



February 9, 2022

The Honorable Richard Durbin  
Chairman, Senate Committee on the Judiciary  
711 Hart Senate Office Building  
Washington, DC 20510

The Honorable Chuck Grassley  
Ranking Member, Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Re: S. 3538 – EARN IT Act – OPPOSE

Dear Chairman Durbin, Ranking Member Grassley, and Members of the Committee:

The Electronic Frontier Foundation (EFF) writes to strongly oppose S. 3538, the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2022 (EARN IT Act). EFF opposed the original and amended versions of this bill in the previous Congress, and the sponsors have not addressed any of our concerns in this reintroduced 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.

As in 2020, when it was originally introduced, the EARN IT Act aims to protect children from online sexual exploitation—an important and laudable goal – but it does so by threatening the privacy, security, and free expression of digital communications for all users. Giving states the power to threaten private companies with criminal prosecution and costly litigation unless they scan all messages from all users shows blatant disregard for the millions of law abiding people who depend on secure messaging to safely communicate. Military families, survivors of domestic violence, victims of identity theft and numerous others: there are many people for whom true end-to-end encryption is vital for personal safety and peace of mind.

### **The EARN IT Act Harms Privacy and Security for Everyone**

When EARN IT was last introduced, the sponsors repeatedly said that the bill was not designed to undermine encryption, a technology that is crucial for safeguarding

Americans' data against hackers, criminals, and foreign adversaries.<sup>1 2</sup> In fact, during Committee markup, Senator Leahy offered an amendment to address the obvious implications of the bill on encryption, which was accepted by the bill's authors.<sup>3</sup> Senator Leahy's amendment attempted to protect the use of encryption by specifying a provider would not be deemed in violation of federal or state laws against online child sexual exploitation "because the provider": (1) uses strong encryption, (2) can't decrypt data, or (3) doesn't take an action that would weaken its encryption.

While we believe this amendment would not have done enough to protect encryption, it was a step in the right direction.<sup>4</sup> Unfortunately, the newest version of EARN IT rolls back those attempts at protecting encryption and provides an explicitly weaker landscape than the status quo.

The current language merely says those three grounds shall not "serve as an independent basis for liability," and emphasizes that courts *can* consider otherwise-admissible evidence of encryption as evidence of the provider's liability.

As an example, WhatsApp messages are end-to-end encrypted (E2EE), and WhatsApp cannot decrypt them. Under the newest version of EARN IT, those features could be used as evidence to support a court finding that WhatsApp was reckless or even negligent—a lower state of mind requirement than in current federal law—in transmitting child sex abuse material (CSAM) on its service in violation of state law.

This new language turns security features that protect all users into a significant legal risk and makes it clear that EARN IT is actually designed to discourage encryption, not protect it.

### **The EARN IT Act Isn't Needed For Effective Law Enforcement**

In 2018, Congress passed SESTA/FOSTA, which imposed new criminal and civil liability on Internet intermediaries for a broadly defined set of state criminal and civil claims and certain federal civil claims around "prostitution". EARN IT proposes to create similar liability by, like SESTA/FOSTA, repealing Section 230 protections in the name of fighting CSAM.

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<sup>1</sup> Lily Hay Newman, *The EARN IT Act Is a Sneak Attack on Encryption*, Wired (March 5, 2020), <https://www.wired.com/story/earn-it-act-sneak-attack-on-encryption/>

<sup>2</sup> Maekan Kelly, *A Weakened Version of the EARN IT Act Advances Out of Committee*, The Verge (July 2, 2020), <https://www.theverge.com/2020/7/2/21311464/earn-it-act-section-230-child-abuse-imagery-facebook-youtube-lindsey-graham>

<sup>3</sup> Senator Leahy's Amendment to the 2020 EARN IT Act, available at [https://www.judiciary.senate.gov/imo/media/doc/Leahy\\_Amendment\\_to\\_S\\_3398\\_-\\_OLL20683.pdf](https://www.judiciary.senate.gov/imo/media/doc/Leahy_Amendment_to_S_3398_-_OLL20683.pdf)

<sup>4</sup> Joe Mullin, *The New EARN IT Bill Still Threatens Encryption and Free Speech*, Electronic Frontier Foundation (July 2, 2020), <https://www.eff.org/deeplinks/2020/07/new-earn-it-bill-still-threatens-encryption-and-free-speech>

However, if SESTA/FOSTA was supposed to protect people by making it easier to prosecute traffickers, it failed.<sup>5</sup> It is clear from numerous sources, including the GAO, that even the threat of an expansive reading of this law has chilled a wide variety of online speech (and not just limited to speech about sex work or sex trafficking), has created dangerous working conditions for sex-workers, and has made it more difficult for police to find trafficked individuals.<sup>6</sup> Moreover, the GAO report confirms what opponents said in 2018: that FOSTA was not necessary for law enforcement to go after bad actors. According to the GAO, since passage, prosecutors have only used FOSTA's new criminal provisions a handful of times and instead have continued to prosecute cases against services engaged in illegal activity via previously existing laws.<sup>7</sup>

EFF, along with sex workers' rights advocates and advocates for victims of human trafficking, warned Congress that passing new laws that threaten websites and apps, which are used by victims, would end up harming many of the exact same people lawmakers claimed to be trying to protect.<sup>8 9 10</sup>

EARN IT risks creating similar problems. Making communications less secure in the name of protecting children isn't worth it. Vulnerable people, including victims of domestic violence, and including children, rely on encrypted communications to establish safe relationships with trusted adults.

Given its significant problems and potential vast impact on internet users, we urge the Committee to reject this new bill. This bill will jeopardize the privacy and cybersecurity of every American, and fundamentally alter the freedom of our online communications.

Sincerely,

India McKinney  
Director of Federal Affairs  
Electronic Frontier Foundation

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<sup>5</sup> Melissa Gira Grant, *The Real Story of the Bipartisan Anti-Sex Trafficking Bill That Failed Miserably On Its Own Terms*, New Republic (June 23, 2021), <https://newrepublic.com/article/162823/sex-trafficking-sex-work-sesta-fosta>

<sup>6</sup> Kendra Albert, Elizabeth Brundige, Lorelei Lee, *FOSTA in Legal Context*, Columbia Human Rights Law Review Issue 52.3 (2021), <http://hrlr.law.columbia.edu/hrlr/fosta-in-legal-context>

<sup>7</sup> U.S. Government Accountability Office, *Sex Trafficking: Online Platforms and Federal Prosecutions*, U.S. Government Accountability Office (June 21, 2021), <https://www.gao.gov/products/gao-21-385>

<sup>8</sup> Sex Workers Outreach Project-USA, *SWOP-USA stands in opposition of disguised internet censorship bill SESTA*, swopusa.org (August 11, 2017),

<https://swopusa.org/blog/2017/08/11/call-to-actionpress-release-swop-usa-stands-in-direct-opposition-of-disguised-internet-censorship-bill-sesta-s-1963-call-your-state-representatives-and-tell-them-to-fight/>

<sup>9</sup> Survivors Against SESTA, available at <https://survivorsagainstsesta.org/>

<sup>10</sup> Elliot Harman, *Stop SESTA: Whose Voices Will SESTA Silence?*, EFF.org (September 13, 2017), <https://www.eff.org/deeplinks/2017/09/stop-sesta-whose-voices-will-sesta-silence>