

June 5, 2023

RE: Criminal Justice Organizations Urge “No” Vote on Cooper Davis Act

The Honorable Dick Durbin
Chair, Senate Judiciary Committee
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Lindsey Graham
Ranking Member, Senate Judiciary Committee
211 Russell Senate Office Building
Washington, D.C. 20510

Dear Chair Durbin, Ranking Member Graham, and Members of the Senate Judiciary Committee:

The below signed criminal justice and civil rights advocacy groups urge you to vote “no” on S. 1080, the Cooper Davis Act. The bill purports to address the sale of methamphetamine, fentanyl, and “counterfeit substances” by coopting online services to report the alleged or suspected creation, manufacture, or distribution of these substances — or possession with intent to create, manufacture, or distribute them.¹ Rather than meaningfully addressing the public health crisis caused by such substances, this bill would instead incentivize online services to search through user content and effectively deputize them as agents of the Drug Enforcement Agency (DEA),² undermining the Fourth Amendment and the Stored Communications Act, likely with disproportionate effects on people of color, LGBTQ+ people, and other marginalized communities.

This bill circumvents constitutional and statutory privacy protections and falls short of its intended purpose. The bill requires online services³ — including social media, email, and internet service providers⁴ — to identify “facts or circumstances” indicating an “apparent violation involving” “the creation, manufacturing, distributing, dispensing, or possession with intent to manufacture, distribute, or dispense” fentanyl, methamphetamine, or a counterfeit substance and report them to the DEA.⁵ Not only does the bill *require* reporting for “actual knowledge” of those “facts and circumstances,” but it *permits* reporting on a mere “reasonable belief” that an “apparent” violation has occurred.⁶ Failure to perform the required reporting can result in criminal and civil fines amounting to hundreds of thousands of dollars.⁷ The bill goes

¹ Cooper Davis Act, S. 1080, 118th Cong., sec. 2(a)(1), § 521(b)(1), (3) (ELL23280).

² Cooper Davis Act, S. 1080, 118th Cong., sec. 2(a)(1), § 521(b)(1), (3) (ELL23280).

³ The bill applies to “providers,” encompassing “electronic communication services” and “remote computing services” as defined under the Electronic Communications Privacy Act. Cooper Davis Act, S. 1080, 118th Cong., sec. 2(a)(1), § 521(a) (ELL23280) (citing 18 U.S.C. §§ 2510, 2711).

⁴ In re iPhone Application Litigation, 844 F.Supp.2d 1040, 1057 (N.D. Cal. 2012) (“[T]he computer systems of an e-mail provider, a bulletin board system, or an ISP are uncontroversial examples of facilities that provide electronic communications services to multiple users. . . .”).

⁵ Cooper Davis Act, S. 1080, 118th Cong., sec. 2(a)(1), § 521(b)(3) (ELL23280).

⁶ Cooper Davis Act, S. 1080, 118th Cong., sec. 2(a)(1), § 521(b)(2) (ELL23280).

⁷ Cooper Davis Act, S. 1080, 118th Cong., sec. 2(a)(1), § 521(f)(1)–(2) (ELL23280).

further in encouraging companies to turn over identifying information including screen names, photos, IP addresses, geolocation information, and even the content of communications to the DEA and potentially other law enforcement agencies.⁸ The bill also requires that the provider retain the information for later access by law enforcement⁹ and prohibits notice to the user.¹⁰

Rather than addressing a pressing health crisis, this bill does an end run around the Fourth Amendment¹¹ by requesting user information from online services in the form of reporting and voluntary disclosures. This puts online services in the position to decide what appears to be a sale of or intent to sell illicit substances and then decide how much to report to the DEA. The bill's "reasonable belief" standard is not clearly defined and falls far short of the probable cause standard demanded by the Fourth Amendment¹² that law enforcement generally has to meet before obtaining a warrant and engaging in a search. The bill also expressly undermines¹³ the already limited warrant or subpoena and notice requirements of the Stored Communications Act.¹⁴

The criminal legal system has always enforced drug crimes disproportionately in Black and Brown communities. This bill will result in the same disparate outcomes. Online services are not qualified to determine a user's intent when they post photos, videos, or other communications to online services. People on online services often post things that are untrue or exaggerated in order to promote a persona — and as the DEA has observed, illegal activity is often transacted in coded communication¹⁵ that is not easily decipherable. The inevitable result will be users having their personal information and private communications shared with the DEA by online services that lack the expertise and cultural competence to determine users' intent — a fact demonstrated by the disproportionate impact of online services' content moderation efforts on Black and transgender people.¹⁶ Whether the determinations are made by algorithms or humans, disparate outcomes will mirror those in the larger criminal legal system.

Opioid addiction continues to be a pressing health concern that has claimed entirely too many lives; however, this bill does not properly address the problem. It instead creates a new problem by asking the employees of online services or even algorithms to make determinations on the meaning and intent of people's social media posts and private messages. Online services are not qualified to make judgements on who is selling unlawful substances. Even law enforcement officers with years of experience are prone to misread such actions and intentions, and social media companies should not be asked to undertake the same highly problematic task. Thank you for your consideration. We urge you to vote no on this bill.

⁸ Cooper Davis Act, S. 1080, 118th Cong., sec. 2(a)(1), § 521(c)(1)(A)–(E) (ELL23280).

⁹ Cooper Davis Act, S. 1080, 118th Cong., sec. 2(a)(1), § 521(i)(A) (ELL23280).

¹⁰ Cooper Davis Act, S. 1080, 118th Cong., sec. 2(a)(1), § 521(i)(B) (ELL23280).

¹¹ *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (“The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause.”).

¹² *Id.*

¹³ Cooper Davis Act, S. 1080, 118th Cong., sec. 2(b) (ELL23280).

¹⁴ 18 U.S.C. §§ 2702–03.

¹⁵ Drug Enforcement Administration, *EMOJI DRUG CODE DECODED* (2021), available at <https://www.dea.gov/sites/default/files/2021-12/Emoji%20Decoded.pdf>

¹⁶ Oliver Haimson et al., *Disproportionate Removals and Differing Content Moderation Experiences for Conservative, Transgender, and Black Social Media Users: Marginalization and Moderation Gray Areas*, Proceedings of the ACM (2021), <https://dl.acm.org/doi/abs/10.1145/3479610>.

For questions please contact Jumana Musa, National Association of Criminal Defense Lawyers, at jmusa@nacdl.org or Cynthia Roseberry, American Civil Liberties Union, at croseberry@aclu.org.

Sincerely,

Advocacy For Principled Action In Government
American Civil Liberties Union
Center for Democracy & Technology
Defending Rights & Dissent
Due Process Institute
Electronic Frontier Foundation
Electronic Privacy Information Center
Government Information Watch
Innocence Project
Justice Strategies
The Leadership Conference on Civil and Human Rights
NAACP Legal Defense & Educational Fund, Inc.
National Association of Criminal Defense Lawyers
Organization for Identity & Cultural Development (OICD)
Restore The Fourth
Surveillance Technology Oversight Project