ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

February 28, 2017

VIA EMAIL

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Re: HB 2422 (Human Trafficking and Child Exploitation Prevention Act) - OPPOSE

Dear Representative Neely and Speaker Richardson,

We write on behalf of the Electronic Frontier Foundation (EFF) to oppose the Human Trafficking and Child Exploitation Prevention Act (or HTPA), which would create an unconstitutional and draconian Internet censorship and taxation regime in Missouri.[1]

The EFF is a member-supported, national non-profit organization advocating for freedom of expression, privacy, and other civil liberties in the digital age.[2] Over the past two years, we have tracked the HTPA in various forms in state legislatures across the country.[3] Although its supporters claim the bill would protect women, children, and vulnerable communities, in truth the bill would limit residents' freedom of speech, allow the government to intrude into their private lives, restrict control of devices owned by consumers, and levy a disproportionate tax on consumer electronics.

Last year, versions of the HTPA failed in Alabama, Florida, Georgia, Indiana, Louisiana, New Jersey, North Dakota, Oklahoma,

1 In some states, this bill is titled the "Human Trafficking Prevention Act."
2 "About EFF," https://www.eff.org/about.
3 Human Trafficking and Child Exploitation Prevention Act, SPECIAL FORCES OF LIBERTY, http://humantraffickingpreventionact.com/#q1.

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South Carolina, Texas, and Wyoming.[4] We urge you to likewise oppose this bill.

The Human Trafficking and Child Exploitation Prevention Act

While there are some textual differences between versions of the HTPA that are circulating in state legislatures today, the core of the bill is a two-part unlawful restraint on speech and privacy.[5]

First, the bill requires all companies that manufacture and sell an Internet-enabled device in the state to install blocking software to prevent that device from visiting webpages and applications that show content that the state finds objectionable. This provision unlawfully restrains the information that users may view on the Internet, and limits to whom and in what forums users may speak on the Internet. It also imposes extraordinarily onerous business regulations that will make it difficult for technology companies to do business in the state.

Second, if any person wants to remove blocking software from a device that they own, they have to ask the manufacturer to remove that filter, sign a written acknowledgement of the supposed risk of disabling the filter, and in most versions of the bill pay a $20 tax to unblock each of their devices. The tax and other steps required to remove the blocking software unconstitutionally burden the rights to speak and to access the speech of others on the Internet. They also unduly burden the right to privately speak and listen on the Internet without reporting that activity to government officials, and the right of property owners to use their technological devices as they see fit.

This restraint and tax applies to computers, TVs, gaming consoles, and mobile devices that facilitate access to Internet content.

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4 Dave Maass, "States Introduce Dubious Anti-Pornography Legislation to Ransom the Internet," EFF DEEPLINKS BLOG (April 12, 2017), https://www.eff.org/deeplinks/2017/04/states-introduce-dubious-legislation-ransom-internet.

5 The bill has been introduced this session in at least the following state legislatures:
Hawaii S.B. 2478, https://legiscan.com/HI/text/SB2478/2018;
Iowa, H.S.B. 523, https://legiscan.com/IA/text/HSB523/2017;
Kansas, S.B. 363, https://legiscan.com/KS/text/SB363/2017;
Maryland, S.B. 585, https://legiscan.com/MD/text/SB585/2018;
Mississippi, S.B. 2315, https://legiscan.com/MS/text/SB2315/2018;
Missouri, H.B. 1558, https://legiscan.com/MO/text/HB1558/2018;
New Mexico, S.B. 89, https://legiscan.com/NM/text/SB89/2018;
New Jersey, A.B. 878, S.B. 540, https://legiscan.com/NJ/text/A878/2018;
New York, A.B. 9011 https://legiscan.com/NY/text/A09011/2017;
Rhode Island, S.B. 2028, https://legiscan.com/RI/text/S2028/2018;
South Carolina, H.B. 3003, https://legiscan.com/SC/text/H3003/2017;
Tennessee, H.B. 2685, S.B. 2280, https://legiscan.com/TN/text/HB2685/2017;
Virginia, H.B. 1592, https://legiscan.com/VA/text/HB1592/2018;
West Virginia, S.B. 460, https://legiscan.com/WV/text/SB460/2018.

It also applies to routers and other equipment that facilitate Wi-Fi access.

Although there is variance among the HTPA bills in defining what Internet content must be blocked, all of the definitions are vague and overbroad, and would deprive residents of important and legal content. For example, some versions of HTPA restrict "indecent" content, while others restrict content that depicts human trafficking. In both cases, the definitions do not provide clear guidance for a computer algorithm to narrowly distinguish unacceptable content from content that will a socially valuable purpose. And as described below, these definitions likely will not survive the strict scrutiny applied by courts in determining the validity of 1st Amendment restrictions.

Widespread Censorship of Online Content is Unconstitutional

Although different versions of the HTPA categorize the content that must be blocked differently, the end result of each is the unconstitutional restriction of speech people can access, engage with, and create on the Internet.

The Supreme Court has already championed the Internet, and by extension Internet-connected devices, as a means to freely exercise First Amendment rights in *Reno v. ACLU*: "It is no exaggeration to conclude that the content on the Internet is as diverse as human thought."[6] In *Reno*, the Court struck down provisions of a federal law (the Communications Decency Act) that criminalized the transmission of obscene or indecent materials to minors and required online service providers to restrict access to "patently offensive" material to minors.[7] The HTPA tries to attempt much of the same and ignores established free speech doctrine in the United States.

First, sexual content that is not obscene cannot be restricted by statute or other government mechanisms: "[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."[8]

Second, "obscene" speech must be judicially determined in a complex analysis that questions, among other things, whether a work lacks "serious literary, artistic, political, or scientific value" – essentially affirming the First Amendment protections of a work that has any arguably redeeming value.[9] This speech cannot be restricted until it is

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6 *Reno v. ACLU*, 521 U.S. 844, 852 (1997)

7 *Reno* (1997).

8 *Casey v. Population Services Int'l*, 431 U.S. 678, 701 (1977). *See also*, *Reno* at 874; *Sable*, 492 U.S. 115, 126 (1989).

9 *Miller v. California*, 413 U.S. 15, 24 (1973) ("(a) whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a

determined obscene by a judge, and the determination cannot be delegated to a non-judicial authority.[10] The content-filtering technologies required by the HTPA cannot hold the power of determining what is obscene and, as a technical matter, are incapable of distinguishing speech with nuance required by the test.

Third, while governments may have some interest in restricting content that may be "harmful to minors," the definition must hold to the narrow standard established in *Ginsberg*,[11] and the restriction cannot infringe on the ability of persons' over 17 to access the same speech.[12]

Fourth, it is unconstitutional to restrict "indecent" speech, except in narrow situations for broadcast media.[13] Courts have consistently rejected every effort to apply the FCC's broadcast indecency regime to other media. Indeed, in *Reno*, the Court specifically declined to apply the FCC's definition of indecency to the Internet.[14]

Finally, the HTPA's attempt to filter Internet content about illegal prostitution and human trafficking on the Internet would surely result in the censorship of lawful and valuable content. For example, online advertisements for illegal prostitution are often coded in such a way that makes it difficult—for people and algorithms alike—to properly identify those listings among other online ads, which under the HTPA would likely result in the over-censorship of non-infringing speech. More troubling is that the bill would apply not just to web-browsing, but also include frequently-used online communication services, like email

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patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lasks serious literary, artistic, political, or scientific value.")

10 *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("What Rhode Island has done, in fact, has been to subject the distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned. Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.")

11 *Ginsberg v. New York*, 390 U.S. 629. 646 (1968) (The New York statute upheld in the case defines harmful to minors as "(1) predominately appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors."

12 *Reno* at 874. ("In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.")

13 Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978).

14 *See also Playboy*, 529 U.S. 803 (200) (cable television); *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989) (telephone communications); *Bolger v. Young Drug Products Corp.,* 463 U.S. 60 (1983) (unsolicited U.S. Postal Service mail).

and messaging apps; therefore, the inevitable over-blocking will extend to people's protected personal communications as well.

The bill's speech-blocking provisions may not actually help victims of sexual violence as intended. Sex trafficking experts have raised concerns that attempts to prohibit online advertising about illegal prostitution and sex trafficking, can inadvertently harm the victims by driving the market further underground, where these crimes are harder to detect and where victims are even more in danger.[15]

The Process to Remove Blocking Software Overburdens Speech

The HTPA creates a process for technology users to unblock the government-mandated filtering programs, but this is an onerous burden for anyone who wants to access disfavored Internet speech. Not only does the HTPA unblocking process violate the First Amendment (for all the reasons described above), but it also forces people who wish to access speech to sacrifice their privacy by telling the government what they want to read.

The Supreme Court has long struck down such regimes, which require recipients to affirmatively identify themselves to the government before the government grants them access to disfavored speech. For example, in *Lamont v. Postmaster General*, the Supreme Court held that the postmaster unconstitutionally restrained speech by requiring recipients of certain leaflets to identify themselves at the post office, and affirm that they requested the leaflets, before the postal service would allow them to read the leaflets.[16] The Court reasoned that such restrictions impermissibly chill and deter would-be recipients from hearing the disfavored speech. Similarly, in *Denver Area Educational Telecommunications Consortium v. FCC*, the Supreme Court struck down a Federal Communications Commission regulation that prohibited cable customers from viewing sexually explicit programming, unless they requested the programming in advance in writing.[17]

To be clear, the HTPA's deactivation process does not simply chill speech; it also requires consumers to sacrifice their privacy and anonymity, as the price of exercising their First Amendment rights. If enacted, consumers would be forced to identify themselves when making a written request for filter deactivation, creating a humiliating situation that suggests they want access to controversial sexual material. Moreover, the bill provides no security protection for this sensitive information, which could be subject to all-too-common data

15 Elliot Harmon, "Sex Trafficking Experts Say SESTA Is the Wrong Solution," EFF DEEPLINKS BLOG (Oct. 3, 2017), https://www.eff.org/deeplinks/2017/10/sex-trafficking-experts-say-sesta-wrong-solution

16 *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

17 *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996).

breaches, whether stored by government or companies.[18] In short, HTPA deactivation would be a frightening form of thought-based surveillance.

Further, the HTPA creates a pay-for-play speech taxation regime. Most versions of the bill require consumers to pay a fee to unlock each of their Internet-connected devices. This is especially unfair to less affluent residents. Moreover, such taxes on speech are strongly disfavored by courts. For example, taxation and speech-licensing schemes are presumptively unconstitutional,[19] and courts have struck them down in cases regarding the sale of sexually explicit books and movies,[20] as well as the sale of technologies like encryption.[21]

Moreover, the HTPA forces individual technology users to pay a $20 speech tax for access to *each of their devices*. According to a 2014 report by Ericsson, the average household in North America owned 5.2 Internet-connect devices.[22]

Consider the effective speech tax rates based on the following prices,[23] assuming a typical HTPA unblocking fee of $20 per device:

Device	**Retail Cost**	**Effective Tax**
NetGear Router	$118.99	16.8%
Kindle Paperwhite	$119.99	16.6%
Samsung Galaxy Tablet	$229.99	8.7%
Lenovo Laptop	$249.99	8%
Playstation 4 console	$249.99	8%
Sony Smart TV	$449.99	4.4%
iPhone 7	$699.99	2.9%

Thus, the HTPA would result in a consumer who purchases these seven items paying the government an additional $140, the equivalent of a 6.6% speech tax on their consumer electronics. This is not a “sin tax”

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18 Symantec, *Over Half a Billion Personal Information Records Stolen or Lost in 2015*, https://www.symantec.com/content/dam/symantec/docs/infographics/istr-reporting-breaches-or-not-en.pdf.

19 *Minneapolis Star Tribune Company v. Commissioner*, 460 U.S. 575 (1983) (overturning a use tax directed at the press for paper and ink in excess of $100,000 consumed in any calendar year); Freedman v. Maryland, 380 U.S. 51 (1965) (stricking down a requirement to receive a license prior to showing a film).

20 FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) (ordinance requiring a permit to operate a business selling sexually explicit books and movies).

21 Bernstein v. U.S. Dep’t of State, 974 F. Supp. 1288 (N.D. Cal. 1997) (regulation requiring a license to export encryption technology).

22 Ericsson, *North America Mobility Report June 2015*, http://www.ericsson.com/res/docs/2015/ericsson-mobility-report-june-2015-rnam-appendices.pdf.

23 Prices were obtained from the Best Buy website, http://www.bestbuy.com/.

on pornography, because many consumers will pay this tax in order to access mistakenly blocked sites. As written, the bill arguably also covers online services, requiring users to pay a $20 unblocking tax for each of the many email, text messaging, blogging, and social media platforms they use.

Some versions of the bill would allow companies to pay a $20 “opt-out fee” for each product that enters the respective state, yet this cost would surely be passed on to the technology user in order to recoup costs of the tax.

The Government Cannot Restrain Corporate Speech by Mandating Content-Filtering Technology

The HTPA restrains not just the First Amendment rights of technology users, but also the First Amendment rights of the companies that create technological goods and services. The First Amendment clearly protects the rights of corporations like these to gather, organize, and share information with their customers.[24]

Further, a company’s development of new products and technologies is an inherently creative process, regardless of the potential revenue they may bring. And the software and devices that a technology company creates are often a reflection of the company’s beliefs and identity. The HTPA in effect legislates the speech of technology manufacturers by requiring them to comply the censorship regime.

Some versions of the HTPA are even more problematic, because they impose criminal liability on companies that fail to ensure that their customers cannot access certain Internet content. As described above, a similar federal attempt to impose criminal liability on companies that would not restrict the speech that minors could access was found to violate the First Amendment.[25]

Finally, the HTPA’s technological mandates would interfere with U.S. technology companies’ ability to engage in interstate commerce, by creating a patchwork of free-expression markets and government censorship markets, violating the Commerce Clause in the Constitution.[26] It would also put a significant financial and logistical strain on technology companies by requiring them to invest heavily in censorship tools. The bill could even encourage content creation companies to stop making certain content available on the Internet, out of fear that publishing this content will get their entire site blocked.

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24 See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *United States v. Playboy Enter. Group, Inc.*, 529 U.S. 803 (2000); *New York Times Company v. Sullivan*, 376 U.S. 254 (1964).

25 *Reno* (1997).

26 United States Constitution, Art. 1m Sec. 8, Cl. 3.

Conclusion

The Human Trafficking and Child Exploitation Prevention Act will create enormous burdens for free speech, user control of their own devices, privacy, and the consumer technology economy. It will do little or nothing to address human trafficking. The Electronic Frontier Foundation urges you to oppose the HTPA.

Sincerely,

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