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June 12, 2023

The Honorable Richard J. Durbin
Chair, Senate Judiciary Committee
United States Senate
711 Hart Senate Building
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member, Senate Judiciary Committee
United States Senate
211 Russell Senate Office Building
Washington, DC 20510

Re: Journalism Competition and Preservation Act of 2023 (S. 1094)

Dear Chair Durbin and Ranking Member Graham:

We write to renew our concerns about the Journalism Competition and Preservation Act (JCPA). This bill is substantially identical to the final version of last year's JCPA, and thus shares that bill's grave defects. Absent amendment, it will be weaponized against moderation of hate speech, misinformation, and various other forms of online content that are steadily corroding our democracy.

We have expressed our concerns in three previous letters.[1] Everything in JCPA turns on the definition of "eligible digital journalism provider"—and so do our concerns. JCPA is designed to help "serious" journalism. It asks courts to determine which publications engage in "fact checking through multiple firsthand or secondhand news sources,"[2] "perform[] a public-information function comparable to that traditionally served by newspapers and other periodical news publications,"[3] and have "an editorial process for error correction and clarification."[4] But 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 "legitimate speech." This is why existing state media shield laws, for example, define

[1] Letter from TechFreedom to Chairman Durbin, Ranking Member Grassley, Senator Klobuchar, and Senator Lee (Sept. 7, 2022), https://techfreedom.org/wp-content/uploads/2022/09/Journalism-Competition-Preservation-Act-JCPA.pdf; Letter from TechFreedom to Senators Durbin, Klobuchar, Grassley, and Lee (Sept. 14, 2022), https://techfreedom.org/wp-content/uploads/2022/09/2nd-letter-Journalism-Competition-Preservation-Act-JCPA.pdf; Letter from TechFreedom to Majority Leader Schumer, Minority Leader McConnell, Speaker Pelosi, and Minority Leader McCarthy (December 6, 2022), https://techfreedom.org/wp-content/uploads/2022/12/JCPA-December-6-2022-letter.pdf.

[2] S. 1094, 118th Cong. § 2(11)(B)(iii) (2023).

[3] *Id.* § 2(11)(B)(ii).

[4] *Id.* § 2(11)(B)(v).

journalists eligible for protection in functional terms,[5] rather than by asking courts to distinguish among publications based on the quality of their editorial practices.[6]

If courts do not strike down JCPA under the First Amendment, they will likely interpret the definition of DJP so broadly as to include virtually any publication—to avoid potential viewpoint discrimination. This might save the bill's constitutionality, but it would also allow extremist, pseudo-journalistic publications that peddle noxious content to qualify as "digital journalism providers."[7] Thus, the "joint negotiation entities" authorized by the bill to negotiate with platforms will not be able to exclude such publications. We appreciate amendments made to the Senate bill at last year's markup, which clarified that negotiations between covered platforms and cartels sanctioned by JCPA may not involve most aspects of content moderation (especially whether to carry content at all).[8] But this will only *partially* help to ensure that platforms can enforce their content moderation policies. Those amendments still leave several ways for JCPA to be weaponized:

1. Individual publishers could sue by framing moderation of their content as "retaliation";

2. Publishers could sue over being denied payment when their content violates monetization policies based on content and viewpoint; and

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[5] *See, e.g.*, Colo. Rev. Stat. § 13-90-119(1)(c) ("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."); 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."). *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 June 12, 2023).

[6] 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. *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.

[7] 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) (upholding a state tax exemption for print and satellite media, but not cable). 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."

[8] S. 1094, 118th Cong. §§ 3(b)(2), 4(d)(5)(E) (2023).

3. Covered platforms must pay DJPs merely for "accessing" their content, a term defined so broadly (to include "indexing" or "crawling") as to force platforms to pay even for refusing to carry huge swathes of objectionable content.

In other words, JCPA may still impose "must-carry" obligations on platforms. Even if it does not, it will likely impose "must-pay" obligations. Both would do the opposite of JCPA's supposed purpose: promoting serious journalism. Both perverse outcomes must be addressed before the Committee sends this bill to the floor.

Retaliation. Ostensibly, Section 6(b)(1) bans only retaliation by a platform against a DJP "for . . . participating in a negotiation . . . or an arbitration." Yet the definition of retaliation remains so broad ("refusing to index content or changing the ranking, identification, modification, branding, or placement of the content"), that essentially *any* content moderation decision could be framed as "retaliation" against a DJP. Language added at last year's markup to exclude most content moderation decisions from the scope of what could be covered in either negotiation or arbitration does not apply to retaliation suits.[9] Indeed, "retaliation" suits can still be brought over one of the things explicitly excluded from the scope of "discrimination" suits: "changing the ranking . . . of the [DJP's] content . . . ."[10]

To the extent that refusing to carry a DJP's content at all could constitute retaliation, JCPA establishes an unconstitutional must-carry mandate. The First Amendment protects platforms' right to determine what content they will disseminate,[11] and that right is not diminished by the fact that a platform's objection is to *paying* for content. Compulsory subsidization of speech "raises similar First Amendment concerns" to those raised by compelling the speech itself.[12] Platforms might reasonably host (or permit links to) content they find disagreeable in order to allow a broader variety of expression. But they might also draw the line at financially supporting the creation of that content. Government is not free

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[9] *Compare* Journalism Competition and Preservation Act, S. 1094, 118th Cong. §§ 3(b)(2), *and* 4(d)(5)(E), *with* § 6(b)(1) (2023).

[10] *See infra* notes 14–16 and associated text.

[11] NetChoice, LLC v. Moody, 34 F.4th 1196, 1226 (11th Cir. 2022) ("[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.").

[12] Janus v. Am Fed'n of State, Cnty., & Min. Emps., Council 31, 158 S. Ct. 2448, 3464 (2018). *See also* United States v. United Foods, Inc., 533 U.S. 405, 413 (2001) (holding unconstitutional a government regulation imposing a financial assessment on handlers of fresh mushrooms to fund generic advertising, noting that "[i]t is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment …").

to redraw those boundaries for platforms and force them to subsidize speech against their will.

In a retaliation suit, a defendant platform must prove a negative: that it did *not* refuse to carry, downrank, etc. a DJP's content because of the DJP's participation "in a negotiation . . . or an arbitration."[13] The platform's motivation is a question of fact that will be difficult, if not impossible, to resolve before trial. Because Section 6(a)(1) bars cartels from "discriminating" against any DJP based on viewpoint, *every* DJP will be able to participate in *some* cartel whose content platforms want.[14] Any DJP could sue any time its "ranking" is changed[15] (which could happen very frequently) for monetary damages and attorneys' fees (the "must-pay" mandate) as well as "injunctive relief on such terms as the court may deem reasonable to prevent or restrain the covered platform from retaliating against the eligible digital journalism provider" (which could include "must-carry" requirements).[16] In short, the law incentivizes retaliation suits, and the threat of such endless litigation may be enough to coerce platforms to carry some content they would otherwise have rejected altogether. In effect, this could be a broad *de facto* must-carry obligation.

Must-Pay: Breaking Monetization Policies. JCPA immunizes DJPs from antitrust liability for forming cartels to negotiate with platforms regarding the "*pricing, terms, and conditions* under which the covered platform may access the content of the eligible digital journalism providers." That provision has been defined to exclude most aspects of content moderation: the way the platform "displays, ranks, distributes, suppresses, promotes, throttles, labels, filters, or curates the content of the eligible digital journalism providers; or . . . of any other person."[17] This was a significant improvement. Notably missing from this definition, however, are monetization policies, a core aspect of content moderation.

Today, platforms refuse to allow monetization of various controversial or inflammatory topics depending on the viewpoint expressed: *e.g.,* supporting versus opposing racism, or denying versus documenting school shootings. For example, on Facebook and Instagram, all

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[13] S. 1094, 118th Cong. § 6(b)(1) (2023).

[14] A cartel ("joint negotiation entity") "may create admission criteria for membership unrelated to the size of an eligible digital journalism provider or the views expressed by its content, including criteria to limit membership to only eligible publishers or only eligible broadcasters." S. 1094, 118th Cong. § 3(a)(1)(C). In practice, this means there may be multiple cartels based on, for example, geography or medium (YouTube content producers versus newspapers). But whatever cartel covers online publishers generally will not be able to exclude, for example, *Breitbart*.

[15] S. 1094, 118th Cong. § 6(b)(1) (2023).

[16] S. 1094, 118th Cong. § 7(c)(2) (2023).

[17] *Id*. § 3(b)(2)(A) (2023).

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."[18] Content about topics that involve "tragedy or conflict" (*i.e.*, "events that result in suffering, destruction or distress") may be eligible for monetization if it discusses those topics "in an explicitly uplifting manner"[19]—that is, depending on its viewpoint. Thus, denial of mass shootings is currently ineligible for monetization, while serious journalism about the shootings and about shooting-denialism remains 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.[20] When Google threatened to enforce this policy against *The Federalist* for refusing to moderate hate speech in user comments about each article (or move them to a separate webpage that did not display Google Ads),[21] *The Wall Street Journal* gave the site's founders the opportunity to bemoan their victimization in an op-ed.[22] Under JCPA, such complaints would also have been filed in court. The First Amendment properly limits government power to regulate or punish such speech. A necessary corollary is that private parties must be free of government interference to decide for themselves what content to host or associate with. The only sure way to protect platforms' ability to make such distinctions is to remove the bill's ban on viewpoint discrimination altogether.

Must-Pay: The Overly Broad Definition of "Access." The JCPA's core obligation is that platforms must pay cartel members for "accessing" their content under "pricing, terms, and

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[18] *Content Moderation Policies*, META BUSINESS HELP CENTER, https://www.facebook.com/business/help/1348682518563619?id=2520940424820218 (last visited June 7, 2022).

[19] *Id*.

[20] *Google Publisher Policies*, GOOGLE ADSENSE HELP (Mar. 23, 2022), https://support.google.com/adsense/answer/10502938?visit_id=637980894241235258-1591325242&rd=1#content.

[21] 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/.

[22] Ben Domench & 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.

conditions" set either through negotiation or arbitration.[23] Otherwise, a DJP could bring a discrimination suit under Section 7(b)(2). But JCPA's current text will produce two perverse results that are not necessary to promote legitimate publications and that have nothing to do with concerns about platforms' allegedly unfair profits from the use of third-party content.

First, the definition of "access" in the current text of JCPA—"acquiring, crawling, or indexing content"—triggers payment obligations too quickly. It would require covered platforms to pay for content before they even know what it is, much less decide what to do with it. Unless a site is already on a blacklist, before a platform "crawls" content on that site, it has no way of discerning the nature of the content. Crawling is *how* a platform decides whether it wants to carry content and how to handle it. But under the JCPA, a platform that "crawls" content may be obligated to pay for the privilege of determining whether the content violates its terms of service.[24] At a minimum, the definition of "access" should exclude circumstances where a covered platform crawls content that it subsequently determines violates the platform's content policies. The same should go for "programmatic access," a term currently left undefined.

Second, consider also content uploaded or posted by DJPs directly *to* a covered platform, such as tweets or YouTube videos. By any reasonable definition, the platform would have "acquired" such content. But only *after* content is uploaded or posted can the platform analyze it to determine whether it violates the platform's content rules. A DJP with an agreement under the JCPA could upload or post content that clearly violates that platform's rules (because, *e.g.*, it glorifies terrorism or incites violence)—and thus trigger the platform's obligation to pay without any action by the platform itself. Such abuse could be prevented by excluding from the definition of "access" any content uploaded or posted directly to a covered platform's service.

Narrowing the definition of "access" and "programmatic access" in these two ways should mean only that websites do not have to pay for content they choose not to carry for editorial reasons. Neither amendment would prevent disputes over content that *is* carried on a site but that is also deemed ineligible for monetization.

Other Necessary Amendments. JCPA's prohibition on viewpoint discrimination (Section 6(a)) and retaliation (Section 6(b)(1)) by platforms both threaten content moderation. The best way to prevent abuse of the non-discrimination provision would be to delete it. The second-best way would be to narrow the definition of "access." With respect to the retaliation

[23] S. 1094, 118th Cong. §§ 3(a)(1)(A), 3(b)(1), 4(a)(1) (2023).

[24] Courts may also interpret "indexing" to include the decisions platforms make to blacklist content.

provision, the best way to prevent abuse would be to exclude content moderation from its scope, as has been done for discrimination. But even with these last two amendments, more would be needed to guard against abuse. One way to do that, at least partially, would be to include a safe harbor.

When a plaintiff brings a discrimination suit seeking payment for content carried ("accessed") by the platform but deemed ineligible for monetization, if a platform makes a prima facie showing that it has applied public, generally applicable monetization policies, the burden of proof should shift to the plaintiff to show that this defense is pretextual, *i.e.*, that the defendant selectively applied those policies to avoid paying for content that it would otherwise have to pay for under the pricing terms of a deal reached with the DJP's cartel.

Similarly, when a plaintiff DJP brings suit alleging that its content was moderated or demonetized in retaliation for its participation in a negotiation or arbitration, if the defendant platform can show that that it has applied public, generally applicable content moderation policies (including demonetization policies), the burden of proof should shift to the plaintiff to show that this defense is pretextual, *i.e.*, that the defendant's actions were purely retaliatory.

Such safe harbors would reflect a fundamental constitutional principle: the First Amendment protects the editorial judgments of media companies but not their business practices.[25] Likewise, platforms have a First Amendment right to refuse to carry or pay for content because they find it objectionable for editorial, rather than economic, reasons.

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Again, we appreciate your attention to our concerns about content moderation. While the amendments we outline above do not address all our concerns about the bill, they would reduce some of the unintended problems the current draft would create.

Sincerely,

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[25] Associated Press v. United States, 326 U.S. 1 (1945) (no First Amendment protection for allowing newspapers to block local competitors from joining the press pool); Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (no First Amendment immunity when a newspaper organized a group boycott of a new radio station by refusing to carry ads from local businesses if they bought ads on the radio station).

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