HON. RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BACKPAGE.COM, LLC,

Plaintiff,

and

INTERNET ARCHIVE,

Plaintiff-Intervenor,

v.

ROB MCKENNA, Attorney General of the State of Washington; RANDY J. FLYCKT, Adams County Prosecuting Attorney; BENJAMIN C. NICHOLS, Asotin County Prosecuting Attorney; ANDREW K. MILLER, Benton County Prosecuting Attorney; GARY A. RIESEN, Chelan County Prosecuting Attorney; DEBORAH S. KELLY, Clallam County Prosecuting Attorney; ANTHONY F. GOLIK, Clark County Prosecuting Attorney; REA L. CULWELL, Columbia County Prosecuting Attorney; SUSAN I. BAUR, Cowlitz County Prosecuting Attorney; STEVEN M. CLEM, Douglas County Prosecuting Attorney; MICHAEL SANDONA, Ferry County Prosecuting Attorney; SHAWN P. SANT, Franklin County Prosecuting Attorney; MATTHEW L. NEWBERG, Garfield County Prosecuting Attorney; ANGUS LEE, Grant County Prosecuting Attorney; H. STEWARD MENEFEE, Grays Harbor County Prosecuting

Case No.: 2:12-cv-00954-RSM

REPLY OF THE INTERNET ARCHIVE IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

HEARING DATE: July 20, 2012

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Defendants, in their official capacities.

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I. INTRODUCTION

SB 6251 is a classic example of bad facts leading to bad law. In an attempt to restrict underage sex trafficking, the state of Washington passed legislation that is preempted by federal statute, impermissibly chills protected speech, and violates the Commerce Clause. Making matters worse, parties that might wish to comply with the legislation are unable to do so because SB 6251 contains vague and undefined terms that cannot explain what content is now proscribed. The state has offered various rationales to explain these flaws away – and illustrated the statute's fatal vagueness in the process – but SB 6251 cannot be salvaged by after-the-fact interpretations and bare promises to enforce the law responsibly. This Court should enjoin SB 6251 from going into effect.

II. ARGUMENT

A. The Internet Archive Has Standing To Challenge SB 6251.

As a threshold matter, the Internet Archive need not wait to be prosecuted before challenging SB 6251, Wash. Rev. Code Ann. § 9.68A.004 (West 2012) ("SB 6251"). This Court has already acknowledged that the Internet Archive has established that it faces a legitimate threat of injury. *See, e.g.,* Order Grant Mot. Intervene 8 ("[E]ven if the Internet Archive had unlimited resources, it could not obtain and retain the identification of all of those persons whose images are displayed in connection with an 'implicit offer for a commercial sex act to occur in Washington' on the websites that it indexes."). SB 6251 "is aimed directly at plaintiffs, who . . . will have to take significant and costly compliance measurers or risk criminal prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988). The only obstacle to prosecution is Defendants' stated interpretation that, for the time being, the Internet Archive (a) lacks the requisite scienter under the statute and (b) disseminates content that is too outdated to be

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proscribed. *See* Opp'n Mot. Prelim. Inj. 6-7 ("Under Internet Archive's business model, it would not have the required state of mind to 'knowingly' participate in advertising . . . . SB 6251 addresses actual advertisements which by definition must be capable of conveying a timely offer to engage in a commercial sex act.").

Without necessary guidance from this Court, nothing binds Defendants to their current interpretations. Furthermore, the Internet Archive's next round of web crawling may well capture advertisements that Defendants feel are current enough to be objectionable. After all, Defendants point to no authority for what makes an offer "timely," leaving it to prosecutors to decide for themselves where this critical line should be set – perhaps at a day old, perhaps at a year old. *See* Hartsock Decl. ¶¶ 63, 68, 74; Opp'n Mot. Prelim. Inj. 5. Defendants' conclusory statements and attempts to narrow the reach of the statute serve only to divert the Court's attention from the far-reaching implications that SB 6251 holds for disseminators of information online.

Moreover, as First Amendment freedoms are at stake, the Internet Archive is also entitled to challenge SB 6251; a court will assume that "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Am. Booksellers Ass'n*, 484 U.S. at 392-3 (internal quotation marks omitted). This chilling effect is at the core of the Internet Archive's arguments. *See infra* p.12. Defendants' assertion that the Internet Archive is not entitled to protect the speech of others is based on the Defendants' strained interpretation that the statute only reaches commercial speech. *See* Opp'n Mot. Prelim. Inj. 7. As explained below, this is not the case; SB 6251 directly attaches liability to those who, like the Internet Archive, "disseminate" advertisements alongside other third-party content. This represents non-commercial speech and not merely offers to engage in illicit conduct. This Court

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has recognized that the Internet Archive "has a paramount interest in advancing arguments regarding the applicability of SB 6251 to myriad types of content on the Internet." Order Grant Mot. Intervene 8-9. Defendants state their intention to apply the statute only to *some* types of online content, but these after-the-fact assurances are not binding on current or future prosecutors and cannot be relied upon by this Court to safeguard essential liberties.

Additionally, Defendants' contentions that neither party has established a reasonable fear of prosecution are disingenuous at best. *See* Opp'n Mot. Prelim. Inj. 6 ("[N]either plaintiff has alleged facts indicating the existence of a genuine threat of imminent prosecution."). As both Backpage.com and Internet Archive have repeatedly pointed out, SB 6251 was drafted primarily to create criminal liability for not only the creation but also the dissemination of the type of content hosted by Backpage.com. *See* Mot. Intervene 4 n.4 ("What Backpage.com would tell you is we are protected, we can hide behind the federal Communication Decency Act.").[1] Given that legislative background, and that the Internet Archive's automated processes gather material from all across the Internet – including from Backpage.com – it is hard to take seriously Defendants' argument that Plaintiffs have no reasonable fear of prosecution under this law.

Defendants have adopted conflicting views with regard to the potential exposure of the Internet Archive to criminal liability, and evince an intention to apply the statute as they see fit, subject not to the constraints of the law but to their own discretion. In opposing the Internet Archive's intervention in this suit, Defendants did not suggest that the Internet Archive could not be criminally liable under this statute; rather, they suggested that the Internet Archive's interests were identical to those of Backpage.com. *See* Resp. Mot. Intervene 11 ("Internet Archive's

[1] *Public Hearing on SB 6251-6260 Before the S. Jud. Comm.*, 62nd Leg., 2012 Sess. (Wash. 2012) (statement of former Rep. Linda Smith), available at http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2012010180.

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interest and claims are *identical* to that of Backpage.com." (emphasis in original)). Now, Defendants suggest that the Internet Archive has no right to contest the validity of this statute because it cannot be liable under the statute. *See* Opp'n Mot. Prelim. Inj. 6 (arguing that the Internet Archive "does not fall within the scope of SB 6251"). Defendants' wavering interpretations are at the core of the Internet Archive's concerns about SB 6251: the statute fails to provide notice as to who can be liable, and for what conduct. As the Supreme Court held in *American Booksellers Association*, Defendants here have "not suggested that the newly enacted law will not be enforced." *Am. Booksellers Ass'n*, 484 U.S. at 393. Rather, they have suggested that their current interpretation of the law will lead them not to prosecute the Internet Archive. This is not an adequate solution to the statutory or constitutional problems inherent in SB 6251, nor is it sufficient to undermine the Internet Archive's standing to bring this case.

B. SB 6251 Is Preempted By Section 230 of the Communications Decency Act.

The statute's most obvious substantive defect is that it conflicts with federal law. In crafting Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230" or "CDA 230"), Congress "considered the weight of the speech interests implicated" when websites and other interactive computer services host third-party content. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). This careful analysis led to a clear decision "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Id.* at 330. The central element of this choice is Congress's dictate that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." § 230(c)(1). SB 6251 directly contradicts this provision, and is therefore preempted by federal law.

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1. SB 6251 Directly Conflicts With CDA 230 By Treating Online Intermediaries As Publishers.

Defendants' argument that SB 6251 is not preempted relies on the *Salerno* doctrine which states that "the challenger must establish that no set of circumstances exists under which the Act would be valid." Opp'n Mot. Prelim. Inj. 11 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). But as Justice Stevens noted in *City of Chicago v. Morales*, "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself," adding, "Whether or not it would be appropriate for federal courts to apply the *Salerno* standard in some cases" is "a proposition which is doubtful." 527 U.S. 41, 55 n.22 (1999). As in *Morales*, the impropriety of SB 6251 "permeates the text" of the law, rendering it vulnerable to a facial challenge. *Id.* at 55. Moreover, SB 6251 would fail the *Salerno* test even if it were properly applied. In ruling on a recent facial preemption challenge, the Ninth Circuit explained:

> [T]he question before us is not … whether state and local law enforcement officials can *apply* the statute in a constitutional way. [Defendant's] framing of the *Salerno* issue assumes that [the challenged law] is not preempted on its face, and then points out allegedly permissible applications of it. This formulation misses the point: there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent and therefore is preempted by the Supremacy Clause.

United States v. Arizona, 641 F.3d 339, 346 (9th Cir. 2011), *aff'd in part, rev'd in part and remanded*, 132 S. Ct. 2492 (2012).

SB 6251 aims to criminalize not only commercial offers for sex themselves but also "caus[ing] directly or indirectly, to be published, disseminated, or displayed" this proscribed

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material. SB 6251(1).[2] In other words, the statute plainly treats disseminators of content – including the Internet Archive, which "aggregates and displays content from every corner of the Internet," Order Grant Mot. Intervene 8 – as publishers of third-party material. This violates both the text and Congress' intent in crafting CDA 230. "[S]tate law is pre-empted to the extent that it actually conflicts with federal law," especially where, as here, "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

That SB 6251 also applies to print media does not in any way defuse the preemption problem. The Court here is presented with a conflict between a state that wishes to impose liability on online intermediaries and a federal statute, CDA 230, which "immunizes providers of interactive computer services against liability arising from content created by third parties." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). It is true that CDA 230 does not extend its intermediary protections offline, but the relevant point of inquiry is where the state and federal laws conflict, not where the state law in question may also happen to extend. As the Fourth Circuit has explained regarding CDA 230:

> With respect to federal-state preemption, the Court has advised: "[W]hen Congress has 'unmistakably … ordained,' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. The result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, …

[2] *See also* Jeanne Kohl-Welles, *Anti-Trafficking Bills, Including Focus on Online Child Escort Ads, Signed Into Law*, Senate Democrats Blog (March 29, 2012), *available at* http://blog.senatedemocrats.wa.gov/kohlwelles/anti-trafficking-bills-including-focus-on-online-child-escort-ads-signed-into-law/.

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> (1977) (citations omitted). Here, Congress' command is explicitly stated.

Zeran, 129 F.3d at 334. Washington's regulation of online intermediaries must fall, regardless of whether the state also asserts authority over other aspects of commerce.

2. SB 6251 Does Not Fit Into Any of the Exceptions Set Out by CDA 230.

Defendants attempt to find various loopholes to avoid conflict between SB 6251 and CDA 230 by pointing to Section 230's exceptions for intermediary immunity, but none of those attempts withstand scrutiny. First, Defendants argue that SB 6251 is a state law consistent with CDA 230, and is therefore not preempted under Section 230(e)(3). To support this proposition, Defendants point to SB 6251's scienter requirement, arguing that the law applies only to "knowing publication of advertisements for commercial sex acts." Opp'n Mot. Prelim. Inj. 13. Though the language of the statute does not compel this reading of SB 6251, this interpretation, if correct, only illustrates how SB 6251 is fundamentally inconsistent with Section 230. In Washington state, "a person acts knowingly or with knowledge when . . . he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense." Wash Rev. Code Ann. § 9A.08.010(b)(ii) (West). Defendants' reading of the statute thus suggests that a website operator such as the Internet Archive would become liable under SB 6251 as soon as the site is notified that it is illegally disseminating proscribed content. However, "Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA … [and] has a chilling effect on the freedom of Internet speech." *Zeran*, 129 F.3d at 333. The conflict here between SB 6251 and CDA 230 is readily apparent, and must be resolved in favor of the federal standard.

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Second, Defendants argue that because it is a criminal law, SB 6251 is beyond the reach of CDA 230. Defendants point to the title of § 230(e)(1) ("No effect on criminal law"), rather than the actual text of the subsection, for support. Opp'n Mot. Prelim. Inj. 15. ("This title is helpful in interpreting the meaning of subsection(e)(1) because it was included in the amendment which created subsection (e)(1)."). But as the Supreme Court has long maintained:

> [T]he title of a statute and the heading of a section cannot limit the plain meaning of the text . . . For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

Bhd. of R. R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 528-29 (1947). The text here leaves no room for doubt – § 230(e)(1) states that CDA 230 does not conflict with a defined set of federal laws "or any other *Federal* criminal statute." 47 U.S.C. § 230(e)(1) (emphasis added). *See also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted). Defendants do not cite any precedent to support their novel interpretation. *See* Opp'n Mot. Prelim. Inj. 16. The interpretation should likewise not stand here.

Third, Defendants stretch even further by arguing that SB 6251 is consistent enough with federal laws exempted in subsection (e)(1) – laws that criminalize the selling and buying of children and the dissemination of obscene matter – such that SB 6251 is also exempt. Opp'n Mot. Prelim. Inj. 14. These comparisons are inapposite. Nothing in the text of SB 6251 indicates that the statute combats child pornography or obscenity, which receive no protection under the Constitution. *New York v. Ferber*, 458 U.S. 747 (1982); *Roth v. United States*, 354

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U.S. 476 (1957). And unlike the federal statutes criminalizing child pornography, SB 6251 does not address speech that is "intrinsically related" to criminal conduct, because it does not require that any illegal act actually take place for liability to attach to speech. *Compare Ferber*, 458 U.S. at 759 (finding that "distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children"), *with United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010) (holding that statute criminalizing "crush videos" was invalid because it also applied to videos of legal activities that were protected by the First Amendment).

Defendants also urge that, based on their reading of the statute, SB 6251 targets only those who "profit" from child sex trafficking.[3] It is difficult to understand the source of this assertion, as nothing in the text requires that criminal liability under SB 6251 be restricted to actors who profit from underage prostitution. In contrast, the federal statute that Defendants cite as consistent with SB 6251 is concerned with liability for those who "cause" people to "engage in a commercial sex act" under the threat of "force, threats of force, fraud, [or] coercion." 18 U.S.C. § 1591. Unlike SB 6251, 18 U.S.C. § 1591 targets conduct, not speech, and its meaning was set out in the statute, not unilaterally attested to by prosecutors. SB 6251 is therefore inconsistent with federal criminal statutes and is preempted by Section 230.

C. SB 6251 Violates the First and Fourteenth Amendments.

Defendants attempt to avoid the statute's additional First Amendment and due process shortcomings by offering their own narrow interpretation of the statute. Opp'n Mot. Prelim. Inj.

[3] Press Release, Washington State Office of the Attorney General, Washington State Attorney General, county prosecutors file response to Backpage suit (July 12, 2012), *available at* http://www.atg.wa.gov/pressrelease.aspx?&id=30056 (stating that "organizations such as the Internet Archive, which intervened in the case, are not subject to the new law because it is narrowly tailored to target sites that knowingly publish *and profit* from prostitution ads") (emphasis added).

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31–33. But "a promise by the government that it will interpret statutory language in a narrow, constitutional manner cannot, without more, save a potentially unconstitutionally overbroad statute." *Free Speech Coal., Inc. v. Attorney Gen. of U.S.*, 677 F.3d 519, 539 n.15 (3d Cir. 2012) (citing *Stevens*, 130 S. Ct. at 1582). Where, as here, a regulation touches protected speech, the Court must apply a heightened vagueness analysis, and not defer to the interpretations offered by Defendants. *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) (requiring statutes that regulate protected speech "to provide a greater degree of specificity and clarity than would be necessary under ordinary due process principles"); *see also Reno v. ACLU*, 521 U.S. 844, 870-71 (1997) ("The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech."). Indeed, the interpretation of the statute may not be entrusted solely to Defendants, who are prosecutors with discretion to enforce the law. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (forbidding states to "delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis"). It is of the utmost importance that the Court "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 130 S. Ct. at 1591.

Defendants further make a series of claims that purport to save the statute but are wholly unsupported by the statutory text. Defendants assert that SB 6251 does not require strict scrutiny because it is not a content-based restriction on speech. Opp'n Mot. Prelim. Inj. 24. To the contrary, SB 6251 clearly relies on the content of an advertisement to determine its legality. As the Supreme Court has held, "Content-neutral speech regulations are those that are justified without reference to the content of the regulated speech." *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2664 (2011) (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)) (internal

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quotation marks omitted). The state of Washington could not prosecute a person under SB 6251 without first proving that he or she posted an advertisement containing specific *content*, namely, the offer for a commercial sex act that is to take place in the state of Washington. *See* SB 6251(1). As such, liability is dependent on the content of a person's speech, and strict scrutiny applies.

Defendants also attempt to introduce a lesser vagueness standard because, they contend, the statute will only apply to unprotected or commercial speech. Opp'n Mot. Prelim. Inj. 30. This mere assertion that Defendants *intend* to apply the statute only to commercial speech, which receives less constitutional protection, does not mean that the statute, as worded, *captures* only commercial speech. While Defendants maintain (without textual support) that the "indirect" language extends liability to "pimps," Opp'n Mot. Prelim. Inj. 27, the plain text of the statute leaves unclear whether services such as the Internet Archive, which reproduce content displayed elsewhere, may be prosecuted for "indirectly" "disseminat[ing]" offers for commercial sex acts, because "disseminate" is left undefined.[4]

Nor would the reproduction of advertisements by the Internet Archive constitute the type of "commercial speech" that falls under the *Central Hudson* test. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (defining "commercial speech" as "expression related solely to the economic interests of the speaker and its audience"). Unlike the federal child pornography statute at issue in *United States v. Williams*, 128 S. Ct. 1830, 1836 (2008) (extending criminal liability to one who "knowingly" "advertises, promotes, presents,

[4] *See Disseminate Definition*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/disseminate (last visited July 11, 2012) (using the sentence "The Internet allows us to *disseminate* information faster" to illustrate the meaning of the word "disseminate") (emphasis in original).

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distributes, or solicits" what is believed to be child pornography), SB 6251 reaches *beyond* direct proposals for commercial transactions to criminalize the indirect dissemination of such content. SB 6251(1). On its face, SB 6251 thus applies to non-commercial, protected speech of the sort that receives the full protections of the First Amendment. Even if Defendants are correct that the "collateral burdens" of SB 6251 fall only on commercial actors, they have failed to meet their burden to show that the law, whether it targets commercial or non-commercial speech, is appropriately tailored. *See Sorrell*, 131 S. Ct. at 2667 (2010) ("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment.").

Defendants do not contest that enforcement of SB 6251 would have substantial chilling effects on the Internet Archive and on other speakers online. This chilling effect is serious because the law resorts to criminal liability to suppress unwanted speech. Criminal penalties on speech – whether they require "knowledge" or not – are a "stark" example of the sort of oppression the Framers sought to avoid when they drafted the First Amendment. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). This effect is not dissipated in a regime in which criminal liability can be triggered by notification that "illegal" content may be available on an actor's website. *See Zeran*, 129 F.3d at 333 ("[L]iability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation."). The chilling effects that result from the imposition of criminal liability are well recognized by this nation's courts. *See, e.g.*, *Reno v. ACLU*, 521 U.S. at 872 ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."). Defendants' claim that only "commercial" speech will be affected is therefore meritless.

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D. SB 6251 Violates the Commerce Clause.

Laudable goals by themselves will not save a state law that excessively burdens interstate commerce, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and causes "chaos" nationwide. *American Library Ass'n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997). SB 6251 would have just such a chaotic effect and as such violates the Commerce Clause.

The plain language of the statute reveals that one may incur liability under SB 6251 for displaying an advertisement that does not originate in, reach, or pass through Washington. This undoubtedly will lead to SB 6251 reaching conduct that takes place wholly outside of the state. The state attempts to downplay the economic impact of SB 6251 by arguing that the "acts [a defendant] advertise[s] *must occur* in Washington for SB 6251 to apply." Opp'n Mot. Prelim. Inj. 35-36 (emphasis added); *see also id.* at 36 ("SB 6251 affects commerce that is directed at Washington residents and *must always occur in Washington*" (emphasis added)). However, this narrow interpretation of the statute goes against its plain language. Nowhere does SB 6251 require that *any* sex act must occur *at all*, much less a sex act within the state of Washington, for liability to attach. Rather, SB 6251 broadly prohibits the act of disseminating a specific category of advertisement, even if the *dissemination* occurs completely outside Washington, and has no accompanying conduct in-state.

For example, if a person in New York were to post on a Wordpress blog an advertisement for a commercial sex act set to take place in Washington, any person who accidentally linked to the page could potentially be liable, as would Wordpress, Google, and even a New York Internet service provider, for "indirectly" causing the message to be disseminated. The page may never be seen by a Washington resident (or in fact, by anyone), yet liability may be triggered for a huge number of entities, none of which reside within Washington. This would, to put it mildly,

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impose a significant burden on interstate commerce and is therefore precisely the kind of regulation that the Constitution forbids states to undertake themselves.

Defendants go on to argue that the "knowingly" requirement of the statute would prevent an entity such as Wordpress from being held liable under such a hypothetical. Even if the scienter requirement applies to the "causes directly or indirectly" phrase in SB 6251(1) – an interpretation which is certainly not immediately apparent from the plain language of the statute – Wordpress may still be liable *upon receiving notice* of the offending page. *See infra* p. 7. As a practical consequence, any number of entities along the distribution chain for online content would feel pressure to pre-screen content prior to publication in order to "ascertain the true age of the minor depicted in the advertisement." SB 6251(2). This would constitute an immense burden shift for business and would inevitably limit speech outlets due to administrative and compliance costs alone. This is an inappropriate obligation for any state to impose across its borders to any single state, yet SB 6251 affects the entire reach of the World Wide Web.

E. An Injunction Against the Enforcement of SB 6251 Is Necessary to Prevent Plaintiffs, Others Similarly Situated, and the Public From Suffering Irreparable Harm.

If the Court does not enjoin enforcement of SB 6251, providers of interactive computer services – including the Internet Archive – and the public will suffer irreparable harm. "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' for the purposes of the issuance of a preliminary injunction." *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998) (holding that a civil liberties organization that had demonstrated probable success on the merits of its First Amendment overbreadth claim had thereby also demonstrated irreparable harm). Moreover,

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Defendants have offered no evidence to dispute that the harm suffered by the Internet Archive and other online service providers in the absence of preliminary relief is greater than the harm suffered by Washington state if SB 6251 is enjoined. The state of Washington continues to have numerous laws at its disposal to combat child trafficking that do not threaten the liberty interests of those who provide access to information.

The Ninth Circuit, furthermore, considers preventing First Amendment restrictions a significant public interest. *See Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir. 2012) (holding that the public interest in upholding free speech rights outweighed the continued enforcement of a Washington statute); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128-29 (9th Cir. 2011) (holding that the public interest in upholding free speech rights outweighed the continued enforcement of a municipal ordinance). Because SB 6251 threatens to burden large swaths of constitutionally and statutorily protected speech and the underlying platforms for that speech, an injunction should be granted to prevent the risk of harm that is too great and counter to the public interest.

III. CONCLUSION

The Internet Archive has again established that: (1) it is likely to succeed on the merits because SB 6251 is both preempted by federal statute and otherwise unconstitutional; (2) it will suffer irreparable harm if SB 6251 is not enjoined; (3) the balance of equities is in favor of granting preliminary relief; and (4) the public interest favors protecting First Amendment freedoms. All of the required elements for a preliminary injunction are met. Accordingly, the Internet Archive respectfully requests that the motion for a preliminary injunction be granted, enjoining enforcement of SB 6251.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Dated: July 18, 2012

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