December 5, 2022

The Honorable Jarrold Nadler
Chairman
Committee on the Judiciary
United States House of Representative
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
United States House of Representative
Washington, DC 20515

Re: Journalism Competition and Preservation Act of 2021 (H.R. 1735)

Dear Chairman Nadler and Ranking Member Jordan:

I am writing on behalf of the Software & Information Industry Association (SIIA) to express our concerns about the *Journalism Competition and Preservation Act of 2021* (JCPA), which we understand the House Judiciary Committee is planning to mark up this month.

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 the information lifecycle, and its robust application to the Internet fostered United States leadership in the information industry. SIIA members compete in the marketplace of ideas based on fundamental content-based choices about which ideas they will advance, and which they will not.

Our primary concern is that the JCPA is unconstitutional in its current form. As written, it would violate the First Amendment by compelling 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.

Section 8(a)(2) of the House bill 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 8(b)(1) contains an additional prohibition against any type of retaliation aimed at entities that participate in "joint negotiations." A separate and concerning novelty in the bill is

that for the first time, platforms in the future would be required to pay for reporting the fact of a website's online location.[1] When read together with the above "nondiscrimination"provisions, section 3(b)(1), which prohibits discussion of the economic costs of demoting, further prevents online platforms from considering the cost to its business of carrying ideas that destroy the community it wishes to create.

The press, of course, does not receive greater (or lesser) First Amendment rights than anyone else. *Miami Herald Pub. Co. v. Tornillo*, a case ironically enough brought by the newspaper industry, is instructive. There, the state of Florida passed a statute requiring that newspapers be required to run editorial positions opposing those taken by the newspaper itself. The reasons given by the state in support of the statute included many of the same issues animating this legislation, including a "monopoly of the means of communication,"[2] its fears of a "communication revolution," "advocacy journalism," and the influence of a "press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and the course of events."[3]

The Court invalidated that statute, refusing to allow the government to substitute its own judgment for that of private parties, noting that "the Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter."[4] The Court has repeatedly defended this principle, noting for example that "[f]or corporations, as well as for individuals, the choice to speak includes within it the choice of what not to say,"[5] and that "[c]ompelling a person to *subsidize* the speech of other private speakers raises … First Amendment concerns."[6] Even more recently, the Court upheld the rights of a private party to reject particular ideas on its public access channels, despite the "analogy" to a "government-granted monopoly."[7]

By prohibiting online platforms from applying basic content moderation policies, the JCPA would destroy the ability of private businesses to make their own First Amendment-protected decisions about what information they wish to carry and how. Both the House and the Senate-reported bill would compound that problem by preventing platforms from pricing in the risk engendered by carrying ideas harmful to their business models.

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[1] *See* Amendment in the Nature of a Substitute to H.R.1735, Section 2(1).

[2] *See* Senator Ted Cruz, Remarks at the Senate Judiciary Committee Executive Business Meeting, Markup of the JCPA (Sept. 22, 2022).

[3] *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 249-250.

[4] *Id*. at 256 (*"*Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.*")*

[5] *PG&E v. Public Utilities Comm'n*, 475 U.S. 1, 2 (1986).

[6] *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018).

[7] *Manhattan Cmty. Access Corp. v. Halleck*, 204 L. Ed. 2d 405, 139 S. Ct. 1921, 1931 (2019).

SIIA applauds the goal of the JCPA—to support local news and preserve strong, independent journalism. In its current form, however, the bill offends bedrock constitutional principles. For that reason, we respectfully urge you not to advance the bill.

Sincerely,

Christopher A. Mohr
President