No. 24-656

IN THE

Supreme Court of the United States

TIKTOK INC. AND BYTEDANCE LTD.,

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 D.C. Circuit

BRIEF FOR PETITIONERS

Alexander A. Berengaut
David M. Zionts
Megan A. Crowley
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Noel J. Francisco
Counsel of Record
Hashim M. Mooppan
Kelly Holt Rodriguez
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

Counsel for Petitioners

(Additional Counsel Listed in Signature Block)

QUESTION PRESENTED

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

CORPORATE DISCLOSURE STATEMENT, PARTIES TO THE PROCEEDINGS, AND RELATED PROCEEDINGS

Petitioners, who were Petitioners in the lead case in the D.C. Circuit, are TikTok Inc. and ByteDance Ltd. Pursuant to Rule 29.6, Petitioner TikTok Inc. is a wholly owned subsidiary of TikTok LLC; TikTok LLC is a wholly owned subsidiary of TikTok Ltd.; and TikTok Ltd. is a wholly owned subsidiary of Petitioner ByteDance Ltd., a privately held corporation. No publicly traded company owns 10% or more of Petitioners' stock.

Respondent, who was Respondent in the D.C. Circuit, is Merrick B. Garland, in his official capacity as Attorney General of the United States.

Related proceedings in the D.C. Circuit were *TikTok Inc. v. Garland*, No. 24-1113, consolidated with *Firebaugh v. Garland*, No. 24-1130, and *BASED Politics Inc. v. Garland*, No. 24-1183.

Petitioners in the consolidated proceedings below were Brian Firebaugh, Chloe Joy Sexton, Talia Cadet, Timothy Martin, Kiera Spann, Paul Tran, Christopher Townsend, and Steven King (Petitioners in *Firebaugh v. Garland*, No. 24-1130); and BASED Politics Inc. (Petitioner in *BASED Politics Inc. v. Garland*, No. 24-1183). They all are Petitioners in the consolidated case in this Court. No. 24-657.

The D.C. Circuit's opinion and judgment denying petitions for review was entered December 6, 2024. The D.C. Circuit's order denying injunction pending this Court's review was entered December 13, 2024.

A parallel challenge remains pending in the D.C. Circuit. *Kennedy v. Garland*, No. 24-1316.

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The D.C. Circuit's opinion denying the petitions for review (JA 1-92) has not yet been reported and is available at 2024 WL 4996719.

JURISDICTION

The D.C. Circuit issued its judgment on December 6, 2024. Petitioners timely filed an application for injunctive relief on December 16, 2024, which this Court treated as a certiorari petition and granted on December 18, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix to this brief reproduces the First Amendment, U.S. Const. amend. I, and the Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, div. H, 138 Stat. 895, 955-60 (2024) (the Act).

INTRODUCTION

In an unprecedented action, Congress has ordered the shutdown of one of the most significant speech platforms in America. The Government concedes, moreover, that it did so partly based on the fear that the platform's American publisher could be indirectly pressured by China to alter the mix of "content" to influence American minds. That justification is at war with the First Amendment. Petitioners do not contest Congress's compelling interest in protecting this Nation's security, or the many weapons it has to do so. But that arsenal simply does not include suppressing the speech of *Americans* because *other Americans* may be persuaded. At minimum, the Government cannot so burden speech *without even considering* less-restrictive alternatives, which it manifestly failed to do here. If, for example, the danger is secrecy, the tried-and-true solution is sunlight, not suppression—as Congress concluded decades ago when confronting the issue of Americans serving as agents of a foreign power. History and precedent teach that, even when national security is at stake, speech bans must be Congress's last resort. For these and other reasons detailed below, the Act is unconstitutional as applied to Petitioners.

TikTok is an online platform that is one of the Nation's most important venues for communication. It is provided in the U.S. by Petitioner TikTok Inc., an American company that is indirectly owned by Petitioner ByteDance Ltd., which is neither a Chinese company nor owned by one. Starting on January 19, 2025, the Act will ban Petitioners from operating TikTok in this country. Shuttering the platform will silence the speech of Petitioners and

the more than 170 million monthly American users that communicate there about politics, arts, commerce, and other matters of public concern—as illustrated by the massive interest expressed during the recent presidential election.

The D.C. Circuit upheld the Act based on alleged "risks" that China could exercise control over the American platform by pressuring Petitioners' foreign affiliates. JA 32-33. The Government concedes that it has no evidence China has ever attempted to do so. But it fears that, in the future, China "could" try to manipulate the mix of content disseminated on TikTok to influence American users or try to misappropriate their data. JA 650. The D.C. Circuit's decision accepting this rationale flouts this Court's free-speech precedents.

The D.C. Circuit started correctly by assuming the Act is subject to strict scrutiny. JA 31. The Government conceded that TikTok Inc. is a *bona fide* "domestic entity operating domestically" that is "engaged in expressive activity" through "the curation of content on [the platform]." JA 26-27. Nor can the Government credibly dispute that the Act imposes a content-based restriction on TikTok Inc. The Act applies to "covered" applications and websites that (like TikTok) make the expressive choice to permit users to generate or share "text, images, videos, … or similar content," with an exception for product, business, or travel reviews. JA 16 & n.4 (quoting Sec. 2(g)(2)(A)(i)). The Act then "singles out TikTok … for disfavored treatment," JA 26, by banning Petitioners from operating TikTok without giving them the benefit of procedural and substantive standards afforded to other covered

speakers, Sec. 2(g)(3)(A)-(B). And lest there be any doubt, the Government defends the Act partly on the ground that it "limit[s] [China's] ability to manipulate content covertly on the TikTok platform" to "interfere with our political discourse." JA 29-30. As the D.C. Circuit emphasized, this "justification" for the Act itself "references the content of TikTok's speech." JA 30.

Simply put, TikTok Inc. is a U.S. company exercising editorial discretion over a U.S. speech platform. The First Amendment fully protects it from Congress's attempt to ban its operation of the platform based on its purported susceptibility to foreign influence. Congress "may not interfere with private actors' speech" to "improve … the speech market" by eliminating any risk of "skew[]" from pressure by China. *See Moody v. NetChoice*, 603 U.S. 707, 741 (2024). Suppose, for example, Congress forced an American newspaper owner to divest based on fears that a foreign power had leverage to secretly pressure him or his foreign staff to alter the content. That would obviously trigger First Amendment scrutiny. And First Amendment principles do not change for online platforms. *See id.* at 733, 742-43.

The D.C. Circuit fundamentally erred by holding that the Act satisfies strict scrutiny. This Court has upheld speech restrictions under the Constitution's most demanding standard only in rare, narrow circumstances that are far afield from silencing a speech platform used by half the country. To be sure, the D.C. Circuit portrayed its decision as "fact-bound," saying there is "persuasive evidence" of "national security risks" in "the public record." JA 32, 58, 65. But the specter of threats from China

cannot obscure the threat that the Act itself, and the decision below upholding it, pose to all Americans. The court ignored critical gaps in the record before Congress during the Act's hasty passage. Worse, the court's flawed legal rationales dilute heightened scrutiny in multiple ways not limited to this context.

First, the D.C. Circuit held that Congress could *ban* Petitioners' operation of TikTok based on the fear that China could, in the future, "covert[ly]" manipulate content to influence Americans. JA 54. But the Act is grossly overbroad for that interest. An *express disclosure* is the time-tested, less-restrictive alternative the First Amendment requires to address a concern the public is being misled about the source or nature of the speech they receive—including in the foreign-affairs and national-security contexts.

Second, the D.C. Circuit held that Congress could single out TikTok as presenting the "most pressing concern" that China may misappropriate the online data of Americans. JA 42. But the Act is grossly underinclusive for that interest. It *categorically exempts* any application or website that does not contain user-generated or user-shared content or that primarily addresses product, business, or travel reviews—even though those *content-based* categories have nothing to do with the scope of data collected or its relative security.

Third, the D.C. Circuit failed to hold the Government to *its* burden of proving that it considered less-restrictive alternatives and found them ineffective. Even apart from disclosures, for example, the court identified no reason why the Act's "generally applicable provision[]" regulating

adversary-controlled applications was insufficient to address the purported national-security risks posed by TikTok. JA 58. Yet the court nevertheless upheld Congress's decision to "single[] out" TikTok and automatically ban Petitioners from operating it, treating them worse than all other speakers. *Id.*

Indeed, when (1) the singling out of TikTok for uniquely unfavorable treatment is combined with (2) the gross overbreadth as to covert Chinese content manipulation and (3) the gross underinclusion as to data protection, the clear inference is that Congress passed the Act for an entirely different reason. These factors collectively suggest Congress targeted TikTok based on disagreement with the substance of the content posted by TikTok's users and TikTok Inc.'s alleged editorial choices in disseminating that content. The legislative record strongly suggests this too, including in statements contained in the only written report and made by numerous Members. Yet Congress has no legitimate interest in disrupting the U.S. operator of a U.S. speech platform to alter editorial choices about the mix of content to disseminate—whether or not Congress deems some aspect of that content mix foreign propaganda.

This Court's precedents make that clear, and it should reaffirm the principle here. At the very least, the Court should explain that, if Congress were truly motivated by valid national-security interests, it needed to do far better work either tailoring the Act's restrictions or justifying why the only viable remedy was to prohibit Petitioners from operating TikTok. In sum, the Court should hold that the Act's TikTok-specific provision is unconstitutional.

STATEMENT OF THE CASE

A. TikTok Is A Unique Speech Platform Used By 170 Million Americans

TikTok is an online platform enabling users to create, share, and view videos. JA 484. Users can further communicate by commenting on videos, "tagging" others to suggest they view a video, and creating responsive videos. JA 485. Launched in 2017, TikTok has grown into one of the world's most widely used speech platforms, with more than 170 million monthly American users and more than 1 billion users worldwide. JA 486-87.

Americans use TikTok to communicate about all manner of topics—from culture and sports, to politics and law, to commerce and humor. For instance, people of diverse faiths use TikTok to discuss their beliefs with others.[1] Recovering alcoholics and individuals with rare diseases form support groups.[2] Many also use the platform to share videos about products, businesses, and travel. *See* JA 490-91.

Seventeen percent of U.S. adults regularly get news from TikTok—including 39 percent of adults younger than 30.[3] "[S]cores of politicians" spoke on

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[1] J. Reynolds, *TikTok Is Helping Us Reach Millions with the Gospel*, Premier Christianity (Aug. 22, 2022), https://www.premierchristianity.com/real-life/tiktok-is-helping-us-reach-millions-with-the-gospel/13647.article.

[2] AJ Willingham, L. Asmelash, & S. Andrew, *The Biggest Ways TikTok Has Changed American Culture*, CNN (Apr. 2, 2023), https://perma.cc/BSH3-5VYX.

[3] R. Leppert & K. Matsa, *More Americans – Especially Young Adults – Are Regularly Getting News On TikTok*, Pew Rsch. Ctr. (Sept. 17, 2024), https://perma.cc/DZM7-UNWD.

TikTok leading up to November's election, causing traditional media to dub it "the TikTok election."[4] Indeed, the two major presidential candidates used TikTok so effectively in their campaigns that their videos were viewed over *6 billion* times.[5]

Because TikTok is a globally integrated platform, users in the U.S. can seamlessly access content created around the world, and vice versa. JA 486. In 2023, American creators uploaded more than 5.5 billion videos, viewed more than 13 trillion times—half by users outside the country. JA 487. American users viewed foreign content more than 2.7 trillion times, more than a quarter of their views. *Id.*

B. TikTok Inc. Is An American Company That Provides The TikTok Platform In This Country

TikTok is provided in the United States by TikTok Inc.—an American company incorporated and headquartered in California, with thousands of U.S. employees. JA 483. TikTok Inc.'s ultimate parent is ByteDance Ltd., a privately held holding company incorporated in the Cayman Islands that owns subsidiaries worldwide, including in China. *Id.* ByteDance Ltd. ownership is held 58% by institutional investors around the world; 21% by its global workforce; and 21% by a founder who lives in Singapore and is a Chinese national (Yiming Zhang).

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[4] S. Maheshwari & M. Malone Kircher, *The Election Has Taken Over TikTok. Here's What It Looks Like.*, N.Y. Times (Oct. 21, 2024), https://perma.cc/5SCL-XNWC.

[5] T. Hunter, *How Harris won at TikTok but lost the election*, Wash. Post (Nov. 8, 2024), https://www.washingtonpost.com/technology/2024/11/08/harris-tiktok-election-loss-trump/.

JA 484. No arm of the Chinese government has an ownership stake—directly or indirectly—in TikTok Inc. or ByteDance Ltd. *See* JA 483-84.[6]

Users view content on TikTok primarily through its "For You" feed, which presents each user with videos curated specifically for them by TikTok's innovative technology, including a proprietary recommendation engine. JA 489. Unlike other platforms, TikTok does not host written posts and is not as focused on users' interactions with existing friends. *Id.* Instead, TikTok facilitates users' discovery and exploration of new content and communities that interest them. *Id.*

To provide assurance that the Chinese government can exercise no influence over the U.S. platform, TikTok Inc.'s U.S. employees, subsidiaries, and contractors control it. While the algorithm powering the recommendation engine is developed by a global engineering team, JA 499, U.S. entities perform the critical steps of: reviewing and approving the algorithm in the course of operationalizing it onto the U.S. platform; customizing the recommendation engine for use in this country; and developing and overseeing content-moderation policies, JA 493, 499, 506.

The recommendation engine for the U.S. TikTok platform is subject to the control of TikTok Inc.'s U.S. subsidiary, TikTok U.S. Data Security Inc.

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[6] In this brief, "ByteDance Ltd." refers to the Cayman holding company. "ByteDance" refers to the ByteDance group, including ByteDance Ltd.'s subsidiaries and affiliates. "TikTok Inc." refers to the U.S. corporation providing the U.S. TikTok platform. "TikTok" refers to the online platform.

(TTUSDS), created to control access to protected U.S. user data and monitor the platform's security. JA 504-06, 778. The U.S. recommendation engine, along with all the other source code for the U.S. platform, is stored in the Oracle cloud—a collection of U.S. servers operated by TikTok Inc.'s U.S. contractor, Oracle Corporation. *Id.* TTUSDS has full access to the source code and vets changes to the recommendation engine. *Id.* The recommendation engine selects from the content TikTok Inc. makes available on the U.S. platform, which is moderated under publicly available Community Guidelines developed and implemented under its U.S. employees' direction. JA 493-94, 497-98.

C. Petitioners Have Worked To Address The Government's National-Security Concerns

Protecting against platform misuse and securing data are industry-wide issues. They are not unique to TikTok, and the uncontested record shows that "TikTok's approach for dealing with these issues is in line with—and in many respects markedly better than—industry best practices." JA 479. As the Government's declarants admitted, there is no evidence that any foreign adversary has manipulated the content Americans see on the platform or misappropriated their private data. *See* JA 628 ("no information that" China has "coerce[d] ByteDance or TikTok to covertly manipulate the information" on TikTok in the U.S.); JA 640 (China is "not reliant on ByteDance and TikTok to date" to "engage in … theft of sensitive data"); JA 650 (raising only "potential risk" that China "could" abuse TikTok in the future).

Since 2019, Petitioners have worked cooperatively with the U.S. Government to address its fears about whether China could manipulate the mix of content on the U.S. platform or access U.S. user data. From January 2021 to August 2022, Petitioners and the Committee on Foreign Investment in the United States (CFIUS) engaged in an intensive, fact-based process to develop a responsive National Security Agreement (NSA). JA 449, 502-04. The result was an approximately 90-page draft with detailed annexes. JA 236-338, 426.

As explained by Christopher Simkins, a former DOJ attorney who led the agency's participation in many CFIUS matters, the NSA would "effectively mitigate[] national security risk associated with" TikTok; it would do so through "reliance on multiple trusted third parties," "complex and thorough technical mitigations," and "unprecedented oversight, monitoring, and very rigorous enforcement mechanisms." JA 449. All protected U.S. user data (defined in the NSA) would be stored in the Oracle cloud, a U.S.-government-approved partner. JA 241, 284. That data would be overseen by the newly created TTUSDS, supervised by a special board composed of members subject to U.S. Government approval. JA 247-48. The NSA would guard against foreign manipulation of TikTok's content-moderation practices, recommendation engine, and other source code. JA 267-79. The NSA authorizes significant monetary and other penalties for non-compliance. JA 308.

During the negotiations, Petitioners began to voluntarily implement many of the NSA's measures not requiring U.S. Government involvement. JA

504. That effort, called "Project Texas," has cost more than $2 billion. *Id.* The NSA was never signed, however, because CFIUS stopped engaging in September 2022, without explaining why. C.A. Petrs. App. 417. Then in March 2023, CFIUS representatives informed Petitioners that "senior government officials" above them had demanded divestment. *Id.* The Government never explained why the NSA was inadequate or responded meaningfully to Petitioners' objections concerning divestment's feasibility. *Id.* at 418-25.

D. Congress Banned Petitioners From Operating TikTok In America

On March 5, 2024, a bill to ban TikTok was introduced in the House of Representatives. H.R. 7521, 118th Cong. (2024). Six weeks later, the House packaged a nearly identical bill with must-pass foreign aid. Congress quickly passed that omnibus bill, and the President signed the Act into law on April 24, 2024. *See generally* Pub. L. No. 118-50.

The Act prohibits mobile application stores and internet hosting services from providing services for distribution, maintenance, or updating of "foreign adversary controlled applications." Sec. 2(a)(1). Section 2(g)(3) creates two tiers of "foreign adversary controlled application[s]."

The first tier singles out one corporate group: "ByteDance[] Ltd.," "TikTok [Inc.]," and affiliates. Sec. 2(g)(3)(A). The Act deems any application or website they operate to be covered. *Id.*

The second tier creates standards and procedures for the President to designate any other application (or website). Sec. 2(g)(3)(B). An application must be

operated by a "covered company" that is "controlled by a foreign adversary." Sec. 2(g)(3)(B)(i). A company is "controlled by a foreign adversary" if it is domiciled or based in a listed adversary country, is at least 20% owned by such persons, or is "subject to the direction or control of" such persons. Sec. 2(g)(1). A "covered company" operates an application that, *inter alia*, allows users "to generate, share, and view text, images, videos, real-time communications, or similar content." Sec. 2(g)(2)(A)(i). But there is an exclusion for companies that "operate[] [an application] whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews." Sec. 2(g)(2)(B).

If these standards are met, the President may designate an application by determining that the company operating it "present[s] a significant threat to the national security of the United States." Sec. 2(g)(3)(B)(ii). Before doing so, the President must issue "a public notice" proposing the designation and submit a "public report to Congress" 30 days in advance, describing, *inter alia*, "the specific national security concern involved." *Id.* The President's determination is subject to judicial review. Sec. 3(a).

The Act exempts a "foreign adversary controlled application" if the company operating it executes a "qualified divestiture." Sec. 2(c)(1). To qualify, the President must determine that the divestiture (i) results in the application "no longer being controlled by a foreign adversary," and (ii) "precludes the establishment or maintenance of any operational relationship" between the application's U.S. operations "and any formerly affiliated entities that are controlled by a foreign adversary." Sec. 2(g)(6).

For Petitioners' applications, the Act takes effect 270 days from enactment—January 19, 2025. Sec. 2(a)(2)(A). The President may extend this deadline for 90 days if he determines certain conditions are met. Sec. 2(a)(3). Congress also included a severability clause: if the Act's TikTok-specific provision is held invalid, its generally-applicable provision could still be applied to TikTok. Sec. 2(e).

If the Act takes effect, its prohibitions will apply to the U.S. TikTok platform so long as TikTok Inc. or ByteDance Ltd. are directly or indirectly operating it. Sec. 2(g)(3)(A). And pursuing a qualified divestiture would preclude TikTok Inc. from maintaining any operational relationship with ByteDance affiliates, "including any cooperation with respect to the operation of a content recommendation algorithm or an agreement with respect to data sharing." Sec. 2(g)(6)(B). The Government has never contested record evidence that this is technologically and commercially infeasible for TikTok Inc. within the Act's timeframe. *See* C.A. Gov't. Br. 60-61; JA 373-74, 410, 512-15; C.A. Petrs. App. 611-16.

Severing the operational relationship would preclude "thousands of ByteDance employees" from supporting the U.S. TikTok platform through continued algorithm development and other activities. JA 514-15. It would take "several years for an entirely new set of engineers to gain sufficient familiarity with the source code" to keep a U.S.-only TikTok safe and functional, and they would still "need access to custom-made ByteDance software tools." JA 515. In addition, because TikTok Inc. would be unable to have the necessary data-sharing agreement with ByteDance to show global content to

its American users and vice versa, the U.S. TikTok platform would become a content "island": American users would be unable to access global content, and American creators would be unable to reach global audiences. JA 512-13. Without the "rich pool of global content" that "translates to more users," a U.S.-only TikTok would be "significantly less attractive to global advertisers," rendering it unable to compete with its global competitors. JA 513-14. In short, if the Act's prohibitions take effect, they will "render the TikTok platform inoperable in the United States." JA 506-07.[7]

E. Legislators Repeatedly Expressed Disagreement With The Content On TikTok

Unlike other instances where Congress legislated in sensitive First Amendment areas, the hastily passed Act includes no specific findings or statements of purpose. The only written legislative history is a House committee report. It focused on the potential that "foreign adversary controlled applications" "can be used" "to collect vast amounts of data on Americans, conduct espionage campaigns, and push misinformation, disinformation, and propaganda on the American public." JA 210-11.

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[7] Before the D.C. Circuit ruled, the Government never disputed that, absent a qualified divestiture, the Act would require the U.S. TikTok platform's immediate shutdown on January 19, 2025. But in opposing an injunction pending further review, it suggested that existing users might be able to use their current app versions for some time before those become inoperable. C.A. Gov't Inj. Opp. 21 & n.2. Regardless, there is no serious dispute that, absent relief from this Court (or the President), the Act will imminently destroy TikTok as it now exists.

Meanwhile, numerous legislators expressed varying (and misinformed) concerns about TikTok, including grounds that discriminated on viewpoint and content: *e.g.*, "exposes children to harmful content," JA 348; "trends" like "the glorification of Hamas terrorists," JA 229; and "TikTok videos will be promoting that Taiwan ought to be part of China," JA 357. At a hearing, a government official testified that it was "striking to what degree th[e] narratives [on TikTok] are resonating with young people in America." JA 798.

A lead sponsor explained that the Act attracted support because TikTok "show[ed] dramatic differences in content relative to other social media platforms." JA 353. And just after enactment, a Senator stated that the reason for "such overwhelming support for us to shut down potentially TikTok" is that "[i]f you look at the postings on TikTok and the number of mentions of Palestinians relative to other social media sites, it's overwhelmingly so." JA 366.[8]

F. Proceedings Below

Petitioners filed suit in the D.C. Circuit, which has exclusive original jurisdiction over challenges to the Act. Sec. 3(b). Petitioners raised claims under the First Amendment and other constitutional provisions. JA 124-159.

The Government advanced two justifications for the Act's TikTok-specific provision: that China may (1) "covertly manipulate the application's

[8] Allegations that TikTok amplified support for either side of the Israeli-Palestinian conflict are unfounded. JA 472-75.

recommendation algorithm to shape the content" on the platform, C.A. Gov't Br. at 35, or (2) obtain "access" to users' "data," *id.* at 27. The Government submitted declarations from national-security officials. It filed more than 15% of its merits brief and nearly one-third of its declarations *ex parte*. *See id.*; C.A. Gov't App. The declarations' unredacted portions conceded that the Government's concerns were only about what China might do in the future, not that China was already engaging in such conduct through the U.S. TikTok platform. *Supra* at 10.

The D.C. Circuit denied the petition. All three panel members agreed the Act triggers heightened First Amendment scrutiny. JA 24-27, 66. Judges Ginsburg and Rao assumed strict scrutiny applies, JA 27-31, but held the Act survives it, JA 32-57. Chief Judge Srinivasan concurred in the judgment, concluding the Act is subject to, and satisfies, intermediate scrutiny. JA 66. The court rejected Petitioners' other claims. JA 57-64. Although the court granted the Government's motion to file materials *ex parte*, it emphasized that it upheld the Act based only on the public record. JA 64-65 & n.11.

SUMMARY OF ARGUMENT

I. The First Amendment requires applying strict scrutiny to the Act's TikTok-specific provision.

The Government conceded that TikTok Inc. is an American company engaged in editorial curation for the U.S. TikTok platform. Curating content for an online platform is expressive activity, and using an algorithm to recommend content is an editorial choice. TikTok Inc. expressively associates with ByteDance Ltd. in doing so, and the Government disavowed any argument for disregarding TikTok Inc.'s legally distinct identity as an American speaker. The severe burden imposed on this protected expression by banning Petitioners from operating the U.S. platform is thus undeniable.

The Act inflicts that burden for content-based and speaker-based reasons. The Act generally covers applications based on their speech content, and then singles out TikTok for worse treatment than all other speakers. Moreover, the Government admits that Congress did this based partly on fears that a foreign adversary might manipulate the mix of content on the TikTok platform to influence Americans' views. The Government's scattershot attempts to evade strict scrutiny are thus untenable.

II. The Act's TikTok-specific provision fails any form of heightened First Amendment scrutiny.

Under heightened scrutiny, a speech restriction must be narrowly tailored to achieve an important interest. The strict form of this standard is demanding, and the Act does not come close to the only three laws this Court has held satisfy it.

Indeed, the Act's flaws are so severe it would not even survive intermediate scrutiny.

To begin, the interests asserted by the Government are facially defective. Justifying the Act based on "content manipulation" concerns is either (1) an impermissible attempt to prohibit Americans from disseminating protected speech that may further foreign interests, or (2) an overbroad attempt to prevent "covert" foreign influence without Congress even having considered whether the traditional remedy of disclosure would be ineffective. And justifying the Act based on "data protection" concerns does not work because (1) the Government cannot show that Congress would have passed the Act for that non-content-based reason alone; and (2) the Act is woefully underinderclusive as to data security since its scope is based on content.

Regardless, the TikTok-specific provision is not remotely tailored to either of those interests. In addition to disclosures, there are a host of other less-restrictive alternatives that Congress failed even to consider. And the D.C. Circuit also did not hold the Government to its burden of proof, forgiving numerous holes in the evidentiary record.

At minimum, the Government failed to justify treating TikTok worse than all other speakers. There is no basis for subjecting it to more than the Act's generally-applicable process and standard, which Congress itself deemed to adequately address alleged adversary-controlled applications.

ARGUMENT

AS APPLIED TO PETITIONERS, THE ACT VIOLATES THE FIRST AMENDMENT

Congress's unprecedented attempt to single out Petitioners and bar them from operating one of the Nation's most significant speech venues is profoundly unconstitutional. The First Amendment requires the strictest of scrutiny before allowing Congress to impose such a severe and unique burden on an American provider of a speech platform used by millions of Americans, for avowedly content-based reasons. Yet the Act flunks *any* form of heightened scrutiny. The interests asserted by the Government are facially deficient; and regardless, the statute is not narrowly tailored to advancing them.

I. THE ACT'S TIKTOK-SPECIFIC PROVISION IS SUBJECT TO STRICT SCRUTINY

A. The Act Severely Burdens The Expression Of TikTok Inc., An American Company Protected By The First Amendment

1. "The Government concedes, as it must …, that the curation of content on TikTok is a form of speech." JA 26. "[E]xpressive activity includes presenting a curated compilation of speech originally created by others." *Moody v. NetChoice, LLC*, 603 U.S. 707, 728 (2024). The "editorial function itself is an aspect of speech." *Id.* at 731. "Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity." *Id.*

TikTok "combin[es] multifarious voices to create a distinctive expressive offering." *Id.* at 711 (cleaned up). TikTok Inc. performs "content moderation," enforcing "publicly available … rules and standards." JA 493. It also performs "content recommendation," disseminating videos through its "For You" feed, employing an algorithm to "match[] users with content they are predicted to like." JA 497-99. And it "promot[es] and filter[s]" select content to foster "diverse and high-quality content." JA 499-500.

TikTok Inc. "thus unabashedly control[s] the content that will appear to users." *NetChoice*, 603 U.S. at 736. By using the algorithm, in particular, TikTok Inc. makes "an editorial choice" reflecting a "belief[] about which messages are appropriate." *Id.* at 738-39. If the *Washington Post* used an algorithm to email its subscribers op-eds based exclusively on predicted subscriber preferences, that would be an editorial choice—a decision to target readers with content they likely want, rather than what editors think they should read. The First Amendment fully protects such editorial choices.

2. "[T]he Government [also] does not dispute facts suggesting at least some of the regulated speech involves TikTok's U.S. entities." JA 27. In fact, it all does. TikTok Inc. is a California corporation providing the U.S. platform. JA 10. Through U.S. employees, subsidiaries, and contractors, it develops and oversees content-moderation policies, reviews and approves the algorithm in the course of operationalizing it onto the U.S. platform, and customizes the recommendation engine for use in America. *Supra* at 9-10.

Accordingly, as the D.C. Circuit held, "TikTok[] Inc. … is a domestic entity operating domestically" with "First Amendment rights." JA 27. Congress cannot ignore those rights merely because TikTok Inc. is a corporation. *See Citizens United v. FEC*, 558 U.S. 310, 342-43 (2010). And the Government disavowed any argument that "the fundamental principle of corporate separateness" should be disregarded. JA 27; *see* C.A. Oral Arg. 1:30:18, 1:35:15. While its ultimate corporate parent is a Cayman holding company, TikTok Inc. "remain[s] legally distinct," as the Government "do[es] not ask this Court to pierce the corporate veil" or "invoke any other relevant exception" that would permit treating it as a foreign corporation—let alone part of a foreign government. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 435-36 (2020) (*AOSI*).

TikTok Inc. therefore cannot be stripped of *its* First Amendment rights even (wrongly) assuming that China might be able to pressure ByteDance's Chinese affiliates to manipulate the algorithm applied in this country. As the U.S. provider of a U.S. speech platform, TikTok Inc. is entitled to make an "expressive choice[]" about its preferred method for "compiling and curating others' speech." *NetChoice*, 603 U.S. 731-32. That includes the choice to use a particular recommendation engine, even if China could influence or control it. Congress cannot deem that choice constitutionally "unprotected" by deciding this "cost[]" "[out]weighs" the algorithm's "value." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 792 (2011) (*EMA*). The First Amendment leaves that "judgment" to the speaker, not the State. *Id.*

Suppose, for example, Congress tried to force Jeff Bezos to sell the *Washington Post* based on fears that foreign governments might use their power over his foreign business interests to pressure him to alter the newspaper's content. That law would obviously burden his First Amendment rights. The same is true for TikTok Inc., a U.S. entity that likewise possesses full First Amendment protections. *NetChoice*, 603 U.S. at 733 ("basic principles" of First Amendment "do not vary" for online-platform operators). In deciding the recommendation engine is the best curation method for its platform, TikTok Inc. is an American company making its "*own* editorial choice[] about the mix of speech it wants to convey." *Id.* at 734 (emphasis added).

3. Given the Government's concessions that TikTok Inc. engages in protected expression, it cannot credibly dispute that the Act severely burdens that expression. The Act categorically deems TikTok a prohibited "foreign adversary controlled application" *as long as* it is operated, directly or indirectly, by "ByteDance[] Ltd." or "TikTok [Inc.]." Sec. 2(g)(3)(A). Thus, the Act bans TikTok Inc. (1) from engaging *itself* in the "expressive activity" of "presenting a curated compilation of speech" on the U.S. platform, *NetChoice*, 603 U.S. at 728, and also (2) from "*associat[ing]* for th[at] purpose" with ByteDance Ltd., *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 68 (2006) (emphasis added); *see AOSI*, 591 U.S. at 437 (noting that American speakers "are free to choose whether to affiliate with foreign organizations").

Importantly, the expressive harm to *TikTok Inc.* would not be eliminated *even if* ByteDance Ltd. could effectuate a qualified divestiture. That would "preclude[] the … maintenance" of "any operational relationship" between TikTok Inc. and ByteDance affiliates, "including any cooperation … [on] a content recommendation algorithm." Sec. 2(g)(6)(B). Severing that relationship would imperil the algorithm's future functionality, a vital aspect of TikTok Inc.'s expression. *Supra* at 14. And it would prevent TikTok Inc. from collaborating with its preferred expressive partners. This is akin to forcing Jeff Bezos *to fire* his non-U.S. publisher, or prohibiting the *Washington Post* from licensing ByteDance's services when recommending articles to subscribers. Indeed, it is worse. Cutting the U.S. platform off from ByteDance would fundamentally alter the content TikTok Inc. offers. Instead of an integrated platform that enables receiving and sharing content internationally, U.S. TikTok would become an uncompetitive American "island" isolated from the platform's non-U.S. users and global content. *Supra* at 14-15.

This Court has recognized cognizable burdens on speech based on expressive harms far less severe. In *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), for instance, the Court found a law "impos[ed] a financial burden on speakers" by requiring that proceeds from certain books be temporarily placed in escrow to satisfy potential civil judgments against the authors. *Id.* at 109, 115-16. Forcing TikTok Inc.'s divestiture is an even more "obvious" "tax" on expressive activity, *id.* at 115—it is effectively the death penalty. *See*

United States v. Playboy Ent. Grp., 529 U.S. 803, 812 (2000) ("The distinction between laws burdening and laws banning speech is but a matter of degree.").

B. The Act's Coverage Of Petitioners Is Both Content-Based And Speaker-Based, Triggering Strict Scrutiny

The Act's burdening of TikTok Inc.'s protected expression is subject to strict scrutiny, for several reasons.

"[S]trict scrutiny applies" whenever a speech restriction's "justification" is "content based." *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015). "The First Amendment presumptively places this sort of discrimination beyond the power of the government" because it "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster*, 502 U.S. at 116. This implements the fundamental principle that "information is not in itself harmful." *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 770 (1976). "[R]igorous scrutiny" is required to ensure the Government has "an adequate justification" for content discrimination. *Playboy*, 529 U.S. at 812-813.

Here, as the D.C. Circuit emphasized, the Act "cannot be justified without reference to the content of the regulated speech," because one of the Government's justifications *itself* "reference[s] the content of TikTok's speech." JA 29-30. The Government defends the Act based on its fear that "China may … covertly manipulate the application's recommendation algorithm *to shape the content* that the application delivers to American audiences."

C.A. Gov't Br. 35 (emphasis added). This "interest" plainly "is related to expression," triggering strict scrutiny. *Texas v. Johnson*, 491 U.S. 397, 410 (1989). Indeed, this is the most "egregious form of content discrimination," as it "target[s] [the] viewpoint[]" of speech supposedly furthering China's interests. *Reed*, 576 U.S. at 156.

Statutory text and structure reinforce that the Act is content-based. The Act generally covers applications that, like TikTok, permit users to generate or share "text, images, videos, … or similar content," Sec. 2(g)(2)(A)(i)—*i.e.*, "platforms [that] make choices about what third-party speech to display and how to display it," *NetChoice*, 603 U.S. at 716. It next exempts applications focused on particular types of content—those "whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews." Sec. 2(g)(2)(B). And it then singles out TikTok for uniquely harsh treatment. Sec. 2(g)(3)(A)-(B); *supra* at 12-13.

Thus, while the Act restricts foreign-adversary control, "the conduct triggering" that restriction "consists of communicating a message." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010); *see Simon & Schuster*, 502 U.S. at 116-18 (applying strict scrutiny to content-based escrow requirement for book-sale proceeds). Regardless of Congress's *motive*, the Act "directly and immediately" regulates based on *content*. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

"[S]ingl[ing] out TikTok … for disfavored treatment," JA 26, makes matters worse. "[S]peech

restrictions based on the identity of the speaker" are subject to strict scrutiny partly because they are "often simply a means to control content," *Reed*, 576 U.S. at 170—as the Government *concedes* here. This "contradict[s] basic First Amendment principles." *Playboy*, 529 U.S. at 812. Laws "singl[ing] out" particular speakers "present[] such a potential for abuse" that they are presumptively unconstitutional. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 585, 592 (1983). Thus, singling out TikTok for worse treatment requires the most searching First Amendment scrutiny.

C. Arguments For Lesser Scrutiny Are Meritless

The Government and the panel below advanced a muddled mix of alternative arguments why strict scrutiny is (or might be) inapplicable. Despite the many theories thrown against the wall, none sticks.

First, "[t]he Government suggest[ed] that because TikTok is wholly owned by ByteDance, a foreign company, it has no First Amendment rights." JA 27. The D.C. Circuit rightly held otherwise because "TikTok[] Inc. … is a domestic entity" that "operat[es] domestically" curating content for the U.S. platform. *Id.* Having disavowed any argument for disregarding corporate separateness, *supra* at 22, the Government has no reason why TikTok Inc. loses *its* First Amendment rights because it has a foreign parent. The Government invoked *AOSI*, but that decision implies *the opposite*, reaffirming "the First Amendment rights of American organizations" despite their "affiliat[ion]" with "legally separate" "foreign organizations." 591 U.S. at 439.

Second, the Government argued this case "does not implicate the First Amendment" because it is "akin to *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986)." JA 25. The D.C. Circuit correctly "reject[ed]" that "ambitious" argument too. *Id.* *Arcara* denied a First Amendment claim brought by a business shut down for running a brothel out of an adult bookstore, reasoning that the public-health law "was directed at unlawful conduct having nothing to do with books or other expressive activity." 478 U.S. at 707. In obvious contrast to "[e]nforcement of a generally applicable law unrelated to expressive activity," "the Act singles out TikTok, which engages in expressive activity, for disfavored treatment," JA 26, and *does so because of* that expressive activity.

Third, the Government's invocation of intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968), likewise fails. *O'Brien* applies only where expressive activity is regulated for reasons "unrelated to the suppression of free expression." *Id.* at 377. Yet as the panel majority observed, "the Government's concern with content manipulation" *itself* "reference[s] the content of TikTok's speech." JA 30. It thus *is* "related" to suppressing expression—namely, overriding TikTok Inc.'s editorial choice that the recommendation engine is the best content-dissemination method, *because of* fear China may "manipulate" the algorithm "to shape the content that American users receive." *Id.* The Act also imposes far "more than an incidental burden"; "on its face and in its practical operation," the Act "imposes a burden based on the content of speech and the identity of the speaker." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

Fourth, the majority observed that the Act's "TikTok-specific provisions" address "control by a foreign adversary" without expressly referencing content. JA 28. That ignores the Act's structure. TikTok was plainly included within the Act only because, like the applications covered by the generally-applicable provision, it has *user-generated* and *user-shared content*. Sec. 2(g)(2)(A). Again, it is worse, not better, that the Act then singles out TikTok for uniquely harsh treatment. Moreover, it is *undisputed* that Congress passed the TikTok-specific provision *because of* the content-and-viewpoint-based fear that the user-generated content on the platform might be deployed to manipulate Americans and favor China. That is why a qualified divestiture would require TikTok Inc. to sever its "operational relationship" with ByteDance as to the "content recommendation algorithm." Sec. 2(g)(6)(B).

Fifth, the majority asserted that the option for Petitioners to "divest" suggests the Act does "not target speech based on its communicative content." JA 28. Again, however, divestiture would prohibit TikTok Inc. from curating the platform *using the algorithm* it develops and implements in *expressive association* with ByteDance; and the Act severs this relationship due to fear that this *editorial choice* may result in manipulation of the mix of *content* Americans view. The Act thus "directly and immediately" burdens TikTok Inc.'s expression. *Boy Scouts*, 530 U.S. at 659.

Sixth, the majority described TikTok as having the "special characteristic" of being "designated by the political branches as a foreign adversary controlled application," noting that strict scrutiny "'is

unwarranted when the differential treatment is justified by some special characteristic of the particular medium being regulated.'" JA 29 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 660-61 (1994)). But *Turner* involved a "content-neutral" regulation of the entire cable medium. 512 U.S. at 652. It does not suggest that, where Congress engages in *content-and-speaker-based* regulation, the Government can evade strict scrutiny by claiming the *speaker* is "special." The point of requiring such regulations to "satisf[y] strict scrutiny" is to ensure there is "adequate justification" for discriminatory treatment. *Playboy*, 529 U.S. at 813. Saying TikTok is "special" *because* Congress singled it out turns this Court's speaker-discrimination cases on their head.

Seventh, the majority posited that fear of "covert[]" content manipulation could be "wholly consonant with the First Amendment." JA 30-31. Again, that is question-begging: courts must *first apply* strict scrutiny to *determine whether* this content-based justification sustains the Act.

Finally, Chief Judge Srinivasan's concurrence applied intermediate scrutiny based on a "longstanding regulatory history" of "restrictions on foreign control … in the communications arena." JA 70. But he primarily relied on "broadcast" media regulations. *Id.* That is a "special" context because of bandwidth "scarcity," which this Court deemed to justify lesser First Amendment protections than in "the vast democratic forums of the Internet." *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

In *this* context, history and tradition show that the constitutional commitment to free speech

protects Americans *even when* they intentionally disseminate a foreign adversary's propaganda. *Infra* at 36-40. By banning Petitioners from engaging in the protected expressive activity of operating TikTok, based on asserted fears their affiliates *merely might someday be pressured* by China, the Act pursued a presumptively unconstitutional path. It must be subjected to the strictest of judicial scrutiny.

II. THE ACT'S TIKTOK-SPECIFIC PROVISION DOES NOT SATISFY STRICT (OR EVEN INTERMEDIATE) SCRUTINY

A. Strict Scrutiny Is A Demanding, Rarely Satisfied Standard

1. A law cannot "survive strict scrutiny" unless the Government "prove[s]" that it (1) "furthers a compelling interest" and (2) "is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171. This "is a demanding standard," and "[i]t is rare" a law satisfies it. *EMA*, 564 U.S. at 799.

To prove a "compelling interest," the Government must "specifically identify an actual problem in need of solving." *Id.* (cleaned up). "Because it bears the risk of uncertainty …, ambiguous proof will not suffice." *Id.* at 799-800. Moreover, when a law "is wildly underinclusive," that "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* at 802. Likewise, the Government may rely only on "the legislature's actual purpose," *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (cleaned up), not justifications "invented *post hoc*," *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022).

The Government can prove "narrow tailoring" only if it establishes that "curtailment of free speech [is] actually necessary." *EMA*, 564 U.S. at 799. "If a less restrictive alternative would serve the Government's purpose, the legislature must use [it]." *Playboy*, 529 U.S. at 813. "To do otherwise would be to restrict speech without an adequate justification." *Id.* Indeed, where a law is patently "overinclusive," it suggests the speech is being targeted for a different, illegitimate reason. *See EMA*, 564 U.S. at 804.[9]

2. Given the high bar, this Court almost always invalidates speech restrictions under strict scrutiny. *See, e.g., Reed*, 576 U.S. at 171; *Playboy*, 529 U.S. at 807; *EMA*, 564 U.S. at 799; *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 621 (2020); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 753 (2011). (The full list is far longer.)

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[9] Even "[i]ntermediate scrutiny"—which generally applies to content-neutral speech restrictions—requires the law be "narrowly tailored to serve a significant governmental interest." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022). While intermediate scrutiny does not require adoption of the "least restrictive" alternative, a law still cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Thus, where "a variety of approaches … appear capable of serving [the Government's] interests" through less-burdensome means, the law fails under either intermediate or strict scrutiny. *Id.* at 494. Likewise, even under intermediate scrutiny, "underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 774 (2018) (*NIFLA*) (quoting *EMA*, 564 U.S. at 802).

By contrast, this Court has upheld a speech restriction under strict scrutiny only three times: *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality op.), *Holder v. Humanitarian L. Project,* 561 U.S. 1 (2010) (*HLP*), and *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015). These exceptions prove the rule. In each, the challenged laws banned limited, strictly defined categories of speech, based on clear incompatibility with compelling government interests unrelated to expression.

In *Burson*, the law created a 100-foot "restricted zone" around polling places in which no campaigning was permitted. 504 U.S. at 208. As the plurality explained, "the evolution of election reform … demonstrate[d] the necessity of restricted areas … around polling places" to prevent "bribery, violence, or intimidation" towards voters—as reflected by a "time-tested consensus" in "all 50 States." *Id*. at 200-06. Thus, the "minor geographic limitation" survived strict scrutiny. *Id*. at 210.

In *HLP*, the law criminalized "knowingly provid[ing] material support" to a "foreign terrorist organization." 561 U.S. at 8. The Court upheld the law because Congress had not "sought to suppress ideas or opinions," but rather "prohibited 'material support,' which most often does not take the form of speech at all" and was "carefully drawn to cover only a narrow category of speech" tied to terrorism. *Id*. at 26. Notably, Congress made "specific findings regarding the serious threat" involved, "explicitly reject[ing]" a less-restrictive alternative (to prohibit support only of the organizations' terrorist activities, not their "legitimate activities") because "any

contribution to such an organization facilitates" terrorism. *Id.* at 29 (cleaned up).

In *Williams-Yulee*, the law "advance[d] the State's compelling interest in preserving public confidence in the integrity of the judiciary," by restricting only one "narrow slice of speech": personal donation solicitations by judicial candidates. 575 U.S. at 444, 452. That rule "aim[ed] squarely at the conduct most likely to undermine public confidence," "applie[d] evenhandedly to all judges and judicial candidates," and contained "zero exceptions." *Id.* at 449. There was no suggestion of "a pretextual motive," and the law permitted as much speech as possible while addressing the problem. *Id.* at 452.

Shuttering one of the Nation's most popular speech platforms bears no resemblance to those three exceptional laws. The Act is both quantitatively broader (to put it mildly) and qualitatively different. The Government does not claim there is anything harmful about the *actual* content created and received by TikTok's 170 million American users, or even about Petitioners' *current* expressive curation. Rather, the Government seeks to *prophylactically* silence all that speech based on fear that China *could someday* wield control over Petitioners' foreign affiliates to misuse the U.S. TikTok platform.

This massive, unprecedented restriction of protected speech reinforces the importance of rigorously applying strict scrutiny. The D.C. Circuit, however, rendered the standard a shadow of its normal self, deeming this case to be "much like" one that applied *arbitrary-and-capricious* review to uphold a *non-speech-related* regulation. JA 40. Real

strict scrutiny looks nothing like APA review. Properly applying the constitutional standard, the Act cannot satisfy either the compelling-interest or narrow-tailoring prongs.

B. The Government's Asserted Interests Are Facially Deficient

The D.C. Circuit upheld the Act's TikTok-specific provision based on "two national security justifications": the "risk" of China (1) "covertly manipulating content on TikTok"; or (2) "collect[ing] data of and about persons in the United States." JA 33. Even accepting, momentarily, the (incorrect) factual premises, each interest is legally inadequate given the Act's scope.

1. The content-manipulation interest asserted is facially impermissible

The Government and the D.C. Circuit conflated two meanings of "content manipulation." Insofar as they mean an interest in *preventing* Americans from *potentially choosing* to disseminate content at a foreign government's behest, that is illegitimate. And insofar as they reframe that interest as limited to *protecting* Americans from receiving content that a foreign government may have *covertly* influenced, that does not work here either.

a. Under any form of heightened scrutiny, a law must advance interests "unrelated to the suppression of free speech." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997). And as *NetChoice* squarely held, "correct[ing] the mix of speech" on "social-media platforms" is "very much related to the suppression of free expression." 603 U.S. at 740. Congress thus "cannot prohibit speech to improve or

better balance the speech market," *id.* at 741, as the Act concededly attempted.

TikTok Inc. has made the "editorial choice[]" to use the recommendation engine to achieve "the mix of speech it wants to convey." *Id.* at 734; *supra* at 20-24. Congress cannot override that choice because, like the States in *NetChoice*, it worries the resulting "amalgam" of content is "skewed" in "dangerous" or "un-American" ways. 603 U.S. at 741.

The D.C. Circuit, however, suggested that involvement of a "foreign government" alters the analysis. JA 43. It reasoned that the Act eliminates the "threat[]" of China "distort[ing] free speech on an important medium of communication." *Id.* This rationale fundamentally misunderstands the speech interests at stake.

TikTok Inc. is a *U.S. speaker* making the editorial choice of how to curate its U.S. platform's content—*even if* its chosen method involves an algorithm that might reflect foreign influence or control (it does not). The Government cannot ban U.S. theaters from displaying "political propaganda" films—even if a foreign power *completely controls* their content. *See Meese v. Keene*, 481 U.S. 465, 480 (1987). At the Cold War's height, the Government still could not ban domestic agitators from disseminating "communist political propaganda"—even if created by the Soviets. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 302-03, 306-07 (1965). The First Amendment vests the "judgment" about how to "weigh" the algorithm's "value" and "costs" in TikTok Inc., not Congress. *EMA*, 564 U.S. at 792. The "State may not interfere"

with how this "private actor[]" strikes that "balance." *NetChoice*, 603 U.S. at 741.

That is so even if TikTok Inc.'s editorial choice assumes a "risk that [China] might shape the content that American users receive" and "interfere with our political discourse." JA 30. Petitioners vigorously dispute that premise. But even were it true, if Americans find American-disseminated foreign propaganda "influen[tial]," *id.*, that is the First Amendment in action. It "makes for us" the "choice[] between the dangers of suppressing information[] and the dangers of its misuse." *Va. Pharmacy Bd.*, 425 U.S. at 770. Confronted with a similar argument that high-spending individuals were "distorting" elections, this Court declared that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment…." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) (cited in *NetChoice*, 603 U.S. at 742). In sum, the "uninhibited, robust, and wide-open debate and discussion" protected by the First Amendment extends to Americans' right to share foreign "propaganda." *Lamont*, 381 U.S. at 307 (cleaned up).

b. The D.C. Circuit also tried to reframe the Government's interest. Rather than "suppressing propaganda and misinformation," the court claimed, "[t]he Government's justification in fact concerns the risk of [China] *covertly* manipulating content on the platform." JA 42. That reframing is triply flawed.

First, the Government may rely only on Congress's "actual purpose," not "*post hoc*" justifications. *Supra*

at 31. Yet the Government has fallen far short of proving that Congress's genuine concern was the "covert" nature of any content manipulation.

If Congress's concern were that limited, it had an easy way to prove it: Include statutory findings or a statement of purpose. Congress previously did just that when regulating speech for national-security reasons, and this Court relied on those "specific findings." *HLP*, 561 U.S. at 29. Here, the Executive Branch urged Congress to do the same—to "hav[e] the[] hearings and then mak[e] the findings directly." JA 795. *Congress declined* to do so. Given that history, "the absence of any detailed findings by the Congress" is a red flag that Congress's motives were not what the D.C. Circuit assumed. *See Reno*, 521 U.S. at 879.

The legislative record strongly supports that inference. The only committee report featured concerns about "misinformation, disinformation, and propaganda." JA 211. It accused TikTok of ensuring "specific videos" achieve certain numbers of views, objected that TikTok could amplify "false information," and worried TikTok might "shape the content … to suit the interests" of China. JA 217-18. Members raised other content-and-viewpoint-based objections. *Supra* at 15-16. None of that was objecting to *covert* Chinese manipulation. Rather, these were complaints about content posted by TikTok users and (erroneous) assertions about TikTok Inc.'s editorial dissemination choices.

Second, the "covertness" interest is insufficient on this record to justify banning Petitioners from operating TikTok. As this Court has repeatedly held,

"disclosure" is the "less restrictive alternative" to remedy speech that is misleading in source or nature. *Citizens United*, 558 U.S. at 369. The Foreign Agents Registration Act (FARA), 22 U.S.C. §§ 611-621, provides a powerful, on-point illustration. Even when American citizens are *actual agents* for foreign powers, Congress chose registration and disclosure over speech restrictions. *Meese*, 481 U.S. at 469-71. Faced with "increased attempts by foreign agents at the systematic manipulation of mass attitudes," Congress "add[ed] requirements to keep our Government and people informed of the nature, source, and extent of political propaganda distributed." *Id.* at 487 (Blackmun, J., dissenting in part); *accord id.* at 480 n.15 (majority op.). Under FARA, Americans retain their constitutional right to serve as advocates for foreign interests, provided they *disclose* that choice.

At minimum, the Government had the burden to prove disclosure would be insufficient. *Reno*, 521 U.S. at 879. Yet it put forth no evidence—zero—that Congress *even considered* disclosure. And the D.C. Circuit's nearly 60-page opinion offered one *ipse dixit* sentence: "[C]overt manipulation of content is not a type of harm that can be remedied by disclosure." JA 54. That is manifestly wrong. The risk a listener will be misinformed about the source or nature of speech is *exactly* the harm disclosure remedies. The court gave no explanation why it would be inadequate, for example, to include a conspicuous warning on the TikTok platform telling users what the Government told the court: "[The Government believes] there is a risk that [China] may coerce … TikTok to covertly manipulate the information

received by … Americans." JA 628. Congress has often used disclosures to inform Americans about the speech they receive, including from foreign agents. *See, e.g.*, 22 U.S.C. § 614(b) (requiring a "conspicuous statement" saying "materials are distributed by the agent on behalf of the foreign principal"). Indeed, the Government has advocated for warnings on social-media platforms in other contexts.[10]

To be clear, Petitioners believe such a warning would be unwarranted for various reasons. Nonetheless, this much-less-restrictive alternative forecloses the Government from justifying the far-more-draconian remedy of banning Petitioners from operating TikTok. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730-31 (2014). Indeed, Congress's failure to even *consider* this approach is fatal under *any* standard of scrutiny. *Infra* at 44-45.

That is especially true here because the fear is not that China could "manipulate" the content by altering it in a way that would render it unprotected—say, by crafting "incitement to imminent lawless action," rather than "mere advocacy" of ideas favoring China's interests. *See Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (overruling *Whitney v. California*, 274 U.S. 357 (1927)). Instead, the alleged concern, at best, is that China could "manipulate" the content by secretly influencing the mix of constitutionally protected, user-created content the U.S. platform recommends.

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[10] V. Murthy, *Surgeon General: Why I'm Calling for a Warning Label on Social Media Platforms*, N.Y. Times (June 17, 2024), https://www.nytimes.com/2024/06/17/opinion/social-media-health-warning.html.

Responding to *that* risk by banning Petitioners from operating TikTok entirely, and shuttering the platform for 170 million American creators and users, is drastic over-kill. All the more so since much of the content has nothing to do with politics or other potential objects of China's "influence campaigns." JA 36; *supra* at 7.

Third, and relatedly, that Congress ignored disclosure and imposed a massively overbroad ban further calls into question Congress's true objective. It suggests the objection was to the content on TikTok, not the "covert" nature of any potential influence by China. *See EMA*, 564 U.S. at 804. Again, however, if Americans choose to continue viewing TikTok with their eyes opened wide, the First Amendment entrusts them with making that choice, free from Congress's censorship.

2. The data-protection interest asserted is facially inadequate

The data-protection interest is tainted by the content-manipulation interest. Regardless, it fails on its own terms.

a. As explained, Congress acted partly based on a content-based, anti-propaganda interest that is not just inadequate but impermissible. *Supra* at 35-38, 41. Accordingly, even if Congress partly relied on a data-protection interest, the Act cannot survive absent proof Congress would have passed it "even in the absence of" the improper motive. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

Yet the Government never tried to prove Congress would have passed the Act for data-protection

reasons alone. Nor did it argue the Act could be sustained solely on this ground. JA 31 n.8, 77-78. For good reason. The legislative record makes clear that both the content-based and data-protection interests were before Congress, and it contains no indication that the Act would have passed without the former. JA 211, 218. To the contrary, the Act makes clear that *content* was Congress's central focus: it limits coverage to applications with particular content, Sec. 2(g)(2), and does not accept divestiture unless "cooperation" over "a content recommendation algorithm" is precluded. Sec. 2(g)(6)(B). The Government thus cannot invoke the data-protection interest.

b. The Act is also so wildly underinclusive as to data protection that it cannot be sustained on that basis. "[U]nderinclusivity raises a red flag" for two reasons. *Williams-Yulee*, 575 U.S. at 449. It "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *EMA*, 564 U.S. at 802. And it "can also reveal" the law "does not actually advance a compelling interest," rendering it unnecessary to restrict speech. *Williams-Yulee*, 575 U.S. at 449. Thus, while strict scrutiny does not require "address[ing] all aspects of a problem in one fell swoop," it also does not permit "fail[ing] to regulate vast swaths of conduct that similarly [imperil] [the Government's] asserted interests." *Id.* at 448-49; *accord NIFLA*, 585 U.S. at 774 (same under intermediate scrutiny).

The Act does just that, twice over. *First*, it *categorically exempts all* adversary-controlled applications and websites (other than Petitioners')

that do not have user-generated or user-shared content. Sec. 2(g)(2)(A). *Second*, it exempts adversary-controlled applications and websites focused on "product reviews, business reviews, or travel information and reviews." Sec. 2(g)(2)(B). By its terms, the "review" exemption extends to *all* applications and websites of an otherwise "covered company" operating even a single review application or website; but at minimum, it exempts the review application or website itself. *See id.*

These exempted adversary-controlled applications and websites are as capable as TikTok of collecting Americans' data. Nothing about an adversary's ability *to collect data* turns on whether the *content* is user-generated or user-shared and does not primarily include reviews. E-commerce platforms, for example, lack such content but collect massive amounts of sensitive user data. In fact, the record confirms that "the type and amount of data that TikTok collects from U.S. users" is "comparable" to that collected by exempted e-commerce applications with equivalent alleged China connections. *See* JA 455-56, 461-62, 752 & n.16 (cleaned up). Further, a report by the "U.S.-China Economic and Security Review Commission" warned of "Chinese e-commerce platforms" growing "a dominant U.S. market presence" while "struggl[ing] to protect user data." JA 339-40. The D.C. Circuit disregarded this evidence when declaring that "TikTok does not identify any company operating a comparable platform in the United States with equivalent connections to [China]." JA 42.

The D.C. Circuit invoked *Williams-Yulee* to defend the Act's underinclusivity, but that case is

inapposite. There, this Court found "no fatal underinclusivity concerns" given three features: the law (1) "aim[ed] squarely at the conduct most likely to undermine" the State's interest; (2) "applie[d] evenhandedly to all judges and judicial candidates"; and (3) was "not riddled with exceptions." 575 U.S. at 449. *None* of those is true here. Congress's adoption of *content-based* exceptions strongly suggests that *content* rather than *data* is what motivated it. At minimum, the Government cannot justify why it needs to shutter TikTok to protect American users' data while leaving them exposed to Chinese e-commerce sites and other *exempted* applications and websites.

C. The Government Did Not Prove That The Act Is Narrowly Tailored

In all events, the Government's asserted interests cannot satisfy the narrow tailoring required under any form of heightened scrutiny. The Government did not consider several less-restrictive alternatives. And the D.C. Circuit failed to hold the Government to its evidentiary burden.

1. The Government failed to consider less-restrictive alternatives

When "a plausible, less restrictive alternative" to "a content-based speech restriction" exists, the Government bears "the obligation to prove that the alternative will be ineffective." *Playboy*, 529 U.S. at 816. And the Act's "breadth" "imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective." *Reno*, 521 U.S. at 879.

Here, there is no evidence "that the Government even considered … alternatives," *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002), much less found them ineffective. Under either strict or intermediate scrutiny, that is fatal. *See id.; McCullen*, 573 U.S. at 494; *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 130 (1989). While the burden of proof is on Congress, *supra* at 38, *no Branch* has carried it (or tried to do so). There are myriad less-restrictive alternatives that the Government did not consider meaningfully or at all.

a. Disclosure. Most obviously, disclosure is the traditional means of alerting Americans to otherwise-covert foreign influence. *Supra* at 38-39. It is also plainly less restrictive than banning the speech of Petitioners and 170 million American TikTok users: "disclosure requirements trench much more narrowly" on First Amendment rights "than do flat prohibitions on speech." *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). Whether or not the Government might have found disclosure ineffective, there is "no hint" it "*even considered*" this alternative. *Thompson*, 535 U.S. at 373 (emphasis added); *supra* at 39-40.

Nor is there evidence the Government considered other transparency measures. For instance, the European Union requires large online platforms to disclose their content-moderation policies and provide data for assessing whether they viewpoint-discriminate. C.A. Petrs. App. 633, 637-39. The First Amendment requires the Government to "consider[] different methods that other jurisdictions have found effective." *McCullen*, 573 U.S. at 494. It never did so.

b. Data Protection. As part of the same legislation containing the Act, Congress barred "data broker[s]" from "mak[ing] available personally identifiable sensitive data of a United States individual" to certain countries and entities. Pub. L. No. 118-50, div. I, § 2(a), 138 Stat. 895, 960 (2024). Congress could have extended this (or similar) restrictions to all online platforms, rather than subjecting TikTok *alone* to a *ban*. JA 459-60. Again, however, nothing in the record shows that the Government even considered this "readily available" "less intrusive tool[]." *McCullen*, 573 U.S. at 466.

c. National Security Agreement. There also are no findings or evidence proving that Congress considered the comprehensive NSA and found it inadequate. *Supra* at 11. The D.C. Circuit assumed Congress was "familiar[]" with *the NSA* because some Members were briefed on *Project Texas*. *See* JA 52-53. But the NSA went beyond Project Texas through a "combination" of mutually reinforcing measures, JA 449; *see* JA 440, 464-65, so the full alternative was not considered.

The court instead deferred to "the Executive's judgment" the NSA was inadequate. JA 49-50. But *Congress* banned TikTok, so *Congress* was required to consider that robust alternative. *See Sable*, 492 U.S. at 129. Regardless, the Executive Branch's consideration of the NSA was hardly genuine. It refused to explain, let alone prove, why it deemed the NSA inadequate. *Supra* at 12. It "did not raise" key objections during the NSA negotiations that it asserted in litigation and that Petitioners could have addressed. JA 773-75. This cannot satisfy the Government's burden to "show[] that it *seriously*

undertook to address the problem with less intrusive tools readily available to it." *McCullen*, 573 U.S. at 494 (emphasis added).

d. Generally-Applicable Provision. Congress adopted a general process and standards it deemed adequate to address alleged adversary-controlled applications. That *itself* is a less-restrictive alternative to singling out TikTok for uniquely harsh treatment. *Infra* at Part II.D.

2. The D.C. Circuit failed to hold the Government to its evidentiary burden

The D.C. Circuit made a fundamental error cutting across its entire analysis. Under strict scrutiny, the "usual presumption of constitutionality afforded congressional enactments is reversed." *Playboy*, 529 U.S. at 817. So when there are "substantial factual disputes," the Government must "shoulder its full constitutional burden of proof." *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004); *accord Turner*, 512 U.S. at 664-66 (plurality op.) (same for intermediate scrutiny). Yet the court trivialized the Government's evidentiary burden: It accepted conclusory assertions, minimized basic factual errors, forgave analytical gaps, and ignored Petitioners' submissions. This was not any recognizable form of heightened scrutiny.

a. Chinese Control. Strict scrutiny demands "hard evidence," not "anecdote and supposition." *Playboy*, 529 U.S. at 819, 822. Yet the D.C. Circuit never even required the Government to prove the Act's core premise that Petitioners are, in fact, "foreign adversary controlled." Sec. 2(g)(3)(A).

The court let pass false assertions that ByteDance Ltd. is a Chinese company or owned by one. *See* JA 212 (House report describing ByteDance Ltd. as a holding company owned by "Beijing ByteDance Technology," a "Chinese internet technology company headquartered in Beijing"); C.A. Gov't Br. 1 (asserting that TikTok Inc. is "ultimately owned by the Chinese company ByteDance"). The undisputed record, however, establishes that neither Beijing ByteDance Technology, nor any other Chinese company, owns either ByteDance Ltd. or TikTok Inc., directly or indirectly. *Supra* at 8-9.

And while there are ByteDance affiliates located in China, "many U.S. companies maintain software and other engineering operations in China." JA 462. Congress did not make those facts trigger the "controlled by a foreign adversary" definition, Sec. 2(g)(1), (g)(3)(B)—nor did it deem any other company covered on that basis, Sec. 2(g)(3)(A). The court thus had no basis for treating as established "fact[]" that TikTok is "subject to the control of a foreign adversary nation." JA 24. In fact, the Government's admission (*supra* at 10) that there is no evidence China has ever attempted to assert its purported control over the U.S. platform is itself evidence suggesting such control does not exist.

b. Content Manipulation. The Government acknowledges it has "no information" that China was or is using the U.S. TikTok platform to "covertly manipulate the information received by … Americans." JA 628. The D.C. Circuit nevertheless credited the Government's "predict[ion]" that Petitioners "would try to comply if" China were to make future content-manipulation demands. JA 47.

Under strict scrutiny, a "predictive judgment" cannot rest on "ambiguous proof." *EMA*, 564 U.S. at 799-800. The Government must adduce "persuasive evidence." *HLP*, 561 U.S. at 36.

The court, however, accepted the Government's prediction based on *no evidence at all*. It credited the Government's bare assertion that it is "aware" that "ByteDance and TikTok Global have taken action in response to [Chinese] demands to censor content *outside* of China." JA 47. The public record contains that single conclusory sentence; everything after is redacted. JA 641-42. Aware of the serious problems with untested secret evidence, C.A. Petrs. *Ex Parte* Opp'n 9-25, the court upheld the Act based *solely* on the "public record." JA 65. The court therefore based a critical finding on just the Government's say-so. "[C]oncerns of national security and foreign relations do not warrant [this] abdication of the judicial role." *HLP*, 561 U.S. at 34.

The court also faulted Petitioners for not "squarely den[ying]" this allegation. JA 47. But Petitioners *did* deny as squarely as possible the Government's vague censorship allegations. JA 759-60. Insofar as this one referred to government takedown requests, reports in the record demonstrate that TikTok has *not* taken down content in other countries at China's request. JA 761 n.57. There was no concession excusing the Government's lack of evidence.

c. Data Protection. The Government concedes that China is "not reliant on ByteDance and TikTok to date" to engage in "theft of sensitive data." JA 640. The D.C. Circuit again identified no persuasive evidentiary basis that this is likely to change.

The record shows that, like TikTok, many other "U.S. technology companies … have Chinese-headquartered subsidiaries" and "face the same theoretical risk that Chinese government officials may seek to compel disclosure of customer or user data." JA 461. Yet "it is unlikely that China would seek to compel TikTok to turn over user data for intelligence-gathering purposes," since China has "more effective and efficient means of obtaining relevant information." JA 460. It is especially unlikely since the Government was wrong that TikTok collects "users' precise locations." *Compare* C.A. Gov't Br. 1, *with* JA 502, 750, 778. Locations can be identified only to roughly a 50-mile radius, JA 751—information the Government has never suggested would be useful to China.

The court brushed all this aside as "quibbles" that "miss[] the forest for the trees." JA 38-39. But the big picture is this: The Government has banned an extraordinary amount of speech; demands deference to unsubstantiated predictions a future risk will materialize; and gets facts wrong when it bothers to provide them. That the D.C. Circuit credulously accepted this is irreconcilable with heightened scrutiny of any form.

d. Less-Restrictive Alternatives. Petitioners showed that the Government's objections to the NSA rested on basic factual errors—*e.g.*, "a mistaken notion about the volume of data flow," and concerns about Oracle's oversight that "are not consistent with the practical realities of Source Code review." JA 722, 727. The D.C. Circuit, however, repeatedly elided such issues by recasting them as "judgment" calls. JA 32-33, 38-41, 47-51. It is one thing to defer

to the political branches' "considered judgment" on unusual questions like whether "support to a designated foreign terrorist organization … bolsters [its] terrorist activities." *HLP*, 561 U.S. at 36. It is another to defer on *factual* questions like volumes of data flow in the opposing party's operations, and *technical* questions like the feasibility of a private company's source-code review. This does not satisfy even deferential APA review, much less heightened constitutional scrutiny. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency cannot "offer[] an explanation … that runs counter to the evidence" or "entirely fail[] to consider an important aspect of the problem").

D. At Minimum, Congress Failed To Justify Subjecting TikTok To More Than The Act's General Provision Applicable To All Other Speakers

Finally, even setting aside everything above, the TikTok-specific provision fails heightened scrutiny for an independent, simple reason. The Act's general provision regulating all other applications is a *built-in* less-restrictive alternative. Yet Congress provided no justification why TikTok alone must be subjected to a harsher scheme. And this is further evidence that Congress instead discriminated against TikTok because it disliked the speech on the platform.

Under the Act's general provision, every other application can invoke procedures and standards to oppose a ban: They can seek judicial review focused on "a public report … describing the specific national security concern," and they can contest whether they

fall within the definition of a "covered company" that is "controlled by a foreign adversary." Sec. 2(g)(3)(B). Congress necessarily found that approach adequate to address any threat posed by alleged adversary-controlled applications. Only TikTok is "singled out" for the "differential treatment" of an automatic ban. JA 58.

Nothing in the Act or legislative record suggests that the generally-applicable provision could not likewise address any threat posed by TikTok. To the contrary, the Act recognizes the provision as adequate. Its severability clause provides that the general provision remains available even if the TikTok-specific provision is invalidated. Sec. 2(e)(2).

The D.C. Circuit tried to justify this discrimination by calling TikTok an "immediate threat." JA 58. But the Government did not treat TikTok that way. It deliberated "[f]or years." C.A. Gov't Br. 1. The current Administration commenced discussions with Petitioners in 2021 but went silent for long stretches. C.A. Petrs. App. 413-25. And Congress itself delayed the Act's effectiveness for 270 days, *including through a presidential election*, with a possible 90 days more. Sec. 2(a)(2)(A), 2(a)(3).

By contrast, the generally-applicable process can be completed with just 30 days' notice to Congress, Sec. 2(g)(3)(B)(ii)(II). A need for unusual haste is thus not a plausible explanation for singling out TikTok. In fact, a Justice Department official told Congress that "the executive branch could go back and build a record under the more general provision against [Petitioners] and go back in to court and use that record to achieve the same outcome." JA 789.

The more evident explanation is that Congress sought to obscure judicial review. Under the general pathway, the Government would have needed to prepare a public report describing the specific national-security concern. If that report, like the Act, had omitted all of the findings and evidence required by heightened scrutiny, that likely would have been harder for the D.C. Circuit to ignore.

Moreover, any "immediate threat" cannot explain subjecting TikTok to different *substantive* standards. Other applications do not qualify as "controlled by a foreign adversary" unless they satisfy specific criteria. Sec. 2(g)(1). Yet those criteria are not met for TikTok. Adversary control can be established through 20% ownership by a person "domiciled in" China, Sec. 2(g)(1)(A)-(B), but ByteDance Ltd. is 21% owned by a Chinese national domiciled in Singapore, JA 484. Nowhere did the D.C. Circuit either find that TikTok satisfies the general criteria for adversary control or explain why those criteria are sufficient to define control for all applications *except* TikTok. It deemed TikTok adversary-controlled simply because Congress said so, and it alone is denied any standard, finding, administrative process, or judicial review on the issue. Likewise, other companies may be able to invoke the "review"-application exclusion from the Act's "covered company" definition. Sec. 2(g)(2)(B). Only TikTok, inexplicably, is denied any chance to do so.

Thus, compared to the TikTok-specific provision, the Act's generally-applicable provision is itself an obvious less-restrictive alternative that Congress denied to TikTok without explanation. This alone is fatal under any form of heightened scrutiny. *See*

Playboy, 529 U.S. at 823-26; *Hobby Lobby*, 573 U.S. at 730-31.

Finally, this also starkly illustrates the concern that "speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Reed*, 576 U.S. at 170 (cleaned up). There is a real risk that the TikTok-specific provision is an "instrument[] to censor" a disfavored speaker, *Citizens United*, 558 U.S. at 340, rather than address national-security concerns implicated by numerous entities besides TikTok. This is why "[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *Playboy*, 529 U.S. at 812; *see News Am. Pub., Inc. v. FCC*, 844 F.2d 800, 804, 813-14 (D.C. Cir. 1988) (law that targeted "a corporation controlled by K. Rupert Murdoch" "with the precision of a laser beam" offended the Constitution at the "intersection" of First Amendment and Equal Protection principles). Heightened scrutiny, in short, is designed to smoke out whether the Government had permissible reasons for its speaker-based discrimination. On that score, the TikTok-specific provision fails.

* * *

For the reasons explained, the Act cannot withstand any meaningful scrutiny. That, however, does not prevent Congress or the President from protecting national security—including with respect to China or even TikTok. If, for example, Congress had clearly identified its interest as being about the "covert" manipulation of the mix of content, and expressly considered disclosures and other less-restrictive alternatives but found them ineffective, this Court would have faced the more-difficult question of how much deference to afford those factual findings. Here, by contrast, Congress did not even consider obvious, less-burdensome means, likely because it was pursuing broader, improper ends. The First Amendment does not tolerate such short-cuts, which imperil the free-speech rights not just of Petitioners and their 170 million American users, but the entire Nation.

CONCLUSION

The judgment below should be reversed.

December 27, 2024

Respectfully submitted,

Alexander A. Berengaut
David M. Zionts
Megan A. Crowley
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Noel J. Francisco
Counsel of Record
Hashim M. Mooppan
Kelly Holt Rodriguez
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
njfrancisco@jonesday.com

John E. Hall
Anders Linderot
COVINGTON & BURLING LLP
New York Times Building
620 Eighth Avenue
New York, NY 10018
(212) 841-1000

Andrew J. Pincus
Avi M. Kupfer
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

APPENDIX

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APPENDIX A

PUBLIC LAW 118-50—APR. 24, 2024 138 STAT. 895

Public Law 118-50

118th Congress

An Act

Making emergency supplemental appropriations for the fiscal year ending September 30, 2024, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ORGANIZATION OF ACT INTO DIVISIONS.

(a) DIVISIONS.—This Act is organized into the following divisions:

(1) DIVISION A.—Israel Security Supplemental Appropriations Act, 2024.

(2) DIVISION B.—Ukraine Security Supplemental Appropriations Act, 2024.

(3) DIVISION C.—Indo-Pacific Security Supplemental Appropriations Act, 2024.

(4) DIVISION D.—21st Century Peace through Strength Act.

(5) DIVISION E.—FEND off Fentanyl Act.

(6) DIVISION F.—Rebuilding Economic Prosperity and Opportunity for Ukrainians Act.

(7) DIVISION G.—Other Matters.

(8) DIVISION H.—Protecting Americans from Foreign Adversary Controlled Applications Act.

(9) DIVISION I.—Protecting Americans' Data from Foreign Adversaries Act of 2024.

(10) DIVISION J.—SHIP Act.

(11) DIVISION K.—Fight CRIME Act.

(12) DIVISION L.—MAHSA Act.

(13) DIVISION M.—Hamas and Other Palestinian Terrorist Groups International Financing Prevention Act.

(14) DIVISION N.—No Technology for Terror Act.

(15) Division o.—Strengthening Tools to Counter the Use of Human Shields Act.

(16) DIVISION P.—Illicit Captagon Trafficking Suppression Act.

(17) DIVISION Q.—End Financing for Hamas and State Sponsors of Terrorism Act.

(18) DIVISION R.—Holding Iranian Leaders Accountable Act.

(19) DIVISION S.—Iran-China Energy Sanctions Act of 2023.

(20) DIVISION T.—Budgetary Effects.

SEC. 2. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

* * *

DIVISION H—PROTECTING AMERICANS FROM FOREIGN ADVERSARY CONTROLLED APPLICATIONS ACT

SEC. 1. SHORT TITLE.

This division may be cited as the "Protecting Americans from Foreign Adversary Controlled Applications Act".

SEC. 2. PROHIBITION OF FOREIGN ADVERSARY CONTROLLED APPLICATIONS.

(a) IN GENERAL.—

(1) PROHIBITION OF FOREIGN ADVERSARY CONTROLLED APPLICATIONS.—It shall be unlawful for an entity to distribute, maintain, or update (or enable the distribution, maintenance, or updating of) a foreign adversary controlled application by carrying out, within the land or maritime borders of the United States, any of the following:

(A) Providing services to distribute, maintain, or update such foreign adversary controlled application (including any source code of such application) by means of a marketplace (including an online mobile application store) through which users within the land or maritime borders of the United States may access, maintain, or update such application.

(B) Providing internet hosting services to enable the distribution, maintenance, or updating of such foreign adversary controlled application for users within the land or maritime borders of the United States.

(2) APPLICABILITY.—Subject to paragraph (3), this sub-section shall apply—

(A) in the case of an application that satisfies the definition of a foreign adversary controlled application pursuant to subsection (g)(3)(A), beginning on the date that is 270 days after the date of the enactment of this division; and

(B) in the case of an application that satisfies the definition of a foreign adversary controlled application pursuant to subsection (g)(3)(B), beginning on the date that is 270 days after the date of the relevant determination of the President under such subsection.

(3) EXTENSION.—With respect to a foreign adversary controlled application, the President may grant a 1-time extension of not more than 90 days with respect to the date on which this subsection would otherwise apply to such application pursuant to paragraph (2), if the President certifies to Congress that—

(A) a path to executing a qualified divestiture has been identified with respect to such application;

(B) evidence of significant progress toward executing such qualified divestiture has been produced with respect to such application; and

(C) there are in place the relevant binding legal agreements to enable execution of such qualified divestiture during the period of such extension.

(b) DATA AND INFORMATION PORTABILITY TO ALTERNATIVE APPLICATIONS.—Before the date on which a prohibition under sub-section (a) applies to a foreign adversary controlled application, the entity that owns or controls such application shall provide,

upon request by a user of such application within the land or maritime borders of United States, to such user all the available data related to the account of such user with respect to such application. Such data shall be provided in a machine readable format and shall include any data maintained by such application with respect to the account of such user, including content (including posts, photos, and videos) and all other account information.

(c) EXEMPTIONS.—

(1) EXEMPTIONS FOR QUALIFIED DIVESTITURES.—Subsection (a)—

(A) does not apply to a foreign adversary controlled application with respect to which a qualified divestiture is executed before the date on which a prohibition under subsection (a) would begin to apply to such application; and

(B) shall cease to apply in the case of a foreign adversary controlled application with respect to which a qualified divestiture is executed after the date on which a prohibition under subsection (a) applies to such application.

(2) EXEMPTIONS FOR CERTAIN NECESSARY SERVICES.—Sub-sections (a) and (b) do not apply to services provided with respect to a foreign adversary controlled application that are necessary for an entity to attain compliance with such subsections.

(d) ENFORCEMENT.—

(1) CIVIL PENALTIES.—

(A) FOREIGN ADVERSARY CONTROLLED APPLICATION VIOLATIONS.—An entity that

violates subsection (a) shall be subject to pay a civil penalty in an amount not to exceed the amount that results from multiplying $5,000 by the number of users within the land or maritime borders of the United States determined to have accessed, maintained, or updated a foreign adversary controlled application as a result of such violation.

(B) DATA AND INFORMATION VIOLATIONS.—An entity that violates subsection (b) shall be subject to pay a civil penalty in an amount not to exceed the amount that results from multiplying $500 by the number of users within the land or maritime borders of the United States affected by such violation.

(2) ACTIONS BY ATTORNEY GENERAL.—The Attorney General—

(A) shall conduct investigations related to potential violations of subsection (a) or (b), and, if such an investigation results in a determination that a violation has occurred, the Attorney General shall pursue enforcement under paragraph (1); and

(B) may bring an action in an appropriate district court of the United States for appropriate relief, including civil penalties under paragraph (1) or declaratory and injunctive relief.

(e) SEVERABILITY.—

(1) IN GENERAL.—If any provision of this section or the application of this section to any person or circumstance is held invalid, the invalidity shall not affect the other provisions or applications of

this section that can be given effect without the invalid provision or application.

(2) SUBSEQUENT DETERMINATIONS.—If the application of any provision of this section is held invalid with respect to a foreign adversary controlled application that satisfies the definition of such term pursuant to subsection (g)(3)(A), such invalidity shall not affect or preclude the application of the same provision of this section to such foreign adversary controlled application by means of a subsequent determination pursuant to subsection (g)(3)(B).

(f) RULE OF CONSTRUCTION.—Nothing in this division may be construed—

(1) to authorize the Attorney General to pursue enforcement, under this section, other than enforcement of subsection (a) or (b);

(2) to authorize the Attorney General to pursue enforcement, under this section, against an individual user of a foreign adversary controlled application; or

(3) except as expressly provided herein, to alter or affect any other authority provided by or established under another provision of Federal law.

(g) DEFINITIONS.—In this section:

(1) CONTROLLED BY A FOREIGN ADVERSARY.—The term "controlled by a foreign adversary" means, with respect to a covered company or other entity, that such company or other entity is—

(A) a foreign person that is domiciled in, is headquartered in, has its principal place of

business in, or is organized under the laws of a foreign adversary country;

(B) an entity with respect to which a foreign person or combination of foreign persons described in subparagraph (A) directly or indirectly own at least a 20 percent stake; or

(C) a person subject to the direction or control of a foreign person or entity described in subparagraph (A) or (B).

(2) COVERED COMPANY.—

(A) IN GENERAL.—The term "covered company" means an entity that operates, directly or indirectly (including through a parent company, subsidiary, or affiliate), a website, desktop application, mobile application, or augmented or immersive technology application that—

(i) permits a user to create an account or profile to generate, share, and view text, images, videos, real-time communications, or similar content;

(ii) has more than 1,000,000 monthly active users with respect to at least 2 of the 3 months preceding the date on which a relevant determination of the President is made pursuant to paragraph (3)(B);

(iii) enables 1 or more users to generate or distribute content that can be viewed by other users of the website, desktop application, mobile application, or augmented or immersive technology application; and

(iv) enables 1 or more users to view content generated by other users of the website, desktop application, mobile application, or augmented or immersive technology application.

(B) EXCLUSION.—The term "covered company" does not include an entity that operates a website, desktop application, mobile application, or augmented or immersive technology application whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews.

(3) FOREIGN ADVERSARY CONTROLLED APPLICATION.—The term "foreign adversary controlled application" means a website, desktop application, mobile application, or augmented or immersive technology application that is operated, directly or indirectly (including through a parent company, subsidiary, or affiliate), by—

(A) any of—

(i) ByteDance, Ltd.;

(ii) TikTok;

(iii) a subsidiary of or a successor to an entity identified in clause (i) or (ii) that is controlled by a foreign adversary; or

(iv) an entity owned or controlled, directly or indirectly, by an entity identified in clause (i), (ii), or (iii); or

(B) a covered company that—

(i) is controlled by a foreign adversary; and

(ii) that is determined by the President to present a significant threat to the national security of the United States following the issuance of—

(I) a public notice proposing such determination; and

(II) a public report to Congress, submitted not less than 30 days before such determination, describing the specific national security concern involved and containing a classified annex and a description of what assets would need to be divested to execute a qualified divestiture.

(4) FOREIGN ADVERSARY COUNTRY.—The term "foreign adversary country" means a country specified in section 4872(d)(2) of title 10, United States Code.

(5) INTERNET HOSTING SERVICE.—The term "internet hosting service" means a service through which storage and computing resources are provided to an individual or organization for the accommodation and maintenance of 1 or more websites or online services, and which may include file hosting, domain name server hosting, cloud hosting, and virtual private server hosting.

(6) QUALIFIED DIVESTITURE.—The term "qualified divestiture" means a divestiture or similar transaction that—

(A) the President determines, through an interagency process, would result in the relevant foreign adversary controlled application no longer being controlled by a foreign adversary; and

(B) the President determines, through an interagency process, precludes the establishment or maintenance of any operational relationship between the United States operations of the relevant foreign adversary controlled application 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 or an agreement with respect to data sharing.

(7) SOURCE CODE.—The term "source code" means the combination of text and other characters comprising the content, both viewable and nonviewable, of a software application, including any publishing language, programming language, protocol, or functional content, as well as any successor languages or protocols.

(8) UNITED STATES.—The term "United States" includes the territories of the United States.

SEC. 3. JUDICIAL REVIEW.

(a) RIGHT OF ACTION.—A petition for review challenging this division or any action, finding, or determination under this division 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 division or any action, finding, or determination under this division.

(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 date of the enactment of this division; and

(2) in the case of a challenge to any action, finding, or determination under this division, not later than 90 days after the date of such action, finding, or determination.

APPENDIX B

United States Constitution
Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.