

July 1, 2020

Re: Vote “NO” on the Manager’s Amendment to the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (EARN IT Act)

Dear Senators,

The American Civil Liberties Union, on behalf of its members, urges you to vote “NO” on the amended version of the S. 3398, the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (EARN IT Act).¹ While there are significant changes made in the amended version, these changes do not alleviate the concerns that the EARN IT Act will undermine the privacy of every single American, stifle our ability to communicate freely online, and harm LGBTQ people, sex workers, and protesters.



We urge you to vote “NO” on passage of the EARN IT Act out of the Senate Judiciary Committee. The ACLU will score this vote.

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Susan Herman
President

Anthony Romero
Executive Director

Ronald Newman
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Director*

Since our previous letter urging you to vote against the EARN IT Act,² the sponsors of the bill have put forth a manager’s amendment making changes to the bill. Under the changes, the best practices created by the National Commission on Child Sexual Exploitation would be advisory. However, compliance with them would not trigger immunity under Section 230 of the Communications Decency Act, a key federal provision providing that online services shall not be liable as publishers for the illegal speech of their users, except in certain narrow circumstances, would be amended to eliminate interactive computer service providers’ liability shield in federal civil claims regarding the production, distribution, solicitation, and reporting of child sexual abuse material (CSAM). The amended EARN IT Act would also abrogate Section 230’s shield for all state criminal and civil laws “regarding the advertising, promotion, presentation, distribution, or solicitation” of CSAM, as that term is defined by federal law.

As we said in our earlier letter, the EARN IT Act would be even more dangerous than SESTA/FOSTA, which caused the disproportionate censorship of the LGBTQ community and placed the health and safety of sex workers at risk. The amendments do not change that assessment of the EARN IT Act’s harms to the LGBTQ and sex worker communities. The changes also would not alleviate the dangers to protesters using encrypted communications to organize.

By allowing states to set their own standards for platform liability for CSAM, the amended version allows states to create inappropriate

standards by which platform responsibility for user-generated content should be judged. Reckless or negligence standards, which may already be in effect for publication in certain state laws, will increase the likelihood that platforms over-censor speech and undermine or weaken encryption standards in order to avoid legal risk. Additionally, even when state laws employ a “knowingly” standard with respect to liability for distributing CSAM, courts interpret mens rea standards in different ways which creates legal uncertainty that will lead to censorship and potential harms to strong encryption standards. That means the EARN IT Act, despite significant changes, would continue to harm the privacy and online expression of every person and would continue to disproportionately harm LGBTQ communities, protesters, and other marginalized communities. And for sex workers, who are among our most vulnerable communities, the impacts would be even more dire and could place their lives at risk. This is unacceptable.

The Amended EARN IT Act Harms Our Privacy and Security.

The amended EARN IT Act doesn’t solve the encryption problem – it just shifts it to a different place. Under the amended EARN IT Act, platforms would be subject to state criminal and civil liability for negligent or reckless publishing of CSAM. These legal standards could force platforms to undermine or weaken their own encryption and privacy practices in order to avoid legal liability because plaintiffs could argue that end-to-end encryption, itself, is reckless or negligent conduct. Claimants could argue that platforms deploying strong encryption recklessly or negligently protected against accessing contents of communications although the platform was reasonably aware that its systems were used to distribute illegal CSAM. In addition, claimants could argue that the providers have liability for failing to take actions – like content filtering or adoption of the UK’s “ghost proposal” that would allow law enforcement to eavesdrop on private communications – which functionally undermine the ability to offer strong cybersecurity.

Such liability claims could be bolstered if the advisory committee’s best practices recommend that platforms create encryption backdoors or otherwise take steps to weaken the encryption of their services. Given that Attorney General Barr has identified end-to-end encryption as one of the primary obstacles to combating CSAM and other crimes, and the fact that he or his designee will head the commission, there remains a significant risk that the commission’s best practices may recommend against strong encryption practices.

Amending the law in this manner would also have a disproportionately negative impact on small businesses. Large corporations would likely have the expertise and resources to defend against a suit claiming they are liable under the new standards the EARN IT Act permits states to employ. Small businesses, on the other hand, would likely lack such

¹ S. 3398, 116th Cong., 2d Sess. (2020). We further note that we join at least twenty-five other civil society groups in opposing this bill. See Letter to Senator Lindsey Graham and Senator Richard Blumenthal from the Open Technology Institute & Twenty-Four Organizations Opposing the EARN IT Act (Mar. 6, 2020), https://newamericadotorg.s3.amazonaws.com/documents/Coalition_letter_opposing_EARN_IT_3-6-20.pdf.

² Letter from the American Civil Liberties Union to the Members of the Senate Judiciary Committee (June 29, 2020), <https://www.aclu.org/letter/aclu-letter-opposition-earn-it-act-markup>.

capacity. Thus, they would potentially have to choose between the risk of a lawsuit or a loss of competitiveness stemming from adoption of practices that decrease the cybersecurity of their products. For those reasons, the amended EARN IT Act would continue to place the privacy of our communications at risk

The Amended EARN IT Act Is a Tool for Censorship.

The Supreme Court has long recognized that the Constitution forbids laws having the collateral effect of disproportionately censoring legal speech.³ By allowing states to lower the standards for liability even further than SESTA/FOSTA, the amended EARN IT Act would create just such an impermissible collateral effect and presents even graver risks to online expression than SESTA/FOSTA, especially for the LGBTQ and sex worker communities.

As we said in our previous letter, the aftermath of the passage of SESTA/FOSTA,⁴ which eliminated Section 230's liability shield for content related to sex trafficking, makes the overbroad implications for online speech clear.⁵ Even if the speech covered by the law could be restricted without raising constitutional concern, the content moderation practices the companies will deploy to avoid liability risk will sweep far more broadly than the illegal content.⁶ SESTA/FOSTA was intended to protect people engaged in sex work from being trafficked against their will. It has, instead, sent them back out into the streets and made them less safe.⁷ Moreover, the platforms' content moderation practices have disproportionately silenced the LGBTQ community, making it more difficult for them to come together and create community online.⁸

Under the amended EARN IT Act, Section 230's shield for all state criminal and civil laws "regarding the advertising, promotion, presentation, distribution, or solicitation" of CSAM, as that term is defined by federal law, would be eliminated, permitting states to assign liability for negligence or recklessness. In other words, states would be able to go even further than SESTA/FOSTA in lowering the standards for liability for platforms.

³ See *Smith v. California*, 361 U.S. 147 (1959) (striking down a city ordinance which held book sellers criminally liable for any obscene content sold, regardless whether the bookseller had notice of the content).

⁴ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115-164 (2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/1865>.

⁵ Ian S. Thompson, *Congress Proposes to Fight Online Sex Trafficking by Harming Sex Workers*, ACLU (Mar. 16, 2018), <https://www.aclu.org/blog/criminal-law-reform/congress-proposes-fight-online-trafficking-harming-sex-workers>.

⁶ Daniel Villareal, *SESTA/FOSTA Is Turning the Web into a G-Rated Minefield*, LGBTQNATION (Mar. 16, 2019), <https://www.lgbtqnation.com/2019/03/sesta-fosta-turning-web-g-rated-minefield-dan-savage-pals-know-2-ways-destroy/>; Michael Aaron, *Why FOSTA/SESTA Harms Those it Supposedly Serves*, PSYCHOLOGY TODAY (Jul. 17, 2018), <https://www.psychologytoday.com/us/blog/standard-deviations/201807/why-fostasesta-harms-those-it-supposedly-serves>.

⁷ Makena Kelly, *Democrats Want Data on How Sex Workers Were Hurt by Online Crackdown*, THE VERGE (Dec. 17, 2019), <https://www.theverge.com/2019/12/17/21026787/sesta-fosta-congress-study-hhs-sex-work-ro-khanna-elizabeth-warren-ron-wyden>.

⁸ Alexander Cheeves, *The Dangerous Trend of LGBTQ Censorship on the Internet*, OUT MAGAZINE (Dec. 6, 2018), <https://www.out.com/out-exclusives/2018/12/06/dangerous-trend-lgbtq-censorship-internet>.

Negligence and recklessness standards will undoubtedly result in platforms' disproportionately censoring far more than CSAM.

Under the amended bill, states would be empowered to criminalize not only the transmission of illegal CSAM but also "solicitation" and "promotion" of these images. These prohibitions would extend beyond the illegal CSAM itself to encompass a broader and less clearly defined category of speech. In the wake of SESTA/FOSTA, which created similar liability standards for online platforms, entire web sites that provided forums for sex workers to connect, share critical health and safety information, and build community disappeared after SESTA/FOSTA. Google and other remote storage sites began to scan for sex-related content and remove it from their systems. The censorship of sex-related speech also disproportionately harmed the LGBTQ community. The same and worse would be true of EARN IT's amended language, as platforms increase their censorship practices and remove wide swaths of content to try to avoid amorphous and opaque liability standards.

The EARN IT Act's Best Practices Remain Problematic

The amended EARN IT Act still would create a National Commission on Online Child Sexual Exploitation Prevention and it would put the Attorney General or his representative at the head of it. The amended version decouples the Commission from any changes to Section 230, but the changes basically stop there and that remains a concern for online privacy and expression. The Commission would still have a broad mandate to write best practices for online platforms to "prevent, reduce, and respond to online sexual exploitation of children, including the enticement, grooming, sex trafficking, and sexual abuse of children and proliferation of online child sexual abuse material." The Commission still would not include representation from the LGBT, sex worker, or other marginalized communities, ensuring the concerns of impacted communities would not be considered in the development of the best practices.

Consequently, there remains a substantial risk that the Commission could recommend best practices that would encourage actions that break encryption and result in over-censorship of online expression, as we expressed in our previous letter. Furthermore, though the Commission's recommendations would no longer have the force of law, the circumstances of their development and the involvement of government officials like the Attorney General in their creation and approval risk disproportionate emphasis on the best practices as the legal standard by which platforms' practices with respect to content moderation will be judged.

Any Commission to create best practices for censorship of content should at a minimum ensure representation of the interests of impacted communities in the process. The EARN IT Act's Commission continues to fail this basic test and the results could be catastrophic for online expression and privacy.

Additional Concerns

With less than 48 hours to review the significant changes to the bill in advance of the markup, every possible implication of the changes made cannot be fully assessed. There

may be other civil liberties concerns raised by the bill, which we may address in future analysis.

The amended EARN IT Act seeks to accomplish the legitimate and worthy goal of protecting children from real dangers and makes some positive changes to the introduced version of the bill. However, it is not the solution to the problems it claims to address. Instead, the amended EARN IT Act will undermine privacy in ways that harm protesters at a time when Congress should be doing everything in its power to ensure their protection. The amended EARN IT Act will also disproportionately harm the LGBTQ and sex worker communities by over-censoring their speech and undermining the private communications services that are vital to their health, safety and well-being. We urge you to vote NO on passage of the amended EARN IT Act out of the Senate Judiciary Committee. Please contact Kate Ruane, kruane@aclu.org, (202) 675.2336, Neema Singh Guliani, nguliani@aclu.org, or Ian Thompson, ithompson@aclu.org, with any questions.

Sincerely,



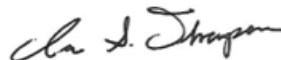
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