No. 24-656

IN THE

Supreme Court of the United States

TIKTOK, INC., *et al.*,

Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, INSTITUTE FOR JUSTICE, REASON FOUNDATION, FUTURE OF FREE SPEECH, WOODHULL FREEDOM FOUNDATION, FIRST AMENDMENT LAWYERS ASSOCIATION, STOP CHILD PREDATORS, PELICAN INSTITUTE FOR PUBLIC POLICY, AND CJ PEARSON IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Foundation for Individual Rights and Expression ("FIRE") is a nonpartisan, nonprofit organization that defends the rights of all Americans to the freedoms of speech, expression, and conscience—the essential qualities of liberty. Through litigation and advocacy, FIRE works 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, LLC v. Bonta*, 113 F.4th 1101 (9th Cir. 2024); *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023), *appeal argued*, No. 23-356 (2d Cir. Feb. 16, 2024). FIRE regularly acts to protect First Amendment rights by challenging laws that restrict access to protected speech online. *E.g.*, *Zoulek v. Hass*, No. 2:24-cv-00031-RJS-CMR (D. Utah); *Students Engaged in Advancing Texas v. Paxton*, No. 1:24-cv-949-RP (N.D. Texas). *Amicus* FIRE also has a particular interest in this case given its use of TikTok as an advocacy tool. FIRE regularly posts videos updating over 78,000 followers about threats to expressive rights nationwide. FIRE also uses TikTok to educate viewers on their own First Amendment rights.[2] Since 2022, FIRE has posted 323 videos garnering over 14 million views.

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1. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or its counsel contributed money intended to fund preparing or submitting this brief.

2. FIRE (@thefireorg), TikTok, https://www.tiktok.com/@thefireorg.

The Institute for Justice ("IJ") is a nonprofit, public interest law firm that seeks to end widespread abuses of government power and secure the constitutional rights that allow all Americans to pursue their dreams. Its free-speech advocacy particularly focuses on governmental attempts to silence speech through economic regulations, *see Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014), and on government officials' attempts to use their power to retaliate against individuals and businesses whose speech they dislike. *See Gonzalez v. Trevino*, 602 U.S. 653 (2024). Both interests are implicated by this case, where the United States Congress has, in the guise of an economic regulation, prohibited an entire channel of communication and explicitly done so, at least in part, because of concern about what might be said through that channel. IJ also engages in public advocacy about constitutional rights, through which it has (for example) saved tens of thousands of homes and businesses from eminent-domain abuse. As an advocate, IJ constantly seeks new avenues to reach the American public to convey messages about important legal issues—and, in its direct experience, TikTok is one of those avenues.[3] It therefore has an interest in this case both as a defender of free speech and as a speaker in its own right.

Reason Foundation ("Reason") is a nonpartisan and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. Reason advances its mission by publishing the critically acclaimed *Reason* magazine, as well as commentary on its websites, www.reason.com and www.reason.org. To further

3. IJ (@instituteforjustice), TikTok, https://www.tiktok.com/@instituteforjustice.

Reason's commitment to "Free Minds and Free Markets," Reason has participated as *amicus curiae* in numerous cases raising significant legal and constitutional issues, including cases implicating free expression and social media platforms. *See*, *e.g.*, Brief of Reason Foundation et al. as *Amici Curiae* in Support of Petitioners, *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024); Brief of Reason Foundation as *Amicus Curiae* Supporting Respondent. *Gonzalez v. Google*, 598 U.S. 617 (2023). Reason also has an interest in this case as a speaker because it uses TikTok to promote its messages to an audience of over 24,000 followers.[4]

The Future of Free Speech ("FoFS") is a nonpartisan and nonprofit think tank, founded in 2023 and located at Vanderbilt University. FoFS' mission is to promote a resilient global culture of free speech for all and reverse the current worldwide free speech recession that threatens democracy and freedom around the world. FoFS advances its mission by publishing policy reports, original research, surveys, books, op-eds and engaging in advocacy on the state of free speech globally. FoFS has published several reports documenting how speech-restrictive measures adopted in European democracies help create the blueprint and legitimacy for crackdowns on social media and online speech in authoritarian countries.

The Woodhull Freedom Foundation ("Woodhull") is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and free expression. Woodhull's name was inspired by the

4. Reason Magazine (@reasonmagazine), TikTok, https://www.tiktok.com/@reasonmagazine.

Nineteenth Century suffragette and women's rights leader, Victoria Woodhull. The organization works to improve the well-being, rights, and autonomy of every individual through advocacy, education, and action. Woodhull's mission is focused on affirming sexual freedom as a fundamental human right. Woodhull is particularly concerned with government censorship of speech involving human sexuality.

The First Amendment Lawyers Association is a non-profit bar association comprised of attorneys throughout the United States and elsewhere whose practices emphasize defense of freedom of speech and of the press, and which advocates against all forms of government censorship. Since its founding, its members have been involved in many of the nation's landmark free expression cases and it has frequently addressed First Amendment issues as *amicus curiae* in the Supreme Court and federal and state appellate courts throughout the country.

Stop Child Predators ("SCP") is a nonpartisan nonprofit organization, founded in 2005, that brings together a team of policy experts, law enforcement officers, community leaders, and parents to launch state and federal campaigns to inform lawmakers and the public about policy changes that will protect America's children from sexual predators. SCP spearheaded the passage of Jessica's Law in 46 states, and work on legislation in all 50 states. Recognizing that sex offender management and child safety must be addressed in both the real world and the digital world, SCP launched the Stop Internet Predators initiative in 2008 to focus on protecting children from online exploitation while also defending parents' rights to choose how and when their family engages in

the use of social media and the internet. To promote SCP's commitment to parental rights, SCP participated as *amicus curiae* in multiple court cases, including *Moody v. NetChoice*, 603 U.S. 707 (2024), challenging restrictions limiting First Amendment rights of teens and families to access social media platforms. As a group of experts in child welfare and child protection, SCP has become increasingly concerned that proposed policy developments in child exploitation, including banning social media platforms like TikTok, has largely failed to address prevention, support law enforcement, or make the critical connection between digital and real-world exploitation of children.

The Pelican Institute for Public Policy is a non-partisan research and educational organization—a think tank—and the leading voice for free markets in Louisiana. The Institute's mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government.

CJ Pearson is a longtime Gen Z conservative activist and National Co-Chair of the Republican National Committee Youth Advisory Council. For more than a decade, Pearson has fought on the frontlines of the political youth movement and, as an extension of his activism, has developed a deep passion for the protection of civil liberties and the safeguarding of free speech online. Pearson's TikTok account (@thecjpearson) has garnered 3.6 million "likes" and reaches 159,500 followers.

SUMMARY OF ARGUMENT

The nationwide ban on TikTok is the first time in history our government has proposed—or a court approved—prohibiting an entire medium of communications. Erwin Chemerinsky, *Opinion: The TikTok court case has staggering implications for free speech in America*, Los Angeles Times (Dec. 9, 2024), https://www.latimes.com/opinion/story/2024-12-09/tiktok-court-free-speech-first-amendment. The law imposes a prior restraint, and restricts speech based on both its content and its viewpoint. As such, if not unconstitutional *per se*, it must be subject to the highest level of First Amendment scrutiny. Given the grave consequences, both for free speech doctrine and for the 170 million Americans who use TikTok to communicate with one another, this Court should reverse the decision of the U.S. Court of Appeals for the District of Columbia.

The D.C. Circuit rejected the government's framing of the case and correctly recognized the Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, Div. H (Apr. 24, 2024) ("the Act"), as a direct regulation of speech. Exercising original and exclusive jurisdiction over TikTok's constitutional challenge, the court found the Act "implicates the First Amendment and is subject to heightened scrutiny," assuming but not deciding strict scrutiny was the correct standard. *TikTok Inc. v. Garland*, Nos. 24-1113, 24-1130, 24-1183, 2024 U.S. App. LEXIS 30916, at *28 (D.C. Cir. Dec. 6, 2024). However, the court held the Act "clears this high bar," granting deference to the government's public characterization of alleged national security concerns.

It concluded the Act was "carefully crafted to deal only with control by a foreign adversary, and it was part of a broader effort to counter a well-substantiated national security threat posed by the [People's Republic of China]." *Id.* at *39–40.

The appellate panel was correct to find the highest level of First Amendment scrutiny is appropriate but failed to faithfully *apply* strict scrutiny or hold the government to its burden of proof. Instead, it too readily deferred to unsupported assertions of a potential national security threat.

Congress has not met the heavy constitutional burden the First Amendment demands for regulating speech, let alone to justify banning an entire expressive platform. The danger Congress identified is purely speculative—it is neither clear nor present. No published legislative findings or other official public records attempt to explain or substantiate any real and serious problem that supports severely encroaching upon millions of Americans' right to speak and to receive information. Nor was there any serious attempt to show the ban would effectively address the asserted risks.

The legislative record showing the law's purpose reveals illegitimate intent to suppress disfavored speech and generalized concerns about data privacy under the general umbrella of "national security." The goal of "tilt[ing] public debate in a preferred direction" is not even a valid governmental purpose. *Moody v. NetChoice, LLC*, 603 U.S. 707, 741 (2024) (quoting *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 578–79 (2011)). And the evidence the

D.C. Circuit relied upon falls far short of satisfying the "heavy burden of showing justification for the imposition of such a restraint." *New York Times v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (citation omitted). The D.C. Circuit's passive deference to governmental conjecture is unwarranted, misguided, and dangerous. The Act is not narrowly tailored to serve any compelling government interest, as the First Amendment requires.

The D.C. Circuit's decision justifies the Act's sweeping censorship by invoking "free speech fundamentals." In so doing, it confuses the First Amendment values at stake and sacrifices our constitutional tradition of debate and dialogue for enforced silence. The D.C. Circuit's misguided reasoning is sharply at odds with longstanding First Amendment precedent, violating the constitutional protections it claims to preserve. Instead of following the instructive example set by Taiwan, which has eschewed a blanket TikTok ban in favor of robust counterspeech, the D.C. Circuit's logic echoes the authoritarianism of North Korea and Iran.

If a constitutional intrusion of this unprecedented magnitude is allowed to stand, it will not only sanction the ban of an important platform for expression but also open the door to broad regulation of other media based on purely speculative national security concerns. This Court should reverse the D.C. Circuit's decision and enjoin enforcement of the Act as unconstitutional.

ARGUMENT

I. The Act Effectively Bans a Specified Platform for Communication.

In passing the Act, Congress effectively banned an important channel of communication and exposed other online platforms to onerous regulations, including potential bans. That this drastic measure is unprecedented did not deter the appellate panel, which held "Congress was entitled to address the threat posed by TikTok directly and create a generally applicable framework, however imperfect, for future use." *TikTok Inc.* at *60. However *imperfect*? This vastly understates what the Constitution requires. While the First Amendment does not demand perfection, it does hold the government to certain standards of proof and requires solutions tailored to meet specific problems. But the panel's broad deference cannot be squared with the First Amendment and this Court's longstanding precedent.

This Court has repeatedly "voiced particular concern with laws that foreclose an entire medium of expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). 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). It is no answer to observe that other platforms exist, for "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (citation omitted). Even when such prohibitions are "completely free of content or viewpoint discrimination," which this Act is not, "the danger they

pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *City of Ladue*, 512 U.S. at 55. And if anything can be said to be a "common means of speaking," it is a social media platform used by 170 million Americans.

A ban on a particular nationwide chain of bookstores would no doubt trigger strict First Amendment scrutiny, even if Americans remained free to buy books from other stores or sellers. A nationwide prohibition on a specific social media platform is no different, as "regulation of a medium inevitably affects communication itself." *City of Ladue*, 512 U.S. at 48.

Although the Act provides that TikTok can avoid a ban if sold within 270 days to an approved entity, Pub. L. 118-50, Div. H §§ 2(a)(2)(A), (c)(1), TikTok has stated that "divestiture of the TikTok U.S. business and its severance from the globally integrated platform of which it is an integral part is not commercially, technologically, or legally feasible." Pet'rs TikTok and ByteDance Ltd.'s Pet. Review 15. A forced divestiture to which TikTok cannot and will not submit is the functional equivalent of a ban.

Despite the government's acknowledged targeting of a specific medium of communication, the Act contains no legislative findings, and Congress failed to create an official public record supporting the Act's purpose and rationale.[5] Some lawmakers raised concerns about

5. The D.C. Circuit pointedly declined to consider material the government submitted under seal. *TikTok Inc.* at *86 ("Notwithstanding the significant effect the Act may have on the viability of the TikTok platform, we conclude the Act is valid based upon the public record.").

national security related to U.S. TikTok users' data potentially falling into the Chinese government's hands. But many other comments reveal the Act's purpose, at least in part, of suppressing disfavored speech on TikTok.

The House Energy and Commerce Committee Report ("HECC Report"), for example, states the Act is in part intended to prevent TikTok and other regulated communications platforms from "push[ing] misinformation, disinformation, and propaganda on the American public," notwithstanding that foreign actors remain free to do so on other platforms.[6] Similarly, the Act's co-sponsor, Rep. Mike Gallagher, cited the "propaganda threat" as the "greater concern" about TikTok.[7] And before the D.C. Circuit, the government argued the Act is necessary to address the possibility that the People's Republic of China ("PRC") "might shape the content that American users receive," including promotion of content that aligns with PRC interests. *TikTok Inc.* at *36–37.

Even if Congress had characterized its interest as dealing only with problems arising from data collection, its coverage definition manifests its content-based purpose. The Act applies to platforms that feature user-generated content and exempts those dedicated to product, business, or travel reviews. Pub. L. 118-50, Div. H §§ 2(g)(2)(A), (B). If this is allowed, the government could use this approach

6. H.R. Rep. No. 118-417 at 2 (2024).

7. Jane Coaston, *What the TikTok Bill Is Really About, According to a Leading Republican*, N.Y. Times (Apr. 1, 2024), https://www.nytimes.com/2024/04/01/opinion/mike-gallagher-tiktok-sale-ban.html; *see also* Pet'rs Firebaugh et al.'s Pet. Review 20–23.

to eliminate other platforms within the United States based in part on the content they host.

From the beginning of internet regulation this Court has recognized that laws targeting the online medium inherently present serious First Amendment concerns. *See Reno*, 521 U.S. at 868–70. This is true even when the government attempts to evade First Amendment scrutiny by recharacterizing its regulations as advancing some non-speech purpose. *See*, *e.g.*, *NetChoice, LLC v. Yost*, 716 F. Supp. 3d 539, 553 (S.D. Ohio 2024) (characterizing Ohio statute requiring social media platforms to obtain parental consent prior to use by minors as "an access law masquerading as a contract law" and preliminarily enjoining it on First Amendment grounds). The same principle applies here. The government's invocation of "national security" does not permit it to avoid First Amendment scrutiny where it has acted to ban an expressive platform used by half the country.

The Act restricts the flow of information based on speaker- and content-based factors and imposes a *de facto* ban on an entire platform for expression. Its inexplicable exemption for platforms not used for certain specified subjects (including platforms that collect user data and are "controlled by a foreign adversary") indicates its purpose is not really focused on protecting data privacy. These content-based provisions, the government's arguments in the D.C. Circuit, and comments by various members of Congress reveal its purpose is to regulate speech and the platform used to express it.

II. The Act Fails Any Level of First Amendment Scrutiny.

The Act is unconstitutional for two independent reasons. First, its *de facto* ban of a specific platform for expression is an unprecedented prior restraint that will restrict the speech of tens of millions of Americans. Second, the ban is content-based and was adopted to purge disfavored viewpoints from public discourse—which is never a legitimate government interest. Either is grounds for the Court to invalidate the Act, under *any* level of scrutiny.

A. The Act's content-based ban of an entire medium is an unprecedented prior restraint.

Banning a medium of communication cannot be characterized as anything but a classic prior restraint. Prior restraints that "deny use of a forum in advance of actual expression," *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975), are "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The Act's scheduled ban on TikTok will, in advance of actual expression, prevent anyone from using the platform to speak or to receive information. *TikTok Inc.* at *65 ("TikTok's millions of users will need to find alternative media of communication").

The D.C. Circuit dismissed this reality, claiming that, post-divestiture, "TikTok Inc.'s new owners could circulate the same mix of content as before without running afoul of the Act" and that "[p]eople in the United States could continue to engage with content on TikTok

as at present." *Id.* at *57. But this ignores both that forced divestiture is effectively a ban because TikTok cannot divest within the Act's timeline—a fact the government did not rebut, *id.* at *59—and that divestiture, even if feasible, would significantly change the nature of the platform. Most notably, it would deprive TikTok of the unique content curation tools developed by its parent company, ByteDance. Pet'rs TikTok and ByteDance Ltd.'s Pet. Review 18–19.

In other words, divestiture would impair TikTok's ability to "select and shape other parties' expression into [its] own curated speech products." *Moody*, 603 U.S. at 717. As the Court recently explained, "laws curtailing . . . editorial choices must meet the First Amendment's requirements. The principle does not change because the curated compilation has gone from the physical to the virtual world." *Id.* After divestiture, the platform might still be called "TikTok," but it would no longer be the platform millions of Americans use today. Any way you slice it, the Act imposes a prior restraint.

Prior restraints are "presumptively unconstitutional" and "generally call for strict scrutiny." *In re Sealed Case*, 77 F.4th 815, 829 (D.C. Cir. 2023). A prior restraint does not require that the government cut off access to *all* platforms of a particular category, but only that it block in advance whatever expression it restricts. *See Se. Promotions*, 420 U.S. at 547–48, 556 (municipality's denial of use of city auditorium for theatrical production constituted prior restraint, regardless of whether another venue might have hosted the production).

The Act has additional defects. It is content-based, insofar as it "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). Treating speakers differently can also be a form of content discrimination: "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id.* at 170 (citation omitted). Here, the Act is content-based in multiple ways: it explicitly targets TikTok as a speech platform and as a speaker; discriminates against the millions of speakers who use TikTok; is justified in substantial part by disapproval of TikTok's content and fear of a foreign government's influence on it; and exempts websites and apps that do not host user-generated content or that are primarily dedicated to product, business, or travel reviews.

"It is rare that a regulation restricting speech because of its content will ever be permissible." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (citation omitted). The government bears the burden to show the Act's restriction of speech "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative," and the First Amendment forbids a "blanket ban if the [objective] can be accomplished by a less restrictive alternative." *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813–14 (2000) (citation omitted). Congress has not met its heavy burden in these regards.

While the government has expressed concerns about national security, which can be a compelling interest, it still must provide evidence of a specific and serious threat

and prove the Act is necessary to address it. *See id.* at 819, 827 (content-based speech regulation violated First Amendment given "little hard evidence of how widespread or how serious the problem" it targeted was, and due to the government's failure to use "least restrictive means" to address it). Even when the interest asserted involves our nation's security, "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *N.Y. Times Co.*, 403 U.S. at 725–26 (Brennan, J., concurring).

This Court has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000). With respect to national security, the Court has observed: "The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." *United States v. U.S. Dist. Court*, 407 U.S. 297, 314 (1972); *see also N.Y. Times Co.*, 403 U.S. at 719 (Black, J., concurring) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.").

B. Congress did not meet the heavy burden the First Amendment demands.

A primary purpose of the Act is to banish disfavored viewpoints from the marketplace of ideas—a constitutionally infirm basis for regulating speech. Yet

even if Congress had acted for a legitimate purpose under the First Amendment, the D.C. Circuit was far too lenient in accepting the government's rationale for the Act and its assertions that this law would materially combat the suggested harms. Rather than holding the government to its obligation to provide evidence, the court was satisfied by generalized claims regarding Chinese hackers, PRC efforts to purchase large data sets in other contexts, and predictions that TikTok entities "would try to comply if the PRC asked for specific actions to be taken to manipulate content for censorship, propaganda, or other malign purposes." *TikTok Inc.* at *41–45.

The Act's purpose of preventing Americans from encountering disfavored ideas on TikTok is not even a legitimate governmental interest, let alone a compelling one. "At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society." *NRA of Am. v. Vullo*, 602 U.S. 175, 187 (2024). The government "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

Moreover, the First Amendment protects not only the right to express ideas but also the right to receive them, including alleged "propaganda" from abroad. *Lamont v. Postmaster General*, 381 U.S. 301, 306–07 (1965). Chief Judge Srinivasan's concurring opinion incorrectly characterized *Lamont* as a "narrow" decision dependent on "an affirmative obligation to out oneself to the government in order to receive communications from a foreign country

that are otherwise permitted to be here." *TikTok Inc.* at *109 (Srinivasan, C.J., concurring). *Lamont* struck down a requirement that anyone wishing to obtain foreign "communist political propaganda" through the mail must affirmatively notify the Postal Service. However, the Court based its holding on the broader principles that the First Amendment prohibits the government from seeking "to control the flow of ideas to the public," including from foreign sources, and that it protects "'uninhibited, robust, and wide-open' debate." *Lamont*, 381 U.S. at 306–07 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

This Court's decision in *Lamont* was narrow, but only in the sense that it means the First Amendment does not prevent the government from efforts to "classify the mail," "fix the charges for its carriage," "inspect material from abroad for contraband," or pursue similar speech-neutral actions. *Id.* at 306–07. Nothing in *Lamont* suggests the government could pass laws even *more* restrictive than an affirmative-request requirement on Americans' access to information from abroad. If the government cannot impose *Lamont*'s notice requirement because it would likely cause recipients "to feel some inhibition in sending for literature" designated as propaganda, *id.* at 307, it cannot—for relevant example—completely *ban* receipt of the information. That does more than risk chilling access to information—it *freezes out* access.

This Court's subsequent decision in *Meese v. Keene*, 481 U.S. 465 (1987), confirms that *Lamont* controls any government attempt to "prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit." *Id.* at 480. And by preventing Americans from accessing

information on TikTok, including—but not limited to—content allegedly affected by a foreign adversary, that is essentially what the Act does here.

Despite acknowledging the "Government justifies the Act in substantial part by reference to a foreign adversary's ability to manipulate content seen by Americans," *TikTok Inc.* at *30, the Circuit majority paradoxically determined the government is not motivated by concerns about the ideas or messages Americans encounter on TikTok. But the court directly contradicted this perplexing conclusion when it characterized the government's concerns about "the risk that the PRC might shape the content that American users receive, interfere with our political discourse, and promote content based upon its alignment with the PRC's interests." *Id.* at *36–37. The government even posits a risk of the PRC promoting its views on a specific topic: "Taiwan's relationship to the PRC." *Id.* The government's expressed concern about the potential of TikTok content to "undermine trust in our democracy and exacerbate social divisions" removes any doubt the Act is intended to shape public sentiment. Public Redacted Br. for Resp't 35 (*TikTok Inc. v. Garland*, D.C. Cir. 24-1113, Document No. 2066896).

Numerous legislators who supported the Act similarly expressed concerns about "propaganda" and specific viewpoints being promoted on TikTok.[8] *If* such

8. The HECC report's and Rep. Gallagher's comments about "propaganda" noted above are just the tip of the iceberg. *See* H.R. Rep. No. 118-417, *supra* note 6, at 2; Coaston, *supra* note 7. When the Act was introduced, Rep. Mikie Sherrill claimed the Chinese Communist Party uses TikTok to "promote propaganda." *Bill to Protect Americans From Foreign Adversary Controlled*

hypothesized content manipulation occurs, the legislative concern "centers on the *potential reactions* to covert content-creation decisions made by the PRC." *TikTok Inc.* at *13 (emphasis added). That is, the government is plainly targeting PRC's alleged influence over TikTok's content over concern over about what messages and ideas Americans encounter on the platform, taking the Act into forbidden constitutional territory.

Even if the government's "content manipulation" rationale is not treated as *per se* unconstitutional viewpoint discrimination, it still falls far short of the demands of strict scrutiny. The argument is speculative twice over. First, the government "acknowledges that it lacks specific intelligence that shows the PRC has in the past or is now coercing TikTok into manipulating content in the United States." *TikTok Inc.* at *60. The D.C. Circuit thus relied on what it calls "informed judgment" and reasonable prediction while acknowledging "the absence of 'concrete evidence' on the likelihood of PRC-directed censorship," yet it somehow concluded this is "more than mere speculation." *Id.* at *61. How so? The

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Applications, Including TikTok, Select Comm. on the CCP (Mar. 5, 2024), https://selectcommitteeontheccp.house.gov/media/bills/bill-protectamericans-foreign-adversary-controlled-applications-including-tiktok. Rep. John Moolenaar said, "we cannot allow the CCP to indoctrinate our children." *Id.* Rep. Ashley Hinson claimed China uses TikTok to "push harmful propaganda, including content showing migrants how to illegally cross our Southern Border, supporting Hamas terrorists, and whitewashing 9/11." *Id.* And Rep. Elise Stefanik accused TikTok of "proliferating videos on how to cross our border illegally" and "supporting Osama Bin Laden's Letter to America." *Id.* That is only a sampling of lawmakers' remarks betraying the Act's clear viewpoint-discriminatory purpose.

government's mere reliance on national security as a reason for "deference" is insufficient to paper over this deficiency. *N.Y. Times Co.*, 403 U.S. at 725–26 (Brennan, J., concurring) (government cannot restrict speech based on "surmise or conjecture that untoward consequences may result"). *See FEC v. Cruz*, 596 U.S. 289, 307 (2022) (the government may not restrict speech just because it might prevent some subsequent "anticipated harm").

Second, neither the government nor the court explained *how* the PRC's manipulation of TikTok content would pose a "grave threat to national security." *TikTok Inc.* at *71. What exactly is the threat? Will the PRC's influence over a single social media platform in the U.S.—a democracy where citizens have free access to an overwhelming diversity of viewpoints and information sources—magically turn millions of Americans into Manchurian candidates? And how does this threat compare to the potential threat from PRC agents using other, unrestricted platforms to spread propaganda?

Despite the lack of evidence that the PRC is controlling TikTok's content and an inability to explain how such control would seriously threaten national security, the court meekly deferred to the government's judgment and unjustifiably dismissed an obvious, less-restrictive alternative: counterspeech. *See Kohls v. Bonta*, No. 2:24-cv-02527 JAM-CKD, 2024 U.S. Dist. LEXIS 179933, at *3 (E.D. Cal. Oct. 2, 2024) ("Especially as to political speech, counter speech is the tried and true buffer and elixir, not speech restriction.") (citation and quotation marks omitted). The government can battle ideas it opposes by contributing to the marketplace of ideas, but it cannot rig the marketplace. That is First Amendment 101.

The government's separate claim that the Act serves national security by countering the PRC's efforts to collect data from Americans also amounts to little more than conjecture. The D.C. Circuit based its decision on a record devoid of evidence showing ByteDance has actually disclosed or will disclose TikTok user data to the PRC, what that data includes, what the PRC has done or would do with it, or how those actions will harm U.S. national security. Notably, last year, a federal district court preliminarily enjoined Montana's TikTok ban on First Amendment grounds, citing the lack of supporting evidence for the state's argument that China "can gain access to Montanan[s'] data without their consent." *Alario v. Knudsen*, 704 F. Supp. 3d 1061, 1082 (D. Mont. 2023).

Use of a prior restraint in these circumstances—the most intrusive of speech restrictions, and a content-based one at that—is particularly suspect where numerous less restrictive options were available to the government. For example, Congress could have enacted generally applicable legislation addressing the specific data practices that concern many of the Act's supporters. Moreover, TikTok reached a national security agreement through negotiations with the Committee on Foreign Investment in the United States, "including agreeing to a 'shut-down option' that would give the government the authority to suspend TikTok in the United States if [TikTok and ByteDance] violate certain obligations under the agreement." Pet'rs TikTok and ByteDance Ltd.'s Pet. Review 5. The court recognized that the agreement and TikTok's voluntary mitigation efforts "provide some protection" but again uncritically deferred to the government's unsupported assertion that these available less-restrictive means are inadequate. *TikTok Inc.* at *51.

The Act's underinclusiveness further demonstrates sloppy tailoring. "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802. If the Act's purpose is to prevent platforms that collect user data from disclosing it to foreign adversaries, it is not at all clear why the Act applies only to platforms that permit users to "generate or distribute content," Pub. L. 118-50, Div. H, § 2(g)(2)(A)(iii), or why it exempts platforms "whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews." *Id.* § 2(g)(2)(B). The asserted interests in data privacy would seem to apply generally to *any* website or application that collects user data and is "controlled by a foreign adversary," regardless of whether its users generate content or whether its content centers on reviews rather than, say, political speech.

The government's failure to substantiate how the Act would materially address the speculative harms is even more glaring. Although it justified passage based on generalized claims about foreign cyber-espionage activity, *TikTok Inc.* at *41–45, it does not affect "the PRC's ability to communicate through any medium other than TikTok." *Id.* at *108 (Srinivasan, C.J., concurring). Nor does it have any effect on international cyber-espionage, hacking, or the ability to acquire data on Americans from other sources. The D.C. Circuit at least acknowledged "the Act does not fully solve the data collection threat posed by the PRC," but suggested rather weakly that this "does not mean it was not a step in the right direction." *Id.* at *53–54. But strict scrutiny demands more. Particularly when the future of an entire medium of communication

is at stake, the government is obliged to do more than suppose it might be taking a positive step. *E.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662–64 (1994); *Brown*, 564 U.S. at 799.

III. The Act's Sweeping Censorship Betrays First Amendment Values.

Notwithstanding the "central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas," *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978), the D.C. Circuit upheld the Act even after applying strict scrutiny—"the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To reach this result, the court not only invoked the "risk of the PRC manipulating content on the platform"—despite the government's admission it had no evidence the PRC had ever done so, *TikTok Inc.* at *60—it went so far as to portray the Act's sweeping censorship as necessary to *protect* free expression. In the court's telling, the mere possibility the PRC might one day "manipulate" speech on the platform is "at odds with free speech fundamentals" and provides ample justification for the ban. *Id.*

But any conception of "free speech fundamentals" that forgives mass censorship in the name of conjectural concerns about foreign threats is not only worthless, but dangerous. The Founders recognized the risk inherent in the D.C. Circuit's reasoning. "Perhaps it is a universal truth," warned James Madison, the First Amendment's lead author, "that the loss of liberty at home is to be charged to provisions agst. danger real or

pretended from abroad."[9] But because those "who won our independence by revolution were not cowards," the First Amendment they ratified rejects "silence coerced by law—the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring). The Founders would likewise reject the D.C. Circuit's misunderstanding of "free speech fundamentals" because, like the Act itself, it sacrifices liberty for silence.

The court's analysis flips the First Amendment on its head, proclaiming the Act, which eliminates millions of Americans' access to a platform for communication for the purpose of shielding them from disfavored ideas, "actually vindicates the values that undergird the First Amendment." *TikTok Inc.* at *56. Ironically, the court cited *Moody* for the proposition that the First Amendment prohibits "the government from tilting public debate in a preferred direction." *Id.* at 55–56. Yet that is exactly what the government is doing here—regulating a private speech platform "in order to achieve its own conception of speech nirvana." *Moody*, 603 U.S. at 742. The Act doesn't vindicate First Amendment values so much as betray them.

The D.C. Circuit's concern about "content manipulation" confuses the First Amendment protections at stake. The court justified its decision to uphold the Act out of concern that, acting via TikTok, the Chinese government may one day do what the U.S. government cannot: "manipulate the public debate through coercion rather than persuasion."

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9. *Letter from James Madison to Thomas Jefferson*, National Archives (May 13, 1798), https://founders.archives.gov/documents/Madison/01-17-02-0088.

TikTok Inc. at *44 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994)). But the First Amendment not only prevents our government from dictating what we may say and hear, but also the speech private platforms may permit, even if those platforms are aligned with a hostile government. The Act trades a *speculative* risk of foreign "manipulation" for *definite* government intrusion into the private speech marketplace, violating constitutional principles in the name of protecting them.

TikTok is a private platform, and, like other private platforms, it maintains "Community Guidelines" that restrict speech otherwise protected by the First Amendment.[10] The platform's algorithm selects certain content to highlight or reject. These are protected editorial choices. *Moody*, 603 U.S. at 716 (choices to "include and exclude, organize and prioritize" user content create "distinctive compilations of expression," and this process "receive[s] the First Amendment's protection."). That the government believes TikTok may align its choices with the PRC's interests cannot constitutionally serve as grounds to eliminate it as a communications channel any more than the First Amendment allows banning import of a book because a foreign government might have authored (or altered) some chapters of it.

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10. These rules shape TikTok's distinct expressive culture. To game the platform's algorithm and evade content moderation, TikTok users have created new slang marked by substituting certain words for others—for example, "unalive" instead of "dead." *See* Melina Delkic, *Leg Booty? Panoramic? Seggs? How TikTok Is Changing Language*, N.Y. Times (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/style/tiktok-avoid-moderators-words.html.

The D.C. Circuit's flawed reasoning carries far-reaching consequences, opening the door to broad regulation of other communications platforms engaged by foreign governments. Domestic social media platforms frequently receive—and acquiesce to—requests or demands from foreign governments to remove content,[11] and they routinely serve as staging grounds for "influence operations" by designated foreign adversaries.[12] The government fails to explain how its concerns about the PRC's hypothetical manipulation of TikTok content are any more pressing than what is *known* to be happening on other social media platforms. Under the D.C. Circuit's reasoning, could the government ban X or Facebook on national security grounds for complying with foreign government demands to censor content, or for not doing enough to combat foreign influence campaigns?

The D.C. Circuit's confusion undermines the expressive rights of private platforms and their users in deference to a broad, ill-defined governmental interest in protecting "First Amendment values." But "the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas." *Moody*, 603 U.S. at 732. This Court has consistently rejected as "singularly unpersuasive" the destroy-the-village-to-

11. *See, e.g.*, Jack Nicas & Paul Mozur, *The Battle Over Who Controls the Internet*, N.Y. Times (Oct. 15, 2024), https://www.nytimes.com/2024/10/15/briefing/musk-social-media-regulation.html.

12. *See, e.g.*, Shannon Bond, *Meta warns that China is stepping up its online social media influence operations*, NPR (Nov. 30, 2023), https://www.npr.org/2023/11/30/1215898523/meta-warns-china-online-social-media-influence-operations-facebook-elections.

save-it argument that extensive government regulation is necessary to protect free speech online. *Reno*, 521 U.S. at 885. Faced here with the outright ban of an expressive platform used by 170 million Americans, it should do so again.

The remedy for the government's fear that TikTok will tilt public debate in an unfavorable direction is "more speech," *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring), not regulation that seeks "to orchestrate public discussion through content-based mandates." *Alvarez*, 567 U.S. at 728. "As a matter of constitutional tradition," the First Amendment commits us to this path because "encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Reno*, 521 U.S. at 885.

To the extent TikTok is promoting or may one day promote PRC "propaganda," the government, civil society organizations, and ordinary Americans are fully equipped to expose and challenge it through raising their own voices. That is true regardless of whether the propagandizing is "covert"—government officials have obviously had no difficulty raising public awareness about alleged PRC influence on TikTok's content. The government "has not shown, and cannot show, why counterspeech would not suffice to achieve its interest." *Alvarez*, 567 U.S. at 726.

Yet the D.C. Circuit dismissed counterspeech as a "naïve" response to whatever "covert manipulation of content" the PRC may hypothetically pursue. *TikTok Inc.* at *54. That dismissal cannot be reconciled with this Court's recognition that "the proudest boast of our free speech jurisprudence is that we protect the freedom to

express 'the thought that we hate.'" *Matal v. Tam*, 582 U.S. 218, 246 (2017) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). Nor does it square with the instructive approach of Taiwan, a country the D.C. Circuit specifically identified as a potential subject of the PRC's hypothetical content manipulation. Taiwan has banned TikTok from government devices, as has our federal government.[13] But Taiwan—uniquely aware of the PRC's machinations—has not imposed a broad ban of the kind now before the Court. Instead, it has chosen to embrace its "deeply ingrained culture of free political speech," relying on debate, dialogue, transparency, and "a deep network of independent fact-checking organizations" to counter disinformation of the type feared by our Congress.[14]

Taiwan knows we cannot defeat totalitarianism by adopting its methods. Conversely, the Act now before this Court would make the United States the first free and open democracy to adopt a broad blanket ban of TikTok across its territory. And it would do so despite research indicating fears of foreign interference are generally overwrought;[15] that the PRC in particular has been

13. Kelvin Chan, *These are the countries where TikTok is already banned*, Assoc. Press (Apr. 26, 2024), https://apnews.com/article/tiktok-bytedance-ban-china-india-376f32d78861e14e65ec4bc78e808a0d.

14. Meaghan Tobin & Amy Chang Chien, *Taiwan, on China's Doorstep, Is Dealing With TikTok Its Own Way*, N.Y Times (May 16, 2024), https://www.nytimes.com/2024/05/16/business/tiktok-taiwan.html.

15. *See, e.g.*, Christopher A. Bail et al., *Assessing the Russian Internet Research Agency's Impact on the Political Attitudes and*

consistently unsuccessful in its efforts to influence other countries via online disinformation;[16] and that addressing "disinformation" successfully requires long-term efforts that rely on messaging and a focus extending beyond individual platforms.[17] Contrary to the D.C. Circuit's contention, counterspeech is not "naïve"; it is freedom's best answer.

Allowing the TikTok ban to stand would mark an unprecedented departure from our longstanding commitment to free speech exceptionalism, which sets the United States apart not only from authoritarian states but also other democracies that mandate significant government regulation of online speech, such as the European Union and Germany. It would undermine the principles enshrined in the First Amendment and

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Behaviors of American Twitter Users in Late 2017, 117 PROC. NAT'L ACAD. SCI. 243, 243–50 (2020) (finding "no evidence that interacting with [Twitter accounts operated by the Russian Internet Research Agency] substantially impacted 6 political attitudes and behaviors" and concluding the "results suggest Americans may not be easily susceptible to online influence campaigns").

16. *See*, *e.g.*, David Gilbert, *Why China Is So Bad at Disinformation*, WIRED (Apr. 29, 2024), https://www.wired.com/story/china-bad-at-disinformation; Joshua Kurlantzick, *China's Influence Efforts Are Expanding—But They Also Often Are Failing*, THE INTERPRETER (Feb. 23, 2023), https://www.lowyinstitute.org/the-interpreter/chinese-interference-dangerous-also-often-ineffective-counterproductive.

17. *See* Jon Bateman & Dean Jackson, *Countering Disinformation Effectively: An Evidence-Based Policy Guide*, Carnegie Endowment for International Peace (Jan. 31, 2024), https://carnegieendowment.org/research/2024/01/countering-disinformation-effectively-an-evidence-based-policy-guide?lang=en.

signal a troubling shift, aligning the United States with regimes that stifle their citizens' freedom to share and access information and ideas. And this erosion of our constitutional tradition would weaken the nation's moral authority to advocate for speech and press freedoms abroad while chipping away at what the Founders knew as the "bulwarks of liberty" here at home.[18]

Authoritarian nations like North Korea and Iran ban platforms out of fear of what their citizens may read or publish.[19] The United States has not—until now. "Authority here is to be controlled by public opinion, not public opinion by authority." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). The United States is exceptional because our constitutional history and tradition recognizes "[t]hat the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength." *Cohen v. California*, 403 U.S. 15, 25 (1971). This Court should uphold that tradition by striking down this unprecedented ban.

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18. 1 *The Papers of James Madison* Ch. 14, Doc. 50 (William T. Hutchinson et al. eds., 1st ser., 1962–77), https://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html. The notion of freedom of expression as a "bulwark of liberty" dates to Cato's Letter No. 15. Thomas Gordon, *Cato's Letters, or Essays on Liberty, Civil and Religious, and Other Important Subjects* 96 (London 1737), *available at* https://www.thefire.org/research-learn/catos-letter-no-15.

19. Eloise Barry, *These Are the Countries Where Twitter, Facebook and TikTok Are Banned*, TIME (Jan. 18, 2022), https://time.com/6139988/countries-where-twitter-facebook-tiktok-banned.

CONCLUSION

Never before has Congress taken the extraordinary step of effectively banning a platform for communication, let alone one used by half the country. The First Amendment requires an explanation of why such a dramatic restriction of the right to speak and receive information is necessary, and compelling evidence to support it. The government failed to provide either here. What little Congress did place on the public record includes statements from lawmakers raising diffuse concerns about national security and, more disturbingly, their desire to control the American public's information diet in a way that strikes at the heart of the First Amendment. This Court should reverse the decision below and hold that the Act is constitutionally invalid.

December 27, 2024

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