Nos. 24-656 & 24-657

IN THE

Supreme Court of the United States

TIKTOK, INC., *et al.*,

Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

BRIAN FIREBAUGH., *et al.*,

Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF FLOOR64, INC. d/b/a THE COPIA INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Copia Institute submits this brief because upholding the Protecting Americans from Foreign Adversary Controlled Applications Act (the "Act") would walk back critical First Amendment protections that amicus Copia Institute depends on—as do all Americans. In submitting this brief it does so wearing two hats: as a longtime commenter on the issues at the heart of this Constitutional challenge, and as an example of those whose own First Amendment rights are threatened by this statute and all that would follow if the First Amendment were found to tolerate it.

The Copia Institute is the think tank arm of Floor64, Inc., the privately-held California small business behind Techdirt.com ("Techdirt").[2] As a think tank the Copia Institute produces evidence-driven articles and papers[3] as

1. No counsel for any party authored this brief in whole or in part. Amicus and its counsel authored this brief in its entirety. No person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

2. Its founder and owner Michael Masnick was recently profiled in the New York Times. Kashmir Hill, *An Internet Veteran's Guide to Not Being Scared of Technology*, New York Times (Jul. 29, 2023), https://www.nytimes.com/2023/07/29/technology/mike masnick-techdirt-internet-future.html.

3. See, e.g., Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, Techdirt (Aug. 28, 2019), https://www.techdirt.com/2019/08/28/protocols-not-platforms-technological-approach-to-free-speech/. This paper is credited with inspiring the development of the Bluesky social media platform. *A Note About the Knight Institute, X, and Bluesky*,

well as other forms of expressive output such as podcasts[4] and games[5] that examine the nuances and assumptions underpinning technology policy. Armed with its insights it then regularly submits advocacy instruments including regulatory comments and amicus briefs. As an amicus it has been no stranger to this Court, having most recently submitted briefs in *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), *Moody v. NetChoice*, 144 S. Ct. 2383 (2024), and *Gonzalez v. Google*, 598 U.S. 617 (2023), which all involved similar issues as those present here: the expressive rights of Internet platforms and those that use them.

Knight First Amendment Institute (Nov. 25, 2024), https://knightcolumbia.org/blog/a-note-about-the-knight-institute-x-and-bluesky.

4. Mike Masnick, *Announcing Ctrl-Alt-Speech: A New Podcast About Online Speech*, Techdirt (Mar. 7, 2024), https://www.techdirt.com/2024/03/07/announcing-ctrl-alt-speech-a-new-podcast-about-online-speech/.

5. Complementing its more formal work product the Copia Institute additionally produces interactive games such as "Moderator Mayhem" and "Trust and Safety Tycoon," which allows players to experience the difficulties of effective platform moderation given various competing pressures that typically bear on the site management experience, including the sort at issue in this case. *See*, *e.g.*, Mike Masnick, *Trust & Safety Tycoon: Try Your Hand At Managing A Social Media Trust & Safety Team*, Techdirt (Oct. 17, 2023), https://www.techdirt.com/2023/10/17/trust-safety-tycoon-try-your-hand-at-managing-a-social-media-trust-safety-team/. It also recently successfully funded the development of a new game, One Billion Users, via the use of other Internet platforms including Kickstarter and Bluesky. Mike Masnick, *Success! One Billion Users Will Go Into Production (Late Backers Welcome)*, Techdirt (Dec. 20, 2024), https://www.techdirt.com/2024/12/20/success-one-billion-users-will-go-into-production-late-backers-welcome/.

The goal of all of the Copia Institute's efforts is to educate courts, lawmakers, and other regulators—as well as innovators, entrepreneurs, and the public—on issues such as these in order to influence good policy that promotes and sustains innovation and expression. It also does so through Techdirt, an online publication that has chronicled technology law and policy for over 25 years. In this time it has published more than 80,000 articles regarding subjects such as freedom of expression, data privacy, and platform moderation—issues at the heart of this matter—as well as other related topics including cybersecurity, competition policy, and the impact of technology on civil liberties generally. The company is also not just a speaker regularly availing itself of its First Amendment protections to engage in its own expression but a platform provider, soliciting what has amounted to over two million reader comments, which is a form of user expression that advances discovery and discussion. The company then uses other Internet platforms of various types to promote its own expression and engage with its audiences. Although it has not to date used Tiktok to engage in its own expression, the effect of a decision against Tiktok stands to reach it, reshaping the durability and dimension of the rights it depends on to engage in its own expression and facilitate the expression of others, the rights of the platforms it does use, and the right of it and other Americans ever to use any platform including Tiktok.

Amicus Copia Institute therefore submits this brief to raise the alarm at such an outcome. Its rights, as well as those of other Americans, are at stake. While the parties and other amici will ably explain how First Amendment doctrine works to protect Tiktok, the Copia Institute writes to discuss the implications for all Americans if suddenly it does not.

SUMMARY OF ARGUMENT

The question before this Court is whether the Protecting Americans from Foreign Adversary Controlled Applications Act, as applied to Tiktok, is unconstitutional. The answer is yes, but the answer must be yes because of how the answer, and how the answer is reached, will reverberate far beyond Tiktok. The way the Court of Appeals considered the question would weaken the protections that other American speech interests depend on, reducing strict scrutiny to little more than rational basis, thereby compromising the rights of Americans simply to prevent any foreign interest from benefiting from such protection too. In order not to chill expression and invite pretextual attacks on speech interests any Constitutional analysis must instead be carefully considered and adequately protective—and not just now, with respect to Tiktok, but as new challenges emerge, as they inevitably will, and soon.

ARGUMENT

I. How the Court of Appeals erred in finding the Act constitutional points to why it is not

In granting review this Court may be intending to do its own constitutional analysis *de novo*. But as it begins to tread the path previously taken by the Court of Appeals, it can take heed of where that court took wrong turns. In particular, while the appeals court was correct that, to be found constitutional, the Act needed to survive strict scrutiny, the scrutiny the court actually applied was no more rigorous than rational basis. It was unduly deferential to the government, alleviating it of the heavy

burdens it should have been required to carry to justify its action, lest such reasoning open the door to pretextual attacks on speech interests in the future. Nor did it require the government to show how its chosen course of action was narrowly tailored enough to not impact protected speech interests any more than absolutely necessary—and not just those speech interests claimed by Tiktok but of all Americans who use or run platforms.

a. It made speech interests vulnerable to pretextual attack

For the First Amendment to provide its protective function it cannot be forgiving to government action taken against speech interests. To be protective it must be exacting and limit incursions against them to the most seldom of occasions, not just to shield them from whatever harm is threatened by any particular state action but to ensure that none can be harmed in the future by any other state actions, which may be less subject to challenge if Constitutional standards become less rigorous. The concern raised by this litigation is not just that Tiktok or its users will be harmed by the Act, but that if such a law could be permitted to target Tiktok, then any other law or state action could target any other platform, or any other speech interest generally, even when all may be purely domestic. In deeming the Act constitutional the Court of Appeals effectively relaxed the standard for evaluating any state action taken against speech, and doing so again here will reverberate far beyond just this law and just this platform. In evaluating whether a state action is Constitutional stricter standards must apply, even in a case involving facts such as these.

Here the Court of Appeals was able to find the Act constitutional as applied to Tiktok because its analysis, while ostensibly applying strict scrutiny, effectively searched only for a rational basis for the state action. It was unduly deferential to the government and its cited concerns of national security, and then did little to interrogate whether this particular law and its divestment requirement were sufficiently narrowly tailored to minimize the harm to the affected speech interests. Both missteps rendered speech interests significantly less protected than they should have been, jeopardizing not just those related to Tiktok but any others targeted by state action in the future, which would also be exposed to the lesser scrutiny such a decision invites.

In terms of the deference shown, not only did it credit a record largely unavailable to the public to evaluate, but it also presumed a unified bipartisan motivation behind the law's passage, which history belies.[6] It regarded

6. Over the years numerous government officials expressed animus to the expression appearing on Tiktok. *See*, *e.g.*, Morning Edition, *FCC Commissioner Brendan Carr supports a total ban on TikTok*, NPR (Dec. 23, 2022), https://www.npr.org/2022/12/23/1145170887/fcc-commissioner-brendan-carr-supports-a-total-ban-on-tiktok; *see also* David Ingram and Kat Tenbarge, *Critics renew calls for a TikTok ban, claiming platform has an anti-Israel bias*, NBC News (Nov. 1, 2023), https://www.nbcnews.com/tech/social-media/tiktok-ban-israel-gaza-palestine-hamas-account-creator-video-rcna122849. Making common cause with others raising security concerns both created enough political power to pass the bill and allowed those with more censorial objectives to launder them with a more seemingly content-neutral rationale. It presumes too much to assume there was unity of opinion, particularly when the law also achieved passage by piggybacking on another bill that would have been politically costly

the position of the government, that Tiktok warranted this obliterating divestment sanction, as immutably authoritative, even though government can often change its mind, particularly as control of it changes hands. Subsequent administrations might well prefer to protect platforms like Tiktok, perhaps because of how it enhances the expressive ability of young people, or supports the creative economy. But while those future governments could repeal the law, or recharacterize China more favorably, once the current government is allowed to destroy Tiktok there is no un-ringing of that bell by any future government. In effect, deference to the current one is indifference to any future one, a judicial preference for the speech values this one likes over the ones a future one may favor.[7]

It should have instead been a heavy burden for the government to meet to justify a state action that impacted speech interests if those speech interests were to be as adequately protected as the First Amendment proscribes. Alleviating the government of that burden, as the court effectively did in its analysis, puts those interests at risk,

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to veto. Mike Masnick, *Lawmakers Who Insisted The US Gov't Should Never Combat Foreign Influence Online, Vote To Combat TikTok's Foreign Influence Online*, TECHDIRT (Apr. 22, 2024), https://www.techdirt.com/2024/04/22/lawmakers-who-insisted-the-us-govt-should-never-combat-foreign-influence-online-vote-to-combat-tiktoks-foreign-influence-online/ (discussing how the Act was passed along with aid to Ukraine, Israel, and Taiwan).

7. As Tiktok itself has pointed out, the incoming presidential administration, although it originally demanded its censoring, has lately become a champion for it. *See*, *e.g.*, Jeff Stein, Drew Harwell, and Jacob Bogage, *Trump expected to try to halt TikTok ban, allies say*, WASHINGTON POST (Nov. 12, 2024), https://www.washingtonpost.com/business/2024/11/12/trump-tiktok-ban-sale/.

in large part because it makes it all too easy for pretextual reasons to shield unconstitutional actions taken against speech for what are actually impermissibly censorial reasons because it prevents those claimed reasons from being fully vetted. This risk is particularly heightened when national security is claimed as the reason for the government action because any expression that challenges a government's hold on power could be construed as a national security problem. *See*, *e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J. concurring) (referencing the John Peter Zenger trial, where a prosecution for seditious libel was launched against a printer who refused to divulge the identities of people who had published attacks on the Crown governor of New York). Speech is protected in large part to check government power, so it should be a much heavier lift by the government to justify using its power against that speech than the appeals court required.

But even if the government were correct that Tiktok poses a true national security danger, such concerns alone would not render any action taken to address them constitutional. Strict scrutiny requires not just a compelling reason for the state to act but also a narrow tailoring in how it does. Here, the Act's divestiture mandate is hardly narrow; it is a weapon as blunt as it is powerful, effectively banning a platform in its entirety, and with it all its user expression, instead of taking more careful aim at whatever might have been a genuine concern, such as how Tiktok handles user data. But instead of writing a law setting standards for data protection, which, in addition to being less destructive to speech interests would then have the added benefit of reaching any other platform raising similar data protection concerns, Congress wrote a law that obliterated the platform entirely. If the ban is upheld

Tiktok will not be able to misuse user data, but now no one will be able to use Tiktok to express themselves at all. And still user data on other platforms will remain unprotected.

Allowing such a harsh result has consequences, and not just to Tiktok. Even in the case of Tiktok, however problematic it may be, it is nevertheless impossible to say that Tiktok is unequivocally a bad thing. It clearly provides benefits, as the experiences of the user petitioners bear out. Yet with this law we will lose those benefits too.

But they are not all we stand to lose by allowing such a destructive action to be taken against the platform. Because if we cannot say that Tiktok is unequivocally bad, yet ban it anyway, it raises the question of what else that is good might be subject to ban if it has bad aspects too. Perhaps those downsides won't implicate national security, but when it comes to speech there is nearly always a reason for someone to complain—and sometimes even reasonably. Someone can almost always come up with a compelling reason to act against speech, but that justification alone cannot entitle the government to act. *See*, *e.g.*, *United States. v. Stevens*, 559 U.S. 460 (2010) (where a law against pictures of animal cruelty was found to be overbroad); *United States v. Alvarez*, 567 U.S. 709 (2012) (finding a law banning false claims about military honors unconstitutional as a content based restriction). If all that were required to act against speech were such a reason then little could survive.

b. It overlooked how American rights were inherently affected

An undercurrent running through the Court of Appeals decision is the view that the foreign nature of

Tiktok excepts it from the normal rules for evaluating whether a government action is constitutional. The problem with that framing, however, is that it ignores how Americans' rights are affected if Tiktok's are not protected.

A threshold issue is that when nationality can be a litmus test for whether First Amendment rights apply the test itself can result in the loss of Americans' rights. An example of this inevitable dynamic is the right to speak anonymously, which this Court has long recognized as being part and parcel with the First Amendment right to speak generally. *McIntyre*, 514 U.S. at 357. There is no way to ascertain nationality when you cannot ascertain identity, and no way to protect identity if identifying details are necessary to reveal in order to know if the speaker is protected from being identified. For the right to speak anonymously to be meaningful and real, nationality cannot be part of any test to determine how the First Amendment applies.

But anonymous speech is not the only expressive right that would be affected by citizenship tests. If who Americans can speak to—or, in the case of Internet platforms, speak through—can be limited to only those foreigners the government approves of, then it is their freedom that will be limited, as much as that of whoever the government sought to limit. For the right to free expression to be meaningful, everyone needs to be protected by it because there are consequences to the rights of Americans when the rights of non-Americans are not.

The plight of the user petitioners exemplifies how: their ability to engage in expression, and to benefit from others' expression, is threatened when the platform they use to

engage in it is threatened. This Court has recognized that platforms themselves have the First Amendment right to choose how they would facilitate user expression, just as any entity engaging in editorial curation would. *Moody v. NetChoice*, 144 S. Ct. at 2393. Banning the platform, particularly on the grounds that the government does not like how that expression has been facilitated, abrogates that right. Justifying that abrogation because the platform is non-American does not obviate the impact it has on Americans' rights. That impact instead shows why rights cannot be so easily stripped from those who are not American without injuring Americans' rights too.

If only American platforms have the right to facilitate expression as they choose, and foreign ones do not, American rights to speak and read online will be curtailed because Tiktok is not the only insufficiently-American platform they may use. One high profile example is Mastodon. Mastodon can be understood as a micro-blogging platform similar in its basic function to Twitter or Bluesky, although rather than being one centralized platform it is actually a protocol uniting instances running its platform server software. Those servers can be run anywhere and by anyone, including non-Americans and from outside the United States.[8] Even the developer of the Mastodon software itself, which also runs one of the largest instances, was until recently a German entity.[9]

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8. See, for example, the one at https://toot.community/explore, which is a "worldwide Mastodon instance from The Netherlands […]inviting everyone, everywhere to join us in the #fediverse."

9. *See* Eugen Rochko, *Mastodon forms new U.S. non-profit*, Mastodon (Apr. 27, 2024), https://blog.joinmastodon.org/2024/04/mastodon-forms-new-u.s.-non-profit/.

With Mastodon it is easy to see how non-Americans help Americans speak and read online, and, in its example, also help Americans run their own platforms to help others—including other Americans—speak and read online too.

Furthermore, if the rights of a platform operator are going to be contingent on whether it is American or not, there are all sorts of questions about how American they need to be. These questions are not just philosophical but practical, as users choose what platforms to use if they would like to not have to fear their choice being shut down underneath them. It has been reported that Saudis, for instance, own about 4% of the platform company formerly known as Twitter and now known as X.[10] And Russians own shares of it and Facebook, among others.[11] If these investments do not disqualify these platforms from being considered American, the question remains whether there is some level of investment that might, or some terms of that investment that could make the platform vulnerable to this sort of constitutionally exceptional regulation. If there is, it then raises a separate national security issue of whether a foreign investor could essentially sabotage an American company based on how it invests in it, if that investment could disqualify it from the First Amendment protection an American one would enjoy. And with this disqualification then injure the speech interests of Americans when they are no longer able to use the platform for their own expressive activities.

10. Michael Frankel, *Who Owns X (Formerly Twitter)*, The Motley Fool (Mar. 21, 2024), https://www.fool.com/investing/how-to-invest/stocks/who-owns-x/.

11. Jon Swaine and Luke Harding, *Russia funded Facebook and Twitter investments through Kushner investor*, The Guardian (Nov. 5, 2017), https://www.theguardian.com/news/2017/nov/05/russia-funded-facebook-twitter-investments-kushner-investor.

For platforms like Mastodon that used to be a German endeavor they would seem to be in the clear, at least as far as the Act is concerned, because Germany is not currently a declared foreign adversary of the United States. But its example reminds that this status can easily change—who are friends and who are foes is not a constant in history, and although that relative status of a foreign country has tended to change slowly there is little restraining the government from changing its view rapidly. Thus the historic inertia of foreign policy cannot be what free expression hinges on. Because if the relative status of a country a platform is associated with, as friend or foe, is all that stands between American users being able to fully avail themselves of their own rights of free expression, including by choosing platform alternatives that best suit their expressive needs, or not, and having those choices constrained, then their own rights will be extremely fragile. When only American platforms, owned and run by Americans, have the guaranteed freedom needed to provide the user experience Americans seek, Americans will only be free to enjoy a small, provincial, domestic Internet, and not a fully internetworked world. Such restrictions that the Act contemplates therefore restrict Americans' rights as well.

II. The chilling effects that would result from finding this law constitutional point to why it is not

a. There is no limiting principle to this law that would not allow the government to target any other platform or speech interest

This law sought to accomplish two things, one of valid purpose that in its implementation had an unconstitutional

effect on speech interests, and one that at its core was unconstitutional in its intention as well as inevitable effect. Because it will not be the last time a government actor endeavors to do either, care must be taken not to allow speech interests be affected here. A law that can target Tiktok, as this one has, can target any platform, or any speech, in the future. The First Amendment's protective principles must be able to hold here if they will ever be able to hold.

i. Protecting Americans' data privacy is a valid government purpose, but one that nevertheless cannot unduly trample expressive freedom in its implementation

A stated purpose of the Act was to address Tiktok's data collection practices. Data collection practices are an area of genuine policy concern, not just with respect to Tiktok but with regard to how *any* platform, foreign or domestic, acquires and potentially shares the data of its users. Wanting to protect Americans' data privacy is a compelling reason that may animate government action,[12] and further data protection legislation is likely inevitable. But even well-intentioned legislation is prone to having collateral effects. For any legislation that does there needs to be principled analysis to make sure that any intrusion on constitutional rights is, if not completely avoided, as narrow as possible. It is otherwise too easy to harm speech interests if government solution-making

12. And in some states already has. *See* Müge Fazlioglu, *US State Comprehensive Privacy Laws Report*, IAPP (Oct. 24, 2024), https://iapp.org/resources/article/us-state-privacy-laws-overview/.

is not held to enough scrutiny to motivate it to avoid that harm.[13]

With this case this Court can light the way to require that scrutiny, because what this matter teaches is that the concern in how data is collected and shared cannot alone constitutionally absolve all possible actions the government might take in response to it. Which makes intuitive sense: it should not, for instance, be constitutional to ban all social media platforms as a response to data protection concerns. While doing so would certainly address those concerns, because there would be no danger of platforms collecting and sharing too much user data if there were no platforms to collect it, it would result in there being no platforms to facilitate user expression at all. That hit to free expression should be considered unconstitutional, a disproportional and unnecessary harm to speech interests.

But for even less extreme regulatory measures the First Amendment remains clear: no law can be made that abridges free expression, and, as courts have repeatedly found, that admonition holds unless the law can pass strict scrutiny. If the government wants an action it takes, impacting speech interests, to nevertheless be excused, it

13. This problem is particularly evidenced in countries where there is no First Amendment to constrain regulations targeting online speech and the platforms that facilitate it. For instance, in England the Online Safety Act has led to the elimination of valuable community forums because its regulatory demands are impossible for small platform operators to comply with. Mike Masnick, *Death Of A Forum: How The UK's Online Safety Act Is Killing Communities*, TECHDIRT (Dec. 20, 2024), https://www.techdirt.com/2024/12/20/death-of-a-forum-how-the-uks-online-safety-act-is-killing-communities/.

needs to be an action with only the most minimal effect on speech. Narrow tailoring is necessary so that unnecessary harm to speech does not accrue as the government pursues what may otherwise be a valid policy—and it has the added benefit of stimulating more effective regulation when that regulation has to carefully focus on the problem it fixes.[14]

ii. Attempting to control what expression Americans can encounter online is inherently an unconstitutional purpose

If what the government sought to accomplish with this Act was solely intended to confront Tiktok's data collection practices, it would still fail constitutionally but be potentially salvageable in a form less destructive to speech interests. However the twin motivation behind the law—to address how Tiktok curated content—fails on its face. It needs to be understood as an impermissible attack on expression, not just to remedy the otherwise imminent injury to Tiktok and its users but to guard against similar attacks on expression that are likely to

14. Even to the extent that the government is genuinely concerned about Americans' data being accessible to the Chinese government, this Act has still not solved the problem. Despite having effectively banned Tiktok, if China, or any other government, wants access to Americans' data, it is still able to purchase it from a data broker, legally. Karl Bode, *Forget A TikTok Ban, We Need To Regulate Data Brokers And Pass A Real Privacy Law*, TECHDIRT (Mar. 21, 2023), https://www.techdirt.com/2023/03/21/forget-a-tiktok-ban-we-need-to-regulate-data-brokers-and-pass-a-real-privacy-law/. Not only is the law the government has passed not effective in addressing its stated purpose, but it demonstrates how its actions fail to meet strict scrutiny because its remedy, far from being narrowly tailored, is hardly tailored to the problem at all.

follow if this one is allowed. Courts will be called upon to evaluate the constitutionality of all sorts of state actions, whether legislative or otherwise, from every state as well as the federal government, and affecting all sorts of technology and policy issues raised by technology, if they have not been already. *See*, *e.g.*, *Moody*, 144 S. Ct. at 2383.

In particular, this Court, as well as other courts, are likely to soon be called upon to evaluate laws involving content moderation,[15] algorithms,[16] intermediary liability,[17] and age-restricting the Internet,[18] as well as continue to consider the effects on speech of intellectual property laws.[19] In every case there can be compelling reasons for government to act in a way that affects speech interests, including to disfavor or disfavor certain speech, regard algorithmic tools with suspicion, protect children, or greenlight the preclusive power of an intellectual property

15. *Moody v. NetChoice* was but one recent example.

16. The Court of Appeals for the Third Circuit recently considered another case involving Tiktok with respect to its algorithms. *Anderson v. Tiktok*, 116 F.4th 180 (3d Cir. 2024). Its outcome differed from how the Second Circuit had considered similar issues, and it may soon be ripe for this Court to resolve the split. *See Force v. Facebook*, 934 F.3d 53 (2d Cir. 2019).

17. *See*, *e.g.*, *Gonzalez v. Google*, 598 U.S. 617 (2023); *Taamneh v. Twitter*, 598 U.S. 471 (2023).

18. *See Free Speech Coalition v. Paxton*, No. 23-1122. The Copia Institute also served as an amicus and declarant in the First Amendment challenge of California's "Age Appropriate Design" law that would have effectively prohibited minors from using the Internet entirely, had the Ninth Circuit not enjoined it. *NetChoice v. Bonta*, 113 F.4th 1101 (9th Cir. 2024).

19. *See*, *e.g.*, *Matal v. Tam*, 582 U.S. 218 (2017). *See also Cox Communications v. Sony*, No. 24-171.

right over others' expression. But in all these situations there are speech interests at stake, interests that need to be constitutionally protected in order not to risk real harm to expression and all the reasons it needs to be free from government interference. If, for instance, any algorithm or content curation practice could be deemed suspect and so easily stripped of First Amendment protection as the Act does here, then we risk losing not just the more dubious algorithms but all algorithms, no matter how beneficial or useful they are, and not just the ones employed by non-Americans but any.

Any analysis that does not start from the presumption that affected speech interests are presumptively protected unless an incursion against them can meet rigorous strict scrutiny is troubling for everyone, including amicus Copia Institute. As a business engaged in exercising its expressive rights, both in furtherance of its own direct expression and as a platform operator curating others' expression, including as a means of connecting with its own audience and building a sense of community, how the Court acts here, with respect to the issues raised by this Act, will affect it, just as it will all Americans.

Applying true strict scrutiny here will therefore be critical to protecting the speech interests all these policies inherently affect. It is thus critical that the Court carefully do so here in order to not preemptively foreclose future challenges to government actions that overstep and chill what should be protected expression.

b. The artificial urgency permeating this law and its review invites other unconstitutional government actions

The Court of Appeals did not just find that the Act satisfied strict scrutiny; in denying the injunction it accepted that the urgency Congress baked into the Act was warranted. But whether the protections of the First Amendment can give way so quickly is the actual emergency before the Court right now, not just in terms of the ruinous sanction looming over an Internet platform used by countless Americans, but in terms of what it portends for any future speech interest government would attack. If this Act is not enjoined—let alone if it is upheld—it will serve as a roadmap for other unconstitutional legislation by demonstrating how it can escape review. Far from alleviating harm to Americans, it would create a new vector for it.

First, the government limited the courts that could have jurisdiction to review its law, sending all challenges directly to the Court of Appeals and cutting out the district court, which meant that instead of reviewing the district court's analysis for error, the Court of Appeals was the first to render one. For a question of such import, the more judicial input the better, but Congress essentially wrote itself a shortcut to avoid as much as it could. For future laws it might attempt to avoid even more.

It also wrote into the statute a date of enforceability, but this was not a date of enactment. It was not even a date after which a cause of action against Tiktok could be brought. It was a date when a presumptive penalty—divestment—could be imposed, with no further opportunity

for due process. And although the 270 days between bill passage and enforcement could have been shorter, it still created a very short timeline for constitutional review to be sought.[20] This artificial urgency is why an injunction would be especially needed, to ensure that there is time for adequate review.

Without it review is needlessly rushed. As it is, parties and amici, and even this Court itself, is left to rush all briefing and oral argument preparation over the winter holidays. The short and inconvenient timeline will inevitably affect the briefs and who is able to participate in briefing. For an issue of this import, where the decision will affect the Internet, and all online expression, as well as offline expression if strict scrutiny remains weakened, it is especially important that all who will be affected be able to weigh in to assist this Court in making the most prudent ruling possible, aided by the most insight. Without an injunction to slow down the timeline and enable that participation, this Court risks making what portends to be a monumental decision without the care such a decision requires.

A quick decision finding the Act unconstitutional would of course ameliorate the constitutional danger of this particular legislation. But because the decision will speak not just to the now but the future, if there is any inclination to not remediate the constitutional threat it

20. That it was not shorter would seem to undermine the claimed exigence, but the more significant risk is that in the future Congress may write a statute with a period only a fraction as long before the penalty kicks in. If Congress can effectively cause a constitutional injury simply by writing a law that inflicts it quickly, there is no limit to the harm to speech it could cause.

represents, then this Court should at minimum enjoin the law and invite further briefing and argument according to a more typical timeline.

CONCLUSION

For the foregoing reasons, the Act, at least as applied to Tiktok, should be held unconstitutional, or at minimum enjoined pending further briefing and review.

Respectfully submitted,

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