Nos. 24A587, 24A588

IN THE

Supreme Court of the United States

TIKTOK INC., *et al.*,

Applicants,

—v.—

MERRICK B. GARLAND, in his Official Capacity as Attorney General of the United States,

Respondent.

BRIAN FIREBAUGH, *et al.*,

Applicants,

—v.—

MERRICK B. GARLAND, in his Official Capacity as Attorney General of the United States,

Respondent.

ON EMERGENCY APPLICATION FOR INJUNCTION PENDING SUPREME COURT REVIEW

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, ELECTRONIC FRONTIER FOUNDATION, AND KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU has frequently appeared in First Amendment cases in this Court and courts around the country, both as direct counsel and as amici curiae, including seminal cases regarding free speech online and editorial discretion. *See, e.g.*, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (amicus); *Reno v. ACLU*, 521 U.S. 844 (1997) (counsel); *Miami Herald Publ'g Co v. Tornillo*, 418 U.S. 241 (1974) (amicus).

The Electronic Frontier Foundation ("EFF") is a member-supported, non-profit civil liberties organization that has worked for over 30 years to protect free speech, privacy, and innovation in the digital world. EFF, with over 35,000 members, represents the interests of technology users in court cases and broader policy debates surrounding the application of law to the Internet and other technologies.

The Knight First Amendment Institute at Columbia University is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, policy advocacy, and public education. The Institute promotes a system of free expression

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than amici, its members, or its counsel contributed money intended to fund the preparation or submission of the brief.

that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government. The Institute has been particularly active in defending free speech online.

INTRODUCTION

Without this Court's prompt intervention, the government will soon ban Americans from accessing a social media application, TikTok, that millions use every day to communicate, learn about the world, and express themselves. Such a ban is unprecedented in our country and, if it goes into effect, will cause an extraordinary disruption in Americans' ability to engage with the content and audiences of their choice online. The D.C. Circuit's opinion upholding the ban ostensibly applied strict scrutiny under the First Amendment, but it subjected the government's assertions to little genuine scrutiny in the end. In failing to closely examine the government's claims, the court of appeals ran afoul of this Court's rulings. At the same time, it rightly acknowledged one central fact bearing on Applicants' requests for temporary relief: the government has not presented credible evidence of ongoing or imminent harm caused by TikTok. App. 47a. That being the case, this Court should have the opportunity to assess the merits of the ban for itself, properly applying the governing First Amendment standards, before Americans are forced from an app used by so many to speak and share.[2]

[2] While the Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50 (2024) ("the Act") is styled as a divestiture requirement, it is functionally a ban on TikTok under its existing ownership, as the D.C. Circuit recognized. *See* App. 26a.

Amici write to underscore three points bearing on the equities and Applicants' likelihood of success on the merits.

First, the Act implicates core First Amendment-protected speech and, in the absence of a temporary injunction, will violate the expressive rights of millions of Americans. The D.C. Circuit's opinion barely acknowledged the substantial First Amendment interests that so many Americans have in continuing to use TikTok to speak and engage with others around the world. Implicit in the ruling is the assumption that TikTok's millions of American users could simply move to a different platform with little consequence for their First Amendment rights. That is mistaken.

Second, the Act's breadth and operation represent an extraordinary restriction on speech, and should be scrutinized accordingly. The Act effectively functions as a prior restraint on TikTok and its users—an especially disfavored means of restricting First Amendment rights, and one that calls for "the most exacting" judicial scrutiny. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 102 (1979). This is because the statute will shut down the app, blocking millions of users, as well as TikTok itself, from engaging in protected expression "in advance of the time that [their] communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993).

In addition, even if the Act is not viewed as a prior restraint, its ban on TikTok is content- and viewpoint-discriminatory. The Act, on its face, discriminates based on content. And the D.C. Circuit recognized that the ban is also content-based

in practice. But Congress's intent to discriminate against disfavored viewpoints is far clearer and more pervasive than the court of appeals acknowledged. Given that record, there can be no question that strict scrutiny applies.

Third, although the D.C. Circuit claimed to apply strict scrutiny, its analysis did not hold the government to its heavy burden. The court of appeals repeatedly accepted the government's say-so where the First Amendment requires proof, and it assumed that Congress weighed less restrictive alternatives even in the absence of evidence that it actually did so. The court at times cited "national security" as a justification for deferring to the government's hypothetical claims or mere assertions, but the government's burden to justify an infringement on First Amendment rights is the same in the national security context as in any other. *See, e.g.*, *N.Y. Times Co. v. United States* ("*Pentagon Papers*"), 403 U.S. 713, 714 (1971); *id.* at 730 (Stewart, J., concurring). In fact, the judiciary has an especially critical role to play in ensuring that the government meets its burden when the government invokes national security.

Amici urge the Court to see the Act for what it is: a sweeping ban on free expression that triggers and fails the most exacting scrutiny under the First Amendment. This Court should grant Applicants' motion for a temporary injunction to preserve the status quo while the Court considers these significant questions for itself.

I. The Act targets core First Amendment-protected speech and, in the absence of a temporary injunction, will violate the expressive rights of millions of Americans.

Millions of Americans use TikTok to share and receive ideas, information, opinions, and entertainment from other users around the world. *See generally Moody v. NetChoice, LLC*, 603 U.S. 707, 719 (2024) (describing "social media platforms"). This activity lies squarely within the protections of the First Amendment. As this Court recognized in holding that the First Amendment protects the use of social media, the "most important places . . . for the exchange of views" are "the 'vast democratic forums of the Internet' in general . . . and social media in particular." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (quoting *Reno*, 521 U.S. at 868).

TikTok hosts a vast universe of expressive content, from musical performances and comedy to politics and current events. *See, e.g.*, Gene Del Vecchio, *TikTok Is Pure Self-Expression. This Is Your Must-Try Sampler*, Forbes (June 6, 2020), https://perma.cc/6UJ6-JEPS. And with over 170 million users in the United States and more than one billion users worldwide, App. 8a, TikTok is host to enormous national and international communities that most U.S. users cannot readily reach elsewhere. This expansive reach allows U.S. users to communicate with people far beyond their local communities—and vice versa. Recently, TikTok has been an essential platform for users to learn about and express their views on

everything from Russia's invasion of Ukraine,[3] to nationwide protests in Iran,[4] to the recent U.S. Presidential election.[5] Because of its popularity, TikTok is also widely used by publishers and journalists to reach immense audiences in the United States and around the world.[6]

TikTok is also a unique expressive platform for non-profits like amici. Non-profits use TikTok to grow their base, communicate with their supporters, and elevate their causes, and TikTok specifically offers tools for non-profits to achieve these goals. *See TikTok For Good*, https://www.tiktok.com/forgood. For example, amici ACLU and EFF, with over 274,000 followers and 3.4 million likes collectively,[7] use the platform for precisely these purposes—to show the human impact of government policies, inform people of their rights, and alert their supporters to new legislation.[8]

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[3] Kyle Chayka, *Watching the World's "First TikTok War,"* New Yorker (March 3, 2022), https://perma.cc/YQ2Y-TXPA.

[4] Whitney Shylee May, *How Iranian Protesters Are Using TikTok to Avoid Government Censors*, Fast Company (Dec. 14, 2022), https://bit.ly/3BFyqUv.

[5] Sapna Maheshwari & Madison Malone Kircher, *The Election Has Taken Over TikTok. Here's What It Looks Like.*, N.Y. Times (Oct. 21, 2024), https://bit.ly/4iSqYXd.

[6] Neiman Lab, *Here's a running list of publishers and journalists on TikTok*, https://bit.ly/4gtIDT6.

[7] *See* ACLU (@aclu), TikTok, https://www.tiktok.com/@aclu?lang=en; EFF (@efforg), TikTok, https://www.tiktok.com/@efforg?lang=en.

[8] *See, e.g.*, ACLU (@aclu), TikTok (Feb. 27, 2023), https://www.tiktok.com/@aclu/video/7204964519834029354; ACLU (@aclu), TikTok (June 13, 2023), https://www.tiktok.com/@aclu/video/7244323765520354606; ACLU (@aclu), TikTok (Apr. 27, 2024), https://www.tiktok.com/@aclu/video/7362596004002041118; EFF (@efforg), TikTok (June 10, 2024), https://www.tiktok.com/@efforg/video/7379030543330970911.

Given the breadth of expressive activity on TikTok, the Act squarely implicates protected First Amendment speech. That is true both for the millions of Americans who use the platform to exchange unique content with other TikTok users around the world, and for TikTok itself, which posts its own content and makes editorial decisions about what user content to carry and how to curate it for each individual user. *See* App. 26a (citing *Moody*, 603 U.S. at 729–30).

The D.C. Circuit correctly recognized that the statute, as a ban on a communications platform due to its content, triggers First Amendment scrutiny. *See* App. 25a–27a. However, the D.C. Circuit mentioned only in passing the ban's most significant consequences: its effects on the First Amendment rights of TikTok's 170 million users in the United States, including those who were petitioners in the court below. *See, e.g.*, App. 9a. Indeed, the majority opinion barely addressed users' First Amendment interests in speaking, sharing, and receiving information on the platform at all. And it perplexingly attempted to cast the government's ban on TikTok as a *vindication* of users' First Amendment rights. *See* App. at 65a.[9]

It is nothing of the sort. Absent a temporary injunction, Americans will be blocked from accessing or updating the app in mobile app stores as soon as January

[9] The court of appeals appears to have assumed, incorrectly, that TikTok's users could readily move to other platforms without any impact on their First Amendment interests. *See, e.g.*, App. 65a (TikTok's users "will need to find alternative media of communication"). But the global audiences that U.S. TikTok users have built, and the many sources of information, opinion, art, and entertainment that Americans access on the app, cannot be easily recreated on other platforms. *See* Creator Pet'rs' Br., *TikTok, Inc. v. Garland*, No. 24-1113 (D.D.C. June 20, 2024), Doc. 2060744 at 7, 27–30, 33–34. TikTok is unique—a fact only underscored by its immense popularity.

19, 2025, and TikTok will become inoperable as the services it relies on to function are cut off. *See* Sec. 2(a)(1)–(2).[10] That will cause immense and irreparable harm to Applicants and millions of other TikTok users in the United States, who will be unable to enjoy the many unique, expressive features of the app. *See supra*; *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Before that occurs, this Court should grant the instant applications to preserve the status quo while it considers whether to grant certiorari.

II. The Act is a sweeping ban on the speech of TikTok and its users, and it warrants the most exacting First Amendment scrutiny.

The Act is not merely a regulation of expression; it instead functions as prior restraint—the most disfavored type of speech restriction, which this Court has described as "the essence of censorship." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). These types of restrictions are subject to "the most exacting scrutiny." *Smith*, 443 U.S. at 102.

"Prior restraint[s]" are "orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander*, 509 U.S. at 550. The "historical paradigm" of a prior restraint was the English system of licensing all presses and printers, which forbade printing without

[10] Users who are blocked from accessing software updates for the TikTok app will be unable to install critical security updates—leaving them and their data vulnerable to precisely the kind of cybersecurity threats the government claims it wants to prevent. *See* Cybersecurity & Infrastructure Sec. Agency, *Keep Your Device's Operating System and Applications Up to Date*, https://perma.cc/SF9B-FMSD.

government permission. Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 544 (1977). Over time, the Court has recognized that prior restraints can take many forms—ranging from administrative schemes that wield informal sanctions, like a state board that issues advisory notices about the suitability of books for minors, *see Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 66–71 (1963), to a complete ban on publication, like a court injunction against the printing of a particular newspaper, *see Near*, 283 U.S. at 711–13.

By barring expression *before* it is uttered, prior restraints prevent speech altogether, rather than merely chilling speech through risk of subsequent sanction. *See Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980). In *Nebraska Press Association v. Stuart*, the Court highlighted the defining features of prior restraints by contrasting them with subsequent punishments: "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." 427 U.S. 539, 559 (1976). "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

When analyzing restrictions like these, this Court has imposed especially demanding versions of the compelling-interest and narrow-tailoring tests. *Smith*, 443 U.S. at 102. The government must show that the harm is "direct, immediate, and irreparable," *Pentagon Papers*, 403 U.S. at 730 (Stewart, J., concurring), and that its "degree of imminence [is] extremely high" as demonstrated by a "solidity of

evidence," *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978); *accord Craig v. Harney*, 331 U.S. 367, 386 (1947). With respect to tailoring, prior restraints must be "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968); *see also Neb. Press Ass'n*, 427 U.S. at 562, 565, 569–70.

Under this Court's precedents, the Act functions as a prior restraint. It bars TikTok users from speaking or receiving speech through the app, and it bars TikTok from curating speech for its users before that speech can be published. In this latter respect, it is analogous to court injunctions barring newspapers from publishing, which this Court has held to be unconstitutional prior restraints. In *Near*, for example, the Court invalidated a statute authorizing an injunction against a newspaper's publication, reasoning that the Constitution "prevents previous restraints upon publication." 283 U.S. at 713. Similarly, in *Pentagon Papers*, the Court held that an order barring the *New York Times* from publishing the Pentagon Papers was an unconstitutional prior restraint. 403 U.S. at 729–30.

Indeed, the Act's prohibition here is even more sweeping than those in *Pentagon Papers* or *Near*. The government has not merely forbidden particular communications or speakers on TikTok based on their content; it has banned an entire platform. It is as though, in *Pentagon Papers*, the lower court had shut down the *New York Times* entirely. In fact, the ban is even broader. Unlike an injunction targeting a single local newspaper, as in *Near*, the Act bans a digital medium used

by millions of individual speakers—the kind of medium this Court has recognized allows "any person . . . [to] become a town crier with a voice that resonates farther than it could from any soapbox." *Reno*, 521 U.S. at 870.

Below, the D.C. Circuit opined that the Act is directed at TikTok and a foreign adversary, not TikTok's users and their expressive activities. *See* App. 44a. That is not correct as a factual matter. *See* Sec. 2(a)(1)(A) (prohibiting entities from "providing services" to TikTok "through which *users* within . . . the United States may access, maintain, or update such application" (emphasis added)). And, in any event, it would not change the prior restraint analysis. In *Bantam Books*, for example, the Supreme Court held that book publishers could challenge a state censorship scheme that purported "only to regulate [book] distribution," because, in practice, it also operated as a restraint on publishers. 372 U.S. at 64 n.6; *id.* at 67 (instructing courts to "look through forms to the substance" when assessing prior restraints that suppress speech).

The same is true here. By shutting down the platform, the Act "in fact" forecloses speech by TikTok's users, *id.* at 68, even if they may be able to express themselves elsewhere. *See Se. Promotions*, 420 U.S. at 556 ("Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence."). And the Act completely restrains TikTok itself, foreclosing its ability to speak in a way that reflects its editorial judgment. *Cf.* App. 47a (recognizing that the government seeks to prevent speech that has not yet occurred).

The D.C. Circuit addressed the prior restraint question only in passing, citing the divestiture option as evidence that the Act does not restrain speech. *See* App. 44a. But that is wrong in two ways. First, it incorrectly assumes that divestiture is possible before any ban is triggered. As the court of appeals acknowledged just paragraphs later, it is not. See App. at 46a ("[T]he Government does not rebut TikTok's argument that 270 days is not enough time for TikTok to divest."). Second, the court of appeals assumed that a change in ownership, if one ultimately occurred, would leave TikTok's content and editorial policy unchanged. *See* App. at 44a. But that too is far-fetched. A compelled sale would have clear First Amendment implications, with changes to the app's user experience and editorial policy—as many Twitter users have discovered.[11] *See also* Creator Pet'rs' Br. at 36–37 (describing how divestiture would alter users' expression and change the content they see on the platform). In TikTok's case, it is highly doubtful that new owners could retain the platform's coveted algorithm, and, regardless, potential buyers have announced their plans to make major changes to the app.[12]

More broadly, the D.C. Circuit's failure to analyze the ban as a restraint on users' speech appears to have been driven by the flawed assumption that users could simply speak somewhere else. *See* App. 44a, 65a. But in the prior restraint

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[11] *See* Matt Binder, *X/Twitter use is down by nearly a quarter since the Musk Era started, report says*, Mashable (March 27, 2024), https://perma.cc/TC3Z-CGJX.

[12] *See, e.g.*, Liza Lin, et al., *TikTok Deal Talks Are Snarled Over Fate of App's Algorithms*, Wall St. J. (Sept. 2, 2020), https://bit.ly/3ZW6hSy; Makena Kelly, *TikTok's Future in the US Is Unclear. We Check Back in With the Billionaire Who Wants to Save It*, Wired (Dec. 12, 2024), https://bit.ly/3Dfuo5Y.

analysis, there is no requirement that TikTok be users' sole means of communicating on social media. Government action need not entirely silence certain speech or certain speakers to constitute a prior restraint. *See Org. for a Better Austin v. Keefe*, 402 U.S. 415, 417–19 (1971) (injunction against leafletting and picketing was prior restraint even though protestors had other ways to protest); *Carroll*, 393 U.S. at 182–85 (injunction only against protests, but no other speech, was a prior restraint). Even if there were such a requirement, the speech and expression that Americans watch, enjoy, and engage with on TikTok is unique and uniquely curated for them. As other courts have recognized, TikTok is not interchangeable with other social media apps because it "provides [users] a way to communicate with their audience and community *that they cannot get elsewhere on the Internet.*" *Alario v. Knudsen*, 704 F. Supp. 3d 1061, 1081 (D. Mont. 2023) (emphasis added). And that is enough to show that the government's ban on TikTok will "stifle[] speech before it can take place." *Cuviello v. City of Vallejo*, 944 F.3d 816, 831–32 (9th Cir. 2019).

III. The Act is also a content- and viewpoint-based restriction subject to strict scrutiny.

Regardless of whether the Court analyzes the Act as a prior restraint, it is a content- and viewpoint-discriminatory restriction on TikTok's and its users' speech. Content-based restrictions are subject to strict scrutiny and presumptively unconstitutional. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Restrictions based on "specific motivating ideology" or the speaker's "opinion or perspective" are viewpoint-based and thus even more "egregious." *Rosenberger v. Rector & Visitors of*

Uni. of. Va., 515 U.S. 819, 829 (1995). Because the Act is both content- and viewpoint-based, the government must at a minimum establish that it is narrowly tailored to serve a compelling state interest. *Reed*, 576 U.S. at 163.

On its face, the Act is content-based in two ways. First, it restricts only those adversary-controlled applications that share user communications. *See* Sec. 2(g)(2)(A)(i) (a "covered company" is one that operates an application that "permits a user to create an account or profile to generate, share, and view text, images, video, real-time communications, or similar content"). Second, it does not restrict applications that primarily publish "product reviews, business reviews, or travel information." *See* Sec. 2(g)(2)(B). These are restrictions based on content. *See, e.g.*, *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 811 (2000) ("[t]he speech in question is defined by its content").

The Act is also content-based because, as the D.C. Circuit rightly acknowledged, the government's justifications for the law "reference the content of TikTok's speech." App. 29a–30a. To be content-neutral, the Act must be "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 (1984)). But the Act plainly fails that test. Indeed, one of the government's main justifications for the law is "to limit the PRC's ability to manipulate content covertly" on TikTok. App. 30a. As the D.C. Circuit explained:

> [T]he Government invokes the risk that the PRC might shape the content that American users receive, interfere with our political discourse, and promote content based upon [TikTok's] alignment with the PRC's interests. In fact, the Government identifies a particular

> topic—Taiwan's relationship to the PRC—as a "significant political flashpoint" that may be a subject of the PRC's influence operations, and its declarants identify other topics of importance to the PRC.

App. 30a. Thus, in justifying the Act, the government explicitly relies on the content of speech on TikTok and the information Americans may encounter there, and accordingly, strict scrutiny applies. *See Reed*, 576 U.S. at 163.

In fact, the Act involves an especially egregious form of content discrimination, because its restrictions are based on the perceived "motivating ideology" or "opinion or perspective" expressed in TikTok users' speech and the platform's editorial judgments. *Rosenberger*, 515 U.S. at 829. Not only has the Department of Justice defended the Act on the grounds that it suppresses PRC viewpoints that it views as dangerous to Americans, App. 30a, but Congress made clear that it shared this core objective—to limit the risk of Americans' access to foreign propaganda. *But see Lamont v. Postmaster Gen.*, 381 U.S. 301, 306–07 (1965) (striking down law that burdened Americans' access to foreign propaganda as an unconstitutional effort to "control the flow of ideas to the public"). For example, a House committee report observed that applications such as TikTok "can be used" by adversaries to "push misinformation, disinformation, and propaganda on the American public." H.R. Comm. on Energy & Com., *Protecting Americans from Foreign Adversary Controlled Applications Act*, H.R. Rep. No. 118-417 (2024). Although Rep. Mike Gallagher, Chairman of the House Select Committee on the Chinese Communist Party, noted "privacy" concerns around TikTok, he underscored that the "most important[]" reason for a ban was the risk that "young Americans

are getting all their news from Tik[T]ok."[13] At least 20 other legislators justified their support for the Act's provisions in content- and viewpoint-based terms, citing risks ranging from the proliferation of Chinese propaganda, to the sharing of content harmful to minors, to the alleged suppression of pro-Ukraine and pro-Israel views.[14]

These were not merely "stray comments," *contra* Op. 45; they instead reflect Congress's desire to restrict Americans' access to the content it believes is promoted and shared on TikTok. Thus, the Act is presumptively unconstitutional, and the government bears the burden to show that it survives strict scrutiny.[15]

IV. The court of appeals failed to properly apply strict scrutiny.

A. The D.C. Circuit's strict scrutiny analysis conflicts with this Court's precedents.

To survive strict scrutiny, the government must show that its legislation addresses a compelling interest through the least restrictive means possible. *See*

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[13] Mike Gallagher, Rep., Transcript of Chairman Gallagher's Press Conference Response to TikTok Intimidation Campaign Against U.S. Users (Mar. 7, 2024), *in* https://perma.cc/7VL5-UTCH at 4.

[14] *See, e.g.*, TikTok Pet'rs' Br., *TikTok Inc. v. Garland*, No. 24-1113 (D.C. Cir. June 20, 2024), Doc. 2060743 at 19–21; Creator Pet'rs' Br., at 46–47; Knight First Amend. Inst. Amicus Br., *TikTok, Inc. v. Garland*, No. 24-1113 (D.C. Cir. June 27, 2024), Doc. 2062072 at 19–23 (collecting statements); Select Committee on the CCP, *Bill to Protect Americans From Foreign Adversary Controlled Applications, Including TikTok* (Mar. 5, 2024), https://perma.cc/BV43-VYXJ.

[15] Even if the Court were to deem the TikTok ban content- and viewpoint-neutral, the government would still have to satisfy a strict narrow-tailoring requirement because it is a total ban on a unique and important means of communication. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). A total ban of this kind fails unless it "curtails no more speech than is necessary to accomplish its purpose." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).

Playboy, 529 U.S. at 813, 815. In the context of laws burdening speech, this standard is truly strict: It is "rare" for this Court to hold that the government can meet its burden. *Id.* at 818; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."). Yet the majority below concluded that the Act here—which would effectively shut down a communications platform used by 170 million Americans—passes muster under strict scrutiny. The court's analysis was wrong in three key respects.

First, the panel majority erred in holding that the government's interest in countering propaganda satisfies the compelling-interest prong of strict scrutiny. As an initial matter, the court's reasoning rests on a false distinction between the PRC's "covert manipulation of content" and "promotion of propaganda." In the majority's view, "[i]t is the 'secret manipulation of the content' on TikTok—not foreign propaganda—that 'poses a grave threat to national security.'" App. 54a (quoting Gov't Br. 36). But the record is clear that the government's concerns about "covert manipulation" are at bottom concerns about propaganda—*i.e.*, about Americans' access to the perceived content and viewpoints presented on TikTok. *See supra* Section III.

Regardless, under this Court's precedents, neither rationale is a compelling governmental interest. There is no legitimate (let alone compelling) interest in throttling Americans' ability to receive information, even where the government

regards that information as "communist political propaganda" or "the seeds of treason." *Lamont*, 381 U.S. at 306–07. If the government cannot constitutionally restrict Americans from receiving *the seeds of treason*—during the Cold War no less, *id.*—surely it cannot bar Americans from receiving the immense variety of information and viewpoints on TikTok, based on Congress's speculation that some of that information might be at risk of covert manipulation in the future. Moreover, as the Court recently emphasized in *Moody*, the government may not seek to "correct the mix of speech" on private social-media platforms "consistent with the First Amendment." 603 U.S. at 740–42. It cannot be that when the government does not like that mix of speech, or fears the presence of foreign propaganda, it can simply shut the platform down altogether or require its sale to an owner with friendlier editorial views.

Second, the panel majority erred by crediting speculative harms as real ones. *See, e.g.*, App. 47a, 50a; *see also infra* Section IV.B. Under strict scrutiny, the government is required to demonstrate that its recited harms "are real, not merely conjectural," *Turner*, 512 U.S. at 664, and that its restrictions are directed at "an actual problem in need of solving," *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799–800 (2011) (quoting *Playboy*, 529 U.S. at 822–23) (rejecting state's argument that the legislature could make a "predictive judgment" about the link between violent video games and harm to minors). In meeting this burden, "ambiguous proof will not suffice." *Id.* at 800 (citation omitted).

Here, the government justifies the Act based on content-manipulation and data-collection concerns. *See* App. 29a–30a. Both rest on speculation. As the D.C. Circuit noted, "the Government acknowledges that it lacks specific intelligence that shows the PRC has in the past or is now coercing TikTok into manipulating content in the United States." App. 47a. And while it is true that TikTok collects large volumes of certain types of user data, App. 39a, the government failed to establish actual or imminent national security harm from this collection. *See, e.g.*, App. 54a ("TikTok *could* facilitate the PRC's access to U.S. users' data, which *could* enable PRC espionage." (emphasis added)). Countless other platforms and companies collect and sell similar types of information. Pet'rs' App., Vol. III, *TikTok, Inc. v. Garland*, No. 24-1113 (D.D.C. June 20, 2024), Doc. 2060757 at APP-767–69. As Professor Steven Weber explained below, there are "a variety of ways by which [the PRC] can obtain U.S. user data from the data broker ecosystem," notwithstanding recent U.S. legislation designed to regulate certain data brokers. *Id.* The government's inability to identify *any* "real, not merely conjectural" national security harms is fatal to its defense of the Act. *See Turner*, 512 U.S. at 664.

Third, the panel majority's narrow-tailoring analysis misapplied this Court's precedents, misunderstood the significance of divestiture in the First Amendment analysis, and failed to account for the Act's extraordinary infringements on the constitutional rights of the 170 million Americans who use TikTok.

Under the narrow-tailoring prong of strict scrutiny, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that

alternative." *Playboy*, 529 U.S. at 813. Where a plaintiff presents a plausible alternative, "it is the Government's obligation *to prove* that the alternative will be ineffective to achieve its goals." *Id.* at 816 (emphasis added); *see also Ashcroft v. ACLU*, 542 U.S. 656, 668 (2004) (faulting the government for failing to introduce "specific evidence" that alternatives were less effective). This demanding test "ensure[s] that speech is restricted no further than necessary to achieve the goal." *ACLU*, 542 U.S. at 666.

Because the government failed to prove that plausible, less-restrictive alternatives would be ineffective, the panel majority erred in holding that the Act is narrowly tailored. *See* App. 48a–56a. For example, Applicants proposed that the government address its content-manipulation concerns by requiring TikTok to notify users of the risk of manipulation. *See* App. 53a. Yet the majority rejected that alternative out of hand, baldly asserting that "covert manipulation of content is not a type of harm that can be remedied by disclosure." App. 54a. To the contrary, *covert* manipulation is precisely the type of harm that could be addressed through notice of this risk to users. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465, 480 n.15 (1987) (discussing the "label[ing]" of "information of foreign origin," so that "our people, adequately informed, may be trusted to distinguish between the true and the false" (citation omitted)); *Citizens United v. FEC*, 558 U.S. 310, 369 (2010) (discussing disclosure as a "less restrictive" remedy). The government failed to prove otherwise.

The majority's narrow-tailoring analysis was wrong for yet another reason: it fundamentally misunderstood the First Amendment implications of the Act's

divestiture provisions and failed to account for the constitutional harms to tens of millions of Americans who use TikTok. As noted above, it is undisputed that the Act functions as an effective ban on TikTok, given the infeasibility of divestiture in the timeframe allotted. *See* App. 46a. Rather than address the extraordinary harms to Americans' speech that would result from shuttering TikTok—even for a relatively short period of time—the majority simply asserted that TikTok could divest "later." App. 46a. And in the majority's view, "[w]ere a divestiture to occur, TikTok Inc.'s new owners could circulate the same mix of content as before without running afoul of the Act." App. 44a. But what the majority failed to consider is that divestiture would inevitably alter the platform, the user experience, and the community of users—curtailing Americans' speech and infringing on the right to receive information. *See supra* Section II; Creator Pet'rs' Br. at 27–34, 36–37.

Finally, even assuming that eliminating the risk of PRC data collection and covert content manipulation are compelling government interests, and even assuming that there is evidence of "real, not merely conjectural" harm to the United States from TikTok, *Turner*, 512 U.S. at 664, it strains credulity to conclude that banning the communications of 170 million Americans is the least restrictive means of preventing those harms. *See Meese*, 481 U.S. at 481 ("the best remedy for misleading or inaccurate speech" is "fair, truthful, accurate speech"). That is especially so when the government has not even attempted to implement the proposed mitigation measures nor provided evidence that they are ineffective. In

the absence of imminent and extraordinary harm, the answer cannot be to *ban* this medium of communication altogether.

B. Claims of national security do not diminish the government's burden under the First Amendment.

Although the government invokes "national security" to justify its sweeping ban, that does not alter the applicable First Amendment standards. Yet at several critical junctures, the majority erred by improperly deferring to the government's "judgment," excusing the government from its burden and accepting mere assertions in lieu of evidence—especially when assessing the sufficiency of alternatives. *See* App. 40a ("The problem for TikTok is that the Government exercised its considered judgment and concluded that mitigation efforts short of divestiture were insufficient."); *see also* App. 49a, 50a, 51a. According to the majority, it is "not the job" of the courts "to substitute their judgments for those of the political branches" on national security questions. App. 50a. But this reasoning sweeps far too broadly, and it conflicts with this Court's precedents, which do not permit abdication of the judicial role where First Amendment rights are at stake—even in cases implicating national security.

As this Court has repeatedly held, the government's invocation of "national security" does not diminish First Amendment protections or the scrutiny applied to speech restrictions. The Court has emphasized that the First Amendment must be applied scrupulously even when national security is invoked, *United States v. Robel*, 389 U.S. 258, 266 (1967), and that "precision must be the touchstone" of legislation affecting basic freedoms in this context, *Aptheker v. Sec. of State*, 378 U.S. 500, 514

(1964). "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." *Pentagon Papers,* 403 U.S. at 719 (Black, J., concurring); *see also Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("Simply saying 'military secret,' 'national security' or 'terrorist threat' . . . is insufficient to [carry the government's burden].").

Historically, the use of different or diminished First Amendment standards in national security cases has been "thoroughly discredited" and replaced with rigorous, consistent judicial review. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (discussing *Whitney v. California*, 274 U.S. 357 (1927)). "Such must be the rule if authority is to be reconciled with freedom." *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

Indeed, the courts must be especially vigilant in the face of national security claims that threaten "constitutionally protected speech," *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 313 (1972), given the possibility that government officials may "disregard constitutional rights in their zeal to protect the national security," *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985). For example, in *De Jonge v. Oregon*, the Court reversed as unconstitutional the defendant's conviction for involvement in a Communist meeting, observing that "[t]he greater the importance of safeguarding the community from incitements," the "more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly." 299 U.S. 353, 364–65 (1937).

Here, the panel majority's failure to properly apply strict scrutiny stems in part from its misapplication of *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34–35 (2010) ("*HLP*"). *See* App. 47a (acknowledging absence of "concrete evidence" but giving "great weight" to the government's judgment, citing *HLP*). In *HLP*, the Court explained that the government could seek to restrict plaintiffs' proposed aid to designated foreign terrorist organizations without "specific evidence" that the aid would support terrorist attacks. 561 U.S. at 9–10, 34–35. But *HLP* did not rule broadly that the government is excused from adducing "concrete evidence" of harm in national security cases. *Id.*[16] Rather, it explained that when the government "seek[s] to prevent *imminent harms*," it need not "conclusively link all the pieces in the puzzle." App. 35a (emphasis added). "In *this context*," conclusions "must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the government." App. 34a–35a (emphasis added). The Court's reasoning in *HLP* has no application here, as the government has failed to identify any "imminent harm" based on Americans' use of TikTok.

In *Pentagon Papers*, a precedent particularly relevant to this case, the Court applied the same "heavy burden" to the government's attempt to prohibit publication of the Pentagon Papers during the Vietnam War as it would other prior restraints. 403 U.S. at 714 (citing *Bantam Books*, 372 U.S. at 70, and *Keefe*, 402 U.S. at 419). Lower courts following this precedent have affirmed that "national

[16] Notably, the Court cited evidence that the two designated terrorist organizations at issue had committed numerous attacks, some of which harmed Americans. *HLP*, 561 U.S. at 9.

security interests . . . are generally insufficient to overcome the First Amendment's 'heavy presumption' against the constitutionality of prior restraints." *Ground Zero Ctr. for Non-Violent Action v. Dep't of Navy*, 860 F.3d 1244, 1260 (9th Cir. 2017). The government must be held to its heavy burden.

* * *

With respect to the equities at this stage, the government has made no claim that the potential harms it attributes to TikTok are imminent, let alone ongoing. This Court should consider for itself the novel and far-reaching First Amendment questions raised by this case before TikTok's millions of users in the United States are forced from the platform.

CONCLUSION

The Court should grant the applications.

Respectfully submitted,

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