August 4, 2020

Dear Majority Leader McConnell:

Although we support Congress's goal of protecting children from cyber harms, Senator Graham and Senator Blumenthal's EARN IT Act will do more harm than good. As written, the bill risks undermining prosecutions of child predators, jeopardizing existing digital safeguards for children, eroding digital privacy protections, chilling free speech, and threatening encryption. To be sure, the Senate Judiciary Committee has tried to alleviate some of these concerns, especially in passing Senator Leahy's amendment. But significant problems remain. And, in some ways, they are even worse.

First, the bill risks courts excluding the most damning evidence against child predators from trial. Under current law, digital platforms must report CSAM once they know of its existence. But the EARN IT Act would allow states to hold platforms criminally and civilly liable under their laws, some of which have a lower mens rea requirement. In Illinois, for example, a platform could be held liable for *not* reasonably "inspecting" its users' content for CSAM. Because such laws encourage private searches--indeed, some even mandate them--they implicate the Fourth Amendment.

As the Supreme Court has explained, when the government "encourages" private searches, those searches must comply with the Fourth Amendment. For that reason, any CSAM discovered and reported could be held inadmissible under the Exclusionary Rule. And because platforms compete in all 50 states, it is not practical for them to apply different policies all over the country. The upshot: platforms will peg their policies to conform with the strictest state law, risking evidence even in states that use a knowing standard like the federal government's.

Second, this constitutional problem also jeopardizes the delicate balance struck under existing law. As mentioned, federal law already requires platforms to report known instances of CSAM. Although this comes close to crossing the Fourth Amendment's line, courts have upheld the law on the grounds that companies *voluntarily* search for CSAM. The reporting requirement, in other words, doesn't require the search; it merely tells platforms what to do after they've already found CSAM. Under this regime, platforms constitutionally report *millions* of pieces of suspect CSAM every year. But all these millions of pieces of evidence would be at risk if EARN IT passed.

Neither of these concerns is theoretical. Then-judge Neil Gorsuch, for example, wrote an opinion for the Tenth Circuit holding that NCMEC is a government agent and a government entity for Fourth Amendment purposes under *current* law. If EARN IT passes, constitutionalists like Justice Gorsuch would likely conclude the same.

Third, the bill would erode digital privacy protections. Because states would be allowed to enforce their laws, which use lower mens rea definitions than federal law does, businesses would be forced to search through and screen all user content that is not protected by Senator Leahy's amendment. Although this may sound good in theory--after all, it would likely unearth some CSAM--it would inflict far more harm on privacy than is necessary. For starters, the scope is limitless: everything from emails to cloud accounts holding personal photos to messages would require screening.

Making matters worse, the bill also covers "solicitation" of CSAM. Again, this is a good thing in theory: no one wants predators using online platforms to solicit child pornography, let alone from children themselves. But solicitation is a broad term and would encompass constitutionally protected speech. So although businesses use algorithms and other technology to flag photos of child pornography already, they would have to develop new technology or use humans to flag certain phrases or words in messages.

Broad terms like "solicitation" also implicate the First Amendment. As we saw with FOSTA/SESTA and its use of the terms "facilitation" and "promotion," solicitation will chill free speech. Businesses will, understandably, be risk-averse and even overly cautious about any user speech that *could* be construed as solicitation. Not only will this threaten constitutionally protected speech, it will also ensure the bill faces the same constitutional attacks as FOSTA/SESTA. For a law meant to protect children, it is simply not worth the risk of a court enjoining its enforcement or striking down its provisions.

Finally, the bill still threatens encryption. Senator Leahy's amendment protects some forms of encryption. But it's riddled with a large loophole: the amendment leaves companies vulnerable to prosecution or litigation in some states if they do not prescreen data or content *before* encrypting it. In other words, the amendment is like a TSA checkpoint in an airport: Once you and your belongings are cleared, you're good to go.

Digital platforms and online businesses take their responsibilities seriously. They neither want child predators to use their sites nor want children to be at risk. This is why they voluntarily search for CSAM and why they are always working to improve their technology and policies. And like Congress, they want to protect children, which is why they support legislation that addresses underlying problems like NCMEC's retention time period and DOJ underfunding and understaffing.

But EARN IT is not the solution. Indeed, its intent is good but its effects are too serious to ignore. We therefore ask that you not schedule a vote on EARN IT.

We appreciate the opportunity to share our concerns and are always available to discuss further.

Sincerely,

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