

April 19, 2023

The Honorable Charles Schumer
322 Hart Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
S-230, The Capitol
Washington, DC 20510

The Honorable Maria Cantwell
254 Russell Senate Office Building
Washington, DC 20510

The Honorable Ted Cruz
512 Dirksen Senate Office Building
Washington, DC 20510

Majority Leader Schumer, Minority Leader McConnell, Chairwoman Cantwell, and Ranking Member Cruz:

We, the undersigned organization, write in opposition to S. 686, the “Restricting the Emergence of Security Threats that Risk Information and Communications Technology Act,” or the “RESTRICT Act.”¹ The RESTRICT Act aims at information and communications (ICTs) technologies like TikTok that are considered a threat to the United States.

Section 3 authorizes the Secretary of Commerce to take action against any individual or entity who makes a “covered transaction” in information and communications technologies that could represent “an undue or unacceptable risk” to the technology products in the United States, the digital economy, the results of or the integrity of elections, or through coercive or criminal acts designed to benefit a foreign adversary. The very definition of a “foreign adversary” is also broad, as the Secretary of Commerce has the power to add countries to the list of foreign adversaries without consulting Congress.

The definition of a “covered transaction” is very broad and includes any transaction from any company or group that is merely “subject to the jurisdiction, or organized under the laws, of a foreign adversary.” Considering that the online marketplace is vast and complex, the RESTRICT Act will affect all online transactions routed through these “foreign adversary” countries. The scope of the act is enormous and may allow the administrative state to issue regulations affecting telecommunications, cryptocurrencies, press freedoms, and the use of and access to the Internet itself.

Section 11 creates several new criminal penalties that carry up to 20 years in prison and up to \$1 million in fines and costly civil penalties and potential forfeiture of property. The relevant section states, “It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any regulation, order, direction, mitigation measure, prohibition, or other authorization or directive issued under this Act.” This language is concerningly broad and fails to provide fair notice.

These criminal provisions are extremely troubling and dangerous for a number of reasons. First, nearly all of them, even those ironically called “specific unlawful acts,” are extraordinarily

¹ RESTRICT Act, S. 686, 118th Congress (2023), available at <https://www.congress.gov/bill/118th-congress/senate-bill/686>.

vague. They would punish the violation, attempted violation, or conspiracy to violate a regulation or order that has yet to be conceived or drafted and does not even currently exist. The Constitution requires notice in criminal statutes so that the public will know what conduct may render them liable. The Supreme Court has held that a statute criminalizing “loitering” provided notice that was constitutionally insufficient because it did not specify what conduct constituted “loitering.”² In this bill, the criminal provisions are even less clear. The regulations that this bill makes it a crime to violate do not even exist yet and so no conduct is specified at all. This is unfair to the public who must have notice of what a crime is and is constitutionally questionable at best.

Second, it constitutes a massive delegation of criminal lawmaking authority to the administrative state. There has been renewed skepticism of the administrative state and abuses of power over the past several years. There have been several legislative efforts to reassert congressional power on a variety of issues, ranging from war powers to emergency powers to trade. Even later this year, Congress is expected to consider major reforms to how agencies interact with technology companies through various surveillance authorities.

Unfortunately, Congress has a proclivity for governing by crisis as it responds to real or perceived threats. This practice often leads to the enactment of poorly crafted public policy that erodes fundamental constitutional rights. Administrative regulations are also issued in a process that is less public than Congressional lawmaking. The notice deficiencies described above are also worsened because this bill exempts the administrative process under this statute from sections of the Administrative Procedures Act that ensure notice and public comment prior to rulemakings. This administrative delegation is also concerning because each new President, or even each new Secretary of Commerce, may issue new criminal rules on this issue, providing a potentially inconsistent and constantly changing landscape of regulations, the violation of which carry a 20-year prison term.

Third, even the “specific unlawful acts” that are, in fact, specified are extraordinarily harsh or entirely unnecessary. One is a 20-year term in federal prison for noncompliance with a “reporting or recordkeeping” requirement. Twenty years in prison for a paperwork violation is extremely severe and would only exacerbate our nation’s mass incarceration. Additionally, making a false statement to the Government is criminalized, but this exact act is already criminalized in numerous other places in federal law.³ This new criminalization will only worsen the trial penalty, incentivize prosecutors to pile on charges, and coerce people, including innocent people, into guilty pleas.

Finally, the RESTRICT Act also includes an alarming expansion of federal civil asset forfeiture. Federal civil asset forfeiture laws flip the presumption of innocence on its head by requiring the person from whom property is seized to prove that it was unconnected to criminal activity. Given this incredibly unfair standard and the fact that law enforcement can keep a huge percentage of the proceeds of forfeited items, it is unsurprising that it has been well documented that civil asset forfeiture is ripe for abuse.

² *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

³ *E.g.*, 18 U.S.C. § 1001.

The RESTRICT Act is far more expansive and encompassing than its supporters admit. We agree with the House Financial Services Committee, which recently noted, “The RESTRICT Act is using TikTok as a smokescreen for the largest expansion of executive power since [the International Emergency Economic Powers Act].”⁴ We hope that the Senate Committee on Commerce, Science, and Transportation will consider these overcriminalization concerns as it approaches any action on the RESTRICT Act.

Please feel free to contact Jason Pye of the Due Process Institute at jason@idueprocess.org or Nathan Pysno of NACDL at npysno@nacdl.org with any questions.

Sincerely,

Due Process Institute
National Association of Criminal Defense Lawyers
Defending Rights and Dissent
Electronic Frontier Foundation
Fair Trials
Fight for the Future
Freedom of the Press Foundation
FreedomWorks
The Project for Privacy and Surveillance Accountability
Protect the 1st
Quincy Institute for Responsible Statecraft
Restore the Fourth
S.T.O.P. - Surveillance Technology Oversight Project
Taxpayers Protection Alliance

⁴ See House Financial Services Committee (@FinancialCmte), Twitter (Mar. 27, 2023), <https://twitter.com/FinancialCmte/status/1640409547532652544>.