No. 24-656

IN THE

Supreme Court of the United States

TIKTOK, INC., ET AL.,

Petitioners

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF FIRST AMENDMENT AND INTERNET LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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SUMMARY OF ARGUMENT

"Without freedom of thought, there can be no such thing as wisdom, and no such thing as public liberty, without freedom of speech." Benjamin Franklin, *Silence Dogwood, No. 8* (July 9, 1722). For this reason, the U.S. Constitution makes clear that the Government cannot abridge free speech based on its content or viewpoint absent compelling and narrowly tailored grounds. Indeed, the protection of all speech is foundational to American democracy. *See United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought"); *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) ("[A]s against dangers peculiar to war, as against others, the principle of the right to free speech is always the same").

Three weeks ago, the United States Court of Appeals for the District of Columbia Circuit (the "lower court") upheld the Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, div. H (the "Act"). The Act is an extraordinary use of government power, requiring ByteDance (TikTok's owner) to divest TikTok or requiring a ban of TikTok wholesale. To put the lower court's holding in context: *millions* of Americans use TikTok daily to express political, social, and economic views. It is a paradigmatic modern-day "public square." *See Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Both TikTok's and its users' speech

will be eradicated under the Act's mandate of divestiture or ban. The free speech consequences are thus serious and wide-ranging.

This is a shocking holding in a country founded on the principle that all speech should be permitted and protected absent actual cause. It is particularly shocking given that the Act discriminates against TikTok, and TikTok alone, based on the content and viewpoint of its speech. Indeed, one of the Government's rationales for the Act—to limit the People's Republic of China's ("PRC") ability to manipulate content covertly on the TikTok platform—is expressly content and viewpoint-based. The lower court acknowledged as much, agreeing that the "risk that the PRC might shape the content that American users receive, interfere with our political discourse, and promote content based upon its alignment with the PRC's interests" references the "content of TikTok's speech." Opinion ("Op.") at 30. But it failed to mention that this also attempts to regulate based on the viewpoint—*e.g.*, anti-Taiwanese independence messaging—of pro-PRC speech. *See, e.g.*, *id.* at 30, 43.

A review of the content and viewpoint purposes underlying the Act requires the application of strict scrutiny with the presumption that the Act is unconstitutional. The lower court did not do so. The lower court's scrutiny was strict in theory, but lax in fact. It allowed the Act to stand based on the risk that TikTok could be used by the PRC to gather information and manipulate content. The Government provided no "specific intelligence" to substantiate its concerns that

TikTok could be so used and the lower court did not cite any such evidence. *Id.* at 32, 47. There was also no evidence showing that these threats were particularly imminent or that any threats could not be better handled through less restrictive alternatives, such as a negotiated mitigation agreement.

Rather, and despite the bare evidentiary record, the lower court deferred to the Government's makeshift contentions, which provided post-hoc rationales and dismissed legislators' own repeated justifications. Strict scrutiny plainly requires more than the speculation the Government has put forth. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 819, 822 (2000) (requiring the Government to provide "hard evidence," rather than "anecdote and supposition" of the problems it seeks to address). As the court with exclusive original jurisdiction over petitions challenging the Act, the lower court should have scrutinized the record to ensure the Act was justified. It did not. And the fact that the lower court did not consider the whole record casts doubt on its conclusion that the Act was the least restrictive means to achieve the Government's goals, especially considering the alternatives proposed by TikTok—*e.g.*, disclosure and the National Security Agreement. *Amici* respectfully urge this Court to reverse the lower court's opening of a dangerous and unconstrained national security exception to the First Amendment, and avoid setting a dangerous precedent that will harm the speech of not only TikTok, but also millions of TikTok users.

ARGUMENT

I THE ACT'S DIVESTITURE MANDATE IS SUBJECT TO STRICT SCRUTINY BECAUSE IT DISPROPORTIONATELY BURDENS TIKTOK AND DISCRIMINATES BASED ON CONTENT AND VIEWPOINT.

The First Amendment insists on broad tolerance of all speech, regardless of the speaker, the content, or the viewpoint. Indeed, it is a bedrock of free speech doctrine that the Government cannot pursue politically expedient speech restrictions as the Government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). For this reason, content-based and viewpoint-based laws are presumptively unconstitutional and subject to strict scrutiny. *Barr v. Am. Ass'n of Pol. Consultants*, 591 U.S. 610, 618 (2020).

The Act violates this bedrock principle, facially discriminating against the content and viewpoint of TikTok's expressive activity. This is because (1) the Act's definition of a "covered company" expressly targets TikTok; (2) the Act's divestiture requirement applies only to TikTok and effectively grants the Executive the power to hand-select the next controller/editor of TikTok; and (3) the Act offers divestiture in lieu of an outright ban, meaning that TikTok must either cease its expressive activity *or* submit to governmental control over its speech. Barely addressing these issues (and never addressing the viewpoint issues with the Act), the lower court concluded the at-issue provisions of the Act are "facially content neutral

because they do not target speech based upon its communicative content" and instead "straightforwardly require only that TikTok divest its platform as a precondition to operating in the United States." Op. at 28.

But as the lower court agreed, the Government's justification for the Act *is* content-based—it rests on "the risk that the PRC might shape the content that American users receive, interfere with political discourse, and promote content based upon its alignment with the PRC's interests." *Id.* at 30. It bears noting that this justification is also viewpoint discriminatory as it only seeks to suppress pro-PRC speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–94 (1992) (this type of message selectivity is viewpoint discrimination as it "creates the possibility that the city is seeking to handicap the expression of particular ideas"). These same content and viewpoint issues permeate the text of the Act. The Act's provisions require ByteDance to either divest TikTok or ban TikTok, all based on a fear that TikTok might express pro-PRC content or viewpoints. This is content and viewpoint discrimination, which matters to the strict scrutiny analysis. Because of the viewpoint and content discrimination, the analysis must begin from a presumption that the Act's application to TikTok is unconstitutional.

This is especially so given the Act's viewpoint discrimination. *See id.* at 28–30 (focusing analysis on whether the Act is content neutral). As Justice Scalia's opinion in *R.A.V.* teaches, viewpoint

discrimination coupled with less restrictive alternatives "elevate[s] the possibility [that the Act is unconstitutional] to a certainty." *See R.A.V.*, 505 U.S. at 394. Given the availability of less restrictive alternatives, *see infra* Section C, the scales should have been strongly weighted in favor of unconstitutionality, which likely would have changed the lower court's ruling. This Court should correct that error by applying strict scrutiny.

A contrary holding will disrupt core First Amendment principles that, generally, speech cannot be censored or banned based on its content and viewpoint. That principle is especially true where, as here, the Government targets a singular speaker because it *might* promote speech that a foreign power agrees with. *E.g.*, *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting) ("[A]s against dangers peculiar to war, as against others, the principle of the right to free speech is always the same"). The Act fails strict scrutiny.

A. The Act Discriminates Based on Content and Viewpoint, Making it Presumptively Unconstitutional and Subject to Strict Scrutiny.

A law is content-based, subject to strict scrutiny, and presumptively unconstitutional if it "restrict[s] expression because of its message, its ideas, [or] its subject matter[.]" *See Police Dep't of Chi.* 408 U.S. at 95. Importantly, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy*, 529 U.S. at 818. Viewpoint discrimination—or the regulation of speech based on "the specific motivating ideology or the opinion or

perspective of the speaker"—is a "more egregious form of content discrimination." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (cleaned up). As noted, given the circumstances, the presumption of unconstitutionality is even stronger—closer to absolute—for viewpoint discrimination. *See R.A.V.*, 505 U.S. at 394–95.

The lower court incorrectly held the text of the Act facially content neutral. Op. at 28. Contrary to the lower court's holding, the Act's provisions *do* target speech based upon its communicative content, specifically its pro-PRC content. *See id.* at 30, 43. The Government's asserted interest in "covert content manipulation" here is simply a shorthand for "secretly pushing messages favored by the PRC." *Id.* at 42. The lower court thus misread the Act and misunderstood the purposes behind it for four reasons.

First, the Act singles out TikTok and ByteDance for immediate sanction. Sec. 2(c), (g)(3). For the first time in history, Congress has targeted a singular company over its views, while deleting and displacing the speech of over a hundred million Americans. As this Court has held, "laws that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994). Despite acknowledging that the Act singles out TikTok and ByteDance, the lower court failed to note the serious First Amendment implications of such targeting. *See* Op. at 26 (noting only the targeting).

Not only does such targeting impact TikTok's expressive conduct, but it also affects the millions of Americans who rely on TikTok to engage in free expression. This unprecedented interference stems from the Government's disapproval of the content and viewpoint of messages that *could be* espoused on the TikTok platform. *E.g.*, *id.* at 30 (risk that content preferring the PRC's view of Taiwan might be promoted to TikTok users provided as a reason to justify the Act); *id.* at 43 (risk of pro-PRC speech on TikTok justifies the Act).

Indeed, one of the Government's rationales for the Act—to limit the PRC's ability to manipulate content covertly on the TikTok platform—is expressly content and viewpoint-based. This attempt to suppress content and viewpoints the Government disagrees with is something it *cannot* do under the First Amendment. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (striking down a law forbidding "advocacy of the use of force or of law violation"); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965) (unanimously holding that a law that required recipients of communist propaganda sent from foreign countries to confirm they wished to receive the mailing was an unconstitutional "limitation on the unfettered exercise of the addressee's First Amendment rights").

Where, as here, one speaker is targeted because of the message they might speak or the viewpoint they might espouse, the regulation is unconstitutionally content and viewpoint-based. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548

(1983) (rejecting First Amendment challenge to differential tax treatment of veterans groups and other charitable organizations, but noting that the case would be different were there any "indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect"); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 445 (1996) (outright bans tend to disfavor "one subject of discussion compared with others" and "operate to skew debate among competing ideas on a single subject").

Second, the Act's definition of "qualified divestiture" requires the federal government to approve the purchaser of TikTok. Sec. 2(g)(6). The divestiture requirement grants the President of the United States the power to select the next editor of TikTok. Sec. 2(c)(1), (g)(3) (under the text of the Act, the approval condition applies exclusively to TikTok). This power will allow the President to, for example, select a buyer sympathetic to the Government's viewpoint, all while stripping TikTok of the authority to decide its own content and leadership. Just as the government cannot take physical control of the printing presses, it cannot take editorial control of virtual free speech marketplaces. *See* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 64 (1992) ("The government cannot take permanent physical possession of the New York Times printing presses"). This amounts to content control, and it is plainly a content and viewpoint based classification.

See Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. OF FREE SPEECH L. 97, 117 (2021).

Third, the Act's provisions indicate that it is designed to regulate certain types of content and viewpoints because it offers divestiture in *lieu* of a ban. The Act requires that TikTok and ByteDance agree to divestiture or accept a ban, thereby depriving them of access to the United States market. Implicit in this reasoning is that some form of TikTok would be permissible (*i.e.*, would not need to be banned) if it had the "right" owner, who would select the "right" editor (implicitly, one not sympathetic to the PRC), and, thus, the "right" type of speech. The Act therefore makes clear that the government is seeking to control the content of TikTok's speech and the viewpoints espoused by its users on the platform.

Finally, the poor fit between the Act's means (forced divestiture or an outright ban) and its purported ends (countering the PRC's efforts to collect data of and about persons in the United States, and the risk of the PRC covertly manipulating speech viewed by persons in the United States), demonstrates a content-based restriction on speech. Op. at 29–31. Judicial suspicion of governmental hostility to a particular viewpoint arises if a restriction poorly serves the viewpoint-neutral ground; "where, in other words, the fit between means and ends is loose or nonexistent." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004); *see supra* Kagan, at 455 ("[T]he looser the fit between the interest asserted and the

contours of the law, the greater the cause for suspicion").

Moreover, the Act limits itself to speech platforms, rather than the constellation of companies that collect personal data, making clear that its goal is fundamentally intertwined with speech regulation. Act § 2(g)(2)(a) (defining a "covered company" as one that allows users to "generate, share, and view . . . content"). As Petitioners assert, there are numerous other options more closely tailored to the Government's justifications for the Act. *See* TikTok Pet. for Writ of Cert. at 29–32. Yet, the lower court simply affords great deference to the claim that Congress considered and rejected these alternatives, rather than scrutinizing them as carefully as the First Amendment requires. Op. at 53–54.

That requirement is particularly salient where, as here, official statements and actions indicate that the Act is a façade for viewpoint-based discrimination. *See, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37,49 n.9 (1983) (scouring the record before finding no indication that "policy was motivated by a desire to suppress" excluded group's views); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (looking to public statements made by administrative members for evidence of discriminatory intent). The Act contained no legislative findings *actually* demonstrating that TikTok poses a "national security risk." *See* Act; Op. at 37. Rather, public statements made by lawmakers demonstrate the driving motivation behind the Law was TikTok's

allegedly pro-Palestinian and pro-Chinese content. *See* App'x to TikTok's Br. at 572 (No. 24-1113, D.I. 27) (Representative Mike Gallagher, who authored the Act, calling TikTok's content on the Israel-Hamas conflict "purely one-sided"); *id.* at 596 (Sen. Romney stating that content featuring and discussing Palestinians is "overwhelmingly so among TikTok broadcasts"); *see id.* at 566 (Sen. Warner opining that TikTok "will be promoting that Taiwan ought to be part of China, or that Putin's right"); Jane Coaston, *What the TikTok Bill Is Really About, According to a Leading Republican*, N.Y. TIMES (Apr. 1, 2024), https://www.nytimes.com/2024/04/01/opinion/mike-gallagher-tiktok-sale-ban.html (Rep. Gallagher explaining his view that the "propaganda threat" posed by TikTok was a "greater concern" than the "espionage threat"). These comments show that the Act was motivated by content and viewpoint discrimination.

Properly understood, the Act discriminates on the basis of both content and viewpoint and therefore is presumptively unconstitutional.

B. The Act Imposes a Disproportionate Burden on TikTok, Making it Subject to Strict Scrutiny.

As the lower court recognized, "the Act imposes a disproportionate burden on TikTok, an entity engaged in expressive activity." Op. at 26. The Act plainly "single[s] out" TikTok's expressive activity by subjecting TikTok—and *only* TikTok—to either a sale or a ban. *Id.*; *see also Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 198 (2024) ("The First Amendment prohibits government officials from wielding their power

selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries"). By prohibiting third parties from hosting TikTok unless and until it executes a divestiture, "the Act singles out TikTok . . . for disfavored treatment." Op. at 26.

Subjecting TikTok, and TikTok alone, to divestiture triggers strict scrutiny and renders the Act presumptively unconstitutional. This is true even despite the lower court's contrary conclusion premised on *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994). *See* Op. at 29. The special characteristics discussed in *Turner* do not apply here; asserting they do could create sweeping consequences.

Turner explains that more intrusive regulation of broadcast speakers than of speakers in other media is permissible due to the "unique physical limitations of the broadcast medium." *See* 512 U.S. at 637 (collecting cases). That is, there are more would-be broadcasters than frequencies available in the same locale. If two broadcasters attempted to transmit over the same frequency in the same locale, they would interfere with one another's signals such that neither could be heard. *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 212 (1943). The scarcity of broadcast frequencies thus required the "establishment of some regulatory mechanism" and the traditional First Amendment analysis is adjusted to allow some limited restraints and impose certain affirmative obligations. *Turner*, 512 U.S. at 638. A licensing regime is simply necessary because of the physical constraints of the medium.

The Internet differs both as a matter of practice and as a matter of function from broadcast media. Internet communications, like newspapers and books, enjoy the greatest safeguards against intrusive regulation because Internet communications "provide perhaps the most powerful mechanism available to a private citizen to make his or her voice heard." *Packingham*, 582 U.S. at 107. And social media services (like TikTok) "offer[ ] 'relatively unlimited, low-cost capacity for communications of all kinds.'" *Id.* at 104 (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)). The Internet is thus materially different from broadcast networks; it is unlimited and allows any person to share any opinion they may have. *Reno*, 521 U.S. at 868–70 ("[A]ny person . . . can become a town crier [on the Internet] with a voice that resonates farther than it could from any soapbox"). This Court has long rejected arguments that would subject the Internet to any reduced First Amendment protections. *See, e.g.*, *Reno*, 521 U.S. at 870.

Furthermore, the broad accessibility of the Internet means the First Amendment rights of "TikTok's millions of users" are equally at stake. Op. at 65. Countless Americans use TikTok to speak, listen, and engage in expressive activity, as the lower court noted. *See* Op. at 8 ("The TikTok platform has approximately 170 million monthly users in the United States and more than one billion users worldwide"), *id.* at 27 (Srinivasan, C.J., concurring) ("[M]any Americans may lose access to an outlet for expression, a source of community, and even a means of income"); *see also* TikTok Pet. for Writ of Cert. at 7 ("Seventeen

percent of U.S. adults regularly get news from TikTok"). Banning TikTok, therefore, will deprive a sizable portion of the American population of its preferred medium for expressive activity. The First Amendment forbids this outcome. It would be a historic departure from our nation's history and tradition of tolerating all kinds of speech if this Court were to erase a platform used by millions of Americans to engage in free expression.

Worse, the shuttering of TikTok will amount to a massive, government-mandated suppression of speech. Facially, the Act permits users to download their content before the ban goes into effect. Act § 2(b). But given the Act's timeline, many (if not most) users will not know to do so, thereby losing their speech forever. The Act's promise of allowing users time to shift their content to other platforms is thus largely illusory and will require users to both lose their recorded speech and the audience to which that speech was made. Nor is it true that the shuttering of one speech platform can be cured simply by advising speakers to find new ones. Indeed, it would be nonsensical to suggest that the free speech harms in the forced closure of a printing press, library, or bookstore could be cured by the possibility that users might find alternative presses, libraries, or bookstores. Further, the Act's nominal allowances for downloading content prior to the ban shows that Congress does not understand the expressive nature of TikTok. TikTok is a platform where creators communicate with one another by reacting to and remixing each other's content. This

dynamic conversation is not something you can cut and paste elsewhere.

And even in the unlikely possibility that TikTok executes a qualified divestiture, Americans will likely face disconnection from the global TikTok platform, unable to participate in the global exchange of views that the First Amendment protects. *Lamont*, 381 U.S. at 305 (upholding the right of an American to receive the Peking Review #12 without U.S. government interference). The Act forecloses the possibility of seamless interoperability between the Global TikTok platform and the U.S. TikTok platform by forbidding any operational relationship between the divested company and "any formerly affiliated entities." Act §2(g)(6)(B).

Amici urge this Court to remain cognizant of the Act's negative ripple effects on the free speech rights of TikTok's users, as well as the more immediate implications for TikTok itself. With these concerns in mind, this Court should apply strict scrutiny and hold that the Government has not presented sufficiently compelling or tailored reasons to overcome the presumption that the Act is unconstitutional.

II THE ACT CANNOT SURVIVE STRICT SCRUTINY.

A. The Interests Cited by the Government Do Not Justify the Act's Content and Viewpoint-Based Restrictions.

Even assuming that the Government's justifications that divestiture is required to limit the PRC's

data collection and content manipulation are genuine and non-pretextual, these interests are insufficient to justify the Act's plain content and viewpoint-based discrimination.

Amici recognize that China, Russia, and other foreign adversaries may *attempt* to disrupt American political and social order by creating or amplifying both traditional mass media and social media content that serves their interests. But an attempt to sow discord, or a fear of the same, cannot serve as a sufficient basis to violate free speech. The law—and especially strict scrutiny—requires more. It requires national security threats to be imminent. *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) ("[National] 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment"); *id.* at 730 (Stewart, J., concurring) (national security threat could not justify a ban on speech absent "direct, immediate, and irreparable damage to our Nation or its people"); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (before one can suppress speech, the danger "must not be remote or even probable; it must immediately imperil").

Further, the risk that private data may be gathered and misused is hardly exclusive to TikTok. *E.g.*, Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html (discussing how Facebook

data was improperly used to build voter profiles); Sheera Frenkel & Julian E. Barnes, *Russians Again Targeting Americans with Disinformation, Facebook and Twitter Say*, N.Y. TIMES (Sept. 20, 2020), https://www.nytimes.com/2020/09/01/technology/facebook-russia-disinformation-election.html. Permitting the Government to rely on the risk that the PRC might use TikTok to collect user data would set a precedent that risks of foreign meddling alone justify banning specific social media companies, especially given that TikTok receives the same type of data as other social media services. *See TikTok and Douyin Explained*, CITIZEN LAB (Mar. 22, 2021), https://citizenlab.ca/2021/03/tiktok-anddouyin-explained/ ("In comparison to other popular social media platforms, TikTok collects similar types of data to track user behaviour and serve targeted ads"); *see also* TikTok Pet. for Review¶ 85 (No. 24-1113, D.I. 3) (noting that much of the data collected by TikTok is no different from the data that Google and Meta collect).

B. The Public Record Does Not Support the Government's Justifications for the Act.

The lower court held that the Government's putative goals of countering (1) the PRC's efforts to collect data of and about persons in the United States; and (2) the risk of the PRC covertly manipulating content on TikTok were constitutionally permissible justifications for the Act. Op. at 29–31. But nothing exists in the public record that supports the proposition that the PRC had or imminently planned to collect American user data or covertly manipulate TikTok

content. And the Circuit Court represented that it "[did] not rely on [the Government's classified materials] in denying the petitions." *Id.* at 65 n.11.

This is extremely troubling because the facts available in the public record are insufficient for any court to properly evaluate the Government's justifications behind the Act. *See also supra* Section II.A. Further, the evidence suggests that the Act was driven by Congress's desire to eliminate disfavored speech. Permitting the lower court's opinion to stand on such a thin record will have devastating long-term consequences for free speech.

1. The Government Has Not Met the Evidentiary Burden Required to Meet the Demands of Strict Scrutiny.

To meet the stringent strict scrutiny standard, the Government must demonstrate that the Act is backed by compelling interests and that those interests could not have been accomplished through less speech-restrictive mechanisms. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004). The Government must offer "hard evidence," rather than "anecdote and supposition," to meet this high burden. *Playboy*, 529 U.S. at 819, 822. Absent such evidence, it cannot overcome the presumption that the Act's content and viewpoint bias is unconstitutional.

Yet, as Petitioners noted in their petition, the Government put forth only "bare factual assertions . . . lacking evidentiary support." TikTok Pet. for Writ of Cert. at 34. These same bare assertions were

used by the lower court to justify divestiture. For example, the court opined that "the PRC *can* access information from and about U.S. subsidiaries" and "*can* conduct espionage, technology transfer, data collection, and other disruptive activities[.]" Op. at 35 (emphases added). The Government can point to no evidence proving that the PRC has accessed information or has conducted espionage as required by *Playboy* nor has it shown it likely (and not just theoretically possible) that TikTok has evaded the extensive protections put in place to prevent exactly these actions. To the contrary, the lower court relied on "reasonable inferences" and "predictions," *id.* at 41, 47, to hold divestiture constitutional. This was after the lower court recognized the weaknesses in the Government's position. *See id.* at 47 (noting that the Government "lacks specific intelligence that shows the PRC has in the past or is now coercing TikTok into manipulating content in the United States"); *id.* at 32 ("Given the sensitive interests in national security and foreign affairs at stake, the Government's judgment based upon this evidence is entitled to significant weight") (cleaned up).

The Government thus has not met this standard. It lacks any evidence—let alone compelling evidence—that the justifications for the law have even occurred. *Cf. Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 800–01 (2011) (California could not show a compelling interest where, as here, it offered only ambiguous proof that the targeted speech actually harmed minors). And it provides no reason for the Act's serious underinclusiveness, namely why TikTok alone is

being targeted. Given this underinclusiveness, the Government has not met its burden of showing that the Act is narrowly tailored to further a compelling government interest. *E.g.*, *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 172 (2015); *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (cleaned up).

Nor does deference save the lower court's opinion. To be sure, deference can be appropriate in certain circumstances. *See Holder v. Humanitarian L. Project*, 561 U.S. 1, 29 (2010) (deferring to the legislature's "specific findings regarding the serious threats posed by international terrorism"). But those circumstances do not apply here. Unlike in *Holder*, which the lower court cited to support its extreme deference to Congress, Congress has not offered *any* "specific findings" to justify the Act. *See* Op. at 47 ("[T]he 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"). Moreover, the Act is a civil statute aimed specially at *one* speaker—TikTok. The generally applicable statute at issue in *Holder* was directed at *any* speaker who "knowingly provides material support or resources to a foreign terrorist organization[.]" *Holder*, 561 U.S. at 8. For these reasons, the Act fails strict scrutiny.

This conclusion accords with the demands of the First Amendment. Indeed, the "high bar" of strict scrutiny, if it is truly the most "demanding" test in constitutional law, requires more than blind deference to Congress or the Executive. Op. at 32; *see Brown*, 564 U.S. at 800; *Playboy*, 529 U.S. at 818 ("It is rare that a regulation restricting speech because of its content will ever be permissible"). It rightly demands that a compelling and narrowly tailored reason support censorship. Affirming the lower court's holding would signal a sea change—namely, that the Government need offer only ambiguous evidence and conjecture to support the suppression of free and controversial speech. That would set a dangerous precedent. The risk of covert manipulation does not depend only on direct ownership or influence by a particular country. Pressure might be exerted in numerous other ways. Loans or business opportunities might also be used to covertly influence a newspaper or television station's coverage or an internet platform's content moderation. Could the government declare that a particular owner or editor of a news platform was at risk of future foreign covert influence and thus should be replaced? Could the government shut down a Chinese-owned AMC Theatre because they, under allegations of allegiance to the PRC, showed anti-Taiwanese independence movies? Under the lower court's opinion, presumably yes. The First Amendment demands more.

2. The Entire Record Suggests that the Government's Justifications for the Act Are Pretextual.

The public record's scant evidence of "specific intelligence" of the Government's justifications supports the conclusion that the Act should fail strict scrutiny. The absence of evidence demonstrates that the concerns motivating the Act were pretextual and that the animating motivation behind the Act was Congress's dislike of the content and viewpoint of TikTok's speech. This Court should exercise vigilance and carefully scrutinize instances where, as here, the Government threatens "'legal sanctions and other means of coercion' against a third party 'to achieve the suppression' of disfavored speech[.]" *Vullo*, 602 U.S. at 175 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)).

Failure to do so will have far-reaching consequences. There is no dispute that the Act will muzzle the millions of Americans who use TikTok to engage in expressive activity. *See* Op. at 12 (noting the "burdens on millions of U.S. users if the TikTok platform were to become unavailable to them as a forum for expressive activity"); *id.* at 65 ("TikTok's millions of users will need to find alternative media of communication"); *id.* at 27 (Srinivasan, C.J., concurring) ("[M]any Americans may lose access to an outlet for expression, a source of community, and even a means of income"); *id.* at 8 ("The TikTok platform has approximately 170 million monthly users in the United States and more than one billion users worldwide"); *see also* Pet. for Writ of Cert. at 7 ("Seventeen percent of U.S. adults

regularly get news from TikTok"). Not only will the Act silence TikTok as a forum for free expression, but it will also silence the millions of Americans who avail themselves of TikTok to express themselves, and stymie those who wish to hear from other users.

The broad consequences on free speech are particularly troubling given that lawmakers clearly disfavored the type of speech available on TikTok. The record is replete with evidence suggesting as much. *See, e.g.*, App'x to TikTok Br. at 566 (24-1113, D.I 27) (Sen. Warner opining that TikTok "will be promoting that Taiwan ought to be part of China, or that Putin's right"); Jane Coaston, *What the TikTok Bill Is Really About, According to a Leading Republican*, N.Y. TIMES (Apr. 1, 2024), https://www.nytimes.com/2024/04/01/opinion/mike-gallagher-tiktok-sale-ban.html (Representative Mike Gallagher explaining "propaganda threat" of TikTok). Citing similar concerns about the content of TikTok's expressive activity, the lower court held divestiture constitutional. Op. at 30–31. Plainly, the divestiture is the aim to regulate the content of TikTok's speech, which the lower court concedes in its opinion. *Id.* at 43 (admitting that the animating purpose of the divestiture is to prevent threats of "free speech [distortion] on an important medium of communication"). This offends the First Amendment.

The lower court was equally incorrect to dismiss these statements as "stray comments." Op. at 45. As part of the heightened diligence strict scrutiny requires, this Court considers statements made

contemporaneously with a law's passing to determine if the law runs afoul of the First Amendment. *See Perry*, 460 U.S. at 49 n.9; *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (holding that, in evaluating if a law's purpose passes muster under the First Amendment's Free Exercise Clause, courts should consider "contemporaneous statements made by members of the decision-making body"). Adherence to this precedent is vital, especially given the strong evidence showing that the Government's national security concerns were pretextual. Doing so would doubtless compel the conclusion that the Act's purpose is to suppress disfavored speech, striking at the heart of the First Amendment.

C. The Act Is Not the Least Restrictive Means to Achieve the Act's Putative Goals.

Even if the Government's justifications for the Act were compelling and not pretextual, the Government has not met its burden of showing that compelled divestiture or shutdown is the less speech-restrictive mechanism.

First, the lower court summarily dismissed the less speech-restrictive alternatives provided by TikTok. These include disclosure and TikTok's proposed National Security Agreement (the "NSA"). Op at 53. As Petitioners contend, disclosure is plainly a less restrictive means than an outright ban. TikTok Pet. for Writ of Cert. at 30 ("[D]isclosure requirements trench much more narrowly on First Amendment rights than do flat prohibitions on speech" (cleaned up). Moreover, the lower court's deference to the Executive's

rejection of the NSA was misplaced given that the Act was passed by Congress, and the record only indicates that "Executive Branch officials briefed congressional committees several times." Op. at 52; TikTok Pet. for Writ of Cert. at 31.

Second, it is unclear how the lower court could have been satisfied that the Act was the least restrictive alternative without any showing that the court actually examined the evidence in the sealed record. As the lower court noted, it "[did] not rely on [the Government's classified materials]" in denying TikTok's petition. Op. at 65 n.11. The fact that the lower court did not consider the whole record casts doubt on its conclusion that the Act was the least restrictive means to achieve the Government's goals.

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Amici did not set forth these legal errors in the lower court's analysis to claim that Congress could never substantiate the conclusion that TikTok poses a national security threat with actual evidence sufficient to survive strict scrutiny. Rather, *amici* sought to demonstrate that, for the Act (or any law that is content and viewpoint discriminatory) to be constitutionally permissible under the First Amendment, it must be supported by a showing of real need and it must be shown that there is no less restrictive alternative.

The rush to react to foreign propaganda is a prominent feature in American free speech history. *See* Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L. J. 939, 939 (2009) ("In the national

security setting, however, the United States has a long and checkered history of allowing fear to trump constitutional values"). The First Amendment rights we enjoy today were shaped by a Supreme Court that grew skeptical of speech restrictions that sprung from moral panics over socialist and Communist propaganda. With those foundational principles in mind, *Amici* urge this Court to find that the Act—which attempts to control the content and viewpoint of TikTok's expressive conduct—does not withstand strict scrutiny.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

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