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The Stop CSAM Act [S.1199] Explainer: Section 2255A
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The Stop CSAM Act [S.1199] contains valuable elements to improve the safety of children online, but the newly created Section 2255A—which allows child victims to sue tech platforms civilly—does not fit its overall mission. While criminal prosecution is essential, so are civil lawsuits which have been critically important to systemic change and accountability leading to the greater protection of children in trusted institutions. Online institutions should be no different.

Civil lawsuits shift the cost of the harm from the victim to the ones who caused it. They also provide discovery that reveals how the larger system in the organization endangers children. Settlements in civil lawsuits involving child sex abuse have routinely included not only compensation, but critical agreements to improve the organization to make it safer for children in the future. The out-of-control Big Tech world requires both robust criminal and civil liability for the online universe to become a safer place for children.

Section 2255A, as currently drafted, would actually make it more difficult to hold Big Tech civilly liable than it is in the courts now. In fact, it is likely to create greater immunity than Section 230 for the vast majority of times that Big Tech fails to remove child sex abuse materials (CSAM) from their platforms. Unlike the rest of the bill, which considerably advances child safety, this section of the bill is not going to encourage the platforms to change their current, dangerous policies and practices in the way Congress demanded last week. Indeed, given the trend in recent court cases, including in the Social Media MDL in the Northern District of California and a case involving Pornhub in Alabama, this bill will provide greater protection for tech than current rapidly evolving law.

The Unfair Burden of Proof Placed on the Victim

Current civil liability for CSAM is found in Section 2255, Masha's Law, which has existed since the 1990s. Despite Section 230's perceived "immunity," courts are beginning to hold that Section 230 does not apply to cases involving CSAM because it's not an "ordinary tort" and because the speech is not protected by the First Amendment. *New York v. Ferber* (1982).

Under current case law, courts require that CSAM victims prove that an online provider knew or should have known about the CSAM on their platforms. The Report Act [S.474], which passed the Senate with unanimous consent in December, applies a reckless and negligence standard to organizations handling CSAM. These are the well-tested and established legal standards that are used in off-line child sex abuse cases in jurisdictions across the country. The Section 2255A(a) standard dramatically increases the burden of proof on the victim from negligence to intentional or knowing action, making it nearly impossible to prevail against a tech company in a CSAM lawsuit.

Not only does this heightened standard protect online service providers—and all but guarantee they are not motivated to do everything in their power to prevent future and ongoing harm to children—but it will also immunize insurance carriers who routinely do not cover "intentional" torts.

The Impossible Proof Requirement

Section 2255A(f) further protects Big Tech against CSAM victims by requiring courts to construe "knowingly" to mean "knowledge of each item of child pornography that the provider hosted, stored, or made available." In other words, a CSAM victim—who is often still a minor—must somehow locate and produce every CSAM image of them on that service provider's website, app, or platform. This is an irrational and psychologically damaging demand on child victims which forces them to hunt for every possible traumatizing image while the entity with the most knowledge of what's on its system can hide behind this impossible-to-meet burden.

The Defense Gift to the Service Providers

Section 2255A's burden of proof, as discussed above, is higher than any other legal standard in any other kind of child sex abuse civil action, meaning it is far more difficult for the victim to prevail and far more difficult to deter the bad acts of Big Tech. To add insult to injury, Section 2255A(h) would provide an

extraordinary gift to online service providers by giving them up to 48 hours to disable access or remove the CSAM *after* the child victim has notified them of its existence. This operates as a defense to the action. In the fast-moving online universe, 48 hours dramatically increases the opportunity for the images to spread inflicting further harm on the child victim. Providers who average fewer than 10,000,000 active users per month have even more time to remove CSAM: two business days.

Sanctions on Civil Attorneys for Actual Knowledge About Their Cases Before Discovery

Section 2255A(i) further operates against the victims and in favor of the service providers by threatening sanctions against victims and their attorneys who file cases in "bad faith." By "bad faith," the bill means that there was actual knowledge *at the time of filing* that the alleged conduct did not involve any minor or did not involve CSAM. In the vast majority of child sex abuse cases, whether online or off-line, the defendants have superior knowledge about what happened, and in this case content. To sanction attorneys before discovery occurs will hide the service providers' vast knowledge of child sex abuse on their platforms from the public, the courts, and the parents trying to protect their children. This provision is in direct conflict with the expressed goals at the recent Senate Judiciary Hearing to change the system that is currently contributing to child deaths and mental health harms of millions of children. It also puts the horse before the cart; whether or not an image constitutes CSAM is a factual decision which is left up to the jury, not the judge and the defense attorneys protecting Big Tech.

The current toxic online world cannot and will not change so long as platforms can avoid civil litigation through draconian requirements like the ones proposed in Section 2255A, which are unprecedented and not found in any other arena involving the sex abuse of children in state or federal law.