Nos. 24-656, 24-657

IN THE
Supreme Court of the United States

TIKTOK INC. AND BYTEDANCE LTD.,

Petitioners,

v.

MERRICK GARLAND,

Respondent.

BRIAN FIREBAUGH, ET AL.,

Petitioners,

v.

MERRICK GARLAND,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE*

Amici curiae are members of Congress. Senator Edward J. Markey represents Massachusetts, Senator Rand Paul represents Kentucky, and Representative Ro Khanna represents California's 17th congressional district. All three are strong advocates of free expression and are deeply concerned that the Protecting Americans from Foreign Adversary Controlled Applications Act will deprive millions of Americans of their First Amendment rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since the colonial era, government officials have attempted to use the pretense of national security to stifle free speech and expression. Before the American Revolution, the English used licensing laws and seditious libel to suppress critical speech that the Crown and Parliament too readily deemed dangerous to the realm's integrity. The Founders cast off the English model, and replaced it with constitutional protection for uninhibited debate on matters of national interest, trusting that speech and counter-speech would best prepare the people to navigate matters of war and national peril.

The government has at times departed from the framework designed by the Founders in periods of actual or perceived national emergency, but history has judged those departures harshly. From the Sedition

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* Under this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Act of 1798 to the Espionage Act of 1917 to the anti-Communist laws after the World Wars, the temptation has been to prohibit speech that might reflect foreign influence. But history has shown that government censorship typically poses a much greater risk to Americans than the speech being censored.

This Court's precedent properly puts a heavy burden on the government to justify prohibiting speech in the name of national security. The starting point is that freedom of expression outweighs theoretical or potential benefits of censorship. Although the government may be able to establish in the rare case that banning speech is necessary to serve a compelling national-security interest, the government cannot carry its burden through conclusory assertions or allusions to vaguely defined threats alone.

The TikTok ban does not survive First Amendment scrutiny. Its only historical parallels are illegitimate. Its principal justification—preventing covert content manipulation by the Chinese government—reflects a desire to control the content on the TikTok platform and in any event could be achieved through a less restrictive alternative. And its secondary justification of protecting users' data from the Chinese government could not sustain the ban on its own and also overlooks that Congress did not consider whether less drastic mitigation measures could address those concerns.

This Court should hold that the TikTok ban fails First Amendment scrutiny.

ARGUMENT

I. The Founders Did Not Envision the First Amendment as a Peacetime Luxury.

The First Amendment states that "Congress shall make no law * * * abridging the freedom of speech, or of the press." U.S. Const. Amend. I. This Court interprets those protections in light of that broad language, as well as history and tradition. *Houston Community College Sys.* v. *Wilson*, 595 U.S. 468, 474-475 (2022).

The right to speak freely on matters of state interest does not wilt in the face of national-security concerns. The Founders knew how to craft exceptions to constitutional rights, as with the privilege of the writ of habeas corpus in "Cases of Rebellion or Invasion." U.S. Const. Art. I, § 9, cl. 2. But the First Amendment's text does not authorize abridgements of speech during wartime or competition with foreign adversaries. To the contrary, citizens have an especially strong interest in speaking about the government's policies and actions during times of war or international competition.

The backdrop to the Bill of Rights confirms that understanding. The First Amendment was, in part, a reaction to the "licensing laws implemented by the monarch and Parliament" to preserve national security against supposedly harmful speech. *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 320 (2002). An English official would review works before publication and could "suppress works that he found to be 'heretical, seditious, schismatical, or offensive.'" *Ibid.* (citation omitted). As the English shifted from prior restraint to after-the-fact punishment, the Founders had "old

seditious libel cases in England" on their minds for very pressing reasons: Dissidents in the Colonies faced "prosecutions by English-controlled courts." *Talley* v. *California*, 362 U.S. 60, 64-65 (1960). The English, for example, infamously prosecuted John Peter Zenger for seditious libel after he published anonymous "attacks on the Crown Governor of New York." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 361 (1995) (Thomas, J., concurring in the judgment).

Having accomplished a Revolution through speech that the English would have branded seditious, the Founders chose a different path in the First Amendment, which trusts the people "to distinguish between the true and the false." *Meese* v. *Keene*, 481 U.S. 465, 480-481 & n.15 (1987) (citation omitted). The Constitution thus presumes that misguided or harmful speech will be met with counterspeech.

II. History Shows the Danger of Speech Restrictions That Serve Speculative Claims of Foreign Interference or Security Risks.

History has shown time and time again that the government is too quick to prohibit speech when faced with the specter of foreign interference or security risks. That track record should cause this Court to view skeptically the government's assertions here that national security demands speech prohibitions.

In 1798, Congress passed and President Adams signed the first Sedition Act while America was on the brink of war with France. The law prohibited publication of "any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with in-

tent to" (among other things) "encourage or abet any hostile designs of any foreign nation against the United States." Ch. 74, § 2, 1 Stat. 596-597. Proponents argued that the Act would counteract a "crowd of spies and inflammatory agents" who were "fomenting hostilities" and "alienating the affections of our own citizens." Geoffrey R. Stone, *Free Speech and National Security*, 84 Ind. L.J. 939, 941 (2009) (Stone) (citation omitted). Although many may have supported the Sedition Act for good-faith reasons grounded in national defense, the Act was a tool for the Federalist-led government to suppress political speech by the Republican opposition. See *ibid.* The government soon "show[ed] its repentance" by pardoning those convicted of sedition and "by repaying the fines that it imposed." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Despite never being "tested in this Court," the Sedition Act of 1798 has proved unconstitutional in the "court of history." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 276 (1964).

The federal government again sought to stamp out foreign-influenced speech when the United States entered World War I. Congress passed and President Wilson signed a law that criminalized willfully "caus[ing] or attempt[ing] to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States." Espionage Act of 1917, ch. 30, § 3, 40 Stat. 219. The Espionage Act was soon expanded to forbid "disloyal, profane, scurrilous, or abusive language" about the government. Sedition Act of 1918, ch. 75, § 1, 40 Stat. 553. President Wilson argued that disloyal Americans "had sacrificed their right to civil liberties," and his administration then

followed through by bringing over 2,000 prosecutions for allegedly seditious speech. Stone 944-945 (citation omitted). Courts applying the Act held that, though "disapproval of war and the advocacy of peace are not crimes," such speech was unlawful when its effect was "to weaken patriotism" and dampen recruitment efforts. *Shaffer* v. *United States*, 255 F. 886, 887-888 (9th Cir. 1919). This Court too rejected First Amendment challenges to the Act. *E.g.*, *Schenck* v. *United States*, 249 U.S. 47, 52 (1919). But the Court later overturned those decisions as it came to realize that executive overreach posed a greater threat to Americans' liberties than speech that purportedly weakens listeners' loyalty to the United States or increases their sympathies for foreign adversaries. See *Dennis* v. *United States*, 341 U.S. 494, 507 (1951).

Concerns about foreign-influenced speech also arose during World War II. As the war unfolded in Europe, Congress criminalized speech "advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence." Smith Act, ch. 439, § 2(a)(2), 54 Stat. 671. The threat of foreign influence was very real. In fact, Nazi agents even gained access to congressional franking privileges to send German propaganda for free by mail. Lily Rothman, *More Americans Supported Hitler Than You May Think*, Time (Oct. 4, 2018), tinyurl.com/452ny5vu. But this Court interpreted the Smith Act narrowly to apply only when the speaker intended to instigate imminent unlawful action. *Yates* v. *United States*, 354 U.S. 298, 326-327 (1957).

Successive Red Scares followed both World Wars. As the federal government and States moved to sup-

press infiltration of Communist ideals from abroad, this Court at first upheld such laws. *Whitney* v. *California*, 274 U.S. 357, 371 (1927). Congress, overriding President Truman's veto, later imposed a range of speech and associational restrictions on Americans who joined domestic Communist parties based on findings that those domestic associations were "controlled, directed and subject to the discipline of the Communist dictatorship of [a] foreign country." Subversive Activities Control Act of 1950, ch. 1024, § 2(5), 64 Stat. 988. This time, the Court stood firm, reminding the government that pursuit of "national defense" cannot lose sight of "defending those values and ideals which set this Nation apart"—chiefly, "the most cherished" protections of the First Amendment. *United States* v. *Robel*, 389 U.S. 258, 264 (1967). The Court warned that "[t]he greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech." *Keyishian* v. *Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 602 (1967) (citation omitted); accord *Lamont* v. *Postmaster General*, 381 U.S. 301, 307 (1965) (invalidating restrictions on domestic mailing of "communist political propaganda" originating abroad).

In short, claims that foreign powers can influence or have influenced domestic speech are nothing new. Government attempts to root out such foreign influence have tended to exaggerate the threat to national security and to suppress far more domestic speech than necessary.

III. The Government Must Meet a Very High Burden When Seeking to Restrict Speech in the Name of National Security.

The foregoing lessons of history have informed this Court's current speech-protective approach to the First Amendment. Justice Brandeis once prescribed "more speech, not enforced silence," to assertions that a foreign power had infiltrated the marketplace of ideas in America. *Whitney*, 274 U.S. at 377 (concurring opinion). That his minority view ultimately prevailed in this Court demonstrates its wisdom. *E.g.*, *United States* v. *Alvarez*, 567 U.S. 709, 727-728 (2012). Today, the Court serves as a beacon for liberty in defending speech from incursion based on speculative risks to national security.

The Court has held that in extremely rare circumstances the government can regulate speech that truly poses a risk of "imminent harms" to national security, as by enabling acts of "terrorism." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 35-36 (2010). But as the Court's decisions show, such regulations typically pass muster only when they cover "a narrow category of speech," such as speech made "under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations." *Id.* at 26. The government also always "carries a heavy burden" to justify a need to suppress speech, even in the name of national security. *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (per curiam) (citation omitted). Neither congressional findings nor conclusory executive assertions can satisfy that heavy burden, lest courts, "in the name of national defense, * * * sanction the subversion of one of those liberties—the freedom of association—which makes the

defense of the Nation worthwhile." *Robel*, 389 U.S. at 264.

The lower courts have largely gotten this Court's message. Because "[h]istory teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions," a "blind acceptance" of stated national-security concerns "would impermissibly compromise the independence of the judiciary." *In re Washington Post Co.*, 807 F.2d 383, 391-392 (4th Cir. 1986). A court thus "may not base its decision on conclusory assertions [about national security] alone, but must make specific factual findings." *Id.* at 392. And the evidence of the security risk must establish that the speech would "surely result in direct, immediate, and irreparable damage." *Beckerman* v. *City of Tupelo*, 664 F.2d 502, 514 (5th Cir. 1981) (quoting *New York Times*, 403 U.S. at 730 (Stewart, J., concurring)).

The need for a judicial cross-check of legislative findings and executive assertions against the factual record follows from the general rule that the "interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Reno* v. *ACLU*, 521 U.S. 844, 885 (1997). Although the government can justify a departure from that baseline in extreme circumstances, it faces a steep uphill climb. Respectful consideration of the political branches' judgment has not been—and should not become—abdication of the judiciary's responsibility to safeguard constitutional rights.

IV. The TikTok Ban Has All the Telltale Signs of Overreach.

If a page of history is worth a volume of logic, the TikTok ban is ripped from the darkest chapters for First Amendment rights in American history. The Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, div. H, 138 Stat. 955 (2024), has no legitimate historical parallel.

To start, make no mistake: The Act operates as a ban. It prohibits TikTok and its affiliates from operating the platform after a 270-day deadline for TikTok to divest. § 2(a)(2)(A), 138 Stat. 956. As the D.C. Circuit recognized, the government did "not rebut TikTok's argument that 270 days is not enough time for TikTok to divest given its high degree of integration with ByteDance." *TikTok Inc.* v. *Garland*, 2024 WL 4996719, at *19 (D.C. Cir. Dec. 6, 2024). One of the Act's cosponsors in fact touted the divestiture provision as a way "'to finally ban TikTok in the United States.'" Select Committee on the CCP, *Gallagher, Bipartisan Coalition Introduce Legislation to Protect Americans from Foreign Adversary Controlled Applications, Including TikTok* (Mar. 5, 2024), tinyurl.com/2p8nbszs (Gallagher Release); accord, *e.g.*, Press Release, *Rubio, Gallagher Introduce Bipartisan Legislation to Ban TikTok* (Dec. 13, 2022), tinyurl.com/mry3c8nd.

The interests identified by the D.C. Circuit do not justify banning a speech outlet used by 170 million Americans. The government sought to justify the ban in part based on unmaterialized concerns that the Chinese government might surreptitiously alter the content received by American users of TikTok. *TikTok*, 2024 WL 4996719, at *17. Specifically, the

House report stated that TikTok could become a vehicle to "push misinformation, disinformation, and propaganda." H.R. Rep. No. 118-417, at 2 (2024). But the D.C. Circuit acknowledged that the government "lacks specific intelligence that shows the PRC has in the past or is now coercing TikTok into manipulating content in the United States." *TikTok*, 2024 WL 4996719, at *19.

To the extent that the TikTok ban is designed to ensure "the right balance of private expression" on online platforms, this Court last Term held that such intervention is illicit censorship under the First Amendment. *Moody* v. *NetChoice, LLC*, 603 U.S. 707, 719 (2024). The D.C. Circuit reasoned that the TikTok ban "actually vindicates the values that undergird the First Amendment" by preventing interference by the Chinese government in the marketplace of ideas. *TikTok*, 2024 WL 4996719, at *17. But this Court rejected that precise argument in *NetChoice*, which established that censorship becomes no more benign when the government acts in an attempt to ensure more open or balanced speech platforms. 603 U.S. at 743.

In truth, what the D.C. Circuit called preventing content manipulation is pretext for viewpoint discrimination. The ban's proponents during congressional deliberations criticized TikTok for purportedly "expos[ing] children to harmful content," restricting "topics that are sensitive to the Chinese government" (like "content that blames China for th[e] pandemic"), and allowing content "glorif[ying] * * * Hamas terrorists." TikTok Appl. 13 (citations omitted). Similarly, proponents sought to justify the ban on the theory that "'TikTok is Communist Chinese malware that is

poisoning the minds of our next generation'" and had "'push[ed] harmful propaganda, including content showing migrants how to illegally cross our Southern Border, supporting Hamas terrorists, and whitewashing 9/11.'" Gallagher Release. This Court thus can hold that the ban violates the First Amendment because its actual motivation was "very much related to the suppression of free expression." *NetChoice*, 603 U.S. at 740.

Even if preventing covert manipulation of content rather than rebalancing viewpoints on TikTok were the true motivation for the Act, that interest could not justify a ban that operates as a sweeping prior restraint on speech that the Chinese government *might* try to manipulate. The ban evokes the English licensing laws that the Founders sought to relegate to a bygone era. See pp. 3-4, *supra*. And this Court has treated "prior restraints on speech and publication" as "the most serious and the least tolerable infringement on First Amendment rights," presumptively unconstitutional unless the government can meet "its heavy burden." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 558-559 (1976).

If our Nation's experience with sedition laws during wartime and Red Scare has taught us anything, the *latent* possibility that the Chinese government could distort speech on TikTok cannot justify the *preemptive* measure of an overbroad and unprecedented ban of that speech outlet for all Americans—particularly when that ban could not prevent the Chinese government from manipulating content on other platforms. See Tiffany Hsu & Steven Lee Myers, *China's Advancing Efforts to Influence the U.S. Election Raise Alarms*, N.Y. Times (Apr. 2, 2024), ti-

nyurl.com/e59t2b6w. The responsibility ultimately will fall on social media users, who "may be trusted to distinguish between the true and the false." *Keene*, 481 U.S. at 480 n.15 (citation omitted).

The government's other stated interest for banning TikTok—protecting user data from the Chinese government—cannot support the Act, either. As Judge Srinivasan observed, "the government makes no argument that the Act's application to TikTok should be sustained based on the data-protection interest alone." *TikTok*, 2024 WL 4996719, at *33 (opinion concurring in part and concurring in the judgment). Congress singled out TikTok alone for the different treatment, despite data-collection concerns that extend well beyond TikTok's application to all manner of foreign-controlled online services that collect data. And the evidence highlighted by the majority—that the Chinese government has collected data on Americans, exerts control over data practices by Chinese companies, and could attempt to subordinate TikTok's parent company to its will—is in any event far too speculative to justify banning TikTok in the United States. *Id.* at *14-15.

The D.C. Circuit stressed that the ban occurred only after "multi-year efforts of both political branches to investigate the national security risks posed by the TikTok platform." *TikTok*, 2024 WL 4996719, at *13. Mere duration in considering an issue cannot cover up for abbreviated consideration of less restrictive alternatives. And the D.C. Circuit's willingness to defer to the political branches far exceeded the proper scope of such deference under the First Amendment. See pp. 8-9, *supra*.

Upholding the Act against TikTok's and the content creators' First Amendment challenges would create a dangerous precedent for subverting individual liberty. Social media has become one of the most important fora for speech about political and social issues. See *NetChoice*, 603 U.S. at 719. Content creators have flocked to these platforms on the promise of their ability to express their viewpoints. There is nothing speculative or contingent about the way that a ban would interfere with all that existing speech and chill future speech.

In the end, this Court should stick with timeless principles of free speech, which put today's fears about Chinese infiltration of the marketplace of ideas into perspective. The charge of dangerous foreign influence is easy to make—and so has been made throughout history. The charge is potent precisely because even latent concerns about national security have a tendency to overpower public officials' commitment to protecting (often critical or unpopular) speech. The First Amendment thus puts a heavy thumb on the scale in favor of speech. Amici submit that the government has not satisfied its heavy burden in justifying a ban of the TikTok platform for all Americans.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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