

September 7, 2022

The Honorable Dick Durbin  
Chairman  
Committee on the Judiciary  
United States Senate

The Honorable Amy Klobuchar  
Chairwoman  
Subcommittee on Competition Policy,  
Antitrust, and Consumer Rights  
United States Senate

The Honorable Chuck Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate

The Honorable Mike Lee  
Ranking Member  
Subcommittee on Competition Policy,  
Antitrust, and Consumer Rights  
United States Senate

**Re: September 8, 2022 Markup: Journalism Competition & Preservation Act (S. 673)**

Dear Chairman Durbin, Ranking Member Grassley, Senator Klobuchar, and Senator Lee:

We write to express our deep concerns about the Journalism Competition and Preservation Act (JCPA). Absent amendment, the bill will be weaponized against moderation of hate speech, misinformation, and various other forms of online content that are corroding our democracy. Despite having bipartisan support, core provisions of this bill resemble the highly partisan legislation recently enacted in Florida and Texas to restrict content moderation. The essential feature of all three bills—banning viewpoint discrimination by private parties—violates the First Amendment. So, too, does the process of mandatory arbitration that the bill establishes.

The JCPA begins by exempting from antitrust scrutiny any cartel (“joint negotiation entity”) formed by qualifying “digital journalism providers” (“DJs”).<sup>1</sup> This exemption allows DJs to collude in negotiations and in mandatory arbitration with “covered platforms”—which include Facebook, Instagram, WhatsApp, YouTube, Google search, and various offerings from

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<sup>1</sup> To qualify as a DJ, a publisher only need generate \$100,000 in annual revenue. Journalism Competition and Preservation Act, S. 673, 117th Cong. § (9)(B)(vi)(I) (2021), <https://bit.ly/3RKLnPg>.

Alphabet and Apple<sup>2</sup>—“regarding the terms and conditions by which the covered platform may access the content of” all members of a cartel.<sup>3</sup> The bill tries to compensate for suppressing the normal operation of the antitrust laws by barring both cartels and platforms from discriminating among DJPs based on their size.<sup>4</sup>

If the bill stopped there, it might do merely what its supporters claim: rebalance market power in favor of publishers, redirecting revenues to support journalism—with safeguards to ensure that larger publishers do not exclude smaller publishers from the benefits of cartelized negotiation over carriage. But the bill does much more, and its safeguards will be inadequate to protect content moderation.

***Banning Viewpoint Discrimination.*** Neither a cartel nor a covered platform may discriminate against a DJP “based on ... the views expressed by its content.”<sup>5</sup> Eligible DJPs—which could well include much more than the serious journalistic publications the bill purports to cover<sup>6</sup>—could sue a covered platform<sup>7</sup> for discriminating against them “in connection with a negotiation ... or an arbitration.”<sup>7</sup> These cartels could include websites such as Gateway Pundit or content creators such as Prager University. The JCPA will be a tool for government power to infringe on platforms’ editorial judgments because (1) most content moderation necessarily involves viewpoint discrimination; (2) content moderation policies are currently, and will necessarily be, part of the “terms and conditions” under which platforms carry DJPs’ content, regardless of whether cartels negotiate over them; and (3) DJPs stand to lose significant revenues (the basis for assessing damages).

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<sup>2</sup> A covered platform is defined as an online platform that during any time in the 12 months prior to the formation of a joint negotiation entity has (a) at least 50,000,000 U.S.-based monthly active subscribers or users, (b) is owned and controlled by a person with market capitalization greater than \$550,000,000,000 or at least 1,000,000,000 worldwide monthly active users, and (c) is not a 501(c)(3) organization. S. 673, 117th Cong. § 2(2) (2021). TikTok may soon qualify. In 2021, the market capitalization of its parent, ByteDance, was \$400 billion, not far from the JCPA’s threshold of \$550 billion. See Coco Feng, *ByteDance’s private valuation falls by US\$100 billion in one year as IPO plans remain up in the air*, South China Morning Post (June 8, 2022), <https://www.scmp.com/tech/big-tech/article/3180850/bytedances-private-valuation-falls-us100-billion-one-year-ipo-plans>.

<sup>3</sup> S. 673, 117th Cong. § (3)(A)(1)(a) (2021). Critically, this language covers not merely payment but all “terms and conditions” under which platforms interact with third-party publishers. Cartel members gain enormous leverage in those negotiations: Right at the start of the prescribed negotiation process, they may jointly withhold access to their content from the covered publisher. *Id.* § (3)(c).

<sup>4</sup> Likewise, platforms may not discriminate against any DJP member of a cartel on the basis of its size “in connection with a negotiation... or an arbitration” authorized under the bill. *Id.* § 6(a)(2).

<sup>5</sup> *Id.* §§ 3(a)(1)(C), 6(a)(1). This language was not present in the version of this bill that received a subcommittee hearing in February. Journalism Competition and Preservation Act of 2019, S.673, 117th Cong. (2021). We discuss discrimination by cartels below. See *infra* pp. 6-9.

<sup>6</sup> See *infra* pp. 4-6.

<sup>7</sup> S. 673, 117th Cong. § 7(b)(2) (2021).

It is unclear under what circumstances the bill might function as a must-carry mandate. The JCPA applies to the terms and conditions by which a covered platform “accesses” the content of a DJP.<sup>8</sup> Thus, platforms will argue that the bill does not apply when a platform refuses to deal with the DJP altogether, such as banning a content creator’s account or refusing to allow users to share any of the DJP’s content on the platform.<sup>9</sup> Yet the bill also invites litigation over refusals to carry a publication: any DJP may sue when it believes a covered platform has retaliated against it for participating in negotiation or arbitration through a cartel “by refusing to index content or changing the ranking, identification, modification, branding, or placement of the content of the eligible digital journalism provider on the covered platform.”<sup>10</sup> At a minimum, the motive behind refusing to carry a DJP’s content will be a question of fact that will be difficult if not impossible to resolve before trial. A single DJP could sue anytime its “ranking” is changed, which could happen very frequently. In practice, the threat of such endless litigation may be enough to coerce platforms to carry some content they would otherwise have rejected altogether

But even if courts ruled that the bill does not require carriage of a publication that a platform wants to ban, or if the bill were amended to make this more clear, complete bans of a publication are currently rare: covered platforms now ban only the most extreme U.S. websites, such as the Neo-Nazi site Stormfront,<sup>11</sup> none of which are likely to meet the current definition of a DJP anyway. Most disputes over content moderation involve partial carriage: the platform hosts (“accesses”) *some* of a publication’s content but refuses to host, amplify, enhance the visibility of, or allow the publication to monetize *certain pieces* of content that it concludes violate its terms of service. For example, PragerU—which has 2.97 million subscribers to its YouTube channel—sued the company for putting some of its videos into “Restricted Mode,”<sup>12</sup> an opt-in tool parents, libraries, and schools can use to limit access to sensitive content that may not be appropriate for children—*e.g.*, “[v]ideo content that is

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<sup>8</sup> *Id.* § 5(a)(2) (“may participate in joint negotiations and arbitration, as members of the joint negotiation entity, with such covered platform regarding the terms and conditions by which the covered platform may access the content for which the eligible digital journalism provider.”).

<sup>9</sup> A cartel may demand carriage for all its members as a package, including DJPs that the covered platform does not wish to “access.” *See infra* pp. 6.

<sup>10</sup> S. 673, 117th Cong. § 6(b)(1) (2021).

<sup>11</sup> *Facebook Dangerous Individuals and Organizations List*, <https://s3.documentcloud.org/documents/21083819/facebook-dangerous-individuals-and-organizations-list-reproduced-snapshot.pdf> (last visited Sept. 6, 2022).

<sup>12</sup> *Your YouTube content & Restricted Mode*, YouTube Help, <https://support.google.com/youtube/answer/7354993?hl=en#zippy=%2Cdoes-restricted-mode-affect-monetization-for-my-videos%2Cwhat-does-restricted-mode-do%2Chow-does-restricted-mode-work%2Cwill-my-content-show-if-my-viewers-have-restricted-mode-turned-on> (last visited Sept. 6, 2022).

gratuitously incendiary, inflammatory, or demeaning toward an individual or group.” Such a policy is clearly not viewpoint-neutral: it “discriminates” against bigoted viewpoints.<sup>13</sup>

Limits on monetization will be especially prone to JCPA litigation. For example, on Facebook and Instagram, all misinformation and “misleading medical information” are ineligible for monetization; both are clearly questions of viewpoint on specific facts. “Content may be subject to reduced or disabled monetization if it depicts or discusses [certain debated social issues] in a polarizing or inflammatory manner”—*i.e.*, depending on the viewpoint expressed—including race, gender, and other standard protected classes, immigration, and the “legitimacy of elections.”<sup>14</sup> Topics that involve “tragedy or conflict” (*i.e.*, “events that result in suffering, destruction or distress”) may be eligible for monetization if they discuss those topics “in an explicitly uplifting manner”<sup>15</sup>—that is, depending on their viewpoint. Thus, denial of mass shootings is ineligible for monetization while serious journalism about the shootings and about shooting-denialism remain eligible.

Google AdSense, the leading provider of display advertising for all websites, will not allow ads to be displayed on pages containing “[d]angerous or derogatory content,” a broad catch-all for content that promotes bigoted views.<sup>16</sup> When Google threatened to enforce this policy against *The Federalist* for refusing to moderate hate speech in the user comments about each article (or move them to a separate webpage that did not display Google Ads),<sup>17</sup> *The Wall Street Journal* gave the site’s founders the opportunity to bemoan their victimization in an op-ed.<sup>18</sup>

Even if such policies pre-exist any negotiation under the JCPA, if a platform insists on them among the “terms and conditions by which the covered platform may access the content of [cartel members],” a DJP may argue that these policies discriminate against it based on

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<sup>13</sup> “We value stories where individuals discuss their personal experiences and share their emotions. Sharing stories about facing discrimination, opening up about your sexuality, and confronting or overcoming discrimination is what makes YouTube great.” *Id.*

<sup>14</sup> *Content Moderation Policies*, Meta Business Help Center, <https://www.facebook.com/business/help/1348682518563619?id=2520940424820218> (last visited Sept. 6, 2022).

<sup>15</sup> *Id.*

<sup>16</sup> *Google Publisher Policies*, Google AdSense Help (Mar. 23, 2022), [https://support.google.com/adsense/answer/10502938?visit\\_id=637980894241235258-1591325242&rd=1#content](https://support.google.com/adsense/answer/10502938?visit_id=637980894241235258-1591325242&rd=1#content).

<sup>17</sup> Mike Masnick, *Why Are There Currently No Ads on Techdirt? Apparently Google Thinks We're Dangerous*, Techdirt (Aug. 12, 2020), <https://www.techdirt.com/2020/08/12/why-are-there-currently-no-ads-techdirt-apparently-google-thinks-were-dangerous/>.

<sup>18</sup> Ben Domenech & Sean Davis, *NBC Tries to Cancel a Conservative Website*, *The Wall Street Journal* (June 17, 2020), <https://www.wsj.com/articles/nbc-tries-to-cancel-a-conservative-website-11592410893>. Kurt Schlichter, who writes for Townhall.com, termed it “fascist silencing of speech.” (@KurtSchlichter), Twitter (June 16, 2020, 3:11PM), <https://twitter.com/KurtSchlichter/status/1272970146005434369>.

viewpoint “in connection with a negotiation ... or an arbitration conducted [under the JCPA].” If a court agrees, it may award actual damages suffered by the plaintiff “as a result of the discrimination” plus costs. In addition, “injunctive relief to prevent such discrimination”<sup>19</sup> could include changing a platform’s policies on monetization or amplification—to require them to treat hate speech like any other content. The bill provides similar remedies for retaliation suits.<sup>20</sup> In both cases, the platform will no doubt argue that Section 230 bars liability, but if a court finds that a platform violated JCPA’s ban on viewpoint discrimination, it may also conclude that any actions taken by the platform to limit monetization or amplification were not taken in “good faith” and thus were ineligible for the protections of Section 230(c)(2)(A).<sup>21</sup>

***Which Publications Are Covered?*** Some may assume that the definition of “digital journalism provider” will ensure that the bill benefits only “legitimate” journalism. By contrast, the News Media Alliance cites Breitbart and Newsmax as examples of “conservative publications” that would benefit from the JCPA by way of its “nondiscrimination provisions and ... right to inclusion.”<sup>22</sup> Both positions are troubling in their own right; the government has no place aiding only what it considers “legitimate journalism,” and the courts have repeatedly held that “leveling the playing field” for speech is not a sufficient government interest to justify intrusion on the First Amendment.<sup>23</sup> But if supporters believe that “illegitimate” outlets will not benefit, they are mistaken. Breitbart and Newsmax have repeatedly trafficked in misinformation about topics including the 2020 election and COVID-19, and yet they will be able to demand inclusion and equal treatment as part of cartels sanctioned by the JCPA. Other publications that would also likely qualify as DJPs include One America News Network<sup>24</sup> and *The Federalist*.

In fact, the courts may set an even lower bar for who qualifies as a DJP—potentially allowing sites like Gateway Pundit, InfoWars, and Project Veritas to qualify—if they find that, in

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<sup>19</sup> The bill governs only “the terms and conditions by which the covered platform may access the content of the eligible digital journalism providers that are members of the joint negotiation entity”—not refusals to access content. *See, e.g.*, S. 673, 117th Cong. § 3(a)(1)(A) (2021). Moreover, covered platforms may be sued for discriminating only “in connection with a negotiation... or an arbitration,” *id.* § 6(a)(1), not in general.

<sup>20</sup> *Id.* § 6(b)(1).

<sup>21</sup> *Lewis v. Google LLC*, 2021 WL 1423118, No. 20-16073 (9th Cir. Apr. 15, 2021). The court may also rule that such policies lay outside the protections of a “publisher” under 47 U.S.C. § 230(c)(1).

<sup>22</sup> Staff, *Myth vs. Fact: The Journalism Competition and Preservation Act (JCPA)*, News Media Alliance (Aug. 1, 2022), <https://www.newsmediaalliance.org/myth-vs-fact-the-journalism-competition-and-preservation-act-jcpa/>.

<sup>23</sup> *See, e.g., Ariz. Free Enter. Club’s Freedom Fund PAC v. Bennett*, 564 U.S. 721, 749 (2011) (striking down electoral contribution limits meant to level the playing field between candidates for office).

<sup>24</sup> One America News Network is no longer carried by any cable or satellite services and is now purely a digital service; it would therefore presumably qualify as an eligible digital journalism provider under the JCPA, despite the bill’s exclusion of “television networks.”

attempting to benefit some publications while excluding others, the JCPA impermissibly discriminates among speakers. The definition of a “qualifying publication” is sure to be challenged in court, both on its face and as applied by cartels refusing membership to certain publications and covered platforms that attempt to moderate content from that publication. In general, “a differential burden on speakers is insufficient by itself to raise First Amendment concerns.” *Leathers v. Medlock*, 499 U.S. 439, 452 (1991).<sup>25</sup> But “differential [treatment] of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints.” *Id.* at. 446. Plaintiffs may well persuade a court that the JCPA’s criteria for eligibility do exactly that: discriminate against “particular ideas or viewpoints.”

Consider how existing state media shield laws define journalists eligible for the protection of the law, such as Colorado’s definition: “Any member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write, or edit news information for dissemination to the public.”<sup>26</sup> While these laws may attempt to limit the institutions to which they apply, they do so by describing the kinds of entities that qualify,<sup>27</sup> *not* by asking courts to distinguish among publications based on the quality of their editorial practices. Such laws cast a wide net. The JCPA does the opposite: it asks courts to determine which publications engage in “fact checking through multiple firsthand or secondhand news sources,”<sup>28</sup> “perform[] a public-information function comparable to that traditionally served by newspapers and other periodical news publications,”<sup>29</sup> and have “an editorial process for error correction and clarification.”<sup>30</sup> Where media shield laws tend to include more speakers, the JCPA intentionally excludes many speakers based on inherently subjective judgments about journalistic quality. Forcing courts to decide which entities produce “real journalism” no less offends the First Amendment than if the government attempted to define and benefit only

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<sup>25</sup> The Court upheld a state tax exemption that applied to print media and scrambled satellite broadcast, but not cable television.

<sup>26</sup> Colo. Rev. Stat. § 13-90-119(1)(c). *See generally* *State definitions of ‘journalist’*, Reporters Committee for Freedom of the Press, <https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2002/state-definitions-journalis/> (last visited Sept. 6, 2022).

<sup>27</sup> *See, e.g.*, Colo. Rev. Stat. § 13-90-119(1)(a) (“‘Mass medium’ means any publisher of a newspaper or periodical; wire service; radio or television station or network; news or feature syndicate; or cable television system.”).

<sup>28</sup> S. 673, 117th Cong. § 2(9)(B)(iii) (2021).

<sup>29</sup> *Id.* § 2(9)(B)(ii).

<sup>30</sup> *Id.* § 2(9)(B)(v).

“legitimate speech.” Similar concerns were raised about the Free Flow of Information Act of 2013, causing the bill to stall in Congress even after it was passed out of committee.<sup>31</sup>

To avoid discrimination against “particular ideas or viewpoints,” courts will likely interpret these criteria broadly, erring on the side of allowing publications that traffic in misinformation to qualify for the benefits of the JCPA. Few would say that a publication that repeatedly tells its readers or viewers that mass shootings are “false flag” operations and that grieving parents are “crisis actors” is engaged in good-faith fact-checking or that it provides a public function similar to traditional media outlets. Yet, because these subjective assessments necessarily raise the specter of viewpoint discrimination, courts will undoubtedly require that these definitional criteria be applied so broadly as to effectively read them out of the statute. Courts could even void these criteria altogether. Critically, the bill includes a savings provision specifying that the bill will remain in effect if some of its provisions are struck down as unconstitutional.<sup>32</sup>

Either way, lawmakers who support the bill believing that it will support only serious journalism may find that it actually benefits the very publications undermining our democracy. Both uses of state power violate the First Amendment: (1) the government providing special benefits to what it considers “real journalism” *and* (2) the government providing legal mechanisms for some speakers, those that object to the content moderation policies of platforms, to force other speakers, the platforms, to treat their content as if it were real journalism. The First Amendment forbids the government from interfering with speech in either way.

***Cartels’ Demands.*** Lawsuits against covered platforms for viewpoint discrimination are not the only way the JCPA may undermine content moderation. A cartel may demand changes to a platform’s content moderation policies. After all, the JCPA applies not only to pricing but to all “terms and conditions” by which a covered platform “accesses” the content of a DJP. The only real limit on what a cartel may demand is majority rule on a one-publication-one-vote basis.<sup>33</sup> We are not confident that this will be enough to prevent the bill from limiting content moderation. Indeed, it is subject to manipulation; political extremists have every incentive

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<sup>31</sup> See Mike Masnick, *Shield Law Moves Forward, Defines Journalism So That It Leaves Out Wikileaks & Random Bloggers*, TechDirt (Sept. 12, 2013), <https://www.techdirt.com/2013/09/12/shield-law-moves-forward-defines-journalism-so-that-it-leaves-out-wikileaks-random-bloggers>. Arguably, the Free Flow of Information Act of 2013 was more inclusive and thus less problematic because its definition of “covered journalist” turned on subjective questions of intent. S.987, 113th Cong. (2013). By contrast, the JCPA requires a court to assess journalistic quality.

<sup>32</sup> S. 673, 117th Cong. § 10 (2021).

<sup>33</sup> *Id.* § 3(a)(1)(D) (“each eligible digital journalism provider shall be entitled to 1 vote on any matter submitted to a vote of the members.”).

to gather multiple small journalistic entities into a cartel in order to control it. Each will have the same vote as a mainstream, serious newspaper.

Above, we noted that Section 6(a)(2)'s prohibition on covered platforms discriminating against DJPs based on viewpoints likely does not apply when a platform refuses to deal with ("access") a particular DJP altogether.<sup>34</sup> Even so, this would not prevent a cartel from demanding that a covered platform not discriminate among its members based on viewpoint; the platform's "access" to all the *other* members of the cartel requires it to carry a publication (or specific pieces of content) it does not wish to carry. This could be akin to the requirement recently enacted by Florida: a "social media platform may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast."<sup>35</sup> Just as Republicans have rallied behind such bills at the state level, there is ample reason to expect the right-wing media ecosystem to form cartels united around such demands.

The most unpredictable aspect of the JCPA's operation is just how many cartels there would be or how they would organize. Section 3(1)(A)(C) specifies only that two or more DJPs "may create admission criteria for membership unrelated to the size of an eligible digital journalism provider or the views expressed by its content." Thus, separate cartels may exist for content creators on each major platform or for kinds of media outlets (*e.g.*, all traditional newspapers). Each publication will have a strong economic incentive to join the largest possible cartel: the larger the cartel, the greater its leverage in negotiating over payment from covered platforms.

But many publications will also have strong political motives. The JCPA may allow them to eat their cake and have it, too. Nothing in the JCPA prevents a publication from belonging to multiple cartels, and the antitrust safe harbor would not bar an antitrust suit against a cartel that required exclusivity of its members<sup>36</sup>—a clear violation of the *per se* rule against group boycotts by competitors.<sup>37</sup> Thus, it is not difficult to imagine how the political right could create a cartel dedicated to forcing changes to content moderation.

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<sup>34</sup> See *supra* pp. 1-4.

<sup>35</sup> S. B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021), <https://www.flsenate.gov/Session/Bill/2021/7072/BillText/er/HTML>.

<sup>36</sup> S. 673, 117th Cong. § 5(b)(1)-(2) (2021).

<sup>37</sup> See *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (limiting "the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors").

True, the JCPA bans cartels discriminating based on “the views expressed by the eligible digital journalism provider’s content,”<sup>38</sup> but this would not prevent a cartel from branding itself in a way that deters enough other publications from joining to take control of the cartel. Nor would it bar discrimination based on geography. To produce majority support among its members for certain positions, the cartel could simply limit its membership to publications from rural areas. Even limiting membership to Republican-leaning states would not, arguably, discriminate among viewpoints in the underlying content. Publications in rural areas or red states that do not share the political motive of the cartel would have a clear right under the JCPA to join such a cartel, but if they do not have a reasonable chance of achieving a governing majority, they will be dissuaded from joining, lest they add to the cartel’s negotiating power with covered platforms.

A number of problems ineluctably follow from politically motivated cartels. For starters, the general nature of arbitration will advantage the cartels. The benefits of arbitration are efficiency and expedience. Often, when two commercial entities have a dispute over a modest (by their lights) sum of money, what they need more than anything is an answer—to whom does the money belong?—and arbitration, with its streamlined schedule, informality, and minimal due process, gets them their prompt resolution. Here, by contrast, politically motivated cartels will be pressing platforms to spread speech—that is, to *compel them to speak*—in a way the platforms find objectionable or abhorrent. The stakes will be high. Disputes involving fundamental rights, such as freedom of speech, are a poor fit for quick-and-dirty arbitration proceedings.<sup>39</sup> It’s a truism that once a dispute gets to a jury, all bets are off. The same goes for a dispute’s going before an arbitrator—sometimes well qualified, often not so much—who is in effect invited simply to take a quick stab at achieving rough justice.

Arbitration awards are basically set in stone. Presumably, arbitral awards under this bill will be subject to the Federal Arbitration Act. It is notoriously difficult, under the FAA, to get an arbitration award overturned in court. Simply put, “federal courts do not review the soundness of arbitration awards.”<sup>40</sup> (Indeed, and again, that’s the *point* of arbitration—to

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<sup>38</sup> S. 673, 117th Cong. § 7(b)(1)(A) (2021).

<sup>39</sup> *Cf. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (“Arbitration is poorly suited to the higher stakes of class litigation.”).

<sup>40</sup> *Chicago Typographical v. Chicago Sun-Times*, 935 F.2d 1501, 1504 (7th Cir. 1991) (Posner, J.). More specifically, the FAA “allows a court to vacate an arbitral award only where the award ‘was procured by corruption, fraud, or undue means’; ‘there was evident partiality or corruption in the arbitrators’; ‘the arbitrators were guilty of misconduct in refusing to postpone the hearing ... or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced’; or if the ‘arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award ... was not made.’” *Concepcion*, 563 U.S. at 350. Normally, the best route of attack, in

reach a result without much rigmarole.) It's "hard to believe that defendants would bet the company," in an arbitration, "with no effective means of review."<sup>41</sup> Likewise it's hard to believe that platforms would bet their speech rights and reputations.<sup>42</sup> Better to compromise in advance, and allow *some* unwanted speech on your platform, than to go to arbitration, lose, and find yourself stuck hosting anything a politically motivated cartel sees fit to publish.

Which brings us to a further problem—the specific form of the arbitration. "Final offer" or "baseball"-style arbitration is all-or-nothing. Such arbitrations work well when only money is at stake: two figures are presented to the arbitrator, and all she need do is pick one. Here, however, the two sides would be disputing the terms by which a platform would host content. Crafting a specific-performance decree is always a fraught undertaking, and disputes under this bill would be no exception. "Baseball" arbitration would make matters that much worse. Normally, an arbitrator could at least strive to construct a careful, nuanced set of terms. In "baseball" arbitration, though, she will be forced to pick between each side's first and only (and thus potentially flawed and clunky) crack at a solution. Worse still, the cartel's offer is likely to be superficially more appealing. Which offer would seem more reasonable to an arbitrator: a platform's complex, inherently subjective, and necessarily unpredictable content moderation policies, or the seemingly simple idea that the platform should not "discriminate" based on viewpoint?<sup>43</sup> An arbitrator may well be persuaded by arguments that Congress intended the JCPA to address viewpoint discrimination.

The theory behind "baseball" arbitration is that it forces each side toward the center. Yet this bill would likely botch even *that* modest benefit. *The platforms*, to be sure, would have an incentive to give ground to politically motivated cartels. The deck would be stacked against them: The JCPA allows any cartel to refuse to provide content to some platforms while providing it to others, creating a competitive imperative for platforms to agree to the demands of any significant cartel even before arbitration. Once arbitration begins, the JCPA specifically prevents the arbitrator from considering the benefits the platform offers cartel

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challenging such an award, is to cast doubt on the contractual arbitration clause that required arbitration to begin with—a route that will not be available here, where the source of the obligation to arbitrate is statutory.

<sup>41</sup> 563 U.S. at 351

<sup>42</sup> True enough, platforms could likely raise constitutional challenges to an award in court. But this is cold comfort. Platforms would still have to work against the usual presumption that arbitration awards should not be disturbed. And adding in the arbitration element creates lots of unknowns. Would platforms be stuck defending their speech rights case by case? Would they forfeit speech rights they conceded, in an attempt at compromise, in their "final offer"?

<sup>43</sup> See generally Mike Masnick, *Content Moderation at Scale is Impossible*, Techdirt (Nov. 20, 2019), <https://bit.ly/3Rk05x9>.

members.<sup>44</sup> And, again, better to let those cartels publish *some* hate speech or misinformation (via the platform’s “final offer”) than *lots* of hate speech or misinformation (via the cartel’s “final offer”). But will politically motivated cartels likewise be pulled toward compromise? Just as cartels could be gerrymandered by location, they could also be gerrymandered by kind of publication to produce a variety of cartels with similar motives. The underlying issue, of course, is that there are few platforms, but there are many outlets available to form cartels. So it’s quite possible that outlets could collaborate in order to generate seriatim arbitrations. Were that to happen, the platforms, to preserve their speech rights, would need to win every arbitration. The outlets, meanwhile, would benefit from winning even once. Following a victory, the next arbitration would feature the argument: “You let *x, y, and z*, say it; there’s no principled reason you can’t let us say it too.”

Culture wars are not resolved in alternative dispute resolution. Yet by shunting important matters of content moderation into “final offer” arbitration, this bill tries to do exactly that. Were that not bad enough, the bill astoundingly puts a thumb on the scale in favor of hate speech and misinformation. It throws freedom of speech and online safety to the wolves.

***Procedural Manipulation.*** Even if such ideologically motivated DJPs do not achieve anywhere near a majority within a cartel, the JCPA gives them what could be a procedural weapon. A cartel may not initiate a final offer “until 180 days after the date the last member joined.”<sup>45</sup> By staggering when they exercise their statutory right to join the cartel, ideologically motivated publishers could hold up final resolution of the arbitration process indefinitely. They could thus force a cartel to include demands about content moderation in its “final offer,” and even force a platform to accept such demands. After all, since the cartel’s primary leverage comes from withholding all its content, if the cartel is large enough, the platform may have a strong incentive to resolve the dispute quickly. This will be most true of cartels dominated by mainstream publications—precisely where such a procedural weapon would be most useful.

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These are just some of the ways in which the complex mechanisms created by the JCPA could be used against content moderation. In each respect, the JCPA goes beyond regulating business practices, which the First Amendment does not protect.<sup>46</sup> Ultimately, the bill

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<sup>44</sup> S. 673, 117th Cong. § 4(e)(2)(A) (2021).

<sup>45</sup> *Id.* § 4(a)(2).

<sup>46</sup> *Associated Press v. United States*, 326 U.S. 1 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

regulates editorial judgments, which are protected by the First Amendment.<sup>47</sup> In responding to the “myth” that the “JCPA would discriminate against conservative news outlets,” the News Media Alliance, the JCPA’s principal advocate, calls the bill “content-neutral.”<sup>48</sup> This may be an effective lobbying talking point, but it implicitly concedes the bill’s unconstitutionality: Banning viewpoint discrimination by private parties (cartels and covered platforms) is precisely the type of content-based restriction that the First Amendment forbids.

Government power to regulate or infringe on platforms’ editorial judgments when they moderate content has been litigated and found to likely violate the First Amendment. Upholding the district court’s injunction of Florida’s SB 7072 on First Amendment grounds, the 11th Circuit found that provision “self-evidently content-based and thus subject to strict scrutiny.”<sup>49</sup> The court struck down the must-carry mandate: “a private entity’s decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment.”<sup>50</sup>

The same is true of the less direct ways the bill could limit the editorial discretion of platforms. When cartels demand changes to platforms’ content moderation policies, state action will be clear: the JCPA creates the cartels, governs their operations, regulates their negotiations with platforms, mandates enforceable arbitration, and ensures that cartels may not discriminate against their members.<sup>51</sup>

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<sup>47</sup> See *NetChoice, LLC v. Attorney General, State of Florida*, 34 F.4th 1196, 1213 (11th Cir. 2022) (“Social-media platforms exercise editorial judgment that is inherently expressive. When platforms choose to remove users or posts, deprioritize content in viewers’ feeds or search results, or sanction breaches of their community standards, they engage in First-Amendment-protected activity.”); see generally *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that the First Amendment prohibits the government from compelling publication of “that which reason tells [publishers] should not be published.”).

<sup>48</sup> Staff, *Myth vs. Fact: The Journalism Competition and Preservation Act (JCPA)*, News Media Alliance (Aug. 1, 2022), <https://www.newsmediaalliance.org/myth-vs-fact-the-journalism-competition-and-preservation-act-jcpa/>.

<sup>49</sup> 34 F.4th 1196, 1226 (11th Cir. 2022).

<sup>50</sup> *Id.* at 1212.

<sup>51</sup> See, e.g., *Janus v. Am Fed’n of State, Cnty., & Min. Emps., Council 31*, 158 S. Ct. 2448, 2470, n.24 (2018) (noting the difference between a state’s “bare authorization” of union-shop agreements and a *requirement* that all employees pay agency fees to a labor union). Here, cartels do not receive “bare authorization.” Rather, they are imbued with the power to force a final arbitration to determine whether a platform’s or the cartel’s proposal will be imposed. This is a clear indication that the government is not simply allowing two private parties to reach an agreement; rather, it is inserting itself and directing the path of the outcome through mandatory provisions.

That the News Media Alliance claims the bill is “designed to preserve diverse points of view, including conservative ones, by providing a necessary check on Big Tech”<sup>52</sup> highlights the constitutional problem. While fostering diverse views may be an important and worthwhile goal, Congress may not pursue it by seeking to level the playing field.<sup>53</sup> Like Florida, Texas attempted to prohibit viewpoint-based content moderation decisions, likewise an effort to “check” the power of “Big Tech” and “preserve diverse points of view.” Enjoining the law, a federal district court noted: “the targets of the statute[] at issue are the editorial judgments themselves and the announced purpose of balancing the discussion ... is precisely the kind of state action held unconstitutional.”<sup>54</sup>

The JCPA recreates these First Amendment problems. If a cartel member feels that a platform’s terms of service discriminates against them based on their viewpoints (and again, prohibiting hateful, discriminatory, or misleading content necessarily does so), it will file a lawsuit alleging that a platform’s insistence on enforcing those rules constitutes unlawful discrimination under the JCPA. And on the other hand, cartels may well demand that platforms treat their content equally regardless of those terms of service—and potentially they will impose that demand should an arbitrator decide in their favor. There is scant difference between these possibilities and the government directly forbidding viewpoint discrimination in content moderation. Put simply, this bill permits the same infringements on editorial judgment that the courts have held the government may not itself legislate.

Ultimately, we do not see an easy solution to the First Amendment problems created by this bill. It would certainly help to clarify that the bill does not require carriage of any content that violates a platform’s terms of service. Removing the ban on viewpoint discrimination by covered platforms would be a significant improvement, but it would not prevent abuse of mandatory arbitration. Removing the ban on discrimination by cartels as to membership would help serious publications avoid allowing publications that traffic in prejudice and misinformation to ride on their coattails—but it could actually make abuse of the cartels more likely, as it would become easier to focus a cartel on an ideological vendetta against content moderation.

At minimum, this bill simply is not ready for markup. We urge you to hold further hearings on how this bill will affect content moderation before taking any further action on it.

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<sup>52</sup> Staff, *Myth vs. Fact: The Journalism Competition and Preservation Act (JCPA)*, News Media Alliance (Aug. 1, 2022), <https://www.newsmediaalliance.org/myth-vs-fact-the-journalism-competition-and-preservation-act-jcpa/>.

<sup>53</sup> See *supra* note 23 and associated text.

<sup>54</sup> *NetChoice, LLC v. Paxton*, No. 1:21-cv-840-RP, 2021 WL 5755120, at 18 (W.D. Tex. Dec. 1, 2021) (internal quotation marks omitted).

Sincerely,

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