Nos. 24-656 & 24-657

In the Supreme Court of the United States

TIKTOK, INC. AND BYTEDANCE LTD.,
Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

BRIAN FIREBAUGH, ET AL.,
Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Protecting Americans from Foreign Adversary Controlled Applications Act, as applied to petitioners, violates the First Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute, established in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, and conducts conferences and forums.

This case interests Cato because it concerns the First Amendment rights of a social media company and its users, a critically important issue in the digital age.

[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

One after another, members of Congress rose on the House floor to support the bill. "It is really incredible," one member said, "that we should allow an avowed and powerful enemy to be pouring poisonous propaganda into the minds of our own youth." Another member quoted an article warning of "unsolicited propaganda attacking the United States as 'imperialist,' 'war mongering,' and 'colonialist.'" The article asked rhetorically whether "a free society ha[s] to leave itself totally exposed to an unending brainwashing of foreign Communist propaganda—mostly concealed in its origin, subtle, purposeful—directed primarily at young Americans, at college students."

The impressionability of youth was a running theme of the day. The same member repeatedly emphasized that the propaganda at issue was "addressed to our youth, the teachers, and to colleges and universities, because this is a favorite trick of the Communists to get at the minds of our young people." Urging other members to support the bill, he called it "one of the most serious problems we have, to stop this Communist propaganda coming into our country. It is the technique of the Communists to work on the young minds of the various nations."

These fears will sound familiar to anyone who has followed recent debates over social media such as TikTok. But these members were not talking about TikTok. They were not talking about social media at all, because social media did not exist when they spoke. These congressional remarks were delivered not in

2024, but in 1961.[2] The members were urging support for a bill that would subject so-called "Communist political propaganda" to a regime of censorship, under which mail from abroad was opened and read by government officials. If the officials decided that a piece of mail qualified as such "propaganda," the addressee could only receive it by affirmative request.

Means of communication may change, but misguided censorial urges are eternal. The law at issue in this case would have the effect of destroying TikTok as we know it within the United States. *See generally* Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, div. H (2024) (hereinafter "the Act" or "the law"). The law was motivated by the same flawed instinct that was on display in 1961: the belief that disfavored speech must be fought with censorship rather than with counterspeech. Members of Congress justified this TikTok ban with claims that "Communist China is using TikTok as a tool to spread dangerous propaganda."[3] They described the speech available on TikTok as "bold attempts to infiltrate our country, spread propaganda."[4]

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[2] 107 CONG. REC. 17,815 (1961) (statement of Rep. Walter Judd); *id.* at 17,818 (statement of Rep. Glenn Cunningham) (quoting Roscoe Drummond, *Propaganda War: Moscow and the Mails*, WASH. POST (July 15, 1961)); *id.* at 17,814 (statement of Rep. Glenn Cunningham).

[3] Press Release, The Select Comm. on the CCP, Gallagher, Bipartisan Coalition Introduce Legislation to Protect Americans from Foreign Adversary Controlled Applications, Including TikTok (Mar. 5, 2024), https://tinyurl.com/yshcpwew (statement of Rep. Elise Stefanik).

[4] Press Release, Rep. Beth Van Duyne, Rep. Beth Van Duyne Votes to Protect North Texans from Communist China (Mar. 13, 2024), https://tinyurl.com/3f999s7r.

And some candidly admitted that the content and viewpoint of the speech on TikTok was their primary motivation for the bill, not data privacy concerns. A co-sponsor of the bill admitted that "the greater concern is the propaganda threat" and the question of "what information America's youth gets."[5]

The rhetoric that members used to justify the two bills was strikingly similar despite being separated by sixty years. Even the metaphors echoed across the decades. In 1961: "We would not allow any other country to be shipping in dangerous drugs or disease bacteria. We would not allow anybody to pour poison into our water supply. But here is our most important possession, the minds and attitudes of our youth, and . . . we allow that enemy to pour this poisonous material day after day into the untrained and uncritical minds of our youth."[6] In 2024: "TikTok is Communist Chinese malware that is poisoning the minds of our next generation;"[7] it is "digital fentanyl"[8] that is "poisoning the minds of our youth every day on a massive scale."[9]

In the 1960s, this Court rightly struck down the restriction on "Communist political propaganda,"

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[5] Jane Coaston, *What the TikTok Bill is Really About, According to a Leading Republican*, N.Y. TIMES (Apr. 1, 2024), https://tinyurl.com/rfrwhyda.

[6] 107 CONG. REC. 17,815 (1961) (statement of Rep. Walter Judd).

[7] Press Release, The Select Comm. on the CCP, *supra* (statement of Rep. Elise Stefanik).

[8] Daniel Arkin, *Pence Calls TikTok 'Digital Fentanyl'*, NBC NEWS (Mar. 13, 2024), https://tinyurl.com/wkemkcka.

[9] Press Release, The Select Comm. on the CCP, *supra*, (Statement of Rep. Chip Roy).

finding it to be "an unconstitutional abridgment of the addressee's First Amendment rights." *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965). The Court described that law as being "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment." *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964)).

This Court should reach the same result here. The government does not have any interest (let alone a compelling one) in suppressing speech it views as "propaganda." Quite the opposite. "In a democracy, government cannot be allowed to systematically indoctrinate its citizenry or instill in citizens a particular ideological bias, because to do so would essentially allow the government to undermine popular control by manufacturing its own consent."[10]

As Justice Robert Jackson eloquently put it, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Congress is attempting to prescribe the outer bounds of orthodoxy by destroying a platform because of the (perceived) viewpoints it carries. Courts can "infer censorial intent from legislative history and . . . invalidate laws so motivated." *News Am. Pub., Inc. v. FCC*, 844 F.2d 800, 809 (D.C. Cir. 1988). The censorial intent behind the Act is clear.

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[10] Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. UNIV. L. REV. 1, 19 (2008).

Further, the evidence in the public record fails to demonstrate that the Act is necessary to address concerns of data collection by the Chinese government. The D.C. Circuit panel below assumed (without deciding) that strict scrutiny applies in this case. But although the form of scrutiny that the panel applied was strict in name, it was deferential in application.

The panel opinion mainly relied on evidence suggesting (in the panel's view) that TikTok's parent company *ByteDance* had misused TikTok user data and on evidence suggesting that the Chinese government has an interest in obtaining Americans' data. App 41a–42a. But notably missing from the panel opinion was any evidence that the Chinese government *has* obtained TikTok user data or that it has a specific plan to do so.

The panel accepted the government's prediction "that ByteDance and TikTok entities 'would try to comply if the [Chinese government] asked for specific actions to be taken . . . .'" App. 36a. But the panel implicitly admitted that this threat remains speculative. Quoting another D.C. Circuit opinion that had applied arbitrary and capricious review (not First Amendment review), the panel asserted that "[t]he Government 'need not wait for a risk to materialize' before acting[.]" App. 41a (quoting *China Telecom (Am's.) Corp. v. FCC*, 57 F.4th 256, 266 (D.C. Cir. 2022)). That may be true under arbitrary and capricious review, but much more is required to show a "compelling governmental interest" under First Amendment strict scrutiny.

While non-content-based concerns over hacking and data-tracking could *hypothetically* justify government action against a platform, the government has not proffered public evidence that meets the high

burden necessary to support this justification. Based on the publicly available record, the Court should invalidate the Act.

ARGUMENT

I. "PROPAGANDA" IS PROTECTED BY THE FIRST AMENDMENT.

> We welcome the views of others. We seek a free flow of information across national boundaries and oceans, across iron curtains and stone walls. We are not afraid to entrust the American people with unpleasant facts, foreign ideas, alien philosophies, and competitive values. For a nation that is afraid to let its people judge the truth and falsehood in an open market is a nation that is afraid of its people.[11]

With these remarks, President John F. Kennedy succinctly stated America's free speech ideals.[12] These ideals have a lengthy historical pedigree, tracing back to John Stuart Mill and beyond. As Mill put it,

> the peculiar evil of silencing the expression of an opinion is, that it is

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[11] President John F. Kennedy, Remarks on the 20th Anniversary of the Voice of America (Feb. 26, 1962), available at, https://tinyurl.com/5n87us7j.

[12] Kennedy's own record of putting these ideals into practice is mixed. While he ended a Post Office program monitoring Communist "propaganda" in 1961, he later signed the bill which brought a substantially similar program back into effect, until its invalidation by this Court. *Historical Background of Propaganda Mail Interception*, *in* CONG. Q. ALMANAC *(18TH ED., 1962*), at 07–370.

> robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[13]

And the principles articulated by Kennedy and Mill are not just cultural values; they are protected by the First Amendment. This Court has repeatedly affirmed that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988). Given this importance, "[t]he First Amendment creates an open marketplace in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 308–09 (2012) (cleaned up).

As this Court has recognized, preserving this marketplace of ideas requires carefully cabining the government's authority. The First Amendment is thus "designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of

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[13] JOHN STUART MILL, ON LIBERTY 76 (Gertrude Himmelfarb ed. 1974) (1859).

such freedom will ultimately produce a more capable citizenry and more perfect polity." *Cohen v. California*, 403 U.S. 15, 24 (1971).

Maintaining the marketplace of ideas requires placing restrictions on the government's power over speech. "[I]t cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

"At bottom, the key is who gets to decide what content is appropriate to circulate in the marketplace of ideas."[14] It is dangerous to give the government control over that decision precisely because government power distorts the free marketplace of ideas. "[I]f the government were allowed to enshrine in law and prohibit the disavowal of a set of ideological principles that favored the current status quo, the dominant political faction could preempt any attacks on the legitimacy of its power."[15]

And even when government does not act with an intentionally self-serving purpose, regulators will often be too quick to dismiss an idea that deserves a full airing (or to embrace an idea that has unseen flaws).

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[14] Clay Calvert, et al., *Fake News and the First Amendment: Reconciling a Disconnect between Theory and Doctrine*, 86 U. CIN. L. REV. 99, 137–38 (2018).

[15] Gey, *supra*, at 20.

"[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Hustler Mag.*, 485 U.S. at 51 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

Of course, not all views have merit and not all ideas have wisdom. Many ideologies deserve their place on the "ash heap of history."[16] But a society cannot truly reject an idea that it has not yet been allowed to hear. "[I]t is by the exposure of folly that it is defeated; not by the seclusion of folly."[17] That is why this Court has consistently held that the antidote for misguided ideas is counterspeech, not censorship. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 97 (1977) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

The explicitly stated justifications for the TikTok ban at issue in this case are antithetical to these principles. Congress has not attempted to hide the ball. The purpose of this law is to stop Americans from

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[16] Richard Pipes, Ash Heap of History: President Reagan's Westminster Address 20 Years Later, Remarks at the Heritage Foundation (June 3, 2002) (transcript available at, https://tinyurl.com/we8ax4h7).

[17] Woodrow Wilson, Address at the Institute of France, Paris (May 10, 1919) *in* 2 SELECTED LITERARY AND POLITICAL PAPERS AND ADDRESSES OF WOODROW WILSON 333 (1926).

receiving speech on TikTok, because Congress disagrees with (what it perceives to be) the messages expressed on TikTok.

A House committee report on a bill that served as a precursor to the Act claimed that TikTok could be used to "push misinformation, disinformation, *and propaganda* on the American public." H.R. Comm. on Energy & Com., Protecting Americans from Foreign Adversary Controlled Applications Act, H.R. Rep. No. 118-417, at 2 (2024) (emphasis added). The report also warned (using language that might fairly describe every newspaper in America) that the platform could "shape narratives and elevate favorable opinions." *Id.* at 11.

Myriad statements made by members of Congress have removed any doubt that the law is aimed at TikTok because of the perceived viewpoint (and persuasiveness) of speech on the platform. One member said that TikTok "should not be influencing our children and . . . should not be able to indoctrinate American users."[18] Another called it "a valuable propaganda tool."[19] And a third warned that it could "influence the American people and our way of life."[20] Whether these

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[18] Press Release, Rep. Jack Bergman, Bergman Supports Bipartisan Legislation to Stop Foreign Adversaries from Owning Social Media Companies (Mar. 13, 2024), https://tinyurl.com/4cr6k2vr.

[19] *Legislation to Protect American Data and National Security from Foreign Adversaries: Hearing on H.R. 7520 and H.R. 7521 Before the H. Committee on Energy and Commerce*, 118th Cong. 3 (2024) (statement of Rep. Cathy McMorris Rodgers, Chairwoman, H. Comm. On Energy and Commerce).

[20] Press Release, Rep. Brett Guthrie, Guthrie Votes to Protect Americans' Data Privacy and National Security (Mar. 13, 2024), https://tinyurl.com/msu7242f.

members were right or wrong about the content or persuasiveness of the speech on TikTok, they admitted that they wished to silence the platform *because of* the viewpoints that they believed the platform carried.

The government has also admitted this purpose behind the law. In its briefing to the D.C. Circuit below, the government argued that the law is necessary to prevent TikTok from being used to amplify speech that could "undermine trust in our democracy and exacerbate social divisions."[21]

The censorship that Congress hopes to achieve cannot be sustained under the Constitution.

First, the Act cannot be justified on the grounds that the targeted speech may come from noncitizens residing outside the United States, who do not have First Amendment rights. Destroying TikTok in the United States would mean that *no one* could use the platform to broadcast their message. This law would cut off the speech of not just noncitizens but also millions of U.S. citizens with full First Amendment rights.

Further, the noncitizen status of some (but not all) speakers on TikTok is irrelevant, because destroying TikTok would infringe Americans' First Amendment right to *receive* speech. And that right applies just as much to speech sent from overseas as it does to speech sent from next door. This Court "in recent decades has fortified the right to receive information and ideas in a variety of contexts."[22] "Considered together, these

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[21] Amended Public Redacted Brief for Respondent at 35, *TikTok Inc. v. Garland*, No. 24-1113 (D.C. Cir. Dec. 6, 2024).

[22] Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269, 305 (2018) (citing *Sorrell v. IMS Health Inc.*, 564 U.S.

decisions likely preclude the government from barring the entry of political speech from abroad on the ground that the speaker is foreign or that the speech is valueless or false—not because foreign speakers abroad have a First Amendment right to speak, but because the First Amendment demands an open marketplace of ideas for domestic listeners."[23]

Second, Congress's intended censorship cannot be justified on the grounds that America's youth needs protection from the supposed threat of foreign propaganda. The government does not have "a free-floating power to restrict the ideas to which children may be exposed. 'Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'" *Brown*, 564 U.S. at 794–95 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975)).

Minors have a First Amendment right to receive speech. And the government cannot restrict that right on the basis of a "parental consent" theory. The government could not make it "criminal to admit persons under 18 to a political rally without their parents' prior written consent." *Brown*, 564 U.S. at 795 n.3. "Such laws do not enforce *parental* authority over children's speech . . . ; they impose *governmental* authority, subject only to a parental veto." *Id.* Parents, of course, can

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552 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786 (2011); *United States v. Stevens*, 559 U.S. 460 (2010); *United States v. Alvarez*, 567 U.S. 709 (2012)).

[23] *Id.*

choose what is best for their children and control their social media access. But governmental censorship of a social media platform would take that choice away from children *and* parents.

In sum, the Act has singled out TikTok because lawmakers decided that the solution to arguments they did not like is government censorship. Labeling such arguments "propaganda" does not exempt them from the First Amendment. On the contrary, *Lamont* makes clear that the most disfavored political speech is most in need of vigilant judicial protection from government suppression.

II. "MISINFORMATION AND DISINFORMATION" ARE PROTECTED BY THE FIRST AMENDMENT.

A second clear theme runs through the congressional statements justifying the Act. The House committee report warned of "misinformation" and "disinformation." H.R. Comm. on Energy & Com., *supra*, at 2. One member of Congress claimed that speech on TikTok was part of an "extensive disinformation campaign."[24] Another similarly warned that the platform could be used "to foment malign disinformation campaigns."[25] And a third likewise invoked the fear of

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[24] Press Release, Yvette D. Clark, Rep. Clarke Releases Statement on H.R. 7521, the Protecting Americans from Foreign Adversary Controlled Applications Act (Mar. 7, 2024), https://tinyurl.com/5y68mjd3.

[25] Press Release, Jared Huffman, Rep. Huffman Statement on Vote for the Protecting Americans from Foreign Adversary Controlled Applications Act (Mar. 12, 2024), https://tinyurl.com/3psywtxd.

"[f]oreign interference and disinformation campaigns."[26]

The government has admitted this purpose behind the Act as well. In its briefing to the D.C. Circuit, the government quoted with approval a U.S. senator's concern that TikTok could be used for "promot[ing] disinformation."[27]

This justification for the law fares no better than the "propaganda" justification. Just as the government may not censor viewpoints it disfavors, neither may it serve as an arbiter of truth. "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion) (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949) (Centennial ed. 2003)).[28] Our constitutional tradition favors open discussion rather than government fiat, and that holds true for questions of fact just as much as questions of politics and philosophy.

Just as censoring a flawed political argument makes it harder to rebut, censoring a false statement makes it harder to disprove. Thus, "suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse." *Alvarez*, 567 U.S. at 728. For all these reasons,

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[26] Press Release, Sean Casten, Casten Statement on HR 7521 (Mar. 13, 2024), https://tinyurl.com/r975wn55.

[27] Amended Public Redacted Brief for Respondent at 35, *TikTok Inc. v. Garland*, No. 24-1113 (D.C. Cir. Dec. 6, 2024) (alteration in original).

[28] All citations to *Alvarez* are to Justice Kennedy's plurality opinion unless otherwise noted.

"[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Id.* at 727. Put another way, "[t]he First Amendment presumes that as the ultimate governors of society, we are rational agents capable of sorting out truth from falsity without government supervision."[29]

In the long run, giving the government truth-deciding power would have a negative effect on citizens' own motivation to make independent judgments. "The benefits to be achieved by having the government correct the dissemination of factual falsehoods would be far outweighed by the signaling effect of having the government settle intellectual disputes through legal sanctions. Allowing the government to act in this way would subtly diminish the importance of recognizing the government's natural tendency to twist reality to its own purposes. Allowing the government to encourage truthfulness by punishing falsehood has the potential for lulling the citizenry into taking what the government says at face value."[30]

Relatedly, granting such power to the government would lead to many true statements being accidentally censored as false, for the simple reason that no one (including government officials) will get every call right. "Those who desire to suppress" purportedly false speech "of course deny its truth; but they are not infallible. . . To refuse a hearing to an opinion, because they

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[29] James Weinstein, *What Lies Ahead?: The Marketplace of Ideas, Alvarez v. United States, and First Amendment Protection of Knowing Falsehoods*, 51 SETON HALL L. REV. 135, 165 (2020).

[30] *Id.*

are sure that it is false, is to assume that *their* certainty is the same thing as an absolute certainty. All silencing of discussion is an assumption of infallibility."[31]

Even more ominously, some wrongful cases of censorship would result from malice rather than from honest mistakes. If the government were granted the power to censor certain speech on the grounds that it is "misinformation," that power would be ripe for abuse. Prosecution of falsehoods would necessarily be selective, and often particular statements would be targeted because the "statement of such facts are bound up with political perspectives that the government seeks to undermine."[32] "Imagine, for instance, that a president and his party, which controls both houses of Congress, believes that 'fake news' about health—which also just happens to criticize the administration's handling of a public health crisis—is causing people to make dangerous health decisions."[33] Because of the danger inherent in this and other examples, "a truly self-governing democracy cannot allow those temporarily vested with power to dictate what is true or false."[34]

The Act at issue in this case exemplifies these concerns. In passing the law, the government singled out TikTok despite offering no evidence that TikTok contains more falsehoods than any other social media site. Given the sheer volume of social media posts, it would

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[31] MILL, *supra*, at 19.

[32] Gey, *supra*, at 22.

[33] JEFF KOSSEFF, LIAR IN A CROWDED THEATER: FREEDOM OF SPEECH IN A WORLD OF MISINFORMATION 197 (2023).

[34] Calvert, *supra*, at 135.

be easy for the government to cherry pick particular examples of falsehoods on any social media site and use those falsehoods as a justification to shut down the disfavored site. As Justice Breyer wrote, "the pervasiveness of false statements . . . provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say, by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims." *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring in judgment).

Americans on all sides of the political spectrum should be wary of such government power. "Think about a law giving the government the power to remove 'misleading political speech' from social media sites, and now imagine that a Trump appointee (or an appointee of whichever president you think might not play fairly under the rules) has the power to decide what counts as 'misleading speech' and to order such speech immediately removed from social media sites."[35] No matter who is in office, "selectively prosecuting those with whose speech the government disagrees violates the core democratic precept of *equal* participation in the political process."[36]

And looking to the future beyond TikTok, the Act would grant the government a further tool of selective censorship. In the Act, Congress has given the president a weapon to suppress and censor disfavored

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[35] RICK HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT 81 (2022).

[36] Weinstein, *supra*, at 165.

speech on *other* platforms beyond TikTok, based on an amorphous finding of "a significant threat" to "national security." The Act, *supra*, § 2(g)(3)(B)(ii). With no further guidelines, it is easy to imagine an administration picking and choosing which platforms to consider a threat to national security, potentially on the basis of selectively identified "disinformation." "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." *N.Y. Times v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring). When it comes to the power to shut down a speech platform, far more statutory guidance is required to ensure that actions taken are not pretextual. "[P]recision must be the touchstone of legislation so affecting basic freedoms." *N.A.A.C.P. v. Button,* 371 U.S. 415, 438 (1963).

Finally, government censorship of alleged falsehoods is incompatible with the First Amendment because the government itself has tools to counteract misinformation that are far less restrictive than censoring speech (or banning entire platforms). "Censorship regimes may block some lies. But it is rare that government regulations can effectively block all or even most false speech, and in doing so they may also prevent a great deal of true speech with little benefit."[37]

For all these reasons, the government must first attempt to further its aims with its less speech-restrictive tools. These tools are the government's *own* speech and the government's ability to provide civic education. Yet in this case, the government made no attempt

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[37] Kosseff, *supra*, at 146.

to solve the alleged problems of misinformation on social media with these less extreme options.

Just as in *Alvarez*, "[t]he Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie." *Alvarez*, 567 U.S. at 726. "[T]he processes of education" may "avert the evil" of "falsehood and fallacies." *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

"If the government is to play any part in fighting fake news, its role must be educational, not censorial. This means ramping up digital media literacy efforts in the nation's classrooms."[38] Indeed, Congress is aware of such options, since they were proposed in a high-profile Select Committee Report. *See* Report of the Select Committee on Intelligence, U.S. Senate on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, vol. 2, p. 81 (calling for a "public initiative . . . focused on building media literacy from an early age" to "help build long-term resilience to foreign manipulation of our democracy"). With education, the government can bolster "private efforts to combat fake news, including counterspeech, self-regulation and media-literacy education."[39]

Foreign disinformation is not a new phenomenon. "Soviet disinformation campaigns that targeted domestic racial injustice and disease outbreak are direct precedents for disinformation efforts by Russia, and other hostile states, that target Western democracies

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[38] Calvert, *supra*, at 138.

[39] *Id.* at 107.

today."[40] In response to prior campaigns, the U.S. government adopted a "strategy of reporting, assessing, and publishing" counterspeech that "was effective" in mitigating the effects of Soviet disinformation and that "remains applicable today."[41] These examples show that disinformation can be effectively rebutted without resorting to government censorship.

Options like media literacy education and government counterspeech "are far superior to creating a government agency vested with Orwellian authority to determine what news is true and false and, in turn, to censor the latter."[42]

III. THE D.C. CIRCUIT DID NOT ENGAGE WITH THE LAW'S TRUE CENSORIAL JUSTIFICATION, AND IT DID NOT APPLY TRULY STRICT SCRUTINY.

In its opinion below, the D.C. Circuit implausibly recharacterized the purpose of the law. The Court did not engage with the government's own admission in its briefing that the law was aimed at suppressing speech that could "undermine trust in our democracy and exacerbate social divisions" and that the law was passed to stop TikTok from being used for "promot[ing] disinformation."[43] Instead, the panel held that the law was passed to protect *TikTok* itself.

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[40] Calder Walton, *What's Old Is New Again: Cold War Lessons for Countering Disinformation*, 5 TEX. NAT'L SEC. REV. 50, 71 (2022).

[41] *Id.* at 72.

[42] Calvert, *supra*, at 107.

[43] Amended Public Redacted Brief for Respondent at 35, *TikTok Inc. v. Garland*, No. 24-1113 (D.C. Cir. Dec. 6, 2024) (alteration in original).

Specifically, the panel reasoned that the Act was passed "to end the [Chinese government's] ability to control TikTok" and that "[u]nderstood in that way, the Act actually vindicates the values that undergird the First Amendment." App. 43a.

It is puzzling to reframe the law as aimed at *protecting* TikTok from governmental regulation by China, given that TikTok itself has brought this challenge and made very clear that it does not want such an intervention. Even assuming for the sake of argument that TikTok is or will be subject to such regulation by a foreign government, the Act would "save" TikTok by ending its ability to operate in the United States *entirely*. To borrow an ironic phrase from medicine, a successful operation would kill the patient.

Suppose (to use an analogy to traditional print media) there were evidence that a book published by a foreign dissident had been edited by a foreign government to remove its most unflattering chapter. It would be entirely appropriate for the American government to publicly note that censorship and to explain how the book had been altered through the use of its own government speech. But it would be counterproductive and, indeed, unconstitutional for the American government to instead ban the book *entirely* from being sold by American booksellers in a misguided attempt to "save" that foreign author from the censorship of his own government.

Even if the D.C. Circuit's justification were grounded in factual evidence, and even if it were one of the government's motivations for the law, it would

not justify a *de facto* ban on TikTok.[44] The solution to censorship is not *more* censorship.

Nor does the public record (on which the panel entirely relied) justify the Act on data privacy concerns. Although the panel claimed that it was applying strict scrutiny, it consistently deferred to the *government*, not to the challengers. The opinion's analysis is strict in theory but friendly in fact.

"Under strict scrutiny, the government must adopt 'the least restrictive means of achieving a compelling state interest[.]'" *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (quoting *McCullen v. Coakley*, 573 U.S. 464, 478 (2014)). A court applying this test must *independently* assure itself that the government has satisfied this very high bar. But the panel instead relied primarily on the government's say-so.

The panel insisted that it "would be wholly inappropriate" for a court to "reject the Government's risk assessment and override its ultimate judgment" that it had no choice but to pass the law. App. 51a. Why is that? Because "Executive Branch officials 'conducted dozens of meetings,' considered 'scores of drafts of proposed mitigation terms,' and engaged with TikTok as well as Oracle for more than two years" before the law was passed. App. 52a. The opinion thus treats the government's own dissatisfaction with other options as decisive evidence that there were no other options.

Truly strict scrutiny requires that this Court *independently* determine whether the risk of TikTok user

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[44] Notably, as the panel below observed, "the Government acknowledges that it lacks specific intelligence that shows the [Chinese government] has in the past or is now coercing TikTok into manipulating content in the United States." App. 47a.

data falling into the hands of the Chinese government is so high that the U.S. government had no alternative but to pass the law at issue. The publicly available record does not show a data-privacy threat so imminent and unavoidable as to overcome strict First Amendment scrutiny.

CONCLUSION

Congress passed the Act because it doesn't like some of the speech on TikTok (or some of the speech Congress *thinks* is on TikTok) and because Congress wants to suppress and censor that speech. Not only that, Congress gave future presidents a dangerous tool with which to threaten or destroy other disfavored speech platforms. If members of Congress or the government disagree with the facts or opinions found on a social media site like TikTok, they can respond and rebut with more persuasive speech. But under the First Amendment, the government cannot punish (let alone destroy) a speech platform because of the viewpoints it carries. That is what happened here, and this Court should block the Act from taking effect.

Respectfully submitted,

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