Nos. 24-656, 24-657

IN THE

Supreme Court of the United States

TIKTOK INC., *et al.*,

Petitioners,

v.

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

Respondent.

BRIAN FIREBAUGH., *et al.*,

Petitioners,

v.

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

Respondent.

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

BRIEF OF THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, FREE PRESS, AND PEN AMERICAN CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Jameel Jaffer
Counsel of Record
Ramya Krishnan
Xiangnong Wang
Alex Abdo
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
jameel.jaffer@knightcolumbia.org

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INTEREST OF AMICI CURIAE[1]

The Knight First Amendment Institute at Columbia University is a non-partisan, not-for-profit organization that defends the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute promotes a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

Free Press is a non-partisan, non-profit, nationwide media and technology advocacy organization. It believes that positive social change, racial justice, and meaningful engagement in public life require equitable access to open channels of communication, diverse and independent ownership of media platforms, and journalism that holds leaders accountable. For nearly two decades, Free Press has engaged in litigation, congressional advocacy, and administrative agency proceedings to advance these goals, including freedom of expression and freedom of the press.

PEN American Center ("PEN America") is a non-partisan, not-for-profit organization dedicated to creative expression and the liberties that make it possible. Founded in 1922, PEN America engages in advocacy, research, and public programming related

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

to free expression in the United States and around the world. PEN America works to ensure that people everywhere have the freedom to create literature, to convey information and ideas, express their views, and access the views, ideas, and literatures of others. PEN America has engaged in research and advocacy related to free expression on social media platforms and is committed to fostering a healthy climate for public discourse online.

SUMMARY OF ARGUMENT

This case concerns the constitutionality of the Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, Div. H, 138 Stat. 895, 955–60 (2024) ("the Act"). The Act will functionally ban Americans from accessing the social media platform TikTok, effective January 19, 2025, unless TikTok Inc.'s parent company, ByteDance Inc., sells the U.S. subsidiary before then.

For reasons explained by Petitioners and other amici, the Act violates the First Amendment because it will unjustifiably restrict some 170 million Americans from using the media platform of their choosing to share their own speech, to receive the speech of others (including other Americans), and to engage with the expressive communities they have sought out and that are meaningful to them. Amici the Knight Institute, PEN America, and Free Press submit this brief to emphasize that the Act also violates the First Amendment because it will unjustifiably restrict Americans from accessing foreign speech, including ByteDance's input into

TikTok's recommendation algorithm, which reflects the platform's editorial judgments and helps determine which content is highlighted for the platform's users. Indeed, insofar as the ban is intended to prevent Americans from accessing ideas, information, and media from abroad, it recalls practices that have long been associated with the world's most repressive regimes.

This brief makes four points.

First, the Act implicates the First Amendment because it restricts U.S. citizens and residents from accessing ideas, information, and media from abroad. The court below properly rejected the government's argument that the ban does not implicate the First Amendment at all.

Second, the Court should view the Act especially skeptically because it recalls practices that have long been associated with repressive governments. For good reason, the United States' own past efforts at curtailing citizens' access to speech from abroad are remembered now with embarrassment and shame. Thus, our own history and the experiences of other societies supply ample reason to approach restrictions on access to foreign media with suspicion.

Third, the Act should be subjected to strict scrutiny because it operates as a prior restraint, is motivated by disagreement with particular viewpoints, and forecloses an entire medium of expression online. The concurrence below was wrong to conclude that the Act should be subjected to only

intermediate scrutiny because the law does not target any specific viewpoint or category of content. The record is clear that legislators acted out of concern about specific viewpoints and categories of content, and the government has expressed some of the same concerns in its defense of the law. In addition, the law's viewpoint- and content-discriminatory nature is only one of multiple reasons to subject this law to strict scrutiny.

Finally, the Act cannot survive any form of heightened scrutiny. The government has no legitimate interest in banning Americans from accessing foreign speech—even if the speech comprises foreign propaganda or may at some point reflect foreign manipulation. And while the government has a legitimate interest in protecting Americans from *covert* propaganda and in safeguarding Americans' personal data, these goals can readily be achieved with less restrictive means.

Upholding the Act would do profound and lasting damage to the First Amendment and the values it embodies. Amici respectfully urge the Court to grant the relief that Petitioners request.

ARGUMENT

I. The Act implicates the First Amendment because it restricts the right of Americans to access ideas, information, and media from abroad.

The D.C. Circuit correctly recognized that the Act triggers First Amendment scrutiny, and it properly

rejected the government's "ambitious" argument that the Act does not implicate the First Amendment at all. C.A. Op. 25–27. As the court explained, "the Act imposes a disproportionate burden on TikTok, an entity engaged in expressive activity," and singles out that "expressive activity by indirectly subjecting TikTok—and so far, only TikTok—to the divestiture requirement." *Id.* at 26. More than that, however, the Act implicates the First Amendment rights of TikTok's 170 million American users, who use the platform to express themselves, get their news, and connect with the people and communities they care about.

It is "well established" that the First Amendment "protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). This Court first recognized that the public has a right to receive information more than 80 years ago in *Martin v. City of Struthers*, 319 U.S. 141 (1943). In that case, the Court invalidated a local ordinance that forbade persons who were "distributing handbills, circulars or other advertisements" from ringing doorbells or knocking on doors. *Id.* at 142. While the Court recognized that the ordinance was aimed at "the protection of the householders from annoyance," it held that a blanket ban failed to accord "due respect for the constitutional rights of those desiring to distribute literature *and those desiring to receive it*." *Id.* at 144, 149 (emphasis added). The Court indicated that the right to receive information was central to its holding, noting that "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society." *Id.* at 146–47.

This right to receive information extends to ideas, information, and media from abroad. In *Lamont v. Postmaster General*, this Court struck down a law requiring individuals who wanted to receive material that the government deemed communist propaganda and that was "printed or otherwise prepared in a foreign country" to notify the post office in advance. 381 U.S. 301, 302 (1965) (citation omitted). The Court explained that this obligation unconstitutionally burdened recipients' First Amendment right to receive information—a right not diluted by the material's foreign origin. *Id.* at 307. Notably, the law did not bar individuals from accessing the relevant foreign speech altogether. But the Court nonetheless struck it down because it burdened willing listeners with an obligation that was "almost certain to have a deterrent effect" on their ability to receive the proscribed material, thereby interfering with the "'uninhibited, robust, and wide-open' debate and discussion . . . contemplated by the First Amendment." *Id.* (citation omitted) .

Since *Lamont*, this Court has repeatedly reaffirmed Americans' First Amendment right to access speech from foreign sources. In *Meese v. Keene*, the Court considered a First Amendment challenge to a law requiring the plaintiff to label three films he wished to exhibit as "political propaganda" because they were distributed by a Canadian government agency. 481 U.S. 465, 473 (1987). The Court rejected the plaintiff's claim only because it determined that, unlike in *Lamont*, the challenged statute "d[id] not pose *any* obstacle to [plaintiff's] access to the [foreign] materials." *Id.* at

480 (emphasis added). Likewise, in *Kleindienst v. Mandel*, the Court reasoned that the government's exclusion of a Belgian journalist from the United States implicated the First Amendment rights of U.S. listeners who sought to meet with him. 408 U.S. 753, 764–65 (1972). Although the Court ultimately rejected the plaintiffs' First Amendment challenge because of Congress's "plenary power to make rules for the admission of [noncitizens]," *id.* at 766 (citation omitted), it nevertheless reaffirmed that the "First Amendment right to receive information and ideas" extends to information and ideas from abroad, *id.* at 762 (cleaned up) .

The upshot of these cases is that the First Amendment protects Americans' right to access, engage with, and disseminate foreign speech and ideas, just as it protects their right to receive "domestic" information.

These protections encompass the right to engage with, and on, foreign-owned social media platforms. The First Amendment protects online speech just as robustly as any other speech. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [online speech]."). Just this past term, this Court confirmed that "settled principles about freedom of expression" apply to social media and other new technologies, just as they do to older forms of media. *Moody v. NetChoice, LLC*, 603 U.S. 707, 733–34 (2024). Thus, where "social-media platforms create expressive products, they receive the First Amendment's protection." *Id.* at 716.

Indeed, as this Court noted in *Packingham v. North Carolina*, social media platforms are now "the most important places . . . for the exchange of views." 582 U.S. 98, 104 (2017). There, the Court considered a state law that forbade registered sex offenders from accessing social media websites on which minors may have accounts. *Id.* at 101, 106–07. The Court recognized that use of social media is vital to the modern-day exercise of multiple First Amendment rights:

> Social media offers relatively unlimited, low-cost capacity for communication of all kinds. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. . . . In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics as diverse as human thought.

Id. at 104–05 (cleaned up). After emphasizing the importance of social media to modern public discourse, the Court invalidated the ban, finding it was not narrowly tailored to the state's interest in protecting minors. *See id.* at 105–06.

Against this background, it is plain that the Act must be subject to First Amendment scrutiny. By preventing access to TikTok, the Act precludes Americans from posting content and viewing content posted by others on that platform. More broadly, it prevents Americans from participating in the expressive communities of their choosing. This is true whether the Act is cast as a ban or as a divestiture requirement. Because divestiture would require TikTok to change ownership, it would bar Americans from engaging with the compilation of content presented by TikTok's current owners. The Act therefore "foreclose[s] [Americans'] access" to media they would otherwise seek out, burdening the "legitimate exercise of [their] First Amendment rights." *Id*. at 108; *see also Moody*, 603 U.S. at 731.

II. The Court should scrutinize the Act especially closely because it recalls practices that have long been associated with repressive governments.

The Court should analyze the Act with particular care because restricting access to foreign media to protect against purported foreign manipulation is a practice that has long been associated with repressive regimes.

Before the internet, shortwave radio technology enabled people to receive timely information from abroad. Foreign radio broadcasts became a threat to totalitarian governments seeking to control the information available to their citizens. After World War II, the Soviet Union began jamming shortwave transmissions to deny its citizens access to

potentially subversive information and ideas from abroad.[2] It was not alone in this practice: China jammed Radio Moscow, Taiwanese Radio, and the Voice of Vietnam.[3]

Many of these same basic practices persist online to this day in repressive regimes the world over. Shortly after invading Ukraine in 2022, Russia blocked access to Facebook, Twitter, and major foreign news outlets.[4] The notorious "Great Firewall" of China has for decades restricted Chinese citizens' access to foreign sources of information online. Leading news sites, such as the *New York Times*, the *Wall Street Journal*, and the British Broadcasting Corporation, are blocked.[5] So too are popular American social media platforms like Facebook, X, Instagram, and YouTube.[6] Earlier this year, the Chinese government ordered Apple to

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[2] *See* Rochelle B. Price, *Jamming and the Law of International Communications*, 5 Mich. J. Int'l L. 391, 391 (1984).

[3] *Id.*

[4] *Freedom on the Net 2024: Russia*, Freedom House, https://perma.cc/WKU5-EKVW; Robert McMahon, *Russia Is Censoring News on the War in Ukraine. Foreign Media Are Trying to Get Around That*, Council on Foreign Rels. (Mar. 18, 2022), https://perma.cc/H7BU-BXZ3.

[5] *Freedom on the Net 2024: China*, Freedom House, https://perma.cc/7SW2-CRMT.

[6] *Id.*

remove WhatsApp, Threads, Signal, and Telegram from its app store in China.[7]

Other rights-abusing governments also restrict their citizens' ability to access information from abroad. Iran blocks a wide array of international news websites and social media platforms.[8] Saudi Arabia blocks certain news sites affiliated with countries with which the Saudi government has tensions, such as Qatar, Iran, and Turkey.[9] And in May, Israeli Prime Minister Benjamin Netanyahu's government, which in recent years has conducted what the Israeli newspaper *Haaretz* has characterized as "an assault on democracy,"[10] shut down the Israeli operations of the Qatari network Al Jazeera and pulled its television station off the air.[11]

The list of countries that have banned TikTok should itself be a warning because these countries do not share American commitments to a free and open internet. According to a report from earlier this year, there are eleven such countries, not counting

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[7] Aaron Gregg & Eva Dou, *Apple Pulls WhatsApp, Threads and Signal from App Store in China*, Wash. Post (Apr. 19, 2024), https://perma.cc/6Z63-YZ6U.

[8] *Freedom on the Net 2024: Iran*, Freedom House, https://perma.cc/7DPU-S5BS.

[9] *Freedom on the Net 2024: Saudi Arabia*, Freedom House, https://perma.cc/XEV3-87T7.

[10] Dahlia Scheindlin, *Netanyahu's Assault on Democracy*, Haaretz (Aug. 8, 2023), https://perma.cc/7KLB-CH93.

[11] Tia Goldenberg & Jon Gambrell, *Israel Orders Al Jazeera to Close Its Local Operation and Seizes Some of Its Equipment*, Assoc. Press (May 5, 2024), https://perma.cc/ST7A-BEA6.

those that merely disallow the app on government devices.[12] Ironically, China bans TikTok, allowing only a Chinese version called Douyin that is subject to heavy censorship.[13] The ten other countries—Afghanistan,[14] India,[15] Iran,[16] Jordan,[17] Kyrgyzstan,[18] Nepal,[19] North Korea,[20] Senegal,[21]

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[12] Anna Gordon, *Here's All the Countries With TikTok Bans as Platform's Future in U.S. Hangs in Balance*, Time (Apr. 25, 2024), https://perma.cc/35ZD-J4UE.

[13] Claire Fu & Daisuke Wakabayashi, *There Is No TikTok in China, but There Is Douyin. Here's What It Is*, N.Y. Times (Apr. 25, 2024), https://perma.cc/QH2B-7MFV.

[14] Comm. to Protect Journalists, *CPJ Calls on Taliban to Drop Plans to Restrict Facebook Access in Afghanistan* (Apr. 8, 2024), https://perma.cc/7SAL-F8YT.

[15] *Modi Ramps Up Online Censorship in India*, Reps. Without Borders (Apr. 9, 2023), https://perma.cc/43HV-9N9N.

[16] *Freedom on the Net 2024: Iran*, Freedom House, *supra* note 8.

[17] *Freedom on the Net 2024: Jordan*, Freedom House, https://perma.cc/49SP-APSY.

[18] *Freedom on the Net 2024: Kyrgyzstan*, Freedom House, https://perma.cc/L9NC-FQD3.

[19] U.S. Dep't of State, *Nepal 2023 Human Rights Report*, at 11–13, https://perma.cc/5XU5-LUHQ.

[20] U.S. Dep't of State, *Democratic People's Republic of Korea 2023 Human Rights Report*, at 26–28, https://perma.cc/MV6V-MLNY.

[21] Ngouda Dione, *Senegal Cuts Internet Again Amid Widening Crackdown on Dissent*, Reuters (Feb. 13, 2024), https://perma.cc/SRV4-ZKM9.

Somalia,[22] and Uzbekistan[23]—also restrict politically disfavored online material or restrict internet access.[24]

The United States has at times restricted its citizens' access to speech from abroad due to fears of foreign manipulation, but many of those efforts are now recalled with embarrassment and shame. Cold War restrictions blocked Americans' access to a wide array of political and cultural figures, as well as foreign materials from so-called "enemy" countries. These provisions—which Congress has since largely rescinded—prevented Americans from accessing information from abroad and caused others to question our nation's dedication to its ideals.

In 1952, Congress passed the McCarran-Walter Act, which barred from entry to the United States anarchists, Communists, and persons whose "activities" would be "prejudicial to the public interest."[25] While waivers of inadmissibility were sometimes available, no waiver was available for denials under the "prejudicial to the public interest"

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[22] U.S. Dep't of State, *Somalia 2023 Human Rights Report*, at 20–23, https://perma.cc/4JAQ-H2ZB.

[23] *Freedom on the Net 2024: Uzbekistan*, Freedom House, https://perma.cc/M3EE-6VYP.

[24] Since the report was published, a twelfth country appears to have joined the list. *See* Llazar Semini, *Albanian Prime Minister Says TikTok Ban was Not a 'Rushed Reaction to a Single Incident'*, Assoc. Press (Dec. 23, 2024), https://perma.cc/TPP4-3FAJ.

[25] Pub. L. No. 82-414, § 212(a)(28), (27), 66 Stat. 163, 184–185 (1952).

standard.[26] In passing the law, Congress overrode the veto of President Truman, who characterized the provisions as "thought control" and "inconsistent with our democratic ideals," remarking that "[s]eldom has a bill exhibited the distrust evidenced here for citizens and aliens alike."[27]

The McCarran-Walter Act was used to target a vast array of political and cultural figures. "From the time it was enacted in the fever of McCarthyism," said Senator Daniel Patrick Moynihan in 1987, "there has been an annual scandal. Some writer, some painter, some minister could not be allowed to enter the United States."[28] The Act kept out novelists such as Gabriel García Márquez, Czesław Miłosz, Carlos Fuentes, Jorge Luis Borges, Graham Greene, and Doris Lessing. It kept out actors like Maurice Chevalier, Yves Montand, and Simone Signoret. It kept out poets like Pablo Neruda. It kept out a former prime minister—Ian Smith of Rhodesia—and a future one—Pierre Trudeau of Canada. Persons on the left and the right were excluded. Even NATO's former Vice-Supreme Allied Commander for Nuclear Affairs in Europe, Nino Pasti, was kept out of the United States after he criticized the Reagan

[26] *Id.* § 212(d)(3), 66 Stat. 187.

[27] 98 Cong. Rec. 8084 (1952).

[28] Sidney Blumenthal, *Congress Lifts Political-Beliefs Bar to Aliens Under McCarran-Walter Act*, Wash. Post (Dec. 17, 1987), https://perma.cc/5ETL-5W5V.

administration's effort to deploy new missiles to Europe.[29]

Predictably, the government's power to exclude individuals on the basis of viewpoints it deemed dangerous or undesirable was used to exclude individuals who had done nothing more than criticize the United States. The casual dismissiveness with which the law was deployed was exemplified in the exclusion of Italian playwright Dario Fo. "Nobody in State thinks that Fo is going to foment revolution or throw bombs," said a State Department official to a reporter. "It's just that Fo's record of performance with regard to the United States is not good. Dario Fo has never had a good word to say about" the United States.[30]

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[29] *See id.*; *Deportation Bid Based on McCarthy-Era Law*, L.A. Times (Jan. 29, 1987), https://perma.cc/QM6D-7Y98; John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 Tex. L. Rev. 1481, 1496–97 (1988); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930, 930 (1987); David Margolick, *Bar Panel Urges End of Law that Limits Entry Into U.S.*, N.Y. Times (Apr. 4, 1984), https://perma.cc/P7FW-XXDC; Steven A. Holmes, *Legislation Eases Limits on Aliens*, N.Y. Times (Feb. 2, 1990), https://perma.cc/Z2DV-B3RS.

[30] Statement of Arthur C. Helton, Exclusion and Deportation Amendments of 1983: Hearing Before the Subcommittee on Immigration, Refugees, and International Law of the Committee on the Judiciary, House of Representatives, Ninety-Eighth Congress, Second Session, on H.R. 4509 and H.R. 5227 (June 28, 1984), at 107–08 (quoting Erika Munk, *Cross Left*, Village Voice (June 2, 1980) at 86), https://perma.cc/C77S-MYTR.

These practices had serious costs beyond limiting Americans' access to speech. They undermined the U.S. government's ability to hold other nations accountable for repressing their own citizens. Senator Moynihan observed that the McCarran-Walter Act "made us seem hypocritical" and "made us easy to caricature and deride."[31] As the writer Larry McMurtry testified before Congress in 1989:

> [T]he very existence of ideologically-based legislation undermines the effectiveness and moral authority of American organizations . . . that are dedicated to promoting free and open communication "within all nations" and "between all nations" . . . . How can we presume to be the "leaders of the free world" and criticize the more egregious practices of other governments when we fail to live up to the standards we set for ourselves – that serve as a model for the internationally recognized human rights standards against which all nations are judged?[32]

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[31] Clifford D. May, *Washington Talk; A McCarthy Era Act, Used to Block Visits by Foreigners, Is About to Fall*, N.Y. Times (June 1, 1989), https://perma.cc/FQH5-Q8QB.

[32] Testimony of Larry McMurtry, Free Trade in Ideas: Hearings Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, One Hundred First

The practice of ideological exclusion gradually came to be regarded as irreconcilable with the values of an open society. In 1977, in order to comply with its commitment under the Helsinki Accords to facilitate travel between states, Congress passed the McGovern Amendment, which modified the McCarran-Walter Act by providing that the State Department "should" recommend a waiver of inadmissibility when the noncitizen was inadmissible "by reason of membership in or affiliation with a proscribed organization."[33] In 1986, the D.C. Circuit held that the government could exclude someone on the separate grounds that admission would be prejudicial to the United States only if that determination was independent of the fact of membership or affiliation with a proscribed organization. *See Abourezk v. Reagan*, 785 F.2d 1043, 1058 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987). Congress passed legislation temporarily repealing the ideological exclusion provisions of the McCarran-Walter Act in 1987 and 1988 before repealing them permanently in 1990.[34] The Senate vote in favor of repeal was unanimous.[35]

Ideological exclusion is not the only means the U.S. government has used to limit citizens' access to

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Congress, First Session (May 3, 1989), at 56, https://perma.cc/7DNH-W9HR.

[33] *See* Pub. L. No. 95-105 § 112, 91 Stat. 844, 848 (1977); Shapiro, *supra* note 29, at 931 n.13.

[34] *See* Holmes, *supra* note 29.

[35] *Id.*

foreign ideas. In 1917, Congress enacted the Trading with the Enemy Act (TWEA), which granted the President the authority to control trade with foreign adversaries, including the power to restrict the purchase of books, films, and periodicals produced in those nations.[36] The law was used repeatedly during World War II and the Korean War, and was expanded to cover peacetime national emergencies in 1933.[37] However, what were intended to be temporary restrictions during times of exigency "were transformed into a permanent fixture of postwar American life" when President Truman's declaration of a national emergency on the eve of the Korean War remained in effect even after the end of the conflict in 1953.[38]

As a result, during the intense national debate in the late 1960s over the United States' participation in the Vietnam War, "access to books, newspapers, magazines and films produced in North Vietnam and China was virtually cut off."[39] Although Congress ultimately limited the TWEA to wartime use in 1977, it subsequently granted peacetime sanctions authority to the President through the International Emergency Economic Powers Act (IEEPA), and grandfathered all restrictions—including stringent limitations on trade with Cuba,

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[36] Pub. L. No. 65-91, 40 Stat. 411 (1917).

[37] Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 Wm. & Mary L. Rev. 719, 728–29 (1985).

[38] *Id.* at 729.

[39] *Id.* at 730.

North Korea, Vietnam, and Cambodia—then in effect.[40]

Scrutiny of the executive branch's authority to restrict the exchange of ideas across the border came to a flashpoint in 1981, when the Treasury Department directed customs and postal authorities to seize thousands of publications from Cuba destined for American readers.[41] Over 100 plaintiffs, including prominent news outlets like the *Nation* and the *Guardian*, sued on First Amendment grounds.[42] The day before its response was due, the government capitulated and released the materials without requiring a license.[43]

In recognition of the serious First Amendment interests at stake, Congress in 1988 passed legislation known as the Berman Amendment to make clear that TWEA and IEEPA did not authorize restrictions on the dissemination of information.[44] The Berman Amendment exempted from regulation "the importation from any country, or the

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[40] Christopher A. Casey, Dianne E. Rennack & Jennifer K. Elsea, Cong. Rsch. Serv., R45618, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, at 8 n.57 (2024), https://perma.cc/X9GC-U9A4.

[41] *See* Neuborne & Shapiro, *supra* note 37, at 731.

[42] *See id.*; *see also The Nation v. Haig*, No. 81-2988 (D. Mass. Feb. 12, 1980).

[43] *See* Neuborne & Shapiro, *supra* note 37, at 731.

[44] Jarred O. Taylor III, *Information Wants to be Free (of Sanctions): Why the President Cannot Prohibit Foreign Access to Social Media Under U.S. Export Regulations*, 54 Wm. & Mary L. Rev. 297, 307 (2012).

exportation to any country, whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials."[45] As the accompanying House Report made clear, the Berman Amendment reflects "the principle that no prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First Amendment."[46] Congress later expanded the scope of the Berman Amendment in 1994 through the Free Trade in Ideas Act,[47] seeking to "protect the constitutional rights of Americans to educate themselves about the world by communicating with peoples of other countries in a variety of ways."[48]

Throughout the 1950s, the U.S. government also engaged in efforts to restrict Americans from receiving mail from abroad that it deemed communist propaganda. Officials detained everything from *Lenin's Selected Works* to *Chess for Beginners*.[49] In one especially embarrassing episode,

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[45] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 2502, 102 Stat. 1107, 1371–72 (1988).

[46] H.R. Rep. No. 100-40, pt. 3, at 113 (1987); *see also Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1205 (9th Cir. 2003) ("The Berman Amendment was designed to prevent the executive branch from restricting the international flow of materials protected by the First Amendment.").

[47] Pub. L. No. 103-236 § 525(a), 108 Stat. 382, 474 (1994).

[48] H.R. Rep. No. 103-482, at 239 (1994).

[49] *Government Exclusion of Foreign Political Propaganda*, 68 Harv. L. Rev. 1393, 1393–94 (1955); Murray L. Schwartz & James C. N. Paul, *Foreign Communist Propaganda in the*

officials held up delivery of the *London Economist* magazine to American subscribers due to a "possible propaganda matter," which the Solicitor of the Post Office blamed on "some over-officious underling."[50]

These restrictions not only kept a range of materials out of the hands of Americans, they posed a risk to U.S. credibility abroad—something the government itself recognized. In 1960, an interagency committee organized by the National Security Council recommended that the program be abandoned, noting that "[t]he knowledge that we ourselves maintain what is loosely considered a 'censorship' program impairs the effectiveness of our presentation abroad."[51] President John F. Kennedy subsequently discontinued the program in 1961.

Although this apparatus was later revived by Congress in the Postal Service and Federal Employees Act of 1962,[52] this Court ended the practice in *Lamont*. Recognizing Americans' right to access speech from abroad, the Court unanimously invalidated the law's communist mail provisions. *See* 381 U.S. at 305. As Justice Brennan wrote in his concurring opinion:

Mails: A Report on Some Problems of Federal Censorship, 107 U. Pa. L. Rev. 621, 633–35 (1959).

[50] Schwartz & Paul, *supra* note 49 at 634 n.34.

[51] *Report Prepared by an Ad Hoc Interagency Committee*, Office of the Historian, U.S. Dept. of State (Jun. 15, 1960), https://perma.cc/Z4MM-GWZQ.

[52] Pub. L. No. 87-793, § 305(a), 76 Stat. 832, 840 (1962).

> That the governments which originate this propaganda themselves have no equivalent guarantees only highlights the cherished values of our constitutional framework; it can never justify emulating the practice of restrictive regimes in the name of expediency.

Id. at 310 (Brennan, J., concurring).

Congress's repeal of the McCarran-Walter Act's ideological exclusion provisions, its recognition of free-speech limitations on the President's sanctions authority, and this Court's own vindication of the right to receive foreign speech helped turn the page on ill-advised Cold War efforts to restrict Americans' access to information and ideas from abroad. As Senator Charles Mathias cogently articulated in a speech on the Senate floor: "Diversity, dialog, and exchange of ideas are the life-giving elements—the water and air—of American tradition; exclusion, restriction, repression of ideas are the features of far more troubled, less confident nations."[53]

III. The Act is subject to strict scrutiny because it is viewpoint-motivated and its effect is to broadly restrict protected expression online.

The Act should be evaluated under the most stringent form of constitutional review because it operates as a prior restraint, *see Lovell v. City of*

[53] 132 Cong. Rec. 6550 (1986).

Griffin, 303 U.S. 444 (1938); because it was substantially motivated by a "disagreement with the message[s] . . . convey[ed]" by and on TikTok, *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (citation omitted), as evidenced by the Act's legislative history and reflected in the government's defense of the Act below; and because it effectively "foreclose[s] an entire medium of expression," *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).[54]

To start, strict scrutiny is warranted because the government defends the Act by pointing to dangers it says are associated with particular viewpoints and categories of content. In the court below, the government "invoke[d] the risk that the PRC might shape the content that American users receive, interfere with our political discourse, and promote content based upon [TikTok's] alignment with the PRC's interests." C.A. Op. 30. The government expressed particular concern about content relating to "topics of importance to the PRC," including China's relationship to Taiwan. *Id.* One of the government's declarants noted that "topics in line with Chinese Communist Party priorities" had an "outsized prevalence on TikTok" while "various Uyghur-related and Tibet-related hashtags" had relatively limited prevalence, C.A. Gov't App. 22, and underscored the risk that TikTok might be used by the Chinese government to "shap[e] the information landscape in this country and around the world." C.A. Gov't App. 26. These concerns are

[54] Amici do not address the "prior restraint" argument at length here because they understand that other amici intend to focus their briefs on this issue.

motivated by express disapproval of the content and viewpoints that the government believes are prevalent on TikTok, and the detrimental effect the government believes these messages might have on Americans.

The government's defense of the Act echoes the legislative record, which reveals that many legislators supported the Act because they disagreed with particular viewpoints and subjects they believed to be widespread on TikTok. In November 2023, the bill's eventual lead sponsor, Representative Mike Gallagher, the chairman of the House committee on the CCP, published an article calling for a TikTok ban and characterizing TikTok as "digital fentanyl" through which the CCP can "push its propaganda."[55] Two days after introducing the bill in March 2024, Chairman Gallagher noted "privacy" and "espionage" concerns regarding TikTok but made clear that the "most important[ ]" reason for a ban was the possibility that "young Americans are getting all their news from Tik[T]ok."[56]

A House report on the bill likewise declared that communications applications owned by foreign adversaries "present a clear threat" because they can, among other things, "push . . . propaganda on

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[55] Representative Mike Gallagher, *Why Do Young Americans Support Hamas? Look at TikTok.*, The Free Press (Nov. 1, 2023), https://perma.cc/QGU6-2L65.

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

the American public."[57] The report repeated concerns that the Chinese Communist Party (CCP) could use TikTok for "influence operations" and to "drive divisive narratives internationally."[58] Representative and former House Speaker Nancy Pelosi similarly cited concerns over CCP "propaganda" in explaining her vote in favor of the Act.[59]

In the brief debate on the Senate floor, senators likewise cited viewpoint-based motivations for supporting the legislation. Senator Maria Cantwell expressed concern that "[f]oreign policy issues disfavored by China and Russian governments . . . had fewer hashtags on TikTok, such as pro-Ukraine or pro-Israeli hashtags."[60] Senator Pete Ricketts supported the ban because the CCP allegedly uses TikTok "to skew public opinion on foreign events in their favor," including by promoting hashtags that align with its foreign policy perspectives such as "StandwithKashmir" and "[p]ro-Palestinian and pro-Hamas hashtags."[61] Indeed, multiple lawmakers have cited the prevalence of pro-

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[57] H.R. Rep. No. 118-417, at 2 (2024).

[58] *Id.* at 8, 10.

[59] *Pelosi Statement on House Passage of Protecting Americans from Foreign Adversary Controlled Applications Act*, Congresswoman Nancy Pelosi (Mar. 13, 2024), https://perma.cc/JAV6-Y9TJ.

[60] 170 Cong. Rec. S2963 (Apr. 23, 2024).

[61] *Id.* at S2970–71.

Palestinian content on TikTok as a reason for supporting the Act.[62]

The only senator to speak in the Senate in opposition to the bill, Senator Ed Markey, noted that his colleagues "want to ban TikTok . . . because of TikTok's viewpoints"—a course of action that, he warned, carried grave First Amendment implications.[63] Senator Markey was right about the facts and about their implications.

The legislative record is shot through with statements that collectively make plain that the statute the government describes as an effort to address "covert content manipulation" is, in fact, an effort to restrict Americans' access to disfavored viewpoints and messages. This kind of censorship is antithetical to the First Amendment, as this Court emphasized only last term. *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 187 (2024) ("[V]iewpoint discrimination is uniquely harmful to a free and democratic society."); *cf. Moody*, 603 U.S. at 741 (referencing statements made by a law's sponsor and the Governor as evidence of the state's motivation to suppress certain viewpoints). At the very least, it is

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[62] Nikki McCann Ramirez, *Lawmakers Admit They Want to Ban TikTok over Pro-Palestinian Content*, Rolling Stone (May 6, 2024), https://perma.cc/RVJ8-9CK7; Prem Thakker & Akela Lacy, *In No Labels Call, Josh Gottheimer, Mike Lawler, and University Trustees Agree: FBI Should Investigate Campus Protests*, The Intercept (May 4, 2024), https://perma.cc/EUC5-7F8L.

[63] 170 Cong. Rec. S2968 (Apr. 23, 2024).

reason for this Court to subject the statute to especially searching review.

There is another reason why the Court should apply strict scrutiny here: because the Act's effect is to shutter an entire medium of expression. *City of Ladue*, 512 U.S. at 54–55. Of course, the Act does not preclude Americans from using *other* social media platforms, like Facebook, YouTube, and Twitch. But this doesn't matter, for the same reason an American's right to read (say) the *Columbia Daily Spectator* can't be set aside on the grounds that she can read the *New York Post* instead. As the Court observed in *Reno*, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." 521 U.S. at 880 (quoting *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939)). The First Amendment protects Americans' right to access their preferred media, even if the government would prefer they access other media instead.

This principle is especially important here because social media platforms are not interchangeable expressive products. They offer meaningfully different features, user bases, and expressive environments. TikTok prioritizes different speech than other platforms do and provides users with a distinct set of affordances. As a result, it fosters different expressive communities. *Cf. Moody*, 603 U.S. at 743 (suggesting that a social media platform's choices about "selecting and moderating content" can result in a "different expressive product, communicating different values and priorities"); *City of Ladue*, 512 U.S. at 56

(explaining that a residential sign "often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means"). Foreclosing entirely Americans' ability to access TikTok therefore warrants strict scrutiny.

IV. The Act fails First Amendment scrutiny because suppressing speech is not a permissible means of countering foreign content manipulation, and because the government could achieve its other goals with less restrictive means.

The Act fails any form of heightened scrutiny. As an initial matter, the government has no legitimate interest in banning Americans from accessing foreign speech—even if the speech comprises foreign propaganda or reflects foreign manipulation. And while the government has a legitimate interest in protecting Americans from *covert* propaganda and in safeguarding Americans' personal data, these goals could readily be achieved with less restrictive means.

The suppression of speech is not a permissible means of addressing concerns about misinformation, propaganda, and content manipulation. The First Amendment generally forecloses the government from suppressing speech on the basis of its truth or falsity. *United States v. Alvarez*, 567 U.S. 709, 718–19 (2012) (plurality); *id.* at 730–31 (Breyer, J.,

concurring).[64] The Supreme Court has long recognized that the remedy for misleading speech is "more speech, not enforced silence." *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

The Court reaffirmed this view just last term in *Moody*: "The government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey." 603 U.S. at 734. Thus, the objective of "correct[ing] the mix of speech" available on a "major social-media platform[ ]"—by, for instance, forcing the platform to change owners—is not a "valid, let alone substantial" government interest. *Id.* at 740.

The court below distinguished "[p]reventing covert content manipulation by an adversary nation" from "suppressing propaganda or misinformation," C.A. Op. 42–43, suggesting that restricting speech on the former ground is justifiable (and indeed even "vindicates" First Amendment values, C.A. Op. 43), whereas restricting speech based on the latter ground is not. But this reasoning does not hold up.

First, if the government's concern is with the *covertness* of foreign content manipulation, there are less restrictive alternatives than a ban. For example, the government could require platforms to disclose certain information about their recommendation

[64] There are important exceptions to this rule, but none of them has any application here. *See generally* Eugene Volokh, *When Are Lies Constitutionally Protected?*, Knight First Amend. Inst. (Oct. 19, 2022), https://perma.cc/4PWU-FWUT.

algorithms and content-moderation practices, or it could make the case to the American people that the speech they are consuming is foreign propaganda. As this Court has explained, "disclosure is a less restrictive alternative to more comprehensive regulations of speech," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010), as is government counterspeech, *see Alvarez*, 567 U.S. at 726–29.

The D.C. Circuit asserted that covert content manipulation is "not a type of harm that can be remedied by disclosure" and that relying on government counterspeech to address the problem is "naïve." C.A. Op. 54. But informing the American public about the possibility of foreign manipulation would seem to be the most direct way to address the government's concern that the Chinese government could co-opt TikTok without Americans knowing of it. This Court has counseled that "[a] court should not assume a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 824 (2000).

While the court below also contended that disclosure or government counterspeech would not "mitigate that threat nearly as effectively as divestiture," C.A. Op. 54, this Court has underscored that it is a mistake to focus on "whether the challenged restriction has some additional ability to achieve Congress' legitimate interest," for "[a]ny restriction on speech could be justified under that analysis." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). The appropriate focus, the Court has said, should be on "whether the challenged regulation is

the least restrictive means among available, effective alternatives." *Id.* Here, a sweeping ban on TikTok is not.

Second, if the government's concern is with foreign government speech or propaganda (rather than with the *covertness* of the alleged propaganda), that concern cannot justify a broad prohibition on Americans' access to speech from abroad. *Lamont* makes this clear. The mail restrictions in *Lamont*—which undeniably targeted "foreign government[ ]" "propaganda," 381 U.S. at 308 (Brennan, J., concurring)—were unlawful precisely because they sought to "control the flow of ideas to the public," *id.* at 306 (majority opinion). The Act here does the same, in an even more pernicious manner: while the law in *Lamont* burdened Americans' access to specific speech from abroad, the Act prohibits it entirely.

The D.C. Circuit's efforts to distinguish *Lamont* are unpersuasive. The panel opinion argued that the Act would not in fact prevent Americans from accessing foreign speech, because TikTok's new owners "could circulate the same mix of content as before," C.A. Op. 44, but this does not distinguish *Lamont*. In that case, too, the restriction at issue would not have prevented Americans from receiving the very same content from domestic speakers. The Court nonetheless invalidated the law, and it should do the same here. The Act prevents Americans from accessing ByteDance's input into the curation of TikTok's feed, and it is extremely implausible that new owners of the company would continue to curate the platform in precisely the same way, now and into

the future, as its current owners.[65] Even if they did, Americans are entitled to hear ByteDance's perspectives from ByteDance itself, whether or not there is an American company with roughly the same views.

In his concurrence, Chief Judge Srinivasan suggested that *Lamont*'s holding rested on the "narrow ground" that the government had imposed "an affirmative obligation to out oneself to the government in order to receive communications." C.A. Op. 82 (Srinivasan, C.J., concurring). But this misunderstands the relevance of the affirmative obligation to the Court's analysis. In *Lamont*, the affirmative obligation was significant only because it imposed a burden on Americans' access to foreign speech, thus triggering First Amendment scrutiny. 381 U.S. at 305, 307; *see also Kleindienst*, 408 U.S. at 763 (explaining that *Lamont* held that the statute at issue "placed an unjustifiable burden on the addressee's First Amendment right"). Here, the burden is the outright ban that the Act imposes on access to a platform curated by its current owners. That burden is more, not less, severe than the one in *Lamont*.

The D.C. Circuit also asserted that banning TikTok would "actually vindicate[ ]" First Amendment values by preventing foreign manipulation of American public discourse, C.A. Op.

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[65] Petitioners also explained below that it would be technologically and legally infeasible for new owners to operate TikTok's content moderation systems in the same way as TikTok's current owners. *See* C.A. TikTok Petrs.' Br. 20–21, 23.

43, but this turns the First Amendment on its head. The opinion below substitutes speculative covert content manipulation by a foreign government for definite overt content manipulation by the U.S. government. As this Court has explained, permitting our government to interfere with speech intermediaries' editorial choices "to advance its own vision of ideological balance" is not "the way the First Amendment achieves [its] goal." *Moody*, 603 U.S. at 741.

The Act's data privacy rationale also fails to justify the law.[66] This is because, while the government certainly has a substantial interest in protecting Americans' privacy, far less restrictive alternatives are available for that purpose. For example, the government could pass a comprehensive privacy law to regulate the collection, transfer, and misuse of Americans' personal information—including, but not limited to, its potential transfer to China. Such a law would address privacy concerns directly and would do so without restricting Americans' access to a single, popular medium of expression. That the government could satisfy its aims in this way makes clear that a "substantial portion of the burden on speech"

[66] The government has offered no evidence—much less the "substantial evidence" required—that the Chinese government has a "real, not merely conjectural" ability to access data collected by TikTok or to exercise control over the platform. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666, 664 (1994). In light of those deficits, the danger the government asserts is speculative. But even accepting the danger as real, the government's intervention cannot withstand scrutiny for the reasons discussed below.

imposed by banning TikTok does nothing to "advance [the government's data privacy] goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Courts frequently invalidate "total ban[s]" on a particular form of expressive activity for precisely this reason. *See Ward*, 491 U.S. at 799 n.7 (citing *Martin*, 319 U.S. 145–46); *City of Ladue*, 512 U.S. at 55 (collecting cases). It is the "essence of narrow tailoring" that a restriction actually "focus[ ] on the source of the evils the [government] seeks to eliminate," and not "suppress a great quantity of speech that does not [itself] cause th[ose] evils." *Ward*, 491 U.S. at 799 n.7. In this case, the "evil[ ]" the government seeks to address is the dissemination and use of Americans' personal information. This stems from platforms' data collection practices, not the expressive aspects of online communications. Therefore, just as a total ban on handbilling is plainly overbroad in relation to the problems of "fraud, crime, litter, traffic congestion, or noise" that could result from it, so too a total ban on TikTok is "substantially broader than necessary to achieve the interests justifying it." *Id.* (citing *Martin*, 319 U.S. at 145–46); *see also Alario v. Knudsen*, 704 F. Supp. 3d 1061, 1079 (D. Mont. 2023) (observing that, in attempting to ban TikTok, the Montana "[l]egislature used an axe to solve its professed concerns when it should have used a constitutional scalpel").

Notably, Congress has already recognized that it is possible to further data privacy aims directly and without resorting to the suppression of vast amounts

of protected speech. In the same omnibus legislation as the TikTok ban, Congress passed another law that prohibits data brokers from transferring "personally identifiable sensitive data" to designated foreign adversaries, including China.[67] Congress could build on that law—without restricting speech—by limiting the collection and transfer of personal data by online platforms such as TikTok.[68]

In any event, the government's data protection interest cannot save the Act. This is because the government's content manipulation interest is not merely an inadequate one, but an illicit one, as it reflects the impermissible purpose of "protecting" Americans from speech the government would prefer not be heard. *Cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 574–75 (2011) (holding that an otherwise valid interest in protecting consumers' data privacy could not withstand First Amendment scrutiny where the government acted with an "impermissible purpose to burden disfavored speech"); C.A. Op. 78 ("[T]he government makes no argument that the Act's application to TikTok should be sustained based on the data-protection interest alone.") (Srinivasan, C.J., concurring).

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[67] Protecting Americans' Data from Foreign Adversary Controlled Applications Act of 2024, Pub. L. No. 118-50, Div. I § 2(a), 138 Stat. 960 (2024).

[68] *See, e.g.,* Exec. Order No. 14,117, 89 Fed. Reg. 15421 (Feb. 28, 2024) (addressing the collection, use, and transfer of Americans' bulk sensitive personal data in transactions with certain countries).

CONCLUSION

Amici respectfully submit that the Court should reverse the judgment below.

Respectfully submitted,

Jameel Jaffer
Counsel of Record
Ramya Krishnan
Xiangnong Wang
Alex Abdo
Knight First Amendment Institute
at Columbia University
475 Riverside Drive
Suite 302
New York, NY 10115
(646) 745-8500
jameel.jaffer@knightcolumbia.org

Counsel for Amici Curiae

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