

July 1, 2020

The Honorable Lindsey Graham
Chairman, Senate Committee on the Judiciary

The Honorable Dianne Feinstein
Ranking Member, Senate Committee on the Judiciary

Dear Chairman Graham and Ranking Member Feinstein:

The undersigned organizations write to state our strong opposition to the *Eliminating Abusive and Rampant Neglect of Interactive Technologies Act* (EARN IT Act). We fully support the goal of curbing child sexual exploitation online. However, the bill as currently drafted will not accomplish that goal, and is seriously flawed in several important respects. In particular, EARN IT could threaten the ability of companies to provide strong encryption services—which society relies upon now more than ever during the coronavirus pandemic—and would incentivize overbroad censorship of user expression, raising constitutional concerns. We urge Senators to abandon the EARN IT Act and consider alternative, more effective, approaches to the very real problem of child sexual exploitation on and offline.

The EARN IT Act is an ineffective and problematic approach to combating child sexual exploitation.

The EARN IT Act would establish a National Commission on Online Child Sexual Exploitation Prevention (“Commission”), tasked with developing “best practices” that online service providers must implement to detect child sexual abuse material (CSAM), under the threat of losing Section 230 protections. Despite its laudable objective to prevent, reduce, and respond to child sexual exploitation online, the bill threatens to eliminate strong encryption, raises several serious constitutional questions, and would fall far short of the goal of protecting children.

The EARN IT Act establishes the Commission to recommend best practices to address CSAM. The bill would give law enforcement an outsized role in developing the Commission’s recommendations, including law enforcement entities that are pressing proposals that would ban or weaken end-to-end encryption. By affording broad law enforcement control over the best practices the Commission would produce, the bill would provide these officials a mechanism for pressuring online service providers of all sizes to avoid offering strong device encryption or end-to-end encrypted messaging services, and instead create encryption backdoors for law enforcement. Further, the EARN IT Act sets up companies to lose Section 230 protections potentially just by offering encryption services. Weakened encryption and backdoors to encryption make everyone in society more vulnerable to privacy, cybersecurity, and other risks, leaving their data and communications susceptible to misuse by bad actors of many sorts. In contrast, strong

encryption allows individuals to freely express themselves, to exchange personal and other sensitive information, and to protect their data. For these reasons, encryption services are vital to the U.S. economy—large sectors including online banking, e-commerce, and R&D rely upon trusted encryption services. Especially now, as our society and economy are more reliant than ever upon secure online communications and commerce in the midst of the coronavirus pandemic, we cannot afford to weaken these crucial protections.

In addition, the EARN IT Act raises several constitutional concerns. First, numerous matters to be addressed in “best practices” are vaguely described without clear definitions, and could result in “best practices” that incentivize impermissible censorship of protected speech by service providers, running afoul of the First Amendment. The bill also raises serious questions under the Fourth Amendment, jeopardizing the admissibility of evidence in CSAM cases. The threat of increased legal liability and of losing Section 230 protections, would, in effect, make the “best practices” mandatory requirements. Therefore, in light of *United States v. Stevenson*¹ and *United States v. Ackerman*² a court could consider such private companies to be acting as “agents of the government.” Consequently, companies would have to comply with Fourth Amendment requirements, and failing to do so would create the risk that any evidence obtained pursuant to the EARN IT Act could be suppressed in court.

Finally, the EARN IT Act would not meaningfully address the problem of CSAM online, let alone the larger problem of child sexual exploitation. News media have recently reported how the relevant government agencies and the National Center for Missing and Exploited Children (NCMEC) suffer from a lack of funding, personnel, and resources that hinders their ability to deal with the tens of millions of online photos and videos reported yearly by service providers. Also, the press accounts have described how the Department of Justice (DOJ) has failed to comply with the oversight and accountability mandates it has under existing laws on this matter.³ However, instead of dealing with child sexual exploitation holistically, and supporting NCMEC and prosecutors to better enforce current laws, the EARN IT Act disregards the needs of government entities, placing responsibility on the online service providers to solve the CSAM *online* problem alone, which is not possible, and would not address the entire problem regardless.

To more meaningfully respond to the problem of child sexual exploitation, Congress should ensure that law enforcement resources are reallocated accordingly.

¹ “When a statute or regulation compels a private party to conduct a search, the private party acts as an agent of the government. Even when a search is not required by law, however, if a statute or regulation so strongly encourages a private party to conduct a search that the search is not primarily the result of private initiative, then the Fourth Amendment applies.” *United States v. Stevenson*, 727 F.3d 826, 829 (8th Cir. 2013).

² *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016).

³ Michael H. Keller and Gabriel J.X. Dance, “The Internet Is Overrun With Images of Child Sexual Abuse. What Went Wrong?,” *New York Times*, September 29, 2019, available at <https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html> (accessed June 22, 2020).

Through the appropriations process, Congress has the ability to direct how resources within law enforcement and other government entities are allocated, and could prioritize funding to combat child sexual exploitation. Especially now, as we are engaged in a national conversation about racial justice and addressing long-standing systemic inequality, Congress should take steps to re-direct funds from overbroad surveillance programs and other law enforcement efforts that threaten Black and Brown communities, to instead address the harms to children that EARN IT purports to mitigate.

Congress and the Administration should make it a priority to: prevent child sexual exploitation; enforce existing laws against CSAM and child sexual exploitation; and to assist and support victims of such abuse. Congress continually appropriates only half of the annual enforcement funds authorized by the PROTECT Our Children Act, and even then DOJ diverts a significant portion of that funding.⁴ As Congresswoman Wasserman Schultz has pointed out, DOJ has failed to comply with many important provisions of the PROTECT Our Children Act of 2008 and Child Protection Act of 2012, including creating and implementing a National Strategy for Child Exploitation, Prevention, and Interdiction every two years.⁵

Congress should also use its oversight authority to review the federal government's response to child sexual exploitation, including the failure to fulfill the requirements of these bills, and reassess how to ensure that law enforcement and NCMEC are better supported to carry out their responsibilities. Congress has a very near-term opportunity to redirect funding to NCMEC and relevant DOJ accounts, and could use this opportunity to divert funds away from law enforcement accounts that contribute to overpolicing and oversurveillance of Black and Brown communities, while better equipping these agencies to enforce child exploitation crimes.

We appreciate your efforts to take on the very difficult but important task of addressing child sexual abuse online. However, we urge Senators to abandon the EARN IT Act and consider more effective, holistic approaches that would more directly address the problems of child sexual exploitation on and offline. In particular, Congress should take steps to ensure reallocation of resources away from overpolicing of Black and Brown communities and instead to prioritize enforcement of these heinous crimes against children.

Sincerely,

⁴ Michael H. Keller and Gabriel J.X. Dance, "The Internet Is Overrun With Images of Child Sexual Abuse. What Went Wrong?," New York Times, September 29, 2019, available at <https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html> (accessed June 22, 2020).

⁵ Rep. Debbie Wasserman-Schultz, Letter to the Hon. William Barr and the Hon. Jeffrey Rosen, August 15, 2019, available at <https://int.nyt.com/data/documenthelper/1859-wasserman-schultz-letter-doj/7e13eb1633a8a721fa7e/optimized/full.pdf#page=1> (accessed June 22, 2020).

AccessNow

Advocacy for Principled Action in Government

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Defending Rights & Dissent

Demand Progress

Fight for the Future

Freedom House

National Coalition Against Censorship

New America's Open Technology Institute

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Restore The Fourth

S.T.O.P. – The Surveillance Technology Oversight Project

TechFreedom

cc: Senate Judiciary Committee Members