Nos. 24-656, 24-657

IN THE
Supreme Court of the United States

TIKTOK, INC., ET AL.,
Petitioners,
v.
MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

BRIAN FIREBAUGH, ET AL.,
Petitioners,
v.
MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* CHAIRMAN OF THE SELECT COMMITTEE ON THE CCP JOHN R. MOOLENAAR AND RANKING MEMBER RAJA KRISHNAMOORTHI IN SUPPORT OF RESPONDENT

THOMAS M. JOHNSON, JR.
Counsel of Record
JEREMY J. BROGGI
JOEL S. NOLETTE
DANIEL T. PARK
WILEY REIN LLP
2050 M Street N.W.
Washington, D.C. 20036
tmjohnson@wiley.law
(202) 719-7000

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Treatises

Other Materials

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Chairman of the Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party John R. Moolenaar and Ranking Member Raja Krishnamoorthi are Members of the United States House of Representatives who seek to protect all Americans from foreign adversary controlled applications that present a clear national security threat to the United States.[2]

Earlier this year, wide bipartisan majorities in Congress enacted and President Biden signed the Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, Div. H, 138 Stat. 895, 955–60 (2024) ("Divestiture Act") (and a near-identical precursor to this law was introduced by the bipartisan leaders of the Select Committee on the CCP, unanimously reported out of the House Energy and Commerce Committee with a 50-0 vote, and passed the House by a vote of 352-65-1). Contrary to

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici Curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] In the D.C. Circuit, a bipartisan, bicameral coalition of fifty-five additional Members of Congress signed onto a similar *amicus* brief filed by *Amici Curiae* in support of the Divestiture Act, including Senate Select Committee on Intelligence Vice Chairman Marco Rubio, House Energy and Commerce Committee Chair Cathy McMorris Rodgers, House Energy and Commerce Committee Ranking Member Frank Pallone, House Majority Leader Steve Scalise, and House Speaker Emerita Nancy Pelosi. But because of time constraints, *Amici Curiae* were unable to re-solicit other Members to invite them to join this brief.

the claims of Petitioners in these cases, the Divestiture Act does not regulate speech or require any social-media company to stop operating in the United States. The Divestiture Act is instead focused entirely on the regulation of foreign adversary control and provides a clear, achievable path for affected companies to resolve the pressing and non-hypothetical national security threats posed by their current ownership structures. As the Court of Appeals explained, the Divestiture Act embodies the "multi-year efforts of both political branches to investigate the national security risks posed by the TikTok platform, and to consider potential remedies proposed by TikTok." App. 32a, *TikTok, Inc. v. Garland*, No. 24-656 (U.S. Dec. 16, 2024) ("App."). Because the Constitution invests the political branches and especially Congress with responsibility and authority to protect the American people from foreign threats, *Amici Curiae* have a strong interest in supporting the Divestiture Act.

SUMMARY OF ARGUMENT

In the Divestiture Act, Congress determined that foreign adversary controlled applications that present a clear and significant national security threat should not be permitted to access application stores or web hosting services in the United States. To stop foreign adversaries from targeting, surveilling, and conducting covert repression campaigns against the American people through social media and related applications, the Divestiture Act requires companies controlled by the Democratic People's Republic of North Korea, the People's Republic of China ("PRC"), the Russian Federation, and the Islamic Republic of Iran to divest themselves of that control or face restrictions

in the United States. Divestiture Act §§ 2(a), 2(c); *see id.* § 2(g)(4) (citing 10 U.S.C. § 4872(d)(2)).

In enacting the Divestiture Act, Congress exercised the authorities and responsibilities vested in it by Article I of the Constitution of the United States. Backed by extensive factfinding about the national security threat to the American people posed by certain foreign adversary controlled applications, the Divestiture Act resembles and, indeed, is narrower than numerous other restrictions on foreign ownership that Congress has enacted in other statutory regimes. Congress did not transcend the limits imposed by the First Amendment because "it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution," *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 433 (2020), and because the Divestiture Act regulates business conduct not speech. As the Court of Appeals rightly recognized, the Divestiture Act "actually vindicates the values that undergird the First Amendment" by preventing a foreign adversary from "distort[ing] free speech." App. 43a; *see id.* 65a ("[T]he Government acted solely to protect th[e] freedom [of speech] from a foreign adversary nation and to limit that adversary's ability to gather data on people in the United States.").

Because the Divestiture Act is constitutional, the Court should affirm.

ARGUMENT

I. THE CONSTITUTION VESTS CONGRESS WITH AUTHORITY TO PROTECT AMERICANS FROM FOREIGN NATIONAL SECURITY THREATS.

The Constitution establishes Congress as the Nation's lawmaker. The first clause of Article I provides that "All legislative Powers" are "vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." As the Constitution makes clear, "[t]he Founders of this Nation entrusted the law making power to the Congress alone." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

Congress may legislate pursuant to its constitutional powers with any purpose not constitutionally prohibited. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."). And Congress's lawmaking power includes authority to regulate both foreign and interstate commerce.

With respect to foreign commerce, the Foreign Commerce Clause grants Congress authority to "regulate Commerce with foreign nations." U.S. Const. art. I, § 8, cl. 3. This authority has many applications reflecting Congress's power to protect national security. "[F]rom the beginning[,] Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries." *Buttfield v.*

Stranahan, 192 U.S. 470, 492 (1904); *see also SEC v. Jarkesy*, 144 S. Ct. 2117, 2132 (2024) (noting how, in *Buttfield*, the Court held that "Congress's power over foreign commerce . . . was so total that no party had a 'vested right' to import anything into the country"). Congress can "establish quarantine regulations, and to protect the country as respects its commerce from contagious and infectious diseases." *See Bartlett v. Lockwood*, 160 U.S. 357, 361 (1896); *accord Simpson v. Shepard*, 230 U.S. 352, 406 (1913). And Congress may "pass embargo and non-intercourse laws." *Bd. of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48, 58 (1933) (internal quotation marks omitted); *see also* 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law—Substance & Procedure* § 4.2(a), Westlaw (updated July 2024) ("The Constitution as originally framed seems . . . to recognize a virtually unlimited power of Congress over commerce with foreign nations.").

The Divestiture Act is also a routine exercise of Congress's interstate commerce power. To be sure, the law relates to national security and foreign affairs. But because it regulates domestic activity, it stands at the core of Congress's lawmaking power. *See* Michael Ramsey, *The Constitution's Text in Foreign Affairs* 6 (2007) ("[A]ltering rights and duties within the domestic legal system, even in pursuit of foreign affairs objectives, . . . is a 'legislative' (lawmaking) function, not an executive one."). As "[f]ully eleven of the powers that Article I, § 8 grants Congress deal in some way with foreign affairs," 1 Laurence H. Tribe, *American Constitutional Law* § 5-18 (3d ed. 2000), Congress is on especially strong footing here.

Because "Congress . . . has the facilities necessary to make fairly" the "important policy decision[s]" in the "delicate field of international relations," *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957), judicial review in this area is, as a rule, "extremely deferential." *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007). Time and again, this Court has acknowledged and respected the "controlling role of the political branches" in the face of "an exercise of congressional authority regarding foreign affairs." *Bank Markazi v. Peterson*, 578 U.S. 212, 234 (2016); *see also Regan v. Wald*, 468 U.S. 222, 242 (1984) (explaining the Court's "classical deference to the political branches in matters of foreign policy"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (recognizing that matters related to the "conduct of foreign relations . . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"). Per the Framers' design, the "sensitive and weighty interests of national security and foreign affairs" should be addressed by Congress, and courts are "not to substitute . . . [their] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010) (collecting authorities).

For these reasons, TikTok Petitioners err in suggesting that Congress is not qualified to make its own judgment about the national security threat posed by the PRC's control of those companies and must instead provide those companies with the process it supplied to other entities, including judicial review of factual findings made by the executive branch. *See* Emergency Appl. for Inj. Pending S. Ct. Rev. at 3–4, 10–11, 21, 31–32, *TikTok Inc. v. Garland*, No. 24A587

(U.S. Dec. 16, 2024) ("Emergency Appl."). But executive processes are at most a second-best option, adopted to "reintroduce public participation and fairness to affected parties after governmental authority ha[d] been delegated to unrepresentative agencies." *See Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980). Congress represents the people, answers to the people, and is constitutionally empowered to establish and delimit executive discretion in the realm of foreign commerce. *See Youngstown*, 343 U.S. at 585. The "single, finely wrought and exhaustively considered, procedure" set forth in Article I, *INS v. Chadha*, 462 U.S. 919, 951 (1983), is constitutionally adequate.

II. CONGRESS APPROPRIATELY EXERCISED ITS CONSTITUTIONAL AUTHORITY BY ENACTING THE DIVESTITURE ACT.

The Divestiture Act is backed by extensive legislative factfinding demonstrating that foreign adversary nations seek to exploit applications including social media to target, surveil, and conduct other covert activities (including transnational repression) against the American people. The Divestiture Act resembles, but is narrower than, similar foreign ownership regulations that have been on the books for decades and upheld by the courts.

A. Congress Identified Specific Threats From Foreign Adversaries, Including China.

The Divestiture Act targets specific safety and national security threats posed by foreign adversary nations, including the PRC. *See* Divestiture Act § 2(g)(4)

(citing 10 U.S.C. § 4872(d)(2)); *accord* 15 C.F.R. § 791.4(a) (recognizing that these countries "have engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons"). It is the product of extensive legislative factfinding going back decades.

For instance, since 1999, Congress has required the Secretary of Defense to submit to it an annual report on PRC strategy. *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 1202(a)–(b), 113 Stat. 512, 781–82 (1999). Over the years, the content Congress required the Secretary of Defense to cover in that report has ballooned to include many specifics about the PRC's cyber strategy and malicious actions via digital media. *See, e.g.*, NDAA for Fiscal Year 2008, Pub. L. No. 110-181, § 1263, 122 Stat. 3, 407; NDAA for Fiscal Year 2013, Pub. L. No. 112-239, § 1271, 126 Stat. 1632, 2022; John S. McCain NDAA for Fiscal Year 2019, Pub. L. No. 115-232, § 1260, 132 Stat. 1636, 2059 (2018); NDAA for Fiscal Year 2020, Pub. L. No. 116-92, § 1260, 133 Stat. 1198, 1677–78 (2019). And Congress has required the President to report on the PRC's "use of intelligence networks to exploit open research and development" and "[m]alicious cyber activities," NDAA for Fiscal Year 2019 § 1261, as well as efforts to "deter industrial espionage and large-scale cyber theft of intellectual property and personal information" by the PRC, William M. (Mac) Thornberry NDAA for Fiscal Year 2021, Pub. L. No. 116-283, § 1260F, 134 Stat. 3388, 3963–64.

Congress has long understood how internet-based applications can be a vector exploited by foreign adversaries to compromise Americans' devices and to surveil, covertly influence, and repress. *See generally, e.g.*, *Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec.*, 909 F.3d 446 (D.C. Cir. 2018) (discussing the ban Congress imposed on Kaspersky Lab's cybersecurity software in the NDAA for Fiscal Year 2018). And it has been advised repeatedly about the threats posed by the PRC's "cyber espionage operations." *See* Off. of the Dir. of Nat'l Intel., *Annual Threat Assessment of the U.S. Intelligence Community* 10 (Feb. 6, 2023), https://tinyurl.com/5n6r6k68. Moreover, Congress understood that foreign adversary controlled applications present espionage and counter-intelligence risks that cannot be remedied through less restrictive means, such as traditional counter-intelligence mechanisms like defensive briefings. *See* U.S. Dep't of Just., *Justice Manual* § 9-90.730 (updated Nov. 2022).

All this legislative factfinding enabled Congress to assess the national security risk posed by foreign adversary controlled applications generally, as well as the connection between the PRC and ByteDance (the owner of the TikTok social-media application) in this instance. In its current form, TikTok began operations in the United States in August 2018. *See TikTok: Technology Overview and Issues*, Cong. Rsch. Serv. (updated June 30, 2023), https://tinyurl.com/mvejaz84. More or less immediately, legislators began investigating the "national security risks" it posed. *See* Letter of Sens. Schumer and Cotton to Acting Dir. Nat'l Intel. (Oct. 23, 2019), https://tinyurl.com/2t7bfwz7; *cf.* App. 11a–12a (recounting the executive branch's similarly swift response). Subsequently, recognizing the threat posed

by the CCP more generally, a wide and bipartisan majority of the House of Representatives (365-65) voted to establish the Select Committee on the CCP, to investigate and make policy recommendations to address that threat. *See* H.R. Res. 11, 118th Cong. (2023).

The Select Committee on the CCP and the Senate Select Committee on Intelligence have held numerous classified briefings and open hearings on the threat posed by the CCP generally as well as through TikTok specifically. *See* Am. Public Redacted Br. for Resp't at 2, 11, *TikTok Inc. v. Garland*, No. 24-1113 (D.C. Cir. July 30, 2024); *see also* H.R. Rep. No. 118-417, at 10–11 (2024); H.R. Res. 1051, 118th Cong. (2024).

For instance, the Select Committee on the CCP heard about the CCP's grand strategy and the threats it poses to America generally. *See Hearing on the Chinese Communist Party's Threat to America Before the Select Comm. on the CCP*, 118th Cong. (2023), https://tinyurl.com/4p94n5jj. Numerous national-security-and-technology experts testified about the PRC's technology ambitions. *See Hearing on Commanding Heights: Ensuring U.S. Leadership in the Critical and Emerging Technologies of the 21st Century Before the Select Comm. on the CCP*, 118th Cong. (2023), https://tinyurl.com/4rfkpruy. Witnesses testified about the PRC's laws and practices requiring nominally private enterprises to engage in clandestine cooperation with PRC authorities. *See Hearing on Risky Business: Growing Peril for American Companies in China Before the Select Comm. on the CCP*, 118th Cong. (2023), https://tinyurl.com/49f72hvd. Government cybersecurity officials testified about cyber threats the CCP poses to the United States. *See*

Hearing on the CCP Cyber Threat to the American Homeland and National Security Before the Select Comm. on the CCP, 118th Cong. (2024), https://tinyurl.com/448fh89a ("*CCP Cyber Threat Hearing*"). And witnesses testified about the CCP's campaign of transnational repression. *See Hearing on CCP Transnational Repression: The Party's Effort to Silence and Coerce Critics Overseas Before the Select Comm. on the CCP*, 118th Cong. (2023), https://tinyurl.com/3yjsc45f.

Similarly, the Senate Select Committee on Intelligence held numerous open and closed hearings on foreign covert intelligence operations leveraging social-media platforms, including receiving testimony from the Director of the FBI on the national security threat posed by TikTok during its annual Worldwide Threats hearing. *See Hearing on Worldwide Threats Before the Senate Select Comm. on Intel.*, 118th Cong., at 01:08:53–01:11:01 (2024), https://tinyurl.com/4pehm887.

Not only that, but in March 2023, TikTok Inc. CEO Shou Zi Chew testified before Congress for approximately five hours. *See generally Full Committee Hearing on TikTok: How Congress Can Safeguard American Data Privacy and Protect Children from Online Harms Before the House Energy & Com. Comm.*, 118th Cong. (2023), https://tinyurl.com/mpanhcfa ("*TikTok Hearing*").

Acting on the information it has obtained over this time, Congress previously enacted the No TikTok on Government Devices Act, prohibiting government officials from downloading or using TikTok on their government devices. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. R, § 101, 136 Stat.

4459, 5258–59 (2022). The Divestiture Act—spearheaded by the then-Chairman and the Ranking Member of the Select Committee on the CCP and sponsored by the current Chairman—followed this thorough investigative process. *See, e.g.*, H.R. Res. 1051. The findings undergirding the law bear this out.[3]

As the Report on H.R. 7521—what became the Divestiture Act—of the House Committee on Energy and Commerce details, there are "tight interlinkages" between ByteDance, TikTok, and the CCP. H.R. Rep. No. 118-417, at 3; *accord* H.R. Res. 1051. Through TikTok, the PRC not only can "control data collection on millions of users" but also can "control the software on millions of devices" and thus "compromise" them. *See CCP Cyber Threat Hearing*, *supra*, at 00:43:30–00:45:08 (Testimony of FBI Director Wray); *see also* H.R. Res. 1051 (referencing this testimony).

Among the ways this is so, the PRC is able to coerce companies headquartered there—like ByteDance—to "surrender all its data to the PRC," no matter "where that data was collected." *See* H.R. Rep. No. 118-417, at 3–4; *see also* H.R. Res. 1051 (reciting the President's determination in 2020 that "TikTok's ownership by ByteDance Ltd. enables the [PRC] . . . and [CCP] . . . to gain access to 'Americans' personal and proprietary information'"). Several recent PRC laws underscore this threat. *See* H.R. Rep. No. 118-

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[3] Of course, "Congress is not obligated, when enacting its statutes, to make a record . . . to accommodate judicial review." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality opinion); *accord* App. 52a (collecting authorities). But there is one here.

417, at 4; H.R. Res. 1051; *see also* App. 35a (recognizing how the PRC "poses a particularly significant" threat because of recently adopted laws in China enabling the PRC "to access and use data held by Chinese companies").

For instance, the National Intelligence Law of 2017 requires that "[a]ll organizations and citizens shall support, assist, and cooperate with national intelligence efforts." *See* National Intelligence Law of 2017, ch. I, art. 7, https://tinyurl.com/5n6cbxdc. Among other things, this means that PRC security and intelligence forces can require organizations like ByteDance—along with their subsidiaries anywhere around the globe—to "provide necessary support, assistance, and cooperation," which includes giving those forces access to collect all "relevant files, materials or items." *Id.* ch. II, arts. 14–16. Also, the Data Security Law of 2021 gives PRC authorities jurisdiction over "data handling activities" outside of the Chinese mainland and requires all "relevant organizations and individuals" to "cooperate" when "[p]ublic security organs and state security organs collect[] data as necessary to lawfully preserve national security or investigate crimes." *See* Data Security Law of 2021, ch. I, art. 2; ch. IV, art. 35, https://tinyurl.com/mrxvv8b6. And the PRC's recently revised Counter-Espionage Law mandates that any technological innovations be accessible to PRC authorities for use to further the PRC's state security and intelligence goals. *See* Counter-Espionage Law of 2023, ch. I, art. 8; ch. IV, arts. 44, 49; ch. V, art. 59, https://tinyurl.com/yb5yvtsx.

These laws—paired with Chairman Xi Jinping's dramatic broadening of the country's conception of national security, *see, e.g.*, Katja Drinhausen & Helena Legarda, *"Comprehensive National Security" Unleashed: How Xi's Approach Shapes China's Policies at Home and Abroad*, Mercator Institute for China Studies (Sept. 15, 2022), https://tinyurl.com/yvfmdrdy—mean that ByteDance must comply with virtually any data request from the PRC, including a request for TikTok data. The national security risks that such access could pose in a conflict hardly require enumeration.

And the threat of all this being weaponized for surveillance, covert influence, and transnational repression is not hypothetical. As has been reported, the CCP and others have used TikTok to spy on pro-democracy protestors in Hong Kong and to conduct "surreptitious surveillance" on U.S. citizen journalists. *See* H.R. Rep. No. 118-417, at 5 & n.22, 8 & n.45, 9; H.R. Res. 1051 (reciting then-National Security Advisor Robert O'Brien's statement that "the CCP uses TikTok . . . to collect personal, private, and intimate data on Americans to use 'for malign purposes'"); *see also* Sebastian Rotella, *Even on U.S. Campuses, China Cracks Down on Students Who Speak Out*, ProPublica (Nov. 30, 2021), https://tinyurl.com/4ky4d244 (documenting how the PRC uses social-media applications to surveil, target, and persecute U.S.-based dissidents).

Congress therefore determined that addressing this existing and future threat for designated social-media applications, including TikTok, required excising the foreign adversary control from the applica-

tions. And with respect to TikTok in particular, Congress considered half-measures that have been proposed (so-called "Project Texas") and concluded that they are neither reliable, *see, e.g.*, *Rubio, Warner Call for Investigation into TikTok After Chinese Communist Party's Access to U.S. Data Comes to Light* (July 6, 2022), https://tinyurl.com/423m2z4x (documenting "TikTok's misrepresentation" about its corporate structure that "undermine[d] longstanding claims by TikTok's management that the company's operations were firewalled from the CCP's demands"), nor adequate, *see* H.R. Res. 1051 (finding that "Project Texas" would still expose Americans to "malicious code, backdoor vulnerabilities, surreptitious surveillance, and other problematic activities" deriving from the PRC).[4]

Indeed, through extensive discussions with TikTok's senior corporate management, congressional committees identified myriad deficiencies in the proposed national security agreement offered by TikTok Petitioners, as well as residual risks that could not be resolved through any behavioral remedies stipulated to by the Committee on Foreign Investment in the United States (particularly given documented instances of the company's misrepresentation over its corporate governance, data security, and other practices). *See, e.g.*, H.R. Rep. 118-417 at 4–5; H.R. Res. 1051. Congress thus determined that the Divestiture Act is the least restrictive way to resolve the national security threat because nothing short of addressing

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[4] Accordingly, TikTok Petitioners' suggestion that Congress neither "knew" about Project Texas nor "'found it wanting,'" Emergency Appl. at 31, is mistaken.

TikTok's foreign adversary control can address such risks.[5]

B. Congress Chose To Respond To Those Threats Through Tailored Means That Regulate More Narrowly Than Other Foreign Ownership Statutes.

Accordingly, Congress passed the Divestiture Act. Contrary to Petitioners' contentions, the Divestiture Act neither bans any social-media application nor imposes any regulation on speech. For apps whose operators choose to keep them "controlled by a foreign adversary" after a specified time, the law (1) prohibits app stores from "distribut[ing], maintain[ing], or updat[ing]" foreign adversary controlled applications "within the land or maritime borders of the United States" by means of an online application store and (2) prohibits internet hosting services from providing such "services to enable the distribution, maintenance, or updating" of foreign adversary controlled applications "within the land or maritime borders of the United States." Divestiture Act § 2(a)(1)–(3), 2(c).

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[5] Along with the Divestiture Act, Congress also enacted the Protecting Americans' Data from Foreign Adversaries Act of 2024, *see* Pub. L. No. 118-50, Div. I, 138 Stat. 895, 960–63. This law addresses a related national security problem—data-broker sales of Americans' data to foreign adversaries. But because of the distinct threat posed by foreign adversary control of social-media applications generally and TikTok specifically, *see supra*, Congress concluded that additional measures were needed, resulting in the Divestiture Act. *Cf.* App. 55a ("That the Congress considered a series of other measures before ultimately adopting the [Divestiture] Act implies only that the Congress determined nothing short of divestiture would sufficiently avoid the risks posed by TikTok.").

But the Divestiture Act gives companies that operate "foreign adversary controlled applications" in the United States a way to continue offering uninterrupted services in the United States without threatening national security—by taking prescribed steps to eliminate foreign adversary control over the application. *See id.* § 2(c)(1); *id.* § 2(g)(3), (6).

The Divestiture Act not only reflects specific intelligence Congress considered about the impact of foreign adversary control on ByteDance and its applications; it is also representative of longstanding congressional concern about the potential national security risks posed by foreign control of American companies. *See* App. 44a ("[The Divestiture Act] follows the Government's well-established practice of placing restrictions on foreign ownership or control where it could have national security implications."); *id.* 66a–71a (Srinivasan, C.J., concurring in part and concurring in the judgment) (explaining how the Divestiture Act is "in step with longstanding restrictions on foreign control of mass communications channels"). Indeed, the Act is narrower than other, similar foreign ownership regulations, including ones that have been upheld against constitutional challenge.

For instance, in the Communications Act of 1934, Congress generally prohibited foreign-incorporated or -owned companies from holding radio spectrum licenses. *See* 47 U.S.C. § 310(b)(2)–(3). Under § 310, a company qualifies as foreign owned if more than twenty percent of its stock is owned by foreign persons or entities. *See id.* § 310(b)(3). The Divestiture Act follows this model, similarly adopting a foreign incorporation rule as well as a "20 percent stake" threshold

in defining what it means for a company to be "controlled by a foreign adversary." Divestiture Act § 2(g)(1)(A)–(B). That said, the Divestiture Act is narrower: while the Communications Act applies universally, the Divestiture Act applies only to applications that present a "significant threat to the national security of the United States," have a large user base, and are ultimately controlled by one of four foreign adversary nations. *See id.* § 2(g)(3)(B)(ii); *id.* § 2(g)(2); *id.* § 2(g)(4) (citing 10 U.S.C. § 4872(d)(2)).

Section 310's foreign ownership ban has been upheld against constitutional attack. In *Moving Phones Partnership L.P. v. FCC*, 998 F.2d 1051 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1004 (1994), the court recognized that § 310 "reflect[ed] a long-standing determination to safeguard the United States from foreign influence in broadcasting." 998 F.2d at 1055 (internal quotation marks omitted). And in the face of an equal-protection challenge to § 310, the court applied rational-basis scrutiny and found that the statute easily passed given the "national security policy" underlying it. *See id.* at 1056.

Consider also CFIUS, an interagency body with authority to review, block, and even unwind after-the-fact corporate mergers, acquisitions, or takeovers that "could result in foreign control" over domestic commerce. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425–26; Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 3, 121 Stat. 246, 252. Recently, this authority has been exercised to require the divestiture of an American app owned by a Chinese company. *See, e.g.*, Echo Wang, *China's Kunlun Tech Agrees to U.S. Demand to Sell Grindr*

Gay Dating App, Reuters (May 13, 2019), https://tinyurl.com/yhsc6hrs. The Divestiture Act complements the much broader authority granted to CFIUS by regulating with particularity a narrowly defined class of foreign adversary controlled applications.

More recently, Congress has adopted other measures that specifically target the national security threat posed by CCP control of companies involved in supplying communications network infrastructure. For example, in the NDAA for Fiscal Year 2019, Congress prohibited federal agencies from using telecommunications equipment produced by several entities affiliated with the PRC, including Huawei and ZTE. *See* Pub. L. No. 115-232, § 889. Then, in 2019, Congress required the FCC to create a list of "covered communications equipment or services" on which federal funds could not be spent, and the law defined those as communications or services that "pose[] an unacceptable risk to the national security." Secure and Trusted Communications Networks Act of 2019, Pub. L. No. 116-124, § 2, 134 Stat. 158, 158–59 (2020). In that law, Congress required the FCC to include as "covered" the equipment produced by the specific entities identified in the NDAA for Fiscal Year 2019. *See id.* § 2(c)(3). And in 2021, Congress passed the Secure Equipment Act of 2021, Pub. L. No. 117-55, 135 Stat. 423, specifying that the FCC could not authorize the use of such "covered" equipment. *See id.* § 2(a)(2).

In these laws, too, Congress identified specific companies that posed a threat to American data security due to Chinese corporate ownership. And the first law in this series, the NDAA for Fiscal Year

2019, has been upheld against constitutional challenge claiming that the law improperly singled out specific companies. *See Huawei Techs. USA, Inc. v. United States*, 440 F. Supp. 3d 607, 628–54 (E.D. Tex. 2020). The Divestiture Act is no different.

III. PETITIONERS' FIRST AMENDMENT OBJECTIONS ARE MERITLESS.

Petitioners argue the Divestiture Act violates their First Amendment rights. The Court of Appeals rightly rejected that argument, applying heightened scrutiny. App. 32a–33a. This Court should affirm because the Divestiture Act does not regulate protected speech.

First, "it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution." *Agency for Int'l Dev.*, 591 U.S. at 433 (collecting cases); *see also id.* at 433, 439 (holding that "legally distinct foreign affiliates" of American corporations "possess no rights under the U.S. Constitution"). As Chief Judge Srinivasan explained below, that "settled" principle forecloses any First Amendment claim by ByteDance, which is a foreign incorporated holding company controlled by the PRC. App. 72a–74a (concurring in part and concurring in the judgment); *see also id.* 27a (majority opinion) (agreeing ByteDance has "no First Amendment rights").

The same principle appears to foreclose any argument by Petitioner TikTok as well. Although "TikTok Inc." is an American company incorporated and headquartered in California, it "is wholly owned by ByteDance, a foreign company." App. 27a. As Justice

Barrett recently explained, "a social-media platform's foreign ownership and control over its content-moderation decisions might affect whether" the First Amendment applies, even for a U.S.-based company. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2410 (2024) (concurring).

TikTok concedes its "U.S. application is highly integrated with the global TikTok application" and "runs on billions of lines of code that have been developed over multiple years by a team of thousands of global engineers." Br. of Pet'rs TikTok Inc. & ByteDance Ltd. at 21, 23, *TikTok Inc. v. Garland*, No. 24-1113 (D.C. Cir. June 20, 2024) (cleaned) ("TikTok C.A. Br."); *see also id.* 32 ("A post-divestiture, U.S.-only TikTok would lack the recommendation engine that has driven its success"). Those assertions, taken against the backdrop of TikTok's foreign ownership structure, strongly suggest that "the platform's corporate leadership abroad makes the policy decisions about the viewpoints and content the platform will disseminate" and that "Americans" "the corporation employs" are taking "the direction of foreign executives." *NetChoice*, 144 S. Ct. at 2410 (Barrett, J., concurring). Thus, even if the Divestiture Act did regulate TikTok's speech, such regulation "might [not] . . . trigger First Amendment scrutiny." *See id.*

Second, and more fundamentally, the Divestiture Act regulates corporate ownership over U.S.-based communications infrastructure, not speech. This Court has long held that "restrictions on protected expression are distinct from restrictions on economic activity" and that "the First Amendment does not prevent" the latter. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Also, it has "reject[ed] the 'view that

an apparently limitless variety of conduct can be labeled speech.'" *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Determining that speech is not at issue is easy where the regulated conduct "manifests absolutely no element of protected expression." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986).

That is so here. The Divestiture Act states that it "does not apply to a foreign adversary controlled application with respect to which a qualified divestiture is executed." Divestiture Act § 2(c). A "qualified divestiture" requires, in relevant part, "a divestiture or similar transaction" that "the President determines, through an interagency process, would result in the relevant foreign adversary controlled application no longer being controlled by a foreign adversary." *Id.* § 2(g)(6); *see also id.* § 2(g)(1) (defining "controlled by a foreign adversary").

Under the Divestiture Act, therefore, TikTok can avoid any regulation whatsoever by simply divesting itself of foreign control. Because that requirement "exhibits nothing that even the most vivid imagination might deem uniquely expressive," *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 53 (1st Cir. 2005); *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) ("A business agreement or business dealings . . . is not conduct with a significant expressive element."), the First Amendment does not apply.

TikTok Petitioners do not deny that a qualified divestiture is conduct not speech. Instead, they assert that their First Amendment rights are nevertheless

burdened because the practical effect of the Divestiture Act is to shut TikTok down. Emergency Appl. at 1, 10. But that plainly is not true. For one, the Divestiture Act does not require that TikTok shut down—only that it shed foreign adversary control. *Cf. Am. Soc'y of Ass'n Execs. v. United States*, 195 F.3d 47, 50 (D.C. Cir. 1999) (concluding that a law providing "option[s]" whereby an entity "can avoid any alleged burden on its First Amendment rights"—such as by "splitting itself into two organizations"—does not trigger First Amendment scrutiny). To the extent divestiture presents challenges, similar (and here, temporary) burdens are imposed by "many laws [that] make the exercise of First Amendment rights more difficult." *See Univ. of Penn. v. EEOC*, 493 U.S. 182, 200 (1990). But a plaintiff "cannot claim a First Amendment violation simply because" it "may be subject to . . . government regulation." *Id.* By the same token, TikTok users cannot claim a constitutional injury if TikTok elects to shut down rather than shed its foreign adversary control.

Further, TikTok Petitioners' argument on this point—which they have framed in terms of the purported infeasibility of spinning off a U.S.-specific version of TikTok, *see* Emergency Appl. at 12—rests on a myopic reading of the Divestiture Act. ByteDance could spin off TikTok entirely—both U.S.-based and non-U.S. operations—and avoid the ostensible challenges posed by a hypothetical U.S.-only TikTok.

Though Mr. Chew testified before Congress under 18 U.S.C. § 1001 that "ByteDance is not owned or controlled by the Chinese government," *see TikTok Hearing*, *supra*, at 00:20:39–00:20:50, TikTok Petitioners argued below that the PRC holds such sway over

ByteDance that it would block this sort of transaction, *see* TikTok C.A. Br. 24. But if that is so, the PRC, not the Divestiture Act, is to blame. And the First Amendment is not triggered by that. As Chief Judge Srinivasan explained, "[i]nsofar as the PRC's (or ByteDance's) own decisions may prevent [divestiture] from happening, the independent decisions of those foreign actors cannot render Congress's chosen means [unconstitutional]." App. 89a (concurring in part and concurring in the judgment); *see id.* 74a–75a; *cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) (finding no First Amendment problem when speech restrictions were "self-imposed").

TikTok Petitioners have also asserted that "any divestiture would change TikTok's speech" because a "post-divestiture, U.S.-only TikTok would lack the recommendation engine that has driven its success." TikTok C.A. Br. 32. But elsewhere, TikTok Petitioners conceded that this "recommendation engine" is in fact under the control of a foreign adversary country. *See id.* 25. TikTok Petitioners' concession that TikTok's recommendation engine is ultimately controlled by the PRC merely confirms that, to the extent that it involves expressive conduct, such conduct is unprotected. *See Agency for Int'l Dev.*, 591 U.S. at 433.

TikTok Petitioners are also wrong in claiming the Divestiture Act is content- and speaker-based. *See* Emergency Appl. at 3, 20–22. The statute creates neutral and generally applicable rules for all foreign adversary controlled applications that are determined to pose a national security risk. To be sure, with respect to the TikTok Petitioners, Congress determined that the application is controlled by a foreign adversary and poses a significant national security threat

and did not delegate that function to the executive branch. But Congress gave TikTok Petitioners the same divestment choice and process that it gave to every other application designated under the statute that is controlled by a foreign adversary and poses a significant national security threat.

CONCLUSION

This Court should affirm.

Respectfully submitted,

THOMAS M. JOHNSON, JR.
Counsel of Record
JEREMY J. BROGGI
JOEL S. NOLETTE
DANIEL T. PARK
WILEY REIN LLP
2050 M Street N.W.
Washington, D.C. 20036
tmjohnson@wiley.law
(202) 719-7000

December 27, 2024 *Counsel for* Amici Curiae