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 ASIAN AMERICANS ADVANCING JUSTICE | AAJC AND THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AS *AMICI CURIAE* SUPPORTING NO PARTY

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INTEREST OF *AMICI CURIAE*[1]

Asian Americans Advancing Justice | AAJC ("Advancing Justice-AAJC") is a nonprofit, nonpartisan organization that seeks to create an equitable society for all. Advancing Justice-AAJC works to further civil and human rights and empower Asian American communities through organization, education, advocacy, and litigation. Advancing Justice-AAJC is a leading expert on issues of importance to the Asian American community, including immigrant rights, racial profiling, and national security.

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is based at the University of California, Irvine School of Law ("UC Irvine Law"). Inspired by the legacy of Fred Korematsu, the Korematsu Center works to advance justice for all through research, advocacy, and education. The Korematsu Center has a special interest in addressing government action targeting classes of persons based on race, nationality, or religion and in seeking to ensure that courts understand the historical—and, at times, unjust—underpinnings of arguments asserted to support the exercise of such executive power. The Korematsu Center does not, here or otherwise, represent the official views of UC Irvine Law.

SUMMARY OF ARGUMENT

I. The Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50

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[1] No counsel for a party authored this brief in any part, and no person or entity other than *amici* or *amici* counsel made any monetary contribution to fund the brief's preparation or submission.

(2024) (the "Act"), prohibits entities in the United States from hosting or publishing certain apps that have a statutorily defined relationship with four nations and the people or entities domiciled there. By choosing to single out content associated with persons domiciled in some nations but not others, the Act fosters viewpoint discrimination, no different from choosing sides in any controversial debate.

That conclusion follows both from the Act's text and structure—which specifically single out, as relevant to TikTok, content associated with China and Chinese nationals—and from the statements of members of Congress themselves, which focus not on location but on the potential for "communist propaganda" to be disseminated on TikTok in the United States and thereby influence public opinion. This is no mere regulation on foreign entities or governments, nor does it exempt American citizens. Instead, the Act targets speech that takes place domestically by prohibiting web hosting and app distribution—expressive activities—but only of content associated with people domiciled in China and three other countries.

Nor does the Act escape viewpoint discrimination by purportedly limiting its reach to "foreign adversary control." By focusing on domicile, the Act necessarily focuses on nationality, as most Chinese nationals are domiciled in China, and most of those domiciled in China are Chinese. That presumption that Chinese domicile or incorporation is a proxy for control by China's government leads to absurd applications that defy the First Amendment, like barring the distribution or hosting of certain apps or websites created by Chinese nationals living in the United States on temporary visas.

These speech limitations are an alarming parallel to the restrictions on other rights States have increasingly imposed targeting Chinese, and other, residents. Two States have adopted, and more than twenty more have considered, laws restricting non-citizens from disfavored countries from buying, owning, or even leasing real property, for example.[2] These are unfortunate and potentially dangerous modern analogues to the long history of racial discrimination against Asian Americans generally and those of Chinese descent specifically.

II. With that context in mind, it is essential that this Court not unduly defer to invocations of national security—particularly when those putative national security concerns arise as a repetition of anti-Asian bias and amid a growing trend of xenophobia and racism. While *amici* express no view on the merits of the specific national security concerns at issue here, *amici* write to emphasize that "it is essential that there be definite limits to" the deference accorded to claims of national security, for "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting). Strict scrutiny must be strict, if not fatal, in fact and not solely in theory.

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[2] Terry Tang & Didi Tang, *State Alien Land Laws Drive Some China-Born U.S. Citizens to Rethink Their Politics*, AP News (Oct. 26, 2024), https://apnews.com/article/us-china-alien-land-laws-a8a832335fbfda53ffa262f1e0f6e264.

ARGUMENT

I. Targeting Speech on the Basis of National Domicile Is Content-Based and Viewpoint Discrimination.

Underlying "the First Amendment itself" is the "principle of viewpoint neutrality". *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984). "Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others."); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (explaining that the Court has "frequently condemned . . . discrimination among different users of the same medium for expression"). That is because "speech restrictions based on the identity of the speaker are all too often simply a means to control content". *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015) (cleaned up).

Taken together, these principles mean that the government cannot ban people in the United States from publishing or hosting certain apps or websites in the United States owned by Chinese residents but permit them to publish German-owned apps or websites any more than it can ban a "sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are". *R.A.V. v. St. Paul*, 505 U.S. 377, 391-92 (1992). But the Act does just that by discriminating between apps and websites associated with people from "foreign adversary" nations and all other apps and websites. It regulates "based on the

content of speech and the identity of the speaker" both "on its face" and in its "purpose and practical effect". *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565, 567 (2011). We address each in turn.

A. The Act Explicitly Discriminates on the Basis of National Domicile.

1. On its face, the Act discriminates on the basis of an app's connection to people from certain nations (their "domicile")—a form of viewpoint discrimination. The Act's text discriminates on the basis of national domicile by specifically targeting for disfavored treatment any "foreign adversary controlled application". This term is broadly defined to include, "with respect to a covered company or other entity," any "website, desktop application, mobile application, or augmented or immersive technology application" operated either "directly or indirectly" by TikTok, ByteDance, or any individual or company that is either domiciled in the Democratic People's Republic of North Korea, the People's Republic of China, the Russian Federation, or the Islamic Republic of Iran, *or* is at least 20 percent owned, directly or indirectly, by individuals or entities that are. Act §§ 2(g)(1); 2(g)(4) (adopting the "foreign adversary country" definition in 10 U.S.C. § 4872(d)(2)).[3]

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[3] Entities other than ByteDance and TikTok are subject to § 2(a) if the President determines they "present a significant threat to the national security of the United States" following a notice period. Act § 2(g)(3). A "covered company" creates an app that allows users to create an account, share content with others,

The sum of the Act's provisions prohibits any "entity"—domestic or foreign—from distributing, updating, or hosting foreign adversary-controlled apps (including websites) "within the land or maritime borders of the United States." Act § 2(a)(1). The Act thus places restrictions on what *people in the United States* can say *here* based on a content characteristic—the identity of who controls the app or website they host or distribute. That control could be as little as having a China-based relative as a 20 percent minority investor. By contrast, any app or website content developed by a German company—even one controlled by the German government—may be distributed or hosted in the United States without triggering the Act, even if the President were to conclude that the app, or Germany itself, threatened national security.

The Act may also apply domestically for another reason: an owner can be considered "domiciled" in a foreign country while residing in the United States, even for extended periods of time. The "domicile" is "generally understood to mean the place where an individual establishes both physical presence and an intent to remain indefinitely." *Melian v. INS*, 987 F.2d 1521, 1524 (11th Cir. 1993). Nonimmigrants such as those on temporary worker, tourist, or student visas are not domiciled in the United States because they do not intend to remain here indefinitely. *See Graham v. INS*, 998 F.2d 194, 196 (3d Cir. 1993) (temporary

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and view content others share, if the app "has more than 1,000,000 monthly active users" during two of the three months preceding a Presidential national security determination—but apps "whose primary purpose is to allow users to post" product, business, or travel reviews or travel information are exempted. Act § 2(g)(2). "Other entity" is undefined.

worker visa-holder); *Melian*, 987 F.2d at 1525 (tourist visa-holder); *Brown v. INS*, 856 F.2d 728, 731 (5th Cir. 1988) (student visa-holder). Thus, an app may be within the Act's scope if it is controlled by a Chinese resident on a student visa at Harvard University.

2. To see how the government chooses sides of speech through the Act, consider the example of ToTok. With just two letters to distinguish it from the petitioner in Case No. 24-656, ToTok is an app for smartphones that is a spying tool "used by the government of the United Arab Emirates to try to track every conversation, movement, relationship, appointment, sound and image of those who install it on their phones."[4] U.S. intelligence linked ToTok to DarkMatter, an Abu Dhabi-based hacking group under FBI investigation, and warned "some allies" about the app's dangers, while declining to warn the American public. *See id.* Launched in October 2019, ToTok was downloaded millions of times in just two months and placed among the most installed social apps in the United States for one week that December, *see id.*, conceivably enough that the app would, if its domestic distribution continued, satisfy the Act's million monthly user threshold.

ToTok thus appears in practice to raise the same hypothetical national security concerns that Congress invoked to justify the Act's regulation of TikTok and other apps associated with enumerated nationalities.

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[4] Mark Mazzetti, Niciole Perlroth & Ronen Bergman, *It Seemed Like a Popular Chat App. It's Secretly a Spy Tool*, N.Y. Times (Aug. 14, 2020 ed.), https://www.nytimes.com/2019/12/22/us/politics/totok-app-uae.html.

But because the Act limits its censorship to content with a nexus to persons in China (or to persons in Iran, North Korea, or Russia), ToTok falls outside its reach. Thus, American companies like Google and Apple are free under the Act to host or distribute ToTok or any other website or app created or operated by foreigners, so long as they are not Chinese, Iranian, Russian, or North Korean. But our government has "no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

While a regulation prohibiting or regulating speech by Chinese nationals or other foreigners abroad might be "*facially* valid if it met the requirements of the Equal Protection Clause" because it is "directed at certain persons or groups," *id.* (emphasis in original), the Act instead regulates what American web and app hosts and distributors may publish within the United States based on that content's relationship to four specific nations and those domiciled there.

And if the Court finds that the Act passes constitutional muster, it's easy to see how Congress might be emboldened to start choosing sides on other contested topics by, for example, banning Americans from hosting websites developed by companies with 20 percent Palestinian ownership but permitting Americans to host websites 20 percent owned by Israelis, or *vice versa*. Such a ban could be based on assumptions that a company whose ownership is 20 percent Palestinian would espouse different views than would a company whose ownership is 20 percent Israeli. In the same way, as explained below, Congress assumes that TikTok, post-divestiture, would make available different

content than it does now. That is functionally viewpoint discrimination, no different from distinguishing between "capitalists and socialists, and those arrayed on both sides of every possible issue." *Matal v. Tam*, 582 U.S. 218, 243 (2017). Perhaps Congress could regulate *all* distribution of foreign-owned or operated apps that pose a national security threat. But what it may not do is choose sides among nations in proscribing what people may say in the United States.

B. The Government's Proffered Justifications Echo National-Origin Animus.

If any doubt remained that the Act discriminates on the basis of nationality, history and context would remove it.

First, the Act's text is similar to the recently-enacted—and constitutionally suspect—"alien land laws" primarily targeting Chinese nationals. Those laws, themselves, echo an ugly past of similar laws previously struck down as discriminatory.

Second, statements from members of Congress further support this conclusion. Time and again, Congress identified Chinese nationals as a threat to U.S. national security and objected specifically to the Chinese "communist propaganda" that TikTok purportedly makes available.

1. The Act follows the long and unfortunate history of anti-Asian prejudice in American law. This discrimination has been rooted in stereotypes of Asian Americans as "outsiders," "aliens," and "perpetual foreigners."

The differential legal treatment of those of Chinese origin predates the Civil War. By 1854, a California

court barred testimony from Chinese witnesses, describing them as "a race of people whom nature has marked as inferior" and who bring "with them their prejudices and national feuds," among other things. *People v. Hall*, 4 Cal. 399, 405 (Cal. 1854). In 1858, California adopted its own exclusion act barring persons of "the Chinese or Mongolian races" from entering the State, which its Supreme Court struck down in an unreported decision. *Lin Sing v. Washburn*, 20 Cal. 534, 564 (1862) (statement of counsel). California's Revenue Act of 1861 taxed all "foreigners not eligible to become citizens of the United States" living in "any mining district" in the State. *Ex parte Ah Pong*, 19 Cal. 106, 108 (1861). Because "a Chinaman" was "not eligible to become a citizen of the United States," *id.*, that (since-invalidated) law effectively targeted California's growing Chinese population. California was even more explicit in an 1862 law titled, "An Act to protect free white labor against competition with Chinese coolie labor, and discourage the immigration of the Chinese into the State of California," which was similarly struck down. *Lin Sing*, 20 Cal. at 564. And when 17 Chinese men and boys were lynched in Los Angeles in 1871, few legal consequences for the perpetrators followed.[5]

At the federal level, the Page Act came next in 1875. It applied to immigrants from "China, Japan, or any Oriental country" and purported to bar "importation" of "women for the purposes of prostitution,"

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[5] *See* John Johnson, Jr., *How Los Angeles Covered Up the Massacre of 17 Chinese*, LA Weekly (Mar. 10, 2011), https://www.laweekly.com/how-los-angeles-covered-up-the-massacre-of-17-chinese/.

among other persons. Act of March 3, 1875, ch. 141, §§ 1, 3, 18 Stat. 477 (repealed 1974). President Grant told Congress that "importation of Chinese women, but few of whom are brought to our shores to pursue honorable or useful occupations" was an "evil." *Seventh Annual Message* (Dec. 7, 1875). In practice, this false stereotype that presumed Chinese women to be prostitutes disproportionately prevented their immigration to the United States.[6] Congress extended this discriminatory treatment to bar immigration by all Chinese laborers (with few exceptions) in the Chinese Exclusion Act of 1872, which, as extended, effectively banned Chinese immigrants for nearly 60 years.[7] The Court at the time upheld the Chinese Exclusion Act, deferring to the "government of the United States" in considering "foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security". *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889).

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[6] *See* Jessica Pearce Rotondi, History, *Before the Chinese Exclusion Act, This Anti-Immigrant Law Targeted Asian Women* (Apr. 23, 2024 ed.), https://www.history.com/news/chinese-immigration-page-act-women.

[7] Testimony of John C. Yang, President and Executive Director of Advancing Justice-AAJC, at 5, *Hearing on Promoting Opportunity: The Need for Targeted Federal Business Programs to Address Ongoing Racial Discrimination Before the Senate Small Business Committee* (May 6, 2024), *available at*: https://www.advancingjustice-aajc.org/sites/default/files/2024-12/SBC%20Written%20Testimony_AAJC_Final%20%281%29.pdf.

With immigration from China restricted federally, the States renewed their discrimination against Chinese (and other Asian) immigrants and their businesses. San Francisco, for its part, targeted Chinese immigrants with regulations that overwhelmingly denied them permits to operate laundries. *See Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). States also blocked Asian immigrants from owning land under so-called "alien land laws." Although these statutes did not, on their face, "single out any particular ethnic group," they did prohibit property ownership by those "ineligible for citizenship"—a coded reference to Asians specifically, who were ineligible for citizenship. *See Admin. Order 2017-05-17*, 394 P.3d 488, 488 (Cal. 2017); *see also, e.g.*, *Ozawa v. United States*, 260 U.S. 178, 189, 198 (1922) (Japanese immigrant residing in the United States for over twenty years was "clearly ineligible for citizenship" because he "is clearly of a race which is not Caucasian").

California passed the first alien land law in 1913, and at least ten more States adopted similar laws between 1917 and 1943.[8] After its 1913 alien land law was struck down, California adopted another in 1920. A voters' pamphlet for the 1920 election "stated that the statute's 'primary purpose is to prohibit Orientals who cannot become American citizens from controlling our rich agricultural lands,'" and a former state attorney general saw it as "prevent[ing] ruinous competition by the Oriental farmer against the American farmer." *Sei Fujii v. State*, 242 P.2d 617, 628 (Cal.

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[8] *See* Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 Cal. L. Rev. 7, 7-8 (1947).

1952); *see also Oyama v. California*, 332 U.S. 633, 651 (1948) (Murphy, J., concurring) ("The California Alien Land Law was spawned of the great anti-Oriental virus".). Other States soon followed. *See* McGovney, *supra* n.8, at 7-9 (identifying similar laws in Arizona (1917), Louisiana (1921), New Mexico (1922), Idaho (1923), Montana (1923), Oregon (1923), Kansas (1925), Utah (1943), Wyoming (1943), and Arkansas (1925 and 1943)).

Although these laws and their logic were eventually repudiated, in recent years, States have considered, and even adopted, laws again restricting Chinese (and other) residents from owning property, often invoking a "foreign adversary" concept like the Act at issue here does. Indiana, for example, adopted a statute banning citizens of "China, Iran, North Korea, Russia, or a country designated as a threat to critical infrastructure by the governor" from acquiring or leasing real property within ten miles of a military installation. Ind. Code §§ 1-1-16-6(1), 1-1-16-10.2(b) (2024). A Florida law similarly focuses on those countries (plus "the Venezuelan regime of Nicolas Maduro," "the Republic of Cuba," and "the Syrian Arab Republic"), covering any persons "domiciled" in those countries who are not a U.S. citizen or lawful permanent resident. Fla. Stat. §§ 692.201(3), (4)(d). It also provides that any person domiciled in China who is not a U.S. citizen or lawful permanent resident, as well as any corporation organized under the laws of the People's Republic of China or with its principal place of business in China, may not own more than a "de minim[i]s indirect interest" in real property generally, Fla. Stat. § 692.204(1)(a) (2024). Although it exempts "one residential real property that is up to 2 acres in size" (sub-

ject to other conditions) and property interests acquired before July 1, 2024, *id.* §§ (2), (3), in practice, the law restricts purchases in the overwhelming majority of residential areas in the state.

By relying on the "domicile" of Chinese nationals—and those of other covered nations—the Florida law, like the Act here, singles out particular nationalities for restrictions while not imposing similar restrictions on other similarly-situated immigrants, quintessential national origin discrimination. That is because those "domiciled" in China are overwhelmingly persons of Chinese national origin, while neither the Florida law nor the Act imposes any similar restrictions on persons "domiciled" in any non-"foreign adversary" countries.

The Eleventh Circuit has enjoined Florida's restrictions on property ownership as to two Chinese citizens challenging the law pending appeal. *Yifan Shen v. Comm'r*, No. 23-12737, 2024 U.S. App. LEXIS 2346 (11th Cir. Feb. 1, 2024) (per curiam). Judge Abudu's concurrence concluded that the Florida law's "language, the anti-Chinese statements from Florida's public officials, and SB 264's impact establish that the law is a blanket ban against Chinese non-citizens from purchasing land within the state", which "blatantly violates" the Equal Protection Clause. *Id.* at *9.

2. Statements by members of Congress in hearings about TikTok and the Act recall this history of suspicion of China and discriminatory rhetoric of "control" by Chinese people, showing the Act's purpose in regulating content by people from, or associated with, disfavored nations and points of view:

- Representative Cathy McMorris Rodgers (R-WA): TikTok is "a valuable propaganda tool for the CCP" that "**will never embrace American values, virtues of our society, and culture**". *Legislation to Protect American Data and National Security from Foreign Adversaries: Hearing Before the H. Comm. On Energy and Commerce*, 118th Cong. 3 (Mar. 7, 2024);
- House of Representatives Committee on Energy and Commerce: Foreign adversaries like China "push misinformation, disinformation, and propaganda on the American public." H.R. Rep. No. 118-417 at 2 (Mar. 11, 2024);
- Senator Mitch McConnell (R-KY): "The goal of the Foreign Adversaries Act is to further the highly compelling state interest of preventing . . . deployment of subversive enemy propaganda through algorithmic curation." Br. for Sen. Mitch McConnell as Am. Curiae Opposing Emergency Appl. for Inj. Pending Supreme Ct. Review at 4 (No. 24A587);
- Representative Frank Pallone, Jr. (D-NJ): The Chinese Communist Party "has the ability, with TikTok, to . . . promote pro-Communist propaganda". *Hearing Before the H. Comm. On Energy and Commerce*, 118th Cong. 10;
- Representative Robert E. Latta (R-OH): "Based on the established relationship between your company and the Chinese Communist Party, it is impossible for me to conclude that the video is anything different

than the type of propaganda the CCP requires Chinese companies to push on its citizens." *TikTok: How Congress Can Safeguard American Data Privacy and Protect Children from Online Harms: Hearing Before the H. Comm. on Energy and Commerce*, 118th Cong. 33 (Mar. 23, 2023);

- Representative Marc A. Veasey (D-TX): "I also worry that TikTok is the world's most powerful and extensive propaganda machine, allowing the Chinese Communist Party to use TikTok's platform to influence public opinion". *Id.* at 69;
- Representative Randall K. Weber (R-TX): "And let's be honest, TikTok is indoctrinating our children with divisive, woke, and pro-CCP propaganda". *Id.* at 97; and
- Representative Morgan Griffith (R-VA): "[L]ogic would tell us that there are a fair number of your employees who are members of the Chinese Communist Party". *Id.* at 115.

C. Strict Scrutiny Applies.

Because the Act is both facially and purposively content-based, strict scrutiny applies—and it applies even if the Act were viewpoint neutral (which it is not). *See Boos v. Barry*, 485 U.S. 312, 321 (1988). Three justifications offered below for applying something less than strict scrutiny are unpersuasive.

First, the Act does more than merely regulate "foreign organizations operating abroad" that lack protection under the First Amendment. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 436 (2020) (*Alliance II*). The Act prohibits any "entity"—

domestic or foreign—from distributing, updating, or hosting a foreign adversary-controlled application or website in the United States. Act § 2(a)(1). And, as explained above, the Act could apply to Chinese residents living temporarily in the United States. Those facts make this case more like *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205, 208 (2013) (*Alliance I*). The Court distinguished the two fact-patterns in 2020, explaining that the "prior decision recognized the First Amendment rights of American organizations and held that American organizations do not have to comply with" a funding requirement to oppose prostitution or sex trafficking, *All. II*, 591 U.S. at 439—a requirement, in effect, to "pledge allegiance" to that policy, *All. I*, 570 U.S. at 220. The court below correctly found that the Act here does "not directly proscribe conduct by an entity that owns a foreign adversary-controlled application" but rather "bar[s] others from providing critical support in the United States for such an application" by hosting or distributing it. Pet. App. 18a. That is just the same domestic application that involved the First Amendment in *Alliance I*.

Although Chief Judge Srinivasan's concurrence below highlighted the history of regulation of the airwaves to prevent foreign control, Pet. App. 68a-71a, this Act is materially different because it proscribes domestic speech associated with *particular foreign countries and by particular people domiciled there*, rather than control by foreign actors generally. None of the statutes, past or present, offered by the concurrence singles out specific nations in defining foreign control. *See* Pub. L. No. 62-264, § 2, 37 Stat. 302, 303 (repealed 1927) (Radio Act of 1912 providing that every radio license "shall be issued only to citizens

. . . or to a company incorporated" domestically); Pub. L. No. 69-632, § 12, 44 Stat. 1162, 1167 (repealed 1934) (prohibiting grant of station licenses to "any alien", "any foreign government," and any company "organized under the laws of any foreign government" or that has "an alien" as a director or officer or more than 20 percent owner); 47 U.S.C. § 310(a)-(b) (similar); 47 U.S.C. § 151 (no mention of particular countries for FCC's consideration of "national defense").

Second, the Act's focus on particular nationalities does not transform it into a content-neutral "time, place, or manner regulation," as the majority and concurrence below suggested. *Contra* Pet. App. 25a, 81a. Just the opposite. "Precisely because of their location" of origin, covered apps and websites "provide information about the identity of the 'speaker.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994). The concurrence admits that the Act "amounts to a speaker-based regulation," but claims there is no "content preference underpinning it". Pet. App. 82a. But "the fact that a distinction is speaker based does not, as the [concurrence] seemed to believe, automatically render the distinction content neutral." *Reed*, 576 U.S. at 170. As the above statements from members of Congress illustrate, the content of purported Chinese "communist propaganda" was a significant driving force behind the Act's passage.

The Court rejected a similar "location-based" justification in *Carey v. Brown*, 447 U.S. 455 (1980). There, an Illinois statute barred picketing in front of residences but exempted "the peaceful picketing of a place of employment involved in a labor dispute." *Id.* at 457. To be sure, that statute by its terms purported to reg-

ulate by "place," but it could not "be seriously disputed" that the labor exemption gave "preferential treatment to the expression of views on one particular subject". *Id.* at 460-61. The same is true here. The Act regulates speech by those in the United States based on an app's association with persons from a subset of nations, which necessarily gives preferential treatment to expression—the hosting and distribution of covered apps and websites—associated with all other countries.

Third, the option of divestiture does not save the Act, as the court below implied. *See* Pet. App. at 30a ("[C]ontent on the platform could in principle remain unchanged after divestiture".). Rather, the divestiture requirement, read together with Congress's concern about Chinese "communist propaganda," is more evidence that Congress is discriminating based on viewpoint. Congress implicitly assumed that a change in the national domicile of the owner would change the content on TikTok, and on that basis, refuses to allow U.S.-based web and app distributers to host TikTok without its divestment. That viewpoint-biased *purpose* is what triggers strict scrutiny, not whether "in principle" that purpose will succeed. After all, even a facially neutral law adopted "for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination." *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 736 (2010) (Alito, J., dissenting).

II. The Court's Application of Strict Scrutiny Should Be Rigorous.

No interest is so pressing that it justifies diluting constitutional muster. This is particularly salient

where, as here, strict scrutiny applies. A straightforward application of First Amendment precedent "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest". *Reed*, 576 U.S. at 171 (cleaned up). The Court should hold the government to that standard. Here, the government contends that it seeks to address a potential threat to national security. But even if the government successfully demonstrates its compelling interest in national security, it must *also* show that the Act is narrowly tailored to achieving that interest.

If this Court defers to asserted national security interests as the court below did in its application of strict scrutiny, it would leave prone the very same rights it is bound to protect. The Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role" and "do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (cleaned up).

The judiciary has failed to uphold the guarantees of the Constitution against claims of national security and emergency before, leading "to this Court's greatest regrets." *Dr. A. v. Hochul*, 142 S. Ct. 552, 559 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief). Some of the most prominent instances bore directly, and devastatingly, on Asian Americans. *See, e.g.*, *Korematsu*, 323 U.S. 214. These hard-learned lessons should inform the Court's approach today as America again faces a tide of rising anti-Asian sentiment, accompanied by laws restricting the rights of Asian nationals.

A. The Court Should Not Unduly Defer to "National Security" Claims.

1. The assertion of a government interest in national security does not dispense with the need for vigorous application of strict scrutiny. *Cf. Downes v. Bidwell*, 182 U.S. 244, 384 (1901) (Harlan, J., dissenting) ("The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued."). Accepting government justifications at face value creates a dangerous precedent that "then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

This Court's precedents today make clear that the Court "do[es] not defer to the Government's reading of the First Amendment, even when [national security] interests are at stake." *Humanitarian Law Project*, 561 U.S. at 34. This Court and lower courts have repeatedly evaluated putative national security claims and found them wanting before, even in more sensitive defense contexts.

For example, as the Vietnam War raged, the Court held unconstitutional a law prohibiting any member of a "Communist-action organization" that is under order to register with the government from "employment in any defense facility." *United States v. Robel*, 389 U.S. 258, 260 (1967). The Court specifically rejected the notion that the law should be saved simply because the judiciary "has given broad deference to the exercise of [the war] power by the national legislature," for "even the war power does not remove constitutional limitations safeguarding essential liberties." *Id.* at 263-64

(cleaned up). It has since reaffirmed this view. *See, e.g.*, *Hamdi v. Rumsfeld,* 542 U.S. 507, 532 (2004) ("It is during our most challenging and uncertain moments that . . . we must preserve our commitment at home to the principles for which we fight abroad.").

The same was true during other emergencies, including the recent COVID-19 pandemic. *See, e.g.*, *Roman Cath. Diocese v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten."); *id.* at 21 (Gorsuch, J., concurring) ("Government is not free to disregard the First Amendment in times of crisis."); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting from denial of application for injunctive relief) ("We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility."). The constitutional standard should be no lower when assessing putative national security interests in post-pandemic peacetime.

2. Lower courts also often closely interrogate proffered national security interests rather than defer to them wholesale. *See, e.g.*, *Kiiskila v. Nichols*, 433 F.2d 745, 750 (7th Cir. 1970) ("[P]laintiff's rights may not be threatened or curtailed by the defendants' own unsupported assessment of the requirements of national defense."). Departing from this norm would both erode civil liberties and create confusion in the lower courts.

For example, lower courts, applying the Court's instruction that national security does not require abdication of the judicial role, have scrutinized the factual bases for the government's proffered justifications, affirming that "[d]eference to the executive's national security and military judgments is appropriate only

where [courts] have sufficient information to evaluate whether those judgments were logical and plausible." *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 901 F.3d 125, 134 (2d. Cir. 2018).

As the Ninth Circuit has recognized, where national security justifications implicate First Amendment rights in particular, strict scrutiny requires courts to undertake a "careful review" to satisfy themselves that "the government made a sufficiently particularized inquiry that substantiates the need for" the limitation on speech "in the specific context of [the plaintiff's] operations." *Twitter, Inc. v. Garland,* 61 F.4th 686, 699 (9th Cir. 2023), *cert. denied sub nom. X Corp. v. Garland*, 144 S. Ct. 556 (Jan. 8, 2024). In *Twitter*, the district court had before it "three rounds of classified and unclassified declarations" from the government with "granular details regarding the threat landscape and national security concerns that" justified the claimed danger there. *Id.* at 699-700.

The D.C. Circuit has ruled similarly. In *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972) (per curiam), the court reversed denial of injunctive relief against a rule mandating chapel attendance at federal military academies. Chief Judge Bazelon's concurrence explained that "[w]hile some weight must be accorded . . . [to] military judgment . . . it is for this court to assess that decision in constitutional terms." *Id.* at 296. He found that the rule involved nothing "vital to our immediate national security, or even to military operational or disciplinary procedures." *Id.* Other examples abound. *See, e.g.*, *Taylor v. McDonough*, 71 F.4th 909, 940 (Fed. Cir. 2023) (rejecting the government's "generalizations about military secrecy" as insufficient

to bar plaintiff from pursuing a compensation claim where less restrictive alternatives were available).

To be sure, the Court has sometimes afforded greater deference to the government's national security concerns in exceptional circumstances—namely, when faced with an ongoing war or in the context of the specific conduct of foreign affairs or military decision-making. No such circumstance exists here in considering the Act's application to peacetime speech within the United States. *See Ziglar v. Abbasi*, 582 U.S. 120, 143 (2017) ("This danger of abuse is even more heightened given the difficulty of defining the security interest in domestic cases." (cleaned up)).

3. Even if the Court affirms, the process by which it arrives at its conclusion influences both the public and the government itself.[9] In particular, vigorous judicial review of government action creates the proper incentives for state actors to comply with the Constitution, providing essential counterbalances to various "perverse incentives."[10] For example, government officials, including law enforcement such as FBI agents,

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[9] *See generally* Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 Fordham L. Rev. 827 (Nov. 2013).

[10] *Commentary by Carol Lam for the Committee of the 100*, https://www.committee100.org/wp-content/uploads/2021/09/FINAL-CLam-C100-Commentary-1.pdf (Sept. 2021); *see also* Michael German, *The 'China Initiative' Failed US Research and National Security. Don't Bring it Back*, The Hill (Sept. 19, 2024), https://thehill.com/opinion/national-security/4886821-china-initiative-restart-harmful/ (describing how structure of recent "China Iniative" incentivized investigators to search for crimes with which to charge those of Chinese descent, including U.S. citizens).

may be encouraged by promotions and rewards to dig up more negative information on communities presumed to be national security threats, even if those assumptions lack merit.[11]

Careful judicial scrutiny provides an important counterweight to these incentives, influencing the government to either create new national security policies, make amendments to existing ones, or publicize more information about how it reaches decisions, increasing public confidence and potentially leading to better security policy overall. *See* Deeks, *supra* n.9, at 841. For instance, the government disclosed details about its detainee transfer process at Guantanamo in litigation after its previous "lack of transparency hurt the government's ability to defend its policies in court." *Id.*

While the vigorous application of strict scrutiny in the face of claims of national security is always appropriate in cases involving fundamental rights, it is essential here, where the challenged government action echoes racial animus. Though *amici* express no view on the legitimacy of the asserted national security interests in this case, *amici* urge the Court to consider the Congressional record and the growing anti-Asian animus reflected in various state legislation. *See supra* Section I.B.

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[11] *See* Lam, *supra n.*10; *see also* Sana Sekkarie, *The FBI Has a Racism Problem and It Hurts Our National Security*, Geo. Sec. Stud. Rev. (Aug. 19, 2020), *available at* https://georgetownsecuritystudiesreview.org/2020/08/19/the-fbi-has-a-racism-problem-and-it-hurts-our-national-security/ ("Information that exonerates people from suspicion is not similarly rewarded. Suspicious activity is created that otherwise would not have existed.").

Respondents' proffered national security interests demand close interrogation—not because they are rare, but because they are common. *Cf. Robel*, 389 U.S. at 263 ("[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.").

B. Failure to Adequately Interrogate National Security Justifications Has Devasting Consequences.

Historically, excessive judicial deference to putative national security concerns has resulted in the egregious violations of the rights of Asian Americans and others and chilled Asian Americans' meaningful participation in civic life. Perhaps the most infamous example of this Court's deference to national security was its approval of the incarceration of roughly 110,000 Japanese Americans living on the west coast of the United States during World War II. *See Korematsu*, 323 U.S. 214; *Hirabayashi v. United States*, 320 U.S. 81, 63 (1943). These decisions robbed individuals of liberty and sundered families and communities. History has not judged those opinions kindly. *See, e.g.*, *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (recognizing that *Korematsu* "has been overruled in the court of history"). When a federal court vacated Fred Korematsu's conviction underlying the 1944 *Korematsu* case 40 years later, it said the prior opinion "remains on the pages of our legal and political history," serving "as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." *Korematsu v. United*

States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). That lesson, so hard learned, must not be forgotten now.

Japanese Americans detained in incarceration camps suffered "very substantial economic losses" that lasted for years, if not the rest of their lives.[12] Some of those losses were immediate, as they were forced to sell "their income-producing assets under distress-sale circumstances on very short notice", "accept low prices or abandon property or . . . place the property in insecure storage", leave their homes "without the personal attention that owners would devote to them," or close up their businesses.[13]

Other losses accrued over the years spent imprisoned. Individuals who did not, or could not, sell their property returned to find most of what they left behind "ransacked, stolen, or sold."[14] Meanwhile, those de-

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[12] Comm'n on Wartime Relocation & Internment of Civilians, *Personal Justice Denied* 117-118 (1982), *available at* https://www.archives.gov/files/research/japanese-americans/justice-denied/chapter-4.pdf; *see also* Aimee Chin, *Long-Run Labor Market Effects of Japanese American Internment During World War II on Working-Age Male Internees*, 23 J. of Labor Econ. 491, 512-515 (2005), *available at* https://www.journals.uchicago.edu/doi/abs/10.1086/430285?journalCode=jole.

[13] *Personal Justice Denied*, *supra* n.12 at 117, 127-128.

[14] Nolan Cool, *Leaving Home Behind: The Fates of Japanese American Houses During Incarceration*, Nat'l Museum of Am. History Behring Cntr. Blog (Aug. 3, 2017), https://americanhistory.si.edu/explore/stories/leaving-home-behind-fates-japanese-american-houses-during-incarceration (noting that an estimated "80% of goods and property stored with private, non-government entities" faced such losses).

prived of their freedom had an earning capacity "reduced to almost nothing", and, without a source of income, soon fell behind on "tax, mortgage, and insurance payments."[15] As a result, even when finally released, they had to start life "anew on meager resources."[16] The time spent incarcerated had lifelong effects on earning capacity too, reducing "the annual earnings of males by as much as 9%-13% 25 years afterward."[17] The experience of incarceration had lasting effects in other ways, including stripping Japanese Americans of their sense of security and expectation of equal treatment, and chilling their speech, for generations.[18]

Unfortunately, the end of Japanese incarceration was not the end of discrimination against Asian Americans in the United States. Asian Americans faced a more recent wave of prejudice following the COVID-19 pandemic. And since then, Asian Americans are increasingly self-censoring. Of all racial groups polled in one 2021 survey, Asian American respondents viewed themselves as being the second-most-marginalized in exercising their speech, especially on politics and race,

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[15] *Personal Justice Denied*, *supra* n.12, at 117.

[16] *Id*.

[17] Chin, *supra* n.12, at 491.

[18] Erika Lee, *The Making of Asian America: A History* 247 (2015) (noting that after incarceration, Japanese Americans "tried to follow the instructions they had been given to 'assimilate,' 'blend in,' and not 'make waves'").

after Black Americans.[19] On a scale from 1-7, with 1 being "very hard" and 7 being "very easy," Asian Americans' average response on how easy it is for them to use their free speech rights without consequence was a mere 3.8, demonstrating dishearteningly low confidence in their First Amendment rights.[20] This fear of participation in the public sphere chills public discourse and erodes the critical role of civil society by suppressing the voices of already-marginalized communities. There's little security in that.

Today, it is more than clear that purported national security justifications, if not adequately scrutinized, have devastating consequences for all Americans, and for the Asian American community in particular. When courts "acquiesce" to these discriminatory policies by adopting weakened standards of review, they both effectively endorse the government's discriminatory targeting of Asian communities and distort constitutional doctrine. As Justice Jackson warned in dissent in *Korematsu*: "A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image." 323 U.S. at 246. The Court can send a clear message here

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[19] Knight Foundation and Ipsos, *Free Expression in America Post-2020: A Landmark Survey of Americans' Views on Speech Rights* 6-7 (Jan. 6, 2022), *available at* https://knightfoundation.org/reports/free-expression-in-america-post-2020/

[20] *Id.* at 7.

that invoking the idea of national security does not and will not exempt discrimination from scrutiny.

CONCLUSION

The Court should address viewpoint discrimination and scrutinize purported national security justifications.

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