Nos. 24-656, 24-657

In the Supreme Court of the United States

TIKTOK INC., *et al.*,

Petitioner,

BRIAN FIREBAUGH, *et al.*,

Petitioner,

v.

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

Respondent.

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

MOTION OF *AMICUS CURIAE* THE FORUM FOR CONSTITUTIONAL RIGHTS FOR LEAVE TO FILE AN OUT-OF-TIME ARGUMENT MOTION & FOR LEAVE TO PARTICIPATE AT ORAL ARGUMENT

MOTION FOR LEAVE TO FILE AN OUT-OF-TIME ARGUMENT MOTION

Amicus curiae The Forum for Constitutional Rights (FCR) respectfully seeks leave to file the following out-of-time motion to participate at oral argument in the above-captioned cases (collectively, *TikTok*). The Court is scheduled to hear *TikTok* on January 10, 2025. An entry on the Court's docket establishes that: "[a]ny motion pertaining to the [*TikTok*] oral argument shall be filed on or before 5 p.m. (EST), Friday, December 27, 2024." In light of the following facts, the Court should permit this out-of-time motion, which comes just four days past the deadline.

Ordinarily, *amici curiae* may file argument-participation motions "no later than 7 days after the respondent's or appellee's brief on the merits is filed." S. Ct. R. 28.4, 28.7. This timeframe enables amici to file argument-participation motions *after* reviewing the parties' main briefs and other amici briefs. Amici then have the information they need to determine whether their presentation of oral argument "would provide assistance to the Court not otherwise available"—and, if so, file a motion explaining this assistance in a manner that respects "[s]uch a motion will be granted only in the most extraordinary circumstances." S. Ct. R. 28.7.

In *TikTok*, the Court established an expedited briefing schedule requiring submission of the parties' main briefs and all amici briefs on or before December 27, 2024 at 5pm EST—the same deadline for any motions related to oral argument. FCR's counsel needed time to review the parties' main briefs and the other amici briefs to determine whether FCR's participation at oral argument "would provide assistance to the Court not otherwise available" and would be justified as a matter of the "most extraordinary circumstances." S. Ct. R. 28.7.

Having completed this review as quickly as possible, FCR's counsel can now say that FCR alone raises Article III jurisdictional objections of vital importance to the Court's proper disposition of *TikTok*. Given the strength of these objections (as explained below), FCR respectfully asks the Court to grant this Motion for Leave to File an Out-of-Time Argument Motion. *Cf. Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 1029, 1029–30 (2008) (No. 07-512) (granting Oct. 22, 2008 out-of-time argument-participation motion of amicus American Antitrust Institute).

MOTION FOR LEAVE TO PARTICIPATE AT ORAL ARGUMENT

The Protecting Americans from Foreign Adversary Controlled Applications Act (the Act or TikTok ban) poses grave jurisdictional problems for the Court. The Forum for Constitutional Rights[1] (FCR) has filed an amicus brief showing this. FCR now respectfully moves for leave to participate at oral argument. FCR does not seek to intrude upon the parties' time. FCR suggests an enlargement and allotment of 15 minutes to FCR so that FCR may argue against the Court's jurisdiction.

FCR has informed the parties of this motion. Both the TikTok Petitioners (No. 24-656) and Creator Petitioners (No. 24-657) oppose the motion. The position of BASED Politics, Inc. and the Government is unknown to FCR at this time.

FCR seeks argument time because "[t]he fundamental question of jurisdiction . . . must be answered by the [C]ourt, whether [it is] propounded by counsel or not." *Defiance Water Co. v. Defiance*, 191 U.S. 184, 194 (1903) (Fuller, C.J., for the Court). FCR's amicus brief identifies three key jurisdictional problems with the Act:

- **First**, §3(b) grants the D.C. Circuit "exclusive jurisdiction"[2] over "any challenge" to the Act. Unlike other conferrals of exclusive court-of-appeals jurisdiction, §3(b) does not preserve Supreme Court review.[3] The Act thus gives the D.C. Circuit 'supreme' authority to "to say what the law is" when it comes to the Act, violating Article III's creation of "one" Supreme Court. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see* FCR Br. 20–24.

---

[1] Per S. Ct. R. 29.6, FCR certifies it is a Minnesota-based general public-benefit corporation. FCR has no parent corporation and no publicly-held company owns any stock in FCR.

[2] Section 3(b) does not say "exclusive *original* jurisdiction," which would preserve this Court's ability to exercise appellate jurisdiction here consistent with Article III and 28 U.S.C. §1254(1). *See, e.g.,* 5 U.S.C. §3416(c) ("[T]he Federal Circuit shall have **exclusive *original* jurisdiction** . . . ."); *cf., e.g.,* 15 U.S.C. §298(e) ("The district courts shall have **exclusive *original* jurisdiction** . . . .").

[3] *See, e.g.,* 15 U.S.C. §720e(a) ("**Except for review by the Supreme Court** . . . the District of Columbia Circuit shall have original and exclusive jurisdiction . . . ."); 28 U.S.C. §2265(c)(2) ("The Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction . . . **subject to review by the Supreme Court** . . . ."); Hobbs Act, 28 U.S.C. §§2342 (giving "exclusive jurisdiction" to "court of appeals" over certain matters), 2350(a) ("subject to review by the Supreme Court").

- **Second**, §2(e)(2) establishes a reapplication procedure[4] that enables the Executive Branch to nullify judicial decisions invalidating applications of the Act. This procedure violates Article III, which prohibits executive revision of judicial decisions. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."); *United States v. O'Grady*, 89 U.S. 641, 648 (1875) ("[I]t is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of . . . any other department of the government."); FCR Br. 11–12, 25.

- **Third**, §3 authorizes abstract judicial review of the Act divorced from the concreteness and adversity required by Article III's limitation of judicial power to the resolution of "cases" and "controversies." In particular, §3(a) prescribes "[a] petition for review challenging this [Act]"; §3(b) authorizes D.C. Circuit review of "any challenge to this [Act]"; and §3(c) dictates that "a challenge to this [Act]" must be brought "not later than 165 days after the date of the [Act's] enactment." This jurisdictional grant—upon which *TikTok* now rests—defies the oldest "most consistent thread in the federal law of justiciability": "federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968); *see* FCR Br. 12–16, 26–27.

These jurisdictional objections carry particular force here because, if correct, the whole Act falls. In *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923), the Court considered the possibility of jurisdictional issues producing this kind of result. At issue in *Keller* was the Court's jurisdiction to hear an appeal under a statute that created a Public Utilities Commission (PUC) for the District of Columbia. *See id.* at 436–37 (discussing Act of March 4, 1913, ch. 150, §8, 37 Stat. 938, 974–996 (¶¶1–103)). The statute authorized the PUC to fix the future value and rates of various public utilities—"power which was essentially legislative." *Fed. Radio Comm'n v. Gen. Elec. Co.*, 281 U.S. 464, 468 (1930) (explaining *Keller*).

[4] With bracketed annotations for clarity, §2(e)(2) states: "[i]f the application of any provision of this section [i.e., §2] is held invalid with respect to a foreign adversary controlled application that satisfies the definition of such term pursuant to subsection (g)(3)(A) [i.e., TikTok and TikTok-related entities], **such invalidity shall not affect or preclude the application of the same provision of this section** [i.e., §2] to such foreign adversary controlled application [i.e., TikTok and TikTok-related entities] by means of a subsequent determination pursuant to subsection (g)(3)(B) [i.e., the President declaring TikTok or TikTok-related entities to be a national security threat]."

Paragraphs 64 and 65 of the PUC statute set forth a judicial-review scheme. *Keller*, 261 U.S. at 439–40. Paragraph 64 granted "any person or corporate interest dissatisfied with any [PUC] valuation . . . the right to begin a proceeding in equity" in a D.C. trial court. *Id.* Paragraph 64 then granted jurisdiction to the trial court "to vacate, set aside or modify" challenged PUC decisions to the extent the decision was "unlawful, inadequate or unreasonable." *Id.* Paragraph 65 imposed a 120-day time limit on court challenges, after which "the right . . . of recourse to the courts shall terminate absolutely." *Id.* Finally, Paragraph 64 allowed any party to "appeal from" the trial court's final order to "the Court of Appeals of the District of Columbia, and therefrom [appeal] to the Supreme Court of the United States." *Id.*

Writing for the Court in *Keller*, Chief Justice Taft held that the PUC statute's grant of appellate jurisdiction to the Supreme Court violated Article III, requiring dismissal of the appeal. *Id.* at 442–45. Taft observed: "Congress intended that the [D.C. trial] court shall revise the [PUC's] legislative discretion . . . by considering the evidence and full record of the case and entering the order it deems the [PUC] ought to have made." *Id.* at 442. Such legislative jurisdiction posed no problem for D.C. courts as they were "not created under . . . [Article III] of the Constitution but [were] legislative courts." *Fed. Radio Comm'n*, 281 U.S. at 468 (explaining *Keller*). But the "validity" of Paragraph 64's allowance of an "appeal" to the U.S. Supreme Court" presented a "different question." *Keller*, 261 U.S. at 443–44.

Chief Justice Taft explained that "legislative or administrative jurisdiction . . . cannot be conferred on [the] Court either directly or by appeal." *Id.* Taft then

observed that paragraph 92 of the PUC statute "declare[d] **each paragraph to be independent** and direct[ed] that the holding of **any paragraph or any part of it** invalid shall not affect the validity of the rest." *Id.* (bold added). On this basis, Taft pronounced: "[t]he fact that the appeal to this Court is invalid does not . . . render paragraph 64 invalid as a whole." *Id.* at 444. Taft also declared: "we think Congress would have given the appeals to the courts of the District [per paragraph 64] even if it had known that the appeal to this Court could not stand." *Id.* at 444–45.

Like the PUC statute in *Keller*, the TikTok ban grants legislative jurisdiction insofar as §3 enables judicial review of "challenge[s] to th[e] [Act]" in the abstract. But unlike the PUC statute, the TikTok ban's severability provision does not sweep universally across the ban—i.e., state that if the Act is invalid in any respect, such invalidity will not affect the rest of the Act. The ban's severability provision, located under §2(e)(1), limits severability to §2 of the Act: "[i]f 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."

From this selective language follows the conclusion that severability should not occur—i.e., the entire Act should fall—if the Court should holds §3's provision of judicial review invalid in any way. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). The TikTok ban's severability provision limits severability to §2, negating the application of severability to §3.

Congress drafts statutes with "hierarchical schemes—section, subsection, paragraph, and on down the line." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 300 (2017). "Congress used that structure in the [TikTok ban] and relied on it to make precise cross-references," *id.*—e.g., §2(a)(2)(A)'s precise cross-references to "paragraph (3)" and "subsection (g)(3)(A)." Had Congress intended for severability to apply to every ban provision (including §3), Congress would not have used the word "section" in §2(e)(2) ("[i]f any provision **of this section** . . . is held invalid"). Congress would have said "division"—the word that Congress used across the Act when referring to the whole law. *See, e.g.,* §2(f) ("Nothing in this division . . . .").

These jurisdictional and inseverability points become even more important when one considers the Article II (i.e., executive power) issues that President-elect Trump raises here. President-elect Trump notes that the TikTok ban "purports to dictate how the President must exercise his national security and foreign affairs authority in [a] sensitive area, by mandating that the President must make key determinations 'through an interagency process.'" Trump Amicus Br. 11 (quoting §2(g)(6)(A)–(B)). But absent full invalidation of the ban on the jurisdictional and inseverability grounds described above, the President-elect's hands remain tied[5] by the Act's interagency rule with no possibility of judicial review.[6]

---

[5] That President Biden signed the TikTok ban and thereby embraced the ban's various limits on executive power makes no difference. "The Judicial Branch must be most vigilant in guarding the separation between the political powers precisely when those powers collude to avoid the structural constraints of our Constitution." *SW Gen.*, 580 U.S. at 318 (Thomas, J. concurring).

[6] If, upon taking office, President-elect Trump simply ignored the TikTok ban's various limits on executive power, this disregard would spark an inter-branch conflict, with the President failing to uphold his Article II, §3 constitutional duty to "take care that the laws be faithfully executed." Such disregard would also be anathema to our nation's fundamental character as "a government of laws, and not of men." *Marbury*, 5 U.S. at 163; *see also Olmstead v. United States*, 277 U.S. 438, 485 (1928)

After all, §3(c) provides that "a challenge to this [Act]" must be brought "not later than 165 days after the date of the [Act's] enactment"—a deadline that has long since passed. Section 3(a) does separately authorize the filing of "[a] petition for review challenging . . . any action, finding, or determination under th[e] [Act]." But even if one assumes that presidential rejection of the Act's interagency-process rule is an 'action, finding, or determination under the Act,' Article III would not permit judicial review of a petition by the President to validate his own action (a friendly suit). *See Muskrat v. United States*, 219 U.S. 346, 359–60 (1911) ("It [was] never . . . thought that, by means of a friendly suit . . . the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.").

"[F]ederal courts do not issue advisory opinions about the law—even when requested by the President. Nor do federal courts operate as an open forum for citizens 'to press general complaints about the way in which government goes about its business.'" *FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367, 378–79 (2024). Finally, even if a party with indisputable Article III standing sought to enforce the Act's interagency-process rule, any presidential reply that the Act violates Article II in creating this rule would still be "a challenge to th[e] [Act]" and thus barred by §3(c)(1)'s mandatory 165-days-after-passage filing deadline. *See Manrique v. United States*, 581 U.S. 116, 121 (2017) (claim-processing rules "unalterable" when timely asserted and mandatory); BLACK'S LAW DICTIONARY 244 (8th ed. 2004) ("challenge" means "formally questioning the legality of . . . [a] thing").

(Brandeis, J., dissenting) ("If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.").

FCR recognizes the Court grants amici requests for argument time "only in the most extraordinary circumstances." S. Ct. R. 28.7. But those circumstances exist here given how fast this litigation has moved through the Court without any real consideration of jurisdiction. Usually, when "[a]ll parties agree that the Court has jurisdiction" under circumstances affording good reason to believe the Court does not have jurisdiction, the Court will appoint an amicus "to argue the position that the Court lacks jurisdiction." *United States v. Windsor*, 570 U.S. 744, 755 (2013). Just so: "[i]n the absence of evidence and argument offered by both sides . . . there is insufficient assurance of . . . balanced analysis and careful conclusions." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968).

As detailed above, the TikTok ban's plain text affords multiple good reasons to doubt the jurisdiction conferred by the Act. But the parties are not likely to press these reasons at oral argument. Petitioners have a strong interest in prevailing on the merits, which promises greater long-term relief than a jurisdictional reversal. And the Government has a strong interest in preserving the D.C. Circuit's on-the-merits judgment in the Government's favor. Still, "[a] lack of federal jurisdiction cannot be waived . . . [by] agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934).

In this regard, *TikTok* may prove to be the Court's only chance to address the jurisdictional concerns that the TikTok ban raises. *TikTok* stems from a "petition for review challenging th[e] [Act]," §3(a)—a jurisdictional posture that the Court

will never see again given the Act's 165-days-after-passage filing deadline for such petitions. And if the Court decides *TikTok* without ever addressing the TikTok ban's unequivocal conferral of "exclusive jurisdiction" upon the D.C. Circuit, this reality may prove a jurisdictional *fait accompli* that precludes later judicial consideration of the point (to avoid disturbing *TikTok*). *Cf. FTC v. Standard Oil Co.*, 449 U.S. 232, 249 (1980) (Stevens, J., concurring in the judgment) ("The [Court's] disposition of a novel and important question of federal jurisdiction in a footnote will lend support to the notion that federal courts have a 'carte blanche' . . . .").

In the end, "jurisdiction is not a matter of sympathy or favor"—"courts are bound to take notice of the limits of their authority" and thus prevent the "obtaining [of] an unauthorized judgment by surprise." *Reid v. United States*, 211 U.S. 529, 539 (1909). Because granting argument time to FCR will advance this most important judicial task—assistance unavailable from any other source due this litigation's fast pace and the parties' apparent consensus that jurisdiction exists—the Court should grant FCR's motion for leave to participate at oral argument.

Respectfully submitted,

Dated: December 31, 2024

SUBBARAMAN PLLC

By: /s/Mahesha P. Subbaraman

Mahesha P. Subbaraman
SUBBARAMAN PLLC
80 S. 8th Street, Suite 900
Minneapolis, MN 55402
(612) 315-9210
mps@subblaw.com

Counsel-of-Record for Amicus Curiae