No. 24-34

United States Court of Appeals
for the
Ninth Circuit

SAMANTHA ALARIO, *et al.*,

Plaintiffs-Appellees,

and TIKTOK INC.,

Consolidated Plaintiff-Appellee,

v.

AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana,

Defendants-Appellant.

On appeal from the United States District Court for the District of Montana
Case Nos. CV 23-56-DWM and CV 23-61-DWM
Honorable Donald W. Molloy, Presiding

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

ROBERT CORN-REVERE
Counsel of Record
ZACHARY T. SILVER
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Avenue, SE
Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org
zach.silver@thefire.org

Attorneys for Amicus Curiae *Foundation for Individual Rights and Expression*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on college campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. In June 2022, FIRE expanded its public advocacy beyond the university setting and now defends First Amendment rights both on campus and in society at large. *See, e.g.*, Brief of FIRE et al. as *Amici Curiae* in Support of Respondents, *Murthy v. Missouri*, No. 23-411 (argued Mar. 18, 2024).

In lawsuits across the United States, FIRE seeks to vindicate First Amendment rights without regard to the speakers' views. These cases include matters involving state attempts to regulate the internet and social media platforms, both directly and indirectly. *See, e.g.*, *NetChoice,*

[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

LLC v. Bonta, No. 22-cv-08861-BLF, 2023 WL 6135551 (N.D. Cal. Sept. 18, 2023), *appeal docketed*, No. 23-2969 (9th Cir. Oct. 23, 2023); *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023), *appeal argued*, No. 23-356 (2d Cir. Feb. 16, 2024); *see also* Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Lindke v. Freed*, 601 U.S. 187 (2024); Brief of FIRE as *Amicus Curiae* in Support of Respondent, *O'Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024); Brief of FIRE as *Amicus Curiae* in Support of Petitioners, *NetChoice, LLC v. Paxton*, No. 22-555 (argued Feb. 26, 2024); Brief of FIRE as *Amicus Curiae* in Support of Respondents, *Moody v. NetChoice, LLC*, No. 22-277 (argued Feb. 26, 2024).

SUMMARY OF ARGUMENT

Montana's defense of Senate Bill 419 (S.B. 419) is an exercise in misdirection. Montana erroneously attempts to evade First Amendment scrutiny of S.B. 419 by rebranding its regulation of TikTok's and its users' speech as a consumer-protection law that regulates only conduct. Appellant's Br. 24–32. *See generally* S.B. 419, 2023 Leg., 68th Reg. Sess. (Mont. 2023). This is far from an anomaly. Government actors from across the country and the ideological spectrum have tried to skirt constitutional constraints by characterizing their regulations of

protected online expression as regulations only of conduct or "business practices."

But federal courts have recognized these evasions for what they are and found these policies violate the First Amendment. This Court should do the same with Montana's statewide ban of TikTok, a social media platform used by more than a third of the state's population. Its claims that the ban is nothing more than a common consumer protection measure addressing TikTok's "conduct" are wrong on the law and unsupported by the plain text of S.B. 419.

Once First Amendment scrutiny is brought to bear, S.B. 419 is unconstitutional under any level of scrutiny. While the district court properly enjoined the law's operation, it should have treated the ban as a prior restraint and as a content-based speech regulation subject to strict scrutiny. The court erred in applying too constrained a definition of prior restraint, and it overlooked S.B. 419's content-based legislative purpose. But it at least reached the right result—enjoining the law before it could go into effect.

This Court should affirm that result, as well as the district court's conclusion that S.B. 419 cannot satisfy even intermediate scrutiny.

Montana has failed to meet its constitutional burden of demonstrating that the law is needed to address substantial problems and that the TikTok ban would solve them in a direct and material way. Nor is the bill narrowly tailored as the law requires. The State "used an axe to solve its professed concerns when it should have used a constitutional scalpel." *Alario v. Knudsen*, Case No. CV 23-56-M-DWM, 2023 WL 8270811, at *10 (D. Mont. Nov. 30, 2023). This Court should affirm.

ARGUMENT

I. Montana Cannot Evade First Amendment Scrutiny by Characterizing a Publishing Ban as the Regulation of Conduct.

Montana has banned an important medium of communication and is defending its actions by attempting to characterize its action as something else. But First Amendment review is not so easily evaded. As other states have learned when they attempted to cloak social-media regulation as some form of generic consumer-protection law, speech regulations cannot be transmuted into generic conduct rules by legislative fiat. Montana's effort to do the same is erroneous both as a matter of fact and law.

A. Social media companies are electronic publishers protected by the First Amendment.

The Supreme Court has made clear that "social media in particular" is one of today's "most important places (in a spatial sense) for the exchange of views." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). This medium "offers 'relatively unlimited, low-cost capacity for communication of all kinds,'" *id.* (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)), and "allows users to gain access to information and communicate with one another about it on any subject that might come to mind," *id.* at 107. "In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Id.* at 105 (quoting *Reno*, 521 U.S. at 870).

This is true of TikTok as it is with other social media providers. Like Facebook, X, and other social media platforms, people across the globe "use TikTok for a variety of reasons, including for entertainment, religious, and political purposes," or for "generat[ing] revenue for themselves and their businesses." *Alario v. Knudsen*, Case No. CV 23-56-M-DWM, 2023 WL 8270811, at *2 (D. Mont. Nov. 30, 2023). In the United States alone, TikTok grew from approximately 40 million monthly active users to more than 150 million as of March 2023. *Id.*; Chandlee Decl. ¶ 7,

ECF No. 14.[2] Recent research shows 33 percent of U.S. adults (including 62 percent of U.S. adults under 30) and 63 percent of teens ages 13 to 17 use TikTok.[3] Moreover, a "growing share of U.S. adults say they regularly get news on TikTok. This is in contrast with many other social media sites, where news consumption has either declined or stayed about the same in recent years."[4]

TikTok is an especially popular place for the exchange of views in Montana. With a population of just 1.08 million,[5] "around [380,000]

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[2] *See also Celebrating Our Thriving Community of 150 Million Americans*, TikTok (Mar. 21, 2023), https://newsroom.tiktok.com/en-us/150-m-us-users.

[3] Kirsten Eddyi, *6 Facts About Americans and TikTok*, Pew Rsch. Ctr. (Apr. 3, 2024), https://www.pewresearch.org/short-reads/2024/04/03/6-facts-about-americans-and-tiktok; Jeffrey Gottfried, *Americans' Social Media Use*, Pew Rsch. Ctr. (Jan. 31, 2024), https://www.pewresearch.org/internet/2024/01/31/americans-social-media-use.

[4] Katerina Eva Matsa, *More Americans Are Getting News on TikTok, Bucking the Trend Seen on Most Other Social Media Sites*, Pew Rsch. Ctr. (Nov. 15, 2023), https://www.pewresearch.org/short-reads/2023/11/15/more-americans-are-getting-news-on-tiktok-bucking-the-trend-seen-on-most-other-social-media-sites.

[5] *Montana*, U.S. Census Bureau, https://data.census.gov/profile/Montana?g=040XX00US30 (last visited May 4, 2024).

people in [Montana] access [TikTok] every month." *Alario*, 2023 WL 8270811, at *2. And the evidence in this case provides vignettes into TikTok's popularity in Montana, especially as compared to other platforms. *Id.* (noting Alario "has ten times as many followers on TikTok as on Facebook"; Goddard has 101,000 followers on TikTok but "a miniscule 157" on YouTube; and DiRocco "has over 200,000 followers on TikTok, but only 23,500 on Instagram"); Chandlee Decl. ¶ 11 (highlighting examples of "a rancher in Montana" whose "videos have received over 1.2 million likes" and "an indigenous artisan" who "has amassed over 70,000 followers"). By any measure, TikTok is an important medium of communication in Montana.

B. Government cannot avoid constitutional scrutiny by relabeling speech as "conduct."

Laws that target a particular medium regulate speech, regardless of how those regulations may be "[c]haracterize[ed]." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720 (1931) ("Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint."). This is true even for measures that do not overtly call out "speech" per se. *See, e.g.*, *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575,

582 (1983) (tax on ink and paper "burdens rights protected by the First Amendment"). As this Court has made clear, the First Amendment protects the "process of expression through a medium" as well as "the expression itself." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010). These cases stand for the principle that "[s]peech is not conduct just because the government says it is." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019).

Would-be regulators cannot avoid the First Amendment simply by recasting essential speech processes as "conduct." Otherwise, they "could claim that publishing a newspaper is conduct because it depends on the mechanical operation of a printing press." *Id.* "[T]he creation and dissemination of information are speech within the meaning of the First Amendment," *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011), and "if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct," *Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001) (citation omitted) (regulating the disclosure of information is "a regulation of pure speech … not a regulation of conduct"). *See also Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1

(2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference."); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012) (finding statute targeting a communication technology and imposing potential criminal liability "burdens First Amendment rights directly, not incidentally").

It has been obvious from the beginning of internet regulation that laws targeting this medium inherently present serious First Amendment concerns. *See Reno*, 521 U.S. at 868–70. This is true even for laws that do not specifically mention "speech" (just as for the print medium). *See, e.g.*, *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 12–13 (D.D.C. 2018) (applying First Amendment analysis to unauthorized access prohibitions in Computer Fraud and Abuse Act); *United States v. Yung*, 37 F.4th 70, 77 (3d Cir. 2022) (rejecting argument that federal cyberstalking law targets conduct and not speech). In addition to extending First Amendment protections to internet users, courts have also uniformly recognized the rights of online intermediaries to "disseminate third-party created" speech and exercise editorial control on their platforms. *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1212 (11th Cir. 2022) (citing cases and explaining that "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"), *cert. granted sub nom. Moody v. NetChoice, LLC*, 144 S. Ct. 478 (2023), *argued*, No. 22-277 (Feb. 26, 2024); *Wash. Post v. McManus*, 944 F.3d 506, 515 (4th Cir. 2019) (explaining a "platform-oriented structure poses First Amendment problems of its own"). *But see NetChoice, LLC v. Paxton*, 49 F.4th 439, 463–65 (5th Cir. 2022), *cert. granted*, 144 S. Ct. 477 (2023), *argued*, No. 22-555 (Feb. 26, 2024).

Applying these principles, courts have seen through the pretense when governments attempt to avoid First Amendment scrutiny by relabeling their social media regulations as pursuing some non-speech purpose. In 2023, for example, Ohio enacted the Parental Notification by Social Media Operators Act, Ohio Rev. Code § 1349.09. This law required online platforms "that target[] children, or [are] reasonably anticipated to be accessed by children," to either obtain parental consent for a child to use the platform or bar all children younger than 16 from using the platform altogether. *Id.* § 1349.09(B), (E). The State attempted to "cast the Act—and this case—as not about the First Amendment, but

about … the ability of minors to contract." *NetChoice, LLC v. Yost*, Case No. 2:24-cv-00047, 2024 WL 555904, at *6–7 (S.D. Ohio Feb. 12, 2024).

The district court roundly rejected this argument, explaining that "the Act is an access law masquerading as a contract law" and thus "implicate[s] the First Amendment." *Id.* at *7 (citation omitted). It found the Ohio law regulated both (1) "operators' ability to publish and distribute speech *to minors* and speech *by minors*," and (2) "minors' ability to both *produce speech* and *receive speech*." *Id.* at *6. And as a speech regulation, the court found that the Act was content-based and "not narrowly tailored to protect minors against oppressive contracts." *Id.* at *12.

Likewise, the district court enjoined enforcement of California's Age-Appropriate Design Code Act, Cal. Civ. Code §§ 1798.99.28–.40, which the State had defended as "merely regulat[ing] business practices regarding the collection and use of children's data." *NetChoice, LLC v. Bonta*, Case No. 22-cv-08861, 2023 WL 6135551, at *6 (N.D. Cal. Sept. 18, 2023). Just as in this case, the State had argued the law restricted only "nonexpressive conduct that is not entitled to First Amendment protection." *Id.* The district court rejected the State's characterization,

finding the law was a speech regulation masquerading as a privacy law. It held that the Act regulated protected expression because it "restrict[ed] the 'availability and use' of information by some speakers but not others, and for some purposes but not others." *Id.* at *7 (citing *Sorrell*, 564 U.S. at 570–71). The court then found the Act would fail any level of heightened scrutiny—even "the lesser standard of intermediate scrutiny for commercial speech"—and issued a preliminary injunction preventing its enforcement. *Id.* at *10, *23–24.[6]

C. Montana's effort to shield S.B. 419 from First Amendment review falls flat.

Montana's principal defense of S.B. 419 is based on the false premise that banning a medium of communication is not a regulation of speech subject to First Amendment review. Appellant's Br. at 18–19, 24–34. But a ban on a channel of communication is not, as the State

[6] Two other states' attempts to justify social media regulations under the guise of regulating platforms' nonexpressive conduct are currently before the Supreme Court. *Moody v. NetChoice, LLC*, No. 22-277 (argued Feb. 26, 2024), *granting cert. to NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022); *NetChoice, LLC v. Paxton*, No. 22-555 (argued Feb. 26, 2024), *granting cert. to* 49 F.4th 439 (5th Cir. 2022). *See generally* Brief of FIRE as *Amicus Curiae* in Support of Petitioners, *Paxton*, No. 22-555 (arguing social media platforms' content-moderation decisions are editorial judgments that receive First Amendment protection).

maintains, a run-of-the-mill exercise of police power, like regulating "unfair competition," "selling goods," "mak[ing] loans," or "debt collection." *Id.* at 3–4. Nor can it evade First Amendment considerations by labeling this a "consumer protection" measure or a "data privacy" law. *Id.* at 13, 24–34. Montana's defense of S.B. 419 is wrong both as a matter of law and based on the facts.

Start with the facts: Montana's repeated assertion that S.B. 419 "targets TikTok's conduct, not its expression," and "prohibits using TikTok *without respect* to the messages it conveys," *id.* at 35, 38, is belied by the plain language of the statute, which describes one reason for the ban as TikTok's failure to remove "dangerous content that directs minors to engage in dangerous activities." S.B. 419 pmbl. That purpose of the law goes unmentioned in the State's brief, perhaps because it is so obvious a First Amendment problem. *See, e.g.*, *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000) (explaining it "is the essence of content-based regulation" for a law to "single out particular programming for regulation" and to "single[] out particular programmers"). The district court noted the State's silence on this legislative rationale. *Alario*, 2023

WL 8270811, at *9 (noting the State "did not address" its "stated child-protection purpose" in its briefing).

Likewise, Montana's insistence that S.B. 419 "doesn't 'implicate' the Users' or TikTok's First Amendment rights" and "doesn't regulate the Users' conduct at all," Appellant's Br. at 28–29, is obviously false. Section 1 provides that TikTok "may not operate within the territorial jurisdiction of Montana" and that the law is violated by (among other things) "the operation of tiktok by the company *or users*." S.B. 419 § 1 (emphasis added). The State's assertion that this does not implicate TikTok's or users' First Amendment rights is mere sophistry. A statewide ban on a particular bookstore no doubt would affect both the seller and the buyer—the First Amendment rights of both entities are, to put it mildly, "implicated." It is no different with a statewide prohibition of downloading or using a specified social media application. Where—as here—a law "restrict[s] when, where, or how someone can speak," that law is a direct regulation of "speech," not of "conduct" or "economic activity." *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 961 (9th Cir. 2021); *see also Bartnicki*, 532 U.S. at 527 ("acts of 'disclosing'

and 'publishing' information … constitute speech" itself, "distinct from the category of expressive conduct." (citation omitted)).

Occasionally in its brief, however, the State's mask slips and reveals the obvious purpose of banning a medium of communication. Montana notes, for example, that S.B. 419 "regulates one channel of internet expression but leaves all others untouched." Appellant's Br. at 20. It makes the same admission in various ways. *See id.* at 39 (Montana's ban "applies equally to all speech on the platform"); *id.* at 40 (S.B. 419 "applies to the platform writ large."); *id.* at 41 (S.B. 419 "permits any person to make any statement about any topic, even China. *It just prohibits one way they can make that statement.*" (emphasis added)). Montana inexplicably suggests the law doesn't present a constitutional problem because S.B. 419 "doesn't ban all 'online platform[s] that enable[] users to create, share, and view videos and other forms of content.'" *Id.* at 45. But just as the State would get no First Amendment bonus points if it chose to close down only one bookstore rather than all of them, it gains nothing by arguing it is closing down only one channel of internet expression. This cannot be fairly characterized as the regulation of "conduct."

Montana's reliance on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), to argue that the First Amendment does not preclude enforcement of generally applicable laws that impose "incidental burdens" on speech, is inapposite. Appellant's Br. at 24–34. *Arcara* involved the application of a New York public-nuisance law to close a bookstore that was used as a front for prostitution. But as the district court correctly found, unlike the law in *Arcara*, S.B. 419 "targets one entity, which on its face makes it not generally applicable." *Alario*, 2023 WL 8270811, at *6. The State meets itself coming and going on this argument: It insists S.B. 419 is "generally applicable," but then claims the law's "*targeted regulation singles out TikTok* for its unique data-harvesting practices, not for any expressive activity." Appellant's Br. at 25 (emphasis added); *see also id.* at 20 (S.B. 419 "regulates one channel of internet expression but leaves all others untouched"). The "data harvesting" rationale is wrong for other reasons, but the State's admission that S.B. 419 is "targeted" precludes applying *Arcara* here.

Also, the nuisance law in *Arcara* treated as a nuisance "any building" being used for prostitution, and therefore had "absolutely no connection to any expressive activity," as distinguished from S.B. 419,

which "implicates traditional First Amendment speech" by "banning a 'means of expression' used by over 300,000 Montanans." *Alario*, 2023 WL 8270811, at *6 (quoting *Arcara*, 478 U.S. at 707 n.3). And that is another major distinction. Under the nuisance law upheld in *Arcara*, the bookseller "remain[ed] free to sell the same materials at another location." 478 U.S. at 705. Because the closure order "ha[d] nothing to do with any expressive conduct at all," *id.* at 705 n.2, the bookseller could reopen the next morning down the street. That is not the situation here, where the district court found S.B. 419 deprived plaintiffs "of communicating by their preferred means of speech." *Alario*, 2023 WL 8270811, at *6.

II. Montana's TikTok Ban Fails Any Level of First Amendment Scrutiny.

The district court saw through Montana's claim that banning a medium of communications is not the mere regulation of "conduct" and held that the legislature must regulate "with a constitutional scalpel." *Id.* It held that plaintiffs had shown S.B. 419 likely violates the First Amendment and is "unlikely to pass even intermediate scrutiny." *Id.* at *5. But the court should have gone further and held that S.B. 419 is a prior restraint, and that it is a content-based law that fails strict scrutiny.

Whatever the level of scrutiny, however, this Court should affirm the decision below.

A. S.B. 419 is a prior restraint and fails strict scrutiny.

While it is sufficient to conclude S.B. 419 cannot satisfy lower levels of scrutiny, this Court should properly apply heightened scrutiny, both because the law imposes a prior restraint and because it is a content-based speech regulation.

The district court found that "S.B. 419 completely shuts off TikTok to Montana users," but incorrectly concluded it was not a prior restraint because "users may be able to use other platforms on the Internet" and is "not a ban on the users' sole means of communicating." *Alario*, 2023 WL 8270811, at *8. But a prior restraint does not require that the government cut off *all* access to information, but that it block in advance whatever type of expression it restricts.

The district court's error may have arisen from its excessively narrow conception of a prior restraint, which it defined as "an 'administrative and judicial order[] forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Id.* (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)).

However, prior restraints are not so limited. They can take various forms besides judicial or administrative decrees, including licensing regimes, *Freedman v. Maryland*, 380 U.S. 51 (1965), taxation, *Minneapolis Star*, 460 U.S. at 587 n.9, or even informal coercion, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70–71 (1963). They are "the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 558–59 (1976) (citation omitted).

No administrative or judicial order is a prerequisite where the State's scheme is designed to prevent or deter speech deemed "objectionable" without first securing a judicial determination "that such publications may lawfully be banned." *Bantam Books*, 372 U.S. at 70–71. The prior restraint program struck down in *Bantam Books* did not involve any sort of official process, nor did it ban readers' "sole means of communicating." Likewise, in *Near v. Minnesota*, 283 U.S. 697, the Court found (and invalidated) a prior restraint of a single newspaper—*The Saturday Press*—where there was no requirement that all newspapers be restrained or subjected to a licensing scheme. Under established law, there should be no question that a government ban that cuts off 380,000

Montanans from their preferred social media platform is a prior restraint.

S.B. 419 is also subject to strict scrutiny because it is a content-based speech restriction. Despite the State's repeated claims that the law is a content-neutral regulation of data practices, it cannot escape the statement of legislative purpose to ban TikTok because the company allegedly "fails to remove, and may even promote, dangerous content that directs minors to engage in dangerous activities." S.B. 419 pmbl.; *see Sorrell*, 564 U.S. at 565 ("Formal legislative findings accompanying [the challenged law] confirm … the law's express purpose."); *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 435 (9th Cir. 2008) (instructing courts to analyze "*the government's stated goals*").

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed *or* the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (emphasis added). Accordingly, laws "designed to protect minors from viewing harmful materials" are content based precisely because they restrict speech based on its appropriateness. *Ashcroft v. ACLU*, 542 U.S. 656, 670

(2004); *Brown*, 564 U.S. at 794, 799 (restriction on violent video games to protect minors from psychological harm is content based).[7]

"It is rare that a regulation restricting speech because of its content will ever be permissible." *Brown*, 564 U.S. at 799 (citation omitted). The state bears the burden to show S.B. 419 is necessary to serve a compelling governmental interest and provides "the least restrictive means" of achieving that interest. *See McCullen v. Coakley*, 573 U.S. 464, 478 (2014). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative," and—particularly germane here—the First Amendment does not permit a "blanket ban if the [objective] can be accomplished by a less restrictive alternative." *Playboy Ent. Grp.*, 529 U.S. at 813–14 (citation omitted).

[7] While protecting children is clearly a legitimate interest and a laudable goal, minors "are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Brown*, 564 U.S. at 794. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id.* at 795 (citation omitted); *see also Yost*, 2024 WL 104336, at *8 ("[T]he State does not possess 'a free-floating power to restrict the ideas to which children may be exposed.'" (quoting *Brown*, 564 U.S. at 794)).

Here, however, Montana has made no attempt to demonstrate the law could satisfy strict scrutiny. Instead, it has pretended that no First Amendment review of any kind is needed, or, if any level of review is required, it should be only intermediate scrutiny. Appellant's Br. 18–19. This is wrong. But as the district court found, S.B. 419 likely violates the First Amendment even under intermediate scrutiny. *Alario*, 2023 WL 8270811, at *6.

B. S.B. 419 fails intermediate First Amendment scrutiny.

To support S.B.419's constitutionality under intermediate scrutiny, it is the State's burden to prove that the asserted governmental interest in regulating speech is "substantial" and "unrelated to the suppression of free expression"; that the regulation will "in fact" serve that interest in "a direct and material way" that is "not merely conjectural"; and that it will do so in a manner that is narrowly tailored to suppress no more speech "than is essential to the furtherance of that interest." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662–64 (1994) (cleaned up). However, as the district court found, none of these burdens have been met.

The bill's preamble recites two governmental interests—data protection and "protecting Montana Youth from dangerous content"—yet it substantiates neither interest. *Alario*, 2023 WL 8270811, at *8–9. Montana complains that the district court "improperly flips the evidentiary burden at the preliminary injunction stage on its head," Appellant's Br. at 54, but this is wrong. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Playboy Ent. Grp.*, 529 U.S. at 816. This includes "the burden of identifying a substantial interest and justifying the challenged restriction." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999). And the government "must demonstrate that the recited harms are real, and not merely conjectural." *Turner Broad. Sys.*, 512 U.S. at 664.

Montana has endeavored only to evade its burdens rather than to shoulder them. With respect to the child-protection rationale, the State has done nothing more than include a laundry list of problematic content attributable to TikTok in the preamble to S.B. 419. But since then—evidently to avoid strict scrutiny—it has acted as if the content-based child-protection rationale never existed. It did not brief the issue in the

district court, *Alario*, 2023 WL 8270811, at *10, and has not done so here, either. Clearly, the State cannot meet its burden of proof by ignoring it.

Nor has the State established its asserted interest in protecting Montana consumers from TikTok's allegedly harmful data practices or protecting Montana businesses from Chinese corporate espionage. As the district court found, Montana has "yet to provide *any* evidence to support [these] argument[s]" outside of the text of S.B. 419's preamble. *Id.* (emphasis added).

This evidentiary vacuum is highlighted by the State's reliance on what it calls "a mountain of publicly available reporting," a "tidal wave of news stories," vague references to what "a whistleblower told a U.S. Senator," a "tsunami of reporting," and "volumes of credible news articles." Appellant's Br. at 1, 5, 7, 13, 53. This is pretty thin gruel by which the State seeks to justify banning a communications medium favored by 380,000 of its citizens. The legislature has the wherewithal and resources (not to mention the responsibility) to investigate the subjects on which it passes laws. It is not enough just to jump on a press bandwagon.

Montana's response is to say "that's my story and I'm sticking to it," claiming that it can indeed "rely on a 'mountain of newspaper articles'" to justify a wholesale ban TikTok's and its users' protected speech. Appellant's Br. 53 (quoting *Repub. Party of N.M. v. Torrez*, No. 1:11-cv-00900, 2023 WL 5310645, at *13 (D.N.M. Aug. 17, 2023)). But *Torrez* does not support this bold claim. The district court found that a "mountain of newspaper articles" discussing *allegations* of public corruption *in part* justified New Mexico's asserted "important" interest in preventing the *appearance* of political corruption, because the articles' allegations "were seen by the public and impacted the public's faith in democracy." 2023 WL 5310645, at *13. It did not hold that the articles alone supported the State's interest in the appearance of corruption. *Id.* Nor did it hold that the articles could support the State's interest in preventing *actual* corruption. The court instead explicitly disclaimed this notion.[8]

In addition to failing to show its governmental interests are substantial, Montana has not demonstrated its TikTok ban would serve

[8] *Torrez,* 2023 WL 5310645, at *13 n.8 ("The Court notes, however, that the newspaper articles only support the appearance of *quid pro quo* corruption—they do not show actual *quid pro quo* corruption.").

either of its asserted interests in a "direct and material way." *Turner Broad. Sys.*, 512 U.S. at 664. As the district court observed, "a minor may access dangerous content on the Internet, or on other social media platforms, even if TikTok is banned." *Alario*, 2023 WL 8270811, at *11. And with respect to the issue of data security, the district court noted "there are many ways a foreign adversary, like China, could gather data from Montanans," including purchasing information from data brokers, open-source intelligence gathering, or hacking operations. *Id.* Montana has made no effort to show what good the law would actually do.

S.B. 419 also fails intermediate scrutiny because it is not narrowly tailored to serve the asserted interests. Montana had "obvious less-restrictive alternatives" available to it but chose to ignore them in favor of a legislative cudgel. For example, Montana could have enacted legislation addressing the specific data practices about which it is concerned, such as by requiring all businesses operating within its borders to implement certain access controls on users' personal information.

"In the same legislative session as S.B. 419, the Legislature also passed S.B. 384, a sweeping data privacy law … that purports to protect

Montanans against unsafe data collection practices from social media companies in the state." *Alario*, 2023 WL 8270811, at *10. But the State fails to point to any evidence demonstrating that S.B. 384's requirements—such as requiring all online platforms to implement "administrative, technical, and physical data security practices to protect the confidentiality, integrity, and accessibility of personal data," S.B. 384 § 7(1)(b)—do not effectively protect Montanans from these harms. *Alario*, 2023 WL 8270811, at *9–10. Likewise, the State fails to explain why its existing laws already applicable to TikTok, such as the Trade Secrets Act, Mont. Code Ann. §§ 30-14-401 to -409, do not adequately protect against any alleged "corporate and business espionage." *See Alario*, 2023 WL 8270811, at *9–10.

A law fails narrow tailoring where it was enacted despite "other laws … that would allow [the State] to achieve its stated interest while burdening little or no speech." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949–50 (9th Cir. 2011). In cutting off access to TikTok wholesale—where an estimated 380,000 people in Montana produce and receive protected expression every month—the

State "used an axe to solve its professed concerns when it should have used a constitutional scalpel." *Alario*, 2023 WL 8270811, at *10.

CONCLUSION

Montana's attempt to circumvent First Amendment strictures by portraying its clear regulation of protected online speech as one of unprotected nonexpressive conduct is nothing new. This façade is also unconvincing. To protect the free exchange of ideas on the internet, this Court should reject the State's characterization of S.B. 419 and subject the law to strict scrutiny. And since the law is not narrowly tailored to further any factually supported compelling governmental interest, this Court should affirm the district court's preliminary injunction.

Dated: May 6, 2024

/s/ Robert Corn-Revere

ROBERT CORN-REVERE*
ZACHARY T. SILVER
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Ave., SE
Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org
zach.silver@thefire.org

**Counsel of Record*

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Robert Corn-Revere
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Dated: May 6, 2024

/s/ Robert Corn-Revere

ROBERT CORN-REVERE*
ZACHARY T. SILVER
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
700 Pennsylvania Ave., SE
Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org
zach.silver@thefire.org

**Counsel of Record*