



February 9, 2022

The Honorable Dick Durbin
Chair
Senate Committee on the Judiciary
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Senate Committee on the Judiciary
Washington, DC 20510

Re: Industry Concerns with S. 3538

Dear Chair Durbin and Ranking Member Grassley:

The undersigned organizations have concerns that the recently reintroduced S. 3538, the Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act, would impair lawful speech and conduct, threaten the privacy of law-abiding citizens, hinder law enforcement's efforts against online child exploitation, and limit innovation. We had similar concerns about previous versions of the bill last Congress, and our concerns have not been addressed.¹ As this highly technical bill has yet to receive a hearing, we request that this statement be included in the record of the Senate Judiciary Committee markup scheduled for February 10, 2022. Our industry remains committed to combating online child exploitation, and we welcome the opportunity to work with members of the Committee to address these concerns. Because of the vital interests at stake and the myriad of potential unintended consequences detailed below, we respectfully request that you not move S. 3538 out of committee.

¹ Industry expressed these and a variety of other concerns in letters last Congress when the bill was introduced, in advance of the markup, and opposing it being brought to the floor. See Letter from CCIA, CTA, IA, i2Coalition, and NetChoice, Re: Concerns with Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (Mar. 5, 2020), available at <https://www.ccianet.org/wp-content/uploads/2020/03/Tech-Assn-EARNIT-Letter.pdf>; Letter from CCIA, CTA, i2Coalition, and NetChoice, Re: Requesting Delay of Markup of S. 3398 (July 1, 2020), available at <https://www.ccianet.org/wp-content/uploads/2020/07/Tech-Assn-3398-Letter.pdf>; Letter from CCIA, CTA, Engine, IA, i2Coalition, and NetChoice, Re: Industry Concerns with S. 3398 (Sept. 18, 2020), available at <https://www.ccianet.org/wp-content/uploads/2020/09/2020-09-18-Industry-Letter-on-S.-3398.pdf>.

The technology sector takes seriously the shared responsibility to address illegal and dangerous content online, including child sexual abuse material (CSAM). Pursuant to existing federal criminal law addressing CSAM, industry works proactively to remove and report harmful content and routinely engages with law enforcement to assist and respond to valid requests for information pertaining to criminal activity online.² Industry invests significant resources in addressing these important issues.³ We also welcome greater emphasis and increased resources for law enforcement. While industry makes tens of millions of CSAM reports to authorities every year, fewer than 1300 prosecutions have occurred annually, and that number has declined in recent years.⁴

The application of consistent and predictable national standards for intermediary liability has powered the U.S. tech sector and digital economy. We are concerned that exempting state laws broadly concerning CSAM from intermediary protections would subject companies to litigation under an unpredictable patchwork of state laws with various reduced and untested scienter requirements. As a result, companies would lose legal certainty in their efforts to combat objectionable third-party content and protect their users, while those that don't would not be incentivized to do more. This may lead to services not introducing new features or shutting down entirely due to uncertainty over liability risks.⁵

Industry also has serious concerns about the legislation undermining the security of our users by threatening strong encryption. Additionally, the bill would discourage Internet services from hosting user-created content, which will gravely impact free expression and access to information, especially for marginalized communities. Internet users, including marginalized communities, would be harmed if companies are compelled to excessively filter user-generated content, significantly limiting the scope and diversity of free speech online.

We are also concerned that the bill would encourage more state legislatures to enact new laws restricting the ability of services to design and implement features that protect the privacy and security of users. These state laws could have the effect of compelling services to conduct searches for CSAM content, raising potential “state actor” problems that would make prosecuting criminal activity more difficult.

² 18 U.S.C. § 2258A.

³ For example, companies proactively detect and report CSAM to NCMEC's CyberTipline and have developed tools like CSAI Match (video hash matching), PDQ and TMK+PDQF (open-source photo and video matching), and PhotoDNA (photo hash matching). Companies are also part of initiatives like the Technology Coalition and the WeProtect Global Alliance. *See, e.g.*, The Technology Coalition Annual Report (Aug. 2021), <https://www.technologycoalition.org/annualreport/>; WeProtect Global Alliance and the Technology Coalition, Survey of technology companies (Oct. 2021), <https://www.weprotect.org/survey-of-tech-companies/>.

⁴ *See* Table D-2—U.S. District Courts—Criminal Federal Judicial Caseload Statistics (Mar. 31, 2021), <https://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2021/03/31>.

⁵ Aja Romano, *A new law intended to curb sex trafficking threatens the future of the internet as we know it*, Vox (July 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>; Samantha Cole, *Craigslist Just Nuked Its Personal Ads Section Because of a Sex-Trafficking Bill*, Vice (Mar. 23, 2018), https://www.vice.com/en_us/article/wj75ab/craigslist-personal-ads-sesta-fosta.

While we have concerns about S. 3538, we are committed to combating online child exploitation, and look forward to working with members of the Committee on these serious issues.

Sincerely,

Computer & Communications Industry Association
ACT | The App Association
Chamber of Progress
Consumer Technology Association
Developers Alliance
Engine
Internet Infrastructure Coalition
Mailfence
NetChoice
Software & Information Industry Association
The Tor Project

Cc: Members of the Senate Judiciary Committee