

No. _____

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re Michael Lacey, James Larkin, Scott Spear, John Brunst,
Andrew Padilla, and Joye Vaught,
Petitioners,

Michael Lacey, James Larkin, Scott Spear, John Brunst,
Andrew Padilla, and Joye Vaught,
Petitioners,

v.

United States District Court for the District of Arizona,
Respondent.

United States of America, Real Party In Interest.

From the United States District Court
for the District of Arizona
Case: 2:18-cr-00422-SMB

PETITION FOR WRIT OF MANDAMUS

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I. ISSUES PRESENTED

Petitioners moved the district court to recuse from a criminal case in the District of Arizona, Case No. 2:18-cr-00422-SMB (the “Case”), under 28 U.S.C. §§455(b)(4) and 455(b)(5)(iii), because the district court’s spouse has interests that could be significantly affected by the outcome of the Case, and under 28 U.S.C. §455(a), because the spouse’s statements and actions could cause reasonable people to question the court’s impartiality. ER15-39 (the “Motion”). The district court refused to recuse. ER1-14 (the “Order”). This petition seeks review of whether the district court erred:

1. Holding her spouse’s non-economic interests are not an “interest” requiring recusal under 28 U.S.C. §§455(b)(4) and 455(b)(5)(iii)?
2. Finding her spouse’s non-economic interests could not be significantly affected by the outcome of the Case?
3. Finding public statements about the people, entities, and issues in the Case by her spouse, his partners, and the other advocacy organizations with whom her spouse aligned himself (the “Organizations”) would not cause reasonable people to question her impartiality?
4. Holding Petitioners’ Motion was untimely, despite the uncontroverted declaration of Petitioners’ six independent counsel, all saying they learned the facts supporting the Motion less than two weeks before filing the motion?
5. Striking the Declaration of Petitioners’ expert witness (the former chief judge of the Northern District of California) on the grounds that the Motion presented only a pure question of law and the Declaration was untimely?

II. RELEVANT FACTS

Four Petitioners formerly owned and published 17 weekly newspapers across the country, including the *Phoenix New Times*, San Francisco's *SF Weekly*, and New York City's *Village Voice*, under the corporate name Village Voice Media Holdings, LLC ("VVMH"). VVMH, through a subsidiary, also formerly owned Backpage.com. The other two Petitioners are former employees of Backpage.com.

Backpage.com was an online classified advertising service where users could post classified ads in many categories, including local places, buy/sell/trade, automotive, rentals, real estate, jobs, dating, and services. *See Backpage.com, LLC v. Cooper*, 939 F.Supp. 2d 805, 813 (M.D. Tenn. 2013). Third-party users posted millions of ads every month, making Backpage.com the second-largest online classified ad service after Craigslist. *See Backpage.com, LLC v. McKenna*, 881 F.Supp. 2d 1262, 1266 (W.D. Wash. 2012). Backpage.com included a category for "adult" services, *e.g.*, strippers and escort services, but that category closed in January 2017 following years of pressure from the government, including a campaign the Seventh Circuit called an unconstitutional effort to "crush Backpage." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015). Over the years, Backpage.com hosted hundreds of millions of classified ads, including many *millions* of adult-oriented ads.

Petitioners were indicted on March 28, 2018, on charges of facilitating prostitution offenses under the Travel Act (18 U.S.C. §1952), money laundering (18 U.S.C. §§1956 and 1957), and conspiracy to commit those offenses (18 U.S.C §§371 and 1956). All charges are premised on Backpage.com's publication of adult-oriented classified ads posted to the site by third-party users. ER356-447. At its core, the Case

seeks to hold Petitioners criminally responsible for 50 specific classified ads (all of which were for dating, massage, or escort services) posted to Backpage.com by third-party users. ER405. Backpage.com *never* allowed ads proposing sex for money transactions and used automated tools and human moderators to try to delete all such ads. Through its conspiracy charge, the government also seeks to hold Petitioners responsible for Backpage.com's publication of the 50 charged ads even if they knew nothing of the ads and had nothing to do with publishing them.

The Case originally was assigned to Judge Logan, who recused on March 1, 2019. The Case was reassigned to Judge Rayes, who recused on March 4, 2019, and then reassigned to Judge Brnovich on March 4, 2019. At that time, Judge Brnovich says she “reviewed the case for any possible issue for recusal and found none.” ER6. Judge Brnovich did not advise Petitioners of her husband's positions regarding Backpage.com, her review of recusal issues, or her determination that she need not recuse herself. Petitioners knew Judge Brnovich's husband was Arizona's Attorney General, Mark Brnovich (“AGBrnovich”), who had taken a high-profile public stance against human trafficking in his political campaigns and while in office, but that did *not* provide grounds for recusal.

In September 2020, the defense discovered AGBrnovich (and others acting in his name and on his behalf): 1) made public statements excoriating Backpage.com—statements reasonable people would interpret as AGBrnovich saying Petitioners are guilty of the crimes charged here, reflecting a strong bias against Backpage.com/Petitioners; 2) repeatedly invited the public to visit websites containing inflammatory and highly-prejudicial statements about Backpage.com/Petitioners; 3)

repeatedly touted/vouched for the credibility of the government’s trial witnesses; and 4) publicly claimed facts the government says will be at issue in the trial already are established. Moreover, the defense discovered AGBrnovich had “partnered” with, or otherwise promoted, numerous organizations that also excoriated Backpage.com—organizations with which many of the government’s proposed trial witnesses are associated.

In particular, on September 10, 2020, the defense discovered AGBrnovich’s booklet entitled: *Human Trafficking: Arizona’s Not Buying It* (the “Booklet”), a purported primer on human trafficking.¹ ER41-87. The Booklet’s cover is emblazoned with AGBrnovich’s name and starts with a “Letter from Mark,” accompanied by a large photograph of AGBrnovich. The Booklet asserts “75% of underage sex trafficking victims said they had been advertised or sold online” and decries Backpage.com as “an online classified advertising site used frequently to purchase sex,” claiming “over 300 ads are placed each day in Phoenix on Backpage.com for adult services—with an estimated 20% for girls under 18.” ER62/65. AGBrnovich repeatedly supports the Booklet’s claims, including those about Backpage.com, with citations to the U.S. Department of Justice and organizations whose current or former leadership are listed as government witnesses. ER46/48/54/60/64/74/86. The Booklet also directs readers to the websites of several advocacy groups, associated with the government’s trial witnesses, containing inflammatory and highly-prejudicial comments about Backpage.com/Petitioners. ER86. (AGBrnovich also directs the public to those

¹ https://www.azag.gov/sites/default/files/publications/2018-06/Human_Trafficking_Not_Buying_It.pdf.

websites in numerous places on his own website, in his social media posts, and in his webinars.)

After discovering the Booklet, the defense researched AGBrnovich's public statements about Backpage.com and learned the following:

On August 16, 2017, AGBrnovich sent a letter to Congress requesting changes to the federal law providing immunity to websites for content posted by third-parties, saying:

The recent news highlighting the potential **complicity of online classified-ad company Backpage.com in soliciting sex traffickers' ads for its website** once again underscores the need to expand, not limit, the ability of all law-enforcement agencies to fight sex trafficking....**[O]nline classified ad services, such as Backpage.com...have constructed their business models around advertising income gained from participants in the sex trade...Clearly...Backpage.com is facilitating—and profiting from—these illegal activities.**²

AGBrnovich highlighted his letter with a press release saying:

Some federal courts have interpreted the CDA to render state and local authorities unable to take action against **companies that actively profit from the promotion and facilitation of sex trafficking and crimes against children**....[T]he CDA...was never intended to place **facilitators of child sex trafficking** outside the reach of law enforcement. [It] is being used as a shield by **those who profit from prostitution and crimes against children...such as Backpage.com.**³

² https://www.azag.gov/sites/default/files/docs/press-releases/2017/letters/CDA_Final_Letter.pdf (emphasis supplied). ER232-37.

³ <https://www.azag.gov/press-release/attorneys-general-ask-congress-amend-sex-trafficking-law> (emphasis supplied). ER228. AGBrnovich's statements were directed at Backpage.com, rather than Petitioners, but the government alleges Petitioners owned, operated, and controlled Backpage.com and seeks to hold Petitioners

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AGBrnovich promoted his press release and letter via Twitter.⁴

On August 20, 2020, AGBrnovich promoted via Twitter⁵ a “human trafficking prevention” webinar presented by the “Office of the Arizona Attorney General Mark Brnovich” entitled “Human Trafficking for Parents.”⁶ The webinar: says “Backpage.com...[was] where the vast majority of all advertisements were posted for sex trafficking and sexual exploitation” [at 34:42]; identifies organizations associated with two of the government’s witnesses as “the two very trustworthy sources that we always want to use” [at 5:03]; and directs viewers to obtain more information from four organizations whose websites include inflammatory and highly-prejudicial material about Backpage.com/Petitioners.⁷ At least seven of the government’s witnesses are associated with those organizations.

AGBrnovich has issued multiple “tweets” promoting the Arizona Anti-Trafficking Network (“AATN”), AATN’s program known as “TRUST,” and the “SAFE Action Plan” initiative.⁸ AGBrnovich says the “Arizona Attorney General’s

responsible for Backpage.com’s actions. AGBrnovich’s press release and letter predated the indictment, but nearly all the charged ads in the indictment were published before AGBrnovich’s statements, so his statements are pertinent to those charges.

⁴ <https://twitter.com/GeneralBrnovich/status/897870570682859520>. ER239.

⁵ https://twitter.com/AZAG_Outreach/status/1296105375607844864. ER218.

⁶

<https://azag.webex.com/webappng/sites/azag/recording/play/8f25c17baa904932be6592aa3b3bac70> (password: BeAware2020).

⁷ The opening slide of the webinar and slide referencing the four “resource” organizations can be found at ER220-21.

⁸ <https://twitter.com/GeneralBrnovich/status/839955194565677056>;
<https://twitter.com/GeneralBrnovich/status/1217485170011279360>;

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Office is a **proud partner** of the Arizona Anti-Trafficking Network.”⁹ AGBrnovich is featured in several videos on AATN/TRUST’s Facebook page, which says AATN/TRUST “are thrilled to partner” with AGBrnovich.¹⁰ Through Twitter and his website, Booklet, and webinars, AGBrnovich repeatedly directs the public to AATN/TRUST websites, one of which contains these inflammatory and highly-prejudicial comments about Backpage.com/Petitioners, the Case, and related forfeiture proceedings:

The infamous story of **Backpage.com’s exploitation and trafficking of women and children is fairly well known** at this point. **What is little known, however, is the raging battle being waged in the courts to prevent Backpage’s erstwhile former owners from absconding with millions of dollars in illegal profits made from their now-shuttered sex business...** The former owners have been caught red-handed attempting to steal away their ill-gotten profits to prevent the victims from ever recovering a penny’s worth of compensation....Many of the individuals featured in [Backpage] ads were victims of sexual abuse and sex trafficking, while some were just young children and teens. These ads earned Backpage’s then-owners **James Larkin and Michael Lacey and their top lieutenants** an average of over \$9 million in profits every month....Backpage’s owners began moving their profits off-shore and purported to sell the company to a foreign buyer. **All of these efforts were transparent attempts at concealing and indeed laundering the profits from their criminal enterprise to frustrate the claims of the victims. The federal government is now properly attempting to secure the money earned from this illegal operation through federal forfeiture laws.**

<https://twitter.com/GeneralBrnovich/status/1156294051215187968>;
<https://twitter.com/GeneralBrnovich/status/1205204574883024896>. ER243-46.

⁹ <https://www.azag.gov/outreach/human-trafficking-exploitation> (emphasis supplied). ER252.

¹⁰ <https://www.facebook.com/270004956516789/videos/667563003427647>. ER248.

Backpage and its swarm of attorneys are resisting this effort claiming, incredibly, that the protection of the First Amendment shields them from the consequences of their illegal behavior. One can only imagine how the nation’s founders would view this twisted interpretation of the Free Speech Clause where the **First Amendment is turned on its head to license the rape, sexual abuse, and victimization of countless women and children...** [T]he courts must not allow Backpage to victimize them a second time....The name of the case is **United States v. James Larkin, John Brunst, Michael Lacey, and Scott Spear.**¹¹

AGBrnovich regularly touts these highly-prejudicial statements¹² by directing the public to AATN/TRUST’s website.

AATN/TRUST’s website also contains a “Shocking Facts” document,¹³ which appears to be the source of numerous statements in AGBrnovich’s Booklet:

AATN/TRUST “Shocking Facts”	AGBrnovich’s Booklet ¹⁴
“78,000 MEN in Phoenix are online sex ad customers”	“78,000 men in Phoenix are online sex ad customers” (ER62)
“300+ ads are placed each day in Phoenix on Backpage.com for adult services – with an estimated 20% for girls under 18”	“Over 300 ads are placed each day in Phoenix on Backpage.com for adult services – with an estimated 20% for girls under 18” (ER62)

¹¹ <https://trustaz.org/news/ncose-joins-brief-to-prevent-backpage-owners-from-hiding-assets-to-avoid-payment-of-damages-to-sex-trafficking-victims/> (emphasis supplied). ER264.

¹² As to these statements, the Order said only that the AATN/TRUST website “contains statements about Defendants in this case and other litigation” and “directly references this case.” ER5. The court’s glossing over the inflammatory statements on AATN/TRUST’s website starkly contrasts with its more fulsome discussion of far more peripheral facts.

¹³ <https://www.trustaz.org/downloads/aw-trust-shocking-facts.pdf>. ER266-67.

¹⁴ https://www.azag.gov/sites/default/files/publications/2018-06/Human_Trafficking_Not_Buying_It.pdf. ER41-87.

“The average age a teen enters the sex trade in Arizona is 14 YEARS OLD Law enforcement has seen girls as young as 9 sold for sex”	“The average age of entry into the sex trade in Arizona is 14 years old. Law enforcement has seen girls as young as 9 sold for sex” (ER55)
“Backpage.com is listed as a privately held Arizona corporation, with headquarters in Phoenix”	“Backpage.com...is listed as a privately held Arizona corporation, with headquarters in Phoenix” (ER62)

AGBrnovich’s ratification of the statements on AATN/TRUST’s website imbues the statements with his authority, vouches for the accuracy of the information on his partners’ website, and endorses what his partners say—including false and scurrilous statements about Backpage.com/Petitioners.

The prosecution hinges on the claim that the “overwhelming majority of [Backpage.com’s] ‘adult’ and ‘escort’ ads were actually ads for prostitution.” ER364. AATN/TRUST makes the same claim: “Backpage.com was likely the largest internet source for advertising underage sex trafficking in Arizona. While the list of internet sources where sex can be advertised and purchased is ever-changing, nearly 80 percent of the ads that were posted as ‘adult services’ on Backpage.com were actually for the sale of sex.”¹⁵

AGBrnovich repeatedly promotes, using Twitter and his Booklet, website, and webinars, Shared Hope International, an organization with which government witness Ernie Allen is associated.¹⁶ Its website is replete with derogatory and prejudicial pages attacking Backpage.com, including one titled “Internet Safety Amidst the COVID-19

¹⁵ <https://trustaz.org/human-trafficking-information/human-trafficking-101/>. ER260.

¹⁶ <https://twitter.com/GeneralBrnovich/status/747609719896834049> (ER292); <https://www.azag.gov/outreach/human-trafficking-exploitation> (ER253); https://www.azag.gov/sites/default/files/publications/2018-06/Human_Trafficking_Not_Buying_It.pdf (ER86); ER41-87.

Outbreak” saying “classified websites like Backpage.com[] are widely viewed as responsible for the explosion of sex trafficking in the United States. Our own research backs this up.”¹⁷ This false reference to Backpage.com amidst the COVID-19 outbreak is especially gratuitous, as the government shuttered Backpage.com long before COVID-19.

AGBrnovich also promotes, via his Booklet, website, and webinars, Polaris Project.¹⁸ Government witness Bradley Myles, Polaris’ long-time CEO, said of this prosecution: “The seizure of Backpage.com and its affiliated websites is a major victory and milestone in the fight against sex trafficking. Shutting down the largest online U.S. marketplace for sex trafficking will dramatically reduce the profitability of forcing people into the commercial sex trade.”¹⁹

These are just some of AGBrnovich’s statements about human trafficking and Backpage.com, and a drop in the bucket regarding the statements of AGBrnovich’s partners and the Organizations.

During a political campaign, AGBrnovich released two campaign videos featuring Judge Brnovich—including one called “Live Your Values, Do the Right Thing,” in which Judge Brnovich said AGBrnovich “is one of the most brilliant people I know” and can “look at what the problem is, consider all of the possible

¹⁷ <https://SharedHope.org/what-we-do/prevent/awareness/internetsafety/>. ER269.

¹⁸ <https://www.azag.gov/outreach/human-trafficking-exploitation> (ER253); https://www.azag.gov/sites/default/files/publications/2018-06/Human_Trafficking_Not_Buying_It.pdf (ER86); ER41-87.

¹⁹ <https://polarisproject.org/press-releases/polaris-statement-on-backpage/>. ER294.

solutions, and then fix it.”²⁰ Judge Brnovich also is featured in a video on AGBrnovich’s official YouTube channel discussing her marriage:

I think the key is to be in it together and actually living it together, not living your separate lives—and both participating it equally in it and sharing in it....We have our own career paths, but we are on the same life path....So the decision for him to run for public office was a big change in our life, but to watch him thrive in that was great for me—I loved watching it.²¹

Campaign photos/videos featuring Judge Brnovich remain on AGBrnovich’s campaign website and elsewhere on the Internet.²² AGBrnovich is term-limited, but expected to run for another office in 2022.

Thirteen days after discovering AGBrnovich’s Booklet, Petitioners sought recusal: a) under 28 U.S.C. §§455(b)(4) and 455(b)(5)(iii) because the outcome of the Case could substantially affect AGBrnovich’s “interests;” and b) under 28 U.S.C. §455(a) because 1) the public statements of AGBrnovich, AATN/TRUST, and the Organizations excoriating Backpage.com, 2) AGBrnovich’s repeated touting/vouching for the credibility of many of the government’s trial witnesses, and 3) the claims of AGBrnovich, his partner AATN/TRUST, and the Organizations that facts the government says will be at issue in the trial already are established create an appearance of partiality, requiring recusal. ER15-39.

²⁰ <https://www.youtube.com/watch?v=ALrAoygmcnY> (at 01:26).

²¹ https://www.youtube.com/watch?v=ZGkDo_9Kq_c (at 2:30).

²² See, e.g., <https://www.mark4az.com/photos-videos/>; <https://www.youtube.com/watch?v=UhIP3GCB6GI>. AGBrnovich also has publicly touted Judge Brnovich’s elevation to the Federal bench at his campaign events. <https://m.youtube.com/watch?v=OJSRn4F6zV8> (at 0:23).

Judge Brnovich refused to recuse, holding: 1) “the term ‘interest’ as used in both §455(b)(4) and (5)(iii) encompass (sic) only interests which are financial or proprietary in nature” and “AGBrnovich clearly has no financial or proprietary interest in this matter;” 2) even if a non-economic interest was an “interest” under §§455(b)(4) and 455(b)(5)(iii), any “interest that could be recognized by AGBrnovich from the outcome of this case is highly speculative;” 3) “the average person on the street would not reasonably believe the Court would approach this case in a partial manner simply because AGBrnovich stands against human trafficking or has addressed the issue of whether statutory protection for online publishers should continue;”²³ and 4) the Motion was untimely because counsels’ unrebutted declaration saying they learned the facts underpinning the Motion in September 2020 were “unbelievable” and “it is not credible to claim Defendants knew nothing of AGBrnovich’s position on human trafficking.”²⁴ ER9/10/12-13/7. Judge Brnovich also struck the declaration of Petitioners’ expert witness finding the declaration untimely because submitted on reply and improper because the decision whether to recuse “is solely a question of law.” ER13.

Judge Brnovich’s rulings were erroneous as a matter of law and mandamus relief is warranted.

²³ Petitioners did not contend a reasonable person would question Judge Brnovich’s impartiality for those reasons.

²⁴ Petitioners did not claim to be unaware that AGBrnovich opposed human trafficking, but sought recusal based on specific statements targeting Backpage.com/Petitioners they discovered only in September 2020.

III. REASONS THE WRIT SHOULD ISSUE

This Court has jurisdiction pursuant to, and mandamus authority under, 28 U.S.C. §1651. *In re Sussex*, 781 F.3d 1065 (2015). Historically, writs of mandamus were orders compelling a court or officer to act, but they also are used in the exercise of “supervisory” or “advisory” authority “in cases ‘involving questions of law of major importance to the administration of the district courts.’” *U.S. v. Sanchez-Gomez*, 859 F.3d 649, 655 (9th Cir. 2017) (*en banc*), *rev’d on other grounds*, 138 S. Ct. 1532 (2018). Supervisory writs allow “courts to provide broader relief than merely ordering that the respondent act or refrain from acting, which promotes the writ’s ‘vital corrective and didactic function.’” *Id.*

This Court looks at five factors to determine when a writ should issue:

- (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief;
- (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal;
- (3) whether the district court’s order is clearly erroneous as a matter of law;
- (4) whether the district court’s order is an oft repeated error or manifests a persistent disregard of the federal rules; and
- (5) whether the district court’s order raises new and important problems or issues of first impression.

Id. at 656 (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977)). The five factors need not all be present to justify the issuance of a writ. *Id.*

This Court “generally examine[s] the first and second factors together because the second is closely related to the first.” *Id.* “[T]he fourth and fifth factors are rarely present in the same case.” *Sanchez-Gomez*, 859 F.3d at 656.

The third factor is whether the district court clearly erred as a matter of law. Generally, an “order is clearly erroneous for purposes of a mandamus petition” if the Court “is left with the definite and firm conviction that a mistake has been committed,” in which case “the third *Bauman* factor strongly favors granting the writ.” *In re Henson*, 869 F.3d 1052, 1058-59 (9th Cir. 2017). “Where a petition for mandamus raises an important issue of first impression, however, a petitioner need show only ordinary (as opposed to clear) error.” *Barnes v. Sea Hawaii Rafting, LLC*, 889 F.3d 517, 537 (9th Cir. 2018). Ordinary error is the standard here because whether non-economic interests are “interests” under 28 U.S.C. §§455(b)(4) and 455(b)(5)(iii) is an important issue of first impression for this Court.

“In the final analysis, the decision of whether to issue the writ lies within [the Court’s] discretion.” *Sanchez-Gomez*, 859 F.3d at 656. Applying the *Bauman* factors, a writ is well within the Court’s discretion.

A. Petitioners Have No Other Adequate Means to Attain Relief and Will Be Prejudiced in a Way That Cannot be Corrected on Appeal.

The district court’s Order was not a final order. *U.S. v. Wash.*, 573 F.2d 1121, 1122 (9th Cir. 1978) (dismissing appeal of order denying disqualification motion for “lack of jurisdiction” because the “denial of a motion to disqualify is not a final order” and, as such, “is not an appealable order”). The district court also did not certify its Order for interlocutory appeal under 28 U.S.C. §1292(b). Therefore, Petitioners cannot directly appeal the Order and a writ of mandamus is Petitioners’ only means of relief.

The prejudice Petitioners face without a writ of mandamus cannot be corrected through post-trial appeal. If Judge Brnovich presides, Petitioners can correct her error only if they don't prevail—and the only relief available would be a second trial with a new judge, which would not eliminate the damage to Petitioners or the judicial system from a trial conducted by a judge obligated to recuse. *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 712 (7th Cir. 1986) (this Court has been “liberal” in allowing mandamus review of disqualification motions because a “judge’s refusal to recuse...casts a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole,” which “should be dispelled at the earliest possible opportunity”). Moreover, a second trial would significantly prejudice Petitioners, particularly given the government’s concerted efforts to deprive them of resources to defend the Case through pre-trial seizures. *In re Any and All Funds Held in Republic Bank of Arizona, et al.*, No. 19-56510 (9th Cir. 2019).

B. The District Court Clearly Erred As a Matter of Law.

Our system of law “must satisfy the appearance of justice.” *In re Murchison*, 349 U.S. 133, 136 (1955). “Any question of a judge’s partiality threatens the purity of the judicial process and its institutions.” *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

“An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.” *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016). *See also Alexander*

v. Primerica Holdings, Inc., 10 F.3d 155, 167 (3d Cir. 1993) (“impartiality and the appearance of impartiality in a judicial officer are the *sine quo non* of the American legal system” (quotation marks and citation omitted)).

Section 455 “requires a judge to exercise [her] discretion in favor of disqualification if [she] has any question about the propriety of [her] sitting in a particular case.” *Potashnick*, 609 F.2d at 1111. Section 455 “clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify [herself] in a questionable case” and “any inconvenience which does arise is more than outweighed by the need to protect the dignity and integrity of the judicial process.” *Id.* “[A]ny doubts must be resolved in favor of recusal.” *In re Moody*, 755 F.3d 891, 895 (11th Cir. 2014); *accord U.S. v. Holland*, 519 F.3d 909, 912 (9th Cir. 2008) (“[i]f it is a close case, the balance tips in favor of recusal”).

1. The District Court Erred Holding a Non-Economic Interest Cannot Require Recusal Under 28 U.S.C. §§455(b)(4) and 455(b)(5)(iii).

Federal law provides for “the mandatory disqualification of a judge,” *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 113 (7th Cir. 1977), if her “spouse...has a financial interest in the subject matter in controversy...or any other interest that could be substantially affected by the outcome of the proceeding” or if her “spouse...[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.” 28 U.S.C. §§455(b)(4) and 455(b)(5)(iii). Although financial interests are the most common reasons compelling recusal, both provisions apply to non-economic interests. *Potashnick*, 609 F.2d at 1113 (“The language of section

455(b)(5)(iii) referring to ‘an interest’ does not require that the interest of the judge’s lawyer-relative be financial....[T]he congressional drafters recognized that noneconomic interests may affect a judge’s bias or prejudice.”); *SCA Services*, 557 F.2d at 115-16 (“The language of the amended statute [Section 455], in contrast to its predecessor, does not require that the interest be financial....[T]he Congressional drafters recognized that non-economic interests may affect a judge’s bias or prejudice.”). Despite the Fifth and Seventh Circuits’ unambiguous holdings saying Congress amended Sections 455(b)(4) and 455(b)(5)(iii) to *include* noneconomic interests, Judge Brnovich erroneously construed them as applying *only* to financial or proprietary interests, despite no statutory language supporting that limitation.

Moreover, the reasoning in *Melendres v. Arpaio*, 2009 WL 2132693, at *9 (D. Ariz. July 15, 2009), on which Judge Brnovich relies, is flawed and cannot withstand scrutiny. *Melendres* cited *SCA Services*, without mentioning the Seventh Circuit expressly held the Congressional drafters of Section 455(b)(4) knew “non-economic interests may affect a judge’s bias or prejudice” and modified the statute to *require* consideration of non-economic factors. Because of this oversight, *Melendres*’ conclusion that the term “interest” excludes noneconomic interests, 2009 WL 2132693, at *10-11, was unsupported, contrary to the very authority upon which the conclusion relied, and provided no basis for Judge Brnovich to deny recusal.

The three other decisions on which Judge Brnovich relies do not say the term “interest” excludes non-economic interests. The question of whether non-economic interests can require recusal was neither addressed in those opinions nor contested before those courts. *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 525 F.3d 554,

558 (7th Cir. 2008); *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir. 1976); *In re New Mexico Nat. Gas Antitrust Litig.*, 620 F.2d 794, 796 (10th Cir. 1980).

2. The District Court Erred Holding AGBrnovich's Non-Economic Interests Could Not Be Substantially Affected.

AGBrnovich is Arizona's top *elected* law enforcement officer. He made sex trafficking and child sex trafficking key agenda items in his political campaigns and as Attorney General. As part of his high-profile anti-trafficking campaign, he personally and publicly declared that Backpage.com facilitated sex trafficking, solicited ads from sex traffickers, and profited from unlawful sex trafficking and prostitution—allegations at the core of the government's Case.

AATN/TRUST do the same—while also claiming Petitioners laundered money (another core allegation of the government's Case) to abscond with unlawful profits due victims of sex trafficking. AATN/TRUST further characterize the Case as the government's attempt to recover compensation for victims. The Organizations made similar claims. Through social media posts and his website, Booklet, webinars, and public appearances, AGBrnovich has repeatedly touted his partner AATN/TRUST and the Organizations, while constantly directing the public to their websites by recommending them as resources for more information.

The Order said Petitioners “do not claim that AGBrnovich has adopted or endorsed the organizations' statements about the Defendants in this case,” ER13, but by repeatedly touting AATN/TRUST and the Organizations, citing them as trustworthy resources, and referring the public to their websites for information, AGBrnovich endorses what they say. AGBrnovich referred to two Organizations as

“the two very trustworthy sources that we always want to use”—an explicit endorsement. AGBrnovich refers to AATN/TRUST as his *partners* (and *vice versa*). His Booklet contains text mirroring the AATN/TRUST website. AGBrnovich and AATN/TRUST need not be “partners” in any formal legal sense for a reasonable person to conclude AGBrnovich agrees with what AATN/TRUST say.

The Order also said: “AGBrnovich is not associated with any party in this case, did not aid in the investigation and is not prosecuting the case so the outcome of the case is exceptionally unlikely to affect his reputation.” ER10. AGBrnovich does not need to prosecute the Case for its outcome to potentially affect his credibility and political future. If Petitioners are convicted, AGBrnovich will reap the rewards from his public excoriation of Backpage.com. If Petitioners are exonerated, AGBrnovich will suffer the blowback from wrongly accusing Backpage.com/Petitioners of scurrilous charges and partnering with others who did the same. The law would be strange indeed if it mandates recusal if a spouse has a *de minimis* financial interest in a case, but not if an attorney general spouse publicly declares defendants on trial before his spouse guilty before their trial. *In re Cement & Concrete Antitrust Litigation*, 515 F. Supp. 1076, 1078 (D. Ariz. 1981), *mandamus denied*, 688 F.2d 1297 (9th Cir. 1982) (28 U.S.C. §455(b)(4) mandated recusal because of judge’s wife’s *de minimis* financial interest in the case (between \$4.23 and \$29.70)), *aff’d*, 459 U.S. 1190 (1983).

AGBrnovich’s interests could be substantially affected by the outcome of the Case. He has staked his own “reputation and goodwill” (*SCA Services*, 557 F.2d at 115-16) on his claim Backpage.com/Petitioners were guilty of serious criminal conduct. Because AGBrnovich has an “interest, and the outcome of the proceeding

may potentially affect that interest,” recusal is mandatory, even if the district court concludes it is—and can be—impartial and even if AGBrnovich’s interests don’t create an appearance of partiality. *Potashnick*, 609 F.2d at 1113; *accord SCA Services*, 557 F.2d at 115-16.

3. The District Court Erred Holding AGBrnovich’s Statements Would Not Cause Reasonable People to Question Its Partiality.

A judge must recuse “in any proceeding in which [her] impartiality might reasonably be questioned.” 28 U.S.C. §455(a). The standard is objective: whether “a reasonable person *with knowledge of the facts* would conclude that the judge’s impartiality might reasonably be questioned.” *Blixseth v. Yellowstone Mountain Club, LLC*, 742 F.3d 1215, 1219 (9th Cir. 2014) (emphasis supplied); *accord Potashnick*, 609 F.2d at 1111. Section 455(a) does not require “the reality of bias or prejudice but its appearance.” *Liteky v. U.S.*, 510 U.S. 540, 548 (1994). “Because 28 U.S.C. §455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how [her] participation in a given case looks to the average person on the street”—assuming that person had the full facts underlying recusal.²⁵ *Potashnick*, 609 F.2d at 1111.

This objective standard may result in disqualification where a judge is not actually biased, but “the appearance of partiality is as dangerous as the fact of it.”

²⁵ Because the analysis *assumes* knowledge of the facts, the government’s claim that AATN/TRUST’s incendiary statements about Backpage.com/Petitioners were not “on TRUST’s homepage” is irrelevant. The Court must assume a reasonable person *knows*: AGBrnovich and AATN/TRUST are partners, AGBrnovich regularly and repeatedly touts AATN/TRUST and refers the public to their websites, and the content of all of AGBrnovich’s and AATN/TRUST’s statements about Backpage.com/Petitioners.

U.S. v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980). “The very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.” *Liljeberg v. Health Servs. Acq. Corp.*, 486 U.S. 847, 865 (1988). “The general standard of section 455(a) was designed to promote the public’s confidence in the impartiality and integrity of the judicial process by saying, in effect, that if any reasonable factual basis for doubting the judge’s impartiality exists, the judge ‘shall’ disqualify [herself] and let another judge preside.” *Potashnick*, 609 F.2d at 1111. As the court noted in *SCA Services* (involving two brothers):

This appearance of partiality begins with the natural assumption that brothers enjoy a close personal and family relationship and, consequently, would be inclined to support each other’s interests. When one brother is a lawyer in the firm representing a party before his brother who is the judge in the case, the belief may arise in the public’s mind that the brother’s firm and its clients will receive favored treatment, even if the brother does not personally appear in the case.

557 F.2d at 116.

The issue here is not whether spouses may have separate careers or differing opinions, nor whether Judge Brnovich “is an independent person from AGBrnovich.” ER12. The issue is whether Judge Brnovich should preside over a case involving charges that Backpage.com facilitated prostitution, where AGBrnovich has publicly accused Backpage.com *of facilitating prostitution* and where the government claims Petitioners are guilty of a crime *because Backpage.com facilitated prostitution*.

The issues that will cause reasonable people to question Judge Brnovich’s impartiality don’t flow only from AGBrnovich and his partners publicly branding Backpage.com a facilitator of prostitution and sex trafficking. Petitioners will need to

question prospective jurors to determine whether they have seen AGBrnovich's statements about Backpage.com and the organizations with which the government's witnesses are affiliated. Just asking questions will taint the process; not asking questions will risk biased jurors. Petitioners will face similar issues questioning the government's trial witnesses about their biases.

Petitioners will seek to exclude testimony about purported "facts" at trial, while AGBrnovich's Booklet and his webinars present those purported "facts" as established, as do AGBrnovich's partner AATN/TRUST and the Organizations. Petitioners will seek to exclude testimony from many of the government's proposed trial witnesses on the grounds the witnesses are biased and unreliable, cannot provide foundation for their testimony, and will offer improper opinions. AGBrnovich has touted two organizations with which some of these witnesses are associated as "very trustworthy sources that we always want to use" and the others as resources the public can trust.

Further, Petitioners almost certainly will move for acquittal arguing Backpage.com/Petitioners did not facilitate prostitution or launder money, while AGBrnovich, his partners AATN/TRUST, and the Organizations say they did. In the event of convictions, Judge Brnovich will be called upon to determine restitution. Meanwhile AGBrnovich's partners claim Petitioners were "caught red-handed attempting to steal away their ill-gotten profit to prevent the victims from ever recovering a penny's worth of compensation."²⁶ Reasonable people will question

²⁶ <https://trustaz.org/news/ncose-joins-brief-to-prevent-backpage-owners-from-hiding-assets-to-avoid-payment-of-damages-to-sex-trafficking-victims/> (emphasis supplied). ER264.

whether Judge Brnovich can decide such issues impartially, regardless of whether she thinks she can or how hard she tries to do so.

A reasonable person would assume Judge Brnovich and AGBrnovich have a “close personal and family relationship,” *SCA Services*, 557 F.2d at 116, even without seeing Judge Brnovich saying they do in AGBrnovich’s campaign videos. A reasonable person would assume Judge Brnovich and AGBrnovich “would be inclined to support each other’s interests,” *id.*, even without seeing Judge Brnovich saying how much she loves watching her husband succeed as Arizona’s Attorney General in the video on his website.²⁷ Reasonable people will (and do) question how Judge Brnovich can be impartial presiding over a trial to determine whether Backpage.com facilitated prostitution, when AGBrnovich already branded Backpage.com as a “facilitator[] of child sex trafficking” “profit[ing] from prostitution and crimes against children.” ER228.

Judge Brnovich relies on Judge Reinhardt’s order in *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011), to claim no appearance of partiality, but that order provides scant, if any, support. *Perry* involved questions of constitutional *law* before an *appellate* court, and his spouse’s comments involved broad matters of social concern and law. *Id.* at 916 (“a reasonable person with full knowledge of all the facts would not reasonably believe that I would approach a case in a partial manner due to her independent views regarding social policy”). Reinhardt’s order was limited to situations involving a “public interest or advocacy organization that takes positions or supports legislation or litigation or other actions of local, state, or national

²⁷ https://www.youtube.com/watch?v=ZGkDo_9Kq_c (at 2:30).

importance.” *Id.* at 911-12. An appellate judge’s spouse expressing views on social issues of broad public concern does not compare to a trial judge’s spouse publicly proclaiming individual defendants being tried by his spouse guilty and vouching for the prosecution’s witnesses, particularly if the spouse is the state’s top, elected law enforcement officer. Judge Brnovich also cited *Perry* as binding authority, despite it being one judge’s order explaining his decision not to recuse. *Id.* Finally, the Supreme Court subsequently held the Ninth Circuit “was without jurisdiction to consider the appeal” in *Perry* and remanded with instructions to dismiss for lack of jurisdiction, *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013), so the order appears to be of no force or effect.

Judge Brnovich also overlooked the importance of *Melendres*, 2009 WL 2132693, at *1-16, in which the court recused from a *civil* suit under §455(a), after the National Council of La Raza, whose President/CEO was the judge’s twin sister, published Internet articles disparaging defendants before the judge. The court noted the articles “cannot be taken lightly” in “the context of a motion for recusal” when “originat[ing] from a website that is associated with the Court’s sister or the organization that she leads,” where the articles spoke to the “exact questions” the “instant litigation set out to determine.” *Id.* “[B]ecause at the district court level all doubts should be resolved in favor of recusal when the issue is close,” Judge Murguia recused (despite finding it “a close call”). *Id.* at *15; *see also Hoke v. Charlotte-Mecklenburg Hosp. Auth., Inc.*, 550 F.Supp. 1276, 1277 (W.D.N.C. 1982) (the “integrity of the court as a public institution, as seen *even through the anxious eyes of litigants*, is far more important than any opinion of” the court (emphasis supplied)).

In contrast, in this *criminal* case Judge Brnovich ruled “the §455(a) analysis is not a close call,” saying AGBrnovich: “has not made any derogatory or insulting comments regarding the Defendants;” “has not addressed the viability of charges in this matter or the guilt or innocence of the Defendants;” and sent his letter to Congress “before the indictment in this case” and “made no mention of [Petitioners].” ER12. Judge Brnovich’s cramped construction of her husband’s comments is rather unlikely to be shared by the “average person on the street” knowing the facts. The government alleges Petitioners owned, operated, and controlled Backpage.com, Backpage.com facilitated and profited from prostitution and child sex trafficking, and Petitioners are responsible for Backpage.com’s actions. AGBrnovich alleged Backpage.com solicited sex traffickers’ ads, facilitated sex trafficking, profited from prostitution and crimes against children, and facilitated and profited from illegal activities. AGBrnovich’s comments pre-dated the indictment, without citing the Travel Act or naming Petitioners individually, but any informed reasonable person would interpret his allegations as targeting Petitioners and saying they are guilty of the crimes now charged, particularly given the government’s conspiracy charge and its assertion of *Pinkerton* liability.²⁸ *In re U.S.*, 441 F.3d 44, 67 (1st Cir. 2006) (“A district judge, faced with a recusal motion, is also being asked to step outside herself or himself and take the objective view of an informed outsider. That is difficult for even a saint to do. Moreover, the trial judge has been in the heat of the proceedings, and objectivity, though sought, may be elusive.”).

²⁸ *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180 (1946) (coconspirators liable for crimes committed in furtherance of conspiracy).

Federal law requires a judge whose impartiality cannot be reasonably questioned. If a state's top, elected law enforcement officer makes public statements and takes public positions bearing directly on the defendants and issues in a criminal case pending before his spouse—particularly statements readily construed as an opinion of guilt—informed reasonable people would question the judge's neutrality. To avoid “even the appearance of impropriety,” *Liljeberg*, 486 U.S. at 865, Judge Brnovich was obligated to let another judge preside. Her failure to do so was clear error.

4. The District Court Erred Finding the Motion Untimely.

“[N]o per se rule exists regarding the time frame in which recusal motions should be filed,” but “recusal motions should be filed with reasonable promptness *after the ground for such a motion is ascertained.*” *Preston v. U.S.*, 923 F.2d 731, 733 (9th Cir. 1991) (emphasis supplied). In *Preston*, the district court denied as untimely a recusal motion filed “approximately eighteen months” after the transfer of the case to the court and shortly after a request to extend discovery was denied. *Id.* This Court reversed, holding the recusal motion was timely: “counsel asserts that he did not learn of [the basis for recusal] until ten days before the first recusal motion was filed;” “[t]his allegation is uncontroverted;” and “the government offers us nothing but *speculation* that...disqualification...[was] part of [their] trial strategy.” *Id.* at 733 and n.3 (emphasis supplied) (citing *Potashnick*, 609 F.2d at 1115). So too here.

Petitioners' counsel, from six separate law firms, asserted they learned the facts supporting recusal only after discovering the Booklet, less than two weeks before filing the Motion, leading to further research into AGBrnovich's statements about Backpage.com/Petitioners. After the government questioned the veracity of their

assertion, six lawyers submitted a declaration under penalty of perjury stating: before September 2020, they “had not seen any information that led [them] to even consider a recusal motion;” although some had been aware “various Attorneys General had written letters to Backpage.com and to Congress,” only after a search for AGBrnovich’s public statements about Backpage.com hit on his August 16, 2017, letter did they “first realize[] the pertinence of the letter to the issue of recusal, seeing that Attorney General Brnovich had signed the letter and made the claims he did about Backpage.com in the letter;” before their September 2020 investigation, they “never believed [they] had a basis to seek recusal nor were [they] aware of facts that caused [them] to believe [they] might even have a basis to seek recusal;” and they “never postponed investigating or pursuing recusal, whether for strategic reasons or otherwise.” ER353-54.

Despite counsels’ assertions and uncontested declaration, and without contrary evidence or an evidentiary hearing, Judge Brnovich found the Motion untimely and made credibility findings, saying it was “not credible to claim Defendants knew nothing of AGBrnovich’s position on human trafficking” (ER7)—but Petitioners made no such claim. *Knowing AGBrnovich had an anti-trafficking agenda—which is not a basis for recusal—cannot be equated to knowing AGBrnovich and his partners made inflammatory statements specifically targeting Backpage.com/Petitioners.*

Judge Brnovich also concluded either Petitioners should have discovered AGBrnovich’s statements or their six lawyers were dishonest when declaring they knew of no basis for recusal until September 2020. To the extent Judge Brnovich found the Motion untimely because Petitioners were obligated to discover

AGBrnovich's statements, she erred. *Listecki v. Official Committee of Unsecured Creditors*, 780 F.3d 731, 750 (7th Cir. 2015) (“[A] party does not have an obligation to discover any potentially disqualifying information that is in the public record. The onus is on the judge to ensure any potentially disqualifying information is brought to the attention of the litigants.”).²⁹ Absent *any* contrary evidence, Judge Brnovich also erred in rejecting counsels' assertions and declaration and accepting the government's unfounded speculation that Petitioners strategically delayed seeking recusal.

5. The District Court Erred Striking Petitioners' Expert Declaration.

Petitioners offered the expert declaration of Vaughn R. Walker. Among other things, Walker opined on whether AGBrnovich's statements created an interest under 28 U.S.C. §455(b) and whether a reasonable person would question Judge Brnovich's impartiality given AGBrnovich's statements. Judge Brnovich struck the declaration, finding it expressed opinions about legal conclusions, when the issue before her was “solely a question of law.” ER13. She also found his declaration untimely.

Although issues under Section 455 can be pure questions of law, whether AGBrnovich has an interest that may be affected by the outcome of the Case and how a reasonable person, fully informed, would view the statements of AGBrnovich, his partner AATN/TRUST, and the Organizations are mixed questions of fact and law, on which expert testimony is appropriate. Walker's opinions were permitted to embrace ultimate issues. Fed. R. Evid. 704 (“An opinion is not objectionable just

²⁹ Judge Brnovich said nothing to Petitioners about any potential bases for recusal. If the facts underlying the recusal motion were so public that all should have known them, then Judge Brnovich too should have known them, disclosed them, and addressed them with Petitioners.

because it embraces an ultimate issue.”); accord *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1010 (9th Cir. 2004) (although “an expert witness cannot give an opinion as to her legal conclusion, *i.e.*, an opinion on an ultimate issue of law,” “a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible”).

The statements of AGBrnovich, AATN/TRUST, and the Organizations were not disputed, but assessing whether those statements created an interest, whether the interest could be affected by the outcome of the Case, and how the statements would be perceived by a reasonable person plainly had factual components. See *Kivel v U.S.*, 878 F.2d 301, 304 (9th Cir. 1989) (“[c]learly, ‘reasonable’ is a mixed question of fact and law” when assessing whether an inspection of title records was reasonable). If Walker’s declaration crossed any lines, the district court should have disregarded anything inappropriate, rather than striking his declaration entirely.

Judge Brnovich also struck the declaration saying “parties may not generally present new evidence for the first time in their reply briefs” (ER13), but the declaration presented no new arguments or facts. Rather, it properly responded to the government’s response. *E.E.O.C. v. Creative Networks, LLC*, No. CV-05-3032-PHX-SMM, 2008 WL 5225807, at *2 (D. Ariz. Dec. 15, 2008) (“a party may not file ‘new’ evidence with a reply and then deprive the opposing party of an opportunity to respond to the new evidence” but “the challenged exhibits...do not constitute new evidence” as they “rebut arguments first raised by Plaintiff in its opposition” and, “[c]onsequently, the submissions were proper”). Moreover, a “motion to recuse is a very serious matter and must have a factual foundation; it may take some time to

build the foundation.” *In re U.S.*, 441 F.3d at 65. Petitioners conducted an extensive factual investigation and filed their Motion in less than two weeks, without waiting to receive their expert’s opinion. If the declaration’s timing prejudiced the government somehow, the district court should have granted the government leave to respond, rather than striking the declaration.

C. Oft Repeated Error or Manifests a Persistent Disregard of Federal Rules.

This *Bauman* factor is not present.

D. Important Issues of Law Not Previously Addressed by This Court.

Judge Brnovich held 28 U.S.C. §§455(b)(4) and 455(b)(5)(iii) do not encompass a non-economic interest. The Fifth and Seventh Circuits held otherwise. *Potashnick*, 609 F.2d at 1113; *SCA Services*, 557 F.2d at 115-16. This Court has not addressed the issue. As “[a]ny question of a judge’s partiality threatens the purity of the judicial process and its institutions,” *Potashnick*, 609 F.2d at 1111, this Court should resolve this important question of law—an issue of first impression for this Court, where ordinary error, rather than clear error, justifies review.

IV. CONCLUSION

Petitioners request a writ of mandamus directing Judge Brnovich to vacate her Order and enter an order recusing.

RESPECTFULLY SUBMITTED this 18th day of November, 2020.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rules 21.3 and 28-2.6, counsel for Michael Lacey, James Larkin, Scott Spear, John Brunst, Andrew Padilla, and Joye Vaught represent that they are aware of no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 21(d) and Circuit Rules 21-2(c) and 32-3, the attached Petition for Mandamus is 30 pages and contains 7,762 words, and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

DATED this 18th day of November, 2020.

BIENERT | KATZMAN PC

By *s/ Thomas H. Bienert, Jr.* _____

Thomas H. Bienert, Jr.

Whitney Z. Bernstein

Counsel for Petitioner James Larkin

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this matter were emailed a copy of the **Petition for Writ of Mandamus and Petitioner's Excerpts of Record Volumes I, II and III** at the email addresses below.

s/ Thomas H. Bienert, Jr.

Thomas H. Bienert, Jr.

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