





1 APPEARANCES:  
2 NOEL J. FRANCISCO, ESQUIRE, Washington, D.C.; on  
3 behalf of Petitioners TikTok, Inc., et al.  
4 JEFFREY L. FISHER, ESQUIRE, Menlo Park, California; on  
5 behalf of Petitioners Brian Firebaugh, et al.  
6 GEN. ELIZABETH B. PRELOGAR, Solicitor General,  
7 Department of Justice, Washington, D.C.; on behalf  
8 of the Respondent.  
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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24-656, TikTok versus Garland, and the consolidated case.

Mr. Francisco.

ORAL ARGUMENT OF NOEL J. FRANCISCO  
ON BEHALF OF PETITIONERS TIKTOK, INC., ET AL.

MR. FRANCISCO: Mr. Chief Justice, and may it please the Court:

Under the Act, one of America's most popular speech platforms will shut down in nine days. That shouldn't happen for three reasons.

First, TikTok incorporated as a U.S. company speaking in the United States. The Act requires it to go dark unless ByteDance executes a qualified divestiture. Whether you call that a ban or a divestiture, one thing is clear: It's a burden on TikTok's speech, so the First Amendment applies.

Second, the Act is content-based from beginning to end. It applies only to social media platforms that have user-generated content, except for business, product, and travel reviews. Within that content-based

1 universe, it singles out a single speaker for  
2 uniquely harsh treatment, and it does so because  
3 the government fears that China could, in the  
4 future, indirectly pressure TikTok to  
5 disseminate foreign misinformation and  
6 propaganda.

7           Finally, the Act can't satisfy any  
8 standard of scrutiny. The government has no  
9 valid interest in preventing foreign propaganda.  
10 And its fall-back that it seeks merely to  
11 prevent covertness makes no sense since that  
12 could be addressed with a risk disclosure.

13           The government's real target, rather,  
14 is the speech itself, its fear that Americans,  
15 even if fully informed, could be persuaded by  
16 Chinese misinformation. That, however, is a  
17 decision that the First Amendment leaves to the  
18 people.

19           Given that, the government's data  
20 security rationale cannot independently sustain  
21 the Act. It is also grossly under-inclusive and  
22 ignores the most obvious less restrictive  
23 alternative: simply banning TikTok,  
24 Incorporated from sharing any sensitive user  
25 data with anyone.

1                   In short, this Act should not stand.  
2           At a minimum, you should preliminarily enjoin  
3           it, which will allow you to carefully consider  
4           this momentous issue and, for the reasons  
5           explained by the President-Elect, potentially  
6           moot the case.

7                   I welcome your questions.

8                   JUSTICE THOMAS: Exactly what is  
9           TikTok's speech here?

10                  MR. FRANCISCO: TikTok, Your Honor,  
11           uses an algorithm that, in its view, reflects  
12           the best mix of content. What the Act does is  
13           it says TikTok cannot do that unless ByteDance  
14           executes a qualified divestiture. That's a  
15           direct burden on TikTok's speech, much less of a  
16           burden than the one that this Court struck down  
17           in the Simon & Schuster case, where all the  
18           author had to do was take a certain amount of  
19           proceeds and put it into an escrow account for a  
20           short period of time to satisfy a civil  
21           judgment.

22                  JUSTICE THOMAS: So why does a  
23           restriction on ByteDance, which is not a  
24           citizen, is not located in the U.S., a  
25           restriction on TikTok?

1           MR. FRANCISCO: Because what the law  
2 says to TikTok is that, TikTok, you cannot use  
3 the algorithm that you prefer to use unless  
4 ByteDance executes a qualified divestiture.

5           So the law, therefore, falls directly  
6 on TikTok itself. It imposes a burden on  
7 TikTok's speech, again, a much less -- a much  
8 more significant burden than the one that was  
9 struck down in *Simon & Schuster*. There --

10          JUSTICE THOMAS: So you're converting  
11 the restriction on ByteDance's ownership of the  
12 algorithm and the company into a restriction on  
13 TikTok's speech. So why can't we simply look at  
14 it as a restriction on ByteDance?

15          MR. FRANCISCO: Because -- because I  
16 think the burden falls directly on TikTok. And  
17 I can use a hypothetical that helps illustrate  
18 the point. Suppose that China used its leverage  
19 over Jeff Bezos's international empire,  
20 including his Chinese businesses, to force  
21 Wash -- the Washington Post to write whatever  
22 China wanted on the front page of the Post.

23          Surely, the government couldn't come  
24 in and say, Jeff Bezos, you need to either sell  
25 the Washington Post or shut it down. That



1 wouldn't just violate Mr. Bezos's First  
2 Amendment rights. That would also violate the  
3 Washington Post's First Amendment rights because  
4 they are ultimately the one that's suffering the  
5 burden under that law because they have to go  
6 dark and close up their books.

7 CHIEF JUSTICE ROBERTS: Counsel, you  
8 began by saying this is a U.S. company operating  
9 in the United States.

10 MR. FRANCISCO: Yes, Your Honor.

11 CHIEF JUSTICE ROBERTS: But the  
12 ultimate company that controls it, ByteDance,  
13 was found by Congress -- and I'll quote this --  
14 "to be subject to Chinese laws that require it  
15 to assist or" -- "or cooperate with the  
16 Chinese's government's intelligence work" and to  
17 ensure that the Chinese government has the power  
18 to access and control private data that the  
19 company holds.

20 So are we supposed to ignore the fact  
21 that the ultimate parent is, in fact, subject to  
22 doing intelligence work for the Chinese  
23 government?

24 MR. FRANCISCO: Well, Your Honor, I  
25 don't think you are supposed to ignore that at

1 all, but I also don't think that it changes the  
2 analysis for a couple of reasons.

3 Look, TikTok --

4 CHIEF JUSTICE ROBERTS: Well, just --  
5 hold on a second. Well, as I said, you began by  
6 saying this is a U.S. company operating in the  
7 United States. And it seems to me that you're  
8 ignoring the major concern here of Congress,  
9 which was Chinese manipulation of the content  
10 and acquisition and harvesting of -- of the  
11 content.

12 MR. FRANCISCO: Sure. And I'll start  
13 by saying that TikTok, Incorporated is a United  
14 States subsidiary operating in the United States  
15 with its own set of free speech rights. I --

16 CHIEF JUSTICE ROBERTS: Do you dispute  
17 the fact that ByteDance is a -- has ultimate  
18 control of TikTok in its corporate organization?

19 MR. FRANCISCO: Yes, Your Honor, I do  
20 dispute that, but I also don't think that it  
21 matters because, even if China could exercise  
22 overwhelming power against TikTok versus  
23 ByteDance, I don't think it would change the  
24 analysis. And I can take that Washington Post  
25 hypothetical and ratchet it up a little bit to

1 help illustrate the point.

2 Let's suppose that the Chinese  
3 government had actually taken the Bezos children  
4 hostage and it was using that leverage in order  
5 to force Bezos and the Washington Post to  
6 publish whatever they wanted on the front page  
7 of the Post. So China effectively has total  
8 control.

9 I still don't think that Congress  
10 could come in and tell Bezos either sell the  
11 Post or shut it down because that would violate  
12 Bezos's rights and the Washington Post's rights.

13 Maybe what they could do is come in  
14 and say you need to disclose the fact that  
15 you're under this amount of coercion so that the  
16 people who are looking at the paper understand  
17 it and can make their own assessment.

18 But I think the First Amendment rights  
19 of both Bezos and the Post would be directly  
20 implicated, notwithstanding that China, in that  
21 scenario, has effectively total control over  
22 what -- what -- what gets printed in the  
23 Washington Post.

24 JUSTICE SOTOMAYOR: Counsel, let me  
25 break this down. I understand your argument

1 that there is a First Amendment right that the  
2 U.S. company has. I'll go that far with you,  
3 okay?

4 MR. FRANCISCO: I'll take it.

5 (Laughter.)

6 JUSTICE SOTOMAYOR: Because we're  
7 affecting their ability to talk in some -- in  
8 whatever way they choose. The Washington Post  
9 could choose, without any influence or threat  
10 against the children of Mr. Bezos, to promote  
11 Chinese policy, and our First Amendment would  
12 permit them to do that if they chose it  
13 independently, correct?

14 MR. FRANCISCO: Yes.

15 JUSTICE SOTOMAYOR: Now the question  
16 becomes, so it's not -- that's just a given,  
17 that they have a First Amendment right. The  
18 next question is, assuming they do, what's the  
19 level of scrutiny --

20 MR. FRANCISCO: Mm-hmm.

21 JUSTICE SOTOMAYOR: -- we apply?  
22 Isn't that what the issue here is?

23 MR. FRANCISCO: That is certainly one  
24 of the issues, Your Honor.

25 JUSTICE SOTOMAYOR: All right. So, if

1 we get to that side of the issue, that TikTok  
2 U.S.A. has some sort of First Amendment right,  
3 taking your example, if the government said no  
4 speaker is free to speak under -- under a  
5 criminal compulsion by someone else, because of  
6 extortion, because of kidnapping, we are doing  
7 this because it is the only way to ensure the  
8 safety of people, that they are not going to be  
9 kidnapped or threatened, their lives threatened.

10 You don't think that the government  
11 has a compelling state interest in saying, if  
12 there is a threat, a -- a physical criminal  
13 threat against someone to do some activity, that  
14 the government couldn't say: I'm not  
15 questioning whatever the content is --

16 MR. FRANCISCO: Mm-hmm.

17 JUSTICE SOTOMAYOR: -- of that  
18 activity. I'm simply saying we, in our  
19 governmental powers, have a right to say: You  
20 can't do that. You can't speak.

21 MR. FRANCISCO: Sure, Your Honor. So,  
22 to take your question in pieces, I do think that  
23 they would have a compelling interest in that  
24 scenario to do something. But what I don't  
25 think is that they could simply target speakers

1 and speech.

2 Take, for example, generally  
3 applicable laws like the treaty --

4 JUSTICE SOTOMAYOR: So you think in  
5 that situation that it -- that the only thing  
6 the government could do is tell the Washington  
7 Post: Disclose to the public that you are  
8 saying this because you are being forced to?

9 MR. FRANCISCO: So, sure --

10 JUSTICE SOTOMAYOR: That that --  
11 that's the only remedy the government could  
12 undertake?

13 MR. FRANCISCO: No -- no, Your Honor,  
14 but I want to make sure I understand the  
15 hypothetical. The compelling interest is in  
16 preventing this kind of compulsion, coercion,  
17 and ultimately harm to children.

18 And I think that the government has a  
19 lot of different ways they can address that  
20 through speech-neutral laws. And I was going to  
21 point to things like the Trading with the Enemy  
22 Act or Russia sanctions. You can broadly say  
23 and attack problems --

24 JUSTICE SOTOMAYOR: They haven't been  
25 very effective.

1 MR. FRANCISCO: Well, be that as it --

2 JUSTICE SOTOMAYOR: We -- we're still  
3 having people kidnapped. We're still having  
4 coercion.

5 MR. FRANCISCO: And be that as it may,  
6 you can say to Americans: You cannot  
7 collaborate with our enemies at all, and if you  
8 do that, you're going to be severely punished  
9 for doing that. But what I don't --

10 JUSTICE SOTOMAYOR: All right. We can  
11 go on to the effectiveness of the remedy.

12 MR. FRANCISCO: Mm-hmm.

13 JUSTICE SOTOMAYOR: But the point is,  
14 I believe, that even if your First Amendment  
15 rights are impinged and there is some  
16 protection, the question is, is what -- at what  
17 level of scrutiny --

18 MR. FRANCISCO: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: -- and whether  
20 that -- the action is content-neutral or not.

21 MR. FRANCISCO: I -- I -- I agree that  
22 that is the way that the analysis proceeds.  
23 Here, we believe that the level of scrutiny  
24 should be strict scrutiny.

25 JUSTICE KAVANAUGH: What -- what is

1 the relevance of the history? Chief Judge  
2 Srinivasan, in his opinion in the D.C. Circuit,  
3 emphasized that there is a long tradition of  
4 preventing foreign ownership or control of media  
5 in the United States --

6 MR. FRANCISCO: Sure.

7 JUSTICE KAVANAUGH: -- going back:  
8 radio, television, and what have you. I would  
9 think no matter the level of scrutiny, that  
10 history has to be important, and I want to get  
11 your response to it.

12 MR. FRANCISCO: Mm-hmm. I don't  
13 actually think it's important in this context  
14 because that history all arises in the context  
15 of bandwidth scarcity. And in that context, you  
16 have the government that's in -- in the position  
17 of doling out a limited number of licenses.

18 And when you have to dole out a  
19 limited number of licenses, you, by definition,  
20 have to pick winners and losers, and when you  
21 have to do that, you get a certain amount of  
22 discretion. I think that's the whole basis of  
23 those cases.

24 You can't really take those cases  
25 and --



1 JUSTICE KAVANAUGH: Well -- keep  
2 going.

3 MR. FRANCISCO: You can't really take  
4 those cases and extend them to an area where  
5 there is no scarcity, like the World Wide Web,  
6 because, once you do that, there's really no  
7 limiting principle. There's no reason why it  
8 wouldn't also apply to really popular books or  
9 magazines or newspapers or chains of newspapers.

10 The bandwidth scarcity, I think, is  
11 really what justifies the greater discretion  
12 that the government gets in that area.

13 JUSTICE ALITO: Mr. Francisco, let me  
14 see if I can break this down. Suppose that  
15 TikTok were outright owned by the People's  
16 Republic of China. Would you make the same  
17 argument?

18 MR. FRANCISCO: I wouldn't be making  
19 the same argument, Your Honor. There, you  
20 would --

21 JUSTICE ALITO: Why -- why not?

22 MR. FRANCISCO: Because, there, you  
23 would have to confront a very different  
24 question, whether a foreign government that was  
25 speaking in the United States has First

1 Amendment rights. And I don't know that the  
2 Court has ever addressed that. But, here, we've  
3 got a U.S. company --

4 JUSTICE ALITO: No, I understand that.  
5 I just want to see where you draw the line.

6 So it's true, the Court has never held  
7 that a foreign government has free speech  
8 rights. And if we were to hold that, I would  
9 think it's because -- it would be because speech  
10 by a foreign government, particularly one with  
11 enormous resources, is not protected -- allowing  
12 that is -- does not serve the underlying  
13 interests of the First Amendment, which are,  
14 among other things, fostering democratic  
15 self-government and furthering the -- the  
16 truth -- the search for truth.

17 So let's assume that that's -- we  
18 start with that, all right? What if TikTok were  
19 then not owned by the foreign government, but it  
20 was undisputed that TikTok was totally  
21 controlled by the foreign government, could not  
22 do one thing without the approval of the foreign  
23 government? That's different?

24 MR. FRANCISCO: I do think that it is  
25 different, Your Honor. For example, you know,

1 I -- I've given the hypothetical that I've  
2 given, but there are a lot of companies in this  
3 country that have foreign owners, not just  
4 companies like Politico, with -- which is German  
5 owned, or Al Jazeera, which is partly owned by  
6 the government of Qatar.

7 JUSTICE ALITO: Well, I -- I  
8 understand that, but what would be the reason  
9 for drawing that line?

10 MR. FRANCISCO: Sure. Because --

11 JUSTICE ALITO: If -- if there's a  
12 good reason for saying that a foreign  
13 government, particularly an adversary, does not  
14 have free speech rights in the United States,  
15 why would it all change if it was simply hidden  
16 under some kind of contrived core -- corporate  
17 structure?

18 MR. FRANCISCO: Because it is a U.S.  
19 speaker.

20 I'll give you another example. AMC  
21 movie theaters used to be owned by a Chinese  
22 company. Under this theory, Congress could  
23 order AMC movie theaters to censor any movies  
24 that Congress doesn't like or promote any movies  
25 that Congress wanted.

1                   And I think the reason is that, here,  
2                   where it's conceded you actually have a bona  
3                   fide U.S. company. It is not simply a Chinese  
4                   cutout that is the Chinese government speaking  
5                   itself --

6                   JUSTICE ALITO: All right. Let's say  
7                   that's not a complete --

8                   MR. FRANCISCO: -- but an independent  
9                   United States company.

10                  JUSTICE ALITO: Let's say this is not  
11                  a complete answer to -- to your First Amendment  
12                  argument, but would you be willing to concede  
13                  that this is a very important factor that should  
14                  be taken into account in deciding whether  
15                  there's a First Amendment violation?

16                  MR. FRANCISCO: Well, Your Honor, I  
17                  think that it does help supply a compelling  
18                  governmental interest, but I still think you  
19                  have to march through the strict scrutiny  
20                  analysis and analyze their interests. I do not  
21                  think that they have a compelling governmental  
22                  interest in -- in -- in the manipulation of  
23                  content.

24                  I think that is in the teeth of the  
25                  First Amendment. And if you look at the

1 government's brief and the rest of the record in  
2 this case, that's really what it's focused on.  
3 Their complaint is the fear that the content  
4 could be critical of the United States  
5 Government or -- or could undermine our  
6 democracy.

7 Yes, Your Honor.

8 JUSTICE GORSUCH: Mr. Francisco, I  
9 just wanted to follow up on -- on that line of  
10 questioning with just some fact questions --

11 MR. FRANCISCO: Mm-hmm.

12 JUSTICE GORSUCH: -- because it seems  
13 to me there are a couple of things that the  
14 parties still dispute about facts in this Court,  
15 which is a little unusual.

16 The government says that TikTok U.S.  
17 has no authority or ability to alter the  
18 algorithm or recommendation engine but must  
19 simply follow ByteDance's directives. You  
20 disagree with that in your reply brief.

21 MR. FRANCISCO: Yes, we do.

22 JUSTICE GORSUCH: Somebody has to be  
23 right and somebody has to be wrong about that.  
24 What's -- what's the fact -- what does the  
25 record show on that?

1                   MR. FRANCISCO: Well, Your Honor, we  
2 are here on a record, and there is nothing in  
3 the record that says that TikTok, like any other  
4 subsidiary, doesn't have its own  
5 independent-making authority. If you look at  
6 their record cites, what they point to is the  
7 ordinary types of control that a parent company  
8 has over a subsidiary company. But it doesn't  
9 change the fact that --

10                   JUSTICE GORSUCH: All right. What is  
11 the fact? Are you prepared to make a -- a  
12 representation of the fact here?

13                   MR. FRANCISCO: Yes, Your Honor. The  
14 fact is that TikTok, Incorporated, as a U.S.  
15 company, does have a choice over the algorithm.  
16 Now it would be a incredibly bad business  
17 decision for them to abandon this algorithm and  
18 they very doubtful would ever do it, but they  
19 have that authority.

20                   What they clearly have the authority  
21 to do is shut down the platform in the face of  
22 Chinese pressure. That's actually what they  
23 agreed to do in the national security agreement.  
24 I think that underscores why TikTok,  
25 Incorporated, as a U.S. company, does have its

1 own set of First Amendment rights.

2 JUSTICE GORSUCH: Okay. And then  
3 another fact question.

4 Before the D.C. Circuit, you -- you  
5 argued that the Chinese government has made  
6 clear in public statements that it would not  
7 permit a forced divest -- divestment of the  
8 recommendation engine. Does that mean that some  
9 key component of the recommendation engine is  
10 under Chinese control?

11 MR. FRANCISCO: No, Your Honor. What  
12 it means -- and this might warrant a little more  
13 explanation. What it means is that there are  
14 lots of parts of the source code that are  
15 embodied in intellectual property that are owned  
16 by the Chinese government, and they would  
17 restrict, like the United States restricts, the  
18 sale of those types of things to foreign  
19 governments.

20 It doesn't alter the fact that this is  
21 being operated in the United States by TikTok,  
22 Incorporated. So --

23 JUSTICE GORSUCH: Okay. I -- I got  
24 it.

25 MR. FRANCISCO: Okay.

1 JUSTICE GORSUCH: I got it. And then  
2 you represent that the divestiture is not  
3 feasible within the Act's timeframe. I'm sorry  
4 for these fact questions --

5 MR. FRANCISCO: Sure.

6 JUSTICE GORSUCH: -- but I just want  
7 to understand what's before us.

8 MR. FRANCISCO: Yeah.

9 JUSTICE GORSUCH: Would it be feasible  
10 in any timeframe? I -- I take the government  
11 doesn't dispute that it's infeasible in the 270  
12 days provided by law. But would it be feasible  
13 at all?

14 MR. FRANCISCO: Your -- Your Honor, I  
15 think, at least as we understand how they've  
16 interpreted the qualified divestiture provision,  
17 it would be exceedingly difficult under any  
18 timeframe for two principal reasons.

19 The first is that there's a global  
20 team of engineers that are some in China, some  
21 in Europe, some in the United States, that  
22 maintain and update the original source code.  
23 And, as we understand their interpretation, a  
24 qualified divestiture would prohibit any kind of  
25 coordination with that global team of engineers.



1                   The other reason is because, as we  
2 understand how they're interpreting it, a  
3 qualified divestiture would divorce the U.S.  
4 platform from the global content. So, for  
5 example, there are videos created in the United  
6 States. There are videos created in Ireland.  
7 In order to get global content, we need access  
8 to the Irish videos. They need access to the  
9 U.S. videos.

10                   JUSTICE GORSUCH: I got that.

11                   MR. FRANCISCO: We understand that  
12 couldn't happen.

13                   JUSTICE GORSUCH: Okay. So you think  
14 it's probably not feasible in any timeline?

15                   MR. FRANCISCO: Well, Your Honor, I  
16 think it would be extraordinarily difficult.

17                   JUSTICE GORSUCH: Okay. Last -- last  
18 fact question. Then I'll yield the floor here.

19                   The government admits that it has no  
20 evidence that TikTok has engaged in covert  
21 content manipulation in this country but says  
22 that ByteDance has responded to PRC demands to  
23 censor content outside of China in other  
24 countries. Again, you deny that in your reply  
25 brief. Somebody has to be right about that.

1 MR. FRANCISCO: Well -- well, Your  
2 Honor, the problem there is everything that  
3 follows what you just read is redacted, and so I  
4 don't know what it says.

5 What the record shows is two things.  
6 The record shows first what you just said: They  
7 haven't done anything here in the United States  
8 with respect to TikTok, Incorporated. And,  
9 second, the record also shows through our  
10 transparency reports that we haven't removed or  
11 restricted content on the TikTok platform in  
12 other parts of the world. And TikTok doesn't  
13 operate in China. It operates in other parts of  
14 the world. We haven't removed or restricted  
15 content at the request of China. That's what we  
16 put out in our regular transparency reports.

17 JUSTICE GORSUCH: Removed or  
18 restricted, though, doesn't necessarily cover  
19 covert content manipulation, though, right?

20 MR. FRANCISCO: Well, Your Honor, I'm  
21 limiting my response to what's in the record.

22 JUSTICE GORSUCH: To what's in the  
23 record? Okay.

24 MR. FRANCISCO: It's very difficult  
25 for me to respond to things that I -- where I

1 don't know what the accusations --

2 JUSTICE GORSUCH: I have other  
3 questions about the secret evidence in this  
4 case, but we'll get to that later.

5 MR. FRANCISCO: Yes, Your Honor.

6 JUSTICE GORSUCH: Thank you.

7 JUSTICE BARRETT: Mr. Francisco, can I  
8 ask you a question about the relevant speech  
9 here? So it strikes me that this is a little  
10 different than your Bezos example because,  
11 there, it's clearly content discrimination  
12 because we're talking about the ability to post  
13 particular articles versus other articles. Am I  
14 right that the algorithm is the speech here?

15 MR. FRANCISCO: Yes, Your Honor.  
16 The -- well, I would say it's -- you know, the  
17 algorithm is a lot of things. The algorithm has  
18 built within it -- it's -- it's basically how we  
19 predict what our customers want to see.

20 JUSTICE BARRETT: The editorial  
21 discretion?

22 MR. FRANCISCO: Yeah --

23 JUSTICE BARRETT: Yeah.

24 MR. FRANCISCO: -- the editorial  
25 discretion. It also has built within it the

1 moderation elements. All of this kind of comes  
2 together when the source code is translated into  
3 executable code in the United States. In the  
4 United States, that executable code is then  
5 subject to vetting, review, moderation through  
6 content moderation algorithms. And that -- so  
7 it ultimately lands on the TikTok platform.

8 JUSTICE BARRETT: Got it. But what  
9 we're -- what we're talking about as -- as in  
10 NetChoice is the editorial discretion that  
11 underlies the algorithm. And -- and I just want  
12 to be clear. A lot of your examples talk about,  
13 including the Bezos one --

14 MR. FRANCISCO: Mm-hmm.

15 JUSTICE BARRETT: -- the right of an  
16 American citizen to repeat what a foreign entity  
17 says or say, you know, I'm hitching my wagon to  
18 China; I want to say everything China does.

19 Here, the concern is about the covert  
20 content manipulation piece of the algorithm.

21 MR. FRANCISCO: Mm-hmm.

22 JUSTICE BARRETT: That is something  
23 that ByteDance wants to speak, right?

24 MR. FRANCISCO: Well, Your Honor, I  
25 think that ultimately it's TikTok's choice

1 whether to put it on the platform. And --

2 JUSTICE BARRETT: And you don't want  
3 that? Are you -- is your client disclaiming  
4 any --

5 MR. FRANCISCO: We -- we -- we  
6 absolutely resist any kind of content  
7 manipulation by China at all, but what I do want  
8 to focus in on is what -- their asserted  
9 interests here. They do talk about covertness.  
10 But it can't possibly be that all they're  
11 concerned about is mere covertness.

12 If all you were concerned about was  
13 the covertness untethered from the underlying  
14 content, that's something that could be easily  
15 addressed through a risk disclosure.

16 JUSTICE BARRETT: But that goes to  
17 scrutiny, the level of --

18 MR. FRANCISCO: Yes, Your Honor.

19 JUSTICE BARRETT: -- the application.  
20 I'm trying to -- I mean, let's say that I agree  
21 with you the First Amendment is implicated, and  
22 I'm trying to figure out what level of scrutiny  
23 applies.

24 MR. FRANCISCO: Sure.

25 JUSTICE BARRETT: And I'm trying to

1 figure out what content, if any, discrimination  
2 is going on here. You know, there's a  
3 disproportionate burden. I --

4 MR. FRANCISCO: Right.

5 JUSTICE BARRETT: Let's say that I  
6 agree with you about that.

7 No one is preventing you -- I mean,  
8 you're seeking access to a particular source  
9 code engineering the recommendation feature.  
10 It's -- it's the technology that you want.  
11 You're not trying to repeat, as in the Bezos  
12 example, if we take the speech that the  
13 government's concerned about to be the covert --  
14 the covert content manipulation rationale,  
15 you're not seeking to utter that speech.

16 MR. FRANCISCO: Well, what we're --  
17 that's correct, Your Honor. What we are seeking  
18 to do is use an algorithm that displays the  
19 combination of content that we prefer our users  
20 to see on the platform.

21 JUSTICE KAGAN: But is that --

22 JUSTICE BARRETT: And the government  
23 doesn't care about that. I mean, the  
24 government -- the government is fine with you  
25 doing that. You can invent it yourself. It

1 doesn't even care what content that displays,  
2 cat videos or whatever.

3 MR. FRANCISCO: Yeah, but -- but I  
4 think that the way that the analysis has to  
5 unfold is first you ask, is this law burdening  
6 our speech? I think we agree --

7 JUSTICE BARRETT: Yeah.

8 MR. FRANCISCO: -- that the law is  
9 burdening our speech. Then you have to look at  
10 whether the law itself is somehow content-based.  
11 Not just what their motivations are but whether  
12 the law is content-based. And, here, the  
13 trigger for this law, the one thing that gets it  
14 going, is if you operate a social media platform  
15 that has user-generated content, unless that  
16 content takes the form of a product, travel, or  
17 business review.

18 Then, within that universe of content,  
19 it says there's one speaker we're particularly  
20 concerned about, and we're going to hammer home  
21 on that one speaker. And then, just to make the  
22 rubble bounce, they come in and tell us that one  
23 of the reasons they're targeting that speaker is  
24 because they're worried about the future content  
25 on that platform, that it could in the future

1        somehow be critical of the United States or  
2        undermine democracy, to pull examples from the  
3        government's brief.

4                    So I think there's no way to get  
5        around the fact that this is a content-based  
6        speech restriction and you do have to go  
7        directly to what their interests are.

8                    Now their principal interest is --  
9                    JUSTICE KAGAN:    Could -- could I --  
10       because I think I'm a little bit surprised by  
11       one of the answers that you gave to Justice  
12       Barrett.    I had understood that TikTok's  
13       essential complaint here is that they wouldn't  
14       be able to use the algorithm that ByteDance has  
15       invented and that they want to use the algorithm  
16       that ByteDance has invented.

17                    MR. FRANCISCO:    One hundred percent.  
18       And if I -- if I was unclear on that, Your  
19       Honor, I apologize.

20                    JUSTICE KAGAN:    Okay.    Because I  
21       think --

22                    MR. FRANCISCO:    That is absolutely the  
23       core of the claim.

24                    JUSTICE KAGAN:    -- what Justice  
25       Barrett was saying to you is, like, what's the



1 problem here because ByteDance is a foreign  
2 company. Or maybe this isn't what Justice  
3 Barrett says; it's just what I say.

4 (Laughter.)

5 JUSTICE KAGAN: ByteDance is a foreign  
6 company. And you started off with Justice Alito  
7 saying, you know, well, we would be making a  
8 different argument. And, of course, that's  
9 true. I mean, I would think that Alliance for  
10 Open Society makes it pretty clear that you have  
11 to be making a different argument with respect  
12 to a foreign state or a foreign company.

13 So let's -- let's say that they don't  
14 have First Amendment rights. The only First  
15 Amendment rights lie in TikTok, which does have  
16 First Amendment rights. And I -- I guess my  
17 question is, how are those First Amendment  
18 rights really being implicated here?

19 This -- this statute says the foreign  
20 company has to divest. Whether or not that's  
21 feasible, however long it takes, TikTok still  
22 has the ability to use whatever algorithm it  
23 wants, doesn't it?

24 MR. FRANCISCO: No, Your Honor. And  
25 their rights are implicated at a most basic

1 level. In 10 days, TikTok wants to speak. In  
2 10 days, because this law was passed, TikTok  
3 cannot speak unless ByteDance executes a  
4 qualified divestiture.

5 That's not just ByteDance's choice.  
6 That is a -- that is a condition --

7 JUSTICE KAGAN: Well, I realize --

8 MR. FRANCISCO: -- that's imposed by  
9 law.

10 JUSTICE KAGAN: -- that it has -- it  
11 definitely has effects on TikTok if ByteDance  
12 acts in the way that you're assuming it will  
13 act. So -- so this is not to say that the First  
14 Amendment isn't involved because TikTok is going  
15 to suffer some pretty severe incidental effects,  
16 but they are incidental, aren't they?

17 Because the statute only says to this  
18 foreign company divest or else and -- and leaves  
19 TikTok with the ability --

20 MR. FRANCISCO: Right.

21 JUSTICE KAGAN: -- to do what every  
22 other actor in the United States can do, which  
23 is go find the best available algorithm.

24 MR. FRANCISCO: Yeah. I very much  
25 disagree that the effects are incidental because

1 the way that this law works is it is only  
2 triggered if somebody is engaging in speech  
3 based on their content, user-generated content,  
4 except for business, product, and travel  
5 reviews. It then singles out a single speaker.  
6 And you have the concession for the government  
7 that one of the reasons they've singled out that  
8 speaker --

9 JUSTICE KAGAN: That puts a lot of  
10 emphasis on the idea of just like -- you know, I  
11 think what you're basically saying is that all  
12 speaker-based restrictions generate strict  
13 scrutiny. I'm not sure that we've ever said  
14 anything like that.

15 You know, let's put aside the  
16 facial -- your argument that this is facially  
17 content-based. It seems to me that your  
18 stronger argument or at least the one that most  
19 interested me was this argument of, look, if the  
20 government is doing something specifically for  
21 the purpose of changing the content that people  
22 see, that has to be subject to strict scrutiny.

23 But I don't see that as -- as  
24 affecting TikTok as opposed to as affecting  
25 ByteDance, that --

1           MR. FRANCISCO: Well, no, no, I -- I  
2 very much do see it as affecting TikTok because  
3 they choose this algorithm because it reflects  
4 the mix of content. The government's fear is  
5 that China could come in and pressure TikTok,  
6 TikTok, through ByteDance, to TikTok, to alter  
7 that mix of content to make it too pro-Chinese  
8 or too anti-American. That is very much  
9 directly a content-based charge straight at  
10 TikTok.

11           The other point I would like to --

12           JUSTICE KAGAN: I -- I hear you that  
13 it might very well have that effect. I guess  
14 what I'm suggesting is that the law is only  
15 targeted at this foreign corporation, which  
16 doesn't have First Amendment rights.

17           Whatever effect it has, it has. You  
18 know, maybe ByteDance will figure out a way to,  
19 like, put this on open source, and then TikTok  
20 will be able to use the algorithm.

21           MR. FRANCISCO: So, Your Honor, if I  
22 could take that on directly, because to the -- I  
23 think TikTok has First Amendment rights. To the  
24 extent ByteDance is speaking in the United  
25 States, it, I believe, has First Amendment

1 rights.

2           If you conclude that neither has First  
3 Amendment rights, then surely the creators have  
4 First Amendment rights. But, if you take a step  
5 back, what their position is is that none of  
6 these entities -- this is the universe of  
7 entities affected by this law -- none of these  
8 entities have the authority to assert First  
9 Amendment rights, which means that the  
10 government really could come in and say: I'm  
11 going to shut down TikTok because it's too  
12 pro-Republican or too pro-Democrat or won't  
13 disseminate the speech I want, and that would  
14 get no First Amendment scrutiny by anybody.  
15 That cannot possibly be the case, yet that is  
16 the effect of their position.

17           The last point I'd like to emphasize,  
18 though, is this law, like the Playboy case, like  
19 the Hobby Lobby case, has built within it a less  
20 restrictive alternative, which is the general  
21 provision by definition designed to protect  
22 against the very harm the government is  
23 identifying.

24           Suppose New York State passes an  
25 asbestos abatement law. They say: These types

1 of buildings have to abet -- abate asbestos. In  
2 addition, New York Times, you have to abate  
3 asbestos in your building. And they say: There  
4 are two reasons for this. One, we want to abate  
5 asbestos. Two, we hate the New York Times  
6 editorial page.

7 Surely, at the very least, what you're  
8 going to say is: You can't target The New York  
9 Times directly. What you can do is throw them  
10 into the general process.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 MR. FRANCISCO: We think that's the  
14 minimum that should be done here.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel. We -- we've been talking about  
17 connection between the regulation of -- of  
18 TikTok and the burden on expressive conduct.  
19 And your basic position is that interfering with  
20 the ownership of TikTok constitutes a direct  
21 regulation of the expressive conduct of other --  
22 other people.

23 What -- what is your best example in  
24 our precedent of a situation where we've -- a  
25 regulation of corporate structure or something

1 else has been treated as a direct regulation of  
2 expressive conduct?

3 MR. FRANCISCO: The regulation of a  
4 corporate structure as a --

5 CHIEF JUSTICE ROBERTS: Yeah.

6 MR. FRANCISCO: Your Honor, I -- I --  
7 I don't have a case in my fingertips. I can  
8 consider it when we come back on --

9 CHIEF JUSTICE ROBERTS: Well, I don't  
10 have one at my fingertips or any other part of  
11 my body.

12 MR. FRANCISCO: -- rebuttal. But I --  
13 but I think it's quite clear, though, that if  
14 you're saying to a company: You have to stop  
15 talking unless somebody else does something, and  
16 that's imposed by the force of law, it directly  
17 affects that company's speech. That's --

18 CHIEF JUSTICE ROBERTS: Well, it's --  
19 it's -- it's -- again, I don't -- I don't know  
20 if it's directly affecting the company's speech  
21 or the speech of third parties. And I'm not  
22 sure what -- you know, where your -- your  
23 emphasis is.

24 But, again, I'm not sure there's  
25 another case where we've said that regulating a

1 company has -- should be -- others' expression  
2 should be treated as direct imposition on their  
3 speech in terms of a standard of review, for  
4 example, when it's based on derivative  
5 regulation of corporate structure of somebody  
6 else.

7 MR. FRANCISCO: Well, Your Honor, I  
8 think that it's -- I -- I would concede that  
9 this is a pretty unprecedented case. I'm not  
10 aware of any time in American history where the  
11 Congress has tried to shut down a major speech  
12 platform.

13 But I -- I think that if a law imposes  
14 a -- a direct regulation on a third party that,  
15 in turn, results in shutting down somebody  
16 else's speech, and they do it for content-based,  
17 viewpoint-based reasons, and, in particular, on  
18 this record, because the speaker that is  
19 ultimately being shut down, they don't like the  
20 speech of that particular platform, that's a  
21 real problem. So --

22 CHIEF JUSTICE ROBERTS: Well, it may  
23 be a real problem or it may not. But I just am  
24 wondering if there's any precedent where we have  
25 that same connection and that it affects the



1 standard of review, for example, you would treat  
2 it as a direct restriction on expression. Even  
3 the only thing the law does is say, in this  
4 case, somebody other than the Chinese government  
5 has to own TikTok.

6 MR. FRANCISCO: So -- so -- so we  
7 don't have any direct precedent along the lines  
8 that you're citing, but we do have precedents.  
9 We have cases like Arcara, and what Arcara says  
10 is, if the law is totally speech-neutral, then  
11 that's one thing. We have cases like O'Brien,  
12 which say, if the law doesn't care about speech  
13 but happens to draw in speech, that's another  
14 thing.

15 Both of those cases make clear,  
16 however, is that when the law is concerned with  
17 the content of the speech, when the  
18 justification is based on the content of the  
19 speech -- that's cases like Reed too -- then you  
20 do trigger strict scrutiny --

21 CHIEF JUSTICE ROBERTS: So then I  
22 think your argument comes down to: Is this  
23 direct concern with speech, or is it concern  
24 with the potential for Chinese interference with  
25 the level of interference in -- indirectly?

1                   In other words, they're not coming  
2 back -- the Chinese government -- TikTok doesn't  
3 care what the people are saying on TikTok.  
4 That's not the -- the concern. The concern is  
5 that they are regulating a particular channel of  
6 communication. And I just wonder if there's any  
7 precedent for that type of thing.

8                   They're not saying: We're going to  
9 restrict this content and that content but not  
10 this. They're just saying: We're going to be  
11 in a position where we can control what happens,  
12 whether it's based on expression, whether it's  
13 based on anything else.

14                   MR. FRANCISCO: So, Your Honor, I  
15 disagree. And I think, if you take a step back  
16 and look at this record, I think it is quite  
17 clear that it is focused on both current and  
18 potential future content on TikTok, TikTok,  
19 Incorporated.

20                   Here, you don't have just an act that  
21 is based on speakers and speech. It's triggered  
22 by speech. It's focused on a single speech or  
23 TikTok -- speaker, TikTok, Incorporated.

24                   CHIEF JUSTICE ROBERTS: Thank you.  
25                   Justice Thomas, anything further?

1 Justice Alito?

2 JUSTICE ALITO: What if Congress -- if  
3 there were nothing in this Act about content  
4 moderation or covert manipulation? What if it  
5 was just about preventing what Congress viewed  
6 as an enormously powerful, popular application  
7 from gathering an arsenal of information about  
8 American citizens, and they said: This is the  
9 worst offender and we're going to require  
10 divestiture by this offender?

11 Would there be a First Amendment  
12 problem there? And if you think there would be,  
13 what would the level of scrutiny be?

14 MR. FRANCISCO: Yes, there would be a  
15 First Amendment problem if you had a law like  
16 this that was only focused on speakers, those  
17 who use user-generated content, other than  
18 product, travel, or business reviews, and --

19 JUSTICE ALITO: Well, Congress --  
20 Congress concludes that this particular entity  
21 is the worst, this is the worst offender, and it  
22 happens to be an entity that is involved with  
23 speech.

24 MR. FRANCISCO: If all you had -- so I  
25 want to make sure I understand the hypothetical.

1 The only provision you have is one that says:

2 This company has to shut down --

3 JUSTICE ALITO: Right.

4 MR. FRANCISCO: -- because of data  
5 security.

6 JUSTICE ALITO: Right.

7 MR. FRANCISCO: I would have a  
8 different set of arguments.

9 I think it would still implicate the  
10 First Amendment, particularly where you have  
11 strong evidence that they were being targeted in  
12 part at least because of their speakers and  
13 speech. Suppose Congress passed the law that  
14 you posited --

15 JUSTICE ALITO: Well, all right, but  
16 you're changing the -- you're changing the  
17 hypothetical by -- by injecting congressional  
18 concern about the content of the speech.

19 MR. FRANCISCO: Okay. Well, I'll put  
20 that to the side.

21 JUSTICE ALITO: So what would your  
22 argument be? It would be an equal protection  
23 argument --

24 MR. FRANCISCO: No. No. I'd still be  
25 saying --

1 JUSTICE ALITO: -- based on rational  
2 basis? What --

3 MR. FRANCISCO: -- I'd still be saying  
4 that Arcara itself makes clear that where a law  
5 disproportionately burdens just a speaker, we  
6 have to subject that to scrutiny to suss it out,  
7 to suss out whether the asserted interest is the  
8 actual interest.

9 There, the asserted interest is in  
10 data security. I think I would have a couple of  
11 arguments under whatever form of scrutiny you  
12 wanted to apply, whether it is strict scrutiny  
13 or intermediate scrutiny in that context.

14 I would say first that that law is  
15 dramatically under-inclusive because it  
16 categorically exempts e-commerce apps that this  
17 record shows have comparable ties to China --

18 JUSTICE ALITO: All right. You say --  
19 you say -- I don't want to prolong this too  
20 much. You -- you say this is not like Arcara, I  
21 think primarily because you say that divestiture  
22 requires the new company to cease using the  
23 algorithm, right?

24 MR. FRANCISCO: No. I think it's not  
25 like Arcara for a much more fundamental sense.

1                   Arcara involved a totally  
2 speech-neutral law. It didn't go after speakers  
3 at all. If you had a law in Arcara that said  
4 we're going to prohibit prostitution in  
5 bookstores only, then I think that Arcara would  
6 have come out differently. There would have at  
7 least been, you know, some kind of intermediate  
8 scrutiny, potentially strict scrutiny.

9                   JUSTICE ALITO: All right. Well,  
10 you're -- you're continuing --

11                  MR. FRANCISCO: That's the law that I  
12 think is your hypothetical.

13                  JUSTICE ALITO: -- you're continuing  
14 to walk away from the hypothetical that --

15                  MR. FRANCISCO: I don't think so, Your  
16 Honor.

17                  JUSTICE ALITO: -- I proposed for the  
18 purpose of narrowing in on what your -- on what  
19 your argument is.

20                  My -- I understood you to say that  
21 it -- this -- that would not be a -- a solution  
22 to the problem because one of Congress's  
23 motivations was -- was the content -- was based  
24 on the content of TikTok.

25                  Am I wrong in that? Did I read your

1 argument incorrectly?

2 MR. FRANCISCO: Well, I think the -- I  
3 want to make sure I understand what you're  
4 saying. I certainly think that because one of  
5 the motivations was content, that is an  
6 enormously important fact.

7 I was trying to answer your  
8 hypothetical where we were trying to take that  
9 out of the mix.

10 And the reason why Arcara is different  
11 is because Arcara didn't just simply say no  
12 prostitution in bookstores. That's what your  
13 hypothetical effectively says. It says no data  
14 security problems in speakers or in this  
15 particular speaker. And I think that that would  
16 trigger at the very least intermediate scrutiny.

17 JUSTICE ALITO: All right.

18 MR. FRANCISCO: And --

19 JUSTICE ALITO: Thank you. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Sotomayor?

22 JUSTICE SOTOMAYOR: That gets to my  
23 question, which is Justice -- the Chief Justice  
24 asked you whether or not we've ever had a case  
25 where pure ownership was at issue and not

1 speech. And I don't think we've had one like  
2 that, you're right, but I don't think that your  
3 question -- that the question gets to the  
4 essence of your argument, is it? The essence of  
5 your argument is you're being asked to divest  
6 because of speech, correct?

7 MR. FRANCISCO: Correct.

8 JUSTICE SOTOMAYOR: All right. So, if  
9 I get past that, if I go to Justice Alito's  
10 point, which is I don't think it's just about  
11 speech, it's about data control --

12 MR. FRANCISCO: Mm-hmm.

13 JUSTICE SOTOMAYOR: -- if it's about  
14 data control -- and assume for the sake of  
15 argument that I believe intermediate scrutiny  
16 applies --

17 MR. FRANCISCO: Mm-hmm.

18 JUSTICE SOTOMAYOR: -- to the data  
19 control provision --

20 MR. FRANCISCO: Mm-hmm.

21 JUSTICE SOTOMAYOR: -- then your  
22 arguments would be different, wouldn't they?  
23 They would be under-inclusiveness, they would be  
24 other arguments, correct?

25 MR. FRANCISCO: Well, Your Honor, I



1 think they'd be very similar because I think the  
2 nature of our arguments work just as well under  
3 intermediate and strict scrutiny.

4 JUSTICE SOTOMAYOR: All right.

5 MR. FRANCISCO: If I could unpack that  
6 a little?

7 JUSTICE SOTOMAYOR: No, I'm not going  
8 to --

9 MR. FRANCISCO: Sure.

10 JUSTICE SOTOMAYOR: Because we're  
11 going to run out of time, because we're going to  
12 need to figure out what intermediate scrutiny  
13 means. But I'm not sure it means what you do,  
14 which is I don't think any of our cases have  
15 ever suggested that we have to use the least  
16 restricted means under intermediate scrutiny.  
17 In fact, our cases have said --

18 MR. FRANCISCO: Mm-hmm.

19 JUSTICE SOTOMAYOR: -- we have to use  
20 a reasonable means.

21 MR. FRANCISCO: And if I can respond  
22 to that point specifically, I completely agree  
23 it's not a least restrictive means alternative,  
24 Your Honor. But you do have to at least  
25 consider alternatives.

1                   Here, if the concern -- let's take the  
2 data security concern, which you put your finger  
3 on.

4                   JUSTICE SOTOMAYOR: Well, I -- I know  
5 you want to keep going on, but I can't let you  
6 because I can't monopolize the argument, okay?  
7 But let me just get to the bottom of that, all  
8 right?

9                   You seem to suggest that Congress has  
10 to actually look at all of the alternatives and  
11 say no. I don't think we have a case that says  
12 that.

13                   MR. FRANCISCO: I -- I am not  
14 suggesting --

15                   JUSTICE SOTOMAYOR: If from the record  
16 it's clear that alternatives won't be adequate  
17 for whatever set of reasons, isn't that enough?

18                   MR. FRANCISCO: If the record were  
19 clear on that, that might be enough.

20                   JUSTICE SOTOMAYOR: Okay. Now -- I  
21 take that.

22                   MR. FRANCISCO: But, here, on the  
23 key --

24                   JUSTICE SOTOMAYOR: Now let me go to  
25 the next question and the last.

1 MR. FRANCISCO: If -- if I could, Your  
2 Honor, just one sentence?

3 JUSTICE SOTOMAYOR: Mm-hmm.

4 MR. FRANCISCO: If on the key less  
5 restrictive alternatives they had actually  
6 considered them and said what you suggested,  
7 this would be a different case. But our point  
8 is that on the key most obvious less restrictive  
9 alternatives, a law, for example, that simply  
10 prohibits TikTok, Incorporated from sharing any  
11 sensitive user data with ByteDance or anyone  
12 else, there's nothing in the record that  
13 suggests they even considered it.

14 JUSTICE SOTOMAYOR: That's because  
15 there --

16 MR. FRANCISCO: And that's why it  
17 would fail under even intermediate scrutiny.

18 JUSTICE SOTOMAYOR: We have -- we have  
19 a different problem, which is that the record  
20 shows that there is no sharing that could happen  
21 that wouldn't put the data at security.

22 MR. FRANCISCO: That's --

23 JUSTICE SOTOMAYOR: But we can go past  
24 that.

25 MR. FRANCISCO: -- that's incorrect

1 actually.

2 JUSTICE SOTOMAYOR: No, because the  
3 NSA doesn't. What's very clear --

4 MR. FRANCISCO: I'm not talking about  
5 the NSA.

6 JUSTICE SOTOMAYOR: Or even anything  
7 else. But putting that aside, one last  
8 question.

9 Assuming that the covert manipulation  
10 issue is one, I think that what remains is, to  
11 the Chief's question and Justice Alito's  
12 questions, if the covert manipulation is a  
13 concern, then the question becomes what kind of  
14 burden does it put on TikTok U.S.A.?

15 And I think your point is that that  
16 requires strict scrutiny because it doesn't  
17 permit them to speak to the Chinese government  
18 through the algorithm and promote whatever  
19 speech it wants to promote through the  
20 algorithm, correct?

21 MR. FRANCISCO: It doesn't prohibit --  
22 permit them to speak to the American public  
23 through the algorithm --

24 JUSTICE SOTOMAYOR: Right.

25 MR. FRANCISCO: -- and promote

1 whatever type of speech they want to promote on  
2 the algorithm. And I also think that this  
3 covert manipulation is a little bit odd.  
4 They're not concerned just with covertness. If  
5 all you were concerned with is secret --

6 JUSTICE SOTOMAYOR: I'm going to ask  
7 the SG about that, how you disentangle the two  
8 things.

9 MR. FRANCISCO: Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?  
11 Justice Gorsuch?

12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: Just on the data  
14 collection interest, I think Congress and the  
15 President were concerned that China was  
16 accessing information about millions of  
17 Americans, tens of millions of Americans,  
18 including teenagers, people in their 20s, that  
19 they would use that information over time to  
20 develop spies, to turn people, to blackmail  
21 people, people who, a generation from now, will  
22 be working in the FBI or the CIA or in the State  
23 Department.

24 Is that not a realistic assessment by  
25 Congress and the President of the risks here?

1           MR. FRANCISCO: Well, Your Honor, I'm  
2 not disputing the risks. I'm disputing the  
3 means that they've chosen. One way, the most  
4 direct way to address that, all of this user  
5 data sits on data servers in Virginia controlled  
6 by Oracle.

7           I'm not talking about the national  
8 security agreement. What I'm talking about is a  
9 law that simply says to TikTok, Incorporated and  
10 its U.S. employees, you cannot share that user  
11 data with anybody. You can't give it to  
12 ByteDance. You can't give it to China. You  
13 can't give it to Google. You can't give it to  
14 Amazon. You cannot give it to anybody under a  
15 threat of massive penalties.

16           They never even considered that most  
17 obvious alternative. And so, whether you apply  
18 intermediate scrutiny or strict scrutiny, it's  
19 not a least restrictive means test, but you've  
20 got to at least consider the most obvious  
21 alternative.

22           JUSTICE KAVANAUGH: So you acknowledge  
23 the risk that Congress and the President were  
24 concerned about. You're just saying the means  
25 they chose to address that risk were incorrect?

1 MR. FRANCISCO: So I -- I --

2 JUSTICE KAVANAUGH: Not permissible?

3 MR. FRANCISCO: -- I mean, I certainly  
4 acknowledge the risk, but I think there are lots  
5 of reasons, not just the one I just gave, but  
6 there are lots of reasons why that risk still  
7 can't justify the law. When it sits alongside  
8 of the impermissible covert manipulation risk, I  
9 think it falls under Mt. Healthy. It's no  
10 different if they came in and said we passed  
11 this law, one for data security --

12 JUSTICE KAVANAUGH: I -- I understand  
13 that, but just on the -- on the data collection,  
14 that seems like a huge concern for the future of  
15 the country.

16 MR. FRANCISCO: And, Your Honor,  
17 again, it is a concern -- two responses.

18 First, it is a concern that can be  
19 addressed directly. The reason why there's no  
20 evidence in this record about whether that kind  
21 of direct prohibition on TikTok, Incorporated  
22 from sharing sensitive user data with anybody,  
23 including ByteDance, the reason why the record  
24 is devoid of any evidence of that is because  
25 Congress never considered the other side of the

1 balance.

2           And that's the minimum that Congress  
3 has to do under the First Amendment. It's got  
4 to at least consider the -- the consequences of  
5 shutting down a speech platform used by 170  
6 million Americans against the benefits of an  
7 alternative like simply saying to TikTok's  
8 employees, you're essentially going to get  
9 massive fines, potentially jail sentences, if  
10 you share any of that sensitive user data with  
11 anybody, not TikTok, not ByteDance -- I'm sorry,  
12 not ByteDance, not China, not anybody else in  
13 the world. Yet there's nothing in this record  
14 that suggests they even considered that  
15 alternative.

16           JUSTICE KAVANAUGH: What happens after  
17 January 19th if you lose this case? Can you  
18 just spell that out?

19           MR. FRANCISCO: At least as I  
20 understand it, we go dark. Essentially, the  
21 platform shuts down.

22           JUSTICE KAVANAUGH: Unless there's a  
23 divestiture?

24           MR. FRANCISCO: Unless there's a  
25 divestiture. Unless --



1 JUSTICE KAVANAUGH: A presidential  
2 extension --

3 MR. FRANCISCO: -- President Trump  
4 exercises his authority to extend it by not --  
5 but he can't do that on January 19th. On  
6 January 19th, we still have President Biden, and  
7 on January 19th, as I understand it, we shut  
8 down.

9 It is possible that come January 20th,  
10 21st, 22nd, we might be in a different world.  
11 Again, that's one of the reasons why I think it  
12 makes perfect sense to issue a preliminary  
13 injunction here and simply buy everybody a  
14 little breathing space.

15 This is an enormously --

16 JUSTICE KAVANAUGH: What do you mean  
17 by "shut down" too? Can you just spell that  
18 out?

19 MR. FRANCISCO: So --

20 JUSTICE KAVANAUGH: If -- if you can.

21 MR. FRANCISCO: -- the app -- one, the  
22 app is not available in the app stores. That's  
23 at a minimum. But, in addition, what the Act  
24 says is that all of the other types of service  
25 providers can't provide service either.

1                   Now there's enormous consequences for  
2     violating that for the service providers. So,  
3     essentially, you know, what they're going to say  
4     is that, you know, I think, we're not going to  
5     be providing the services necessary to have you  
6     see it. So it's essentially going to stop  
7     operating.

8                   I think -- I think that's the  
9     consequence of this law, which, again, is why a  
10    short reprieve here would make all the sense in  
11    the world. It's an enormously consequential  
12    decision, and it -- and -- and I think all would  
13    benefit if it weren't necessary.

14                   JUSTICE KAVANAUGH: Thank you.

15                   CHIEF JUSTICE ROBERTS: Justice  
16    Barrett?

17                   JUSTICE BARRETT: So I just want to --  
18    just kind of following up on Justice Kavanaugh's  
19    questions. Let's say I agree with you that some  
20    level of scrutiny applies and --

21                   MR. FRANCISCO: Mm-hmm.

22                   JUSTICE BARRETT: -- I'm trying to  
23    figure out which level of scrutiny applies, and  
24    I'm trying to figure out if there's content  
25    discrimination.

1                   And let me ask you a different  
2 question than I did before --

3                   MR. FRANCISCO: Mm-hmm.

4                   JUSTICE BARRETT: -- about the  
5 algorithm. I mean, you keep saying "shut down."  
6 The law doesn't say TikTok has to shut down. It  
7 says ByteDance has to divest.

8                   If ByteDance divested TikTok, we  
9 wouldn't be here, right? If -- if -- if  
10 ByteDance was willing to let you go and willing  
11 to let you take the source code with you, that  
12 would be fine, right? We would not be here?

13                  MR. FRANCISCO: Well, Your Honor, if  
14 ByteDance divested, then the law wouldn't fall  
15 on TikTok. But the law will -- the law, not  
16 ByteDance. The law requires TikTok to shut  
17 down.

18                  JUSTICE BARRETT: But that's because  
19 of ByteDance's choice, right?

20                  MR. FRANCISCO: Well, it --

21                  JUSTICE BARRETT: I mean, this is like  
22 Justice Kagan's point. I mean, I'm trying to  
23 figure out how we account for the reality of  
24 third-party choices, and --

25                  MR. FRANCISCO: Mm-hmm.

1 JUSTICE BARRETT: -- the choices of  
2 third parties, that's the whole reason for the  
3 law being passed in the first place.

4 MR. FRANCISCO: Yeah, Your -- Your  
5 Honor, I -- I -- I still don't -- I -- I think  
6 that the way the analysis works is: Step 1, is  
7 there a First Amendment violation here?

8 JUSTICE BARRETT: Right.

9 MR. FRANCISCO: Step 2, you get to the  
10 question that we're grappling with: What  
11 standard of scrutiny do you apply?

12 Typically, what you do is you ask: Is  
13 this law content-based? Is it content-based on  
14 its face? Is it content-based in its decision?

15 Here, we know it's content-based on  
16 its face because it says what it says. We know  
17 it's content-based in its motivation because the  
18 government concedes it's content-based in its  
19 motivation.

20 JUSTICE BARRETT: Well, that's not  
21 quite what I'm asking. I mean --

22 MR. FRANCISCO: I think --

23 JUSTICE BARRETT: -- that's the  
24 dispute between you --

25 MR. FRANCISCO: Yeah.

1 JUSTICE BARRETT: -- and the  
2 government, is, is it content-based if it's  
3 about divestiture and not about telling TikTok  
4 what content it can display on the platform.

5 MR. FRANCISCO: And I think it has to  
6 be because that's -- I think that that really  
7 goes to the first question: Does the burden  
8 fall on the speaker? If the burden falls on the  
9 speaker, that triggers the speaker's First  
10 Amendment rights.

11 But the law is, in fact,  
12 content-based, whether it comes in the form of a  
13 divestiture or something else, when the law  
14 specifically says it's content-based. We're  
15 worried about the content on the platform and  
16 when the government tells you that one of our  
17 reasons -- one of the things that we're worried  
18 about is TikTok, not ByteDance, but TikTok,  
19 Incorporated, and TikTok in the United States  
20 will, absent the divestiture, have a mix of  
21 content that we find objectionable. They will  
22 mix around their videos in a way that is too  
23 pro-Chinese or too anti-American.

24 JUSTICE BARRETT: Okay. Let me --

25 MR. FRANCISCO: And that is TikTok,

1 the platform.

2 JUSTICE BARRETT: -- let me just ask  
3 you one last question. Why is it impossible to  
4 divest in the 270 days, even assuming that the  
5 Chinese government hadn't said you couldn't?

6 MR. FRANCISCO: Mm-hmm. Sure. And  
7 this is the exchange I was having with Justice  
8 Gorsuch. There are -- there are two basic  
9 reasons.

10 The first is that the underlying  
11 source code, that's the source code that comes  
12 in here and then has to be converted and  
13 executed and --

14 JUSTICE BARRETT: But -- but that's  
15 what Justice Gorsuch said, just not ever.

16 So it's not really that you can't do  
17 it within the timeframe. It's that you really  
18 couldn't ever divest because you never are going  
19 to get the source code.

20 MR. FRANCISCO: So -- well, let me  
21 unpack that a little bit. No, it's that with  
22 the underlying source code, it takes a team of  
23 engineers to update and maintain that. It would  
24 take us many years to reconstruct a brand-new  
25 team of engineers to do that with respect to the

1 source code.

2 With respect to the sharing of  
3 content, that was the --

4 JUSTICE BARRETT: Yeah.

5 MR. FRANCISCO: -- different reason.  
6 In theory, we could kind of send our salesmen  
7 around the world, go to Ireland, go to Finland,  
8 go to every country, and say: Look, you used to  
9 automatically get our content, but now you've  
10 got to separately sign up for our platform.

11 JUSTICE BARRETT: Okay. So last --  
12 last point. Let me make sure I understand what  
13 you're saying.

14 It's not that you couldn't execute the  
15 disentanglement. You could say: We're  
16 independent. You just can't re-create TikTok in  
17 any kind of way --

18 MR. FRANCISCO: Well, I think that --

19 JUSTICE BARRETT: -- as I recall.

20 MR. FRANCISCO: -- any new TikTok  
21 would be a fundamentally different platform with  
22 different content, which is yet another reason  
23 why I think this is a content-based restriction  
24 that falls directly on TikTok, Incorporated  
25 itself and our platform.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Jackson?

3 JUSTICE JACKSON: So I guess I'm back  
4 to some of the questions that Justice Barrett  
5 and Justice Kagan asked about the sort of  
6 threshold issue that you point out, which is, is  
7 there a burden on the speaker.

8 I'm trying to understand what the  
9 burden is that you are articulating and whether  
10 it really isn't about association and not  
11 speech. You say -- you have in your brief some  
12 cases that talk about American speakers being  
13 free to choose whether to affiliate with foreign  
14 organizations. And the colloquy you had with  
15 Justice Kagan made me think that what you're  
16 really complaining about is the inability to  
17 associate with ByteDance and its algorithm, that  
18 it's not really about, you know, TikTok came up  
19 with its own algorithm or bought an algorithm  
20 from some other company or devised it or  
21 whatever. This law would have nothing to do  
22 with them from your perspective.

23 But the problem I think you're  
24 articulating -- and this is -- I -- I'm seeking  
25 your clarification.



1 MR. FRANCISCO: Mm-hmm. Sure.

2 JUSTICE JACKSON: The problem I think  
3 you're articulating is that you want to use  
4 ByteDance's algorithm and, therefore, associate  
5 with ByteDance, and Congress has prohibited that  
6 by requiring divestiture.

7 So isn't this really a right of  
8 association case under the First Amendment?

9 MR. FRANCISCO: I -- I think it's -- I  
10 think it's both, Your Honor. I do think that  
11 that is a component of it. We want to use the  
12 algorithm that we think reflects the best mix of  
13 content. That's the algorithm that reflects the  
14 best mix of content.

15 What this law says is we can't do that  
16 unless ByteDance exercises a qualified  
17 divestiture. But I also think more directly  
18 what this law does is it says to: TikTok,  
19 Incorporated, if ByteDance doesn't exercise a  
20 qualified divestiture, you have to go mute. You  
21 cannot speak at all. Full stop, period.

22 JUSTICE JACKSON: No, I don't think it  
23 says that, though. I mean, if -- if -- if  
24 TikTok were to, post-divestiture or whatever,  
25 pre-divestiture, come up with its own algorithm,

1 right, then, when the divestiture happened, it  
2 could still operate.

3 MR. FRANCISCO: I think --

4 JUSTICE JACKSON: It doesn't say,  
5 TikTok, you can't speak.

6 MR. FRANCISCO: -- I -- I think that's  
7 theoretically correct, Your Honor.

8 JUSTICE JACKSON: Right. But --  
9 but --

10 MR. FRANCISCO: But I think that also  
11 underscores the content-based nature of the  
12 restriction. We have to change our speech.

13 JUSTICE JACKSON: No, but the fact --  
14 excuse me. The fact that that's true suggests  
15 that you're wrong about the statute being read  
16 as saying, TikTok, you have to go mute, because  
17 TikTok can continue to operate on its own  
18 algorithm, on its own terms, as long as it's not  
19 associated with ByteDance.

20 So isn't this really just all about  
21 association?

22 MR. FRANCISCO: Your Honor, I think it  
23 is partly about association, but I'm going to  
24 take another shot at explaining why it's not  
25 just about association.

1 JUSTICE JACKSON: Okay. Well, let me  
2 just take you down the association path for a  
3 second because, if it is about the association  
4 of TikTok with ByteDance, then don't we have  
5 cases that seem to undermine your view that  
6 Congress can't do this?

7 I mean, I thought we had cases about  
8 Congress prohibiting association with terrorist  
9 organizations, prohibiting association with  
10 foreign adversaries. And so why doesn't this  
11 fall into that kind of group of -- of our  
12 jurisprudence?

13 MR. FRANCISCO: Well -- well, at least  
14 as I understand all of those cases, they applied  
15 strict scrutiny. The -- the -- the material  
16 support statute most definitely applied strict  
17 scrutiny.

18 JUSTICE JACKSON: And -- and  
19 ultimately upheld the law, so fine.

20 MR. FRANCISCO: But -- but -- sure.  
21 And if -- I think, if we go down the strict  
22 scrutiny road here, I don't see that this law  
23 can possibly be satisfied under the interests  
24 that they assert here.

25 But I do want to emphasize why this is

1 also about TikTok's speech. Even under your  
2 hypothetical, where, theoretically, they can say  
3 something differently than they are say --  
4 saying today, that in and of itself is a direct  
5 restriction on TikTok's speech.

6 They can't engage in the speech they  
7 want to engage in. They have to engage in a  
8 different kind of speech, the speech they don't  
9 want to engage in. That is a direct burden on  
10 TikTok, Incorporated's speech --

11 JUSTICE JACKSON: All right.

12 MR. FRANCISCO: -- wholly apart from  
13 association.

14 JUSTICE JACKSON: I think I understand  
15 that argument.

16 Let me ask you a question about your  
17 colloquy with Justice Kavanaugh. Did I  
18 understand you to concede that there is a  
19 compelling interest and that the problem is  
20 really tailoring?

21 I mean, you said: I understand the  
22 risks. I don't hear you suggesting that the  
23 risks don't exist. So it sounds like we've  
24 gotten past -- even if we're in strict scrutiny  
25 world, we've gotten past the compelling interest

1 part of this.

2 MR. FRANCISCO: No, Your Honor. What  
3 I was saying is that if all you had, standing  
4 alone, were the data security, that would be a  
5 different case.

6 Here, when you have the content  
7 manipulation sitting right alongside of the data  
8 security, that taints the data security  
9 rationale. If Congress came in and said: We're  
10 passing this law for two reasons -- one, we  
11 really care about data security, and, two, we  
12 hate the speech on TikTok -- the data security  
13 wouldn't alone sustain that law.

14 Under cases like Mt. Pleasant that  
15 would speak --

16 JUSTICE JACKSON: I understand. But  
17 why -- why -- you're equating we don't want  
18 foreign adversaries to be able to manipulate the  
19 content on this platform, you're equating that  
20 with we hate the content, and I'm just trying to  
21 understand why.

22 MR. FRANCISCO: Be -- be -- sure.  
23 Because content manipulation is, by definition,  
24 a content-based distinction.

25 Look, everybody manipulates content.

1 There are lots of people who think CNN, Fox  
2 News, The Wall Street Journal, The New York  
3 Times, are manipulating their content. That is  
4 core protected speech. That's why they put so  
5 much weight on this mere covertness. But --

6 JUSTICE JACKSON: Right, but that's --  
7 that -- but that analysis is just about  
8 content-based versus content-neutral and,  
9 therefore, whether you apply strict scrutiny.

10 I'm in the strict scrutiny world.

11 MR. FRANCISCO: Mm-hmm.

12 JUSTICE JACKSON: Okay? I'm assuming  
13 that you're right, that strict scrutiny applies,  
14 and now prong number one in that world is do --  
15 does the government have a compelling interest.

16 MR. FRANCISCO: And --

17 JUSTICE JACKSON: And so I'm trying to  
18 understand why the government's argument that we  
19 have data manipulation concerns, which I  
20 understood you in colloquy with Justice  
21 Kavanaugh to say is a risk, and we are  
22 concerned, based on what Justice Gorsuch says  
23 when he's looking at the facts, you know, that  
24 the government contends that there's this real  
25 problem with this foreign adversary doing

1 manipulation in other places, are you saying  
2 those are not compelling government interests?

3 MR. FRANCISCO: I am 100 percent  
4 saying that content manipulation is not just not  
5 a compelling governmental interest, it is an  
6 impermissible governmental interest. You could  
7 not go to CNN or Fox News and say we're going to  
8 regulate you because you're manipulating the  
9 content in the way that we don't like. That is  
10 per se impermissible.

11 JUSTICE JACKSON: Okay.

12 MR. FRANCISCO: That is why --

13 JUSTICE JACKSON: Can I just ask you  
14 one last thing? You -- you say with respect to  
15 the tailoring issue that disclosure, you think,  
16 is a possible more narrowly tailored way of  
17 handling some of this.

18 And I guess I'm just wondering whether  
19 disclosure under this Court's case law and the  
20 law of other lower courts doesn't carry its own  
21 First Amendment complications, that don't we  
22 have -- wouldn't we have compelled speech  
23 problems if disclosure was required in this  
24 situation?

25 MR. FRANCISCO: Sure, Your Honor.

1 Now, look, I might think so because I think that  
2 the factual predicate is wrong, but they think  
3 the factual predicate is right. And if the  
4 factual predicate is right, then there are no  
5 First Amendment problems at all under Zauderer  
6 and the cases that you're suggesting.

7 And that underscores the larger  
8 problem here. Not all disclosures are perfect.  
9 I'm not here to argue that they are. But you've  
10 always got to consider what the alternative is.  
11 And, here, the alternative is shutting down one  
12 of the largest speech platforms in America.

13 The reason there's no evidence in this  
14 record as to disclosures is because Congress  
15 never even undertook that balancing in the first  
16 place --

17 JUSTICE JACKSON: Thank you.

18 MR. FRANCISCO: -- the bare minimum  
19 that has to be done before we take an  
20 unprecedented -- unprecedented step of shutting  
21 down the voices of 170 million Americans.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Fisher.



1                   ORAL ARGUMENT OF JEFFREY L. FISHER  
2           ON BEHALF OF PETITIONERS BRIAN FIREBAUGH, ET AL.

3                   MR. FISHER: Mr. Chief Justice, and  
4 may it please the Court:

5                   Wholly apart from the companies' legal  
6 interests here, the Act directly restricts the  
7 rights, the First Amendment rights, of American  
8 creators to participate and speak in what the  
9 Court a little less than a decade ago called the  
10 modern public square and what you might say  
11 today is the most vibrant speech forum in the  
12 United States of America.

13                   And the Act, therefore, is inescapably  
14 subject to strict scrutiny because of the First  
15 Amendment implications. And the Act fails that  
16 test and, indeed, any level of scrutiny under  
17 this Court's case law because the Act and the  
18 reasons behind it defy our history and  
19 tradition, as well as precedent.

20                   American creators have long and always  
21 enjoyed the right to speak in conjunction with  
22 foreign speakers or work with foreign  
23 publishers. Americans even have the right under  
24 the Lamont case to receive information from  
25 foreign speakers, indeed, foreign governments.

1 The -- so that leaves the -- the government with  
2 this implication in its -- in its use of the  
3 phrase "national security" in this context. But  
4 that just simply doesn't change the calculus.

5           Throughout our history, we have faced  
6 ideological campaigns by foreign adversaries.  
7 Yet, under the First Amendment, mere ideas do  
8 not constitute a national security threat.  
9 Restricting speech because it might sow doubt  
10 about our leaders or undermine democracy are the  
11 kind of things our enemies do. It is not what  
12 we do in this country. And so we think the  
13 Court should reverse.

14           And I would welcome the Court's  
15 questions.

16           JUSTICE THOMAS: How exactly is -- are  
17 the creators' speech being impeded?

18           MR. FISHER: So two ways, Justice  
19 Thomas. First, I'd just point you to the text  
20 of the statute, which directly regulates text,  
21 images, communicate -- real-time communications,  
22 videos. My clients, the creators, are the ones  
23 creating that speech and posting it to speak to  
24 other Americans.

25           JUSTICE THOMAS: But it doesn't say

1 anything about creators or people who use the  
2 site. It's only concerned about the ownership  
3 and the concerns that data will be manipulated  
4 or there will be other national security  
5 problems with someone who's not a citizen of  
6 this country or a company who's not here.

7 MR. FISHER: So there's two ways, and  
8 I think the Sorrell case is where you look for  
9 the analysis of the First Amendment burden here.  
10 As I said, the text of the statute regulates our  
11 speech. And then you point out ownership, and  
12 this was talked about a lot in the first part of  
13 the argument here, so let me be very clear.

14 American creators have a right to work  
15 with the publisher of their choice. So imagine  
16 somebody wanted to work on -- post speech on  
17 Twitter, now known as X, and Congress passed a  
18 law saying we don't like the current owner of X.  
19 The current owner of X has to sell that platform  
20 or else it has to shut down.

21 People who post on that platform and  
22 who, indeed, some of them make a living  
23 commentating, engaging on current events, news,  
24 politics, would have a First Amendment claim --

25 JUSTICE THOMAS: But --

1                   MR. FISHER:  -- to work with that  
2 particular publisher.

3                   JUSTICE THOMAS:  -- using that  
4 argument, you could have said that about the  
5 breakup of AT&T.  You could say that about the  
6 foreign -- foreign -- limitations on foreign  
7 ownership of broadcast companies.

8                   MR. FISHER:  Well, no -- I think that  
9 you have to dig a little deeper than that,  
10 Justice Thomas.  It's not mere foreign ownership  
11 and it's certainly -- the broadcast cases I'll  
12 get to in a moment.  But it's foreign ownership  
13 because of a particular perspective.

14                   If you boil it down to an essence, the  
15 owner of a print media or online media  
16 publication is -- is the essence of the  
17 viewpoint of that publication.  The current  
18 owner of X or the current owner of Fox News or  
19 the current owner of MSNBC has a particular  
20 perspective.  And working with that particular  
21 platform is shot through with the ownership from  
22 top to bottom.

23                   JUSTICE JACKSON:  But why couldn't  
24 Congress prohibit Americans from associating  
25 with certain foreign organizations that have

1 interests that are hostile to the United States?  
2 I mean, I thought that's what Holder versus  
3 Humanitarian Law Project allowed, so I don't  
4 really understand what you mean.

5 MR. FISHER: Right. So I'm glad  
6 you're bringing that up.

7 JUSTICE JACKSON: Yes.

8 MR. FISHER: So, when it comes to  
9 national security, you are right that Congress  
10 can prohibit Americans, to use that case as an  
11 example, from associating with terrorist  
12 organizations or other organizations that pose a  
13 clear and present danger to this country.

14 This case, Justice Jackson, is  
15 fundamentally different. What the government  
16 tells you in its own brief that it is worried  
17 about here are the ideas that might be expressed  
18 on TikTok. We might undermine U.S. leadership.  
19 We might sow doubts about democracy. We might  
20 have pro-China views.

21 And so, if you look to whether that is  
22 a legitimate interest, my fundamental  
23 submission -- and this, I think, goes to the  
24 last colloquy you were having with Mr.  
25 Francisco -- is that is an impermissible

1 government interest. And you look throughout  
2 our history and tradition, and I think the place  
3 I would point you most directly would be the  
4 opinions of Justice Brandeis in Whitney and  
5 Justice Holmes in Abrams --

6 JUSTICE JACKSON: I guess I don't  
7 understand how that's distinguishable from  
8 what's happening in Holder, and -- and so can  
9 you just say a little bit more?

10 MR. FISHER: It's -- it goes to the  
11 nature of the national security threat. So my  
12 position is the government just doesn't get to  
13 come in and say national security and the case  
14 is over or you don't get to associate. You have  
15 to dig underneath what is the national security  
16 claim. And what Justice Holmes said in his  
17 Abrams dissent -- and I know that was a dissent,  
18 these are hard issues, but that has been  
19 vindicated over time -- is that it's not enough  
20 to say national security. You have to say what  
21 is the real harm. Is it -- you know, is it  
22 terrorism? Is it where -- where our battleships  
23 are located?

24 JUSTICE JACKSON: But Justice  
25 Kavanaugh --

1 MR. FISHER: Is it war?

2 JUSTICE JACKSON: -- Justice Kavanaugh  
3 presented a number of potential risks, right,  
4 with -- with foreign adversaries using covert  
5 manipulation of the data platforms that are  
6 being used by youths today that would then make  
7 it more likely that people would turn into spies  
8 and do terrible things to the United States.  
9 This is a hypothetical, but --

10 MR. FISHER: Yeah.

11 JUSTICE JACKSON: -- you know what I'm  
12 saying?

13 MR. FISHER: I -- I get it. So I  
14 think, if I understood Justice Kavanaugh  
15 correctly, he was talking about the data  
16 security arguments. Let me just pull these  
17 apart.

18 You first have an argument -- and the  
19 government itself separates these two arguments  
20 in its brief. The first argument and the one  
21 I'm focusing on initially is the content  
22 manipulation argument, and that argument is that  
23 our national security is implicated if the  
24 content on TikTok is anti-democracy, undermines  
25 trust in our leaders. They use -- they use

1 various phrases like that in their brief. So my  
2 primary submission is that is an impermissible  
3 government interest that taints the entire Act.

4 Now there's a secondary argument the  
5 government makes, and we say you don't even get  
6 to that because, once you have an impermissible  
7 motive like that, the law is unconstitutional.

8 But, even if you could get to that,  
9 Justice Jackson, I do grant that data security  
10 in -- in the way Justice Kavanaugh spelled it  
11 out is compelling. That is compelling, but  
12 that's not the question. You just don't ask in  
13 the air, you know, was Congress worried about  
14 data security or could it reasonably be worried  
15 about data security? You say, can this Act, the  
16 Act before you, be sustained on data security  
17 grounds?

18 And our answer to that has to be no.  
19 You don't have to look any further than the  
20 divestiture -- the divestiture provision itself,  
21 which says that the content recommendation  
22 algorithm cannot be used in the future. Well,  
23 that has nothing to do with data security. So  
24 the core feature of the divestiture provision is  
25 going at content manipulation, which I say is



1 impermissible. You can't -- you can't uphold  
2 that under data security grounds.

3           And the rest of the Act, when you look  
4 at the covered companies provision, Justice  
5 Jackson, if this were primarily a data security  
6 law, what you think you'd find is, what kind of  
7 data is procured? How is it stored? Is it  
8 shared? Those are the things you think you'd  
9 find under covered companies, but you don't find  
10 that.

11           What you find is, are text images  
12 shared? Is content being shared between users?  
13 Is it being created and posted in a social media  
14 platform?

15           So I don't dispute for one second that  
16 data security is a very important thing, and  
17 Congress in this very law regulated data  
18 security in other ways with the -- with data  
19 brokers. That's perfectly permissible. But the  
20 question before you today is narrower. The  
21 question is, is this law before you sustainable  
22 on data security grounds? And that answer has  
23 to be no.

24           JUSTICE GORSUCH: Mr. --

25           CHIEF JUSTICE ROBERTS: Congress

1 doesn't care about what's on TikTok. They don't  
2 care about the expression. That's shown by the  
3 remedy. They're not saying TikTok has to stop.  
4 They're saying that the Chinese have to stop  
5 controlling TikTok.

6 So it's -- it's not a direct burden on  
7 the expression at all. Congress is fine with  
8 the expression. They're not fine with a foreign  
9 adversary, as they've determined it is,  
10 gathering all this information about the 170  
11 million people who use TikTok.

12 MR. FISHER: Well, again, Mr. Chief  
13 Justice, if I may, let me separate the -- the --  
14 where you started, which was the content  
15 manipulation, and then go to the data security  
16 part of it.

17 So I understand --

18 CHIEF JUSTICE ROBERTS: Well, the  
19 first part was not -- I'm not talking about the  
20 content manipulation. I'm talking about the  
21 content harvesting.

22 MR. FISHER: I -- I -- when you say  
23 "content harvesting," do you mean people don't  
24 know where the --

25 CHIEF JUSTICE ROBERTS: Well, they've

1 got all the information --

2 MR. FISHER: Yeah.

3 CHIEF JUSTICE ROBERTS: -- whatever  
4 they -- whatever algorithms they want that has  
5 access to the personal information or at least  
6 information that is not readily available about  
7 170 million Americans.

8 And whether they're going to use it in  
9 10 or 15 years, when those people grow up and,  
10 you know -- you know, have different jobs in  
11 different places, or whether they're going to  
12 use it now, that, at least as I look at the  
13 Congressional Record, is what Congress was  
14 concerned about.

15 MR. FISHER: Well, I think, though,  
16 that --

17 CHIEF JUSTICE ROBERTS: And they're  
18 not concerned about the fact that it is  
19 available. As I said, the remedy is just  
20 somebody else has to run TikTok.

21 MR. FISHER: Right.

22 CHIEF JUSTICE ROBERTS: So they're not  
23 concerned about the content. They're concerned  
24 about what the foreign adversary is doing.

25 MR. FISHER: So, if I may, I think I

1 still -- to answer your question properly, I  
2 think I have to separate two things.

3           One is the content recommendation  
4 algorithm, and that's what I was speaking about  
5 a moment ago. That has nothing to do with data  
6 security. That doesn't itself procure data.  
7 That just determines what videos people see on  
8 their feed on TikTok.

9           As to that, I think the answer is  
10 inescapably that the government and Congress  
11 itself was worried about content. The  
12 government itself is here saying: National  
13 security.

14           So, like, a mix of cat videos or dance  
15 videos doesn't affect national security. No  
16 matter what happens, the only thing that can  
17 affect data security -- I'm sorry, national  
18 security are the substance of those videos.

19           And when the government's pressed in  
20 its briefing, it outright tells you that. It  
21 says: What we're really worried about is sowing  
22 doubts about U.S. leaders, et cetera. So let me  
23 turn then to data security.

24           Yes, you know, there were various  
25 Congresspersons, and in the record that we have

1 in the D.C. Circuit, there were conversation  
2 about the problem of data security here. As I  
3 said, I don't dispute that that is a valid  
4 governmental interest.

5 So I think you address whether that  
6 alone could sustain the Act in two steps.  
7 First, you would ask: If you have an  
8 impermissible motive and a permissible one, can  
9 we sustain the Act based on the impermissible --  
10 based simply on the permissible motive?

11 And I think, for the reasons  
12 Mr. Francisco said and we lay out in our brief,  
13 that alone, the answer is no under Hunter  
14 against Underwood and other cases.

15 Even if you could get just to the data  
16 security question, again, you'd have to ask the  
17 question: Would this law have been passed by  
18 Congress for data security reasons? Because  
19 you're being asked to uphold a law based on that  
20 single governmental interest. And when you look  
21 through the provisions like the content  
22 recommendation algorithm provision, like the  
23 covered company provisions, the answer's no.

24 And if you're still in doubt on that,  
25 just go back to the under-inclusiveness problem.

1 Would a Congress really worried about these very  
2 dramatic risks leave out an e-commerce site like  
3 Temu that has 70 million Americans using it and  
4 every bit the connection to the world of  
5 Chinese --

6 JUSTICE KAVANAUGH: Does Congress have  
7 to go all or nothing on that? I mean --

8 MR. FISHER: It doesn't have to go all  
9 or nothing.

10 JUSTICE KAVANAUGH: Didn't they  
11 isolate a particular problem? And they -- they  
12 might be getting to what you're talking about  
13 next, who knows, but you're really sitting up  
14 there and saying Congress would not pass the  
15 divestiture law if data security were the only  
16 interest, and, I mean --

17 MR. FISHER: So I'm saying it would  
18 not have passed this divestiture law if -- if --  
19 if data security were the only interest.

20 It's very curious why you just single  
21 out TikTok alone and not other companies with  
22 tens of millions of people having their own data  
23 taken, you know, in the process of engaging with  
24 those websites and equally, if not more,  
25 available to Chinese control.

1                   So I'm not trying to say that Congress  
2                   has to do everything at once. I'm trying to say  
3                   that once you've concluded that content  
4                   manipulation, for the reasons I've said, as a  
5                   matter of our history and tradition has to be  
6                   impermissible --

7                   JUSTICE SOTOMAYOR: Is there another  
8                   site like this one that covers half the American  
9                   population?

10                  MR. FISHER: I don't -- I don't think  
11                  just by way of sheer numbers, Justice Sotomayor,  
12                  that -- the answer has to be no.

13                  JUSTICE SOTOMAYOR: All right. Now  
14                  put -- put --

15                  MR. FISHER: But 70 million seems like  
16                  a lot.

17                  JUSTICE SOTOMAYOR: A hundred and  
18                  seventy million is a lot, but put that aside.

19                  MR. FISHER: Yeah.

20                  JUSTICE SOTOMAYOR: And -- and -- and  
21                  then go to the next question, which is: How  
22                  many of these sites have all of the data  
23                  collection mechanisms that TikTok has?

24                  From what I understand from the  
25                  briefs, not only is it getting your information,

1 it's asking, and most people give it permission,  
2 to access your contact list, whether that  
3 contact list has permitted them to or not. So  
4 they can now have data about all of your  
5 contacts and anything you say about them.

6           How many other sites gather  
7 information by keystrokes to be able to do voice  
8 and finger ID information if they choose? I  
9 mean, there's a whole lot of data stuff that was  
10 discussed in the brief that I don't think any  
11 other website gathers. So wouldn't this be a  
12 unique site? If I view the evidence that way,  
13 how would this be under-inclusive?

14           MR. FISHER: Justice Sotomayor, I -- I  
15 don't think a lot of the suppositions you're  
16 making actually bear out. And, as Justice  
17 Gorsuch was pointing out, one of, obviously, the  
18 real challenges in this case is it comes to you  
19 without an ordinary trial record compiled and  
20 all the rest. So we have only limited amounts  
21 of information. But, absolutely, these other  
22 websites are taking much the same kind of  
23 information, if not more.

24           And as to the -- as to the contact  
25 list thing, I think you also -- that points out



1 one other aspect of this. This is a voluntary  
2 decision by an American user to share that  
3 information.

4 You know, in the Riley case --

5 JUSTICE SOTOMAYOR: But not informed.  
6 And even if informed, but we --

7 MR. FISHER: Well, but that could be  
8 solved -- if you don't think it's informed, that  
9 could be solved by a warning or disclosure.

10 JUSTICE SOTOMAYOR: Well, no, it can't  
11 be because, for the United States, the threat of  
12 using that information is what is at issue.  
13 It's not whether the user thinks it's okay.  
14 It's whether the U.S. believes that it could put  
15 sites at issue.

16 But let me ask you one --

17 MR. FISHER: Mm-hmm.

18 JUSTICE SOTOMAYOR: -- last question  
19 and fundamental question.

20 Assuming that content -- that  
21 content-neutral data collection concerns were  
22 Congress's -- is one of Congress's provisions,  
23 divest because of this --

24 MR. FISHER: Mm-hmm.

25 JUSTICE SOTOMAYOR: -- why can't we

1 separate that out from how we analyze the  
2 algorithm question?

3 And couldn't we sever the two  
4 provisions to say: Divestiture is right, but  
5 you can't force them not to discuss algorithm?

6 MR. FISHER: Well, I think the reason  
7 why you can't do that is -- is -- is -- as  
8 Mr. Francisco explained, I -- I direct you to a  
9 case like Hunter against Underwood and just  
10 analogize it to this situation.

11 If what you had is the government  
12 saying: We -- we are shutting down TikTok or  
13 requiring divestiture for two reasons, one,  
14 because we think it helps the Democratic Party  
15 too much and, number two, because we're  
16 concerned about data, I think that first  
17 interest would be a poison pill. That would be  
18 an impermissible -- or because we think, you  
19 know, there's too much pro-Catholic content on  
20 TikTok.

21 I think there are some interests that  
22 are just so constitutionally verboten that I  
23 think that -- that just makes the Act  
24 unconstitutional, and you can't go looking for  
25 other interests.

1                   You send it back to Congress: Look,  
2                   if you want to pass a data security law free and  
3                   clear of this impermissible interest, you go  
4                   ahead and do it.

5                   JUSTICE SOTOMAYOR: Thank you,  
6                   counsel.

7                   MR. FISHER: Can I say one other  
8                   thing, Justice Sotomayor, just because I think  
9                   it is also telling here, that even if you didn't  
10                  buy that poison pill argument and you just asked  
11                  whether Congress would have passed this law,  
12                  something else that I think you might notice is,  
13                  even if all this Act goes into effect and the --  
14                  and the law goes through, TikTok gets to keep  
15                  all the data.

16                  So wouldn't a data security law  
17                  require them to expunge that data or get rid of  
18                  it or something? I mean, it's a very weird law  
19                  if you're just looking at it through a data  
20                  security lens --

21                  JUSTICE GORSUCH: Mr. --

22                  MR. FISHER: -- and maybe Congress  
23                  could do better.

24                  JUSTICE GORSUCH: -- Mr. Fisher, you  
25                  know, often we require divestiture for antitrust

1 reasons, for example. And as I take it, your  
2 argument here -- and we don't think of those as  
3 normally implicating the First Amendment  
4 interests of users or people who might speak  
5 or --

6 MR. FISHER: Right.

7 JUSTICE GORSUCH: -- associate with  
8 editors.

9 And -- and the difference here is, as  
10 I understand it, in your mind, that this law is  
11 motivated by a content-based interest. Is -- is  
12 that -- is that a fair summary?

13 MR. FISHER: I -- I think that -- the  
14 only thing I would add to it is the prior step,  
15 which it is -- it is regulating the speech  
16 itself for content-based reasons, yes.

17 JUSTICE GORSUCH: Yeah. We don't do  
18 that in the antitrust area --

19 MR. FISHER: Exactly.

20 JUSTICE GORSUCH: -- but you say this  
21 law does.

22 MR. FISHER: Exactly.

23 JUSTICE GORSUCH: Okay. And -- and it  
24 does on -- on the content -- covert content  
25 manipulation side, do you think that's a

1 compelling interest or not? Forget about the  
2 tailoring for a moment.

3 MR. FISHER: No. My point is is that  
4 preventing content manipulation, whether it's  
5 covert or not --

6 JUSTICE GORSUCH: Is simply not  
7 compelling?

8 MR. FISHER: -- is impermissible. If  
9 what you mean by "content manipulation" are the  
10 kinds of interests the government is saying,  
11 like undermining trust in our leaders --

12 JUSTICE GORSUCH: Yeah.

13 MR. FISHER: -- you know, undermining  
14 trust in democracy --

15 JUSTICE GORSUCH: And that's Whitney  
16 and Abrams in your mind?

17 MR. FISHER: -- that's Whitney and  
18 Abrams. And, like, those cases --

19 JUSTICE GORSUCH: Got it. I got it.

20 MR. FISHER: Yeah.

21 JUSTICE GORSUCH: I got it.

22 JUSTICE KAGAN: So, Mr. Fisher --

23 JUSTICE GORSUCH: Just a couple more,  
24 I'm sorry.

25 MR. FISHER: Yeah. Yeah.

1 JUSTICE GORSUCH: I'll finish up real  
2 quick.

3 And so that would take us to the  
4 tailoring question, and there, you say  
5 disclosure and alerting Americans that there is  
6 covert content manipulation possibility, putting  
7 aside the -- the data collection part of it --

8 MR. FISHER: Yeah.

9 JUSTICE GORSUCH: -- telling Americans  
10 that there -- there is content -- covert content  
11 manipulation going on in TikTok or at least it's  
12 possible.

13 And the government says that's just  
14 simply not enough. And the D.C. Circuit did  
15 too. And I wanted to give you a chance to  
16 respond to that.

17 MR. FISHER: Right. So I think that's  
18 the only aspect of the governmental interest  
19 that could be permissible, the -- the covert  
20 part.

21 And my answer, as you just said, is  
22 disclosure solves that problem. And -- and --  
23 and you have a law, a longstanding law which we  
24 haven't talked about yet today, that gives you  
25 that example. Again, under a

1 history-and-tradition test, you look at not just  
2 precedent but laws and our traditions of our  
3 country. Look at the Foreign Agent Registration  
4 Act, passed -- passed in the run-up to World War  
5 II, and the concern was Americans would be  
6 controlled by foreign agents to speak and  
7 advocate certain causes.

8 JUSTICE GORSUCH: We didn't ban them.  
9 We just required disclosure.

10 MR. FISHER: You did not ban them.  
11 All you did is require --

12 JUSTICE GORSUCH: Okay.

13 MR. FISHER: You, Congress.

14 JUSTICE GORSUCH: Yeah.

15 MR. FISHER: All Congress did was  
16 require a disclosure.

17 JUSTICE GORSUCH: I certainly  
18 wasn't -- I wasn't around for that.

19 (Laughter.)

20 JUSTICE GORSUCH: On the secret  
21 evidence point, I'm concerned about the  
22 government's attempt to lodge secret evidence in  
23 this case without providing any mechanism for  
24 opposing counsel to review it. And I expressed  
25 that concern in Zubaydah, and I noted that there

1 are mechanisms to read in counsel and that other  
2 countries, including our allies, often do that.  
3 I just wanted to give you a chance to give me  
4 your thoughts on that.

5 MR. FISHER: Yes, Justice Gorsuch. We  
6 made all those arguments in the D.C. Circuit.  
7 So there was a flurry of motion practice about  
8 whether or not the government could rely on  
9 classified evidence. Those motions were never  
10 resolved.

11 What the D.C. Circuit did -- I think  
12 you probably noticed from the decision -- is say  
13 we're going to decide this case solely based on  
14 the public record, and my understanding is  
15 that's how it comes to this Court.

16 JUSTICE GORSUCH: It's interesting  
17 that --

18 MR. FISHER: But, if the Court were  
19 ever -- ever --

20 JUSTICE GORSUCH: It's interesting  
21 that Congress hasn't acted in this field. I  
22 mean, we have in the FISA area, you know, lots  
23 of opportunity. They have regulated this area,  
24 and it does seem like an area that Congress  
25 might want to -- to pay attention to given the



1 increased appeals to secret evidence that the  
2 government has made in recent years.

3 Last question for you. Could the new  
4 administration after January 20th -- Mr.  
5 Francisco suggested that it might -- be able to  
6 extend the deadline even though -- if you were  
7 to lose here by January 19th, is that possible  
8 as you read the law?

9 MR. FISHER: I'm not sure it is. I'm  
10 not sure -- maybe -- maybe that's a question for  
11 the Solicitor General, but --

12 JUSTICE GORSUCH: Oh, it certainly is.  
13 I --

14 MR. FISHER: Good.

15 (Laughter.)

16 JUSTICE GORSUCH: -- I thought maybe  
17 I'd give you a chance too.

18 MR. FISHER: So, you know, as I  
19 understand the law, it's 270 days unless  
20 extended, and once that time runs, I'm not sure  
21 you're talking about an extension anymore.

22 JUSTICE GORSUCH: Okay.

23 MR. FISHER: You know, there's ex post  
24 facto law that --

25 JUSTICE GORSUCH: Yeah, yeah.

1 MR. FISHER: -- kind of does this  
2 stuff.

3 JUSTICE GORSUCH: Got it. Thank you.

4 MR. FISHER: Yeah.

5 JUSTICE KAGAN: Can I take you back,  
6 Mr. Fisher? Let's say I agree with you that if  
7 you're talking about content manipulation,  
8 that's an inherently content-based rationale for  
9 acting. So, if Congress had passed a law that  
10 says we hate the content manipulation that  
11 TikTok is doing, that's strict scrutiny land,  
12 and I don't know that the government can do  
13 that, however important, you know, the -- the --  
14 the interest.

15 But that's not what Congress is doing  
16 here -- and this is the same kinds of questions  
17 that I asked --

18 MR. FISHER: Mm-hmm.

19 JUSTICE KAGAN: -- Mr. Francisco --  
20 because, if -- if -- let's take it as a given  
21 that Congress actually can do whatever it wants  
22 with respect to a wholly foreign corporation or  
23 a foreign government.

24 MR. FISHER: Yeah.

25 JUSTICE KAGAN: And so Congress could

1 act with the intent to interfere with the  
2 content manipulation that a foreign corporation  
3 is doing. And so now we're in this strange  
4 world where we're saying they can't act with  
5 respect to TikTok. They could act with respect  
6 to ByteDance.

7           Why isn't this Congress acting with  
8 respect to ByteDance in the sense that all it's  
9 doing is saying ByteDance has to divest, and  
10 then TikTok can go about its business, use  
11 whatever algorithm it wants, use whatever  
12 content-moderation policies it wants, just like  
13 everybody else does, choosing from everything  
14 that's available on the open market?

15           MR. FISHER: So let me answer that  
16 question in two parts from the perspective of  
17 the creator Americans who want to use this  
18 platform to speak to other Americans.

19           So the first thing is what the Act  
20 does, as you said, Justice Kagan, is prevent us  
21 from working with a application that is owned by  
22 ByteDance that uses this algorithm. Well,  
23 that's exactly what we want to do. That's our  
24 editor and publisher of choice that we think  
25 best disseminates our speech.

1 JUSTICE KAGAN: Yeah, but what I'm  
2 saying to you is, if you just assume a world  
3 without TikTok, that -- where it's only  
4 ByteDance --

5 MR. FISHER: Yeah.

6 JUSTICE KAGAN: -- and you were trying  
7 to -- you were trying to say, well, we really  
8 want to work with ByteDance --

9 MR. FISHER: Yeah.

10 JUSTICE KAGAN: -- and Congress was  
11 saying we think ByteDance presents national  
12 security interests and they don't have First  
13 Amendment rights, they're just a foreign  
14 corporation, I think that in that case, the  
15 government -- I mean, tell me if you think this  
16 is wrong. It just doesn't matter --

17 MR. FISHER: Yeah.

18 JUSTICE KAGAN: -- that you have  
19 creators who want to work with ByteDance because  
20 ByteDance is a foreign corporation with no First  
21 Amendment rights.

22 Is that what you're contesting?

23 MR. FISHER: So that is what I'm  
24 contesting. So you said two things, though, so  
25 I could be clear. There's two aspects. Do we

1 have a First Amendment right to work with a  
2 foreign company or even a foreign country to  
3 publish our speech? And then there's a national  
4 security part that you put into that, which goes  
5 to the justification.

6 JUSTICE KAGAN: Forget that.

7 MR. FISHER: Forget that. Yes. Let's  
8 do that. So, if that is right, Justice Kagan,  
9 then American creators have no right to -- to  
10 make documentaries with the BBC. They can't --  
11 they can't work with Al Jazeera if Congress  
12 wants to prevent that. Any number of other  
13 publications that are state-owned wholly or  
14 partially.

15 And even under Lamont, remember, where  
16 you're not even creating speech, you're just  
17 listening, you know, that was speech from China  
18 that the Court said you have a First Amendment  
19 right to receive.

20 JUSTICE KAGAN: So would I be right to  
21 say that your position is that because of the  
22 users who want to associate and want to partner  
23 with this foreign corporation, the foreign  
24 corporation ends up having, in your view, the  
25 exact same First Amendment rights as your users

1 do? In other words, it's -- it's irrelevant --

2 MR. FISHER: Yeah.

3 JUSTICE KAGAN: -- that the foreign  
4 corporation doesn't have First Amendment rights.

5 MR. FISHER: I -- I don't think it's  
6 irrelevant because you could imagine a situation  
7 where no American distributor or speaker wants  
8 to work with that.

9 But let me -- let me put it to you  
10 this way: The Communist Manifesto written by  
11 Karl Marx has no First Amendment standing on its  
12 own in America, but if a bookstore wants to sell  
13 that publication, I don't think Congress can  
14 prevent it from doing so.

15 JUSTICE BARRETT: Well --

16 MR. FISHER: A --

17 JUSTICE BARRETT: Oh, sorry. Go  
18 ahead.

19 MR. FISHER: No, I'm -- I'm fine.

20 JUSTICE BARRETT: No, no, no. It's --

21 JUSTICE KAGAN: I'm good.

22 JUSTICE BARRETT: Okay. So I want  
23 to -- but I want to press you a little bit on  
24 the distinction because, in Lamont, the --  
25 the -- the prohibition worked directly on the

1 American, like you have to specifically request  
2 this information that comes.

3 This is working -- kind of as Justice  
4 Kagan's questions were -- were pressing you,  
5 this is working on ByteDance. It's not saying  
6 to your creators you can't post on ByteDance.  
7 That's -- that's indirectly going to happen --

8 MR. FISHER: Right.

9 JUSTICE BARRETT: -- if ByteDance  
10 chooses itself not to permit TikTok to walk away  
11 with the code.

12 So does that matter, that distinction  
13 between Lamont and this case?

14 MR. FISHER: No, for two reasons.

15 One, under the Sorrell case, you look  
16 to not just the law itself but its practical  
17 operation. And the practical operation does  
18 prevent us from working with ByteDance. So  
19 that's one answer.

20 And, you know, you bring up Lamont,  
21 and Lamont's actually a very important case, as  
22 I'm sure you all recognize here. It's important  
23 to look not just at the Court's opinion but look  
24 at the briefing in that case. The government  
25 itself never came in and argued there's no right

1 to receive this information. That's the sort of  
2 greater argument. All the government argued  
3 was, of course, Americans have a right to  
4 receive this, but it's just not so much of a  
5 burden to require them to raise their hand to  
6 get it.

7 So Archibald Cox, when he was the  
8 Solicitor General, said to the Court quite  
9 explicitly in the brief we're not even going to  
10 make this argument because we think it's so  
11 contrary to history and tradition. All we're  
12 going to argue is the burden isn't enough.

13 Now what happened is the D.C. Circuit  
14 kind of turned that upside down and said, oh,  
15 Lamont's just a case about the burden. Well,  
16 that's because that's the only argument the  
17 government was even willing to make in this  
18 Court. There was no argument that Americans  
19 didn't have the right to hear that speech.

20 JUSTICE BARRETT: What about -- so I  
21 think this goes to Justice Gorsuch's questions  
22 about antitrust divestiture. Let's say that --  
23 let's say that for antitrust reasons or -- or  
24 let's even say not for that, let's say for  
25 suspect First Amendment reasons, Congress tells



1 Jeff Bezos that he has to divest in the  
2 Washington Post. You know, he can no longer own  
3 the Post. And let's say that neither Bezos nor  
4 the Post challenges that. But let's say that  
5 you represent clients who really like the Post  
6 as it was, who really want to keep receiving the  
7 Post, who really want to publish op eds in the  
8 Post.

9 MR. FISHER: Yeah.

10 JUSTICE BARRETT: Would you have  
11 standing? Like, what kind of a claim would you  
12 be making then?

13 MR. FISHER: I believe so, Justice  
14 Barrett. And the Court has cited Lamont in  
15 other cases in more recent years to say we've  
16 recognized the right of American listeners to  
17 receive information from others. And remember  
18 even that is a lot -- that's only a small part  
19 of the argument I'm making on behalf of the  
20 creators.

21 You know, I don't mean to diminish  
22 Mr. Francisco's arguments on behalf of the  
23 company and ByteDance, but the core speech in  
24 front of you in this case are the videos and  
25 other forms of communication that people like my

1 clients are posting by the millions every day on  
2 this platform to share with other Americans.

3 JUSTICE BARRETT: Can you win if -- is  
4 it possible for you to win and Mr. Francisco to  
5 lose? Or you rise or fall together?

6 MR. FISHER: No, I think it's  
7 possible.

8 JUSTICE BARRETT: How?

9 MR. FISHER: I mean, I don't think we  
10 should.

11 (Laughter.)

12 MR. FISHER: But -- but --

13 JUSTICE BARRETT: Well, is it possible  
14 for you to win and him to lose? I mean, you  
15 want to win.

16 MR. FISHER: Well, let me put it this  
17 way: If you were to conclude that something  
18 about the corporate ownership structure -- and I  
19 think we had some conversation about this  
20 earlier -- impeded Mr. Francisco from being able  
21 to assert full-throated First Amendment rights  
22 in this case, I would step in and say, well,  
23 certainly, we can do that and get you to the  
24 strict scrutiny.

25 And then the arguments pretty much

1 line up. Then you're in a question of, can the  
2 government satisfy strict scrutiny? And I  
3 think, Mr. Chief Justice, you asked about do we  
4 have cases for this and that. I think that the  
5 idea is, yes, we have cases that say once you're  
6 in strict scrutiny that regulating the content  
7 because you don't think it's going to be  
8 pro-American enough or it's going to be too  
9 pro-foreign interest is just verboten under the  
10 First Amendment. That's the history and  
11 tradition.

12           And, Justice Kavanaugh, when you asked  
13 about the broadcast cases, they're grounded not  
14 just in scarcity, but they're grounded in  
15 scarcity in a particular way, and it has to do  
16 with the absolute need Congress has for  
17 licensing in a world of scarce resources. And  
18 so that's the very small carveout that even in  
19 Turner the Court wouldn't extend to cable  
20 television that exists for broadcast licensing.

21           And if you look in the 200-plus years  
22 of our country for any other example of foreign  
23 ownership of media being regulated by Congress,  
24 let alone being permitted in the case law, you  
25 are not going to find it, and I think the reason

1 why is because everybody has understood that if  
2 you're not in a world of scarcity where  
3 licensing is impossible, you cannot give the  
4 government and, in this -- in this more extreme  
5 example, the President himself unbridled  
6 discretion to choose who is a proper owner of a  
7 speech platform in this country.

8           Because it is so hand-in-hand with  
9 viewpoint, as I said earlier, any number of  
10 owners of big media enterprises, whether they be  
11 Americans or foreign citizens, could be accused  
12 of having a particular viewpoint, but speakers  
13 who engage in those platforms have choices they  
14 can make.

15           And so, you know, on behalf of our  
16 creator clients, we find it -- we find it not at  
17 all satisfactory to be told: Well, look, just  
18 go post somewhere else. You know, it's not  
19 enough to tell a writer: Well, you can't  
20 publish an op ed in the Wall Street Journal  
21 because you can publish it in the New York Times  
22 instead. Just like here, to say: You can  
23 publish it on Instagram or some other platform,  
24 not just TikTok.

25           TikTok has a distinct editorial and

1 publicational perspective, and it particularly  
2 benefits people like my clients, who are not  
3 famous people. They're not actors from  
4 Hollywood who have a lot of people following  
5 them. They're ordinary American citizens whose  
6 content that they create on the platform gets  
7 privileged by way of the quality of that  
8 content.

9           And that's what's so powerful about  
10 the platform. So whether you're an ordinary  
11 American citizen or, I might add, whether you're  
12 a presidential candidate in our last election,  
13 if you want to reach new and different  
14 audiences, TikTok is the place people go.

15           JUSTICE ALITO: Well, this may not  
16 make any difference for constitutional purposes,  
17 but just out of curiosity, I'd like you to  
18 explain what the practical consequences would  
19 likely be for your clients if TikTok went dark,  
20 as Mr. Francisco put it.

21           There, I assume, is a great demand for  
22 what TikTok provides, and if TikTok was no  
23 longer there to provide what your clients really  
24 want, is there a reason to doubt that some other  
25 social media company would not jump in and take

1 advantage of this very lucrative market?

2 MR. FISHER: There are two reasons,  
3 Justice Alito. One is many of the declarations  
4 from my clients actually explain they have tried  
5 on other platforms to generate the kind of  
6 audience and engagement they've been able to on  
7 TikTok, and they've fallen dramatically --

8 JUSTICE ALITO: Yeah, I know, they  
9 haven't so far. And I'm just -- you know, I'm  
10 just wondering whether this is like somebody's  
11 attachment to an old article of clothing.

12 I mean, I really love this old shirt  
13 because I've been wearing this old shirt, but I  
14 could go out and buy something exactly like  
15 that, but, no, I like the old shirt.

16 Is that what we have here, or is there  
17 some -- some reason to think that only  
18 ByteDance --

19 MR. FISHER: Yeah.

20 JUSTICE ALITO: -- has this -- can --  
21 that ByteDance has devised this magical  
22 algorithm that all of the geniuses at Meta and  
23 all of these other social media companies, they  
24 couldn't -- no matter, if they put their minds  
25 to it, they couldn't come up with this magical

1 thing?

2 MR. FISHER: I -- I think,  
3 empirically, the other companies have been  
4 trying for a few years to catch up with TikTok  
5 and replicate it and have been very  
6 unsuccessful, and so that ought to tell you  
7 something.

8 And so just imagine the algorithm here  
9 as a collection of thousands of editors. You  
10 know, imagine the floors of an office building  
11 being filled with a collection of editors. You  
12 could imagine a situation where that collection  
13 of genius that is on a particular floor cannot  
14 be replicated by another group of people.

15 JUSTICE ALITO: Okay. All right.

16 MR. FISHER: And that's kind of what  
17 you have here.

18 JUSTICE ALITO: All right. I  
19 understand that.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Justice Thomas?

23 Anything further, Justice Alito?

24 JUSTICE ALITO: Yeah, one other -- one  
25 other question. I'm intrigued by your Mt.

1 Healthy, Hunter versus Underwood argument. I  
2 mean, maybe you're right, but Mt. Healthy arose  
3 in an entirely different context, where you're  
4 trying to get to an employer's motivation.

5 Hunter versus Underwood involved an  
6 extreme situation where the Court looked at the  
7 records of a state constitutional convention and  
8 came to the conclusion apparently that racism  
9 was the only motivation for what was done. But  
10 it does seem to me to be potentially quite  
11 unworkable and contrary to what we've generally  
12 said about legislative intent to apply the Mt.  
13 Healthy framework to a congressional enactment.

14 Do you -- do you recognize or do  
15 you -- do you acknowledge that that would be  
16 very difficult because, when an act of Congress  
17 is passed, there could be more than 250  
18 different motivations for the votes that were  
19 cast by the members.

20 MR. FISHER: Mm-hmm. Yeah, I totally  
21 understand that. And in Hunter, the Court  
22 actually engaged with that problem to some  
23 degree, and what Hunter said is, to avoid that  
24 problem, we're going to look just to two things.  
25 One is the state's brief, which I would say is



1 the Solicitor General's brief by comparison  
2 here, and the text of the law.

3 And, here, that's the only thing I  
4 need to rely on to get you to the place that  
5 they wouldn't have announced -- wouldn't have  
6 enacted this --

7 JUSTICE ALITO: Well, it gets you to  
8 the -- it gets you to the place that this was  
9 part of what motivated Congress, but why does it  
10 get you home?

11 MR. FISHER: Well --

12 JUSTICE ALITO: Particularly when  
13 there's a severability clause in this Act.

14 MR. FISHER: -- it can't be only part  
15 of it. It has to be enough to sustain the  
16 entire Act or at least the parts that you  
17 wouldn't sever from the Act.

18 And so I think the reason why is  
19 because it's not just the content recommendation  
20 algorithm part that can be theoretically, I  
21 guess, severed out, it's also the covered  
22 company provisions, and it's just the whole  
23 approach of the statute that is based on  
24 content, not on data security.

25 JUSTICE ALITO: All right. Thank you.

1 MR. FISHER: So -- okay.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Sotomayor?

4 JUSTICE SOTOMAYOR: No. I'll save it  
5 for the SG.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?  
7 Justice Gorsuch?  
8 Justice Kavanaugh?  
9 Justice Jackson?

10 JUSTICE JACKSON: One quick question.  
11 You -- you repeatedly say that from your  
12 perspective, the government's motivation is that  
13 the content might be too anti-American or too  
14 pro-China, et cetera.

15 MR. FISHER: Uh-huh.

16 JUSTICE JACKSON: So that's why you  
17 think this is a content-based restriction. But  
18 I guess I'm curious if you would say the same  
19 thing if the government had articulated its  
20 rationale as saying, you know, our motivation is  
21 to limit foreign -- foreign interference --

22 MR. FISHER: Yeah.

23 JUSTICE JACKSON: -- in American  
24 social media platforms or discourse. Isn't that  
25 a different motivation --

1 MR. FISHER: I wouldn't -- I --

2 JUSTICE JACKSON: -- from the  
3 standpoint of how we characterize this?

4 MR. FISHER: I agree, but then the  
5 question I would ask if the government said  
6 that, which I think kind of in the reply brief  
7 maybe the government does say that, is that how  
8 on earth are you then serving a national  
9 security interest?

10 You know, if all you're doing is just  
11 saying we don't like a foreign country  
12 rearranging cat and dance videos, like, it's  
13 hard to come in and make a national security  
14 argument.

15 So the only way you get to national  
16 security, which is the government's own  
17 argument, is to look at the substance that's  
18 being rearranged and say we don't like the way  
19 the substance is going to be rearranged and --  
20 and curated differently.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 General Prelogar.

25

1 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

2 ON BEHALF OF THE RESPONDENT

3 GENERAL PRELOGAR: Mr. Chief Justice,  
4 and may it please the Court:

5 The Chinese government's control of  
6 TikTok poses a grave threat to national  
7 security. No one disputes that the PRC seeks to  
8 undermine U.S. interests by amassing vast  
9 quantities of sensitive data about Americans and  
10 by engaging in covert influence operations, and  
11 no one disputes that the PRC pursues those goals  
12 by compelling companies like ByteDance to  
13 secretly turn over data and carry out PRC  
14 directives.

15 Those realities mean that the Chinese  
16 government could weaponize TikTok at any time to  
17 harm the United States. TikTok collects  
18 unprecedented amounts of personal data. And, as  
19 Justice Sotomayor noted, it's not just about the  
20 170 million American users but also about their  
21 non-user contacts, who might not even be  
22 engaging with the platform.

23 That data would be incredibly valuable  
24 to the PRC. For years, the Chinese government  
25 has sought to build detailed profiles about

1 Americans, where we live and work, who our  
2 friends and coworkers are, what our interests  
3 are, and what our vices are.

4           TikTok's immense data set would give  
5 the PRC a powerful tool for harassment,  
6 recruitment, and espionage. On top of that, the  
7 Chinese government's control over TikTok gives  
8 it a potent weapon for covert influence  
9 operations. And my friends are wrong to suggest  
10 that Congress was seeking to suppress specific  
11 types of content or specific types of  
12 viewpoints.

13           Instead, the national security harm  
14 arises from the very fact of a foreign  
15 adversary's capacity to secretly manipulate the  
16 platform to advance its geopolitical goals in  
17 whatever form that kind of covert operation  
18 might take.

19           The Act addresses the threat of  
20 foreign adversary control with laser-like focus.  
21 It requires only divestiture of TikTok to  
22 prevent Chinese government control, and that  
23 divestiture remedy follows a long tradition of  
24 barring foreign control of U.S. communications  
25 channels and other critical infrastructure.

1                   So, no matter what level of First  
2 Amendment scrutiny applies, this Act is valid  
3 because it's narrowly tailored to address  
4 compelling national security threats.

5                   Now my friend, Mr. Fisher, just  
6 emphasized and I acknowledge that millions of  
7 Americans enjoy expressing themselves on this  
8 platform. But the important thing to recognize  
9 is that the Act leaves all of that speech  
10 unrestricted once TikTok is freed from foreign  
11 adversary control.

12                   The First Amendment does not bar  
13 Congress from taking that critical and targeted  
14 step to protect our nation's security.

15                   I welcome the Court's questions.

16                   JUSTICE THOMAS: Is there any  
17 difference between content manipulation by a  
18 non-U.S. company as opposed to a U.S. company?  
19 I didn't hear Mr. Fisher make a distinction  
20 between the two.

21                   GENERAL PRELOGAR: Yes. And I think  
22 the important thing to recognize is that the Act  
23 here is targeting covert content manipulation by  
24 a foreign adversary nation.

25                   Now I understand my friends to say --

1 JUSTICE THOMAS: What difference does  
2 that make?

3 GENERAL PRELOGAR: The difference is  
4 that there is no protected First Amendment right  
5 for a foreign adversary to exploit its control  
6 over a speech platform.

7 JUSTICE THOMAS: No, I mean the  
8 difference -- the difference between covert and  
9 non-covert.

10 GENERAL PRELOGAR: So I think that --  
11 that Congress's concern with a covert operation  
12 was that a foreign adversary could effectively  
13 weaponize this platform behind the scenes in  
14 order to achieve any number of geopolitical  
15 goals.

16 Here -- here are some of the examples  
17 that come to mind. One of the pages out of the  
18 playbook here is for a foreign adversary to  
19 simply try to get Americans arguing with one  
20 another to create chaos and distraction in order  
21 to weaken the United States as a general matter  
22 and distract from any activities that the  
23 foreign --

24 JUSTICE KAGAN: I guess, what --

25 GENERAL PRELOGAR: -- adversary might

1 want to conduct on the world stage.

2 JUSTICE KAGAN: -- what do you mean by  
3 "covert," though? I mean, does "covert" just  
4 mean it's hard to figure out how the algorithm  
5 works? Because we could say that about every  
6 algorithm.

7 GENERAL PRELOGAR: No. The covert  
8 nature of it comes from the fact that it's not  
9 apparent that the PRC is the one behind the  
10 scenes pulling the strings here and deciding  
11 exactly what content is going to be made to  
12 appear on the site.

13 And another way that the PRC --

14 JUSTICE KAGAN: It's just because we  
15 don't know that China's behind it? That's what  
16 "covert" means?

17 GENERAL PRELOGAR: Well, I think --

18 JUSTICE KAGAN: It doesn't have  
19 anything to do with the difficulty of figuring  
20 out what the algorithm is doing? It's just  
21 because people don't know that China is pulling  
22 the strings? That's what "covert" means?

23 GENERAL PRELOGAR: What it means is  
24 that Americans are on this platform thinking  
25 that they are speaking to one another, and this



1 recommendation engine that is apparently so  
2 valuable is organically directing their speech  
3 to each other. And what is covert is that the  
4 PRC, a foreign adversary nation, is instead  
5 exploiting a vulnerability in the system to  
6 suppress and silence views --

7 JUSTICE KAGAN: Well, that's all it  
8 means, that, like, people don't know that  
9 China's behind it? Like, everybody now knows  
10 that China is behind it.

11 (Laughter.)

12 GENERAL PRELOGAR: No, but it -- but  
13 it's the specific -- the specific content that's  
14 being manipulated would be unapparent. And so I  
15 think that --

16 JUSTICE KAGAN: Well, that's true of  
17 every search engine. I mean, you can -- you can  
18 take any of these algorithms, whether it's X or  
19 whether it's, you know, you name it -- what are  
20 the new ones, Bluesky -- I mean, none of  
21 these -- none of these are apparent, right?  
22 You -- you get what you get and you think that's  
23 puzzling. And --

24 (Laughter.)

25 JUSTICE KAGAN: -- and it's all a

1 little bit of a black box. So you can't just  
2 mean it's a black box, it's covert. They're all  
3 black boxes. And if you just mean what's covert  
4 is the fact that there's China behind it, I  
5 mean, honestly, really, like, everybody does  
6 know now that there's China behind it.

7 So I just don't get what this "covert"  
8 word does for you.

9 GENERAL PRELOGAR: I think the problem  
10 with just saying, as a general matter, China has  
11 this capability and might at some point be able  
12 to exercise it and manipulate the platform is it  
13 doesn't put anyone on notice of when that  
14 influence operation is actually happening, and,  
15 therefore, it doesn't guard against the national  
16 security harm from the operation itself.

17 JUSTICE GORSUCH: General, isn't that  
18 a pretty paternalistic point of view? I mean,  
19 don't we normally assume that the best remedy  
20 for problematic speech is counter-speech? And,  
21 you know, TikTok says it could even live with  
22 a -- a disclaimer on its website saying this can  
23 be covertly manipulated by China in case anybody  
24 were left in doubt after today about that  
25 possibility. So you're saying that won't work

1 because?

2 GENERAL PRELOGAR: That won't work  
3 because it is such a generic generalized  
4 disclosure that it wouldn't put anyone  
5 reasonably on notice about when it's actually  
6 happening. And the example I've --

7 JUSTICE GORSUCH: That's your best --

8 GENERAL PRELOGAR: -- been thinking  
9 about is --

10 JUSTICE GORSUCH: -- that's your best  
11 argument, is that the average American won't be  
12 able to figure out that the cat feed he's  
13 getting on TikTok could be manipulated even  
14 though there's a disclosure saying it could be  
15 manipulated?

16 GENERAL PRELOGAR: But imagine if you  
17 walked into a store and it had a sign that said  
18 one of one million products in this store causes  
19 cancer, that is not going to put you on notice  
20 about what product is actually jeopardizing your  
21 health. And I think that's roughly equivalent  
22 to the type of disclosure they're contemplating  
23 here.

24 They brought up the example of the  
25 Foreign Agents Registration Act, FARA.

1 JUSTICE GORSUCH: If that -- if that's  
2 true --

3 GENERAL PRELOGAR: There, you have to  
4 disclose the actual content.

5 JUSTICE GORSUCH: -- if that's true,  
6 then wouldn't that be true for all social media  
7 companies for all content? I mean, every  
8 editor, every newspaper in its editorial room  
9 makes decisions about what it's going to run and  
10 how it's going to say it. And every algorithm  
11 has preferences, whether it's domestic or  
12 foreign. And nobody really knows exactly when  
13 those editorial decisions are being made or how,  
14 but they're generally aware, and we think that  
15 that's enough.

16 GENERAL PRELOGAR: I think, though,  
17 that there is a real risk that when a foreign  
18 adversary has control of that kind of mechanism  
19 and a speech platform in the United States, it  
20 could weaponize -- weaponize that platform to  
21 harm United States' interests. And one of the  
22 key ways that the PRC --

23 JUSTICE GORSUCH: That -- I'm --  
24 I'm --

25 GENERAL PRELOGAR: -- flexes its

1 muscle is to suppress speech.

2 JUSTICE GORSUCH: General, I'm sorry  
3 to interrupt you, but I'm -- again, I'm not --  
4 not -- we're not arguing about the compelling  
5 interest. We're arguing about the tailoring.

6 GENERAL PRELOGAR: Right. And so I  
7 guess what I would say -- you began by saying  
8 the -- the cure for concerning speech is  
9 counter-speech. Here, I dispute the premise  
10 that Congress was specifically concerned about  
11 any particular subject or any particular  
12 viewpoint. It wanted to close off the  
13 capability of a foreign government.

14 But, in any event, it's very hard to  
15 engage in counter-speech when you don't know  
16 because someone is secretly manipulating the  
17 platform behind the scenes. And, in particular,  
18 what the PRC has the capability to do --

19 JUSTICE GORSUCH: Well, wouldn't the  
20 same thing be true --

21 GENERAL PRELOGAR: -- is simply  
22 silence American voices.

23 JUSTICE GORSUCH: -- with a newspaper  
24 owned by a foreign company and a foreign  
25 government? You wouldn't know when it's

1 exercising editorial discretion about this  
2 article or that article or how it's doing it, so  
3 maybe we just need to shut down the Oxford  
4 University Press in America or, you pick it, any  
5 other foreign-owned -- Politico I was told today  
6 is owned by Germany.

7 GENERAL PRELOGAR: So what that --

8 JUSTICE GORSUCH: That would all be  
9 okay on your theory so long as Congress  
10 designates that country a foreign adversary?

11 GENERAL PRELOGAR: We are not asking  
12 the Court to articulate bright-line rules to  
13 govern all kinds of hypothetical situations.

14 JUSTICE GORSUCH: I -- I understand  
15 that, but I am testing --

16 GENERAL PRELOGAR: And --

17 JUSTICE GORSUCH: -- I am testing your  
18 argument.

19 GENERAL PRELOGAR: Yes. And in -- and  
20 what I want to acknowledge is that sometimes the  
21 Court has recognized that a speaker-based  
22 preference might reflect a content-based  
23 preference. And in the context of ownership of  
24 a newspaper, for example, in part, because a  
25 newspaper is a one-way channel of communication

1 and is generally understood to represent to some  
2 extent its publisher's views, maybe the Court  
3 would more readily infer that a regulation  
4 targeting that is actually aiming to target  
5 conduct -- content.

6 JUSTICE GORSUCH: Again, I'm talking  
7 about the --

8 GENERAL PRELOGAR: But I don't think  
9 that the Court could draw the same conclusion  
10 here.

11 JUSTICE GORSUCH: I'm not talking  
12 about the compelling interest or any of that.

13 GENERAL PRELOGAR: Right.

14 JUSTICE GORSUCH: I'm talking about  
15 the tailoring. And -- and you're saying we have  
16 no alternative but to stop this speech  
17 altogether. We can't -- we can't rely on  
18 disclosure. But you say that wouldn't apply to  
19 Politico or to the Oxford University Press  
20 because?

21 GENERAL PRELOGAR: In the circumstance  
22 where you have a newspaper that is understood to  
23 reflect its publisher's views, then you might  
24 think that disclosure would be a more adequate  
25 remedy there because it's not just holding

1     itself out as a forum for speech between other  
2     people.

3                   I think social media platforms do  
4     raise distinct interests in this regard because  
5     what people think when they're engaging with  
6     TikTok is that it's organically feeding them  
7     videos based on the recommendation engine. And  
8     if actually China is behind the scenes engaging  
9     in this kind of covert operation, it does  
10    present a distinct national security risk.

11                   Of course, the other big difference  
12    with a newspaper is it's not likely to be  
13    collecting sensitive personal information about  
14    170 million-plus people and then having the  
15    capacity to send that back to a foreign  
16    adversary.

17                   JUSTICE BARRETT: General Prelogar,  
18    can I --

19                   CHIEF JUSTICE ROBERTS: Counsel --

20                   JUSTICE BARRETT: Oh. Go ahead.

21                   CHIEF JUSTICE ROBERTS: -- I was just  
22    going to say, did I understand you to say a few  
23    minutes ago that one problem that Byte -- is it  
24    ByteDance might be, through TikTok, trying to  
25    get Americans to argue with each other?



1           GENERAL PRELOGAR: That it might be  
2 just trying to foment disruption or --

3           CHIEF JUSTICE ROBERTS: If they do, I  
4 say they're winning.

5           (Laughter.)

6           GENERAL PRELOGAR: That might very  
7 well be true, Mr. Chief Justice, and I think the  
8 point I'm trying to make is that China is a  
9 foreign adversary nation that looks for every  
10 opportunity it has to weaken the United States  
11 and to try to threaten our national security.  
12 And if it has control over this key  
13 communications channel, it's hard to predict ex  
14 ante exactly how it's going to use that as a  
15 tool to harm our interests.

16           But we know it's going to try first  
17 and foremost by seeking to get the data of these  
18 American users, which would be of a piece of all  
19 of the activity the PRC has already undertaken  
20 to breach our laws, hack OPM, for example, and  
21 exfiltrate the background files and security  
22 clearances of 20 million government employees,  
23 the breach of Equifax to get sensitive financial  
24 data, Anthem to get sensitive healthcare data.

25           We know that the PRC has a voracious

1 appetite to get its hands on as much information  
2 about Americans as possible, and that creates a  
3 potent weapon here because the PRC could command  
4 that ByteDance comply with any request it gives  
5 to obtain that data that's in the hands of the  
6 U.S. subsidiary.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 JUSTICE ALITO: Suppose --

9 JUSTICE BARRETT: General Prelogar --  
10 go ahead.

11 JUSTICE ALITO: Suppose that TikTok  
12 had no connection whatsoever with any foreign  
13 government. It was owned instead by an  
14 immensely, immensely rich multinational  
15 corporation, and Congress concluded that this  
16 multinational corporation really has it in for  
17 the United States and is going to use this  
18 extremely popular platform to do everything it  
19 can to undermine the United States in all the  
20 ways in which you think that TikTok may -- may  
21 pursue at the direction of the PRC.

22 Would this -- would that be the same  
23 case?

24 GENERAL PRELOGAR: I think there would  
25 be a first-order question of whether the

1 multinational corporation itself has First  
2 Amendment rights.

3 JUSTICE ALITO: All right. It's a --  
4 it's an American corporation.

5 GENERAL PRELOGAR: So, if it were an  
6 American corporation, I think that -- and  
7 Congress disagreed with the viewpoints or  
8 content the corporation would display,  
9 obviously, that's a direct regulation of  
10 protected speech, and it would trigger strict  
11 scrutiny.

12 I think that's different in kind from  
13 what Congress was worried about here, which was  
14 not regulating speech as such but instead  
15 regulating foreign adversary control and --

16 JUSTICE ALITO: So your whole -- your  
17 argument depends on the fact that what is at  
18 bottom here is the -- the People's Republic of  
19 China using TikTok. That's what your argument  
20 depends on. If this were an American  
21 corporation, it would be an entirely different  
22 thing.

23 GENERAL PRELOGAR: Exactly. And the  
24 reason we know this statute is different is  
25 because all of the same speech that's happening

1 on TikTok could happen post-divestiture. The  
2 Act doesn't regulate that at all. So it's not  
3 saying you can't have pro-China speech, you  
4 can't have anti-American speech. It's not  
5 regulating the algorithm. TikTok, if it were  
6 able to do so, could use precisely the same  
7 algorithm to display the same content by the  
8 same users.

9 All the Act is doing is trying to  
10 surgically remove the ability of a foreign  
11 adversary nation to get our data and to be able  
12 to exercise control over the platform.

13 JUSTICE BARRETT: General Prelogar --  
14 oh, sorry.

15 JUSTICE SOTOMAYOR: I'm sorry.

16 JUSTICE BARRETT: I just wanted you to  
17 respond to Mr. Fisher's argument about the  
18 rights of Americans to receive information, say,  
19 from the PRC or anyone else and that even if  
20 ByteDance did not itself have First Amendment  
21 rights, that Americans would have a First  
22 Amendment right to -- to receive that  
23 information in the Lamont sense.

24 GENERAL PRELOGAR: Yes. So I think  
25 that Lamont reflected a principle that there can

1 be a right of American listeners to receive  
2 information. And if Congress is directly  
3 regulating that based on disagreement with the  
4 speech that's being sent into this country,  
5 that's obviously going to trigger heightened  
6 scrutiny under the First Amendment.

7 But, here, I think the users have to  
8 be asserting a different type of interest  
9 because what Congress was safeguarding against  
10 was not the ability of TikTok to continue to  
11 operate or the users to post content. It was  
12 focused only on foreign adversary control.

13 And so the users would have to  
14 demonstrate that they have some unqualified  
15 First Amendment right to post on a platform  
16 that's controlled by a foreign adversary, which  
17 could use that access to then threaten our  
18 nation's security by gathering data on tens or  
19 hundreds of millions of Americans and also use  
20 it for covert influence operations of whatever  
21 form.

22 And I don't think there's a First  
23 Amendment right to do that.

24 JUSTICE KAGAN: I was trying to think  
25 of whether there's a historical analog here, and

1 this is what I came up with, and you can tell me  
2 whether it's fallacious.

3           You know, in the mid-20th century, we  
4 were very concerned about the Soviet Union and  
5 what the Soviet Union was doing in this country.  
6 And the Communist Party of the United States at  
7 that time was integrally attached to the  
8 Communist International, which was essentially a  
9 Soviet operation, right?

10           So, if Congress had said: Well, it's  
11 very nice, we can have the Communist Party  
12 U.S.A., but it has to divest, it has to  
13 completely divorce itself from the common turn  
14 and from any international ties that it has, do  
15 you think that that would have been absolutely  
16 fine? And so, if the answer is yes, yes, it  
17 would have been fine, it's just like this case,  
18 or, if the answer is no, why is it not like this  
19 case?

20           GENERAL PRELOGAR: So I guess I think  
21 I would need to know info -- more information  
22 about how the international organization is able  
23 to exercise control over the American affiliate  
24 and if it had the capacity, for example, to, in  
25 an unqualified fashion, gather data from that

1 affiliate in a way that was going to jeopardize  
2 our nation's security or --

3 JUSTICE KAGAN: Well, I'm talking more  
4 about --

5 GENERAL PRELOGAR: Yeah.

6 JUSTICE KAGAN: -- sort of the  
7 content. Let's put --

8 GENERAL PRELOGAR: Yeah.

9 JUSTICE KAGAN: -- the data collection  
10 piece of this aside, which seems not very  
11 pertinent to my 1950s analog.

12 But, you know, we were very concerned  
13 about the kind of speech that the Communist  
14 Party was making in the United States. And it  
15 turns out that that content was pretty well  
16 scripted someplace else.

17 GENERAL PRELOGAR: I think, if it was  
18 specifically a concern about the content, then  
19 that would trigger heightened scrutiny under the  
20 First Amendment. We're not trying to run away  
21 from that principle here. Instead, we're  
22 making, I think, a narrower argument.

23 JUSTICE KAGAN: Well, then I think  
24 that -- that you're a little -- I think you've  
25 just given your thing away because content

1 manipulation is a content-based rationale.

2           We think that this foreign government  
3 is going to manipulate content in a way that  
4 will -- that concerns us and may very well  
5 affect our national security interests. Well,  
6 that's exactly what they thought about Communist  
7 Party speech in the 1950s, which was being  
8 scripted in large part by international  
9 organizations or directly by the Soviet Union.

10           GENERAL PRELOGAR: I disagree that the  
11 concern with covert content manipulation is  
12 itself content-based or that it looks anything  
13 like the kinds of laws this Court has previously  
14 said are content-based.

15           The Court most recently in City of  
16 Austin said you only have a content-based law  
17 when Congress is setting out to discriminate  
18 against particular subject matters or particular  
19 viewpoints.

20           So it's not enough that the law is --  
21 is regulating in the space that involves content  
22 in some way. You have to have this motive by  
23 Congress to actually want to suppress speech on  
24 certain topics or certain viewpoints.

25           Here, Congress just wants to cut the



1 PRC out of the equation altogether, and all of  
2 the same speech could continue to happen on the  
3 platform.

4           It's like patching up a backdoor  
5 vulnerability that the PRC has that we can't  
6 totally see around all the corners to imagine  
7 how it could use it against our interests, but  
8 we know the PRC will do whatever it can to try.

9           And I think that is different in kind  
10 from imputing to Congress some motive to  
11 specifically get more speech on certain topics  
12 or with certain viewpoints. You know, this law  
13 was passed by broad bipartisan majorities in  
14 both Houses of Congress, and our legislatures --  
15 our legislators don't always agree on  
16 everything. I think it's unlikely that all of  
17 them had exactly the same views about what's  
18 good content on TikTok or what are good  
19 viewpoints. They weren't united on that.

20           What they were united around was the  
21 idea that it is a grave threat to our nation if  
22 the PRC can itself behind the scenes be  
23 controlling how this platform operates.

24           JUSTICE ALITO: Why doesn't this --  
25 why doesn't this Act classify on the basis of

1 speaker?

2 GENERAL PRELOGAR: I do think that  
3 when it comes to the PRC and ByteDance, you  
4 could treat this as a speaker-based restriction.

5 JUSTICE ALITO: And aren't speech --  
6 speaker-based restrictions almost always  
7 viewpoint-based restrictions, content-based  
8 restrictions?

9 GENERAL PRELOGAR: The Court has said  
10 it depends. It hasn't applied an inflexible  
11 rule that anytime you are regulating certain  
12 speakers you are invariably regulating based on  
13 content. Instead, the Court has said it  
14 warrants closer consideration.

15 And, here, if you look at the U.S.  
16 speakers, TikTok U.S. and the users, none of  
17 them are being regulated in a way that suggests  
18 its disagreement with their content. It's all  
19 about what our foreign adversary is doing with  
20 respect to the platform.

21 JUSTICE ALITO: It's hard for me to --  
22 it's hard for me to think of situations, maybe  
23 they exist, where a classification based on  
24 speaker is not viewpoint- or content-based  
25 restrictions.

1           I mean, somebody says Joe can't talk  
2 anymore. We're going to shut Joe up. And we  
3 don't know what he's going to say tomorrow or  
4 two weeks from now. We don't know what he's  
5 going to discuss, but whatever he says is bad  
6 because Joe is a bad person.

7           I mean, that's -- that's viewpoint-  
8 and content-based, isn't it?

9           GENERAL PRELOGAR: I think, when it  
10 comes to a foreign adversary, it's not right to  
11 view it that way, and the reason for that again  
12 is this is a sophisticated adversary nation and  
13 we can't just simplistically say: Oh, what the  
14 PRC is going to want is to see more pro-China  
15 content on this app.

16           As Chief Judge Srinivasan observed,  
17 there are various ways that the PRC could try to  
18 create some kind of false flag operation and  
19 actually promote anti-China content, not to  
20 dictate how Americans should think about things  
21 but simply to create some trumped-up  
22 justification for a military or economic action  
23 that the foreign adversary wants to take against  
24 us.

25           And I don't think a concern with

1 trying to ward off that capability --

2 JUSTICE GORSUCH: Why -- why isn't  
3 that -- why isn't that viewpoint or content  
4 still? We don't know what the content's going  
5 to be, but we know Joe is bad.

6 GENERAL PRELOGAR: Because I think the  
7 better classification is to recognize that what  
8 we're trying to prevent is not the specific  
9 subject matter, the specific viewpoints, but the  
10 technical capability of a foreign adversary  
11 nation to use a communications channel against  
12 this.

13 JUSTICE GORSUCH: I guess I'm just  
14 struggling how covert content manipulation isn't  
15 content-based restriction.

16 GENERAL PRELOGAR: So, again, it's  
17 because --

18 JUSTICE GORSUCH: I mean, the word --  
19 it's kind of hard to avoid the word "content" --

20 GENERAL PRELOGAR: I don't --

21 JUSTICE GORSUCH: -- and it's kind of  
22 hard to avoid the word "viewpoint" here, isn't  
23 it?

24 GENERAL PRELOGAR: I don't dispute  
25 that it's related to content, but I don't think

1 it reflects Congress seeking to set out in  
2 advance what kind of speech we should have  
3 reflecting certain views on certain topics.

4           Instead, it's about trying to close  
5 off a vulnerability that our foreign adversary  
6 nation could exploit.

7           And I would be remiss if I didn't  
8 point out that even if you thought this was  
9 content-based, all that means is that we're in  
10 strict scrutiny. And, as the D.C. Circuit  
11 recognized here, we think that this law serves  
12 compelling national security concerns that sound  
13 in some of the same arguments that I'm making  
14 here and that have a longstanding correspondence  
15 to history and tradition --

16           JUSTICE GORSUCH: And then we get to  
17 the --

18           GENERAL PRELOGAR: -- of trying to  
19 prevent foreign control.

20           JUSTICE GORSUCH: -- and then we get  
21 to the question whether there's a less  
22 restrictive means, I get that, and whether  
23 disclosure might suffice.

24           On -- on -- on -- on the data security  
25 point, your friends on the other side make the

1 argument that if that were the concern, Congress  
2 could ban TikTok U.S. from sharing data with  
3 anyone on -- on pains of penalties that would  
4 put people in prison and shut the company down  
5 in the future, as the government did, for  
6 example, with Arthur Andersen.

7           Why -- why isn't that a less  
8 restrictive means available?

9           GENERAL PRELOGAR: So I was surprised  
10 to hear Petitioner offer that up today because  
11 there was a long course of discussion between  
12 the executive branch and ByteDance and TikTok  
13 leading up to Congress's enactment of this Act  
14 that spanned over four years, an extensive  
15 conversation about what limitations could be  
16 placed to protect Americans' data.

17           And it was never a suggestion that  
18 there would be any way to create a true firewall  
19 that would prevent the U.S. subsidiary from  
20 sharing data with the corporate parent.

21           And the reason for that sounds in the  
22 technological features of this application. I  
23 think there can be no reasonable dispute that  
24 the source code development and the maintenance  
25 of this algorithm rests in China, which is why

1 China has sought to try to control export  
2 restrictions with respect to the algorithm. And  
3 what that means is you need substantial data  
4 flows between the companies in order to continue  
5 to modify that algorithm, refine it and so  
6 forth.

7 So I don't think that that was an  
8 option ever on the table, including with respect  
9 to the proposed national security agreement that  
10 was insufficient in -- in protecting our data  
11 privacy and security concerns.

12 JUSTICE SOTOMAYOR: That didn't come  
13 across enough in the briefs. If we are in the  
14 world of data protection as opposed to  
15 content -- content control, I think the -- it's  
16 hard to get around the post-divestiture  
17 provision that says you can't do business with  
18 them on the algorithm because that very much is  
19 content-based. It's a content-based  
20 restriction.

21 But what you're saying is you can't do  
22 it for a data control reason, meaning that you  
23 can't really run their algorithm without sharing  
24 the very data that we are concerned about as a  
25 threat, correct?

1           GENERAL PRELOGAR: That's right,  
2 Justice Sotomayor. And you don't have to take  
3 my word for it. You can look at the specific  
4 terms of the national security agreement that  
5 ByteDance itself proposed. The relevant  
6 definition of the accepted data is at JA 239 to  
7 240. And it references categories of  
8 information that would of necessity,  
9 technological necessity and business necessity,  
10 have to flow back to China.

11           And the relevant categories are in the  
12 sealed appendix, but I would really encourage  
13 the Court to look this up because it's  
14 eye-opening. It is at the court of appeals  
15 sealed appendix 249 to 252 and 254.

16           If you look at that information, it  
17 was a wealth of data about Americans that was  
18 going to have to go back to China in order for  
19 the platform to just continue its basic  
20 operations. And there's a -- a legitimate  
21 commercial justification for that, but it  
22 creates this gaping vulnerability in the system  
23 because once that data is in China, the PRC can  
24 demand that ByteDance turn it over and keep that  
25 assistance secret.



1                   And the one final point on this is  
2                   that ByteDance was not a trusted partner here.  
3                   It wasn't a company that the United States could  
4                   simply expect to comply with any requirements in  
5                   good faith. And there was actual factual  
6                   evidence to show that even during a period of  
7                   time when the company was representing that it  
8                   had walled off the U.S. data and it was  
9                   protected, there was a well-publicized incident  
10                  where ByteDance and China surveilled U.S.  
11                  journalists, using their location data -- this  
12                  is the protected U.S. data -- in order to try to  
13                  figure out who was leaking information from the  
14                  company to those journalists.

15                  CHIEF JUSTICE ROBERTS: General, you  
16                  want us to look at that and you get to look at  
17                  it, but your friends on the other side don't get  
18                  to look at it. That doesn't seem fair.

19                  GENERAL PRELOGAR: That's the sealed  
20                  appendix, Mr. Chief Justice, so it's their  
21                  information. They can look at it. It's just  
22                  under seal to protect their proprietary business  
23                  information.

24                  CHIEF JUSTICE ROBERTS: Okay.

25                  JUSTICE BARRETT: General, so I want

1 to go back to the discussion about content  
2 discrimination and we're going to shut Joe up.  
3 Here, it seems to me like we are saying to  
4 ByteDance we want to shut you up. And so let's  
5 say that I think that that is content  
6 discrimination based on speaker.

7 Tell me -- if -- if I think that, tell  
8 me if I have to conclude that it is also  
9 speaker-based discrimination and content-based  
10 discrimination for TikTok?

11 GENERAL PRELOGAR: No, it is not, and  
12 the reason for that is because it would be an  
13 anomalous principle to say that an entity  
14 outside the United States that can't assert its  
15 own First Amendment rights can somehow  
16 manufacture that right through the expediency of  
17 forming a U.S. subsidiary, especially one that  
18 it wholly controls.

19 JUSTICE BARRETT: So you don't have to  
20 stand on that argument that you were having with  
21 Justice Alito and Justice Gorsuch to still have  
22 your point about content discrimination?

23 GENERAL PRELOGAR: That's right. And  
24 I think, if you're focusing in on the relevant  
25 U.S. entities here, TikTok U.S. and the users

1 themselves, this Act isn't regulating them in  
2 any way. It's not trying to dictate the  
3 algorithm that TikTok U.S. can use. And, in  
4 fact, Congress, I think, was doing everything it  
5 could to preserve access to TikTok in the United  
6 States, in recognition that Americans enjoy  
7 expressing themselves and building community on  
8 the site.

9 JUSTICE BARRETT: One last quick  
10 question --

11 JUSTICE ALITO: Well, I don't know,  
12 General --

13 JUSTICE BARRETT: Sorry, just one last  
14 quick question.

15 JUSTICE ALITO: No, no, go ahead.

16 JUSTICE BARRETT: Justice Gorsuch had  
17 asked your friends on the other side whether the  
18 new administration on January 20th could extend  
19 the deadline. What's the -- your position on  
20 that?

21 GENERAL PRELOGAR: So I think it tees  
22 up a statutory interpretation question of  
23 whether there can be an extension after the time  
24 period for divestiture has lapsed. I would  
25 think the Court might start with its decision in

1 the HollyFrontier case, which did recognize the  
2 ability to get an extension after a lapse like  
3 that.

4 JUSTICE BARRETT: So it's your  
5 position that they could?

6 GENERAL PRELOGAR: We have not run it  
7 to ground, in part, because it's simply not  
8 presented here, and I'm not prepared to take a  
9 position on that statutory interpretation  
10 question.

11 I do emphasize, though, that my  
12 friends have pointed to January 19th or nine  
13 days from now as a moment when TikTok might go  
14 dark. At the outset, of course, Congress was  
15 hoping to prompt a divestiture, but I think the  
16 more important thing to -- to focus on now is  
17 that even if that were to happen, Congress  
18 specifically anticipated it and provided  
19 authority to lift these restrictions as soon as  
20 there's a qualified divestiture.

21 And the reason for that is because  
22 foreign adversaries do not willingly give up  
23 their control over this mass communications  
24 channel in the United States, and I think  
25 Congress expected we might see something like a

1 game of chicken, ByteDance saying we can't do  
2 it; China will never let us do it.

3 But, when push comes to shove and  
4 these restrictions take effect, I think it will  
5 fundamentally change the landscape with respect  
6 to what ByteDance is willing to consider, and it  
7 might be just the jolt that Congress expected  
8 the company would need to actually move forward  
9 with the divestiture process.

10 JUSTICE ALITO: Well, that's --

11 GENERAL PRELOGAR: So it's not  
12 irrevocable.

13 JUSTICE ALITO: That -- that's an  
14 interesting point, and I hope Mr. Francisco or  
15 Mr. Fisher, whoever's delivering the rebuttal,  
16 will address it.

17 So, if we were to affirm and TikTok  
18 were forced to cease operations on January 19th,  
19 you say that there could be divestiture after  
20 that point and TikTok could again begin to  
21 operate the way -- continue to operate?

22 GENERAL PRELOGAR: That's exactly  
23 right. There's nothing permanent or irrevocable  
24 that happens on January 19th. And I think that  
25 Congress might have thought that we get in a

1 situation here where a foreign adversary is  
2 doing whatever it can to just not comply. It's  
3 hoping the United States is going to blink first  
4 through our court system or through the  
5 executive branch getting cold feet about  
6 enforcing the law. But Congress set a deadline  
7 and I think it thought that deadline would have  
8 a forcing function.

9 JUSTICE ALITO: Let me ask you a  
10 question about your -- your effort to draw a  
11 distinction between ByteDance's speech and  
12 TikTok's speech.

13 So suppose that the -- the People's  
14 Republic of China funds a movie and -- and there  
15 is an entity in the United States, a U.S.  
16 corporation, that thinks, wow, this is a great  
17 movie. And while the PRC would not have a First  
18 Amendment right to show it in the United States,  
19 would you say that the American company would  
20 not have a First Amendment right to do that  
21 because whatever expression there is in that  
22 movie, it's the PRC's expression; it's not their  
23 expression?

24 GENERAL PRELOGAR: No. No, I wouldn't  
25 make that argument. And I want to be really

1 careful --

2 JUSTICE ALITO: I thought that was the  
3 argument that was being made. No?

4 GENERAL PRELOGAR: No. So our  
5 argument is that this is not a direct regulation  
6 of protected speech in the first place, or at  
7 most, it would warrant intermediate scrutiny  
8 because of the indirect effects that it might  
9 have on the American users or on the U.S.  
10 subsidiary. We're not suggesting that if  
11 Congress sought to directly regulate and  
12 prohibit speech in the United States based on  
13 concerns about its content or viewpoint, that's  
14 somehow immune from First Amendment scrutiny  
15 just because it comes from a foreign source.

16 Obviously, that kind of law is going  
17 to trigger strict scrutiny. And I imagine it  
18 would be a different constitutional analysis  
19 because it's hard to imagine the same profound  
20 national security harms that would exist in that  
21 scenario as compared to what we have here.

22 JUSTICE ALITO: Thank you.

23 JUSTICE JACKSON: General, isn't the  
24 whole point of the divestiture requirement that  
25 the content on TikTok would be different if it

1 was owned by a different company? I'm still  
2 struggling with your insistence that this is  
3 content-neutral versus content-based when we  
4 have that kind of circumstance.

5 GENERAL PRELOGAR: The reason that I  
6 am continuing to try to hold the line on that is  
7 because there is nothing in the Act that would  
8 directly dictate any different mix of content on  
9 TikTok. The U.S. subsidiary could use the same  
10 algorithm, show the same content by the same  
11 users in exactly the same order. It's not about  
12 trying to interfere with the U.S. subsidiary's  
13 exercise of editorial judgment in any relevant  
14 sense.

15 Instead, all Congress was doing was  
16 homing in on the problems of having a foreign  
17 adversary be able to interject itself and be  
18 able to harvest the data or exercise --

19 JUSTICE JACKSON: But your friends on  
20 the other side say that the motivation for doing  
21 that is because the foreign adversary might  
22 influence or change the content. So content  
23 is -- I mean, content matters, doesn't it?

24 GENERAL PRELOGAR: I -- certainly, I  
25 think that content was relevant to Congress's



1 concern about an adversary having control over  
2 the communications channel. I think not, again,  
3 because of any particular concern about  
4 viewpoints or subjects --

5 JUSTICE JACKSON: But isn't that  
6 relevance --

7 GENERAL PRELOGAR: -- but just that  
8 this would be a --

9 JUSTICE JACKSON: -- isn't that  
10 relevance enough to trigger at least some  
11 scrutiny, a heightened scrutiny, from the  
12 standpoint of our legal tests?

13 GENERAL PRELOGAR: I certainly  
14 understand that intuition, and if the Court  
15 thought that it were prudent to simply try to  
16 rule narrowly here and not dictate broader First  
17 Amendment principles, we have no problem with  
18 the Court assuming that heightened scrutiny  
19 applies. We think the law easily satisfies it.  
20 We do think that intermediate scrutiny is a more  
21 appropriate framework for this kind of law  
22 that's not directly targeting protected speech.

23 But, in any event, there's a  
24 compelling national security interest here, and  
25 the law isn't just narrowly tailored; it's

1 precisely tailored. It's trying to fix the  
2 thing that's creating the problem, which is the  
3 PRC's involvement and the Chinese government's  
4 ability to exercise this control over the  
5 corporate entities.

6 JUSTICE KAVANAUGH: How are we  
7 supposed to think about the two different  
8 rationales here and how they interact, the data  
9 collection rationale, which seems to me at least  
10 very strong; the covert content manipulation  
11 rationale, as the hypotheticals have illustrated  
12 raise much more challenging questions for you  
13 about how far that goes. And if that alone --  
14 if you didn't have the data collection piece,  
15 you only had the covert content manipulation  
16 piece, and then Mr. Fisher's point, Mr.  
17 Francisco's, that Congress would not have  
18 enacted this just based on the data collection  
19 rationale alone, just your understanding of how  
20 the two arguments fit together.

21 GENERAL PRELOGAR: Sure. And -- and  
22 let me walk through our defense of the data  
23 protection rationale and why we think it's a  
24 full justification for this law and the Court  
25 could stop there and then be responsive to their

1 arguments that somehow the interest in  
2 preventing covert manipulation somehow taints  
3 it.

4           So just on data protection, I think  
5 that it should be beyond dispute that, of  
6 course, our nation has an enormous interest in  
7 keeping the sensitive data out of the hands of  
8 our foreign adversary. And it should also be  
9 beyond dispute that our foreign adversary has an  
10 existing capability through its laws and through  
11 the way that these companies are integrated to  
12 get its hands on that data.

13           There is no question that Congress was  
14 sincerely motivated by that concern. There's a  
15 whole lead-up to the statute here where the  
16 executive branch across two different  
17 presidential administrations was expressing  
18 concerns about the data problems. Congress was  
19 extensively briefed on those problems.

20           It passed a companion data protection  
21 statute at the same time that was intended to  
22 prevent selling data to foreign adversary  
23 nations. The statute is shot-through with  
24 protections that I think are key to this concern  
25 about closing off the vulnerability of access to

1 the data.

2 So that's a sincere justification for  
3 Congress's desire here to act. We think it's a  
4 compelling interest and it's narrowly tailored.

5 Then you get to the question of what  
6 to do about the fact that there's also this  
7 interest in covert content manipulation. And in  
8 the First Amendment context, this Court in cases  
9 like Heffron has made clear that once you have a  
10 justification that satisfies the First  
11 Amendment, you don't need to go further and look  
12 at other justifications to decide whether they  
13 would independently satisfy First Amendment  
14 scrutiny.

15 So I think it's not necessary for the  
16 Court to go on and probe whether it thinks that  
17 covert content manipulation itself independently  
18 justifies the law.

19 Now, my friends say that's all fine  
20 and good, but they think covert content  
21 manipulation is just per se illegitimate. And I  
22 honestly don't understand how that argument  
23 could carry the day.

24 Because just imagine if Congress  
25 passed a law that said the PRC can't covertly

1     manipulate TikTok. Obviously, that law's not  
2     going to violate any constitutional principle.  
3     It's a laudable goal, I think, for our  
4     legislature to protect us from foreign adversary  
5     interference like that. And so there's nothing  
6     something -- there's nothing that's inherently  
7     impermissible about wanting to guard against  
8     that risk.

9             Maybe you could say that it sweeps in  
10    too much protected speech in the way it's  
11    operationalized in the Act here, but there's  
12    certainly no fundamental taint -- taint or  
13    anything akin to racial discrimination to call  
14    into question whether Congress could seek to  
15    vindicate that as one of many interests.

16            So I guess to just kind of bring it  
17    all together, what I would say to the Court is  
18    they have basically acknowledged the data  
19    protection is a compelling interest. That was  
20    Congress's real interest. It provides a  
21    sufficient basis on its own to uphold this law.  
22    The Court could say just that and -- and affirm.

23            JUSTICE SOTOMAYOR: I don't know how  
24    we do that, unless we accept your argument that  
25    the post-divestiture provision that stops them

1 from conferring on the algorithm is not a speech  
2 impediment; meaning it -- it's very hard for me  
3 to say that it's not motivate -- to decide that  
4 question, that it is a speech impediment, and  
5 one that on its face itself has to be analyzed  
6 separately from the data.

7           GENERAL PRELOGAR: So, Justice  
8 Sotomayor, let me begin by saying, again, that  
9 we do think that an interest in preventing any  
10 operational agreement between the U.S.  
11 subsidiary and ByteDance, which is the relevant  
12 provision you're talking about, is justified by  
13 data protection alone. And that includes with  
14 respect to cooperation on a content  
15 recommendation algorithm, specifically because  
16 of the concern that it necessitates data flows  
17 between the companies.

18           So I think that as a factual matter,  
19 that could justify Congress enacting --

20           JUSTICE SOTOMAYOR: So if it's --

21           GENERAL PRELOGAR: But to the extent  
22 that you think that actually the prohibition on  
23 coordinating with respect to an algorithm  
24 reflects some kind of impermissible  
25 content-based problem with the statute, the

1 statute has a severability clause.

2           And I certainly don't think that it  
3 would give the Court a basis to invalidate this  
4 law or to -- or to stop it from operating with  
5 respect to all of the provisions that operate to  
6 protect data security. At most, it would  
7 suggest that that little piece of the law has to  
8 be on its own severed from the rest of how the  
9 statute operates.

10           JUSTICE SOTOMAYOR: How does that  
11 affect whether we would apply -- because  
12 assuming it's data protection, then I would  
13 think that strict scrutiny wouldn't necessarily  
14 apply. I could understand applying intermediate  
15 scrutiny.

16           But how do we do that with respect to  
17 this part, the algorithm issue? How do we get  
18 to intermediate scrutiny with respect to that?

19           GENERAL PRELOGAR: The way you get to  
20 intermediate scrutiny there is to recognize that  
21 prohibiting foreign adversary control over the  
22 operations of the platform, including with  
23 respect to the fundamental backbone of the  
24 system, is not based on any protected speech or  
25 -- or content-based in the relevant sense.

1                   And I've been thinking of it as akin  
2                   to something like a piece of software you might  
3                   have on your phone that would allow the Chinese  
4                   government to listen in on every American  
5                   conversation. If Congress wanted to enact a law  
6                   that patched up that vulnerability and said:  
7                   You can't use that piece of software or you  
8                   can't coordinate with Chinese companies with  
9                   respect to it, clearly we would recognize that  
10                  closing off that capability of China is a  
11                  laudable and, in fact, compelling government  
12                  interest.

13                  And I think when it comes to the risks  
14                  that foreign adversary control pose here, it's  
15                  similar in kind. It's simply trying to prevent  
16                  access by the Chinese government to the TikTok  
17                  system writ large and that includes through the  
18                  use of the algorithm.

19                  JUSTICE SOTOMAYOR: Thank you.

20                  JUSTICE KAVANAUGH: Could the  
21                  president say that we're not going to enforce  
22                  this law?

23                  GENERAL PRELOGAR: I think as a  
24                  general matter, of course the president has  
25                  enforcement discretion.



1 JUSTICE KAVANAUGH: And would that  
2 then adequately -- would that be binding, in  
3 other words, protect the regulated community  
4 such that it could rely on that under due  
5 process principles going forward?

6 GENERAL PRELOGAR: That raises a  
7 tricky question, so I think there would be a  
8 strong --

9 JUSTICE KAVANAUGH: Well, then it's  
10 not going to be adequate, right?

11 GENERAL PRELOGAR: Well, I think there  
12 is a strong due process argument that the  
13 third-party service providers could invoke, if  
14 there were enforcement action based on a period  
15 of time when the president said the law wouldn't  
16 be enforced. The con -- kind of conical case --

17 JUSTICE KAVANAUGH: They're not going  
18 to take that risk unless they have the assurance  
19 that a presidential statement of non-enforcement  
20 is, in fact, something that can be fully relied  
21 on because the risk is too severe otherwise,  
22 right?

23 GENERAL PRELOGAR: I think that they  
24 might judge that based on this Court's precedent  
25 in the due process space and principles of

1 entrapment by estoppel, maybe they have a  
2 sufficient safeguard here to allow them to  
3 continue to operate.

4 I would think even before a  
5 non-enforcement policy were announced, of  
6 course, the President-elect would want to review  
7 all of the updated national security information  
8 that has come in over the last four years that  
9 undergird Congress's judgment here, but the  
10 final thing I would say is that even if you  
11 think the third-party providers are simply going  
12 to choose not to continue to provide these  
13 services because it's too much of a risk to take  
14 on, again, that's not anything permanent or  
15 irrevocable. And that might be just what the  
16 PRC and ByteDance need to start taking seriously  
17 some of the -- the public reporting about  
18 interest in acquiring the company.

19 JUSTICE ALITO: At one point Mr.  
20 Francisco suggested that what we might want to  
21 do and what he would regard as certainly  
22 preferable to a decision affirming on the merits  
23 was -- is to issue an injunction pending, I  
24 guess, consideration of what we now regard as  
25 the -- as the cert petition that was filed here.

1 What do you think of that suggestion?

2 GENERAL PRELOGAR: So I think this  
3 Court doesn't have any basis to enter a  
4 temporary injunction, unless it thinks  
5 Petitioners are likely to succeed on the merits  
6 of the First Amendment claim.

7 And to be honest, you know, I -- I  
8 would -- I think that there is no argument to be  
9 made that you should find that likelihood of  
10 success. This is an act of Congress. This  
11 isn't some unilateral action by the executive  
12 branch, but it actually was action in parallel  
13 between the Executive and Congress where  
14 Congress took action to close up a loophole in  
15 some of our laws. The Executive had tried to  
16 force divestiture of TikTok under the Trump  
17 administration, but that had gotten tied up in  
18 litigation about those authorities.

19 So Congress came in and provided  
20 additional authority based on a substantial  
21 record, including with respect to the data harm.  
22 And I don't see any basis for this Court to  
23 displace the deadline that Congress set without  
24 finding that actually there is a potential First  
25 Amendment problem here.

1                   JUSTICE ALITO: Do -- do you think we  
2 have the authority to issue an administrative  
3 stay as we have done in -- in other cases or do  
4 you think that the January 20 deadline prohibits  
5 us from doing that?

6                   GENERAL PRELOGAR: I don't think this  
7 Court has a formal basis to not issue an  
8 administrative stay, if it believed that that  
9 was necessary to assist in the Court's own  
10 consideration of the case.

11                   And I would obviously defer to the  
12 Court and whether it has a sufficient time to  
13 resolve the case, but we are here ready to  
14 submit the case today. And I think it is in the  
15 interest of Congress's work and our national  
16 security to resolve the case and allow the  
17 statute to take effect.

18                   JUSTICE ALITO: Can I just test your  
19 -- to see whether your recollection of what Mr.  
20 Francisco said about a warning is consistent  
21 with mine? I did not hear him say -- he can  
22 address this in -- in rebuttal -- that it would  
23 be acceptable to his client if Congress had said  
24 there has to be a stark warning on every TikTok  
25 such as: Warning, communist -- communist China

1 is using TikTok to manipulate your thinking and  
2 to gather potential blackmail material. Did you  
3 hear him say that that would be okay?

4 GENERAL PRELOGAR: I don't think he's  
5 made that concession, but even if he had, I  
6 don't think that would address the government's  
7 national security concerns.

8 And one of the -- the points here is  
9 that it's not just data privacy. So even if you  
10 could somehow put users on notice that the PRC  
11 could obtain their data and they choose to  
12 disregard that, it's not a data privacy  
13 interest. It's a national security interest.

14 There's a distinct sovereign harm to  
15 the United States if our foreign adversary could  
16 collect this massive data set about 170 million  
17 Americans. And as Justice Kavanaugh touched on,  
18 you know, there are a lot of teenagers using  
19 TikTok today who might ignore a warning like  
20 that and not really care, but they're going to  
21 grow up and they might become members of our  
22 military, they might become senior government  
23 officials. And for the -- the Chinese  
24 government to have this vast trove of incredibly  
25 sensitive data about them I think obviously

1 exposes our nation as a whole to a risk of  
2 espionage and blackmail.

3 JUSTICE ALITO: Thank you.

4 GENERAL PRELOGAR: I did want to touch  
5 briefly on the questions about history and  
6 tradition here because my friends have said  
7 several times that the Communications Act of  
8 1934, which we think is roughly analogous to the  
9 type of restriction that Congress was seeking to  
10 enact here, is justified entirely by concerns  
11 about scarcity, how you can't have sufficient  
12 bandwidth.

13 And I of course recognize that  
14 scarcity is what created the need for a  
15 licensing regime in the first place, but I think  
16 it's important to clarify the historical record  
17 here that in choosing to limit foreign control  
18 of radio stations, of broadcast stations,  
19 Congress specifically cited a concern about  
20 national security. That is written into the  
21 statute. National defense was one of the listed  
22 purposes of having that kind of restriction.

23 And so I don't think my friends can  
24 succeed in being dismissive of that concern  
25 about history and tradition and what it shows

1 about the national security judgments that  
2 undergird this law.

3           The one other factual point I wanted  
4 to make, to be responsive to a few points that  
5 my friends have touched on, relates to whether  
6 TikTok U.S. has the ability to alter this  
7 algorithm, whether divestiture is feasible, how  
8 ByteDance has manipulated the platform in the  
9 past.

10           With respect to the algorithm, I think  
11 we're simply talking past each other. We don't  
12 dispute that TikTok U.S. might engage in some  
13 functions in the United States to customize the  
14 algorithm for a U.S. audience. The thing we're  
15 worried about is happening long before that,  
16 over in China, where ByteDance is developing the  
17 source code, creating the basic backbone and  
18 functioning of the system, and is then blasting  
19 out the algorithm for use by the various  
20 subsidiaries in their home country.

21           So we're not seeking to regulate any  
22 activity that TikTok U.S. is engaged in here.  
23 Instead, what Congress is doing is trying to  
24 close off the vulnerability of PRC access  
25 abroad.

1                   With respect to the feasibility of  
2                   divestiture, my friends have said it would have  
3                   been impossible to do this within 270 days. You  
4                   know, at the outset, obviously there's no  
5                   inherent impediment to divesting a social media  
6                   company. We just saw Elon Musk buy X, or  
7                   Twitter, in about six months from offer to  
8                   completion.

9                   And even with respect to this  
10                  particular company, I think my friends are not  
11                  well positioned to complain about the timeline  
12                  because they've been on notice since 2020 that  
13                  unless they could satisfy the federal  
14                  government's national security concerns,  
15                  divestiture might be required.

16                  But, in any event, I don't think that  
17                  the Court should fault Congress for trying to  
18                  balance competing interests here in making sure  
19                  that there was a period for compliance and  
20                  trying to preserve access to the platform for  
21                  Americans while taking steps to safeguard  
22                  against the risk to national security.

23                  Finally, with respect to the question  
24                  of whether ByteDance has taken action on the  
25                  PRC's demands, there is evidence in the record



1 that Congress consulted to demonstrate that  
2 outside of China, ByteDance has taken action to  
3 misappropriate data at the PRC's request. That  
4 included efforts to track dissidents in Hong  
5 Kong, protestors there, to track Uyghurs in  
6 China itself. We know that ByteDance has  
7 misappropriated U.S. data with respect to  
8 surveilling of U.S. journalists. And there was  
9 evidence in the record reinforcing the  
10 conclusion that ByteDance has been asked by the  
11 PRC to undertake efforts to censor content and  
12 manipulate the platform at the behest of the  
13 Chinese government.

14 So I don't think there is a factual  
15 basis to dispute the record that Congress had  
16 before it.

17 If the Court has no further questions.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Thomas?

20 JUSTICE SOTOMAYOR: I have a question.  
21 General, if I understood correctly  
22 under President-elect's first term, he passed an  
23 executive order requiring divestiture, correct?

24 GENERAL PRELOGAR: That's right.

25 JUSTICE SOTOMAYOR: And this -- that

1 was challenged in court and stayed as a result  
2 of him exceeding his executive power to do that.  
3 But this bill followed a bipartisan  
4 investigation, correct?

5 GENERAL PRELOGAR: Yes, that's right.

6 JUSTICE SOTOMAYOR: I am a little  
7 concerned that a suggestion that a  
8 president-elect or anyone else should not  
9 enforce the law when a law is in effect and has  
10 prohibited certain action, that a company would  
11 choose to ignore enforcement on any assurance  
12 other than the change in that law. But putting  
13 that aside, on the 19th if it doesn't shut down,  
14 there is a violation of law, correct?

15 GENERAL PRELOGAR: Yes.

16 JUSTICE SOTOMAYOR: And whatever the  
17 new president does, doesn't change that reality  
18 for these companies?

19 GENERAL PRELOGAR: That's right.

20 JUSTICE SOTOMAYOR: How long is the  
21 statute of limitations in effect? Assuming that  
22 they violated it that day and later continued to  
23 violate it, but how long does the statute of  
24 limitations exist for a civil violation --

25 GENERAL PRELOGAR: It --

1 JUSTICE SOTOMAYOR: -- of this sort?

2 GENERAL PRELOGAR: It would be a  
3 five-year statute of limitations.

4 JUSTICE SOTOMAYOR: All right. Thank  
5 you.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 A rebuttal?

9 REBUTTAL ARGUMENT OF NOEL J. FRANCISCO  
10 ON BEHALF OF PETITIONERS TIKTOK INC., ET AL.

11 MR. FRANCISCO: Thank you, Mr. Chief  
12 Justice. Four points all of which go to why we  
13 think this law would fail whether you apply  
14 intermediate scrutiny or strict scrutiny.

15 I'd like to begin with the least  
16 restrictive alternative, simply prohibiting  
17 TikTok Incorporated from disseminating any of  
18 the sensitive user data to anyone, including  
19 ByteDance, under the threat of massive  
20 penalties. That is definitely a less  
21 restrictive alternative.

22 Now, my friend pointed to the NSA  
23 negotiations. Well, the sensitive user data  
24 that we're talking about and that were of  
25 concern in the NSA negotiations were not the

1 type of technical data that she's talking about.  
2 The NSA did allow certain types of nonsensitive  
3 technical data to go back and forth, but that  
4 wasn't anybody's concern. And as we say in 20  
5 -- page 23 of our briefs, they simply cut off  
6 the negotiations without ever raising those  
7 concerns.

8 But to be clear, if that's a concern,  
9 sweep that into the ban too. Put in that  
10 nonsensitive technical data into the ban too.  
11 We'll deal with that. It's a lot better than  
12 simply being forced to shut down. So that is  
13 most definitely a less restrictive alternative  
14 that would address data security.

15 We talked about the  
16 under-inclusiveness in Temu and Shein, the two  
17 large e-commerce sites. Justice Kagan, you  
18 might have seen Temu during the Superbowl. It  
19 was heavily advertised. It's got -- it's one of  
20 the most popular e-commerce applications in the  
21 United States. It's got 70 million users.

22 Justice Sotomayor, you were asking  
23 what they collect. This is from Joint Appendix  
24 339 to 343, the U.S./China Economic and Security  
25 Commission Review Report. Shein relies on

1 tracking and analyzing user data, draws on  
2 customer data and search history with the  
3 assistance of artificial intelligence  
4 algorithms. It requests users share their data  
5 and activity from other apps including social  
6 media. So they apparently go into your social  
7 media apps and suck up all of the information.  
8 Because they're e-commerce apps, they take  
9 names, addresses, and credit card information.

10 If you look at the privacy policies on  
11 their website, they were -- they collect  
12 location data. It -- it looks like they might  
13 even collect, at some level, GPS location data.  
14 So they collect massive amounts of data.

15 Point 3: Their mere covertness  
16 argument makes no sense for the reasons that the  
17 Court explored. If mere covertness were the  
18 issue, a disclosure would make perfect sense.  
19 Yet, they're not concerned about mere  
20 covertness. They're concerned, as my friend  
21 suggested, with getting Americans to argue with  
22 each other. Well, you know, as far as I can  
23 tell, that's what news organizations do in this  
24 country every single day. That's what we call  
25 editorial content. That's what we call content

1     itself. And so it's trained directly on the  
2     content.

3             But even if you thought somehow that  
4     the mere covertness were the issue, that  
5     definitely could be addressed through a risk  
6     disclosure. So the data-sharing ban, the risk  
7     disclosure, those are obvious less restrictive  
8     alternatives. And had the government considered  
9     them and rejected them, we would be in a  
10    different position. But if you look at this  
11    record, those are two less restrictive  
12    alternatives that the government did not address  
13    at all.

14            Whether you apply strict scrutiny or  
15    intermediate scrutiny, that is fatal because  
16    under both standards, restricting speech has to  
17    be the last resort, not the first one. And when  
18    you fail to consider less restrictive  
19    alternatives, you fail under either standard.

20            My final substantive point is we  
21    absolutely think this Court has the authority to  
22    enter an administrative stay. I didn't  
23    understand my friend to disagree with that. We  
24    think that, given the enormity of this decision,  
25    given the complexity of this case, it would make

1 perfect sense for this Court to enter an  
2 administrative stay.

3 I also think you could enter a  
4 preliminary injunction. Yes, likelihood of  
5 success is one standard, but you don't have to  
6 determine ultimate success. And as you do in  
7 other related contexts, like with respect to  
8 stays, you often make clear that you're not  
9 addressing the merits of the case.

10 I think you could do that here.

11 The bottom line, Your Honor, is this  
12 case ultimately boils down to speech. What  
13 we're talking about is ideas. And my friends on  
14 the other side, when you cut through everything  
15 else, are ultimately worried that the ideas that  
16 appear on the TikTok platform could in the  
17 future somehow manipulate Americans, could  
18 somehow persuade them, could somehow get them to  
19 think something that they ought not be thinking.

20 Well, that whole notion is at war with  
21 the First Amendment. If the First Amendment  
22 means anything, it means that the government  
23 cannot restrict speech in order to protect us  
24 from speech.

25 That's precisely what this law does

1 from beginning to end, whether you look at its  
2 text, whether you look at the government's  
3 justifications in its brief, where they talk  
4 about being worried about speech criticizing our  
5 leaders or undermining democracy.

6 It's what you see in the House report,  
7 which turns specifically on the dangers of  
8 misinformation, disinformation, and propaganda.  
9 And it's what you see in this legislative record  
10 writ large, which is saturated with objections  
11 to -- to TikTok's existing content.

12 We ask that you reverse the Court  
13 below. Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 The case is submitted.

17 (Whereupon, at 12:38 p.m., the case  
18 was submitted.)

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22  
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## Official - Subject to Final Review

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