

May 3, 2023

The Honorable Chuck Schumer
Majority Leader
U.S. Senate
Washington, DC 20510

The Honorable Kevin McCarthy
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

The Honorable Mitch McConnell
Minority Leader
U.S. Senate
Washington, DC 20510

The Honorable Hakeem Jeffries
Minority Leader
U.S. House of Representatives
Washington, DC 20515

RE: Fourth Amendment Issues Posed by the EARN IT Act (S.1207, H.R.2732)

Dear Majority Leader Schumer, Minority Leader McConnell, Speaker McCarthy, and Minority Leader Jeffries:

We are academics who study criminal law and the Fourth Amendment. One of us is a former federal magistrate judge. We support legislative efforts to protect the victims of child sexual abuse material (CSAM). At the same time, we oppose proposals whose constitutional implications risk undermining the fight against CSAM. This letter describes how the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2023 (EARN IT Act), S.1207 / H.R.2732, presents Fourth Amendment issues that could imperil CSAM prosecutions.

Federal law requires the providers of online services to report known CSAM to the National Center for Missing & Exploited Children (NCMEC),¹ which generates investigatory leads for law enforcement. The law, Section 2258A, lets providers search their services for CSAM—but, crucially, disclaims any requirement that they “affirmatively search, screen, or scan for” it.²

This limitation springs from the Fourth Amendment’s prohibition of unreasonable searches and seizures, which precludes the government from having a private actor conduct a search it could not lawfully do itself.³ Where a private party conducts a search primarily at the government’s behest, rather than on its own initiative, it becomes an agent of the government. Those searches must abide by the Fourth Amendment’s requirements, such as that of a warrant supported by probable cause.⁴

In criminal prosecutions, the remedy for an unconstitutional search is the exclusion of the resulting evidence.⁵ CSAM defendants commonly try to exclude evidence found by their online service providers. Numerous services already voluntarily choose to automatically search

¹ 18 U.S.C. § 2258A.

² 18 U.S.C. § 2258A(f).

³ *United States v. Ackerman*, 831 F.3d 1292, 1300–01 (10th Cir. 2016) (Gorsuch, J.) (citations omitted).

⁴ *Id.*; see generally Jeff Kosseff, *Online Service Providers and the Fight Against Child Exploitation: The Fourth Amendment Agency Dilemma*, LAWFARE: THE DIGITAL SOCIAL CONTRACT (January 2021), <https://s3.documentcloud.org/documents/20458337/online-service-providers-and-child-exploitation.pdf>.

⁵ See *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

uploaded content for possible CSAM and then, as required by law, report what they find to NCMEC.⁶ Defendants frequently challenge the admissibility of evidence submitted to NCMEC (and any evidence gathered based on those materials), asserting that Section 2258A turned their provider into a government agent. To date, courts have rejected this argument, finding the services' searches were voluntary and thus the evidence was admissible.⁷

This regime enables online service providers to detect and report CSAM tens of millions of times per year⁸—and its viability rests on the narrow legal foundation of the services voluntarily choosing to prospectively search for CSAM. Congress should tread carefully before changing providers' CSAM-screening obligations lest it topple the precarious balance being tenuously maintained under existing law.

The EARN IT Act creates that risk by exposing providers to civil and state criminal liability for CSAM. The bill's sponsors have expressly stated that they want to goad recalcitrant providers into looking harder for CSAM by adopting widely-used tools “to automate the detection of known CSAM material and report it to NCMEC.”⁹

To the extent the EARN IT Act pushes providers to conduct searches they would not freely choose to do, it converts them into government agents and the evidence they submit to NCMEC (and any further evidence generated from it) risks being thrown out in court.¹⁰ Depriving prosecutors of that key evidence would make it harder to secure convictions and lessen NCMEC reports' utility as a source of investigatory leads. Thus, the bill could *reduce* the number of CSAM offenders held accountable for this heinous crime—by helping them walk free.

The EARN IT Act rolls the dice with the fate of CSAM prosecutions premised on searches the Act would impel providers to conduct. Passing the Act requires Congress to bet that defendants' constitutional challenges to those searches would never once succeed. With justice for child victims at stake, Congress should refuse to make that bet. Rather than proceed with the EARN IT Act, Congress should evaluate other options to address the scourge of online CSAM without impinging on constitutional values.

⁶ Child Sexual Abuse Material (CSAM)—By the Numbers, National Center for Missing and Exploited Children [NCMEC], <https://www.missingkids.org/theissues/csam#bythenumbers>.

⁷ *E.g.*, *United States v. Miller*, 982 F.3d 412, 424 (6th Cir. 2020); *United States v. Stevenson*, 727 F.3d 826, 830 (8th Cir. 2013); *United States v. Cameron*, 699 F.3d 621, 637–38 (1st Cir. 2012); *United States v. Richardson*, 607 F.3d 357, 366–67 (4th Cir. 2010).

⁸ NCMEC, *supra* note 6.

⁹ The EARN IT Act: Myth vs. Fact, *available at* https://s3.documentcloud.org/documents/21194217/earn_it_act_of_2022_myth_vs_fact.pdf (relating to nearly identical version of the bill introduced in the 117th Congress).

¹⁰ Kosseff, *supra* note 4, at 2; *see also* Kir Nuthi, *The EARN IT Act Would Give Criminal Defendants a Get-Out-of-Jail-Free Card*, SLATE (Feb. 11, 2022, 9:59 AM), <https://slate.com/technology/2022/02/earn-it-act-fourth-amendment-violation.html>; Riana Pfefferkorn, *Ignoring EARN IT's Fourth Amendment Problem Won't Make It Go Away*, STAN. L. SCH. CTR. FOR INTERNET & SOC'Y (Mar. 9, 2022, 7:27 PM), <http://cyberlaw.stanford.edu/blog/2022/03/ignoring-earn-it%E2%80%99s-fourth-amendment-problem-won%E2%80%99t-make-it-go-away>.

Signatories

(institutional affiliation is listed for identification purposes only)

Riana Pfefferkorn, Research Scholar, Stanford Internet Observatory

Eric Goldman, Associate Dean of Research, Professor of Law and Co-Director, High Tech Law Institute, Santa Clara University

Derek E. Bambauer, Professor of Law, University of Arizona College of Law

Ahmed Ghappour, Associate Professor of Law, Boston University School of Law; General Counsel, Nym Technologies

James Grimmelmann, Tessler Family Professor of Digital and Information Law, Cornell Law School and Cornell Tech

Thomas E. Kadri, Assistant Professor, University of Georgia School of Law

Brian L. Owsley, Associate Professor of Law, UNT Dallas College of Law; former United States Magistrate Judge