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INTERNET
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September 18, 2020

The Honorable Mitch McConnell
Majority Leader
United States Senate
The Capitol, S-230
Washington, DC 20510

The Honorable Chuck Schumer
Minority Leader
United States Senate
The Capitol, S-221
Washington, DC 20510

Re: Industry Concerns with S. 3398

Dear Majority Leader McConnell and Minority Leader Schumer:

The undersigned organizations continue to have concerns that S. 3398 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.¹ While we appreciate efforts to address concerns with the bill adopted during the Senate Judiciary Committee’s markup, these amendments do not cure the drawbacks and unintended consequences posed by the legislation. Our industry remains committed to combating online child exploitation, and we welcome the opportunity to work with members of the Senate 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 oppose S. 3398 should it come to the Senate floor.

The technology sector takes seriously its responsibility to address harmful 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 from law enforcement. While industry makes tens of millions of CSAM reports to authorities every year, fewer than 1500 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

¹ Industry expressed these and a variety of other concerns in letters when the bill was introduced, and in advance of the markup. 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>.

² 18 U.S.C. § 2258A.

³ For example, the Technology Coalition recently announced Project Protect, a plan to combat CSAM online. The Technology Coalition Announces Project Protect (June 10, 2020), <https://www.technologycoalition.org/2020/05/28/a-plan-to-combat-online-child-sexual-abuse/>.

⁴ See Table D-2—U.S. District Courts—Criminal Federal Judicial Caseload Statistics (Mar. 31, 2020), <https://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2020/03/31>.

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. This may lead to services not introducing new features or shutting down entirely due to uncertainty over liability risks.⁵

Furthermore, services that continue to host third-party content despite expanded liability and legal uncertainty may be incentivized to engage in increased filtering of content to mitigate potential legal exposure. 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 enable 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.

While we have concerns about S. 3398, we are committed to combating online child exploitation, and look forward to working with members of the Senate on these serious issues.

Sincerely,

Computer & Communications Industry Association
Consumer Technology Association
Engine
Internet Association
Internet Infrastructure Coalition
NetChoice

Cc: Members of the Senate

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.