SIIA

September 7, 2022

Senator Richard Durbin
Chairman
Committee on the Judiciary
United States Senate
Dirksen Senate Office Building SD-152
Washington, DC 20510

Senator Charles Grassley
Ranking Member
Senate Committee on the Judiciary
United States Senate
Dirksen Senate Office Building SD-152
Washington, DC 20510

Re: Journalism Competition and Preservation Act (JCPA--S.673)

Dear Chairman Durbin and Ranking Member Grassley:

I am writing on behalf of the Software & Information Industry Association (SIIA) to express our concern that the Journalism Competition and Preservation Act (JCPA) would violate the First Amendment by compelling covered platforms to carry, publish, and pay for content even if those businesses find such content offensive, harmful, or at odds with their terms of service or community standards. We urge the Judiciary Committee not to advance the JCPA in its current form.

By way of background, SIIA is the principal trade association for those in the business of information. We represent more than 450 large and small companies including business-to business-publishers, social media platforms, and analytics firms. Our mission is to protect the three stages of the information lifecycle—creation, dissemination, and productive use.

The First Amendment lies at the core of that lifecycle. Its robust application to the internet is what in large part created United States leadership in the information industry: SIIA members compete in the marketplace of ideas based on the fundamental speech-based choices about which ideas they will advance, and which they will not. The Supreme

Court has long held that under the First Amendment, "[f]or corporations, as well as for individuals, the choice to speak includes within it the choice of what not to say."[1] And in a more recent case, the Court found that "[c]ompelling a person to *subsidize* the speech of other private speakers raises…First Amendment concerns."[2] This legislation violates these basic speech precepts.

Section 6(a)(2) of the JCPA explicitly forbids a "covered platform" from discriminating against "any eligible digital journalism provider" based, among other things, on the views expressed by that entity. Section 6(b)(1) contains an additional prohibition against any type of retaliation aimed at entities that participate in "joint negotiations." These provisions require a covered platform both to carry the content of any journalism entity that is part of a joint negotiation, whether it violates that platform's content moderation policies or not, and to pay for that content.

No matter their size, online platforms routinely promote and demote content as part of their operations. They offer their users the opportunity to contribute their own content. But as a condition, the platform sets the policies that determine what type of information it will allow on its platform, where it will be published, and how it will be displayed. Unlike a common carrier, which carries goods from place to place, a platform's economic growth comes not in spite of the ideas that it chooses to promote, but because of them.

By prohibiting the use of basic content moderation policies, the bill would destroy the ability of private businesses to make their own First Amendment-protected decisions about what information they wish to publish and how. Newspapers, for example, have editorial processes to determine which stories to run and where in the paper they will appear, and they also make daily decisions about which letters to the editor to publish. The fact that, for example, a newspaper might have been the main or sole source of information in a given community does not abrogate the newspaper's First Amendment right to control its own editorial decisions.[3]

Newspapers and other "eligible digital journalism providers" are not entitled to more First Amendment rights than anyone else. But that is exactly what the JCPA would do: it would

---

[1] *PG&E v. Public Utilities Comm'n*, 475 U.S. 1, 2 (1986).
[2] *Janus v. AFSCME*, 585 U.S. 2460, 2464 (2018).
[3] *See Miami Herald v. Tornillo*, 418 U.S. 241, 252-56 (1974) (invalidating Florida statute based on the idea that newspapers constituted monopolies in localities and presented a monopolistic view of the news); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (protecting the ability of a private party to choose the message associated with that party's parade).

require online platforms to negotiate with and provide access to all information providers, regardless of content. This includes purveyors of crush videos, pornography, and any other "lawful but awful" activity capable of being the subject of journalism. That compulsion is unsupported by the First Amendment.

We share your desire to help and strengthen local journalists and digital news publishers, but that strengthening cannot come at the expense of bedrock First Amendment guarantees. We strongly urge you to reconsider taking the JCPA forward.

Sincerely,

Chris Mohr
President