

August 14, 2020

Re: Vote “NO” on 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 object to unanimous consent to consider the reported version of S. 3398, the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (EARN IT Act)¹ on the Senate floor and to vote “NO” on the current version. While the Senate Judiciary Committee made significant changes to the bill during markup, many of which were positive, these changes do not alleviate the concerns that the EARN IT Act will stifle our ability to communicate freely online, harm LGBTQ people, sex workers, and protesters, and disincentivize strong encryption practices.



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Supporters of the EARN IT Act have the worthy goal of stopping the exploitation of children online. Unfortunately, the bill is not the solution to this serious problem. The bill fails to adopt numerous reforms advocated by experts, including investing in prevention, reallocating existing enforcement resources, or expanding services and assistance to victims. Instead, the bill makes changes to existing law that threaten free expression and cybersecurity, and will likely have a disproportionate impact on already vulnerable communities.

This is our fourth letter opposing the EARN IT Act.² After each letter, the sponsors change the bill slightly, but they have yet to truly address the multitude of serious concerns with the bill. As reported out of the Senate Judiciary Committee, the bill creates a National Commission on Child Sexual Exploitation, headed by the Attorney General, and comprised of other law enforcement, prosecutors, victims’ advocates, civil liberties experts, and technology experts. The Commission would be charged with designing best practices for online platforms to combat child sexual exploitation. The EARN IT Act would also amend 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. The EARN IT Act would eliminate this liability shield in federal civil claims regarding the production, distribution, solicitation, and reporting of child sexual abuse material (CSAM). The 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.

These provisions amending Section 230 create legal uncertainty that will lead to censorship and potentially disincentivize strong cybersecurity practices. The bill also continues 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. By eliminating online communities, methods for sharing information, and maintaining health and safety, the EARN IT Act could place their lives at risk. This is unacceptable.

The Amended EARN IT Act Will Encourage Censorship.

To understand the likely impact of the EARN IT Act on online expression, we must look to the aftermath of SESTA/FOSTA. SESTA/FOSTA³ eliminated Section 230's liability shield for content related to sex trafficking, and its supporters argued it would protect sex trafficking victims. However, rather than aid sex trafficking victims, SESTA/FOSTA caused the disproportionate censorship of the LGBTQ community online and, by eliminating many online spaces for sex workers, placed the health and safety of sex workers at risk.⁴

The EARN IT Act would be even more dangerous than SESTA/FOSTA.⁵

The Supreme Court has long recognized that the Constitution forbids laws having the collateral effect of disproportionately censoring legal speech.⁶ By allowing states to lower

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 American Civil Liberties Union to the Members of the Senate Judiciary Committee (Jul. 1, 2020), <https://www.aclu.org/letter/aclu-letter-opposition-earn-it-act-managers-amendment>; 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>; Letter from the American Civil Liberties Union to the Members of the Senate Judiciary Committee (Mar. 9, 2020), <https://www.aclu.org/letter/aclu-opposition-s-3398-earn-it-act>.

³ 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>.

⁴ 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>.

⁵ Jared Trujillo, *Vulnerable LGBTQ+ Sex Workers Targeted Again by Politicians*, The Advocate (July 1, 2020), <https://www.advocate.com/commentary/2020/7/01/vulnerable-lgbtq-sex-workers-targeted-again-politicians>.

⁶ 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).

the standards for platform 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. Reckless or negligence standards, which may already be in effect under certain state laws, will increase the likelihood that platforms over-censor speech 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 also encourage censorship. This is because 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.⁷

After SESTA/FOSTA, platforms censored a great deal of legal sex-related speech, disproportionately harming the LGBTQ community, and the speech of sex workers, generally, harming their ability to organize and engage online. The EARN IT Act will incentivize similar censorship efforts by platforms. Platforms will again ban and censor sex-related speech, especially if it relates to youth. These sex-related speech censorship regimes are particularly harmful to LGBTQ communities and to sex worker communities because their advocacy often discusses or relates to matters involving sex and sex education. Furthermore, censoring the online speech of the LGBTQ community also harms LGBTQ youth, who often first explore their identities by seeking information and building community online, before engaging with their identities offline, especially if their friends or family may not accept who they are.

CSAM and child sexual exploitation online are scourges that we must address, but our solutions to that problem should not – and need not – place other marginalized communities, like the LGBT and sex worker communities, at risk.

Despite Positive Changes, The EARN IT Act Could Disincentivize Strong Encryption Practices.

The EARN IT Act threatens to undermine and disincentivize platforms from providing strong encryption. The Senate Judiciary Committee adopted an amendment to EARN IT specifying that providers will not be responsible for violating CSAM laws “because” they offer encrypted services. While we support the goal of the amendment, it fails to fully resolve two significant encryption concerns with the bill.

One, as drafted, the bill invites repeated and protracted litigation about whether a provider’s decision to provide encrypted services was the entire cause, or just a contributing factor, in its failure to adopt certain practices to combat CSAM. The bill would effectively require companies to defend their cybersecurity practices in court, requiring judges to make

⁷ 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>.

technical findings about whether adoption of certain measures to combat CSAM would indeed have weakened cybersecurity or encryption. For many companies, the lack of clarity and fear of liability will likely disincentivize them from offering strong encryption, at a time when we should be doing the opposite, particularly considering the role that encrypted communications have played for protesters participating in recent calls to end systemically violent and racist policing in this country.

Two, given its makeup, there is a significant risk that the Commission will recommend best practices that may interfere with the provision of strong cybersecurity. The Attorney General is on the record supporting encryption backdoors and has identified encryption as a significant barrier in fighting crime. Thus, there is a risk that the Commission will recommend best practices that may have the effect of discouraging providers from adopting strong cybersecurity practices. Even more, given the Commission's Congressional mandate, and the role of the Attorney General in developing the best practices, reviewing courts may look to those best practice to determine whether a platform has acted recklessly or negligently.

The EARN IT Act's Commission is Flawed

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 reported version decouples the Commission from any changes to Section 230, but the changes from previous iterations of the EARN IT Act 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 undermine encryption and result in over-censorship of online expression. Furthermore, though the Commission's recommendations would not 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.

Supporters of the EARN IT Act seek to accomplish the legitimate and worthy goal of protecting children from real dangers and some positive changes to the introduced version of the bill have been made. However, it is not the solution to the problems it claims to address. Instead, the EARN IT Act will disproportionately harm the LGBTQ and sex worker communities by over-censoring their speech. It also risks undermining the security

of encrypted services that are vital to health, safety and well-being of protesters, sex workers, the LGBTQ community, and the public. We urge you to vote NO on passage of the EARN IT Act. 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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