TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

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Executive Committee
Illinois State Senate
401 S 2nd St, Room 212
Springfield, Illinois 62706

Re: Journalism Preservation Act (SB 3591)

Dear Chair Castro and Members of the Executive Committee:

TechFreedom is a nonpartisan, nonprofit organization devoted to technology law and policy, the protection of civil liberties in the digital age, and the preservation of innovation that drives technological advancement to the benefit of society.

We write to express our concerns about SB 3591, the Journalism Preservation Act (JPA). The JPA, aimed at bolstering journalism outlets in the face of flagging advertising revenue, appears simple on its face: "Eligible digital journalism providers" (DJPs) may submit a notice to a covered platform, after which point the covered platform must track any content it hosts that links to or displays the DJP's content. The covered platform must then remit a monthly "journalism usage fee" to the DJP based on a calculation of the DJP's "allocation share" relative to the covered platform's advertising revenue.

TechFreedom agrees that a diverse and functional press is crucial to our system of democratic self-government. But, like a similar bill that stalled in the last Congress,[1] the JPA violates the First Amendment rights that make a free press possible in the first place and threatens to undermine content moderation in a way that may ultimately help those media outlets weakening our democracy.

The JPA's Eligibility Criteria Raise Constitutional Concerns.

Some may assume that the JPA's definition of "eligible digital journalism provider" will ensure that the bill benefits only "quality" or "legitimate" journalism.[2] This selectivity is

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[1] *JCPA would Break Content Moderation and Violate the First Amendment*, TECHFREEDOM (Sept. 8, 2022), https://techfreedom.org/jcpa-would-break-content-moderation-and-violate-the-first-amendment/.

[2] *See* SB 3591 Sec. 5(g), 2023-2024 Reg. Sess. (Ill. 2024) (finding that "quality local journalism is key to sustaining civic society."). *See also* Graham Womack, *Making Online Media Giants Pay for the Industry They*

constitutionally suspect in its own right: the government has no place aiding only what it considers to be "legitimate" journalism. For that reason, the courts may ultimately lower the bar for who qualifies as an "eligible digital journalism provider" if they find that, in attempting to benefit some publications while excluding others, the JPA impermissibly discriminates among speakers.

The definition of a "qualifying publication" is sure to be challenged in court, both on its face and as applied in disputes between publishers and covered platforms over eligibility. In general, "a differential burden on speakers is insufficient by itself to raise First Amendment concerns."[3] But "differential [treatment] of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints."[4] Plaintiffs may well persuade a court that the JPA's criteria for eligibility do exactly that: discriminate against "particular ideas or viewpoints."

Consider how broadly the Illinois Reporter's Privilege defines journalists eligible for the protection: "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium."[5] Media shield laws in other states have similarly broad criteria for eligibility.[6] While these laws may attempt to limit the institutions to which they apply, they do so by describing the kinds of entities that qualify,[7] *not* by asking

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Crushed, CALIFORNIA LOCAL (Apr. 1, 2023, 5:45 PM), https://californialocal.com/localnews/statewide/ca/article/show/32043-ab-886-journalism-preservation-act/ (Speaking of AB 886, the nearly-identical California Journalism Preservation Act, Assemblymember Buffy Wicks stated "I'm concerned about our democracy and access to information—and the misinformation that exists—and ensuring that we are really supporting our publishers.").

[3] Leathers v. Medlock, 499 U.S. 439, 452 (1991) (upholding a state tax exemption that applied to print media and scrambled satellite broadcast, but not cable television).

[4] *Id.* at 446.

[5] 735 ILCS 5/8-902(a).

[6] *See, e.g.*, CAL. EVID. CODE § 1070(a) (protecting "[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed."); COLO. REV. STAT. § 13-90-119(1)(c) (protecting "[a]ny 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."). *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 March 3, 2024).

[7] *See, e.g.*, 735 ILCS 5/8-902(b) (defining "News Medium" as "any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a news service whether in print or electronic format; a radio station; a television station; a television network; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing."); 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.").

courts to distinguish among publications based on the quality of their editorial practices. Such laws cast a wide net.

The JPA does the opposite: it asks courts to determine which publications engage in "fact checking through multiple firsthand or secondhand news sources,"[8] "perform[] a public information function comparable to that traditionally served by newspapers and other periodical news publications,"[9] and have "an editorial process for error correction and clarification, including a transparent process for reporting errors or complaints to the publication."[10] Where media shield laws err on the side of including more speakers, the JPA 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 "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.[11]

To avoid discrimination against "particular ideas or viewpoints," courts will likely interpret these criteria broadly, so that even publications that traffic in misinformation can qualify for the benefits of the JPA. 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.

Thus, lawmakers who support the bill believing that it will support only serious journalism may find that it actually benefits publications that make it *harder* to find reliable and accurate news sources. 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 (including purveyors of misinformation) to

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[8] SB 3591 Sec. 10, 2023-2024 Reg. Sess. (Ill. 2024).

[9] *Id.*

[10] *Id.*

[11] *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 JPA requires a court to assess journalistic quality.

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.

JPA Will Operate as an Unconstitutional Must-Pay *and* Must-Carry Mandate.

JPA Section 30 prohibits a covered platform from "retaliating" against a DJP for demanding payment under its provisions "by refusing to index content or changing the ranking, identification, modification, branding, or placement" of the DJP's content. This provision amounts to a must-carry mandate for any content from a DJP: once the covered platform receives a notice under the JPA, it may no longer decide not to publish, display, or link to that DJP's content.

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 Eleventh Circuit Court of Appeals found that provision "self-evidently content-based and thus subject to strict scrutiny."[12] 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."[13]

It makes little difference that the JPA only prohibits platforms from making these editorial judgments in response to receiving notice from a DJP. The First Amendment's protection 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.[14] 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 to redraw those boundaries for platforms and force them to subsidize speech against their will. If Illinois wishes to impose a "journalism usage fee"—the wisdom of which is outside

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

[13] *Id.* at 1212.

[14] 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 . . .").

the scope of this analysis—it cannot then disallow platforms from opting out of publishing content rather than subsidizing it.

Section 30 would also effectively coerce platforms into hosting content that violates their content policies. The definition of "retaliation" is broad enough that virtually *any* content moderation decision could be framed as "retaliation" against a DJP. While Section 30(c) disclaims any prohibition of, or liability for, enforcement of platform terms of service against DJPs, this carveout will not protect platforms from weaponized lawsuits attacking content moderation.

In a retaliation suit, a defendant platform will have to prove a negative: that it did *not* refuse to carry, downrank, etc. a DJP's content because of the DJP's "asserting its rights under [the JPA]." This question of fact will be difficult if not impossible to resolve before trial. Any DJP could sue any time its content is removed for violating policies, or its "ranking" is changed (which could happen very frequently)—or even when a platform appends a fact-checking note to content. In practice, the threat of such endless litigation may be enough to coerce platforms to carry some content they would otherwise have rejected altogether to avoid the hassle and expense.

The JPA's constitutionality remains suspect even when a platform's decision is not based on any objections to a DJP's content—*i.e.*, when it simply decides that purchasing the content would not be a worthwhile expenditure.

At first glance, such circumstances may *seem* akin the position of the cable operators in *Turner Broadcasting v. FCC,* where the Supreme Court upheld provisions of the 1992 Cable Act providing that cable companies "must carry" local broadcasters' channels for free.[15] There, too, cable operators never objected to any content or viewpoints expressed in the broadcasters' programming. Rather, as the majority noted, the law "interfere[d] with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations," which caused them to suffer an *economic* loss.[16]

But the must-carry provisions at issue in *Turner* survived because the Court applied intermediate, rather than strict, scrutiny. The Court's reasoning for doing so reveals material differences between those provisions and the JPA that make it likely that the JPA will instead be subject to strict scrutiny—and thus ultimately struck down.

The JPA is a content-based regulation. The cable must-carry regulations escaped strict scrutiny because the Court held them to be content-neutral, both on their face and in

[15] 512 U.S. 622 (1994).

[16] *Id.* at 644.

purpose. The *Turner* Court found that the regulations were not intended to "favor . . . a particular subject, viewpoint, or format," noting that cable operators were required to carry broadcast channels regardless of the content of their programming.[17] Instead, the Court held, Congress sought to "ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue" and "guarantee the survival of a *medium* that has become a vital part of the Nation's communication system."[18]

In contrast, the JPA is explicitly content-*based*. Its core purpose is to advantage—including by mandated carriage—a specific *type* of content, *i.e.*, journalism. And the bill's language codifies that content-based purpose: only publications that "serve a public information function" and produce content "concerning local, regional, national, or international matters of public interest" are entitled to the JPA's benefits. Unlike the regulations in *Turner*, Illinois does not seek to protect the viability of an important *medium* for expression; it singles out a subject matter itself for special treatment. The JPA is thus inherently content-based in a way that the must-carry provisions in *Turner* were not.[19]

Online platforms do not possess bottleneck control over Internet content. Another critical reason that the *Turner* Court applied intermediate scrutiny was the power of cable operators to control the totality of the programming available in its customers' homes. Distinguishing its application of strict scrutiny to Florida's law compelling newspapers to carry certain content,[20] the Court explained:

> When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.[21]

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[17] *Id.* at 646.

[18] *Id.* at 647 (emphasis added).

[19] A law "would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." McCullen v. Coakley, 573 U.S. 464, 479 (2014) (quoting FCC v. League of Women Voters of California, 468 U.S. 364, 383 (1984)). Establishing whether a particular entity is a DJP and therefore entitled to its benefits necessarily requires examination of the content of its publications.

[20] *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[21] 512 U.S. 622, 656 (1994).

By contrast, "when a newspaper asserts exclusive control over its own news copy, it does not thereby prevent other newspapers from being distributed to willing recipients in the same locale."[22] The same is true of online platforms: declining to host or link to a DJP's content does not prevent any person from accessing its content through other platforms, or the DJP's own website. Indeed, it is far easier to find and access DJPs' content with several keystrokes and clicks than it is to locate alternative print publications. "The central dilemma of cable," noted the *Turner* Court, "is that . . . all of the [content] producers and publishers use the same physical plant. If the cable system is itself a publisher, it may restrict the circumstances under which it allows others also to use its system."[23] But the "physical plant" used for online speech is not any particular platform—it is the broadband networks that deliver content, *like any other website*, to consumers. Platforms are simply unable to exert the level of gatekeeper control that concerned the Court in *Turner* and led to its application of intermediate, rather than strict, scrutiny.

Mandating payment in addition to carriage imposes a significant burden. Finally, while cable operators must allocate a certain number of their channels for free broadcast carriage, they are not required to pay broadcasters for their programming. Cable operators can offer a virtually limitless number of channels, and it is highly unlikely that an operator would ever find themselves in the position of turning down a revenue-generating channel to satisfy their must-carry obligations. Indeed, when the must-carry regulations reached the Supreme Court again in *Turner II*, the Court found that the burden on cable operators was merely "modest" and likely to decrease even further as channel capacity continued to expand.[24] Today, the marginal cost of the must-carry provisions is even lower; digital cable systems allow operators to easily and inexpensively add unlimited channels. Moreover, the number of "local commercial television stations" subject to must-carry rules is low: across *all* markets in the United States, the FCC estimates that 1,373 such stations exist[25]—and cable operators are only required to carry stations local to *their* market.[26]

Online platforms similarly have virtually unlimited and relatively low-cost capacity. But the JPA would not merely force platforms to use their property to host content from DJPs, it would also require them to pay for the privilege. And because the JPA would apply to DJPs

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[22] *Id.*

[23] *Id.* at 657 n. 8 (quoting ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 168 (1983)) (internal quotation marks omitted).

[24] Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 214 (1997).

[25] *Update to Publication for Television Broadcast Station DMA Determinations for Cable and Satellite Carriage*, MB Docket No. 22-239, Report and Order, FCC No. 22-89, at 17 (Nov. 18, 2022), https://www.fcc.gov/document/fcc-amends-rules-facilitate-broadcast-station-carriage-elections-0.

[26] 47 U.S.C. 534 (b)(1).

regardless of locality, the number of potential DJPs that a platform may be forced to pay is high indeed—even a moderately successful Substack can generate $100,000 in revenue in a year. Compelling platforms to host *and* pay for any DJP is a burden so severe that courts will likely view it as easily distinguishable from *Turner*.

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A vibrant and functioning press is undoubtedly important, and it is clear that many publications are struggling to adapt to the digital age. But the solution cannot come in the form of the government's heavy hand on the scales of speech. Such intervention will at best inadvertently harm some sectors of the press, and at worst it will violate the First Amendment. We stand ready to discuss these important issues further and assist you in your deliberations. If you have any questions or would like to discuss the issues in this letter further, please contact Ari Cohn at acohn@techfreedom.org.

Sincerely,

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