Nos. 24-656, 24-657

In the Supreme Court of the United States

TIKTOK INC. & BYTEDANCE LTD.,

Petitioners,

BRIAN FIREBAUGH, *et al.*,

Petitioners,

v.

MERRICK B. GARLAND,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Writs of Certiorari to the U.S. Court of Appeals for the D.C. Circuit

BRIEF OF *AMICUS CURIAE* THE FORUM FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*[1]

The Forum for Constitutional Rights (FCR) is a general non-partisan public-benefit corporation that is organized and operated under Minnesota law. FCR offers public education about constitutional history and rights, including (but not limited to) the First Amendment. FCR files amicus briefs in cases that involve key constitutional protections. *See, e.g.,* Brief of *Amici Curiae* Restore the Fourth, Inc. & Forum for Constitutional Rights in Support of Respondent, *FBI v. Fikre*, 601 U.S. 234 (2024) (No. 22-1178); Brief of *Amici Curiae* Forum for Constitutional Rights, *et al.,* in Support of Petitioner, *Ark. Times v. Waldrip*, No. 22-379 (U.S. amicus brief filed Nov. 23, 2022).

FCR is interested in this case because of its potential broad impact on both judicial independence and constitutional cohesion, depending on how the Court parses the Protecting Americans from Foreign Adversary Controlled Applications Act. The Act's judicial-review provision and other related provisions enable the Act's constitutional validity to be decided in the abstract—at a time when the Act expressly bars enforcement of its terms, making the Act's free-speech harms easier to miss. The President-elect has also said he will not enforce the Act, leaving in doubt the need for judicial review. Deciding this case would then entail giving an advisory opinion—something Congress cannot enable federal courts to do.

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[1] This amicus brief is filed in accordance with S. Ct. R. 37.3. No counsel for a party authored this amicus brief in whole or in part; nor has any person or any entity, other than the named *amicus curiae* and their counsel, contributed money intended to fund the preparation or submission of this amicus brief.

SUMMARY OF THE ARGUMENT

The Protecting Americans from Foreign Adversary Controlled Applications Act (or TikTok ban) raises key constitutional questions beyond the First Amendment issues already briefed in this case. The Act's judicial-review provision and other related provisions violate Article III in serious ways.

First, the Act grants the D.C. Circuit "exclusive jurisdiction" over "any challenge" to the Act itself. Unlike numerous similar statutes across the U.S. Code, the Act contains no text preserving Supreme Court review. The Act thereby gives the D.C. Circuit 'supreme' authority over the Act, violating Article III's creation of just "one" Supreme Court.

Second, through a reapplication procedure, the Act permits the Executive Branch to nullify judicial decisions invalidating applications of the Act. This mechanism contravenes Article III, which does not permit executive revision of judicial decisions.

Third, the Act authorizes courts to review the Act in the abstract, divorced from the concreteness and adversity that Article III's case-or-controversy rule demands. This scheme defies the oldest thread of American jurisprudence: no advisory opinions.

Because no severability provision applies to the Act's defective jurisdictional terms, the entire ban should fall with these terms. This reality then merits thoughtful consideration at oral argument, which the Court may secure either by prompting the parties or by appointing an amicus to address jurisdiction.

ARGUMENT

Over 1 billion people across the world, including 170 million Americans,[2] use TikTok: a smartphone application that allows individuals to create, share, and watch short videos between 15 seconds and 10 minutes in length.[3] TikTok's video recommendations for each user (generated by a proprietary algorithm) have transformed the way that Americans consume news, books, film, music, and even politics.[4] TikTok represents "the modern Internet"—a "protean," still-new revolution with "vast potential to alter how we think, express ourselves, and define who we want to be." *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017); *see Reno v. ACLU*, 521 U.S. 844 (1997).

Enter the TikTok ban: Congress's response to the fact that a company based in China owns TikTok. "[B]anning a popular communications tool, foreign or otherwise, is virtually without precedent in the United States."[5] Yet, on April 24, 2024, Congress enacted what it called the Protecting Americans from Foreign Advisory Controlled Applications Act. *See*

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[2] Decl. of Adam Presser (TikTok Head of Operations) at ¶11, *TikTok Inc. v. Garland*, No. 24-1113 (D.C. Cir. dated June 17, 2024), in App'x to Pet'rs Br. 804–05, *TikTok Inc. v. Garland*, No. 24-1113 (D.C. Cir. filed June 20, 2024).

[3] *See* Taylor Lorenz, *TikTok, a Pioneer in Short, Vertical Videos, Now Wants Horizontal Ones*, WASH. POST, Jan. 31, 2024, https://tinyurl.com/a8n2tfrr.

[4] *See* Ashwin Sehsagiri, *How TikTok Changed America*, N.Y. TIMES, Apr. 19, 2024, https://tinyurl.com/4765esvu; *see also* Drew Harwell, *How TikTok Ate the Internet*, WASH. POST, Oct. 14, 2022, https://tinyurl.com/4tk93mjk.

[5] Brendan Bordelon, *Biden and Congress Want to Ban TikTok,* POLITICO. Apr. 16, 2023, https://tinyurl.com/52jtjrvf.

Pub. L. No. 118–50, div. H, 138 Stat. 955. Effective January 19, 2025, the Act bans the distribution, maintenance, or updating of any "foreign adversary controlled application." *See id.* §2(a)(1), (a)(2).

The Act defines "foreign adversary controlled application" to mean "TikTok." *Id.* §2(g)(3)(A)(ii). The term also covers other technologies (e.g., websites) if the technology has over 1,000,000 monthly active users and allows users to generate, share, and view text, images, videos, or like content. *Id.* §2(g)(3)(B). The Act bans these technologies to the extent their owners are based in any "foreign adversary country" and the President finds such ownership is a national security threat. *Id.* The Act provides just one way that the owners of these technologies (and TikTok's owner) may end the ban: a "qualified divestiture," meaning a sale or transfer of the technology that, as determined by the President, terminates the ability of the relevant foreign adversary country to exercise control over the technology. *Id.* §2(c)(1), (g)(6).

In passing the TikTok ban, Congress made no secret of the fact that Congress was on a mission to "suppress disfavored expression." *NRA v. Vullo*, 620 U.S. 175, 188 (2024). The House Committee Report accompanying the ban stressed the need to prevent foreign adversary nations from using technology like TikTok to "push misinformation, disinformation, and propaganda on the American public." H.R. REP. NO. 118–417, at 2 (2024). On the Senate floor, Senator Pete Ricketts praised the ban as a countermeasure to "the Chinese Communist Party using their control of TikTok to skew public opinion on foreign events." 170 CONG. REC. S2970 (daily ed. Apr. 23, 2024).

The Supreme Court has agreed to review the TikTok ban in terms of whether the ban violates the First Amendment's protection of free speech. It does. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). In banning TikTok so long as a company in China owns TikTok, Congress presumes to guard the public mind from any propaganda that the government of China might compel TikTok's owner to push through TikTok. The authors of the First Amendment knew better. They did "not trust any government to separate the true from the false for us," realizing instead "every person must be his own watchman for truth." *Id.*

The TikTok ban poses an even greater problem, however, beyond the ban's derogation of free speech —a threat that seems to have been overlooked by the parties and the D.C. Circuit in the relatively quick pace of this litigation. This threat stems from the ban's judicial-review provision and various other elements of the ban that govern the ban's operation. Through these provisions, the ban violates Article III of the Constitution, which both creates the Judicial Branch and "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Murthy v. Missouri*, 603 U.S. 43, 57 (2024). "If a dispute is not a proper case or controversy, the courts have no business deciding it . . . ." *Id.* (cleaned up). This rule is one of the Constitution's bedrock "government-structuring provisions," which are "no less critical to preserving liberty than are . . . [the] provisions of the Bill of Rights." *NLRB v. Noel Canning*, 537 U.S. 513, 570 (2014) (Scalia, J., concurring in the judgment).

At this point, it is worth considering the strange way that the question of the TikTok ban's validity reaches this Court. Pre-enforcement constitutional challenges to statutes usually reach this Court after having traveled one of two distinct paths:

Path #1: A party files suit in district court under 28 U.S.C. §1331 against the agency charged by law with enforcing the challenged statute.[6] The case-or-controversy rule then requires the party to establish (among other things) that the challenged statute is enforceable and that the party faces a credible threat of enforcement from the sued agency. *See California v. Texas*, 593 U.S. 659, 669–74 (2021). Otherwise, there is no one and nothing for the court to enjoin—any decision of the challenge amounts to an advisory opinion. *Id.* The district court's fact-finding powers may prove critical in resolving this concern. *Cf. Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 72 (1978) ("The District Judge held four days of hearings on . . . standing and ripeness . . . .").

If the case-or-controversy rule poses no bar, the district court decides the constitutional challenge, the court of appeals decides any appeal, and this Court decides whether to grant review. This is how pre-enforcement challenges to the Affordable Care Act (ACA) reached this Court. *See NFIB v. Sebelius*, 567 U.S. 519, 540 (2012); *see also Florida v. HHS,* 716 F. Supp. 2d 1120, 1149 (N.D. Fla. 2010) ("There is no reason whatsoever to doubt that the federal government will enforce the [ACA] . . . .").

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[6] This path assumes that the challenged statute lacks any special judicial-review provision of its own and no other special review scheme (like the Hobbs Act) governs the statute.

Path #2: A party seeks judicial review of some "final agency action" implementing the challenged statute (e.g., a regulation or order) before any actual enforcement of the statute. Congress may require the party to obtain such review by filing a petition for review of agency action in the court of appeals. *E.g.*, 28 U.S.C. §§2342, 2344. Otherwise, the party may sue the relevant agency in district court under the Administrative Procedure Act (APA), 5 U.S.C. §§701 *et seq.* The case-or-controversy rule then poses no bar to the court deciding the validity of the challenged statute—as part of reviewing the final agency action at issue—presuming the "administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 138–39, 148 (1967).

In an APA case, the district court decides the constitutional challenge, the court of appeals decides any appeal, and this Court decides whether to grant review. *See* 28 U.S.C. §§1254, 1291, 1331. Resolution of "petitions for direct review of agency action" entail the court of appeals deciding any challenge raised by the petition followed by this Court deciding whether to grant review. *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 717 (D.C. Cir. 2016). In either circumstance, the "focal point for judicial review" is "the administrative record already in existence." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). This remains so even when the record for the final agency action at issue lacks information that the court needs to decide a constitutional challenge or to enforce the case-or-controversy rule. The court's "proper course" is to "remand [the case] to the agency for additional investigation or explanation." *Id.*

The pre-enforcement challenges to the TikTok ban now before the Court did not travel either of the above-stated paths. Rather, these challenges reach the Court following the D.C. Circuit's consideration of "petitions for review of [the] constitutionality of the Protecting Americans from Foreign Adversary Controlled Applications Act." *TikTok Inc. v. Garland*, No. 24-1113, 2024 U.S. App. 30916, at *1 (D.C. Cir. Dec. 6, 2024). This language tracks the ban's judicial-review provision, which authorizes the filing of "[a] petition for review challenging [the Act]" with the D.C. Circuit "not later than 165 days after the date" of the Act's passage. Pub. L. No. 118–50 at §3.

Congress has thus authorized direct review of a statute, hot-off-the-presses, making Congress the object of the litigation rather than any government action (actual or threatened). During oral argument before the D.C. Circuit, Judge Rao picked up on this. TikTok's counsel argued that the record before the court lacked facts necessary for the TikTok ban to survive strict scrutiny under the First Amendment. Judge Rao responded: "I think you're arguing for us to remand without vacatur to Congress for more findings. . . . Many of your arguments want us to treat [Congress] like they're an agency. It's a very strange framework . . . ." Oral Arg. at 38:48 to 39:14, *TikTok*, No. 24-1113 (D.C. Cir. Sept. 16, 2024).

And yet, that strange framework is what the TikTok ban's judicial-review provision enacts. It then "becomes necessary to inquire whether a jurisdiction so conferred can be exercised." *Marbury v. Madison*, 5 U.S. 137, 175 (1803). The following analysis shows it cannot, and this reality may sink the ban.

I. This Court neither gives advisory opinions nor tolerates legislation eliciting advisory opinions (the *Muskrat* rule).

Born from Article III's case-or-controversy rule, "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968). Generally speaking, advisory opinions are "[judicial] expressions" that carry no binding effect or that address issues lacking the "clear concreteness provided when a question emerges precisely framed and necessary for decision [in a case]." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *see also, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (distinguishing between court resolution of a "definite and concrete" dispute "through a decree of a conclusive character" versus what a court does when it issues "an opinion advising what the law would be upon a hypothetical state of facts").

For example, in July 1793, Thomas Jefferson presented the Supreme Court with 29 questions that President George Washington wanted the Court to answer in relation to "[t]he war which has taken place among the powers of Europe" and "transactions within [American] ports."[7] These questions included such inquiries as whether France could as of right "erect courts within the jurisdiction of the U.S. for the trial & condemnation of prizes made by armed vessels in her service?"[8] Jefferson stressed the legal

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[7] Letter from Thomas Jefferson to the Justices of the U.S. Supreme Court (July 18, 1793), https://tinyurl.com/4f8syyyt.

[8] Enclosure to Jefferson Letter: Questions for Supreme Court (July 18, 1793), https://tinyurl.com/348ttsy8.

nature of the questions: the questions "depend[ed] for their solution on the construction of [American] treaties, on the laws of nature and nations, and on the laws of the land."[9] Jefferson also stressed the national security importance of the questions: the Court's "advice" would "secure" the nation "against errors dangerous to the peace of the U.S."[10]

The Court turned down President Washington's request.[11] The Court explained that "[t]he lines of separation drawn by the Constitution" afforded a "strong argument[]" against "extrajudicially deciding the questions alluded to," as did the Court's status as "a court in the last resort."[12] And that remains the Court's position to this day: "[f]ederal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast*, 392 U.S. at 97. This "rule against advisory opinions" ensures that federal courts stick "to the role assigned them by Article III." *Id.* at 96.

Dozens of the Court's decisions speak to the rule against advisory opinions. Two branches of this case law matter here. The first branch guards against any provision that would allow the Executive Branch to reduce federal court decisions to advisory opinions. The second branch guards against any provision that would allow parties to elicit advisory opinions.

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9 Letter from Thomas Jefferson, *supra* note 8.

10 *Id.*

11 Letter from Supreme Court Justices to President George Washington, (Aug. 8, 1793), https://tinyurl.com/3d82s369.

12 *Id.* (some capitalization omitted).

No Executive Disregard—"Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). The Court faced this issue for the first time in *Hayburn's Case*, 2 U.S. 409 (1792). At issue was a statute empowering circuit courts to award disability benefits to veterans subject to later disallowance by the Secretary of War if he suspected a mistake. *See United States v. Ferreira*, 54 U.S. 40, 49 (1852). Chief Justice Jay issued an opinion declaring the statute "radically inconsistent with the independence of that judicial power which is vested in the courts." *Hayburn's Case*, 2 U.S. at 410 n.†. The statute violated Article III by rendering court "judgments" subject to "revision and control" by "an officer in the executive department." *Id.*

Congress ran into this problem again in 1863 when it created the Court of Claims to administer money claims against the federal government. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 552–53 (1962) (plurality op.). Congress authorized the new court to issue "final judgment[s]" appealable to the Supreme Court. Act of March 3, 1863, ch. 92, §5, 12 Stat. 765, 766. But Congress also provided that government payment of any Court of Claims judgment required "an appropriation" by the Secretary of the Treasury." *Id.* at §14. This Court subsequently refused to review Court of Claims judgments on appeal, deeming the appropriation proviso to grant Treasury a "revisory authority" over judgments at odds with the "exercise of judicial power." *Glidden*, 370 U.S. at 554.

Congress repealed the proviso. See Act of March 17, 1866, ch. 19, §1, 14 Stat. 9. But Treasury failed to

listen, proceeding on its own accord to offset a Court of Claims judgment against a tax debt owed by the judgment-holder. *United States v. O'Grady*, 89 U.S. 641 (1875). This Court ruled the offset unlawful. *Id.* at 648. The Court explained that when "no appeal is taken," an Article III court's judgment is "absolutely conclusive of the rights of the parties" and is not subject to "re-examination and revision" by any other government department. *See id.* at 648–49.

This prohibition applies with full force even when Congress has granted jurisdiction to an Article III court to "aid an administrative or executive body in the performance of duties legally imposed upon it by Congress." *ICC v. Brimson*, 154 U.S. 447, 487 (1894). The Court has noted that for Article III courts to "review an administrative decision" with "only the force of a recommendation" would be "to render an advisory opinion in its most obnoxious form." *Chi. & S. Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113–14 (1948). Article III permits only "conclusive" judgments immune from "later review or alteration by administrative action." *Id.*

No Granting Legislation Review—Congress can neither authorize nor effectively allow parties "to secure an abstract determination by the Court of the validity of a statute." *Nashville, Chattanooga, & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 262 (1933). Federal courts have "no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). Any such power would allow courts to become "roving commissions . . . on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S.

601, 610 (1973). Article III thus affords federal courts "no jurisdiction to pronounce any [federal] statute . . . irreconcilable with the Constitution, **except** as [the court] is called upon to adjudge the legal rights of litigants in **actual** controversies." *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs*, 113 U.S. 33, 39 (1885) (bold added). By extension, Congress cannot grant to courts any jurisdiction contrary to this rule.

In *Muskrat v. United States,* 219 U.S. 346 (1911) the Court rejected an effort by Congress to evade this prohibition. Congress enacted laws in 1904 and 1906 adjusting and impairing land rights that Congress had previously granted to Cherokee citizens under a 1902 law. *Id.* at 348–49. Anticipating that the 1904 and 1906 laws might raise constitutional issues (as a matter of property rights), in 1907, Congress enacted a judicial-review provision. *Id.* at 350–51 (citing Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1028).

The provision said all of the following:

- It authorized the filing of suits "to determine the validity of any acts of Congress passed since the [1902] act" insofar as the later acts imposed additional land "restrictions" (e.g., limits on alienation) or served to reduce the size of individual land allotments. *Id.*

- It named as party plaintiffs four persons who obtained land under the 1902 law—David Muskrat, J. Henry Dick, William Brown, and Levi Gritts—allowing them to sue "on their own behalf" and "on behalf of all Cherokee citizens" with similar interests. *Id.*

- It named "as a party defendant" the "United States" and "charged" the Attorney General "with the defense of said suits." *Id.*

- It established the suits "shall be brought on or before" September 1, 1907. *Id.*

- It conferred "jurisdiction . . . upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits." *Id.*

- It allowed the named plaintiffs to recover their attorney's fees from the government if the final judgment "den[ied] the validity of any portion of the said acts authorized to be brought into question." *Id.*

In accordance with these terms, Muskrat and the other named plaintiffs filed a timely "petition" in the Court of Claims to have the 1904 and 1906 laws declared "unconstitutional" as a violation of the Due Process Clause's protection of private property. *See Muskrat v. United States*, 44 Ct. Cl. 137, 137 (1908) (arguments of counsel). "[B]oth parties . . . asked the court to make findings of fact," which the court did while observing "the findings are mainly deductions from statutes and treaties." *Id.* at 150.

In the end, the Court of Claims sustained the validity of the 1904 and 1906 laws, dismissed the petition, and entered judgment in favor of the United States. *See id.* at 148. The court explained that while "the right of private property is a sacred right, it has

its limitations." *Id.* at 162. One of these limitations was Congress's "plenary power to guard, protect, and administer upon the tribal property of the Cherokee Nation." *Id.* at 148. That power made the parties' dispute one "for the legislative branch and not for the courts to determine." *Id.* Muskrat and his fellow plaintiffs appealed to the Supreme Court.

The Supreme Court "reversed" and "remanded to the Court of Claims, with directions to dismiss . . . for want of jurisdiction." *Muskrat,* 219 U.S. at 363. The Court explained: "[t]hese cases arise under an act of Congress undertaking to confer jurisdiction upon the Court of Claims, and upon this court on appeal, to determine the validity of certain acts of Congress." The "first question" the Court then had to resolve was the Court's "jurisdiction . . . to entertain the proceeding." *Id.* at 351. That question, in turn, "depend[ed] on whether the jurisdiction conferred" by the 1907 judicial-review provision was "within the power of Congress [to grant], having in view [Article III's] limitations of the judicial power." *Id.*

The Court said 'no': the 1907 judicial-review provision violated Article III because the provision authorized judicial review of bare legislation. *See id.* at 360–63. It made no difference that Congress cast this 'legislation review' in the form of a case—e.g., directing the Attorney General to defend the 1904 and 1906 laws. *Id.* The judicial-review provision's "whole purpose" was to "determine the constitutional validity" of the 1904 and 1906 laws in a contrived "proceeding against the Government" in which "the only judgment required" was "to settle the doubtful character of the legislation in question." *Id.*

This led the Court to conclude: "Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority . . . [by] requir[ing] of this court action not judicial in its nature within the meaning of the Constitution." *Id.* at 362. The Court stressed that judicial power to declare a law unconstitutional did not exist so that courts may sit "as a body with revisory power" over statutes. *Id.* at 361. Such power existed only because "the rights of the litigants in justiciable controversies require the court to choose" between the Constitution and "a law purporting to be enacted within constitutional authority." *Id.* "It is legitimate only in the last resort and as a necessity in the [conclusive] determination of real, earnest and vital controversy between individuals." *Id.*

In sum: Congress cannot enact judicial-review provisions that expressly or effectively require courts "to give opinions in the nature of advice concerning legislative action." *Id.* at 362. "This limitation moors the federal courts to their constitutional mandates and keeps them from drifting into the executive or legislative functions of government." *In re Beck*, 526 F. Supp. 2d 1291, 1300 (S.D. Fla. 2007).

At the same time, applying this limitation is not easy. The Court's numerous decisions enforcing the rule against advisory opinions show that violations of the rule (like in *Muskrat*) often come "clad in sheep's clothing." *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting). In such cases, only "a careful and perceptive analysis" of how the relevant judicial-review provision affects "the equilibrium of power" will expose the violation. *Id.* But in the case of the TikTok ban, "this wolf comes as a wolf." *Id.*

II. The Protecting Americans from Foreign Adversary Controlled Applications Act—or TikTok ban—elicits an advisory opinion on terms even worse than the legislation that the Court condemned in *Muskrat*.

Section 3 of Protecting Americans from Foreign Adversary Controlled Applications Act sets forth the Act's judicial-review provision. For clarity's sake, §3's full text is reproduced below, but with all references to "division" replaced with the synonym "Act":

> **(a) RIGHT OF ACTION.**—A petition for review challenging this [Act] or any action, finding, or determination under this [Act] may be filed only in the United States Court of Appeals for the District of Columbia Circuit.
>
> **(b) EXCLUSIVE JURISDICTION.**—The United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over any challenge to this [Act] or any action, finding, or determination under this [Act].
>
> **(c) STATUTE OF LIMITATIONS.**—A challenge may only be brought—
>
> (1) in the case of a challenge to this division, not later than 165 days after the [Apr. 24, 2024] date of the enactment of this [Act];
>
> (2) in the case of a challenge to any action, finding, or determination under this [Act], not later than 90 days after the date of such action, finding, or determination.

Four other provisions of the Act also bear upon the proper interpretation of the Act's judicial-review provision (and its advisory-opinion problem):

Under §2(g)(3), the Act identifies **who** is subject to the Act's prohibitions. Subsection (g)(3)(A) states that the Act's prohibitions apply directly to "TikTok," to TikTok's parent company ("ByteDance, Ltd."), and to subsidiaries or future successors of either entity. Subsection (g)(3)(B) then provides that the applies to any "covered company" that is both "controlled by a foreign adversary" and determined by the President to be "a significant threat to the national security." Subsections (g)(3)(A) and (g)(3)(b) thereby enact two separate, independent ways that an entity may be (or may become) subject to the Act's prohibitions.

Under §2(a)(2), the Act prescribes exactly **when** the Act's prohibitions become enforceable against the TikTok entities described under (g)(3)(A) and against any later, President-designated "covered company" falling under (g)(3)(B). For the TikTok entities, the Act becomes enforceable on January 19, 2025—i.e., "270 days after the date of the enactment" of the Act. *Id.* §2(a)(2)(A). And for later President-designated covered companies, the Act becomes enforceable "270 days after the date" of the President's designation of the covered company as a national-security threat. *Id.* §2(a)(2)(B). The President may grant to a (g)(3)(A) or (g)(3)(B) entity "a 1-time extension" of the Act's enforceability, but the extension cannot be for more than 90 days. *Id.* §2(a)(3). The President must also make several certifications to Congress that together confirm the extension is part of a broader "path to [a violator] executing a qualified divestiture." *Id.*

Under §2(d), the Act prescribes **"enforcement"** of the Act's prohibitions. Subsection (d)(1)(A) dictates that violators shall pay a "civil penalty" not to exceed $5,000 multiplied by the number of people using the violator's application. Subsection (d)(2) then states that the U.S. Attorney General (AG) "shall conduct investigations related to potential violations." If the AG "determin[es] that a violation has occurred," the AG "shall pursue enforcement" of the civil penalty and "may bring an action in an appropriate [federal] district court . . . for appropriate relief." *Id.*

Finally, in §2(e), the Act addresses the subject of "[s]everability." This severability provision expressly limits its effect to invalidation of §2—i.e., it does not prescribe a rule of severability for §3's judicial-review provision. In this regard, subsection (e)(1) provides that if a court invalidates "any provision of **this section**" or invalidates "applications of **this section** to any person or circumstance," then "the invalidity shall not affect the other provisions or applications of **this section** that can be given effect." Subsection (e)(2) then provides that "[i]f the application of any provision of [§2] is held invalid with respect to" a "(g)(3)(A) [entity]," this "shall not affect or preclude the application of the same provision . . . by means of . . . (g)(3)(B)" to the same (g)(3)(A) entity.

With all of these provisions in mind, it becomes clear that the TikTok ban violates the rule against advisory opinions in two ways: (1) through §2(e)(2)'s severability text, which allows the Executive Branch to disregard invalidation of the ban; and (2) through §3(b)'s grant of legislation review. But first, there is a critical jurisdictional impediment to consider.

1. *Jurisdictional Impediment.* Section 3 of the Act states: "[t]he United States Court of Appeals for the District of Columbia Circuit shall have *exclusive* jurisdiction over *any challenge* to this [statute] . . . ." Section 3's "description of [D.C. Circuit] jurisdiction as 'exclusive' necessarily denies jurisdiction . . . to any other federal court" to hear formal questioning of the Act's legality. *Mississippi v. Louisiana*, 506 U.S. 73, 77–78 (1992). The "uncompromising language" of §3 would then appear to bar this Court's exercise of jurisdiction here, as this matter consists entirely of a formal questioning of the Act's legality. *Id.*

This result follows from "the plain meaning of 'exclusive.'" *Id.* It also follows from the plain meaning of "any"—a word that "naturally carries an expansive meaning." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 362 (2018) (cleaned up). "When used (as here) with a singular noun in affirmative contexts, the word 'any' ordinarily refers to a member of a particular group or class without distinction or limitation and in this way implies every member of the class or group." *Id.* at 363. In short: "'any' means 'every.'" *Id.* at 359–60. Finally, this result follows from the plain meaning of 'challenge': "a calling to account or into question"[13] or, as legal dictionaries put it, "an act or instance of formally questioning the legality of . . . [a] thing." BLACK'S LAW DICTIONARY 244 (8th ed. 2004).

Review of comparable statutes bolsters the view that §3 bars the Court from exercising jurisdiction. Surveying the U.S. Code, a familiar pattern appears:

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[13] *Challenge (noun),* MERRIAM-WEBSTER DICTIONARY, https://tinyurl.com/4jcyp5y6 (last accessed Dec. 26, 2024).

virtually every time that Congress grants "exclusive jurisdiction" to a court of appeals, Congress pairs this grant with additional language conferring appellate jurisdiction on this Court. The most obvious example is the Administrative Orders Review Act, also known as the Hobbs Act. *See* 28 U.S.C. §§2341–2351. Under §2342, the Hobbs Act establishes that "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" a host of final agency actions when performed by certain federal agencies."[14] Then, under §2350, the Hobbs Act provides that any injunctive order or final judgment "of the court of appeals in a [Hobbs Act] proceeding . . . are subject to review by the Supreme Court on a writ of certiorari."

Dozens of statutes authorizing exclusive circuit court review mirror this kind of pairing. Sometimes the pair appears in the same sentence or subsection. *See e.g.,* 7 U.S.C. §136n(b); 7 U.S.C. §194(h); 7 U.S.C. §228b–3(h); 12 U.S.C. §1467(j); 15 U.S.C. §77i(a); 15 U.S.C. §3416(a)(4); 26 U.S.C. §7482(a)(1); 38 U.S.C. §7292(c). Other times, as the Hobbs Act illustrates, the grants appear in different subsections, sections, or divisions of the same statute. *See, e.g.,* 12 U.S.C. §1786(j)(2); 15 U.S.C. §21(c), (d); 15 U.S.C. §45(c), (d); 15 U.S.C. §2618(a)(1)(B), (a)(1)(C)(ii), (c)(2); 19 U.S.C. §1516a(g)(4)(A), (H); 49 U.S.C. §46110(a), (c), (e). And then some laws say "[c]hapter 158 of title 28 shall apply to judicial review"—language incorporating the Hobbs Act and its grant of Supreme Court review. *See* 2 U.S.C. §1407(c), 8 U.S.C. §1252(a)(1).

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[14] Some statutes make circuit court jurisdiction exclusive by saying that: "[u]pon the filing of the record with the court, the jurisdiction of the court shall be exclusive." 5 U.S.C. §7123(c).

The general statute governing the jurisdiction of the U.S. Court of Appeals for the Federal Circuit vests "exclusive jurisdiction" of 14 separate matters in that court without a paired reference to Supreme Court review. *See* 28 U.S.C. §1295(a)(1)–(a)(14). But for all 14 matters, the exclusive jurisdiction granted by §1295(a) pertains to "an appeal" or takes force "by appeal."[15] "While an appeal is a continuation of the litigation started in the trial court, it is a distinct step." *Slack v. McDaniel,* 529 U.S. 473, 482 (2000). Section 1295(a)'s grant of exclusive jurisdiction to the Federal Circuit over "appeals" then poses no conflict with Supreme Court review as this later step occurs by "certiorari" (not appeal). 28 U.S.C. §1254(1).

By contrast, §3(b) of the TikTok ban states the D.C. Circuit "shall have exclusive jurisdiction over *any challenge* to this [Act]"—not just any 'petition for review.' And a certiorari petition asking the Court to void the ban is no less a 'challenge' to the ban than a brief arguing the same to the D.C. Circuit. The ban's drafters may not have realized §3's broad language (exclusive, any, challenge) would bar Supreme Court review. "But the limits of the drafters' imagination supply no reason to ignore the law's demands." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 653 (2020). The Court also cannot simply read an allowance of Supreme Court jurisdiction into §3, which is "not a construction" of §3, but "an enlargement of it." *Iselin v. United States*, 270 U.S. 245, 250–51 (1926).

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[15] Section 1295(a)(6)g grants the Federal Circuit exclusive jurisdiction "to review the final determinations of the United States International Trade Commission [ITC]," as made by the ITC under 19 U.S.C §1337. Section 1337 authorizes parties to take "**appeal[s]** . . . [to the] Federal Circuit." *Id.* §1337(c).

"Atextual judicial supplementation" is especially "inappropriate" when "Congress has shown that it knows how to adopt the omitted language." *Rotkiske v. Klemm*, 598 U.S. 8, 14 (2019). And in statute after statute granting exclusive circuit court jurisdiction, Congress has shown exactly this. *See, e.g.,* 15 U.S.C. §720e(a) ("**Except for review by the Supreme Court** on writ of certiorari, the United States Court of Appeals for the District of Columbia Circuit shall have original and exclusive jurisdiction . . . .") 28 U.S.C. §2265(c)(2) ("The Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction . . . **subject to review by the Supreme Court** . . . ."); 42 U.S.C. §1327(b)(3) (same).

Turning to precedent, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Court briefly considered whether Congress's grant of "exclusive jurisdiction" to the D.C. Circuit under the Detainee Treatment Act (DTA) ousted Supreme Court's jurisdiction. *See id.* at 581 & n.11. Despite the relevant DTA sections lacking any reference to the Supreme Court review, the Court summarily declared: "[t]he [D.C.] Circuit's jurisdiction, while 'exclusive' in one sense, would not bar this Court's review on appeal from a decision under the DTA." *Id.* at 581 n.11. The Court's sole authority for this view was the government's reply brief in *Hamdan, see id.,* in which the government "[did] not dispute that the DTA leaves unaffected [the Court's] certiorari jurisdiction under 28 U. S. C. §1254(1)." *Id.* at 671 (Scalia, J., dissenting).

Of greater significance is what happened four months after *Hamdan*: Congress passed the Military Commissions Act (or MCA), Pub. L. No. 109-366, 120

Stat. 2600 (Oct. 17, 2006). *See Hamdan v. Gates,* 565 F. Supp. 2d 130, 131–33 (D.D.C. 2008) (detailing this history). Like the DTA, the MCA granted the D.C. Circuit "exclusive jurisdiction" over certain matters. 120 Stat. 2622 (text of §950g(a)). But the MCA then provided: "[t]he Supreme Court may review by writ of certiorari." *Id.* (text of §950(d)). That text remains present in the current version of the MCA. *See* 10 U.S.C. §950g(e). If *Hamdan*'s drive-by jurisdictional dicta was right, "[i]t would have been unnecessary" for Congress to adopt the text of §950g(e). *Hohn v. United States*, 524 U.S. 236, 249–50 (1998).

An unavoidable Article III violation emerges.[16] "[T]he Constitution does not contemplate that there shall be more than one Supreme Court . . . ." *See O'Grady*, 89 U.S. at 647–48. Yet, the TikTok ban gives the D.C. Circuit the first and last word here, making the D.C. Circuit 'supreme' in this context.[17] Article III (§2) does render the Court's "appellate jurisdiction" subject to "such exceptions . . . as the Congress shall make." But Congress may not ignore "the hierarchy of the federal court system created by the Constitution." *Hutto v. Davis*, 454 U.S. 370, 374 (1982); *see Durousseau v. United States*, 6 U.S. 307, 318 (1810) (Marshall, C.J., jurisdictional op.).

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[16] The All Writs Act, 28 U.S.C. §1651, does not change this reality. Because the TikTok ban "specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pa. Bureau of Correction,* 474 U.S. 34, 43 (1985). The All Writs Act does not allow the Court "to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.*

[17] Because the TikTok ban's preclusion of Supreme Court review is unambiguous, the constitutional-avoidance canon has "no application." *Warger v. Shauers*, 574 U.S. 40, 50 (2014).

2. *Executive Disregard.* The TikTok ban allows the Executive Branch to disregard court judgments, creating an advisory-opinion problem. Section 2(e)(2) provides that court invalidation of "the application of any [ban] provision" to the entities described under (g)(3)(A) "shall not affect or preclude the application of the same provision" to the same entities "by means of . . . (g)(3)(B)." So even if this Court invalidates the ban in full as applied to TikTok—a (g)(3)(A) entity—the Attorney General may resume enforcing the ban in full against TikTok upon the President's decision that TikTok falls under (g)(3)(B) and the end of the 270-day waiting period following this determination. And since the President has delegated all his powers under the ban to the Attorney General, §2(e)(2) in effect gives the AG a means to veto any merits-based loss that the Court might hand him here. *See* 89 F.R. 60793 (2024) (delegation of authority to AG).

Article III forbids this. "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut*, 514 U.S. at 218. If this Court should uphold TikTok's First Amendment claim and hold that the TikTok ban violates freedom of speech, neither the President nor the AG may turn around and say: "Well, I'm going to keep enforcing the ban against TikTok anyway, but this time I'll do it through (g)(3)(B)." When a party's claim "passes into judgment in a court of competent jurisdiction it ceases to be open, under any existing act of Congress, to revision by any one of the executive departments or of all such departments combined." *O'Grady*, 89 U.S. at 648. Section 2(e)(2) of the TikTok ban violates this structural principle, which safeguards both the separation of powers and individual liberty.

3. *Legislation Review*. The TikTok ban grants jurisdiction to review its bare legislative terms apart from any enforcement or threatened enforcement of the ban. The ban's judicial-review provision makes this clear in the two contrasting forms of jurisdiction that §3(b) authorizes: review of "any challenge to this [Act]" and review of "any challenge to . . . any action, finding, or determination under this [Act]."

By its plain text, "any challenge to this [Act]—the jurisdiction on which the present litigation rests —allows judicial review of the "bare existence of [a purportedly] unlawful statute" *California*, 593 U.S. at 683. The Court squarely rejected such 'legislation review' in *Muskrat*: "there is neither more nor less in this procedure than an attempt to provide for a judicial determination . . . of the constitutional validity of an act of Congress." 219 U.S. at 361.

Muskrat's relevance does not stop there. Much like the improper 1907 judicial-review provision in *Muskrat*, the TikTok ban's judicial-review provision creates a right of action (§3(a)), confers jurisdiction (§3(b)), and sets deadlines for filing suit (§3(c)). *See Muskrat*, 219 U.S. at 350. The ban effectively names party-plaintiffs through §2(g)(3)(A)'s naming of the TikTok entities. And the ban effectively commits the Attorney General to defending the ban in stating the AG "shall pursue enforcement" (§2(d)(2)(A)).

That's where the TikTok ban, much like the 1907 judicial-review provision, really falls apart. In *Muskrat,* the Court observed: "[i]t is true the United States is made a defendant to this action, but it has no interest adverse to the claimants." 219 U.S. at

361. Here, the government has no adverse interest as the ban cannot be enforced until January 19, 2025. "In the absence of contemporary enforcement . . . a plaintiff . . . must show that the likelihood of future enforcement is 'substantial.'" *California*, 593 U.S. at 670. But President-elect Trump, who takes office on January 20, 2025, has expressed his desire to save TikTok, making the likelihood of future enforcement of the ban anything but substantial.[18] And there can be no question of the President's "clear constitutional authority to exercise prosecutorial discretion to decline to prosecute violators." *In re Aiken Cnty.* 725 F.3d 255, 266 (D.C. Cir. 2013) (Kavanaugh, J.).

"[L]egislative or administrative jurisdiction, it is well settled, cannot be conferred" on federal courts "either directly or by appeal." *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 444 (1923). Section 3 of the TikTok ban violates this rule in authorizing judicial review of "any challenge to this [Act]" separate and apart from judicial review of "any action, finding, or determination under this [Act]." The only question that remains is severability. Congress included a severability provision under §2(e)(1) of the ban and limited the sweep of this provision to violations in §2. No similar provision exists for §3's judicial-review provision. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). Plain text then supports the conclusion that if §3 is unconstitutional for any reason, then the entire ban should fall. *Id.*

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[18] *See, e.g.,* Gram Slattery, *Trump Says It Could Be Worth Keeping TikTok in US for a Little While*, REUTERS, Dec. 23, 2024, https://tinyurl.com/5bv7mcw4.

III. The Court should consider directing the parties to address at oral argument—or inviting an amicus to argue—the TikTok ban's advisory-opinion problem.

"Without jurisdiction the court cannot proceed at all in any cause." *Ex parte McCardle*, 74 U.S. 506, 514 (1869). The Court has thus refused to cast aside or assume away jurisdictional problems—even when the problem is raised solely by an *amicus curiae*. *See, e.g., Ortiz v. United States,* 585 U.S. 427, 435 (2018) ("Both the Federal Government and Ortiz view th[e] grant of jurisdiction as constitutionally proper. But an *amicus curiae*, Professor Aditya Bamzai, argues that it goes beyond what Article III allows."); *Dart Cherokee Basin Op. Co., v. Owens*, 574 U.S. 81, 90 (2014) ("An *amicus* brief filed . . . by Public Citizen . . . raised a jurisdictional impediment.").

In doing so, the Court has kept faith with the maxim that "jurisdiction is not a matter of sympathy or favor" and "courts are bound to take notice of the limits of their authority." *Reid v. United States*, 211 U.S. 529, 539, 29 S. Ct. 171, 172 (1909). The Court has further avoided the advisory-opinion conundrum that neglecting jurisdictional problems itself poses. "Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 101 (1998).

With this in mind—and presuming the Court finds merit in the jurisdictional arguments raised by FCR—the Court should consider directing the parties

to address FCR's arguments at oral argument. The Court has taken similar steps in other cases. *See, e.g., Atl. Marine Constr. Co. v. U.S. Dist. Ct.,* 570 U.S. 947, 947 (2013) ("The parties . . . should be prepared to address at oral argument the arguments raised in the brief of Professor Stephen E. Sachs as *amicus curiae* in support of neither party.").

Such prompting is especially appropriate here given the accelerated briefing schedule and the fact that no substantive debate over jurisdiction appears to have occurred at the D.C. Circuit. The Court may also wish to consider appointing an amicus to argue against the Court's jurisdiction (or even granting FCR leave to do so) in the event that the parties jointly maintain jurisdiction exists here. *See, e.g., Montgomery v. Louisiana*, 575 U.S. 933, 933 (2015) ("invit[ing] [counsel] to brief and argue, as *amicus curiae*, against this Court's jurisdiction"); *Hohn v. United States*, 522 U.S. 944, 945 (1997) (same).

CONCLUSION

The TikTok ban violates "the oldest and most consistent thread in the federal law of justiciability": "federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968). For that reason—and because the offending provisions are inseverable from the rest of the ban—the entire ban falls.

Respectfully submitted,

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