
25 providing examples),
https://web.archive.org/web/20100526124651/www.craigslist.org/about/help/Adult_Services_Posting_Guidelines (Craigslist Adult Service Posting Guidelines, May 26, 2010);
see also craigslist, Inc. v. McMaster, 2010 WL 11640195, at *2 (D.S.C. Aug. 6, 2010)
(quoting rules); Match.com,
26 <https://web.archive.org/web/20100627072807/www.match.com/registration/membagr.aspx>
27 (June 27, 2010 Terms of Use: "Match.com may review and delete any content,
28 messages ... photos or profiles ..., in each case in whole or in part, that in the sole
judgment of Match.com violate this Agreement or which might be offensive, illegal, or
that might violate the rights, harm, or threaten the safety of Members.").

1 the aggregate” cannot “amount to ... affirmative participation in an illegal venture.”
2 104 F. Supp. 3d at 157; *see also People v. Ferrer*, 2016 WL 7237305, at *3, *10
3 (taking into account First Amendment interests, holding that Backpage.com’s
4 provision of “a forum for online publishing” and receiving payments for ads “qualify
5 as services rendered for legal purposes,” insufficient to support charges of pimping,
6 facilitating prostitution or money laundering).

7 **4. *Attacking Efforts to Promote or Advertise a Website to Users.***

8 In a similar vein, the Indictment offers accusations about efforts Backpage.com
9 made in its early years to promote customer usage through advertising and by offering
10 free ads to users. There is nothing illegal about such practices, and here again the
11 government’s allegations are based entirely on its assumptions that all adult ads are for
12 prostitution.

13 For example, the Indictment attacks a Backpage.com marketing effort in 2007
14 whereby representatives contacted individuals who had posted ads elsewhere (*e.g.*,
15 Craigslist), asked if they would be interested in posting their ads on Backpage.com,
16 and, if the user agreed, the representative would upload the same ad (as written by the
17 user) to Backpage.com. SI ¶ 36; *see generally id.* ¶¶ 35-44 (referring to this as
18 “aggregation”). Purporting to rely on Backpage.com emails and other documents, the
19 Indictment alleges, however, that “Backpage employees would ... *identify prostitutes*
20 *advertising on other websites*” and seek to post their ads. SI ¶ 36 (emphasis added); *see*
21 *also id.* ¶ 9. Yet the cited documents say nothing of the sort, instead referring to
22 identifying leads from “employment,” “therapeutic massage,” and “adult” ads posted
23 elsewhere. DOJ-BP-0004602206. Otherwise, the Indictment merely alleges that this
24 marketing effort was successful and helped generate “new adult content” to the website.
25 *See, e.g.*, SI ¶ 39.

26 The Indictment further presumes that adult ads on Backpage were for
27 prostitution because the website received page views from individuals who had visited
28

1 another site – theeroticreview.com – and, for a time,²⁹ Backpage.com ran banner ads
2 on that site. SI ¶ 10 (referring to this as a “reciprocal link” arrangement). The
3 Indictment then notes that a May 2009 newspaper article referred to
4 theeroticreview.com as a “prostitution website,” SI ¶ 54, and from this premise asserts
5 that Backpage.com “employed ... business strategies that were specifically intended to
6 promote and facilitate prostitution,” SI ¶ 10.³⁰ Here, the government’s accusations
7 amount to presumptions piled atop presumptions – in effect charging Backpage.com
8 (and therefore Defendants) with complicity not only for everything that persons
9 posting ads on the website might have done (albeit unknown) but also based on which
10 other websites individuals reading ads on Backpage.com might have visited.

11 As noted, online adult content is presumptively protected speech, and the
12 government cannot equate it to prostitution or unlawful speech. As is true throughout
13 the Indictment, stripping out the government’s improper presumptions, these
14 allegations describe actions that are legal *and* recognized publisher functions.
15 Reposting third-party content from another website is “a traditionally protected
16 editorial function.” *People v. Ferrer*, 2016 WL 7237305, at *7; *see also Barrett v.*
17 *Rosenthal*, 40 Cal. 4th 33, 63, 146 P.3d 510, 517 (2006). Banner ads on websites are
18 ubiquitous and one of the largest forms of online advertising.³¹ Successful marketing
19 to online customers is legal and common for websites. In its role of ensuring that the

21 ²⁹ Again, this was in the early days of Backpage.com, from 2007-2009, according to
22 the Indictment, *see* SI ¶¶ 45-55, years before any of the alleged ads and transactions
23 that form the Indictment’s Travel Act and money laundering counts.

24 ³⁰ The rest of what the Indictment alleges about theeroticreview is that Backpage ran
25 banner ads on that site for a few years and believed that they helped increase user visits
26 and page views. *See* SI ¶¶ 46-53. Of course, the government no more assume that all
content on theeroticreview.com was unlawful than it can make such an assumption as
to Backpage.com.

27 ³¹ *US Digital Display Ad Spending to Surpass Search Ad Spending in 2016* (Jan. 11,
28 2016), <https://www.emarketer.com/Article/US-Digital-Display-Ad-Spending-Surpass-Search-Ad-Spending-2016/1013442> (2016 spending on online display advertising was \$32.17 billion, with banners and similar ads accounting for the largest percentage).

1 Indictment is not based on challenges to protected speech or practices, the Court
2 should reject these allegations as well.

3 **B. The Indictment Fails to Allege Any Requisite *Mens Rea*.**

4 The premise of the Indictment is that Backpage.com “facilitated” prostitution
5 by providing an online forum where third-party users could post adult ads, and
6 Defendants can be held criminally liable if they knew that some (or many) users used
7 the website for prostitution. The government’s theory – that Defendants may be
8 criminally responsible for *general awareness* that third parties used Backpage.com for
9 criminal purposes – has been universally rejected. Under both First Amendment and
10 statutory standards, the government cannot prosecute on this basis – the law requires
11 the government allege and prove specific intent. The Indictment contains no
12 allegations of the requisite *mens rea*, or anything remotely close.

13 **I. The Government’s Prosecution is Governed by a Specific Intent**
14 **Standard.**

15 A prosecution under the Travel Act requires the government to allege “that the
16 accused formed a specific intent to promote, manage, establish, carry on or facilitate
17 one of the prohibited activities.” *United States v. Gibson Specialty Co.*, 507 F.2d 446,
18 449 (9th Cir. 1974). In *Gibson*, the government asserted charges under the Travel Act
19 against several manufacturers that sold punchboards and pulltabs to businesses in
20 Montana, where the mere possession of those items was illegal under the state’s
21 gambling laws. Even assuming the defendants knew their customers would violate
22 Montana law by purchasing those items, the Ninth Circuit affirmed dismissal of the
23 charges, holding that such knowledge could not satisfy the specific intent requirement
24 of the Travel Act. *Id.* at 450.³² Instead, the Ninth Circuit held that, to show specific
25 intent, “the prosecutor must show that the manufacturer in some significant manner

26
27 ³² As the Ninth Circuit explained, and *apropos* to the government’s prosecution theory
28 here: “It is as likely as not that a vendor similar to the defendants in this proceeding is
totally indifferent to the actions of his purchaser.” 507 F.2d at 450 n.8.

1 associated himself with the purchaser’s criminal venture for the purpose of its
2 advancement.” *Id.* at 449.³³ No lesser showing of *mens rea* can be sufficient under
3 the Travel Act, because otherwise “the act would be plagued by the very
4 overexpansiveness which Congress sought to rule out” *Id.*

5 Similar *mens rea* standards of intent (rather than generalized awareness)
6 govern allegations of money laundering. *See United States v. Brown*, 186 F.3d 661,
7 670 (5th Cir. 1999) (“This element is not satisfied by mere evidence of promotion, or
8 even knowing promotion, but requires evidence of *intentional* promotion.”); *United*
9 *States v. Trejo*, 610 F.3d 308, 314, 317 (5th Cir. 2010) (“Nor may the government rest
10 on proof that the defendant engaged in “knowing promotion” of the unlawful
11 activity.” “[K]nowing promotion’ is not enough for a conviction under the federal
12 money laundering statute.”); *see also* R. Jones, Becker, K., *Whoever Knowingly*
13 *Advertises: Considerations in Prosecuting Sex Trafficking*, U.S. Attorneys’ Bulletin
14 (Nov. 2017), <https://www.justice.gov/usao/page/file/108856/download> (DOJ counsel
15 for this case explaining that “[t]he specific intent to promote requirement” is “the
16 gravamen” of a money laundering charge under 18 U.S.C. § 1956 and is subject to a
17 “stringent” *mens rea* requirement (internal quotations and citations omitted).

18
19 ³³ With respect to prostitution offenses, the Travel Act requires not only that a
20 defendant intended and took action to promote or facilitate a prostitution offense or
21 offenses; but that the promotion or facilitation was of a “business enterprise” involved
22 in prostitution. 18 U.S.C. § 1952(b)(1); *see Gibson*, 507 F.2d at 449. A “business
23 enterprise” is a continuous course of criminal conduct, not just a single incident. This
24 element of the Travel Act thus requires a showing that a defendant knew of the
25 *criminal enterprise* and intended to promote or facilitate it. *See United States v.*
26 *Kaiser*, 660 F.2d 724, 731 (9th Cir. 1981) (“The Travel Act proscribes ... interstate
27 travel to promote unlawful ‘business enterprises’ [and] “[t]he words ‘business
28 enterprise’ refer to a continuous course of criminal conduct rather than sporadic or
casual involvement in a proscribed activity.” (internal citations omitted). As discussed
above, the Indictment does not allege that any Defendant knew anything about any of
the ads that are the bases of the government’s charges or had any dealings with the
third parties who posted the ads, much less that any Defendant knew of any “business
enterprise” of an individual poster (whom they did not know) and intended to further
that enterprise (through the publication of ads they never saw).

1 More fundamentally, it is a basic proposition of First Amendment law that the
2 government cannot criminally punish publishers or distributors of speech without
3 sufficient proof of *scienter*, *i.e.*, that a defendant knew the *specific* speech that is the
4 basis for criminal charges was illegal. This basic principle dates back 60 years, to
5 *Smith v. California*, 361 U.S. at 147, in which the Supreme Court struck down a Los
6 Angeles ordinance making it a crime for booksellers to possess obscene books. Even
7 though the First Amendment does not protect obscene speech, the Court held that a
8 bookseller could not be prosecuted without proof it had knowledge of the contents of
9 *a given book*. *Id.* at 153-54. Absent such *scienter*, First Amendment rights would be
10 severely chilled – the bookseller could not fairly be charged with “omniscience” as to
11 everything in its store, and the bookseller’s burden “would become the public’s
12 burden” because speech would be suppressed for fear of liability. *Id.*; *see also*
13 *Mishkin v. New York*, 383 U.S. 502, 511 (1966) (“The Constitution requires proof of
14 *scienter* to avoid the hazard of self-censorship of constitutionally protected
15 material”); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994)
16 (interpreting 18 U.S.C. § 2252 to require proof that defendant knew that one or more
17 specific performers in video were under 18, because a statute “bereft of [such] a
18 *scienter* requirement ... would raise serious constitutional doubts”).³⁴

19 The DOJ itself has admitted that a website operator cannot be liable under
20 federal criminal laws absent proof that it knew of, and intentionally participated in,
21 illegal conduct of *specific* individuals using the website. The DOJ has said this not
22 once, but many times.

23 In 2010, the DOJ’s National Coordinator for Child Exploitation, Prevention,
24 and Interdiction was asked in Congressional hearings: “[W]hat laws apply to Internet
25

26
27 ³⁴ As courts have also recognized, the First Amendment burden imposed by self-
28 censorship is magnified on the Internet, because “websites ... will bear an impossible
burden to review all of their millions of postings or, more likely, shut down their adult
services section entirely.” *Cooper*, 939 F. Supp. 2d at 830.

1 providers like craigslist that would make them criminally liable for the postings?” She
2 responded:

3 I am not aware of any laws that would make them liable [for third-party
4 postings], unless there was evidence that craigslist was a participant ...
5 conspiring with those who were misusing their site, that is, knowingly
6 conspiring to violate the laws.... I am not aware of any Federal statutes
7 anyway with respect to neglect being the standard. In Federal law, the
8 standard for prosecution would be knowing or willful.... I am not aware
9 of anything that shows us that craigslist might be criminally liable....
[A]t this point, we have the proper tools. We have what we need to
prosecute the guilty, that is, the people who are using the Internet
And I don't think anyone ... here would propose closing the Internet.”

10 *Domestic Minor Sex Trafficking: Hearing Before Subcomm. on Crime, Terrorism, &*
11 *Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 215-16 (2010)),
12 attached as Exhibit B.

13 More recently, in 2016, when Congress amended 18 U.S.C. § 1591 in what was
14 called the “SAVE Act,” (which added “advertising” as a predicate act for sex
15 trafficking if done “knowingly”), in order to withstand Backpage.com’s constitutional
16 challenge to the act, the government insisted that a website publisher could not be
17 liable absent specific knowledge of and participation in an incident of sex trafficking:

18 Even if an advertisement for illegal sex trafficking appeared on [its]
19 website, [Backpage] could not be convicted under [the law] without
20 proving that [it] knew that the advertisement at issue related to illegal sex
21 trafficking of a minor or of a victim of force, fraud, or coercion.

22 DOJ Reply in Support of Motion to Dismiss, at 7-8, *Backpage.com, LLC v. Lynch*, No.
23 1:15-2155(RBW (D.D.C. Apr. 15, 2016) (ECF No. 13). The district court agreed with
24 this interpretation and dismissed Backpage.com’s challenge, concluding the website
25 faced no credible threat of prosecution given its practices and that the statutory
26 amendments *increased* the *mens rea* requirement for liability so as to protect websites.
27 *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 108-09 (D.D.C. 2016); *see also* 161
28 Cong. Rec. H596, H598-H600 (daily ed. Jan. 27, 2015) (intent of amendments was to
“raise the bar” by requiring proof that websites had knowledge that given ads were
unlawful, so as to avoid constitutional problems).

1 In Congress’s most recent attempt to target Backpage.com – the “Fight Online
2 Sex Trafficking Act” (or “FOSTA”), which amended federal sex trafficking laws and
3 Section 230 – legislators also recognized that the law does not allow criminal liability
4 based on allegations of “generalized knowledge.”

5 Though under 18 U.S.C. § 1591, a website may be held criminally liable
6 for knowingly advertising sex trafficking, this knowledge standard is
7 difficult to prove beyond a reasonable doubt. This is so because online
8 advertisements rarely, if ever, indicate that sex trafficking is involved.
9 The advertisements neither directly nor implicitly state that force, fraud,
10 or coercion was used against the victim, nor do they say that the person
11 depicted being prostituted is actually under the age of 18. ... Further,
12 *general knowledge that sex trafficking occurs on a website will not*
13 *suffice as the knowledge element must be proven as to a specific victim.*

14 Report on H.R. 1865, No. 115-572 at 5, [https://www.congress.gov/115/crpt/hrpt572/
15 CRPT-115hrpt572-pt1.pdf](https://www.congress.gov/115/crpt/hrpt572/CRPT-115hrpt572-pt1.pdf) (emphasis added). And writing to the House about that
16 legislation, DOJ acknowledged the high burden of proof for advertising, given First
17 Amendment implications:

18 Section 1591 already sets an appropriately high burden of proof,
19 particularly in cases involving advertising. Under current law,
20 prosecutors must prove that the defendant knowingly benefitted from
21 participation in a sex trafficking venture, knew that the advertisement
22 related to commercial sex, and knew that the advertisement involved a
23 minor or the use of force, fraud, or coercion.

24 Letter from DOJ Assistant Attorney General Stephen E. Boyd to Congressman Robert
25 W. Goodlatte (Feb. 27, 2018)), Exhibit C.

26 The government has acknowledged in other cases it has the burden to prove not
27 just that the Defendants knew that *particular ads* were for prostitution, but that they
28 had the *specific intent to facilitate those particular acts* of prostitution. In *Woodhull
Freedom Foundation v. United States*, the government argued that for prosecutions
under the Travel Act, the prosecutor must prove “not simply that the defendant was
aware of a potential result of the criminal offense, but instead that the defendant
intended to ‘explicitly further[.]’ a specified unlawful act.” 334 F. Supp. 3d 185, 199-
201 (D.D.C. 2018), *appeal filed*, No. 18-5298 (D.C. Cir. Oct. 12, 2018). The court

1 agreed with the government and held that the law applies only to “specific unlawful
2 acts with respect to a particular individual, not the broad subject-matter of
3 prostitution.” *Id.* Most recently, in defending the district court decision in that case,
4 DOJ repeated its position that in a prosecution under the Travel Act, the government
5 must allege that the defendant acted to intentionally promote or facilitate a “specific,
6 unlawful instance of prostitution.” Brief for the United States in *Woodhull Freedom*
7 *Found. v. United States*, No. 18-5298 (D.C. Cir. Apr. 15, 2019) (Doc. #1782997) at
8 21-22.

9 **2. The Indictment Fails to Allege Specific Intent.**

10 The essential premise of the Indictment is that the Defendants had general
11 knowledge that Backpage.com was used by third parties to advertise prostitution and
12 that they took steps to encourage and promote such uses. The charges are false, but for
13 the purpose of reviewing the indictment under Rule 12(b)(3)(B), the allegations are
14 defective as a matter of law because the government fails to allege the necessary *mens*
15 *rea* as to any specific acts, either for the website or for any of the individual
16 Defendants.

17 The overwhelming premise of the Indictment is that the Defendants had a
18 general awareness that “the vast majority” of advertisements in the adult and escort
19 sections of Backpage.com were for prostitution and a general intent to promote such
20 ads. SI ¶¶ 1, 9, 10, 11, 13, 15, 19, 24, 34, 52, 59, 68, 69, 71, 75, 91, 92, 98, 114. The
21 Indictment lists a series of specific instances involving seventeen individuals it
22 describes as “victims,” SI ¶¶ 160-176, but in no case does it assert that any Defendant
23 had any awareness of ads involving the alleged victims, or any intent to facilitate
24 prostitution of those persons. Rather than specific knowledge or intent, the Indictment
25 claims the requisite *mens rea* can be imputed to the Defendants because of general
26 allegations leveled by law enforcement officials, SI ¶¶ 74, 105, 109, 111, 136, 141,
27 144; characterizations in news stories, *id.* ¶¶ 127, 146; statements by advisory bodies
28 and advocacy groups, *id.* ¶¶ 122, 134, 136, 140; allegations by congressional

1 committees, *id.* ¶ 151, and others. *Id.* ¶¶ 69, 131, 135. The Indictment even suggests
2 that the fact Backpage.com’s former CEO cooperated with law enforcement and
3 testified in criminal prosecutions of individual pimps somehow supports an allegation
4 of *mens rea* for all other ads on the website. SI ¶¶ 71, 76, 91. None of these
5 allegations are relevant to the type of showing required for *mens rea* that the
6 government has acknowledged repeatedly – just not in this case.

7 Nor do allegations against the individual Defendants attempt to satisfy the
8 specific intent requirement. Even apart from the government’s distortions about what
9 the Defendants purportedly said or did, the Indictment fails even to allege that any
10 Defendant was aware of any of the ads identified in the Indictment, SI ¶ 201, that any
11 Defendant knew any of those ads was for prostitution, that any Defendant was
12 involved in the decision to publish any such ad, or that any Defendant made such a
13 decision with the intent to further any illegal acts.

14 For Michael Lacey, for example, the Indictment alleges that various groups or
15 individuals had told him (or forwarded their claims) that they believed that a high
16 proportion of ads on Backpage.com were for prostitution. SI ¶¶ 97, 131, 146, 147.
17 After one such allegation was made in a meeting with representatives from the
18 National Center for Missing and Exploited Children (“NCMEC”), Lacey is alleged to
19 have told them “adult prostitution is none of your business.”³⁵ Lacey also is alleged to
20 have once received a letter from an organization that represents sex workers thanking
21 Backpage.com “for continuing to permit sex workers ‘to advertise in the ‘Adult’
22 area.” SI ¶ 142. Finally, Lacey allegedly was on an email chain in which Backpage
23 staff members reported deleting an ad for which a complaint had been received
24

25 ³⁵ SI ¶ 89. The Indictment also alleges that Lacey “believe[s] in legalized
26 prostitution,” SI ¶ 121, and that he once drafted an editorial that the government
27 characterizes as “brag[ging] about the company’s contributions to the prostitution
28 industry.” SI ¶ 11, 107. According to the Indictment, Lacey wrote that Backpage.com
was “part of the solution” because it provides “transparency, recordkeeping and
safeguards.” SI ¶ 11, 107.

1 (although the removal apparently was not made quickly enough in the government's
2 estimation), SI ¶ 126, and allegedly was sent an email in which the former CEO
3 recommended against adopting one of NCMEC's suggested reforms. SI ¶ 106. The
4 Indictment also alleges that Lacey once transferred funds to an overseas bank at a time
5 when charges in a California case had been dismissed, and no other charges were
6 pending. SI ¶ 16. That's it.

7 The allegations regarding James Larkin likewise fail to include any suggestion
8 that he was aware of any of the ads identified, that he knew any of those ads was for
9 prostitution, that he was involved in deciding to publish any such ad, or that he made a
10 decision with the intent to further any illegal acts. As with Lacey, the Indictment
11 alleges that various groups of individuals made general claims to Larkin that
12 prostitution ads were prevalent on Backpage.com. SI ¶¶ 86, 89, 97, 100, 135. The
13 Indictment alleges that Larkin was aware of efforts to grow the business of
14 Backpage.com through "aggregation," "reciprocal links" and banner advertising on
15 other websites that contained adult content. SI ¶¶ 41-43, 47, 49, 50, 56-58, 138. It
16 alleges that Larkin was aware of, and helped edit the editorial in which Lacey claimed
17 Backpage.com was "part of the solution." SI ¶¶ 12, 107, 108. The Indictment claims
18 that Larkin also was a recipient of the "thank you letter" allegedly sent by an
19 organization that represents sex workers, SI ¶ 142, and that he, too, was on the email
20 chain in which Backpage staff members reported deleting an ad that purportedly
21 involved a minor. SI ¶ 126. Likewise, the Indictment alleges that the former CEO
22 copied Larkin on an email in which he recommended against adopting one of
23 NCMEC's suggested reforms. SI ¶ 106. It also alleges Larkin agreed to have a
24 contractor assist with enforcing website rules that banned posting nude photos. SI
25 ¶ 103.

26 The Indictment's allegations against John Brunst, as CFO, are entirely barren of
27 anything that resembles *mens rea*. He allegedly was sent documents describing the
28 "Backpage strategic plan" and other presentations that discussed plans to grow the

1 business through “aggregation” and “reciprocal links” with other sites that contained
2 adult content, SI ¶¶ 42, 49, 138, 155, 157, and allegedly attended meetings in which
3 Google Analytics analyses of web traffic were discussed. SI ¶¶ 57-58. The Indictment
4 also alleges that Brunst received an email saying that Chase Bank was discontinuing
5 accepting transactions from Backpage.com due to allegations about the site. SI
6 ¶ 135.³⁶ The Indictment contains no other allegations regarding Brunst.

7 Finally, nothing in the Indictment alleges *mens rea* on the part of EVP Scott
8 Spear. Most of the allegations focus on claims that Spear was involved in efforts to
9 expand Backpage.com’s business through “aggregation” and “reciprocal links” with
10 other sites with adult content. SI ¶¶ 35, 38, 41, 42, 45, 46, 47, 49, 50, 51, 56, 57, 58,
11 65. The Indictment also alleges that Spear heard or was sent general claims that
12 prostitution ads were prevalent on Backpage.com. SI ¶¶ 97, 100, 135. It claims that
13 Spear received emails describing Backpage.com’s enforcement of terms of service,
14 including the banning of images depicting sex acts, SI ¶¶ 70, 73, 81, 103, and that he
15 was on email chains in which certain recommended changes in website policies were
16 rejected. SI ¶ 90. Finally, without reference to any particular ad, the Indictment
17 alleges that Spear was aware that certain words are “code” for prostitution. SI ¶ 149.
18 As with all the other Defendants, there are no allegations that Spear was aware of any
19 of the ads identified, that he knew any of those ads were for prostitution, that he was
20 involved in any decision to publish the such ads, or that he made a decision with the
21 intent to further any illegal acts.

22 3. *Case Law Compels Dismissal of the Indictment.*

23 The Indictment is a mash-up of broad, generalized allegations coupled with a
24 complete absence of specific allegations that go to the essential element of *mens rea*.

25
26 ³⁶ Allegations about banks or credit card issuers deciding not to process transactions on
27 Backpage.com, *see, e.g.*, SI ¶¶ 178, 179, 181, 183, presumably for perceived
28 reputational reasons, do not suffice as allegations that Brunst specifically intended to
promote or facilitate publishing ads for prostitution, let alone that he ever had any
knowledge of or involvement with any of the ads cited in the Indictment.

1 There is not a single allegation of fact against any Defendant that shows awareness of
2 a particular illegal ad, much less the necessary intent to facilitate any illegality. An
3 indictment must be dismissed where the government attempts to “rely on the
4 defendants’ conduct as a whole.” *Buddenberg*, 2010 WL 2735547 at *10. Especially
5 in this context, where the government is seeking to impose criminal liability on a
6 publisher for content provided by others, given the First Amendment implications, it
7 must “more specifically identify the precise conduct upon which it seeks to hold each
8 defendant criminally liable.” *Id.* at *9. Even without regard to First Amendment
9 principles, the indictment must be dismissed in any event based on a failure to allege
10 specific intent, given the *mens rea* standard under the Travel Act and money
11 laundering statute. *E.g.*, *Woodhull Freedom Found.*, 334 F. Supp. 3d at 199-201. *See*
12 *supra* Sections III.C, IV.B.1.

13 The essential allegations of the Indictment are that Backpage.com provided a
14 platform for escort and adult-themed ads (which the government equates with
15 illegality), that it actively sought to promote that aspect of the business, that the
16 Defendants failed to heed warnings or take adequate steps to prevent such postings,
17 and that moderation practices implementing Backpage.com’s terms of service
18 generally “facilitated” prostitution. Even if the Indictment contained specific
19 allegations of fact to support such claims against each Defendant (which it does not),
20 none of this amounts to culpable criminal behavior, or that Defendants had the
21 necessary *mens rea*, as numerous courts have held.

22 In *Dart v. Craigslist*, 665 F. Supp. 2d 961, for example, the sheriff of Cook
23 County charged that the “erotic services” section of Craigslist constituted a “public
24 nuisance” that violated “federal, state, and local prostitution laws,” including
25 specifically, the Travel Act. *Id.* at 963. Sheriff Dart made the very familiar-sounding
26 allegations that Craigslist was “the single largest source for prostitution, including
27 child exploitation, in the country,” that users posted “obvious” ads for prostitution
28 using coded language with “nude or nearly nude pictures,” that Craigslist assisted

1 these postings through its moderation process, and that the overall allegations were
2 supported by the opinions of advocacy groups and other law enforcement bodies. *Id.*
3 at 962-63. Like the Indictment in this case, “Sheriff Dart’s lengthy complaint relie[d]
4 heavily on a few conclusory allegations to support the contention that [the website]
5 induces users to post ads for illegal services.” *Id.* at 969. Nevertheless, the court held
6 that “[t]he phrase ‘adult,’ even in conjunction with ‘services,’ is not unlawful in itself
7 nor does it necessarily call for unlawful content,” and websites that host such content
8 “are not culpable for ‘aiding and abetting’ their customers who misuse their services to
9 commit unlawful acts.” *Id.* at 967-68 (“Plaintiff is simply wrong when he insists that
10 these terms are synonyms for illegal sexual services.”). The court observed that these
11 types of allegations may be characterized as “negligent publishing,” *id.* at 967, a notion
12 that could never satisfy the strict criminal pleading standard of specific intent.³⁷

13 Other courts have made the same point that some level of “general awareness”
14 does not satisfy the *mens rea* requirement. *See, e.g., Doe v. GTE Corp.*, 347 F.3d 655,
15 659 (7th Cir. 2003) (“Even entities that know the information’s content do not become
16 liable for the sponsor’s deeds. Does a newspaper that carries an advertisement for
17 ‘escort services’ or ‘massage parlors’ aid and abet ... prostitution, if it turns out that
18 some (or many) of the advertisers make money from that activity? How about
19 Verizon, which furnishes pagers and cell phones to drug dealers...?”); *In re Aimster*
20 *Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003) (“A retailer of slinky dresses is not
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22 ³⁷ *See, e.g., M.A.*, 809 F. Supp. 2d at 1054 (Backpage could not be liable based on
23 allegations it aided violations of federal criminal statutes such as 18 U.S.C. § 1591,
24 because publishing third-party ads cannot establish the specific intent required);
25 *McKenna*, 881 F. Supp. 2d at 1277-79 (“[W]here an online service provider publishes
26 advertisements that employ coded language, a reasonable person could believe that
27 facts exist that do not in fact exist: an advertisement for escort services may be just
28 that.... However, if the offer is implicit, how can a third party ascertain that which is
being offered before the transaction is consummated?”); *cf. McMaster*, 2010 WL
11640195, at *10 (dismissing as moot constitutional challenge to threatened
prosecution of Craigslist after Attorney General abandoned “generalized” theory of
prosecution).

1 guilty of aiding and abetting prostitution even if he knows that some of his customers
2 are prostitutes....”). Of particular relevance here, the Seventh Circuit observed that
3 “Backpage is an intermediary between the advertisers of adult services and visitors to
4 Backpage’s website,” and intermediaries “do not become liable for the sponsor’s [*i.e.*,
5 advertiser’s] deeds” “[e]ven [if they] know the information’s content.” *Backpage.com*
6 *v. Dart*, 807 F.3d at 234.

7 The Indictment contains no allegations as to Backpage.com as a website, and
8 certainly not for any of the individual Defendants, that could satisfy a specific intent
9 standard. This “complete failure to recite an essential element of the charged offense
10 is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw
11 requiring dismissal of the indictment.” *United States v. Du Bo*, 186 F.3d 1177, 1179
12 (9th Cir. 1999) (an indictment failing to allege the requisite *mens rea* “on its face is
13 deficient” because “implied, necessary elements, not present in the statutory language,
14 must be included in an indictment”); *accord United States v. Pernillo-Fuentes*, 252
15 F.3d 1030, 1032 (9th Cir. 2001) (indictment dismissed for failure to allege specific
16 intent); *United States v. Carbajal*, 42 F. App’x 954, 954-55 (9th Cir. 2002) (same).
17 Without an express statement of the required level of *mens rea*, an indictment fails to
18 ensure that the defendant is being prosecuted only “on the basis of the facts presented
19 to the grand jury.” *Du Bo*, 186 F.3d at 1179 (quoting *United States v. Rosi*, 27 F.3d
20 409, 414 (9th Cir. 1994)). In the absence of specific allegations, it is impossible to
21 know “if the grand jury would have been willing to ascribe criminal intent” to the
22 Defendants. *Id.* at 1179-80. *See Buddenberg*, 2010 WL 2735547, at *9. Such a
23 defective indictment requires dismissal because it fails to “properly allege an offense
24 against the United States.” *United States v. Morrison*, 536 F.2d 286, 289 (9th Cir.
25 1976).

26 **C. The Travel Act is Unconstitutional as Applied in the Indictment**
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28

1 ***1. Indictment Bases Travel Act Allegations as Generalized Crimes***

2 As set forth in detail above, the Indictment alleges that the Defendants had
3 general knowledge that Backpage.com was used by third parties to advertise
4 prostitution and that they took steps to encourage and promote such uses. The
5 Indictment makes no allegations that any Defendant was aware of any of the ads
6 identified, that he knew in advance that any of those ads was for prostitution, or that he
7 was involved in decisions to publish any of the ads and did so with the intent to further
8 illegal acts. If the Travel Act could be interpreted and applied so expansively, there
9 would be no clear restrictions on its scope and no way to understand its terms. The
10 Travel Act would thus be plainly unconstitutional, as the government seeks to apply it
11 in this case.

12 The theory of prosecution is that the Defendants used facilities in interstate
13 commerce (a website) to promote or facilitate prostitution as prohibited by state law.
14 If the Travel Act can be applied to such generalized actions, there are few limits to its
15 reach. The statutory language is expansive, potentially prohibiting any action in
16 interstate commerce that would “promote, manage, establish, carry on, or facilitate the
17 promotion, management, establishment, or carrying on, of any unlawful activity” as
18 identified by the law. 18 U.S.C. § 1952(a)(3). The terms “promote” or “facilitate the
19 promotion of” have been interpreted quite broadly to mean doing “any act that would
20 cause the unlawful activity to be accomplished or to assist in the unlawful activity in
21 any way.” *United States v. Bennett*, 95 F.3d 1158, at *5 (9th Cir. 1996). *See also*
22 *United States v. Miller*, 379 F.2d 483, 485-86 (7th Cir. 1967) (the term “facilitate” in
23 the Travel Act interpreted to mean “to make easy or less difficult”). As the court
24 observed in *Dart v. Craigslist*, “[f]acilitating’ and ‘assisting’ encompass a broad[]
25 range of conduct, so broad in fact that they include the services provided by
26 intermediaries like phone companies, ISPs, and computer manufacturers.” 665 F.
27 Supp. 2d at 967. However, that court rejected such an expansive reading and
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1 concluded that such intermediaries “are not culpable for ‘aiding and abetting’ their
2 customers who misuse their services to commit unlawful acts.” *Id.*

3 The Ninth Circuit likewise has rejected such a broad reading of the Travel Act,
4 explaining that “intent to facilitate a criminal venture is expressly made part of the
5 offense,” and concluding “we cannot extend the statute by holding that proof of a
6 lesser mens rea is sufficient to establish the crime.” *Gibson Specialty Co.*, 507 F.2d at
7 449. The scope of the Travel Act is thus cabined by the requirement that the
8 prosecutor show that the defendant had specific knowledge of, and associated himself
9 with a criminal venture for the purpose of its advancement. If not so limited, the court
10 found “the act would be plagued by the very overexpansiveness which Congress
11 sought to rule out by inclusion of an express mens rea requirement.” *Id.*

12 **2. Government’s Broad Reading of the Travel Act Conflicts With**
13 **the First Amendment.**

14 Major First Amendment problems arise if the Travel Act can be applied to the
15 operation of a website as set forth in the Indictment. As noted above, the failure to
16 incorporate and apply a specific intent requirement is a First Amendment problem in
17 its own right.³⁸ In addition, if the law is applied without this important limiting
18 principle, the statutory terms become boundless, and the law itself is invalid as being
19 both vague and overly broad. As applied in this case, the Travel Act would allow the
20 prosecution of any website operator whose actions could be said to “make easier” or to
21 “assist in the unlawful activity in any way.” That cannot be the law.

22 As applied in this Indictment, the Travel Act is unconstitutionally overbroad.
23 The law does not define what it means to “promote” or “facilitate the promotion” of
24 prostitution, and without some enforceable limits it could be applied to a broad range

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26 ³⁸ See *supra* Section IV.B.1. Laws used to target expressive activity require a
27 heightened *mens rea*, *Smith v. California*, 361 U.S. at 151-53; *X-Citement Video*, 513
28 U.S. at 78 (“It is [] incumbent upon us to read the statute to eliminate [constitutional]
doubts”), and in particular, knowing conduct, *i.e.*, that any “wrongdoing must be
conscious to be criminal.” *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) .

1 of communicative activities – as the government is seeking to do here. *See Dart v.*
2 *Craigslist*, 665 F. Supp. 2d at 967 (e.g., “they include the services provided by
3 intermediaries like phone companies, ISPs, and computer manufacturers”). Such
4 unbounded application runs afoul of the principle that a law is “may be invalidated as
5 overbroad if ‘a substantial number of its applications are unconstitutional, judged in
6 relation to the statute’s plainly legitimate sweep.’” *United States v. Stevens*, 559 U.S.
7 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican*
8 *Party*, 552 U.S. 442, 449 n.6 (2008)). First Amendment freedoms need “breathing
9 space” to survive, and this means the “government may regulate in the area only with
10 narrow specificity.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). In reading the
11 Travel Act to impose vicarious liability on a website for hosting online content without
12 a specific intent requirement, the government has made the law overbroad as applied.

13 The government’s interpretation of the Travel Act is also unconstitutionally
14 vague as applied. In this Indictment, the government is seeking to impose massive
15 criminal liability on the Defendants by applying the Travel Act’s undefined terms
16 “promote” or “facilitate the promotion” of prostitution.³⁹ This application of the
17 Travel Act to expressive activities raises particular First Amendment concerns. As the
18 Supreme Court has explained, “[w]here a statute’s literal scope ... is capable of
19 reaching expression sheltered by the First Amendment, the [vagueness] doctrine
20 demands a greater degree of specificity than in other contexts.” *Smith v. Goguen*, 415
21 U.S. 566, 573 (1974). When applied to speech, vague laws offend due process
22 because they fail to give people of ordinary intelligence fair warning of what conduct
23 is prohibited, allow arbitrary and discriminatory enforcement, and delegate basic
24 policy matters to policemen, judges and juries for resolution on an ad hoc and

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26 ³⁹ E.g., *Amusement Devices Ass’n v. Ohio*, 443 F. Supp. 1040, 1043, 1051 (S.D. Ohio
27 1977) (invalidating state law prohibiting provision of legal services to criminal
28 syndicate with a purpose of “establishing or maintaining” the syndicate or “facilitating
any of its activities” because the language “fails to specify with reasonable clarity
which kind or kinds of conduct it prohibits.”).

1 subjective basis. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Where penal
2 statutes are involved as they are here, “[p]recision of regulation must be the touchstone
3 in an area so closely touching our most precious freedoms.” *NAACP v. Button*, 371
4 U.S. at 433. Of particular importance to this case, the “unique nature of the [Internet]
5 medium cannot be overemphasized in discussing and determining the vagueness
6 issue.” *ACLU v. Reno*, 929 F. Supp. 824, 865 n.9 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844
7 (1997).

8 The Department of Justice has avoided overbreadth and vagueness problems in
9 other cases by interpreting the challenged statutes narrowly and by insisting that strict
10 *mens rea* requirements limit the respective statutes’ applications. As noted above, in
11 First Amendment challenges to the SAVE Act and FOSTA, the government took the
12 position that those laws were consistent with the First Amendment *because of these*
13 *specific limits*.⁴⁰ In both cases, the courts agreed that these narrow readings of the law
14 and strict *mens rea* requirements were essential to the constitutional analysis. *See*
15 *Lynch*, 216 F. Supp. 3d at 109; *Woodhull Freedom Found.*, 334 F. Supp. 3d at 199-201
16 (under the Travel Act, the prosecutor must prove that the “defendant intended to
17 ‘explicitly further[]’ a specified unlawful act”). In this case, however, by abandoning
18 any such requirement, the government is applying the Travel Act in a way that is
19 unconstitutionally vague and overbroad.

20 **3. The Indictment Must be Dismissed Because it is Predicated on**
21 **an Unconstitutional Application of the Travel Act**

22 An indictment based on an unconstitutional law, either on its face or as applied,
23 must be dismissed. *Packingham*, 137 S. Ct. at 1737-38; *United States v. Sineneng-*
24 *Smith*, 910 F.3d 461, 479-85 (9th Cir. 2018). To be legally sufficient, an indictment
25 “must assert facts which in law constitute an offense; and which, if proved, would

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27 ⁴⁰ *See* DOJ Reply in Support of Motion to Dismiss at 7-8, *Backpage.com, LLC v.*
28 *Lynch*, No. 1:15-2155(RBW), (D.D.C. Apr. 15, 2016) (ECF No. 13); Brief for the
United States at 21-22, *Woodhull Freedom Found. v. United States*, No. 18-5298 (D.C.
Cir. Apr. 15, 2019) (Doc. #1782997).

1 establish prima facie the defendant's commission of that crime." *Landham*, 251 F.3d
2 at 1079 (citations omitted). This requires the government to specify "the precise
3 conduct upon which it seeks to hold each defendant criminally liable" so that the court
4 can determine "whether the specific conduct charged is protected by the First
5 Amendment." *Buddenberg*, 2010 WL 2735547, at *9. A charge that is brought under
6 an overly broad application of a law regulating speech cannot satisfy this standard.

7 The court applied this principle to dismiss an indictment in *United States v.*
8 *Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011). The government had charged the
9 defendant with violating a federal law against "cyber stalking," 18 U.S.C. § 2261A
10 (2)(A), through a series of postings on Twitter and on a blog. The law had been
11 amended so that it did not require a showing of intent to kill or injure the subject of the
12 online postings, but instead included the intent to "harass or place under surveillance
13 with intent to ... harass, or intimidate, or cause substantial emotional distress."
14 *Cassidy*, 814 F. Supp. 2d at 581. So broadened, the court found that "the
15 Government's Indictment is not limited to categories of speech that fall outside of First
16 Amendment protection" and held that the statute was unconstitutional as applied. *Id.*
17 at 583, 587. Because it resolved the constitutional question as applied, the court found
18 it unnecessary to rule on the law's facial validity. *Id.* at 587.

19 This Court should reach the same conclusion about the government's misuse of
20 the Travel Act and money laundering statute to prosecute publishers. The issue here
21 does not go to the statute's facial validity because the Travel Act, on its face, does not
22 criminalize speech. But the government has indicted the Defendants using the Travel
23 Act by targeting their actions as publishers, and doing so without alleging specific
24 intent. The use of the statute in this case violates both the *mens rea* standard that must
25 be applied in First Amendment cases, and it removes the boundaries that otherwise
26 prevent the Travel Act from being unconstitutionally vague and overbroad.
27 Accordingly, the Court should hold that the Travel Act is unconstitutional as applied
28 and dismiss the Indictment.

V. CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court dismiss the Indictment.

DATED this 22nd day of April, 2019.

DAVIS WRIGHT TREMAINE LLP

s/ James C. Grant

s/ Robert L. Corn-Revere

Attorneys for Michael Lacey and James Larkin

LIPSITZ GREEN SCIME CAMBRIA LLP

s/ Paul J. Cambria, Jr.

Attorneys for Michael Lacey

BIENERT KATZMAN, PLC

s/ Thomas H. Bienert, Jr.

Attorneys for James Larkin

BIRD MARELLA BOXER WOLPERT NESSIM

DROOKS LINCENBERG AND RHOW

s/ Ariel A. Neuman

Attorneys for John Brunst

FEDER LAW OFFICE PA

s/ Bruce Feder

Attorney for Scott Spear

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2019, a true and correct copy of the foregoing document was electronically filed with the Clerk of the United States District Court of the District of Arizona by using the CM/ECF system, and that service will be accomplished by the CM/ECF system to all counsel of record.

s/ James C. Grant

Attorney for Michael Lacey and James Larkin