

In The

**Supreme Court of the United States**

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TikTok Inc., and ByteDance Ltd.,  
*Applicants,*

v.

Merrick B. Garland, in his Official Capacity as Attorney General of the United  
States,  
*Respondent.*

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*On Emergency Application to the Hon. John G. Roberts, Chief Justice of the Supreme  
Court, for Injunction Pending Supreme Court Review,*

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**BRIEF FOR SENATOR MITCH MCCONNELL, AS *AMICUS*, IN  
OPPOSITION TO EMERGENCY APPLICATION TO THE HON. JOHN G.  
ROBERTS, CHIEF JUSTICE OF THE SUPREME COURT, FOR  
INJUNCTION PENDING SUPREME COURT REVIEW**

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Senator Mitch McConnell is the Senior Senator from Kentucky and the elected Leader of the Republican Conference in the United States Senate. The longest serving Senate Leader in American history, he is responsible for protecting and advancing the interests of the Republican Conference in legislation. A peerless defender of the First Amendment, he has frequently participated in litigation to vindicate First Amendment principles, both as an *amicus*, as in *FEC v. Cruz*, 596 U.S. 289 (2022), and as a party, as in *McConnell v. FEC*, 540 U.S. 93 (2003).

### INTRODUCTION AND SUMMARY OF ARGUMENT

TikTok is a wildly popular social-media application under the direct control of the Chinese Communist Party (CCP). As a result of the clear national-security threat posed by this application, Congress has taken numerous actions to curb its use, culminating in the Protecting Americans' Data from Foreign Adversaries Act of 2024 (Foreign Adversaries Act). By the terms of this law, the Chinese must divest themselves of TikTok by January 19, 2025, thereby removing the control of this popular application from the primary geopolitical opponent of the United States.

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<sup>1</sup> Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person made a monetary contribution to its preparation or submission.

TikTok and its parent company, ByteDance, predictably sued to avoid this outcome in the venue prescribed by the Foreign Adversaries Act and lost. It now seeks an injunction pending appeal from the Supreme Court.

Any such injunction will move the divestiture date beyond that prescribed by law—and into a new presidential administration. TikTok clearly hopes that the next administration will be more sympathetic to its plight than the incumbent administration. In other words, delay is the point.

Senator McConnell urges this Court to deny TikTok's emergency application. Their First Amendment arguments are meritless and unsound. While the forced divestiture may cause them irreparable harm, any delay caused by an injunction would be contrary to the public interest. This is a standard litigation play at the end of one administration, with a petitioner hoping that the next administration will provide a stay of execution. This Court should no more countenance it coming from foreign adversaries than it does from hardened criminals.

## ARGUMENT

### I. THE PROTECTING AMERICANS' DATA FROM FOREIGN ADVERSARIES ACT OF 2024 IS FULLY CONSISTENT WITH THE FIRST AMENDMENT.

The Protecting Americans' Data from Foreign Adversaries Act of 2024, Pub. L. No. 118-50, div. H (2024), is entirely consistent with the First Amendment. The right to free speech enshrined in the First Amendment does not apply to a corporate agent of the Chinese Communist Party. And even if it does, the Foreign Adversaries Act was the measured and deliberate result of careful legislation that would satisfy all manner of heightened scrutiny.

Senator McConnell is second to none in his appreciation and protection of the First Amendment's right to free speech. Apart from being a frequent litigant in defense of speech rights, *see e.g., McConnell v. FEC*, 540 U.S. 93 (2003), his legislative record bears this out as well, *see, e.g.,* S.J. Res. 31, 104th Cong. (1995) (voting against a resolution proposing a constitutional amendment to allow Congress and the States to prohibit flag desecration). Because of this record of defending the speech rights of Americans against the Government, he could not disagree more with the contention that TikTok—a functional subsidiary of a foreign adversary—deserves the protections of the Constitution.

The core of the right to free speech is the principle that speech cannot be regulated by the government. This applies to the federal government. *See, e.g., Citizens United v. FEC*, 558 U.S. 310 (2010). It applies a state government. *See, e.g., Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021). It applies to local government. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155 (2015). With force, it

applies to a malign foreign government like Communist China, which is essentially demanding the ability to regulate speech on its TikTok platform. The topsy-turvy idea that TikTok has an expressive right to facilitate the CCP censorship regime is absurd. Would Congress have needed to allow Nikita Khrushchev to buy CBS and replace *The Bing Crosby Show* with *Alexander Nevsky*? Even William O. Douglass would have blushed at the idea.

Nevertheless, the D.C. Circuit concluded that the case does in fact implicate the First Amendment and that heightened scrutiny applies to the Foreign Adversaries Act—although the court disagreed as to the level of scrutiny. *Compare Tiktok v. Garland*, 2024 WL 4996719, \_\_ F.4th \_\_ at \*13 (D.C. Cir., Dec. 6, 2024) (Ginsburg, J.) (assuming strict scrutiny) *with id.* at \*28 (Srinivasan, J., concurring) (applying intermediate scrutiny). Fair enough. Even applying strict scrutiny, the court below was correct to conclude that it is satisfied.

Senator McConnell agrees with the majority below that the act could satisfy strict scrutiny. The goal of the Foreign Adversaries Act is to further the highly compelling state interest of preventing Chinese Communist mining of American data and deployment of subversive enemy propaganda through algorithmic curation. *See id.* at \*13–19. It is narrowly tailored and the product of extensive legislative action to get the correct results. *See id.* at 20–23. It would easily satisfy intermediate scrutiny as contemplated by Judge Srinivasan and strict scrutiny as noted by the majority.

**II. THIS APPLICATION IS A DILATORY LITIGATION TACTIC TO EVADE THE CLEAR MANDATE OF CONGRESS AS TO THE TIMING OF DIVESTURE AND SHOULD BE DENIED.**

The goal of this litigation is delay. TikTok clearly desires this Court to enjoin the divesture date in the vain hopes that the divesture order will be punted into the next presidential administration where, perhaps, TikTok will find relief from divesture from a less hostile Department of Justice. This Court should not countenance such tactics and the public interest counsels in favor of denying an injunction, even in the face of irreparable harm.

The Foreign Adversaries Act was the product of a long and extensive legislative process. Successive congresses and presidential administrations realized the danger TikTok poses to American national security and went about carefully crafting a response to that adversary threat—the Foreign Adversaries Act.<sup>2</sup>

A key provision of that act is the required divesture of the TikTok assets by the Communist Chinese by January 19, 2025. *See* Foreign Adversaries Act, § 2(a)(2)(A). The initial language gave TikTok considerably less lead time in which to divest—180 days rather than 270<sup>3</sup>—but the final, later compromise date was deemed by Congress to be enough time to be fair to TikTok both in execution of the divesture and to allow

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<sup>2</sup> *See* Press Release, House Select Committee on the Chinese Communist Party, Gallagher, Bipartisan Coalition Introduce Legislation to Protect Americans From Foreign Adversary Controlled Applications, Including TikTok, (March 5, 2024), <https://selectcommitteeontheccp.house.gov/media/press-releases/gallagher-bipartisan-coalition-introduce-legislation-protect-americans-0>. *See also*, Executive Order on Addressing the Threat Posed by TikTok, 85 Fed. Reg. 48637 (Aug. 11, 2020) *and* No TikTok on Government Devices Act, S. 3455 (116th Cong.).

<sup>3</sup> *See* Protecting Americans from Foreign Adversary Controlled Applications Act, § 2(a)(2)(A), H.R. 7521 (118th Cong.) (as introduced).



for timely, inevitable litigation. It also very clearly removes any possible political uncertainty in the execution of the law by cabining it to an administration that was deeply supportive of the bill's goals.

The Foreign Adversaries Act was enacted into law as part of the national security supplemental. Senator McConnell was integral in securing the passage of this legislative package.<sup>4</sup> His expectation was that any litigation over the Foreign Adversaries Act would be completed by the required divesture date. For example, the venue provision of the Foreign Adversary Act in the D.C. Circuit—perhaps the most over-staffed and under-worked court of appeals in the country<sup>5</sup>—made the timely resolution of legal claims likely.

This effort to extend the divesture beyond the statutory requirements by judicial fiat is simply an effort to inject political uncertainty into the operation of the Foreign Adversaries Act. While Senator McConnell expects the incoming administration to faithfully apply the Foreign Adversaries Act if called upon to do so, the fact is that the incoming president has, at times, taken a different stance on TikTok than President Biden.<sup>6</sup> This offers petitioners a glimmer of hope that their

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<sup>4</sup> Stef W. Knight, *McConnell's victory lap on Ukraine aid*, Axios, Apr. 23, 2024, <https://www.axios.com/2024/04/23/mcconnell-ukraine-aid-tucker-carlson-biden>.

<sup>5</sup> As of March 31, 2024, the average appellate judge nationwide had a total of 115 written decisions over the past year. The average D.C. Circuit judge had a mere 37 written decisions over the past year. See Administrative Office of U.S. Courts, Judicial Caseload Statistics (March 31, 2024), [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_appprofile0331.2024.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0331.2024.pdf).

<sup>6</sup> See Haleluya Hadero, *Trump has promised to 'save TikTok'. What happens next is less clear*, AP, Nov. 12, 2024, <https://apnews.com/article/trump-tiktok-ban-congress-president-282d8df7b91dce270316509badd39978>.

corporate death penalty will be stayed if they can drag out the divestiture beyond the statutory mandate.

This tactic of punting final actions into a potentially more sympathetic administration is not unusual in the case of the actual death penalty, and is frequently foiled by the Supreme Court. For example, this time four years ago Attorney General William P. Barr was in the process of finalizing longstanding execution orders against convicted murderers.<sup>7</sup> These planned executions were met with a flurry of applications to this Court, surely in the hopes that the impending Biden administration—which did, in fact, pause federal executions<sup>8</sup>—would spare petitioners their deserts. *See, e.g., Alfred Bourgeois v. U.S.*, No. 20A104 (2020) (application filed on December 3, 2020); *Brandon Bernard v. U.S.*, No. 20A110 (2020) (application filed on December 10, 2020); *U.S. v. Lisa M. Montgomery*, No. 20A125 (2021) (application filed on January 12, 2021); *Corey Johnson v. U.S.*, No. 20A130 (2021) (application filed on January 14, 2021).

Perhaps the clearest example was *U.S. v. Dustin John Higgs*, 141 S. Ct. 645 (mem) (Jan. 15, 2021), where the Court granted certiorari before judgment and vacated an order by the District of Maryland that sought to indefinitely postpone an execution. The District Court order was issued on December 29, 2020, and when the

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<sup>7</sup> *See* Isaac Arnsdorf, *Inside Trump and Barr's Last-Minute Killing Spree*, Pro Publica, Dec. 23, 2020, <https://www.propublica.org/article/inside-trump-and-barrs-last-minute-killing-spree>.

<sup>8</sup> *See* Hailey Fuchs, *A Pause in Federal Executions, but Uncertainty About What's Next*, N.Y. Times, July 16, 2021, <https://www.nytimes.com/2021/07/16/us/politics/biden-death-penalty.html>.

United States immediately appealed, the Fourth Circuit calendared the appeal for argument on *January 27, 2021*—seven days into the next presidential administration. *U.S. v. Higgins*, ECF 26, No. 20-18 (4th Cir., Jan. 7, 2021). The Fourth Circuit proceeded to deny a motion to expedite the case, *see id.* ECF 28 (Jan. 8, 2021), where Judge Richardson wisely noted that he “respectfully dissent[ed] from [the] decision to delay this case by scheduling oral argument two weeks *after* the scheduled execution,” *id.* (Richardson, J., dissenting) (emphasis in original). Luckily this Court saw what was going on.

Senator McConnell urges the Court to see what’s going on here, too. As happened four years ago, this is a last-minute play to find hoped-for relief in a new presidential administration. Congress chose January 19, 2025, as the divesture date. The Court should not allow procedural games to interfere with it.

## CONCLUSION

For the foregoing reasons *amicus* urges this Court to deny the emergency application for injunction and allow the divesture to go into effect by January 19, 2025, as Congress required.

Respectfully submitted,

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