No. 24-657

IN THE

Supreme Court of the United States

BRIAN FIREBAUGH, ET AL.,
Petitioners,

v.

MERRICK B. GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Protecting Americans from Foreign Adversary Controlled Applications Act, as applied to petitioners, violates the First Amendment.

RULE 29.6 STATEMENT

BASED Politics, Inc. is a Georgia 501(c)(3) nonprofit organization that publishes educational content on free markets and individual liberty. BASED Politics, Inc. has no parent. No publicly traded company owns 10% or more of the stock of BASED Politics, Inc. The remaining petitioners are individuals.

RELATED PROCEEDINGS

The proceedings below are *TikTok Inc. v. Garland*, No. 24-1113 (D.C. Cir.), *Firebaugh et al. v. Garland*, No. 24-1130 (D.C. Cir.), and *BASED Politics, Inc. v. Garland*, No. 24-1183 (D.C. Cir.). Those actions were consolidated. An additional challenge to the same statute remains pending in the D.C. Circuit. *Kennedy v. Garland*, No. 24-1316.

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BRIEF FOR PETITIONERS

Petitioners Brian Firebaugh, Chloe Joy Sexton, Talia Cadet, Timothy Martin, Kiera Spann, Paul Tran, Christopher Townsend, Steven King, and BASED Politics, Inc., respectfully request that the Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The D.C. Circuit's opinion denying the petitions for review (Joint Appendix (J.A.) 1-92) has not yet been reported in the Federal Reporter and is available at 2024 WL 4996719.

JURISDICTION

The court of appeals denied the petitions for review on December 6, 2024. Petitioners filed an application for injunctive relief on December 16, 2024. This Court treated that application as a petition for certiorari and granted certiorari on December 18, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides: "Congress shall make no law … abridging the freedom of speech."

The Protecting Americans from Foreign Adversary Controlled Applications Act is reproduced in an appendix to this brief.

INTRODUCTION

Time and again throughout our Nation's history, this Court has held that the First Amendment does not allow the government to suppress speech because the ideas expressed are objectionable—or even threatening to our political or social order. And just last Term, this Court held that "settled principles about freedom of expression" apply just as fully to social-media platforms as to any other means of communication. *Moody v. NetChoice, LLC*, 603 U.S. 707, 733 (2024). "Whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of the First Amendment do not vary." *Id.* (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011)) (alteration adopted and internal quotation marks omitted).

Yet also last year, Congress enacted the Protecting Americans from Foreign Adversary Controlled Applications Act (the "Act"). The Act prohibits the companies that operate the online platform TikTok in the United States from continuing to do so as of January 19, 2025. The D.C. Circuit has now upheld that novel and dramatic legislation, blessing the government's justification that TikTok poses a threat to our national security. The government admits it has no evidence that the platform has ever been put to use against any such U.S. interest. J.A. 47. But the D.C. Circuit held it is enough that the People's Republic of China could, at some undefined point in the future, access data that the platform collects or alter the app's recommendation system to "interfere with our political system," "manipulat[e] this country's public discourse," or "amplify[] preexisting

social divisions." Amended Public Redacted Brief for Respondent 36, 38, 44 (D.C. Cir. July 30, 2024) ("C.A. Gov't Br."); *see also* J.A. 42-48.

That decision cannot stand. TikTok is today's quintessential marketplace of ideas—an "outlet for expression" and a "source of community" for no fewer than 170 million Americans. J.A. 92 (Srinivasan, C.J., concurring in part and concurring in the judgment). And the vast majority of the content shared on TikTok has no geopolitical implications whatsoever. United States residents use the app principally to exchange ideas about daily diversions such as entertainment, cooking, and fashion. The platform, of course, is also increasingly a medium for discussing social and political issues—indeed, most TikTok users under 30 now use the platform, among other things, to get news. But that just magnifies the free-expression interests at stake. The D.C. Circuit's decision that TikTok can be singled out and shuttered because *ideas* on that platform might persuade Americans of one thing or another—even of something potentially harmful to our democracy—is utterly antithetical to the First Amendment. It also flies in the face of our country's historical practices, decades of precedent concerning the regulation of speech that supposedly threatens national security, and the teachings of *NetChoice*.

In short, whatever challenges the possibility of a foreign adversary influencing the views of Americans might present, the array of permissible responses has never included censoring speech. Quite the contrary: that tactic has often been a hallmark of our adversaries themselves—and one rightly decried by

our own leaders. In our Nation, "the remedy to be applied" to disagreeable public discourse has always been "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). That remedy was sufficient immediately after the Founding when foreign powers tried to meddle in our political affairs. It was sufficient during the First Red Scare and during the run-up to World War II. And it was sufficient during the anxious years of the Cold War. It is more than sufficient today.

STATEMENT

A. Legal and factual background

1. For hundreds of years, people have sought out places to exchange ideas, be entertained, and learn. When our Nation was founded, there was the town square. In the nineteenth and twentieth centuries, there were weekly magazines, daily newspapers, civic and trade associations, and movie theaters. Today, as this Court has recognized, there are social-media platforms. *See, e.g.*, *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017).

One such platform is TikTok. TikTok is published by TikTok Inc., an American company ultimately owned by ByteDance Ltd., affiliates of which operate in China. J.A. 10. The TikTok app provides a vital communications forum for more than 170 million Americans (and more than one billion people worldwide). J.A. 486-87. TikTok allows users to create, publish, view, interact with, and share videos up to ten minutes long. J.A. 170. From dance challenges to book reviews to do-it-yourself tutorials, TikTok videos address topics as diverse as human thought.

From the perspective of a user and creator, the app works as follows: TikTok opens to a default screen called a "For You" page, which displays a series of videos tailored to each user. As one interacts with the videos (liking them, swiping away from them, commenting on them, etc.), additional videos appear. Users can also watch live streams of their favorite creators or shop for products. *See generally* J.A. 590-94.

In addition to viewing and reacting to content, users can create and upload their own videos and other content, which in turn appear in other users' feeds. Creators can build community across America and the world as they follow users and develop relationships with others on the app. *See generally* J.A. 595-600.

Petitioners are just a few representative creators who use TikTok regularly to express themselves, advocate for causes, share knowledge and opinions, create communities, and even make a living.

- Brian Firebaugh, a first-generation rancher and U.S. Marine Corps veteran, teaches the public about agricultural issues, promotes his ranch and products, and helps the ranching community through charitable endeavors. J.A. 527-36.
- Chloe Joy Sexton creates videos about parenting, mental health, and the cookie business that the platform enabled her to launch. J.A. 553-60.

- Talia Cadet shares book reviews and promotes Black authors and Black-owned businesses. J.A. 517-26.
- Timothy Martin, a football coach, makes sports-commentary videos and connects with other fans and former athletes. J.A. 544-52.
- Paul Tran promotes his skincare company, documents memories with his daughter, connects with other dads, follows martial arts, and researches travel and restaurants. J.A. 582-89.
- Steven King creates humorous content about his daily life and spreads awareness about LGBTQ pride, self-confidence, and sober living. J.A. 537-43.
- Kiera Spann advocates for the rights of sexual-assault survivors, shares information about books, news, and politics, and encourages political and social advocacy. J.A. 561-71.
- Christopher Townsend, a U.S. Air Force veteran, shares music he writes and produces, posts light-hearted videos quizzing people on their biblical knowledge and discusses views on current events from a conservative perspective. J.A. 572-81.
- BASED Politics, Inc. is a 501(c)(3) nonprofit organization that seeks to reach members of Gen Z—particularly users under 25 years old—with social media content that promotes individual liberty and free markets. J.A. 619-24.

The breadth of petitioners' engagement with the platform underscores TikTok's distinct identity as a platform for speech.

2. TikTok is also distinct in many ways from other apps that allow users to post and view videos. This is partly attributable to TikTok's special editing tools—including a distinct ByteDance app called CapCut—and the unique feel of the forum. Even more, it is because of TikTok's distinctive content-recommendation system. Other social-media platforms recommend content, for example, that is created by someone in their social network or in response to a specific search. TikTok, by contrast, recommends videos primarily based on a user's interaction with other videos. So if a user's interactions with the platform suggest an interest in, say, cooking, TikTok's recommendation engine will serve up other videos on that and related subjects, even if the creator is not connected to the user. Other apps might recommend videos by the user's friends or by celebrity chefs the user has chosen to follow. *See generally* J.A. 489, 546, 558.

Relatedly, TikTok places greater value on enabling users to discover new interests than other apps do. This is apparent as soon as one launches the app. The user is immediately presented with videos and simply chooses what to engage with; although users can run searches on TikTok, those searches are secondary to the experience. *See* J.A. 590. This reflects TikTok's distinct approach to publication and distribution—an approach that is focused on continuously presenting users with new ideas and new voices. And most important to petitioners, it

allows relatively obscure creators to reach millions of viewers if they create interesting content. *See, e.g.*, J.A. 557-59, 577-78.

As creators gain followers and engagement on the platform, they also gain access to TikTok's "creator management" services and personnel. These include the "creator rewards program," which allows creators to earn money for particularly effective posts. *See, e.g.*, J.A. 520, 541, 548, 556, 565, 577. Individual advisors also provide creators with growth and content strategies and other traditional editorial services, helping them strategize as to how to reach wider and more diverse audiences through their postings.

The upshot is that petitioners—like countless other Americans—have been far more successful sharing their ideas and finding community on TikTok than anywhere else. Despite efforts to grow their presence elsewhere, all of them have far smaller audiences on other platforms. Indeed, some petitioners have even found the exact same videos produce substantially more engagement on TikTok than on other apps. *See, e.g.*, J.A. 557-58. Petitioners accordingly believe that changing the ownership or any editorial practices of TikTok would threaten the vitality and quality of the forum. And courts hearing other cases concerning TikTok have confirmed that there is "no support for the conclusion that [creators] may simply substitute another social media site in place of TikTok and achieve the same effect." *Alario v. Knudsen*, 704 F. Supp. 3d 1061, 1077 (D. Mont. 2023); *see Klein v. Facebook, Inc.*, 580 F. Supp. 3d 743,

769 (N.D. Cal. 2022) (similar); *Marland v. Trump*, 498 F. Supp. 3d 624, 641 (E.D. Pa. 2020) (similar).

3. Beginning in 2018, the Executive Branch became concerned with what it characterized as the Chinese government's potential "influence over TikTok." J.A. 11. Years later, Congress turned its sights on the platform as well. A House report, for example, expressed the worry that postings on the platform could be used to "push misinformation, disinformation, and propaganda on the American public." H.R. Rep. No. 118-417, at 2 (2024). And one of the "lawmakers behind the bill" that became the Act, Representative Raja Krishnamoorthi, voiced the concern that TikTok "show[ed] dramatic differences in content relative to other social media platforms." J.A. 352-53. For example, Senator Mitt Romney reported "support for us to shut down potentially TikTok" because, if "you look at the postings on TikTok and the number of mentions of Palestinians relative to other social media sites, it's overwhelmingly so among TikTok broadcasts." J.A. 366.

On April 24, 2024, as part of a deal to provide aid to Ukraine and Israel, President Joseph R. Biden, Jr., signed into law the Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, div. H, 138 Stat. 895, 955-60 (2024). The Act bans TikTok (and all other apps ultimately owned by ByteDance Ltd.) throughout the United States, effective 270 days after the statute's enactment—on January 19, 2025.

The Act effectuates this ban by prohibiting a "foreign adversary controlled application" from being

made available within the territorial borders of the United States. *See* Act § 2(a)(1)(A)-(B). The Act then defines "foreign adversary controlled application," first and foremost, as any app operated by TikTok or its ultimate parent, ByteDance Ltd. *Id.* § 2(g)(3)(A)(i)-(iii).

In addition to singling out TikTok itself, the Act also applies to a more general category of companies that are "controlled by a foreign adversary" and that are "determined by the President to present a significant threat to the national security." Act § 2(g)(3)(A). Even for such companies, the Act applies only to entities that operate a platform that enables users to "generate, share, and view text, images, videos, real-time communications, or similar content" and have more than one million monthly active users during a specified time period. *Id.* § 2(g)(2)(A)(i). And the Act excludes from that class of publishers any entity that offers any app "whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews." *Id.* § 2(g)(2)(B).

The only way the Act allows TikTok to continue publishing in the United States beyond early 2025 is through a "qualified divestiture." Under this provision, TikTok's owners would have to sell the platform to an entity approved by the President, following an unspecified "interagency process." Act § 2(a)(1)(A), (a)(2)(A), (g)(6). The President would also have to ensure that any divested successor does not maintain "any operational relationship" between its U.S. operations and any "formerly affiliated entities that are controlled by a foreign adversary," including

any "cooperation with respect to the operation of a content recommendation algorithm," like the one used by TikTok. *Id.* § 2(g)(6).

Penalties for violating the Act are severe. The Act subjects any entity (such as an app store) that facilitates access to TikTok to a penalty of $5,000 "multipl[ied] … by the number of users within the land or maritime borders of the United States" who access, maintain, or update the app as a result of the violation. Act § 2(d)(1)(A). Given TikTok's approximately 170 million users in the United States, such a fine could be as high as $850 billion.

B. Proceedings below

1. Invoking the Act's judicial-review provision, Act § 3(a)-(b), petitioners filed petitions for review in the U.S. Court of Appeals for the D.C. Circuit, asserting that the Act violates the First Amendment. The court of appeals consolidated those petitions with a petition filed by TikTok Inc. and ByteDance Ltd.

The government defended the Act on the ground that it prevents the Chinese government from someday covertly manipulating the app's content to influence social or political discourse in the United States. J.A. 42. The government also claimed that the Act addresses "data-collection concerns" that could arise if the Chinese government obtained user information from the platform. J.A. 54. But the government "ma[de] no argument that the Act's application to TikTok should be sustained based on the data-protection interest alone." J.A. 78 (Srinivasan, C.J., concurring in part and concurring in the judgment).

While the petitions were pending, the 2024 Presidential election transpired. Despite the government's purported national-security concerns, both Vice President Kamala Harris and former President (now President-Elect) Donald Trump actively campaigned on TikTok—thereby implicitly encouraging Americans to use the app. Other candidates for federal office did so as well. *See* Kat Tenbarge, *They Supported a TikTok Ban, But Still Used the App To Win Their Elections*, NBC News (Nov. 29, 2024), https://www.nbcnews.com/tech/social-media/tiktok-ban-trump-video-account-donald-election-rcna168693.

2. In late 2024, the court of appeals denied the petitions for review.

a. The majority first rejected the government's "ambitious argument" that the case "does not implicate the First Amendment at all," explaining that the Act "singles out TikTok, which engages in expressive activity, for disfavored treatment." J.A. 25-26. But the majority declined to decide whether the Act is subject to strict scrutiny or intermediate scrutiny. J.A. 27. It recognized that strict scrutiny applies to laws that discriminate among speakers and that the government's content-manipulation justification for the law "reference[d] the content of TikTok's speech." J.A. 29-30. But the court claimed that it could also "conceive of reasons intermediate scrutiny may be appropriate under these circumstances." J.A. 31. It therefore "assume[d] without deciding" that strict scrutiny applies. *Id.*

Explicitly "defer[ring] to the Government's national-security assessment," the court then held

that the Act satisfies strict scrutiny. J.A. 32. The court recognized that "the First Amendment prevents 'the government from tilting public debate in a preferred direction.'" J.A. 43 (quoting *Moody v. NetChoice, LLC*, 603 U.S. 707, 741 (2024)). But the court found that prohibition inapplicable to the government's content-manipulation rationale here, reasoning that the government has a valid interest in preventing a foreign adversary from "distort[ing] free speech on an important medium of communication." *Id.* The court also brushed aside petitioners' contention that the Act's targeting of media entities in general, and TikTok in particular, belied any claim that it meaningfully advanced an interest in data security.

The court of appeals then determined that the Act is a narrowly tailored means of furthering both the government's content-manipulation and data-collection interests. According to the panel, the Act "addresse[s] precisely the harms it seeks to counter and only those harms." J.A. 48.[1]

b. Chief Judge Srinivasan concurred in part and concurred in the judgment. He acknowledged that the Act implicates the First Amendment rights of "users who create and consume content on the TikTok platform" because they "face the prospect of the app becoming unavailable to them." J.A. 75. But he declined to subject the Act to strict scrutiny. J.A. 66. Instead, Chief Judge Srinivasan asserted that

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[1] The court stated that it reached these conclusions based "solely on the []redacted, public filings in the case," without "rely[ing] on" any classified materials submitted by the government. J.A. 64-65 & n.11. This case accordingly comes to this Court on the same terms.

intermediate scrutiny should apply for two reasons. First, he posited that the government's goal of preventing "covert content manipulation"—although "self-evidently connected to speech" that might "advance China's *interests*"—was nevertheless "content neutral." J.A. 75-80. Second, he noted that Congress has previously enacted, and the D.C. Circuit has upheld, certain "restrictions on foreign control of mass communications channels," including radio and wired transmission lines. J.A. 66; *see* J.A. 66-71.

Applying intermediate scrutiny, Chief Judge Srinivasan concluded that the Act passed muster under both of the government's asserted interests. Like the majority, he stressed that he believed the court's "duty to accord deference" to the government's determinations was especially "important" in light of the "national security" implications involved. J.A. 86.

3. Petitioners sought an injunction pending this Court's review. The D.C. Circuit denied the motion. Petitioners then sought emergency relief in this Court, seeking to avert the January 19 shutdown contemplated by the Act. On December 18, 2024, the Court construed the emergency application as a petition for certiorari and granted the petition.

SUMMARY OF ARGUMENT

The Protecting Americans from Foreign Adversary Controlled Applications Act violates the First Amendment because it suppresses the speech of American creators based primarily on an asserted government interest—policing the ideas Americans hear—that is anathema to our Nation's history and tradition and irreconcilable with this Court's precedents.

I. The court below correctly recognized that the Act triggers demanding First Amendment scrutiny.

Social-media platforms are vital hubs in our modern age for the exchange of a vast array of ideas—from lighthearted fare to serious social and political commentary. *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). Millions of Americans therefore use TikTok to speak to, collaborate with, and listen to individuals from around the country, and indeed the world. If TikTok is banned, petitioners and other Americans will lose their ability to reach and learn from communities that are meaningful to them.

The text and structure of the Act confirm that the Act is a direct and severe restraint on speech. The statute targets TikTok based on the content and viewpoint of the material that could be expressed there. At the same time, it excludes from its sweep sites that host a different sort of content—reviews of products, businesses, or travel experiences.

The Act's provision theoretically allowing TikTok to effect a "qualified divestiture" does not alter this analysis. As the D.C. Circuit acknowledged, a divestiture of TikTok is impossible on the timeframe

contemplated by the Act. And even if it were feasible, a forced divestiture would still impair petitioners' free-speech rights by depriving them of the ability to collaborate with the publisher of their choice and to reach the global audience with which they currently engage.

II. The court of appeals erred in holding that the Act satisfies strict scrutiny. The government's asserted interest in preventing "content manipulation" is constitutionally illegitimate, and its supposed data-security interest does not alone justify the Act's suppression of speech.

A. The "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790-91 (2011) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)). Put another way, Congress cannot suppress speech simply because it worries that the speech might affect Americans' thinking regarding social or political issues.

History, tradition, and precedent confirm that this power-to-persuade principle applies equally even if a foreign entity plays some role in directing the speech to Americans. Our Nation has long charted a course permitting foreign speech while, at most, requiring any potential foreign influence on the speech simply to be identified. This Court's cases likewise follow that line: When controversies have arisen, the Court has protected Americans' right to hear foreign-influenced ideas, allowing Congress at most to require labeling of the ideas' origin. *See Meese v. Keene*, 481 U.S. 465 (1987); *Lamont v. Postmaster General*, 381 U.S. 301 (1965). The sole exception—allowing the suppression

in this country of speech extolling communist ideology during the Red Scare—was quickly rejected in the courts of history and law. Indeed, the separate view articulated by Justices Brandeis and Holmes in those cases—that "no danger flowing from speech" justifies its suppression on national security grounds "unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion"—is now a foundational First Amendment principle. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

The Act is an unprecedented break from that principle. Congress passed the Act out of concern that China might manipulate content on TikTok to affect "this country's public discourse," "undermine trust in our democracy," or "exacerbate social divisions." C.A. Gov't Br. 35, 38; *see* J.A. 43. But as just explained, Congress has no power to ban speech because it might affect Americans' social or political beliefs. And, unlike *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), this is not a case where the asserted national-security concerns involve an imminent threat of terrorism, much less the risk of starting or affecting a war. Rather, the government's stated concern—that TikTok might someday be used to build support for some future policy change or protest movement—is precisely the sort of justification for barring speech that history and precedent do not permit.

B. The government's data-security justification cannot sustain the Act either.

The government has never argued that the Act can be independently sustained on data-protection

grounds. For good reason. The statute's primary aim is expressive content, and a generally applicable government interest cannot be used to justify a regulation targeted at media entities. *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983). Furthermore, the Act is woefully underinclusive from any data-security standpoint; it makes no sense to single out TikTok while excluding e-commerce and review platforms that raise the same concerns.

Furthermore, the Act is not the least restrictive means of advancing the government's supposed data-security interest. In the very legislative package that included the Act, Congress banned data brokers from sharing Americans' data with foreign adversary nations. Expanding that prohibition to social-media platforms would advance the government's interest without suppressing petitioners' speech. So would requiring disclosure of the potential data-collection risks—the traditional remedy when it comes to potential consumer harms. All told, there is no plausible need for the government to prevent millions of Americans from sharing ideas on TikTok simply to address the supposed data-security threat.

ARGUMENT

I. The Act has sweeping and profound First Amendment implications.

All three judges below recognized that the Protecting Americans from Foreign Adversary Controlled Applications Act abridges Americans' First Amendment rights in a manner that triggers at least some form of heightened scrutiny. J.A. 24-25

(majority opinion); J.A. 75 (Srinivasan, C.J., concurring in part and concurring in the judgment). On that score, the D.C. Circuit was correct—and, indeed, the majority was right to apply strict scrutiny. The Act impairs petitioners' right to speak, associate, and listen on TikTok. It does so by condemning speech platforms—and TikTok in particular—based on the content and viewpoints they contain. And the Act's provision theoretically allowing TikTok's ownership to sell the platform rather than shuttering it does not diminish the First Amendment interests at stake.

A. The Act restricts the rights of Americans to speak, collaborate with the editor and publisher of their choice, and hear ideas of others.

"A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). Social-media platforms are just such places. Indeed, "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear." *Id.* "It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Id.* (citation omitted). Such sites are, for many, "the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id.* at 107. The Act's regulation of TikTok, therefore,

directly implicates the First Amendment rights of its users in multiple overlapping ways.

1. Perhaps most obviously, the Act prevents millions of Americans from speaking to one another through their chosen medium. The speech on TikTok runs the gamut from an array of lighthearted fare to core political speech—including petitioner Townsend's conservative content about news and religion, petitioner Spann's advocacy against sexual assault, and petitioner BASED Politics's material seeking to promote free-market ideas to Gen Z Americans. *See supra* at 5-6. Some 170 million Americans use the app. If the Act takes effect, they will all lose the ability to communicate using TikTok. J.A. 18.

By the same token, the Act will render creators like petitioners unable to reach and associate with groups that matter to them. On TikTok, petitioners have found communities of "book lovers," J.A. 521; cattle ranchers and people interested in agriculture, J.A. 530-32; sexual assault survivors and their advocates, J.A. 564; sports fans and former athletes, J.A. 546-48; "Christians and conservative-minded people," J.A. 575-76; "mothers and other baking aficionados," J.A. 557-58; as well as LGBTQ audiences and individuals living in or working through sobriety, J.A. 540. These communities are essential to petitioners' ability to speak as they choose.

What's more, the unique format and culture of speech on TikTok makes it "an important and distinct medium of expression" relative even to other social-media sites. *City of Ladue v. Gilleo*, 512 U.S. 43, 55

(1994). Petitioners have not had the same success sharing their ideas on other platforms, even when posting the same content. J.A. 557-58; *see supra* at 8. Nor are petitioners alone in this respect. Both presidential candidates in the 2024 election used TikTok to reach and engage with the platform's distinct audiences, underscoring that the platform is not interchangeable with others. *See supra* at 12.

2. The Act also implicates petitioners' First Amendment right to collaborate with their preferred editor and publisher: TikTok and ByteDance. That choice lies at the core of the "right to associate for the purpose of speaking," *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006), and to "join with others to further shared goals," *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 618 (2021). In other words, the First Amendment forbids the government from choosing with whom individuals may join together to express themselves. *Id.* at 616; *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995) (choice of with whom to march in a parade); *NAACP v. Patterson*, 357 U.S. 449, 460-61 (1958) (choice to be part of a nonprofit organization advocating for political change).

A speaker's right to choose their editor or publisher is a particularly vital aspect of this First Amendment right to join together to speak. Editors and publishers play critical roles in curating and disseminating speech. *See, e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The First Amendment would thus apply with special force if, for instance, the government prohibited a freelance

journalist from placing stories with the magazine she chooses; a musician from releasing a record under her chosen label; or an actor from working with a particular director or movie studio. It would make no difference if the chosen publisher or editor were foreign. American authors and artists have every right to choose to distribute their work through (German-owned) Penguin Books, to publish in (British-owned) *The Economist*, or to post their music on (Swedish-owned) Spotify.

A creator's desire to work with TikTok, or with any other particular social-media platform, is no different. If anything, this choice is *more* deserving of protection. This Court recently held that social-media platforms "compil[e] and curat[e] others' speech" in a manner that implicates core First Amendment values. *Moody v. NetChoice, LLC*, 603 U.S. 707, 731 (2024). But from the user perspective, that is not even the half of it. In our modern age, social media is the dominant form not only of expression but of communication itself. Telling individuals like petitioners that they cannot express themselves in concert with TikTok—no matter what relationships it might have with foreign entities—is not much different from telling them they may not speak as they wish as they go about their daily lives.[2]

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[2] For this reason and others, this case does not require the Court to address a question Justice Barrett recently flagged—namely, whether "a social-media platform's foreign corporate ownership and control over content-moderation decisions might affect whether laws overriding those decisions trigger First Amendment scrutiny." *NetChoice*, 603 U.S. at 747 (Barrett, J., concurring) (citing *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 433-36 (2020)). Even if such a platform's

3. Finally, the First Amendment protects not only the right to speak and associate but also "the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (holding that the First Amendment "necessarily protects the right to receive" information). Indeed, this right—regardless of the "social worth" of the content at issue—"is fundamental to our free society." *Stanley*, 394 U.S. at 564 (collecting cases). And it applies equally to information produced domestically or abroad. *See Lamont v. Postmaster General*, 381 U.S. 301 (1965).

The Act directly restricts petitioners' and other Americans' right to receive information through TikTok. For example, petitioner King, like many Americans, gets news from TikTok—in part because he trusts certain "TikTok creators who are journalists … to produce unbiased and authentic news." J.A. 542. Petitioner Martin enjoys discussing football "with people living all over the world," while petitioner Spann believes TikTok "to be one of the most authentic and timely sources where you can hear diverse and organic perspectives instead of the more curated and potentially biased accounts." J.A. 551, 567-68. Almost 20 percent of Spann's followers are

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"corporate leadership abroad [made] the policy decisions about the viewpoints and content the platform will disseminate," *id.*, the First Amendment would protect the right of American creators to speak to other Americans in concert with that platform. Congress could no more ban U.S. academics from co-authoring papers with foreigners or publishing such work in the United States through the Oxford University Press—or U.S. producers from enlisting foreign director Pedro Almodóvar to create films for distribution in the United States.

from outside the United States, and she values connecting "with survivors and advocates all over the world—bonding over and grieving our shared experiences while learning from our differences." J.A. 564. The Act precludes petitioners from receiving such information.

B. The Act regulates based on the content and viewpoint of speech.

Restricting the speech of 170 million Americans would warrant searching First Amendment scrutiny regardless of a law's form. But the text and structure of the Act make clear that its sweeping restriction of speech triggers strict scrutiny because it regulates on the basis of content and viewpoint. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). And all of that is before one considers the government's defense of the Act, which confirms its viewpoint- and content-based aims. *See infra* at 41-47.

By their plain terms, the Act's general provisions apply only to entities that operate a website or application that "permits a user to … generate, share, and view text, images, videos, realtime communications, and similar *content*." Act § 2(g)(2)(A)(i) (emphasis added). TikTok, of course, specifically fits that bill as well. The Act therefore takes square aim at communication—the precise thing the First Amendment most directly and forcefully protects. *See NetChoice*, 603 U.S. at 740; *Packingham*, 582 U.S. at 107.

What's more, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v.*

Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). Such is precisely the case here. The Act does not apply to *all* communication on social media; it limits its coverage to TikTok and other apps the government believes are "controlled by a foreign *adversary*." Act § 2(g)(3)(B)(i) (emphasis added). This nomenclature highlights Congress' purpose to target speakers with viewpoints supposedly antagonistic to U.S. interests. In the words of *Rosenberger*, the government is regulating speech because it does not like the "motivating ideology" of videos that could appear or be promoted on the platform. 515 U.S. at 829.

The court of appeals resisted this straightforward analysis, suggesting that the Act is not viewpoint-based because it takes aim at curation decisions that could "advance China's *interests*—not China's views." J.A. 79-80 (Srinivasan, C.J., concurring in part and concurring in the judgment); *see also* J.A. 29-30 (majority opinion) (similar). But this Court has never drawn any such distinction. To the contrary, it has explained that whether a law is viewpoint-based turns on whether it "distinguishes between two opposed sets of ideas." *Iancu v. Brunetti*, 588 U.S. 388, 394 (2019).

Speech that furthers China's interests and speech that cuts against them presents such a dichotomy—just like regulating speech furthering the interests of the Libertarian Party or the Catholic Church would equally target speech based on viewpoint. No doubt each of these entities has an array of interests that shift over time on various topics. *See* J.A. 80 (Srinivasan, C.J., concurring in part and concurring

in the judgment). But they all have "a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831. That makes a law targeting that perspective viewpoint-based. *Id.* And even if a law's focus on a speaker's "interests" somehow rendered it non-viewpoint-based, any law that targets speech based on its content is subject to strict scrutiny regardless. Speech that supposedly favors China's interests is quite clearly, at least, a content-based category.

Nor does the D.C. Circuit's reasoning take account of the Act's exclusion. Even for so-called "foreign adversary controlled applications," the Act does not cover all content published on such platforms; it carves out every entity that operates an application "whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews." Act § 2(g)(2)(B). As this Court has previously explained, an exclusion like this makes a law content-based because it shows that the law "singles out specific subject matter for differential treatment." *Barr v. Am. Ass'n of Political Consultants*, 591 U.S. 610, 619 (2020) (plurality opinion) (quoting *Reed*, 576 U.S. at 169); *see id.* at 651 (Gorsuch, J., concurring in the judgment in part and dissenting in part).

C. The Act's divestiture provision does not lessen the need for exacting scrutiny.

Contrary to the suggestion below, J.A. 28, the need for exacting scrutiny here is not alleviated by the Act's provision theoretically permitting TikTok to continue operating in the United States after a "qualified divestiture."

As a factual matter, divestiture does not appear to be a realistic option. TikTok has repeatedly explained—and publicly available information confirms—that the Act's divestiture standard is not "technologically, commercially or legally []feasible." TikTok Appl. 12. And "the Government does not rebut TikTok's argument that 270 days is not enough time for TikTok to divest." J.A. 46. The purpose and effect of the Act is thus to ban TikTok—and, in turn, petitioners' speech on the platform—entirely.

Even if divestiture were feasible, the Act would still deprive petitioners of their First Amendment right to collaborate with the publisher of their choice. The whole point of the divestiture provision is to prohibit ByteDance from continuing to own TikTok. The Act even goes so far as to prohibit a divested TikTok from maintaining "any operational relationship" with "any formerly affiliated entities that are controlled by a foreign adversary," including "cooperation with respect to the operation of a content recommendation algorithm." Act § 2(g)(6)(B). Accordingly, even if the current recommendation system could be transferred to a successor company (and TikTok says it cannot), the new owner would need to update and maintain that system. And any

change in TikTok's ownership would inevitably lead to different publishing and editorial policies, perhaps making the platform less democratic in its approach to surfacing videos from non-celebrity creators like petitioners. *See supra* at 7. These changes would alter petitioners' expression just the same as if the government forced an actor to work with a different director, a musician to record her album with a different studio, or a freelance writer to publish in a different magazine. *See* J.A. 525, 543, 569-70.

Any doubt on this score can be put to rest by considering a real-world example. A couple of years ago, the platform formerly known as Twitter (now renamed X) changed ownership. From the perspective of many users, the platform has since dramatically shifted its culture and substantive focus. *See, e.g.*, J.A. 607-15. Yet if the D.C. Circuit's reasoning here were correct, the First Amendment would not seriously be implicated if Congress passed a law requiring X's ownership to sell to a new owner with a different point of view. That cannot be right.

Divestiture would also limit the audience to whom petitioners can speak and from whom they can hear. A substantial part of TikTok's appeal is the richness and distinctive sensibility of the international content that petitioners regularly enjoy. *See* J.A. 525, 549, 564, 580-81. And petitioners value their ability to speak to and learn from an international audience. *See* J.A. 522, 549, 580-81. Unrebutted evidence shows that a divestiture would take that away, disconnecting Americans from the rest of TikTok's global platform and community. This, in turn, would shrink the creators' worlds—and limit the input the

recommendation system would have going forward to produce new experiences for them. *See* J.A. 525, 559-60.

II. The Act cannot survive First Amendment scrutiny.

Faced with the need to explain a novel and sweeping impingement on free speech, the government advanced, and the D.C. Circuit accepted, two justifications: (1) that the Chinese government could, at some point in the future, "manipulate content covertly on the TikTok platform" to "serve its own ends," J.A. 30, 43; and (2) that the Chinese government could procure data from TikTok about its American users and use that data for nefarious purposes, J.A. 38-39. The first proffered justification underscores that the Act targets speech because of its viewpoint and content, and it renders the Act flat-out invalid. The second rationale, data security, cannot stand on its own—and even if it could, it would not justify the Act.

A. The government's desire to prevent content manipulation cannot support the Act.

The best evidence that the Act is unconstitutional can be found in the government's own briefing in the D.C. Circuit. Those papers defended the Act on the ground that TikTok "could," at some point in the future, be used to "manipulat[e] this country's public discourse" or "amplify[] preexisting social divisions" to "advance [China's] own interests." C.A. Gov't Br. 38, 44, 67. That justification—that TikTok must be shuttered because ideas on the platform may in the future appear at odds with the interests of the United

States—runs headlong into bedrock doctrine and is anathema to our history and tradition.

1. Congress has no power to regulate speech based on its mere potential to influence social or political debates.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The clearest teaching of the First Amendment, therefore, is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790-91 (2011) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

Accordingly, when the government seeks to regulate speech because of its potential effects, black-letter law dictates that it must point to an actual harm—independent from affecting someone's mere "opinion" about "politics" or the like, *Barnette*, 319 U.S. at 642—that will result if the speech is not suppressed. A classic example is "incitement": "advocacy [that] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" may be restrained. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); *see also Bridges v. California*, 314 U.S. 252, 263 (1941) (suppression of speech permissible only where necessary to prevent a "substantive evil" that is "extremely serious" and whose "imminence" is "extremely high").

Under this doctrine, "disapproval of the ideas expressed" is an invalid basis for state regulation of

speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). "However pernicious an opinion may seem, we depend for its correction not on [legal regulation] but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

It can, of course, be very tempting to censor "mere abstract teaching" where it could undermine our country's democratic ideals or it challenges societal conventions. *Brandenburg*, 395 U.S. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297 (1961)). And it can feel uncomfortable for judges to blow the whistle when legislatures regulate on these grounds. But "it is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). As one scholar summarized the Court's doctrine, "the government may not suppress speech on the ground that it is too persuasive." David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 335, 335 (1991); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011) ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.").

Nor does this power-to-persuade principle wax and wane with changes to technology. To the contrary, "even as one communications method has given way to another," the courts' "settled principles about freedom of expression" do not waver. *Moody v. NetChoice, LLC*, 603 U.S. 707, 733-34 (2024); *see Brown*, 564 U.S. at 790. That is why, decades ago, the

Court declined to credit the government's argument that "motion pictures possess a greater capacity for evil … than other modes of expression," reasoning that movies' supposed "capacity for evil … does not authorize substantially unbridled censorship." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). It is also why the Court rejected attempts to regulate violent video games, likening their content to scenes from Homer's *The Odyssey* and rejecting the argument that the interactivity of such games presented new and "special problems." *Brown*, 564 U.S. at 796-98. And it is why this Court rejected the government's argument that special First Amendment rules were necessary to ensure the proper development of the internet, holding that the "interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

Most recently, the Court reaffirmed the continuing vitality of the power-to-persuade principle in the very context of social media. In *NetChoice*, Texas urged that it should be permitted to regulate the content on platforms like YouTube and Meta in order to guard against the influence of "West Coast Oligarchs" and "create a better speech balance." 603 U.S. at 741. Texas argued that the complexity and covertness of algorithms made those sites more difficult to police than the media of old. But it made no effort to connect the supposed "skew[ing]" of content to any real-world harm, much less to an imminent danger. *Id.* So the Court had little trouble holding that Texas had no authority to regulate based on its desire to "correct the mix of speech that the major social-media

platforms present." *Id.* at 740. Such an interest, the Court explained, is "very much related to the suppression of free expression" and so "is not valid, let alone substantial." *Id.*

2. History, tradition, and precedent make clear that this principle applies even if a foreign adversary is involved in the speech at issue.

The D.C. Circuit did not seriously dispute, at least as a general matter, that the First Amendment prohibits Congress from regulating online speech based on its potential to influence social or political debates. If anything, the court of appeals purported to embrace the principle, recognizing that "the First Amendment prevents 'the government from tilting public debate in a preferred direction.'" J.A. 43 (quoting *NetChoice*, 603 U.S. at 741). The court of appeals nevertheless deemed the government's content-manipulation rationale to be legitimate—indeed, "compelling"—on the ground the potential manipulator here is "a foreign adversary nation." J.A. 42-43. Once that extra fact is taken into account, in the D.C. Circuit's view, the Act "actually vindicates the values that undergird the First Amendment." J.A. 43.

That reasoning could not be more wrong. This country has no history or tradition of banning Americans' speech because of concerns that foreign governments might benefit from it or add their own voices to it. To the contrary, the federal government has never interfered with Americans' ability to hear ideas from abroad, even when the purveyors of those ideas intended to influence our social discourse or

political debates. Much less does this Court's precedent suggest that individual Americans can be prevented from collaborating with foreigners to speak in this country, even if to challenge our democratic values or spark social change.

a. "[L]ong settled and established practice is a consideration of great weight" when applying the First Amendment. *Houston Cmty. Coll. System v. Wilson*, 595 U.S. 468, 474-77 (2022) (citation omitted). Without "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription," the government "may not revise the 'judgment of the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'" *Brown*, 564 U.S. at 792 (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010) (alteration adopted)); *see Vidal v. Elster*, 602 U.S. 286, 301 (2024).

We therefore start at the beginning. In 1796, the French ambassador to the United States sought to sway the election to Thomas Jefferson, publishing three letters in a Philadelphia newspaper warning that only Jefferson's election could avoid war with France. *See* Alexander DeConde, *Washington's Farewell, the French Alliance, and the Election of 1796*, Miss. Valley Hist. Rev. 641, 653 (1957). A leading Federalist spokesman responded that "there never was so barefaced and disgraceful an interference of a foreign power in any free country." *Id.* at 653.

George Washington delivered his historic Farewell Address against the backdrop of this French

electioneering. But when he addressed "the insidious wiles of foreign influence," he did not call to ban the foreign speech or to punish the Americans who facilitated it. George Washington, *Farewell Address* 20 (Sept. 19, 1796), https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons_Farewell_Address.pdf. Instead, he urged vigilance, asking the American people "to be *constantly* awake" to foreign influence as "one of the most baneful foes of republican government." *Id.* at 20-21.

Our country's tolerance of foreign speech on issues striking at the core of our democratic ideals persisted throughout the nineteenth century. The Founding generation continued to import and debate foundational political texts such as Montesquieu's *The Spirit of the Laws*, Voltaire's *Essay on Universal History*, and Locke's *Two Treatises of Government*—not to mention legal treatises such as Blackstone's *Commentaries* and Hale's *Pleas of the Crown. See, e.g.*, Letter from Thomas Jefferson to John Garland Jefferson (June 11, 1790), https://founders.archives.gov/documents/Jefferson/01-16-02-0278. Bookstores sold *The Communist Manifesto*, originally published in 1848. *See* Allan Kulikoff, Abraham Lincoln and Karl Marx in Dialogue 1 (2018). And residents throughout the land read and considered the critique of our young country written by a Frenchman, Alexis de Tocqueville, sent here by the French government to study, and perhaps influence, our democracy. *See* Philip C. Kissam, *Alexis de Tocqueville and American Constitutional Law*, 59 Maine L. Rev. 36, 42 (2007).

As the United States became a world power in the twentieth century, it continued to follow the course charted by Washington: It took steps to ensure that Americans could understand and resist foreign advocacy, but it did not ban that advocacy outright. During the run-up to World War II, for example, the Foreign Agent Registration Act (FARA) of 1938 aimed to counter Nazi and communist propaganda seeking to "influence the external and internal policies of this country." H.R. Rep. No. 75-1381, at 2 (1937). The Act "requir[ed] registration of agents for foreign principals" so as "to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda," *Viereck v. United States*, 318 U.S. 236, 241 (1943). *See* Act of June 8, 1938, Pub. L. No. 75-583, 52 Stat. 631. But FARA did not prohibit anyone—American or foreign—from speaking on any topic, so long as the proper disclosures were made.

So too in more recent times. The government, for instance, did not bar *Pravda* or any similar publication during the Cold War. Throughout that period, "[t]he Current Digest of the Soviet Press, with offices in Columbus, Ohio, … provided weekly translations of selected articles from Pravda and other Soviet publications for $515 a year." Andrew Malcolm, *Publisher Decides U.S. Needs English* Pravda, N.Y. Times, Sept. 19, 1985, A16. And today, Americans can access (and publish in) countless sources of foreign-government-affiliated speech—

from the BBC to *China Today* to Al Jazeera—without censorship.[3]

b. The handful of speech-related controversies that have arisen in the United States with regard to foreign adversaries only underscore our tradition of tolerance. One key case is *Lamont v. Postmaster General*, 381 U.S. 301 (1965). There, a federal statute, enacted during the Cold War, required individuals wishing to receive "communist political propaganda" from foreign enemy nations to affirmatively request its delivery from the Post Office. *Id.* at 304. In the government's brief, Solicitor General Archibald Cox "claim[ed] no support for this statute in large public interests such as would be needed to justify a true restriction upon freedom of expression or inquiry." Br. for Appellee at 10, *Lamont v. Postmaster General* (U.S. No. 64-491); *see also Lamont*, 381 U.S. at 309 (Brennan, J., concurring) (noting this concession). Instead, the government argued merely that requiring Americans to request the delivery of foreign propaganda was a minimal and acceptable burden on their constitutional right to receive it. The Court

[3] Other statutes regulating foreign influence in the economy have similarly taken care not to trammel on Americans' ability to receive foreign ideas. The International Emergency Economic Powers Act (IEEPA), for example, allows the President to declare national emergencies to protect the American economy, but carves out the power to "regulate or prohibit, directly or indirectly," the "importation from any country … of any information or informational materials." 50 U.S.C. § 1702(b)(3). That speech-protective carve-out doomed the government's prior effort to invoke IEEPA to ban TikTok. *See Marland*, 498 F. Supp. at 636-41; *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 80-83 (D.D.C. 2020).

rejected even that modest submission as "at war with" the First Amendment, reasoning that Congress lacked any power whatsoever "to control the flow of [foreign] ideas to the public." *Id.* at 306-07.

Meese v. Keene, 481 U.S. 465 (1987), reflects the same disdain for suppression of foreign speech based on its power to persuade. The portion of FARA at issue in that case required films produced by foreign governments to be identified as "political propaganda." *Id.* at 468. A California politician who wished to exhibit "three Canadian motion picture films" produced by a state-run film company argued that the statute's labeling requirement violated the First Amendment. *Id.* at 467. While rejecting that challenge, the Court stressed that Congress had not sought to "prohibit, edit, or restrain" the films—much less discriminated against foreign speech based on any particular viewpoint. *Id.* at 480; *see also* Br. for Appellants at 37, *Meese v. Keene* (U.S. No. 85-1180) (noting that the government "has not prevented appellee from exhibiting these films in any way"). Instead, the law "simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda." 481 U.S. at 480.

There is one blip in this historical tradition of requiring at most disclosure of the source of foreign speech. At the height of the First Red Scare, some Americans were prosecuted for acting as a mouthpiece of a foreign enemy's cause. Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 962-73 (1919). The most notable example was California's prosecution of Anita Whitney.

Whitney belonged to an organization that affiliated with "the Communist International of Moscow" and "adhered to the principles of Communism laid down in the Manifesto of the Third International at Moscow." *Whitney v. California*, 274 U.S. 357, 363, 365 (1927). Working in concert with that foreign adversary, Whitney engaged in public advocacy designed to "spread[] communist propaganda" and "accomplish[] industrial or political changes." *Id.* at 365, 371. This Court sustained Whitney's conviction as consistent with the First Amendment, reasoning that speech tending to "endanger the foundations of organized government" could be punished. *Id.*

But Justice Brandeis, joined by Justice Holmes, wrote separately to explain that the First Amendment actually protected Whitney's speech. 274 U.S. at 372. His concurrence resonates with Washington's parting words: "Those who won our independence," he explained, "believed that the final end of the state was to make men free to develop their faculties" and that "freedom to think as you will and to speak as you think are means indispensable to the discovery of political truth." *Id.* at 375. So "they knew that … it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Id.* Accordingly, Justice Brandeis posited that the First Amendment protects all politically laden speech—even speech in conjunction with foreign adversaries—"unless the incidence of the evil to be apprehended is so imminent

that it may befall before there is opportunity for full discussion." *Id.* at 377. That class of protected speech included "advocat[ing] the desirability of a proletarian revolution by mass action at some date necessarily far in the future." *Id.* at 379.[4]

There is no question that the Brandeis/Holmes view has prevailed in the court of history—as well as in courts of law. Within a few decades, the Court observed that "there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale," *Dennis v. United States*, 341 U.S. 494, 507 (1951), and over fifty years ago it described the *Whitney* majority's First Amendment holding as "thoroughly discredited," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The Court thus now includes the case among those that have been squarely overruled. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 265 n.48 (2022).

[4] In two dissents around the same time, Justice Holmes put the point this way: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Gitlow v. New York*, 268 U.S. 652, 673 (1925). "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." *Abrams v. United States*, 250 U.S. 616, 628 (1919).

3. The Act cannot be reconciled with this principle.

The Act, and the D.C. Circuit's defense of it, is a sharp break from our history and tradition—and an unfortunate echo of *Whitney*.

a. The Act requires the precise suppression of speech that Solicitor General Cox acknowledged in *Lamont* that the government could not defend (and that the Court no doubt would have seen as all the more "at war with" the First Amendment). 381 U.S. at 307. And neither President Washington nor Justice Brandeis would have recognized this Act—which suppresses foreign ideas and "discourage[s] thought"—as consonant with the American tradition. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring). Finally, unlike FARA, the Act does not seek to address any potential problems with "covert" foreign adversary speech through the traditional remedy of disclosure. Instead, it seeks to ban that speech outright. In short, the court of appeals' blank check for the government to police "a foreign adversary's ability to manipulate content seen by Americans," J.A. 25, is itself foreign to American principles.

It is no answer to point, as Chief Judge Srinivasan did in his separate opinion below, to our tradition of regulating foreign ownership of radio stations and wired transmission lines. J.A. 67-71. Most of those examples relate to the broadband spectrum. And this Court has "recognized special considerations for regulation" of that medium—namely, the scarcity of channels available and the resulting need for licensing. *Id.* (quoting *Reno*, 521 U.S. at 868). Those considerations have no application here, given the

internet's unlimited capacity for speech. *Reno*, 521 U.S. at 868. The only additional example provided in the separate opinion below—authorizations for wired transmission lines—arises in another setting where technological limitations exist. It also reflects non-speech concerns, namely that a foreign-owned provider might damage or interfere with critical physical infrastructure. *See, e.g.*, *China Mobile Int'l (USA) Inc.*, 34 FCC Rcd. 3361, 3374-75 (2019). Those concerns are not present here either.

b. Nor is there any force to the D.C. Circuit's suggestion that the content-manipulation rationale "vindicates" First Amendment values because the Chinese government's hypothetical future actions here would be akin to a domestic government interfering with the speech of private actors. J.A. 43. Foreign governments are not subject to the First Amendment. By contrast, *NetChoice* confirms that the Constitution prohibits a domestic government from regulating to correct a perceived skew in speech. 603 U.S. at 741; *see supra* at 32-33. So regardless of whether China has any right to speak in this country, the First Amendment prohibits Congress from suppressing the speech of Americans like petitioners in pursuit of a "better speech balance"—that is, a mix of voices not potentially influenced by the Chinese government—on TikTok. *NetChoice*, 603 U.S. at 741.

c. Neither does this Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), provide any shelter for the D.C. Circuit's decision. In that case, this Court rejected a First Amendment challenge to the federal law banning the provision of material support to designated foreign terrorist

organizations, accepting the "considered judgment" of the political branches that such aid threatens our "national security." *Id.* at 34-36. Citing that decision, the D.C. Circuit reasoned that the government's content-manipulation rationale has purchase because it, too, is grounded in "national security" concerns. J.A. 33-38, 47.

For two primary reasons, however, this case is nothing like *Humanitarian Law Project*.

First, the law in that case was designed to avert "terrorism"—a harm rooted in violent conduct, not mere ideas. 561 U.S. at 35. The holding in that case thus accorded with the Court's prior suggestions that speech favoring the interests of a foreign adversary can be suppressed if it would inflame a "war" or incite "serious violence" aimed at overthrowing our government—the national-security harms that this Court's doctrine condones as reasons for censoring speech. *N.Y. Times Co. v. United States*, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) (Pentagon Papers case); *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring). Here, by contrast, the supposed threat is nothing of the kind. The government is not trying to prevent China from invading our country, publicizing the location of our battleships or nuclear arsenal, or blowing up our hubs of transportation or commerce. Instead, the concern the D.C. Circuit credited is merely that the Chinese government might use TikTok to try to affect "this country's public discourse," "undermine trust in our democracy," or "exacerbate social divisions." C.A. Gov't Br. 35, 38.

A few concrete examples illustrate the point. Imagine—as the government seems to—the People's

Republic of China manipulating the platform to highlight the following hypothetical videos:

- A naturalized U.S. citizen, born in China and sympathetic to its interests, argues that "the United States is using Taiwan to undermine China's rise" to greater geopolitical power on the world stage. C.A. Gov't Br. 22.
- A member of a small church who "believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military," shows footage of American soldiers struggling in battles and contends our military is weak because it allows gay men and lesbians to serve. *Cf. Snyder v. Phelps*, 562 U.S. 443, 448 (2011).
- An owner of a semiconductor business in California presents charts and graphs showing the increased price of goods if steep tariffs on imports from China are allowed to take effect. *Cf. Va. State Bd. of Pharmacy*, 425 U.S. at 752.
- A political activist burns an American flag to protest against the United States' support for capitalism. *Cf. Texas v. Johnson*, 491 U.S. 397 (1989).
- A campus speaker advocates "mass action" to reinvent the United States' republican system of government and establish, "through a 'revolutionary dictatorship of the proletariat,' the system of Communist Socialism." *Cf. Gitlow*, 268 U.S. at 658.

All of these hypothetical videos seem to fit within the government's content-manipulation concern. But

Congress obviously lacks the power to censor them, even if showing them to Americans might serve China's interests. *See supra* at 30-40. Even more obviously, Congress may not ban an entire speech platform just to prevent such videos from possibly being featured there more than they otherwise would.

Second, echoing *Brandenburg*'s more general "imminent lawless action principle," this Court has explained that a national-security justification for suppressing speech "must not be remote or even probable; it must immediately imperil." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)); *see also N.Y. Times Co.*, 403 U.S. at 730 (Stewart, J., concurring) (risk must threaten "direct, immediate, and irreparable damage"). Or, in the words of Justice Brandeis, "no danger flowing from speech" justifies its suppression on national-security grounds "unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring). Thus, *Humanitarian Law Project* highlighted the requirement of immediacy and accepted the law as necessary to "prevent *imminent* harms," not speculative risks. 561 U.S. at 35 (emphasis added).

No imminent threat, however, exists here. "[T]he Government acknowledges that it lacks specific intelligence that shows the PRC has in the past or is now coercing TikTok into manipulating content in the United States." J.A. 47. Nor does the government suggest China plans to do so anytime soon. To the contrary, Congress has allowed the platform to

continue operating for 270 days after the Act's effective date (and allowed the President to extend that delay to 360 days upon certain findings). Act § 2(a)(2)-(3). The platform also operated during the 2024 presidential election, and both parties' presidential candidates (who were presumably regularly briefed on genuine national-security threats) actively campaigned on TikTok.

At the very most, the government seems to worry that content on TikTok might be manipulated sometime in the future to build support for some policy change or protest movement. Even if the government's "informed judgment" in that regard were accurate, J.A. 47 (quoting *Humanitarian Law Project*, 561 U.S. at 34), that speculative possibility would not be enough to shutter the platform. Those would be classic scenarios in which "there [would] be time to expose through discussion the falsehood and fallacies [of any recommended posts], to avert the evil by the processes of education"—in other words, to apply the remedy of "more speech." *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring). That being so, the government's content-manipulation concern falls far short of what the First Amendment requires to allow the suppression of speech.

d. One final thought exercise confirms the illegitimacy of the government's content-manipulation rationale. Only a fraction of the content on TikTok could even plausibly be put to the task of trying to advance China's geopolitical interests. Most of it consists of things like dance videos, home-repair tutorials, and montages of weekend getaways. Accordingly, if the government's concern were valid,

it would, in theory, be easily addressed through narrow tailoring. All Congress would need to do is ban U.S. users or TikTok itself from disseminating the small percentage of videos that might influence discourse on "political" issues or "exacerbate social divisions." C.A. Gov't Br. 35-36.

Yet a moment's contemplation reveals that solution to be constitutionally intolerable. Surely Congress cannot single out and ban speech simply because it might influence political discourse, or amplify societal divisions. And that is exactly the problem with the Act.

B. Data-collection concerns cannot save the Act's constitutionality.

If the content-manipulation rationale falls, the Act falls with it. That is so for two independent reasons. First, the government cannot show that Congress would have targeted TikTok absent concerns about the content on the platform. Second, the Act is in any event not the least restrictive means of advancing any data-collection interest.

1. The data-collection rationale cannot itself sustain the Act.

As Chief Judge Srinivasan observed below, "the government makes no argument that the Act's application to TikTok should be sustained based on the data-protection interest alone." J.A. 78 (Srinivasan, C.J., concurring in part and concurring in the judgment). There are good reasons for that governmental choice.

For one thing, the Court's precedents hold that where one basis for a government action is

constitutionally impermissible, the government can sustain the action only if it can show that it "would have reached the same decision" even "in the absence" of that improper motive. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). And it is entirely implausible that a Congress concerned solely with data security would have passed the same Act.

That much is clear from the text of the statute. Again, the statute targets only applications that host expressive "content" (and, within that category, singles out TikTok for special scrutiny). Act § 2(g)(2)(A)(i), (g)(3); *see supra* at 24-26. And the statute carves out certain categories of content—"product reviews, business reviews, or travel information and reviews"—from its sweep. Act § 2(g)(2)(B). These are not rational lines from a data-security perspective: Americans' data security can equally be imperiled by their use of an e-commerce site (which is not subject to the Act) or a review platform (which is excluded from the Act) as from a social-media platform. And there are, in fact, Chinese e-commerce sites that have millions of American users and collect reams of those users' data. *See* J.A. 339-41, 461-62.

The "qualified divesture" provision also precludes upholding the Act based on data-protection concerns alone. That provision precludes any purchaser from obtaining input from TikTok's ownership concerning the "content recommendation algorithm." Act § 2(g)(6)(B). So even if all purported data-security concerns were addressed, the Act would still require

changes in how TikTok cultivates "content." This requirement confirms that Congress would not have passed the Act solely for data-security reasons.

The Court's underinclusivity precedents reinforce this analysis. They hold that a law's "underinclusiveness can raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015) (quoting *Brown*, 564 U.S. at 802). In such circumstances, the fact that a "regulation is wildly underinclusive when judged against its asserted justification … is alone enough to defeat it." *Brown*, 564 U.S. at 802. So, "[i]n a textbook illustration of that principle," the Court "invalidated a city's ban on ritual animal sacrifices because the city failed to regulate vast swaths of conduct that similarly diminished its asserted interests in public health and animal welfare." *Williams-Yulee*, 575 U.S. at 448 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 543-47 (1993)).

The same sort of problem is present here. The court of appeals asserted that "TikTok does not identify any company operating a comparable platform in the United States with equivalent connections" to the Chinese government. J.A. 42. But as just noted, that is simply not true. Congress failed to regulate "vast swaths of conduct," *Williams-Yulee*, 575 U.S. at 448, that similarly implicate any asserted interest in data collection and security. There is no reason why TikTok would have been a more "pressing concern" than large e-commerce companies, *id.*, especially those actually based in China.

Last but not least, statutes may not "single[] out" expressive entities for the imposition of regulatory burdens having nothing to do with speech. *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987). In *Minneapolis Star & Tribune Co. v. Minn. Commissioner of Revenue*, 460 U.S. 575 (1983), for example, the Court struck down a law "target[ing] individual publications" for special taxation that did not apply to other publications, much less other businesses. *Id.* at 585, 592-93. Similarly, in *Arkansas Writers' Project*, the Court invalidated a tax that singled out particular media outlets. 481 U.S. at 230-31. In both cases, the State argued that its speech-agnostic need to raise revenue justified the taxes. But in each case, the taxes' structure—identifying specific publishers for unfavorable tax treatment—foreclosed the State's purportedly neutral justification.

This prohibition against singling out expressive entities for unjustified disfavored treatment applies with full force here. The data-security justification is just like the revenue-raising justification in *Minneapolis Star* and *Arkansas Writers' Project*: an implausible reason for the government to have acted as it did, given the underinclusivity of the statute and its particular targeting of forums for expression. Consequently, the government has been right not to maintain that its data-security argument can sustain the Act by itself.

2. The data-collection rationale does not satisfy means-ends scrutiny.

Even if the data-security justification could stand on its own, it would not save the Act because the Act is not "narrowly drawn to serve that interest." *Brown*, 564 U.S. at 799.

For one thing, in the same omnibus package as the Act, Congress prohibited any data broker from selling, transferring, or otherwise making available personally identifiable sensitive data of an American citizen to any foreign adversary country or to any entity controlled by such a country. *See* Pub. L. No. 118-50, Div. I, § 2, 138 Stat. at 960. If Congress had expressly prohibited social-media platforms from misusing data in this manner, that would have effectively addressed any data-security concern.

The D.C. Circuit offered no real answer to this narrow-tailoring argument. The court stated that Congress's choice to enact the data-broker law "supports our conclusion that the Act reflects a good-faith effort on the part of the Government to address its national security concerns." J.A. 56. But the question under the First Amendment is not whether Congress made a "good-faith effort" to address its purported concerns. Rather, "it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000). The D.C. Circuit's "good faith" approach did not hold the government to that burden—and so misjudged whether the Act's restriction on speech is lawful.

Requiring TikTok to disclose the potential data-collection risks to users would have also dealt with

any problem the government is actually seeking to address. Disclosure is the typical remedy when it comes to potential consumer harms. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985); *see also Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in the judgment) ("The Government has long required commercial disclosures to prevent consumer deception or to ensure consumer health or safety."). So too here: To the extent Americans are choosing to share sensitive data with the app, a proper warning would presumably motivate anyone genuinely at risk of something like targeted "blackmail" or "corporate espionage," J.A. 39, to take any necessary steps to protect themselves.

Faced with this alternative, the D.C. Circuit's opinion asserted that "covert manipulation of content is not a type of harm that can be remedied by disclosure." J.A. 54. Even as to content manipulation, that statement is quite wrong, as FARA shows. *See supra* at 36. In any event, the statement is no response at all to the point that disclosure could address any *data-security* concern.

Even if a disclosure requirement would not completely address any data-security concerns, banning TikTok altogether as a means of addressing such concerns would still be impermissible. A less-restrictive alternative need not be a "fail-safe method of guaranteeing" the government's interest is achieved. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 130 (1989). Instead, it must simply appear to be a reasonable alternative to a "total ban" on speech. *Id.* at 129. And there is no evidence here that

Congress even considered whether various technological steps TikTok has taken to guard against misuse of data are sufficient to meet any data-security concerns. That being so, the ban on this legislative record "far exceeds that which is necessary" to adequately serve any legitimate government need, *id.* at 131, and to justify preventing millions of Americans from exchanging ideas with others on what for many is their central mode of free expression.[5]

* * *

Petitioners are well aware the United States is currently involved in an "intense geopolitical competition" with China. C.A. Gov't Br. 20. But this is hardly the first—or even the most intense—such competition in our history. It is not even the first competition against a powerful communist regime seeking "to undercut U.S. influence, drive wedges between the United States and its partners, and foster norms that favor [its] authoritarian system." *Id.* at 21 (internal quotation marks and citation omitted).

As in years past, the political branches have any number of tools at their disposal as they strategize

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[5] The D.C. Circuit's holding that the Act also permissibly bans the ByteDance app CapCut, which creators use to edit their videos, see J.A. 566, 586, compounded the court's error. The court of appeals reasoned that "petitioners fail[ed] to demonstrate that neither of the Government's two national security concerns implicate CapCut." J.A. 56. It is the government's burden, however, not challengers', to show its concerns apply to each expressive platform the Act bans and that no less-restrictive alternatives are available. The government has not done so here.

regarding this latest competition. Petitioners are simply here to say that stripping millions of Americans of their First Amendment rights is not among them. Nothing like the Act here has ever been countenanced, and its suppression of Americans' speech flies in the face of our history, tradition, and precedent. This Court should hold that the Act is unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

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