March 9, 2020

Via: Electronic Mail

Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: EARN IT Act (S. 3398) Violates the First Amendment

Dear Chairman Graham, Ranking Member Feinstein, and Members of the Committee:

The Electronic Frontier Foundation (EFF) writes to express its concern that the EARN IT Act (S. 3398) violates the First Amendment in several ways and to urge the Senate Judiciary Committee not to advance the bill.

EFF is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over 30,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

The core problem is this: Although the EARN IT Act attempts to protect children from online sexual exploitation—an important and laudable goal—it does so by impermissibly regulating online speech. The Act forces online service providers to make an impossible choice: cave to government pressure regarding their editorial decisions or face significant new criminal and civil liability.

In essence, the Act seeks to deputize online service providers to police user-generated content that reflects the sexual exploitation of children (including the enticement, grooming, and sex trafficking of children) or is itself child sexual abuse material (CSAM or child pornography).[1]

First, the Act authorizes the creation of a commission that will draft "best practices" to "prevent, reduce, and respond" to such content.[2] If the "best practices" are approved by the attorney general, representatives from the Department of Homeland Security and Federal Trade Commission, and Congress, online service providers must comply with them in order to preserve certain protections from criminal and civil liability

[1] Sec. 4(a)(1)(A); Sec. 7(a) ("It is the sense of Congress that the term 'child sexual abuse material' has the same legal meaning as the term 'child pornography'….").
[2] Sec. 4(a)(1)(A).

for user-generated content under Section 230 (47 U.S.C. § 230).[3] For many online service providers, Section 230 is essential to their survival as a business— noncompliance will not be an option.

Second, the Act amends 18 U.S.C. § 2255 to allow a civil cause of action against online service providers if they are "reckless" in enabling the distribution of visual depictions of child sexual abuse.[4]

1. The EARN IT Act Infringes on Editorial Activity Protected by the First Amendment.

Child pornography and content that represents a criminal transaction, such as an advertisement reflecting the sex trafficking of a minor, is not protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747 (1982); *Osborne v. Ohio,* 495 U.S. 103 (1990); *United States v. Williams*, 553 U.S. 285, 297 (2008) ("offers to engage in illegal transactions are categorically excluded from First Amendment protection").

But the EARN IT Act reaches far beyond this unlawful content, or the users who create and distribute it, to regulate how online service providers *operate* their platforms and *manage* user-generated content.[5] Thus the scope of the "best practices" amounts to an impermissible regulation of editorial activity protected by the First Amendment. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper … constitute the exercise of editorial control and judgment.").[6]

More specifically, the Act gives a government commission broad discretion to require online service providers to behave in particular ways upon pain of losing criminal and civil immunity under Section 230. It is hard to overstate how far-reaching and speech-restricting this regime would be. It would be akin to creating a government

[3] Sec. 6(a).
[4] Sec. 6(b).
[5] *See generally* Sec. 4(a)(3). The "best practices," for example, will govern how online service providers must prevent, identify, disrupt, and report child sexual exploitation; how they must work with "non-profit organizations and other providers of interactive computer services to preserve, remove from view, and report child sexual exploitation;" how they must implement "a standard rating and categorization system to identify the type and severity of child sexual abuse material;" and how they must employ "age rating and age gating systems to reduce child sexual exploitation." Sec. 4(a)(3)(A), (B), (E), and (I).
[6] *See also La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991-22 (S.D. Tex. 2017) ("online publishers have a First Amendment right to distribute others' speech and exercise editorial control on their platforms"); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 438-39 (S.D.N.Y. 2014) (when online platforms "select and arrange others' materials, and add the all-important ordering that causes some materials to be displayed first and others last, they are engaging in fully protected First Amendment expression—the presentation of an edited compilation of speech generated by other persons") (internal quotations omitted).

commission that would codify best practices for news media, and increasing criminal and civil liability on any media that failed to meet them. Such editorial interference would be anathema to the First Amendment. Yet that is precisely what the EARN IT Act imposes on online service providers that host user-generated content.

Additionally, amending 18 U.S.C. § 2255 (the civil cause of action for child victims of various sexual exploitation crimes) to reach online service providers that "recklessly" enable the distribution of child pornography also impinges on platforms' editorial freedom. Online service providers would be exposed to liability under Section 2255 if they either failed to certify their compliance with the "best practices" or were unable to show that they had implemented "reasonable measures," thereby losing Section 230 immunity.[7] This amendment to Section 2255 could put at risk, for example, a social media company that fails to scan every photo before it is uploaded to the platform—a decision that a jury may consider "reckless" but nonetheless is a decision about how to operate its platform and manage user-generated content.[8]

2. The EARN IT Act Fails Strict Scrutiny Under the First Amendment.

The EARN IT Act is a facially content-based regulation of speech: it holds online service providers responsible for a particular kind of (admittedly abhorrent) speech by regulating the editorial choices these companies make regarding how they operate their platforms and manage user-generated content.[9] Because the Act targets speech based on both its "message" and "function," strict judicial scrutiny applies. *See Reed v. Town of Gilbert, Ariz.,* 135 S. Ct. 2218, 2227 (2015). This means that the bill's regulation of speech must (1) further a compelling governmental interest and (2) be narrowly tailored to achieve that interest. *Id*. at 2231.

Preventing the online sexual exploitation of children is indisputably a compelling governmental interest. However, this bill is not narrowly tailored to achieve that interest.

First, the codified "best practices" are likely to be vague and both over- and under-inclusive. That is, the "best practices" are likely to be insufficiently detailed, which will hinder compliance and help ensure that some content targeted by the Act remains online, while some lawful content is taken down.

Second, as mentioned above, the bill does not just directly target unlawful content, such as child pornography or child sex trafficking ads. Rather, the bill regulates *how* online service providers must operate their platforms and manage the speech they host. Thus, the bill will inevitably lead platforms to censor wholly lawful content, as companies will be incentivized to err on the side of overbroad before-the-fact content

[7] Sec. 6(a).
[8] Sec. 6(b).
[9] Sec. 4(a)(3).

screening and/or after-the-fact content takedowns in order to either comply with the "best practices" and preserve their Section 230 immunity, or at least avoid being deemed "reckless" under 18 U.S.C. § 2255.

This incentive to over-censor is exacerbated by the fact that the new exception to Section 230, to be codified in a new Section 230(e)(6), *preserves immunity* from legal actions brought by users who suffered harm due to their content being blocked or taken down.[10] Thus, online service providers would have every incentive to over-censor, and little incentive not to.

3. The EARN IT Act's Selective Removal of Section 230 Immunity Creates an Unconstitutional Condition.

The government may not condition the granting of a governmental privilege on the violation of First Amendment rights. *Elrod v. Burns*, 427 U.S. 347, 361 (1976). Congress has wide authority to modify or repeal Section 230 without violating the First Amendment. However, Congress may not condition Section 230 immunity on platforms complying with "best practices" that interfere with their First Amendment right to make editorial choices regarding whether and how to host user-generated content.

Additionally, the EARN IT Act's "best practices" will likely create a censorship regime that pressures online platforms to employ before-the-fact content screening that will prohibit speech from being posted in the first place.[11] This is because the Act requires the "best practices" to, among other things, "prevent" child sexual exploitation.[12] This would effectively be an unconstitutional prior restraint under the First Amendment for both platforms and their users, and will surely result in the censorship of wholly lawful speech. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68-72 (1963) (a state commission's efforts to blacklist particular books via threatening notices resulted in "a system of prior administrative restraints"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) ("a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional").

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[10] *See* Sec. 6(a). Section 230(c)(2)(A) states: "No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."
[11] Notwithstanding Section 9 of the Act, which states: "Nothing in this Act or the amendments made by this Act shall be construed to require a provider of an interactive computer service to search, screen, or scan for instances of online child sexual exploitation."
[12] Sec. 4(a)(1)(A).

The EARN IT Act (S. 3398) is fundamentally flawed and inconsistent with well-established First Amendment protections. The Senate Judiciary Committee should not advance the bill.

Sincerely,

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