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

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INTRODUCTION

The Government runs away from what the D.C. Circuit held, adding new theories along the way. But it runs into problems just as bad, if not worse.

The Government begins by claiming the Act's TikTok-specific provision is subject to no First Amendment scrutiny *at all*—a position rejected by all three judges below. It argues ByteDance Ltd. has no rights because it is foreign, and TikTok Inc. has no rights because it has no authority over the algorithm and recommendation engine used on the U.S. platform. That argument has no basis in law or fact, and contradicts the Government's concession that TikTok Inc. is a *bona fide* American company. Indeed, the startling proposition that there should be *no* judicial scrutiny of a law shuttering a speech platform used by 170 million Americans would mean Congress could ban Petitioners from operating TikTok explicitly because they refused to censor views Congress disfavors or to promote views it likes. And if accepted, this theory would strip First Amendment rights from any American speaker who publishes content that may reflect input from foreign entities or who is purportedly vulnerable to coercion from them. All this is obviously wrong.

The remaining threshold issue is whether strict or intermediate scrutiny applies. Plainly the former: The Act applies only to applications providing user-generated or user-shared *content*; exempts a *content*-defined class of applications; and singles out one *content* platform for uniquely harsh treatment. The Government, moreover, concedes Congress did all that based on concerns about the platform's *content*.

And regardless, the TikTok-specific provision fails any form of heightened scrutiny.

Start with the "covert content manipulation" interest. The Act says nothing about "covertness," and the record is littered with objections to the platform's *overt content*. The Government, moreover, effectively *concedes* that Congress never even considered the less-restrictive alternative of targeting "covertness" directly with disclosure; that there is no evidentiary basis establishing disclosure would be ineffective; and that targeting "content manipulation" alone is plainly illegitimate. Each concession is fatal under heightened scrutiny.

The Government fares no better arguing, for the first time, that the "data protection" interest alone suffices. It cannot prove Congress would have passed the Act on that basis, independent of its invalid content-based motives. Indeed, the Act is so grossly underinclusive—*categorically excluding* e-commerce companies with similar amounts of U.S. user data and connections to China—that data protection alone could not possibly justify it. Again, that is fatal under strict or intermediate scrutiny.

Finally, while the D.C. Circuit claimed the Act treats TikTok differently because it is an immediate threat, the Government claims TikTok was treated no worse than others. Neither is correct, and carving TikTok out from the general provision was invalid.

In sum, this Court should hold that the Act's TikTok-specific provision is unconstitutional. At minimum, a temporary injunction is warranted to provide the breathing space needed to carefully consider this significant question.

ARGUMENT

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

The Government argues Petitioners have no First Amendment rights to operate TikTok in the U.S., despite admitting that doing so is expressive activity. Once that illogical threshold argument is rejected, the related backup arguments for evading strict scrutiny fall too.

A. Petitioners Have First Amendment Rights Burdened By The Provision

The Government concedes "application of the proprietary recommendation algorithm … on the TikTok platform [is] a form of speech." Br. 20. It also concedes the Act restricts Petitioners from engaging in that expressive activity. Br. 21. The Government nevertheless attempts a three-step argument that Petitioners have "no cognizable First Amendment claim": (1) TikTok Inc. allegedly has no control over the algorithm and must do whatever ByteDance Ltd. says; (2) TikTok Inc. therefore purportedly has no First Amendment right to use the algorithm; and (3) ByteDance Ltd. lacks that right too, as a foreign company supposedly operating only abroad. Br. 19-21.

Each step of that citation-free argument is wrong. And they cannot *all* be right: Someone is curating and publishing this American speech platform, and Congress cannot possibly restrict that expressive activity without any First Amendment scrutiny. Otherwise, Congress could have explicitly passed the Act for the viewpoint-discriminatory reasons, expressed by numerous Members, that the platform's

content allegedly is too pro-Palestinian or harms children. Pet. Br. 16. That is not the law.

1. The Government's factual premise rests on one sentence: TikTok Inc. "has no authority or technical ability to alter the algorithm or recommendation engine, and instead must simply follow ByteDance's directives." Br. 20. Astonishingly, the Government cites nothing in support—not the record, the decision below, its factual statement, or anything else.

The record unequivocally disproves this *ipse dixit*. Through a U.S. subsidiary, U.S. contractor, and thousands of U.S. employees, TikTok Inc. reviews and approves the algorithm in the course of operationalizing it onto the U.S. platform; customizes the recommendation engine for use in this country; and develops and enforces the content-moderation policies constraining the content made available to the engine and users. Pet. Br. 9-10 (citing JA 493-94, 497-99, 504-06, 778). All that happens *after* a global engineering team—including members in China, the U.S., and elsewhere—develops and updates the algorithm's source code. *See id.*; Gov't Br. 3. Code for the recommendation engine cannot be operationalized in the U.S. until TTUSDS employees in the U.S. vet it, train it on U.S. user data stored with Oracle, and deploy it in the Oracle cloud. JA 449, 506, 778. In short, "[t]he recommendation engine for the U.S. TikTok platform … is subject to the control of [TTUSDS]," not ByteDance. JA 778. No contrary record evidence exists, because the Government's story is false.

In sum, by implementing the recommendation engine on the U.S. platform, TikTok Inc. makes the

engine its own. That is TikTok Inc.'s "own editorial choice[] about the mix of speech it wants to convey." *Moody v. NetChoice, LLC*, 603 U.S. 707, 734 (2024). It is, in short, *TikTok Inc.'s speech* as the platform's publisher.

2. Even assuming the false premise, moreover, TikTok Inc. still plainly has the First Amendment right to apply the algorithm and recommendation engine when curating and publishing the U.S. platform. The Government admits TikTok Inc. is a "California company" that "provides the TikTok platform to users in the [U.S.]," Br. 3; *accord* JA 483, and it does not argue this Court should "pierce the corporate veil" and disregard TikTok Inc.'s "corporate separateness." JA 27. Instead, while treating TikTok Inc. as a "legally distinct" entity, *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l, Inc.*, 591 U.S. 430, 435 (2020) (*AOSI*), the Government proclaims this American company "has no First Amendment right to be controlled by a foreign adversary" or to "serv[e] as a compelled mouthpiece for ByteDance's speech." Br. 20. Again, no citation follows that assertion.

Both law and logic hold otherwise. Most obviously, FARA-registered lobbyists have the right to serve as "mouthpieces" whose speech is "controlled" by foreign principals. History and precedent show that, while Congress may require disclosure of that relationship, it may not ban dissemination of foreign viewpoints or propaganda by them or other Americans—including those who feel "compelled" by financial or other circumstances to do so. Pet. Br. 36-40.

The reason why is simple and fundamental. No matter the amount or source of "control" a third-

party wields over an American speaker, the speaker always retains the ultimate choice: It can *acquiesce* in the third-party's demands or *refuse* and incur any consequences. As the "freedom of speech … necessarily compris[es] the decision of both what to say and what *not* to say," *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (cleaned up), the former is "as much an editorial choice" as the latter, *NetChoice*, 603 U.S. at 739. Here, TikTok Inc. speaks through its U.S. personnel, who can choose, at minimum, whether to submit to any purported "control"; ByteDance Ltd. cannot literally make them say anything, though it could seek to remove them using a corporate parent's ordinary powers—just like other foreign entities that own U.S. publications (JA 765-67). *Cf. United States v. Nixon*, 418 U.S. 683, 694-97 (1974) (Attorney General has statutory authority to exercise his powers contrary to the President's orders, despite being removable by the President). Congress's attempt to "overrid[e] [this] private party's expressive choice[]" must "confront[] the First Amendment." *NetChoice*, 603 U.S. at 732.

The Government's contrary position would have radical implications for all Americans—not just subsidiaries of foreign corporations. For example, if domestic publishers lack *any* "First Amendment right to use [this] algorithm" as their curation method, Br. 20, Congress could ban *every* American publication from using *any* foreign-controlled algorithm in recommending content to readers—even if Congress admittedly acted based on viewpoint-disagreement with the recommended content. Likewise, according to the Government, China "build[s] dossiers of personal information for

blackmail," JA 39, and targets "journalist[s]" as part of "influence campaigns." JA 36. So whenever the Government asserts there is a "risk" China may blackmail a newspaper journalist, JA 33, and "predicts" the journalist "would try to comply," JA 36, the Government would have free rein to shutter the paper *unless it fired* the vulnerable journalist. This would override the paper's editorial "judgment" that the journalist's "value" "outweigh[ed] the costs" of Chinese influence. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 792 (2011) (*EMA*). And it would present grave "potential for abuse" by giving the Government unfettered discretion to "single out … members of the press," as the Act does TikTok. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 592 (1983).

To be clear, Congress has plenty of power to remedy foreign "control" of Americans. Congress could pass speech-*neutral* laws regulating foreign agents and investments in the U.S. or protecting victims of foreign coercion; such laws would apply even if speech was involved. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986). But contrary to the Government's suggestion (Br. 22-23), *Arcara* does not allow Congress to target alleged foreign agents *only* when they operate *speech* platforms, then single out *a particular platform* for worse treatment, all because it fears the *content* there. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000); Pet. Br. 28. The First Amendment requires the Government to justify such a law under rigorous scrutiny of both the legitimacy of the ends Congress actually pursued and the necessity of the means selected.

3. In all events, the Government's final step—that ByteDance Ltd. lacks First Amendment rights too—also fails.

The Government observes that "foreign organization[s] operating abroad" have no First Amendment rights. Br. 19 (quoting *AOSI*, 591 U.S. at 436). But foreign persons speaking domestically do. *See Bluman v. FEC*, 800 F. Supp. 2d 281, 286-90 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012). Lower courts thus have recognized that *AOSI* is inapposite where overseas speakers disseminate speech in this country. *See Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 744-75 (9th Cir. 2021); *Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263, 266, 287 (5th Cir. 2024), *cert. granted*, 144 S. Ct. 2714 (2024).

Here, although the Government suggests the Act "targets only … overseas" conduct "by ByteDance," it promptly admits the Act instead targets "applying the algorithm and [recommendation] engine … on TikTok in the United States." Br. 20. TikTok. Inc. and ByteDance Ltd. associate together to perform this *domestic* editorial curation. Pet. Br. 22-23. That is even clearer on the Government's theory: If TikTok Inc. is "a compelled mouthpiece for ByteDance's speech," Br. 20, then ByteDance Ltd. *is speaking in this country through TikTok Inc*. After all, not only is TikTok used in America by 170 million Americans, but the recommendation engine is operationalized here for use in publishing the U.S. platform—as the D.C. Circuit concluded and the record establishes. JA 27; *supra* at 4.

Ultimately, the Government's divide-and-conquer strategy is too clever by half. Corporate labels aside,

the substantive reality is undeniable: *Someone* is curating and publishing the U.S. platform; whether that is TikTok Inc., ByteDance Ltd., or both, they *each* have *that* First Amendment right.

Importantly, *all agree* ByteDance Ltd. is "privately-owned," JA 671; *accord* JA 483-84, so this case does not present the question whether a foreign-state entity would have First Amendment rights to operate an American speech platform. The Government at most claims that, like all companies operating in China, ByteDance Ltd.'s Chinese subsidiaries are heavily regulated, giving the State some control over them. Br. 3-5; *see, e.g.*, JA 648 (Government declarant acknowledging Party committees "are legally required for domestic firms and many foreign firms operating in China"). Such "regulat[ion]" of these subsidiaries does not come close to "mak[ing]" them foreign "state actor[s]" lacking First Amendment rights when speaking in this country—*much less ByteDance Ltd. and TikTok Inc. Cf. Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 816 (2019). Otherwise, Congress could force any private company operating in China, or (like ByteDance Ltd.) with subsidiaries there, to run ads for its preferred political candidate, *immune* from First Amendment scrutiny. The Government cites nothing for the breathtaking proposition that the Chinese government's alleged ability to control a private corporation licenses Congress to follow suit.

B. The Provision Imposes Content-Based Burdens On Petitioners' Speech, Triggering Strict Scrutiny

The only substantial question, then, is which form of heightened scrutiny applies. The Government's claim that the Act "does not impose any content-based restrictions" warranting strict scrutiny is irreconcilable with its own contention that "Congress adopted the Act to protect Americans from … covert *content* manipulation." Br. 24 (emphasis added).

1. The Government contends "any burden" on Petitioners' "constitutionally protected speech" is "purely incidental." *Id.* (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). It reasons the Act "does not aim at [Petitioners'] *constitutionally protected* speech because it targets only the covert manipulation of content by a foreign adversary that lacks First Amendment rights." *Id.* That is wrong twice over.

First, even accepting Congress's *motive* focused on China, the covert-manipulation "interest" is still "related to [Petitioners'] expression." *Texas v. Johnson*, 491 U.S. 397, 410 (1989) (distinguishing *O'Brien*). The Government's justification for singling out TikTok is the alleged risk Petitioners will acquiesce in, or fail to prevent, China's manipulation of the platform's mix of content. Br. 37-41. So "as applied to [them,] the conduct triggering coverage" did "consist[]" of "message[s]" they may later "communicate[]." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010) (distinguishing *O'Brien*). By analogy, if Congress had shuttered the *Washington Post* based on a prediction its reporters would slip

past their editors too much unprotected defamation, that would be *per se* unconstitutional.

Second, wholly apart from Congress's *interests*, "*O'Brien* is inapplicable" because the Act "directly and immediately affects" Petitioners' expressive activity in curating the U.S. platform, rather than regulating conduct that sometimes "happen[s] to" be expressive. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000). Banning Petitioners from operating TikTok absent a divestiture "imposes a burden based on the content of speech and the identity of the speaker," "[b]oth on its face and in its practical operation." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). That is especially true because TikTok was plainly regulated only because, like the apps covered by the generally-applicable provision, it publishes user-generated and user-shared content. Pet. Br. 29. If TikTok were solely an e-commerce app, Congress would not have singled it out from the exempted e-commerce apps. *Infra* at 20-22. So the "justification" for the TikTok-specific provision is unquestionably "content based"—even as to the Government's data-protection interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015).

2. The Government also argues the Act is neither content-based nor viewpoint-based because its "concern" was with "manipulation of [TikTok] to advance China's *interests*—not China's views." Br. 26. The basis of this purported distinction is that speech on any topic, or from any perspective, might theoretically advance China's interests. *Id.*

That is sophistry. The same could be said if Texas banned Facebook claiming it manipulates coverage

to "advance [the Democratic Party's] *interests*." That would be naked viewpoint discrimination, and so is this. Creators Br. 24-26.

3. Analogizing to time, place, or manner regulations, the Government argues the Act leaves "alternative modes of communication" available. Br. 26. The analogy fails because such regulations must be "content-neutral," *id.*, which the Act is not.

Regardless, the Government grossly exaggerates the alternatives available to Petitioners. The Government suggests a qualified divestiture of the U.S. platform theoretically could happen. Br. 27-28. But it does not dispute that, if a divestiture were possible at all, it would require expending massive resources and fundamentally altering the U.S. platform's content, by rendering it an island isolated from the global content that makes TikTok successful. Pet. Br. 14-15; JA 372-74. Those burdens far exceed the modest monetary and practical costs that this Court has held trigger strict scrutiny for content-based speech restrictions. Pet. Br. 24-25.

II. THE ACT'S TIKTOK-SPECIFIC PROVISION DOES NOT SATISFY ANY STANDARD OF HEIGHTENED SCRUTINY

Ultimately, the precise standard of scrutiny is immaterial. The Government's "content manipulation" and "data protection" interests fail any heightened standard. At minimum, the Government fails to justify the Act's singling out of TikTok for worse treatment than all other speech platforms.

A. The Content-Manipulation Interest Cannot Sustain The Provision

1. Like the D.C. Circuit, the Government frames the interest as targeting "*covert* manipulation of content … by a foreign adversary." Br. 37 (emphasis added). But under heightened scrutiny, *disclosure* is the time-tested, least-restrictive alternative to address a concern the public is being misled about the source or nature of speech received—including in the foreign-affairs and national-security contexts, as the FARA regime illustrates. Pet. Br. 38-41. The Government's response is, again, a single sentence: "Congress and the Executive Branch could reasonably determine that petitioners' proposed alternative—an anemic standing disclosure that [China] *could*, at some unspecified point, engage in manipulation—would be useless. See J.A. 687-689." Br. 41. This sentence is tantamount to a confession of error, for three reasons.

First, the Government implicitly admits that neither Congress nor the Executive Branch actually determined that disclosure would be ineffective. The only reason to say "could reasonably determine" rather than "reasonably determined" is because the Solicitor General's Office cannot represent that such a determination was in fact made. That alone is fatal. Under even intermediate scrutiny, "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). *Post hoc* rationalizations will not suffice: to prove a "speech-restrictive law" is "narrowly tailored," the Government must "present evidence showing that—before enacting the [law]—it

'seriously undertook to address the problem with less intrusive tools readily available to it.'" *Billups v. City of Charleston*, 961 F.3d 673, 688 (4th Cir. 2020) (quoting *McCullen v. Coakley*, 573 U.S. 464, 494 (2014)); *see* Pet. Br. 31, 44-45.

Second, the Government's record citation proves our case. We agree this Court should "[s]ee J.A. 687-689," Br. 41, a snippet from a Government declaration. Not one word considers disclosures. It addresses the difficulty of identifying *undisclosed* manipulation. It does not come close to "reasonably determining" that a conspicuous *risk disclosure* on the platform would be "useless." That too is fatal: the Government has "the obligation to prove"—not just assert—that "alternative[s] will be ineffective." *Playboy*, 529 U.S. at 816; *see* Pet. Br. 47, 49.

Third, the Government's view that a disclosure of the alleged risk would be "anemic" and "useless" undermines its own interest. We previously provided an illustrative disclosure using a quotation from the Government's brief below. Pet. Br. 39-40. If that risk description is too "anemic," the described risk cannot be "compelling" or "significant" enough to satisfy heightened scrutiny. *Id.* at 31, 32 n.9. Moreover, the Government routinely requires disclosures about risks that "*could*" occur "at some unspecified point." Br. 41; *see, e.g.*, 17 C.F.R. § 229.106(b)(1) (requiring securities disclosure of "risks from cybersecurity threats"). So the assertion that a risk disclosure is "useless" in *this* context, Br. 41, betrays the Government's real worry: that *even fully informed* Americans will continue using TikTok because they think its benefits outweigh any "risk"

they might see other users' constitutionally-protected content because China so desires.

2. Stripped of the "covertness" gloss, the Government's "content manipulation" interest is *illegitimate*. Pet. Br. 35-37, 40-41. It is an anodyne way of claiming that Congress can prohibit an American speech platform from making the editorial choice to disseminate a mix of content based on the (never-yet-realized) risk that it might have been curated to further China's interests. That is contrary to history and precedent establishing Americans' First Amendment right to disseminate even actual foreign propaganda. *Id.*

The Government does not dispute the legal point. It never contends Congress may prevent Americans from disseminating Chinese propaganda. And in response to our objection that this unconstitutional, anti-propaganda interest motivated Congress, the Government doubles down on claiming the content-manipulation interest is limited to China's ability "to *covertly* manipulate the recommendation algorithm." Br. 38 (emphasis added).

The Government, however, cannot prove Congress's "actual purpose" was so confined. Pet. Br. 31. That would make Congress's failure to even consider disclosure inexplicable. *Id.* at 40-41. Moreover, the Act says nothing about "covertness," while the committee report and numerous Members objected to "misinformation, disinformation, and propaganda" without regard to covertness. *Id.* at 38. And this makes Congress's rejection of the Executive Branch's request to adopt statutory findings even

more suspicious. *Id.*; *see also id.* at 16 (Members' viewpoint objections unrelated to China).

Moreover, the Government itself shows Congress was concerned about potential content manipulation *regardless of* "covertness." The Government asserts "the Act echoes" other laws where Congress has "regulated foreign ownership of, or control over, companies operating in particular industries." Br. 39. But those laws targeted overt foreign conduct. The concern was not that foreign powers may secretly own or operate a bank or radio station, but that they should not wield *any* influence over these strategic industries. Most of the industries did not involve speech, and the ones that did involved broadcast media where Congress has wider latitude given bandwidth scarcity, Pet. Br. 30.

Ultimately, the Government's position reduces to its flawed view that TikTok Inc. has no First Amendment rights at all. To distinguish *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Government asserts that "[n]othing about the Act … impede[s] the flow of ideas on TikTok," and that the First Amendment does not give China the right to "coerc[e] TikTok into covertly manipulating content." Br. 48. But that ignores TikTok Inc.'s own agency as a private American company operating a U.S. speech platform. Pet. Br. 36-37; *supra* at 3-7.

3. Finally, whatever the precise nature of the "content manipulation" interest, the Act fails for a more basic reason. There is no evidence this is even a serious risk for TikTok. Pet. Br. 48-49.

The Government harps on Petitioners' failure to "squarely deny" a conclusory assertion that

"ByteDance" has "taken action in response to PRC demands to censor content *outside* of China," insisting "there is nothing vague about" the assertion. Br. 37-38. As Petitioners previously responded, however, "'[c]ensorship' is a loaded term, and it is not clear precisely what" the accusation is. JA 759. The Government itself made this point when arguing *its* takedown requests to social-media companies fell on the permissible side of a hazy line between "coercion" and slight "encouragement." *Murthy v. Missouri*, 603 U.S. 43, 69 (2024). In all events, Petitioners do squarely deny that TikTok has ever removed or restricted content in other countries at China's request, as its public transparency reports make clear. *E.g.*, JA 761 n.57. And none of this satisfies *the Government's burden* to "prove" the U.S. TikTok platform presents a unique risk of Chinese content manipulation that is an "actual problem in need of solving." *EMA*, 564 U.S. at 799 (cleaned up).

The Government also fails to refute that the NSA would address whatever theoretical problem exists. It emphasizes a "lack of trust in the good-faith compliance of ByteDance." Br. 41. But the NSA's premise was that compliance would be ensured through multiple layers of independent verification by government-approved U.S. entities, including Oracle. JA 449, 740-43. And while the Government questions Oracle's ability to perform its monitoring role, Br. 41, those misgivings rest on basic errors that remain unaddressed, JA 726-30.

B. The Data-Protection Interest Cannot Sustain The Provision

1. Under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), the Government cannot rely on the data-protection interest to justify the TikTok-specific provision unless it proves Congress would have passed the provision independent of any invalid content-based motive. Pet. Br. 41-42. The Government does not offer any such evidence. Instead, it makes two erroneous arguments that *Mt. Healthy*'s burden-shifting framework is inapplicable.

First, it contends *Mt. Healthy* does not apply to *statutes* because "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." Br. 36 (quoting *O'Brien*, 391 U.S. at 383). But *O'Brien* stressed that the statute there regulated conduct with only an incidental effect on speech, rather than (like the Act here) regulating "inevitably or necessarily expressive" activity. 391 U.S. at 385. Moreover, while *O'Brien* rejects "guesswork" about legislative motive based on "what fewer than a handful of Congressmen said," *id.* at 384, it is inapposite where the legislative record shows legislators "were not secretive about their purpose," *Hunter v. Underwood*, 471 U.S. 222, 229 (1985). Here, the Government *concedes* "[t]he Act targets … content manipulation" on the U.S. TikTok platform, Br. 20; the Act's scope is based entirely on content, *infra* at 20; and the only committee report confirms that the legislative "purpose" included preventing "misinformation, disinformation, and propaganda" from being "push[ed] … on the American public," JA 211.

In cases like this, *Hunter* holds that "*Mt. Healthy* suppl[lies] the proper analysis" if the Government asserts legislation rested on a "permissible motive" in addition to the "impermissible" one. 471 U.S. at 232. That is also consistent with heightened scrutiny: As it considers only the law's "actual purpose," Pet. Br. 31, it does not permit the Government to rely on an interest that would not in fact have caused Congress to pass the law. Indeed, on the Government's view, if Congress had expressly said it would *not* have passed the TikTok-specific provision but for its dislike of the views on TikTok, the provision should still be upheld based on the data-protection interest. This Court, however, "should not be blind to what all others can see and understand." Gov't Br. 27 (cleaned up).

Second, the Government argues *Mt. Healthy* applies only where the challenged action is "taken in part for an *unconstitutional* reason." Br. 36-37. But if a content-based speech restriction is not narrowly tailored to a particular interest, that interest *is* an "unconstitutional reason" for passing *that* restriction. After all, heightened scrutiny is intended to smoke out whether a speech restriction actually pursues a legitimate interest, rather than invidiously discriminating based on viewpoint or content. *See* Pet. Br. 25, 31-32 & n.9.

This case is a perfect example. The Government asserts Congress acted based on a legitimate interest in preventing "covert" content manipulation. But Congress's failure to consider disclosure and other obvious less-restrictive alternatives, and the legislative record's focus on content-related issues unrelated to covertness or even adversary control,

strongly suggest Congress instead acted based on illegitimate concerns about the platform's content. *Supra* at 15-16. It is the Government's burden to prove otherwise, and it has not even tried.

2. Regardless, the Act's gross underinclusivity defeats the data-protection interest under any form of heightened scrutiny. Pet. Br. 42-44. The Government responds that TikTok is "a uniquely severe threat," Br. 32, but Congress did not and could not make that finding, for two reasons.

First, the Act's structure proves otherwise. If Congress singled out TikTok because it was the greatest data-security threat, the general provision would be tailored to designating the next-greatest data threats. Instead, it focuses *solely on content*—limited to apps with user-generated or user-shared content (for as few as 1 million users), and excluding "review" apps. Sec. 2(g)(2). A social-media platform with 1 million users can be designated; an e-commerce or product-review platform with 200 million users cannot, *even if* it is collecting precise GPS data and handing it to a foreign adversary. It is thus risible to suggest the general provision is tailored to *data* threats and exempts only apps "unlikely" to pose the same risk. Gov't Br. 32, 43. The focus is obviously on *content* threats, and the same goes for the TikTok-specific provision.

Second, the record confirms the Government cannot plausibly describe TikTok as a materially worse data-security threat than the apps Congress *chose to exempt*. The Government asserts other apps lack "the reach of TikTok's 170 million monthly users." Br. 32. But it disregards record evidence

that "the type and amount of data that TikTok collects from U.S. users" in aggregate "is comparable to the type and amount" collected by other companies—including not just social-media apps published by U.S. companies like Meta and Snap but also e-commerce apps like Shein and Temu with significant connections to China. JA 455-56, 752 & n.16. The Government also asserts other apps lack "the same track record [as TikTok] of taking action at the behest of the PRC." Br. 32. But the "track record" is zero, as the Government concedes neither TikTok nor ByteDance has ever misappropriated any U.S. data at China's behest. JA 640; *accord* Gov't Br. 4-5. The Government thus has no justification for treating TikTok differently from companies like Shein and Temu as well as "many U.S. technology companies"—such as Cisco, Dell, Hewlett-Packard, and Electronic Arts—that "have Chinese-headquartered subsidiaries, and therefore face the same theoretical risk" in the future. JA 461-62.

Indeed, the Government's portrayal of TikTok as a uniquely severe threat is irreconcilable with its own commission's report specifically raising "data risks" from "e-commerce platforms" with substantial operations in China. JA 339. The report noted they have "struggled to protect user data" while "rapidly expand[ing] [their] market presence," with Shein and Temu "rank[ing] in the top five free apps on the Apple Store [as of March 2023], ahead of … Amazon." JA 339-40, 343. Public reporting shows, for example, that Temu had 70 million active

American users shortly before the Act passed.[1] And e-commerce sites like these collect and track substantial amounts of user data, including names, addresses, payment info, and location. JA 340 ("draws on customer data and search history"; "requests that users share their data and activity from other apps, including social media").

To be clear, Petitioners are not suggesting Congress should have also banned apps like these. Rather, the key point is that Congress's decision to exempt them strongly suggests it targeted TikTok for its social-media content, not its data.

3. In fact, the Government fails to prove TikTok is a "severe" data-security risk at all. The Government asserts that (i) China has great interest in Americans' data, (ii) TikTok has great amounts of Americans' data, and (iii) China has great control over TikTok and ByteDance. Br. 30. Again, however, it concedes the alleged risk has never materialized, while making no effort to explain why this dog has never barked.

The explanation is that the Government's premises are wrong. It overstates China's interest in TikTok's data. *See* Pet. Br. 50. And it understates TikTok's ability to protect itself. *See id.* at 50-51. The Government claims Petitioners "would never agree" to stop "sending [U.S. user data] to Beijing to train the algorithm," Br. 34 (cleaned up), but that is what they have already agreed to and done, *see* JA 778. While certain narrow data categories can still

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[1] C. Hodgson, E. Olcott & G. Li, *China's Temu in US online ads blitz in challenge to Amazon*, Financial Times (Jan. 30, 2024), https://perma.cc/2WJ5-KXSG.

be shared with ByteDance, *see* Gov't Br. 33; JA 722, these categories were discussed during the NSA negotiations and the Government never explained why the associated protections were later deemed insufficient, *see* JA 773-74, 776-77.

The Government also ignores the obvious less-restrictive alternative of prohibiting covered companies from sharing sensitive U.S. user data with a foreign adversary. Pet. Br. 46. Again, Congress never considered this, much less concluded that relevant U.S. personnel could not be induced to comply through the threat of massive penalties under a new law.

C. The Provision Cannot Stand Because It Unjustifiably Singles Out TikTok

At minimum, the Act's general provision for designating adversary-controlled applications is *itself* a less-restrictive alternative, yet Congress provided no justification why TikTok is subjected to a process and standard harsher than all others. Pet. Br. 51-54. Rather than following the D.C. Circuit's attempt to justify this "differential treatment," JA 58, the Government denies the Act treats TikTok worse at all, Br. 44-46. That, however, is even less defensible.

As for "process," the Government emphasizes the "negotiation" in which TikTok participated. Br. 44-45. But that also could occur under the general provision, Sec. 2(g)(3)(B)(ii), and the non-statutory process was less protective since the Government could and did walk away without explanation, Pet. Br. 12. The general provision would entitle TikTok to a judicially reviewable "report" describing "specific … concerns," *id.* at 51-52, which would provide

"reasons that can be scrutinized by courts" when conducting statutory and constitutional review, *Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019).

As for the "standard[]," the Government claims TikTok satisfies the general provision's "controlled by a foreign adversary" definition, asserting that "ByteDance [Ltd.]" is "headquartered in" China and "subject to the direction or control" of CCP officials. Br. 45-46. But under the general provision, the Government would need to defend those assertions in court with evidence. *See* Sec. 3(a). It could not rely solely on statements made in a committee report, JA 212, that Congress never adopted in findings. Depriving Petitioners of adversarial testing is particularly harmful because the report is clearly erroneous: it mischaracterizes the corporate relationship between ByteDance *Ltd.* and its Chinese *subsidiaries*, Pet. Br. 48, and thus does not support the baseless assertions in the Government's brief.

The Government alternatively deems it "immaterial" that TikTok does not satisfy the Act's "general criteria" because "Congress determined … that the PRC could exercise control over TikTok in particular." Br. 45. Again, however, Congress made no such finding, and it is implausible that TikTok alone poses a "particular" threat not captured by the criteria Congress contemporaneously developed to assess whether adversary control exists for all other applications.

A final analogy drives the point home. Suppose Congress authorized a federal agency to impose a regulation (1) on individual newspapers (2) if it made certain findings (3) subject to APA review, but

(4) Congress itself deemed the *Washington Post* covered. This Court would never tolerate the Government's asserting that Congress must have thought the *Post* either met the standard or posed "particular" concerns—and certainly not if (5) Congress made no such finding and (6) the legislative record was littered with Members complaining about the *Post*'s content. All that, of course, is this Act in spades as applied to TikTok. Whatever deference Congress receives in the national-security context, it cannot mean turning a blind eye here.

For that reason at least, this Court should hold that the Act's TikTok-specific provision violates the First Amendment. The Government would remain free to pursue TikTok under the Act's general provision, if it can satisfy the statutory standard and the Constitution's requirements.[2]

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[2] Contrary to the Government's suggestion (Br. 48), this Court should not consider the *ex parte* filings. Below, Petitioners raised numerous objections, and the court ruled solely on the public record. JA 64-65 & n.11. This Court therefore has no briefing or decision to review on the significant issue whether consideration of secret evidence is impermissible here.

CONCLUSION

The judgment below should be reversed.

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