

September 9, 2020

Dear Senator:

We, the undersigned civil rights, civil liberties, LGBTQ, sex education, reproductive rights, and sex worker advocacy organizations, oppose S. 3398, the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (EARN IT Act). Supporters of the EARN IT Act have the worthy goal of stopping the exploitation of children online. Unfortunately, the bill is not the solution to this serious problem. Instead, despite some positive changes, the bill, as currently drafted, could compound the harms wrought by SESTA/FOSTA, resulting in the disproportionate censorship of the LGBTQ community and of sex education materials. For sex workers, the impacts could be even more dire. If the bill causes platforms to eliminate online communities and other methods for sharing information and maintaining health and safety, the EARN IT Act could place sex workers' lives at risk. This would be unacceptable.

As reported out of the Senate Judiciary Committee, the EARN IT Act would amend Section 230 of the Communications Decency Act, a key federal provision providing that online services shall not be liable as publishers for the illegal speech of their users, except for federal crimes and in certain other narrow circumstances. The EARN IT Act would eliminate this liability shield in federal civil claims regarding the production, distribution, solicitation, and reporting of child sexual abuse material (CSAM). The EARN IT Act would also abrogate Section 230's shield for all state criminal and civil laws "regarding the advertising, promotion, presentation, distribution, or solicitation" of CSAM, as that term is defined by federal law.

To be clear, we are not concerned about platforms censoring CSAM. However, the effect of the changes EARN IT would make to Section 230 could be similar to, and even more harmful to online speech than, those made by SESTA/FOSTA,¹ which eliminated Section 230's liability shield for content related to sex trafficking. Instead of narrowly targeting sex trafficking which used digital platforms, the law de-platformed and erased the existence of many, including sex workers, harm reduction workers, and sex educators. That law's supporters argued it would protect sex trafficking victims. However, rather than aid sex trafficking victims, SESTA/FOSTA caused the disproportionate censorship of the LGBTQ community online and, by eliminating many online spaces for sex workers, placed the health and safety of sex workers at risk.² This happened because platforms censored a great deal of speech in an attempt to guard against the legal risk of losing Section 230's protection. Their censorship schemes disproportionately

¹ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115-164 (2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/1865>.

² Daniel Villareal, *SESTA/FOSTA Is Turning the Web into a G-Rated Minefield*, LGBTQNation (Mar. 16, 2019), <https://www.lgbtqnation.com/2019/03/sesta-fosta-turning-web-g-rated-minefield-dan-savage-pals-know-2-ways-destroy/>; Michael Aaron, *Why FOSTA/SESTA Harms Those it Supposedly Serves*, Psychology Today (Jul. 17, 2018), <https://www.psychologytoday.com/us/blog/standard-deviations/201807/why-fostasesta-harms-those-it-supposedly-serves>.

silenced the LGBTQ community and the speech of sex workers. Sex workers now have greater difficulty organizing and engaging online. The impact of this erasure led directly to loss of economic stability, increases in client violence, and moving to more vulnerable avenues for commercial sex, such as street-based work. The widespread destabilization led to predatory managers approaching now-desperate workers, who faced increased vulnerability to trafficking and exploitation.

The EARN IT Act could incentivize similar censorship efforts by platforms. Platforms may again ban and censor sex-related speech, especially if it relates to youth. These sex-related censorship regimes are particularly harmful to LGBTQ communities and to sex worker communities because their advocacy often discusses or relates to matters involving sex and sex education. Furthermore, censoring the online speech of the LGBTQ community also harms LGBTQ youth, who often first explore their identities by seeking information and building community online, especially if their friends or family may not accept who they are. Online access to sex education has become even more critical during the ongoing pandemic. The EARN IT Act poses a censorship threat to platforms used to provide critical lifesaving information at a time when it is more important than ever for that information to be widely available on the Internet.

In addition to censorship concerns, the EARN IT Act also threatens to disincentivize platforms from providing strong encryption, which is an essential service to the LGBTQ community who rely on encryption to access a support network; seek resources to combat discrimination and abuse; and find doctors and treatment to assist with transition and other health concerns. The Senate Judiciary Committee adopted an amendment to EARN IT specifying that providers will not be responsible for violating CSAM laws “because” they offer encrypted services. While we support the goal of the amendment, it fails to fully address encryption concerns because platforms may still be incentivized to weaken their encryption standards to avoid legal risk.

The EARN IT Act would also create a National Commission on Child Sexual Exploitation, headed by the Attorney General, and comprised of other law enforcement, prosecutors, victims’ advocates, civil liberties experts, and technology experts, but no representation from the LGBTQ, sex worker, or other impacted communities. The Commission would be charged with designing best practices for online platforms to combat child sexual exploitation. However, without representation from impacted communities on the Commission, there remains a substantial risk that the Commission could recommend best practices that would encourage actions that undermine encryption and result in over-censorship of online expression.

CSAM and child sexual exploitation online are scourges that we must address, but our solutions to that problem should not – and need not – place other marginalized communities, like the LGBTQ and sex worker communities, at risk. To actually address child sexual exploitation, Congress could adopt numerous reforms advocated by experts, including investing in prevention,

reallocating existing enforcement resources, or expanding services and assistance to victims. None of these options are addressed by the EARN IT Act. For these reasons, we believe Congress should look at other avenues for addressing child sexual exploitation both online and off.

Sincerely,

Advocates for Youth
Advocating Opportunity
AIDS Alabama
AIDS Foundation Chicago
AIDS United
American Atheists
American Civil Liberties Union
Amnesty International USA
APNH: A Place to Nourish your Health
Ascension Institute; The Women of Color Sexual Health Network
BAYSWAN
Black & Pink, Boston
Black and Pink
Caucas
Center for Constitutional Rights
Center for Democracy & Technology
Center for Disability Rights
Center for LGBTQ Economic Advancement & Research
CenterLink: The Community of LGBT Centers
COLAGE
Collective Action for Safe Spaces
Defending Rights & Dissent
Drug Policy Alliance
Electronic Frontier Foundation (EFF)
Equality California
Equality North Carolina
EyesOpenIowa
Fight for the Future
Freedom Network USA
Hacking//Hustling
Howard Brown Health
Human Rights Campaign
Human Rights Watch
IWES

Lambda Legal
LGBT Technology Partnership
Michigan Organization on Adolescent Sexual Health
NASTAD
National Asian Pacific American Women's Forum (NAPAWF)
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition Against Censorship
National Equality Action Team (NEAT)
National Network of Abortion Funds
National Working Positive Coalition
NCRSOL
New America's Open Technology Institute
Oasis Legal Services
Partners in Sex Education
Physicians for Reproductive Health
Positive Women's Network-USA
Pride Law Fund
pwn usa ohio
Rad Care
Red Canary Song
Reframe Health and Justice
Sero Project
SIECUS: Sex Ed for Social Change
Silver State Equality-Nevada
Survivors for Solutions
SWOP Baltimore
SWOP-USA
The Center for HIV Law and Policy
The Sex Workers Project at The Urban Justice Center
The Trevor Project
U.S. People Living with HIV Caucus
URGE: Unite for Reproductive & Gender Equity
Virginia Coalition for Sex Ed Reform
Women's Medical Fund
Woodhull Freedom Foundation
WV FREE