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The Honorable Ricardo S. Martinez

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

BACKPAGE.COM, LLC,

Plaintiff,

v.

NO. 2:12-cv-00954-RSM

RESPONSE TO MOTION TO
INTERVENE OF THE INTERNET
ARCHIVE

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 20 Yakima County Prosecuting Attorney,

21 Defendants.

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12 *www.clickz.com*, October 27, 2011 10

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1 **I. ISSUES PRESENTED**

- 2 1. Is the Internet Archive Entitled to Intervention as a Matter of Law?
3 2. Is the Internet Archive Entitled to Permissive Intervention?

4 **II. STATEMENT OF THE CASE**

5 On March 29, 2012, Washington Governor Christine Gregoire signed SB 6251, 62nd
6 Leg., 2012 Sess. (Wash.2012) (“SB 6251”) into law. The law seeks to “[eliminate] sex
7 trafficking of minors in a manner consistent with federal laws prohibiting sexual exploitation
8 of children.” SB 6251 § 1. To accomplish this goal, SB 6251 creates the criminal offense of
9 “advertising commercial sexual abuse of a minor”, which a person commits if “he or she
10 knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be
11 published, disseminated, or displayed, any advertisement for a commercial sex act, which is to
12 take place in the state of Washington and that includes the depiction of a minor.” SB 6251 §
13 2(1). SB 6251 makes violation of the law a class C felony. SB 6251 § 2(3). The law is
14 narrowly tailored to target only the illegal speech “of escort services advertising [that] includes
15 minors who are being sold for sex, a form of sex trafficking and commercial sexual abuse of
16 minors.” SB 6251 § 1. It also only applies to those ads that offer a sexual encounter with a
17 minor in the state of Washington. SB 6251 § 2(1). The law does not extend to those who
18 unwittingly publish, disseminate or display such illegal content, nor does it extend to other
19 forms of illegal content, such as prostitution ads relating to adults.
20
21

22 On June 4, 2012, Backpage.com filed a complaint in U.S. District Court, Western
23 District of Washington, seeking to have SB 6251 declared invalid and unenforceable.
24 Complaint to Declare Invalid and Enjoin Enforcement of Washington Senate Bill 6251 For
25 Violation of the Communications Decency Act, and the First and Fifth Amendments and
26

1 Commerce Clause of the United States Constitution at 10 (hereinafter “Complaint”).
 2 Backpage.com claims to be “the second largest online classified advertising service in the
 3 United States.” *Id.* at 6. Backpage.com “allows users to post in a multitude of categories”,
 4 thereby acting as a conduit for the publication of third-party content. *Id.* On June 5, 2012, the
 5 U.S. District Court in Washington granted Backpage.com’s request for a temporary restraining
 6 order against the enforcement of SB 6251.
 7

8 On June 14, 2012, movant Internet Archive filed a Motion to Intervene (hereinafter
 9 “Motion”) in the complaint filed by Backpage.com, arguing that it is entitled to both
 10 intervention as a matter of right and permissive intervention under Federal Rule of Civil
 11 Procedure 24.¹ In support of its motion, Internet Archive argues both that it is so similarly
 12 situated to Backpage.com that permissive intervention should be granted, and also that it is so
 13 uniquely different than Backpage.com that it is entitled to intervention as a matter of right.
 14 Because Internet Archive fails to establish the requirements of Fed. R. Civ. P. 24(a),
 15 intervention as a matter of right is inappropriate. Furthermore, because Internet Archive’s
 16 interests can be adequately conveyed by amicus curiae status, this Court should deny
 17 permissive intervention.
 18

19 III. ARGUMENT

20 Internet Archive argues that under Fed. R. Civ. P. 24, it should be allowed to intervene
 21 as a matter of right, or in the alternative permissibly. Because Internet Archive fails to meet the
 22

23 ¹ In the Motion, counsel for Internet Archive states he had contacted the defendants to determine whether
 24 they consented to intervention, and that he would “continue to confer with Defendants in the hopes of gaining
 25 their affirmative consent.” However, when counsel for Internet Archive contacted counsel for the Attorney
 26 General, on June 13, 2012, he would not say who he represented, instead stating only that he represented a party
 that had some common interests with Backpage.com and that his client was considering intervening and would
 call counsel back if they decided to intervene. The Attorney General has had no further direct communication
 from Internet Archive and its counsel since that time. Counsel for Defendant Russell Hauge relayed that a similar
 limited exchange occurred with them on June 14, 2012.

1 requirements of Fed. R. Civ. P. 24(a) and (b), and amicus curiae status is appropriate, its
2 motion should be denied.

3 **A. The Internet Archive Is Not Entitled To Intervention As A Matter Of Right.**

4 Under Fed. R. Civ. P. 24(a)(2), a party is entitled to intervene where (1) the
5 intervention is timely; (2) the applicant has a significant protectable interest relating to the
6 property or transaction that is the subject of the action; (3) the disposition of the action may, as
7 a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the
8 existing parties may not adequately represent the applicant's interest. *Arakaki v. Cayetano*,
9 324 F.3d 1078, 1083 (9th Cir. 2003). Each of these four requirements must be met to support a
10 right to intervene. *Id.* (citing *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297,
11 1302 (9th Cir. 1997)). However, "if a party is not 'necessary' under Rule 19(a), then it cannot
12 satisfy the test for intervention as a right under Rule 24(a)(2). *Mastercard Int'l Inc. v. Visa*
13 *Int'l Serv. Ass'n, Inc.* 471 F.3d 377, 389 (2nd Cir. 2006). Fed. R. Civ. P. 19(a) requires parties
14 to be joined if joinder is feasible and if the parties are necessary to "accord complete relief
15 among existing parties," Fed. R. Civ. P. 19(a)(1)(A), or if under specified circumstances,
16 disposing of the case without that party might "(i) as a practical matter impair or impede the
17 person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk
18 of incurring double, multiple, or otherwise inconsistent obligations because of the interest,"
19 Fed. R. Civ. P. 19(a)(1)(B). *Oneida Indian Nation of New York v. Madison County, Oneida*
20 *County, N.Y.*, 605 F.3d 149, 162 (2nd Cir. 2010).

21 **1. The Motion to Intervene is Timely**

22 Backpage.com filed its complaint on June 4, 2012. No responsive pleadings have been
23 filed. On June 14, 2012, Internet Archive filed its motion to intervene. Respondent agrees the
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1 motion is timely.

2 **2. Internet Archive Does Not Have a Significant Protectable Interest Relating**
 3 **to the Property or Transaction That is the Subject of this Action**

4 [F]or an interest to be cognizable under Rule 24(a)(2), it must be direct, substantial, and
 5 legally protectable. An interest that is remote from the subject matter of the proceeding, or that
 6 is contingent upon the occurrence of a sequence of events before it becomes colorable, will not
 7 satisfy the rule. *Brennan v. N.Y.C. Bd. Of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001). No clear
 8 definition has been established by the Supreme Court or the lower courts for the “interest
 9 relating to the property or transaction which is the subject of the action” that is required for
 10 intervention of right. *Blake v. Pallan*, 554 F.2d 947, 952 (9th Cir. 1977). However, it is clear
 11 the intent behind this requirement is to only allow intervention as a matter of right in order to
 12 protect a specific property or contractual right held by the proposed intervenor, rather than a
 13 general potential interest in the subject matter of the litigation. In its Motion, Internet Archive
 14 fails to specify a significant, direct, substantial, and legally protectable interest that is different
 15 than every other online service provider. In fact, Internet Archive’s purported “interest” is
 16 simply general exposure to criminal liability under SB 6251, not a specific property or
 17 transactional interest that is distinguishable from every other online service provider.
 18

19
 20 **3. The Disposition of the Action Will Not, as a Practical Matter, Impair or**
 21 **Impede Internet Archive’s Ability to Protect its Interest.**

22 Because Internet Archive fails to demonstrate a significant interest relating to the
 23 property or transaction which is the subject of the action, the disposition of this action will not,
 24 as a practical matter, impair or impede Internet Archive’s ability to protect its interests.
 25 Internet Archive’s interests in avoiding criminal liability under SB 6251 are not in any way
 26

1 distinguishable from the interests of every other online service provider or other host of third
2 party content.

3 **4. Backpage.com Can Adequately Represent Internet Archive's Interest.**

4 An applicant for intervention has the burden to demonstrate that its interests may not be
5 adequately represented by the existing parties to the suit. *Blake*, 554 F.2d at 954. When
6 considering the adequacy of representation, the court considers three factors: (1) Are the
7 interests of a present party in the suit sufficiently similar to that of the absentee such that the
8 legal arguments of the latter will undoubtedly be made by the former; (2) is that present party
9 capable and willing to make such arguments; and (3) if permitted to intervene, would the
10 intervenor add some necessary element to the proceedings which would not be covered by the
11 parties in the suit? *Id.* at 954-55. Where the intervenor and an existing party have the same
12 ultimate objective, a presumption of adequacy of representation arises. *Oregon Environmental*
13 *Council v. Oregon Dept. of Environmental Quality*, 775 F.Supp. 353, 359 (9th Cir. 1991)
14 (citing *American Nat'l Bank and Trust Co. of Chicago v. City of Chicago*, 865 F.2d 144, 148
15 n.3 (7th Cir. 1989)).

16
17
18 Internet Archive concedes that its current interests in the case are consistent
19 with that of Backpage.com. Motion at 11. This is not surprising, because Internet Archive
20 fails to demonstrate how its position differs from Backpage.com in any meaningful way.
21 Internet Archive suggests its interests may diverge in the future, and that it therefore has a
22 unique, institutional interest that may not be adequately represented by Backpage.com. *Id.* at
23 10-11. This speculation about future differences does not demonstrate that Backpage.com's
24 current representation might be inadequate.
25
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1 **B. Internet Archive Is Not Entitled To Permissive Intervention.**

2 “On timely motion, the court may permit anyone to intervene who: has a claim or
3 defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P.
4 24(b)(1)(B). A court *may* grant permissive intervention where the applicant shows (1)
5 independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant’s claim or
6 defense, and the main action, have a question of law or a question of fact in common. *Nw.*
7 *Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996) (emphasis added). Even
8 where a party meets the requirements for permissive intervention, the court has broad
9 discretion to determine whether to grant intervention. *Amoco Oil Co. v. Dingwell*, 690 F.Supp.
10 78, 83-84, *affirmed* 884 F.2d 629 (D.Me. 1988). Intervention is designed to accommodate two
11 competing policies: “efficiently administering legal disputes by resolving all related issues in
12 one lawsuit of the one hand, and keeping a single lawsuit from becoming unnecessarily
13 complex, unwieldy or prolonged, on the other hand.” *United States v. Pitney Bowes, Inc.*, 25
14 F.3d 66, 70 (2nd Cir. 1994); *Reich v. Webb*, 336 F.2d 153, 160 (9th Cir. 1964). “Where
15 proposed intervenors would present no new questions to the court, conferring amicus status is
16 generally preferred over a grant of permissive intervention.” *Oregon Environment Council*,
17 775 F.Supp. at 360.

18 Here, the Respondent agrees that Internet Archive can show independent grounds for
19 jurisdiction, its motion is timely, and its claim has a question of law and/or fact that is common
20 with the complaint filed by Backpage.com. In fact, Internet Archive’s interest and claims are
21 identical to that of Backpage.com, and it is for that reason that permissive intervention should
22 be denied.
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1 Internet Archive fails to present the Court with any new questions that would warrant
 2 permissive intervention. Internet Archive's interests will be fully served by amicus curiae
 3 status. As explained by a venerable decision from the 5th Circuit,

4 It is easy enough to see what are the arguments against intervention where, as
 5 here, the intervenor merely underlines issues of law already raised by the
 6 primary parties. Additional parties always take additional time. Even if they
 7 have no witnesses of their own, they are the source of additional questions,
 8 briefs, arguments, motions and the like which tend to make the proceeding a
 Donnybrook Fair. Where he presents no new questions, a third party can
 contribute usually most effectively and always most expeditiously by a brief
 amicus curiae and not by intervention.

9 *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F.Supp. 972, 973 (5th
 10 Cir. 1943).

11 **1. The interests of Backpage.com are sufficiently similar to that of Internet**
 12 **Archive such that the legal arguments raised by Internet Archive have**
 13 **already been raised by Backpage.com**

14 In its complaint, Backpage.com alleges that SB 6251 violates the Communications
 15 Decency Act under 47 U.S.C. § 230, that it violates the First and Fifth Amendments of the
 16 Unites States Constitution, and that it violates the Commerce Clause of the United States
 17 Constitution. Complaint at 8-10. Internet Archive has raised the identical issues² in its
 18 motion. Motion at 7-10. Backpage.com also seeks the same relief sought by Internet Archive:
 19 that SB 6251 be declared invalid and unenforceable. Complaint at 10.

20 As stated previously, Internet Archive concedes that its current interests in the case are
 21 consistent with that of Backpage.com. Motion at 11. Internet Archive fails to demonstrate
 22 how its position differs from Backpage.com in any meaningful way. Internet Archive suggests
 23 its interests may diverge in the future, and that it therefore has a unique, institutional interest
 24

25 ² Internet Archive raises a challenge of vagueness, however a review of Backpage.com's motion for
 26 temporary restraining order and preliminary injunction clearly demonstrates that this issue is encompassed in
 Backpage.com's request for repeal. Motion of Plaintiff Backpage.com for Temporary Restraining Order and
 Preliminary Injunction, pp. 16-21.

1 that may not be adequately represented by Backpage.com. *Id.* at 10-11. This speculation
2 about future differences does not demonstrate that Backpage.com's current representation
3 might be inadequate. In fact, any chances of diverging interests in the future, with respect to
4 this lawsuit, are highly unlikely considering their shared objective of repealing SB 6251, and
5 the fact that the parties have raised identical issues in support of their request for repeal.
6

7 **2. Backpage.com is capable and willing to make the same arguments raised
8 by Internet Archive.**

9 Because it is clear that Backpage.com is not only capable of making the arguments
10 raised by Internet Archive, but it has in fact *already done so*, it cannot be argued that
11 Backpage.com cannot adequately represent Internet Archives' interest in the case.

12 Internet Archive argues that it would not be covered by any consent decree that may be
13 entered into with the Defendants. However, given that Backpage.com has "resisted the
14 demand to eliminate its adult category", and instead filed this lawsuit, it is highly unlikely
15 Backpage.com intends to enter into a consent decree to do just what it has vigorously opposed.
16 *See* Complaint at 6. Furthermore, Backpage.com has high financial incentive to continue with
17 its "adult category"—\$22 million per year in revenue from "online prostitution advertising."
18 Susan Kuchinkas, *Village Voice Media Pressured to Drop Backpage.com Adult Ads*, at
19 www.clickz.com, October 27, 2011 (citing an estimate by AIM Group, an interactive media
20 consultancy.) There is no indication that Backpage.com has any incentive to enter into a
21 consent decree.
22

23 **3. If permitted to intervene, Internet Archive would not add any necessary
24 elements to the proceedings which would not be covered by Backpage.com.**

25 Internet Archive argues that its business is factually different than Backpage.com
26 because Internet Archive deals with historical third-party content, as opposed to third-party

1 content under the direct control of third-party posters. Motion at 11. Internet Archive fails,
2 however, to articulate how this minor difference in services adds any necessary elements to the
3 proceedings. Rather, Internet Archive vaguely references “unique concerns” and “other unique
4 perspectives” without articulating what those “concerns” and “perspectives” are. Motion at 11.
5

6 Internet Archive argues that an applicant for intervention need only show that
7 representation of its interest may be inadequate, not that representation will in fact be
8 inadequate. Motion at 10 (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538
9 n.10 (1972)). Respondent agrees with this assertion, however Internet Archive has failed to
10 meet even this minimal standard. Because Internet Archive and Backpage.com have the same
11 ultimate objective -- a declaration that SB 6251 is invalid and unenforceable -- it is presumed
12 that Backpage.com’s representation is adequate. *See Oregon Environmental Council*, 755
13 F.Supp. 353. Internet Archive has not overcome that presumption with its vague assertions
14 about the inadequacy of Backpage.com’s representation.
15

16 Because Internet Archive’s intervention into this proceeding would serve no purpose
17 but to delay progress and increase costs, conferring amicus curiae status is the appropriate
18 designation for Internet Archive to assert its interest in the outcome of Backpage.com’s
19 complaint.
20

21 IV. CONCLUSION

22 Because Internet Archive is not entitled to intervention as a matter of right, and because
23 permissive intervention is not warranted in this case, Internet Archive’s motion should be
24 denied and they should be conferred amicus curiae status.

25 In its Motion, Internet Archive noted the Motion to Intervene for June 29, 2012 and
26

1 requested oral argument. Respondents request the motion be decided on submission of the
2 briefs without oral argument pursuant to Fed. R. Civ. P. 78(b).
3

4 DATED this 25th day of June, 2012.

5 ROBERT M. MCKENNA
6 Attorney General

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CERTIFICATE OF SERVICE

I, Allison Cleveland, declare that on this 25th day of June, 2012, I caused to be electronically filed the foregoing document with the Clerk of the Court using CM/ECF system which will send notification of such filing to all counsel of record:

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of June, 2012, at Seattle, WA.

By: /s/ Allison Cleveland
ALLISON CLEVELAND, Legal Assistant

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