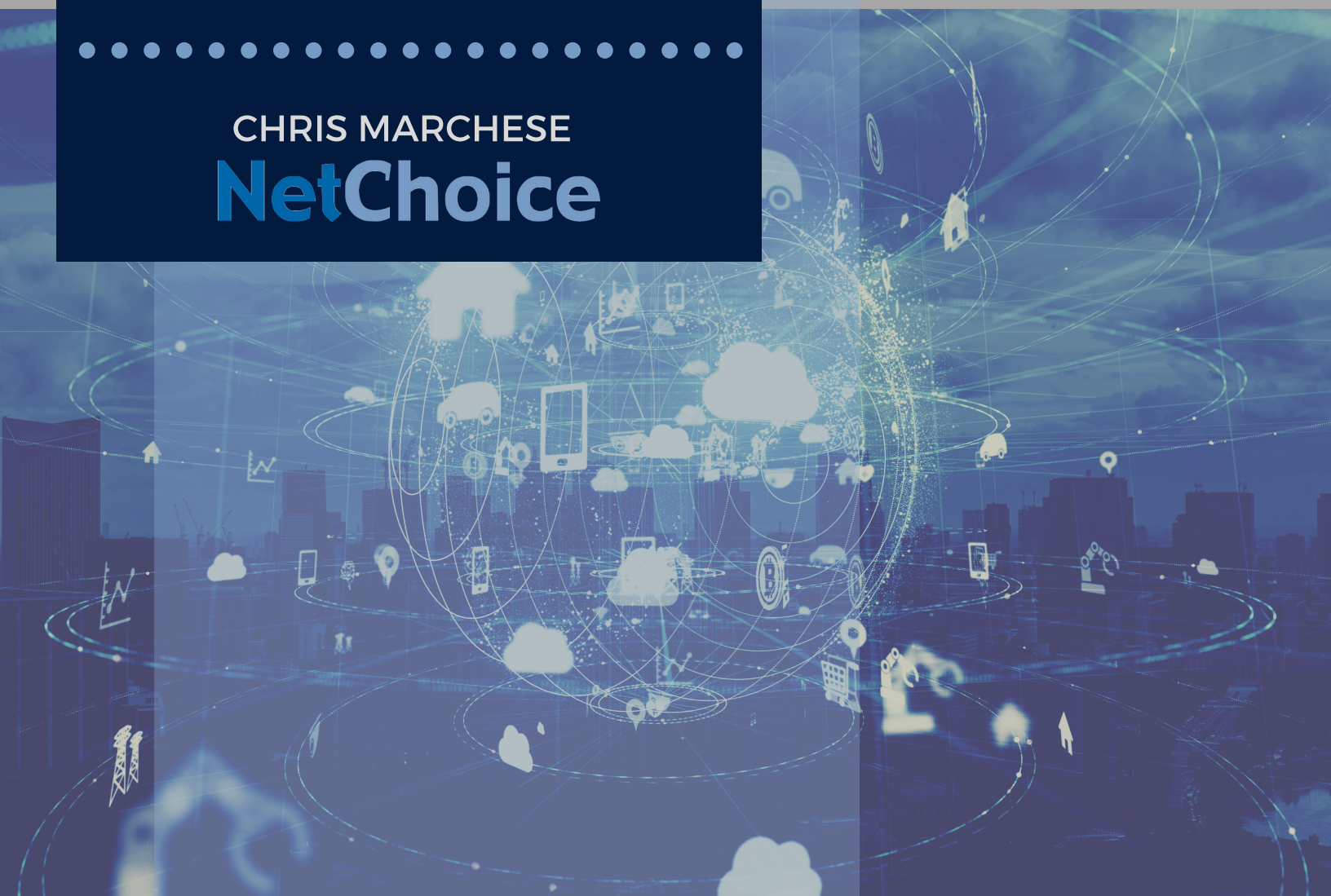


THE EARN IT ACT, S. 3398, COULD ACTUALLY HELP CHILD ABUSERS ESCAPE JUSTICE. THE ACT RISKS FOURTH AMENDMENT IMPLICATIONS THAT COULD LET DEFENDANTS GET THE MOST DAMNING EVIDENCE AGAINST THEM SUPPRESSED BY THE COURTS.

THE EARN IT ACT'S COLLISION COURSE WITH THE FOURTH AMENDMENT

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SUMMARY¹

Congress is properly focused on creating more powerful incentives for internet and social media platforms to assist law enforcement in combatting child exploitation. Understandably, lawmakers also wish to tie these incentives to results. With this calculus in mind, a bill self-descriptively dubbed EARN IT means to change existing federal law that protects internet platforms against liability for offenses committed by third parties on their systems. But the bill risks Fourth Amendment implications that could let defendants get the most damning evidence against them suppressed by the courts.

Under the bill, liability protection would be conditioned upon a platform's willingness to assist law enforcement by searching and seizing third-party content. The bill's operative provisions would tie platforms' continued eligibility for existing legal protections to their conforming with "best practices" that include "retaining child exploitation content and related user identification and location data," and providing reports that include "identity" or "location" data. Those reports would go to the National Center for Missing and Exploited Children (NCMEC), a congressionally chartered and funded clearinghouse for reports of child sexual exploitation. The bill would authorize both criminal and civil causes of action for failure to follow these desiderata.

The EARN IT Act risks Fourth Amendment implications that could let defendants get the most damning evidence against them suppressed by the courts.

¹ **NETCHOICE THANKS FORMER U.S. REPRESENTATIVE CHRIS COX, AUTHOR OF 47 U.S.C. § 230, FOR HIS ASSISTANCE ON THIS ARTICLE.**

Together, the strongly suggestive features of what the bill self-consciously labels “best practices” threaten to upset the precarious legal equipoise under which searches by internet platforms have so far avoided Fourth Amendment concerns.

Much is at stake in avoiding these Fourth Amendment issues. The consequences are serious: If Fourth Amendment rules were to be applied, millions of pieces of evidence currently provided voluntarily by internet platforms would be at risk of exclusion from criminal trials. The very evidence of child exploitation that the bill seeks to unearth could be permanently buried by criminal defendants, who would walk free.

Courts have repeatedly explained why warrantless private searches reported to NCMEC are not at the moment subject to Fourth Amendment constraints, such as exclusion of the evidence of child sexual exploitation from a criminal trial. The key is that the searches must be truly voluntary. They may neither be coerced nor encouraged by government. And indeed, current federal law does not require or authorize searches and reporting to NCMEC. But by providing significant new encouragements for government-desired searches, and by prescribing the preferred means for their accomplishment, the EARN IT bill could easily tip the balance.



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I. INTRODUCTION: WHEN THE FOURTH AMENDMENT APPLIES TO PRIVATE COMPANIES

The Fourth Amendment’s protections against unreasonable searches, including its warrant requirements and its draconian enforcement mechanism known as the Exclusionary Rule, apply only to the federal and state governments.² Private actors are not so constrained.³ But under a long line of Fourth Amendment case law including the U.S. Supreme Court’s 1989 decision in *Skinner v. Railway Lab. Execs. Ass’n*,⁴ warrantless searches and seizures by private companies, including internet platforms, have been scrutinized to determine if they are in reality conducted at the government’s behest.

When a government policy, regulatory program, statutory command, or system of benefits and penalties induces a search and seizure that the government desires, the fact that it was a private actor conducting the search no longer immunizes it from Fourth Amendment constraints.⁵ In *Skinner*, the Supreme Court held that a voluntary program of drug and alcohol testing for railroad employees, even though conducted by private railroads and not by the government, was nonetheless encouraged by the government because it was authorized in statute. Because the private searches and seizures — i.e., the drug and alcohol tests — were conducted in reliance on that statutory authorization, the Court concluded that they “cannot be viewed as private action outside the reach of the Fourth Amendment.”⁶

Even outside the government-agent context the Supreme Court has limited the government’s ability to collect evidence about defendants from private companies without a warrant. Only two years ago, in *Carpenter v. United States*,⁷ the U.S. Supreme Court held that the government’s review of location data inferred from an individual’s cell phone use constitutes a search for Fourth Amendment purposes. This is so even though the information the government obtained consisted solely of business records that were compiled by a private company, with the consent of the individual.⁸ Even though the data were not compiled for the purpose of aiding a government search, the Fourth Amendment applied once the government attempted to use the data in a criminal trial.⁹

The EARN IT bill, S. 3398, introduced in the U.S. Senate on March 5, 2020, seeks to avoid this treacherous territory where private searches become subject to Exclusionary Rule penalties. Its approach to doing so is to begin with statutory recommendations, which will then direct the formulation of more specific guidance to be issued by a statutory commission, which in turn

2 *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

3 *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 614 (1989) (“Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government.”).

4 489 U.S. 602.

5 See, *infra*, Section II.

6 489 U.S. at 633.

7 138 S. Ct. 2206.

8 *Id.* at 2217, 2221.

9 *Id.*

can be amended by the Attorney General, and which can then be—in theory only—“voluntarily” adopted by private companies. This elaborate architecture is meant to put as much distance as possible between the government’s desired ends and its chosen means. Those ends, however, remain in plain sight. Private actors who follow the “best practices” would retain their existing legal benefits and protections that the EARN IT legislation holds out as a carrot to force compliance. Private actors who do not conform with the bill’s “best practices” would be exposed to greater threat of civil and criminal prosecution.

As outlined below, this Rube Goldberg approach is unlikely to provide sufficient camouflage to conceal the bill’s main purpose, which is to condition important legal protections on compliance with government inducements to search and seize private information for the benefit of law enforcement.

If the changes to federal law that would be made by the EARN IT bill change the way that courts view screening for child predatory material conducted by private internet platforms, the result will be to compromise both the current utility of NCMEC, as well as the voluntary nature of all searches conducted by those platforms. In this way, the EARN IT bill could well have the unintentional consequence of making it more difficult to put child predators behind bars.

The Act’s Rube Goldberg approach won’t provide sufficient camouflage to conceal the bill’s main purpose, which is to condition important legal protections on compliance with government inducements to search and seize private information for the benefit of law enforcement.

II. WHY GOVERNMENT-DESIGNED 'BEST PRACTICES' RISK THE VOLUNTARY NATURE OF PRIVATE COMPANY SCREENING FOR CHILD PREDATORY MATERIAL

To be free of Fourth Amendment constraints, a search and seizure by a non-state actor must be free of taint that the actor in fact “acted as an instrument or agent of the Government.”¹⁰ When private searches are not directly compelled by law, courts look at “all the circumstances of the case” for evidence “that the Government did more than adopt a passive position toward the underlying private conduct.”¹¹ If that evidence shows “the Government’s encouragement, endorsement, and participation” in the search, then the private party is deemed “an agent or instrument of the Government for Fourth Amendment purposes.”¹²

How does the EARN IT bill fare under this analysis? The answer turns on whether there is government encouragement of the “best practices” called for by the bill. Since the best practices themselves are broadly outlined in the bill, and since the bill mandates that its federally chartered commission shall write them, it is difficult to avoid the conclusion that the best practices are being encouraged and endorsed by the government. Indeed, the very purpose of the bill is to promote these best practices. Neither can there be any question of government participation. The entire exercise of creating the best practices is one directed by government—indeed, the Attorney General and representatives from the Department of Homeland Security and the Federal Trade Commission must vote to approve the best practices.

The bill is a comprehensive regulatory regime that encourages private companies to search for child sexual abuse material. Moreover, the encouragement does not spare the rod. There are penalties as well as benefits, making the “encouragement” all the more potent. Companies that refuse to search for illegal content will be stripped of their current legal protection from liability for offenses committed by others on their platforms under 47 U.S.C. § 230. As noted in an internal memorandum on the bill from Senate Judiciary staff to colleagues, courts “may” decide that this is not the same as coercion,¹³ or they may decide that it is in fact coercion; but since coercion is not a necessary element for triggering Fourth Amendment scrutiny, the question is academic. *Skinner* instructs that the fact “that the Government has not compelled a private party to perform a search does not, by itself, establish that a search is a private one.”¹⁴ To the contrary, when a statute or regulation makes plain the government’s “strong preference” for private searches and “its desire to share the fruits of such intrusions,” the Fourth Amendment applies.¹⁵

10 *Skinner*, 489 U.S. at 614.

11 *Id.* at 615-16 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)).

12 *Id.* at 614-15

13 *The EARN IT Act: Concerns & Responses*, Memorandum from Senate Judiciary Staff, at 3.

14 *Skinner*, 489 U.S. at 615.

15 489 U.S. at 615-16.

The salient feature of the EARN IT bill — its “best practices” that are “optional” — is fundamentally the same as the voluntary drug testing regime that was at issue in *Skinner*. There, the federal government issued regulations that merely authorized, but did not require, railroads to conduct blood and alcohol tests of their employees. The EARN IT bill is to the same effect. It instructs that companies “may choose” to follow the best practices, but they do not have to do so: “[n]othing 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.”¹⁶

The voluntary aspect of the federal drug and alcohol testing program in *Skinner* was not a sham: railroads really could decide not to do the drug testing that the regulations authorized. But the Supreme Court focused on the government’s obvious preference. By removing all legal barriers to the testing, the government clearly intended to pave the way for railroads to do it.¹⁷ By making clear “its desire to share the fruits” of the drug testing, the government revealed its motive and purpose.¹⁸ In comparison, the “voluntary” aspect of compliance with the best practices of the EARN IT bill is even less compelling. There is a serious legal downside to failing to comply: the loss of 47 U.S.C. § 230 protection from acts of third parties, as well as greater exposure to civil actions as a result of a weakening of the mens rea requirement from “knowing” what is on the internet platform to being “reckless” in not knowing.¹⁹ And in the case of the EARN IT bill, the motive and purpose of encouraging searches of online content to aid the government’s prosecution of child-exploitation crimes are clear from the bill’s text.

Section 4 of the bill, outlining what the best practices should include, requires the commission to consider how they can impact “the ability of law enforcement agencies to investigate and prosecute child exploitation crimes.” This is to include best practices that “retain[] child exploitation content and related user identification and location data.”²⁰ Reports to NCMEC would include “identity” “or location” data.²¹ Just as with the federal regulations in *Skinner*, the EARN IT bill makes clear the government’s desire to share in the fruits of the private searches it is encouraging.

In sum, the bill’s main purpose, as clearly stated in its text and its short title, EARN IT, is to condition important legal protections presently available to internet platforms on compliance with government encouragements to search and seize private information for the benefit of law enforcement. What is to be earned are legal rights presently conferred on internet platforms, but which will be withheld absent compliance with the government’s “best practices” for conducting private searches of evidence in which the government will

16 S. 3398 §3(b), § 9.

17 *Skinner*, 489 U.S. at 615.

18 *Id.* at 615

19 S. 3398 § 6(a).

20 S. 3398 § 4(a)(3)(C).

21 S. 3398 § 8(1)(B)(i)(I).

share. The bill makes no secret of its aim to encourage “reporting child sexual exploitation.”²² This is a legitimate governmental purpose, to be sure. But that is exactly the challenge: the EARN IT bill as structured risks conferring this governmental purpose on heretofore voluntary, private searches, rendering them subject to Fourth Amendment constraints under *Skinner*.

III. WHY SEARCHES THAT WOULD HAVE BEEN PRIVATE, BUT FOR THE EARN IT BILL, COULD NOW BE SUBJECT TO THE FOURTH AMENDMENT

The EARN IT Act would undermine the ability of platforms to report to NCMEC child sexual abuse content.

Internet companies that have a genuine interest in combatting child sexual abuse material on their platforms can and do search for this material and report it to the National Center for Missing and Exploited Children (NCMEC). To date, this has not resulted in courts excluding evidence under the Fourth Amendment. There is a considerable body of helpful case law supporting this conclusion, but it rests upon a fundamental premise that the EARN IT bill would undermine.

FEDERAL CASE LAW MAKES CLEAR THAT PRIVATE SEARCHES MUST BE COMPLETELY VOLUNTARY TO ESCAPE THE FOURTH AMENDMENT

Eight years before the U.S. Supreme Court decided *Skinner*, the U.S. Court of Appeals for the Ninth Circuit decided a case that established what has become a widely cited test for determining when a private search becomes a governmental search.²³ The test was established in the context of a search of luggage by an airline employee. When the airline employee found drugs in a piece of luggage, he notified the federal Drug Enforcement Administration. The DEA had no prior knowledge of this search, nor did it provide him any reward. Nonetheless, the fact that the DEA in the past had provided rewards to this employee, who had

22 S. 3398 § 4(a)(3)(A).

23 *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981).

previously worked as a confidential informant for them was enough for the court to conclude that the airline employee was an “instrument or agent” of the government.²⁴ As a result, the airline’s search was subject to Fourth Amendment standards — and the drug smuggler who had shipped cocaine in her airline luggage was able to exclude the evidence from her criminal trial.²⁵

The test enunciated in this case, *United States v. Walther*, has been followed across most of the other U.S. circuit courts, including in the context of searches by internet companies.²⁶

It asks two questions:

- (1) What was the level of the government’s knowledge and acquiescence in the search?
- (2) What was the intent of the party performing the search?²⁷

In *Walther*, the court applied the first prong of this test in a way that made it well-nigh impossible for the federal government to argue that the Fourth Amendment was not implicated. Whereas the government claimed, with 100% accuracy, that it knew nothing about the search before it had already taken place, the court found that the government could nonetheless be said to have acquiesced in the airline employee’s search because it had “encouraged” the employee to engage in this type of search in the past, had “rewarded” him for providing drug-related information before, and had known of his pattern of search history and had not discouraged it. Thus, the government was “involved” in this search — not as a participant, but “indirectly as an encourager of the private citizen’s actions.”²⁸ There need not be “overt governmental participation”; instead, there must only be more than “the complete absence of such participation.”²⁹

The court’s application of the second part of the test similarly made application of the Fourth Amendment unavoidable. Acknowledging that the facts of the case fell within a “gray area,” the court found that the airline employee acted because he was suspicious that the luggage contained illegal drugs.³⁰ This, it decided, was tantamount to his serving as an agent of the government, because the government itself was concerned with illegal drugs.³¹ All this supported a finding that the employee was fulfilling a governmental objective and might have been motivated by the possibility of a DEA reward — even though he did not get one, and apparently did not even seek one.³²

On the basis of this unlikely legal template, seemingly so hostile to the notion of keeping private searches free from Fourth Amendment strictures, the lower federal courts have constructed a body of case law that is actually quite favorable to the notion of internet

24 *Id.* at 792.

25 *Id.* at 791.

26 Jeff Kosseff, *Private Computer Searches and the Fourth Amendment*, 14 I/S A J. of L. & Pol’y for the Info. Society 187, 198 (2018).

27 *Walther*, 652 F.2d at 792.

28 *Id.* at 791.

29 *Id.* at 791.

30 *Id.* at 792.

31 *Id.* at 792.

32 *Id.* at 791-2.

platforms conducting private searches that do not risk subsequent application of the Exclusionary Rule. Under the *Walther* test, as well as the more recent U.S. Supreme Court precedent in *Skinner*, the government has successfully prevailed in arguing that when private internet companies have independent reasons to conduct searches for child sexual abuse material, those companies are not acting as government agents. A brief review of the leading precedents is helpful in understanding why those precedents exist, and why they are not so elastic as to fit what the EARN IT bill has in mind.

Nearly two decades after *Walther*, and applying its principles in the internet context, the Fourth Circuit in 2010 ruled that when America Online produced to NCMEC “the result of routine scanning the company conducts to recognize files that may be detrimental to AOL,” it was not acting as a government agent.³³ Key to the court’s determination was the fact that the statutory scheme under which AOL produced the data for NCMEC did not “remotely suggest a congressional preference for monitoring.”³⁴ The court contrasted this with *Skinner*, where the explicit authorization for testing indicated a “strong preference for testing.”³⁵

Two years later, the First Circuit similarly found that when Yahoo! uncovered child sexual abuse material and turned it over to NCMEC, the Fourth Amendment was not implicated because there was “no evidence” that “Yahoo! did what it did to further the government’s interest.”³⁶

In the 2013 case of *United States v. Stevenson*, the Eighth Circuit considered whether AOL’s private search for and production of child sexual abuse material to NCMEC should be subjected to Fourth Amendment constraints, in light of the *Skinner* doctrine that government encouragement can render a private search governmental.³⁷ The court held that AOL was not acting as a federal agent, reasoning that unlike the regulatory preference for searches betrayed by the federal regulatory permission for drug and alcohol testing in *Skinner*, federal law requiring reporting to NCMEC neither “authorizes AOL to scan its users’ e-mails,” nor “clears the ‘legal barriers’ to scanning.”³⁸ Furthermore, federal law was “silent regarding whether or how AOL should scan its users’ e-mail.”³⁹

Three years ago, a federal district court in the Sixth Circuit reached a similar Fourth Amendment result on similar grounds.⁴⁰ In *United States v. Miller*, the issue was whether Google’s voluntary scans of emails for child sexual abuse material were in reality the result of “government pressure.”⁴¹ The court’s decision turned primarily on its analysis of the operative federal law under which Google reported the results of these scans. The court noted that federal law neither authorizes scanning, nor provides a basis for inferring that Google’s scanning is primarily motivated to help police investigations.⁴²

33 *United States v. Richardson*, 607 F.3d 357, 367 (4th Cir. 2010).

34 *Id.* at 336-67.

35 *Id.* at 367.

36 *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012).

37 727 F.3d 826 (8th Cir. 2013).

38 *Id.* at 830.

39 727 F.3d 826 (8th Cir. 2013).

40 *United States v. Miller*, No. CV 16-47-DLB-CJS, 2017 WL 2705963 (E.D. Ky. June 23, 2017).

41 *Id.* at *3.

42 *Id.* at *3-*4.

The same year, a federal district court in the Tenth Circuit ruled that Sony’s private searches of PlayStation 3 gaming devices and its reporting of child sexual abuse material to NCMEC did not render it a government agent subject to Fourth Amendment constraints.⁴³ As in previous cases, the court looked to the federal law under which Sony reported, to determine whether the search was truly voluntary on Sony’s part. The court noted that federal law “only requires Sony to file a report if it learns of facts that suggest an incident of child abuse ... Sony [need not] act affirmatively to monitor its users’ accounts, review its users’ downloads, or maintain any sort of reporting system for abuse.”⁴⁴

Finally, in *United States v. Wolfenbarger*, decided last year, a federal district court in the Ninth Circuit determined that Yahoo! did not act as a government agent when it searched for child sexual abuse material and turned it over to NCMEC, because its decision to screen emails was voluntarily made for business reasons.⁴⁵ Once again, the bedrock of that conclusion was the lack of inducement in federal law that might indicate government encouragement was part of the motivation. “Most importantly,” the court said in concluding its analysis, federal law “imposed no duty on Yahoo to monitor its platform for child exploitation materials.”⁴⁶

The pattern established in these cases is clear to see. Courts have been willing to permit private internet platforms to conduct searches of third-party data, and to turn it over to NCMEC by law, without incurring Fourth Amendment penalties because in each case they have judged that the internet platform is acting for its own private, commercial purposes. In each case they have underscored their reliance on the fact that existing

In the 2013 case of *United States v. Stevenson*, the Eighth Circuit considered whether AOL’s private search for and production of child sexual abuse material to NCMEC should be subjected to Fourth Amendment constraints.

43 *United States v. Stratton*, 229 F.Supp.3d 1230 (2017).

44 *Id.* at 1237.

45 No. 16-CR-00519-LHK-1, 2019 WL 6716357 (N.D. Cal. Dec. 10, 2019).

46 *Id.* at *10.

federal law lacks material inducements for private searches, meaning that the element of government encouragement is missing.

THE EARN IT ACT ENCOURAGES PRIVATE COMPANIES TO SEARCH

The EARN IT bill would change this calculus significantly. By expressly conditioning legal benefits on compliance with the government’s “best practices,” by providing explicit authorization and encouragement for screening, by including prescriptive instructions on how the screening should be carried out, and by making it clear the government will share in the fruits of the searches so conducted, it undercuts the rationale of this line of cases. Indeed, the bill requires that companies certify compliance and threatens fines and imprisonment for making knowingly false certifications. The decisions listed above all rested on the fact that companies voluntarily screen, scan, and search for child sexual abuse material, without promise of reward or punishment in federal law.

But under the Seventh and Eighth Circuits’ tests, for example, following best practices in exchange for § 230 protection would constitute a government “reward” meant to encourage private actors to search on the government’s behalf.⁴⁷ That, coupled with the fact that the best practices would “prescribe[] the procedures for doing so”⁴⁸ — something virtually every one of these decisions has noted does not currently exist in federal law — could easily be sufficient to turn private scanning, searching, or screening from acts that are private and voluntary into searches that implicate the Fourth Amendment.⁴⁹ The combination of encouragement, endorsement, rewards, penalties, and explicit guidance that is the essence of the S. 3398 un masks the government’s “strong preference” for searches. The result is that a search that might have been deemed private, but for the EARN IT bill, could now be subject to the Fourth Amendment and the Exclusionary Rule because under the applicable Supreme Court precedent of *Skinner*, it cannot be said to be primarily the company’s own initiative.⁵⁰

There is a tragic irony in this. Currently, internet companies including Google, Facebook, and Twitter need not worry that the data they turn over to NCMEC will be excluded from evidence in a criminal trial because a court might later determine they were acting as an agent of the government in conducting their searches. This is so because the government has been able to claim that it does not have “any role in instigating” searches for child sexual abuse material.⁵¹ The inducements of the EARN IT bill, however, will likely encourage these companies to substitute certification of compliance with the government’s new best practices for their previous programs of voluntary screening, with the result that their very responsiveness to

47 *United States v. Koenig*, 856 F.2d 843, 848 (7th Cir. 1988); *United States v. Malbrough*, 922 F.2d 458, 462 (8th Cir. 1990)

48 *Richardson*, 607 F.3d at 366.

49 *Id.* at 366-67.

50 *Skinner*, 489 U.S. at 615

51 *See, e.g., Cameron*, 699 F.3d at 637.

this government encouragement could turn them into government agents for Fourth Amendment purposes. This would have the unintended effects of both frustrating the government’s criminal prosecutions and undermining the companies’ genuine self-interest in keeping their platforms free from child-exploitation material.

IV. THE EARN IT BILL THREATENS THE UNIQUE ROLE PLAYED BY THE CENTER FOR MISSING AND EXPLOITED CHILDREN

The National Center for Missing and Exploited Children is a federally chartered, federally funded clearinghouse for data related to child victimization. Congress has expressly authorized NCMEC to receive reports of potential child sexual abuse material from internet platforms and other private entities. Beyond merely warehousing this data, NCMEC is statutorily authorized to search through the reports it receives. Most importantly, Congress has expressly required NCMEC to forward reports of child sex abuse material to law-enforcement agencies.⁵²

So although NCMEC is, metaphysically speaking, merely a nonprofit organization — one of many devoted to worthy public purposes — it is in reality a government agent serving a governmental purpose clearly stated in federal law. In the many cases in which the question of NCMEC’s status has arisen, this has been the consistent conclusion. One circuit court and multiple district courts have explicitly found that NCMEC is a government agent.⁵³ Two additional circuits have suggested the same.⁵⁴ And the Tenth Circuit went so far as to find that NCMEC is both a government entity (like the FBI) and a government agent for Fourth Amendment purposes.⁵⁵

The implications of this quasi-governmental status are important for Fourth Amendment purposes.

In each of the cases in which criminal defendants have argued that an internet company should be treated as a government agent for conducting searches for child sex abuse material on its platform, they have staked their claim on the fact that material was provided to NCMEC. Since NCMEC is a government agent, the theory goes, the private company is merely acting as a conduit for the government in performing its searches. It should be therefore be deemed an agent of the government, just as NCMEC itself is.

52 18 U.S.C. § 2258A; 42 U.S.C § 5773(b).

53 See, e.g., *United States v. Ackerman*, 831 F.3d 1292, 1302 (10th Cir. 2016); *United States v. Coyne*, 387 F.Supp.3d 387 (D. Vermont 2018); *United States v. Tolbert*, 326 F.Supp.3d 1211 (D. N.M. 2018); *United States v. Stratton*, 229 F.Supp.3d 1230 (D. Kan. 2017); *United States v. Miller*, No. CV16-47-DLB-CJS, 2017 WL 2705963 (E.D. Ky. June 23, 2017); *United States v. Keith*, 980 F.Supp.2d 33 (D. Mass. 2013).

54 See *United States v. Powell*, 925 F.3d 1 (1st Cir. 2018) (status as government agent uncontested by government); *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012) (analyzed as government agent for Sixth Amendment purposes); *United States v. Reddick*, 900 F.3d 636 (5th Cir. 2018).

55 *Ackerman*, 831 F.3d 1292.

Were it not for NCMEC’s special quasi-governmental status, courts would find the Fourth Amendment analysis of searches conducted by private internet platforms to be much easier. There would be far less reason to worry that the fruits of a search were to be shared with the prosecution, if NCMEC did not have an explicit role under federal law in providing that very information to law enforcement. As it is, courts have been at pains to rule that private searches reported to NCMEC remain outside the Fourth Amendment’s reach, even as NCMEC’s own actions must pass Fourth Amendment muster.

Were it to become law, the EARN IT bill would vastly complicate this analysis in future cases. No longer would it be so easy for a court to dismiss the argument that a private company did nothing more than fulfill a reporting requirement to NMEC. The mandate in §4(a)(3)(B) of the bill that the “best practices” provide for “coordinating with non-profit organizations . . . to preserve, remove from view, and report child sexual exploitation” clearly envisions explicit coordination with NCMEC. Already under existing law, the federal government provides substantial funding to NCMEC, and requires private companies to report to it “backed by threat of sanction” — leading the Tenth Circuit to conclude that there can be “no doubt” NCMEC’s purpose and intent is to help law enforcement.⁵⁶ The additional requirement in the EARN IT bill that companies not only report to but coordinate with NCMEC would make the agency question much less clear.

By increasing the likelihood that courts will find government “encouragement” for collaboration with NCMEC that goes beyond the “mere reporting” to NCMEC that had been fully rationalized in prior decisions, the EARN IT bill similarly increases the odds that courts in the future will subject what were previously deemed private searches to Fourth Amendment standards. There is ample warning of this in the existing cases. In *United States v. Keith*, for example, the court found that NCMEC “is intended to, and does, serve the public interest in crime prevention and prosecution, *rather than a private interest.*”⁵⁷ Yet courts have consistently held that a private company’s avoidance of Fourth Amendment scrutiny in conducting its searches is dependent upon its pursuing its own private interest, rather than serving a governmental interest. Conjoining the motivations and actions of both private actors and NCMEC, as §4(a)(3)(B) of the EARN IT bill does, would remove the tentpole of this argument.

The EARN IT bill would undoubtedly lead those circuit courts that have not yet addressed the question to follow the Tenth Circuit’s *Ackerman* decision not only in concluding that NCMEC is a government entity for Fourth Amendment purposes, but in adopting its reasoning for this conclusion. *Ackerman* noted that federal laws mandate NCMEC’s “collaboration with

56 *Ackerman*, 831 F.3d at 1302.

57 980 F.Supp.2d 33, 41 (D. Mass. 2013) (emphasis added).

The EARN IT Act would have the unintended effects of both frustrating the government's criminal prosecutions and undermining the companies' genuine self-interest in keeping their platforms free from child-exploitation material.

federal (as well as state and local) law enforcement in over a dozen different ways, many of which involve duties and powers conferred on and enjoyed by NCMEC but no other private person.” Its inventory of the many unique governmental powers and roles assigned to NCMEC (from operating the official national clearinghouse for information about missing and exploited children, to providing forensic technical assistance to law enforcement, to training enforcement agencies in identifying sex offenders) leaves no doubt that the organization plays a uniquely valuable role in combating Internet child sexual exploitation.

Unfortunately, these very features of NCMEC's architecture that make it so unique are incontrovertible evidence of government encouragement, endorsement, and sponsorship of its aims. Expressly tying its operations to those of private actors as the EARN IT bill would, in ways that necessarily go beyond what is currently provided for in federal law, risks tainting those private actors as government agents for Fourth Amendment purposes. If the result of this were that massive amounts of data currently provided to NCMEC could potentially be excluded from evidence in criminal trials, it would be a calamity both for the cause of protecting children and for the unique role of NCMEC in that fight.

Indeed, although it is possible that at least some courts will hold that the bill is constitutional, it is likely that other courts will not. Regardless, defendants will be sure to seize on the bill's constitutional shortcomings to aid their defense. Those defendants—accused of one of the worst possible crimes—may have the most-damning evidence against them excluded from trial. So at best, that tactic will delay their trials; at worst, it will let them walk free. That cost is neither acceptable nor necessary. The EARN IT bill is well intentioned, but its flaws and Fourth Amendment implications are too great to ignore.

