TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

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December 6, 2022

The Honorable Charles E. Schumer
Majority Leader
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
1236 Longworth House Office Building
Washington, D.C. 20515

The Honorable Mitch McConnell
Minority Leader
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Kevin McCarthy
Minority Leader
United States House of Representatives
2468 Rayburn House Office Building
Washington, D.C. 20515

Re: Journalism Competition and Preservation Act of 2022 (S. 673)

Dear Majority Leader Schumer, Speaker Pelosi, Leader McConnell, and Leader McCarthy:

We write to express our deep concerns about the Journalism Competition and Preservation Act (JCPA). This bill simply is not ready for floor action in either chamber. 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.

We have expressed our concerns in previous letters.[1] Courts are likely to interpret JCPA to allow extremist, pseudo-journalistic publications that peddle noxious content to qualify as "digital journalism providers." That has not changed. The only question is whether being part of a cartel will allow such publications to benefit from the bill. We appreciate amendments made to the Senate bill at markup clarifying 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). But those amendments will not address three forms of abuse:

[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.

1. Even if cartels cannot use arbitration to force platforms to carry content they find objectionable, individual publishers will still be able to bring suit over any content moderation decision they do not like as a form of "retaliation."

2. Publishers may still be able to sue over being denied payment if their content violates monetization policies based on content and viewpoint—a core aspect of content moderation.

3. Covered platforms must pay DJPs merely for "accessing" their content. That term is defined so broadly (to include "indexing" or "crawling") that it will force platforms to pay fees for the privilege of refusing to carry huge swathes of objectionable content.

In other words, JCPA may still function as a "must-carry" mandate and, even if it does not, it will likely function as a "must-pay" mandate. Neither outcome would serve JCPA's ostensible goal: helping fund serious journalism. They must be addressed before passage of this bill.

Retaliation. Section 6(b)(1) is supposed to focus on retaliation by a platform against a DJP "for…. participating in a negotiation… or an arbitration." But 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. Notably, language added at 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.[2] Indeed, "retaliation" suits can be brought over one of the things explicitly excluded from the scope of "discrimination" suits: ranking.[3]

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." This question of fact 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 will want.[4] Any DJP could sue any time its "ranking" is changed—which could happen very

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[2] *See infra* note 5 and associated text.

[3] *Compare* Journalism Competition and Preservation Act, S. 673, 117th Cong §§ 3(a)(1)(C) and 6(b)(1) (2021).

[4] 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. 673, 117th 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*.

frequently—for monetary damages and attorneys' fees ("must-pay"), 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"[5] ("must-carry"). In practice, the threat of such endless litigation may be enough to coerce platforms to carry some content they would otherwise have rejected altogether.

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."[6] Notably missing, however, from this definition 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 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."[7] 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"[8]—that is, depending on 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-

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[5] S. 673, 117th Cong § 7(c)(2)(B) (2021).

[6] *Id*. § 3(b)(2)(A) (2021).

[7] *Content Moderation Policies*, META BUSINESS HELP CENTER, https://www.facebook.com/business/help/1348682518563619?id=2520940424820218 (last visited Sept. 6, 2022).

[8] *Id*.

all for content that promotes bigoted views.[9] 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),[10] *The Wall Street Journal* gave the site's founders the opportunity to bemoan their victimization in an op-ed.[11] The only sure way to protect platforms' ability to make such distinctions is to remove the ban on viewpoint discrimination altogether.

Must-Pay: The Overly Broad Definition of "Access." The core of the JCPA is that platforms will have to pay cartel members for "accessing" their content under "pricing, terms, and conditions" set either through negotiation or arbitration.[12] If they do not, a DJP can bring a discrimination suit under Section 7(b)(2). But 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 deciding that the content violates its terms of service.[13] 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 that is currently left undefined.

Consider also content uploaded or posted by DJPs directly *to* a covered platform. By any reasonable definition the platform will have "acquired" such content. Only after content is uploaded or posted can the platform analyze it to determine whether it violates that 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. This is a perverse result with significant potential for abuse, and it does

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

[10] 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/.

[11] 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.

[12] S. 673, 117th Cong §§ 3(a)(1)(3), 3(b)(1), 4(a)(1) (2021).

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

nothing to alleviate concerns about platforms' allegedly unfair profits from their use of external content. This shortcoming could be addressed 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 this way should mean that websites do not have to pay for content they choose not to carry for editorial reasons. But it would not prevent disputes over content that *is* carried on a site but also deemed ineligible for monetization.

Potential 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 provision, the best way to prevent abuse would be to exclude the 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 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. Here, that means refusing to pay for content or retaliating against participation in a legally sanctioned negotiation or arbitration process for essentially economic rather than editorial reasons.[14]

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[14] Associated Press v. United States, 326 U.S. 1 (1945); Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

The application of such defenses is highly technical—exactly the kind of thing that should be considered carefully in hearings and at markup. It is not the kind of thing that can be bolted onto a flawed bill at the last minute.

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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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