Nos. 24-656, 24-657

IN THE

Supreme Court of the United States

TIKTOK, INC., *et al.*,

Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

BRIAN FIREBAUGH, *et al.*,

Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* ZEPHYR TEACHOUT AND JOEL THAYER IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are policy and legal experts who have extensively researched the intersection of foreign government interference in domestic politics, tech regulation, and the Constitution. Although *amici* have disagreeing views on a wide range of issues given their political differences, they share the view that the Foreign Adversary Controlled Applications Act ("PAFACAA" or the "Act") follows a fairly traditional content-neutral path for restrictions on foreign ownership and easily passes constitutional muster.

Zephyr Teachout is a Professor at Law at Fordham Law School where she focuses on the intersection of corporate power and political power. She teaches corporations, election law, antitrust, and prosecuting white-collar crime. She wrote one of the first articles in 2009, The Globalization of Local Elections, anticipating the threat of fine-grained foreign engagement in domestic elections. Teachout's most recent book, Break 'em Up (2020), makes a case for reimagining the relationship between democracy and anti-monopoly law. Her prior book, Corruption in America (2014), explored, among other things, the central role foreign governmental corruption played in the Constitutional Convention. Her public writings have appeared in the *New York Times*, *Foreign Affairs*, *New York Review of Books*, *Washington Post*, *The Nation*, and *The New Republic*. In 2021, she took a leave to

1. Amici certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the amici or their counsel made any monetary contribution to this brief's preparation or submission.

work as Special Advisor and Senior Counsel for Economic Justice at the New York Attorney General's Office.

Joel Thayer, President of the Digital Progress Institute, previously was an associate at Phillips Lytle. Before that, he served as Policy Counsel for ACT | The App Association, where he advised on legal and policy issues related to antitrust, telecommunications, privacy, cybersecurity and intellectual property in Washington, D.C. His experience also includes working as legal clerk for FCC Chairman Ajit Pai and FTC Commissioner Maureen Ohlhausen. Additionally, Joel served as a congressional staffer for the Hon. Lee Terry and Hon. Mary Bono. His works have been featured in the *American University Intellectual Property Brief*, *Harvard Journal of Law and Public Policy*, *Stanford Technology Law Journal*, *the Journal of American Affairs*, *The Wall Street Journal*, *Newsweek*, *The Hill*, *The National Review*, and *The Federalist Society*.

Amici urge the Court to affirm and clarify that the law should be reviewed under rational basis review. The decision in this case will have vast implications on how the government can and ought to move forward with respect to thwarting sovereignty and national security threats using foreign ownership restrictions. If this Court grants Petitioners' relief, it would destabilize generations of foreign ownership restrictions on communications infrastructure; any standard of review higher than rational basis would call into question dozens of statutes restricting foreign ownership.

Amici also urge the Court to exercise extreme caution in making any pronouncements regarding the interaction

between the First Amendment and social media. There are extremely complicated and important questions regarding when and how platforms may or may not be afforded First Amendment protection. Such questions should not be hastily addressed, given the significant potential impact of dicta on hundreds of pieces of pending state and federal legislation.

INTRODUCTION AND SUMMARY OF ARGUMENT

During the Constitutional Convention, Alexander Hamilton warned, "Foreign powers … will interpose, the confusion will increase, and a dissolution of the Union ensue." James Madison, Notes on the Constitutional Convention (June 18, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 285 (Max Farrand ed., 1911). The delegate Elbridge Gerry said, "Foreign powers will intermeddle in our affairs and spare no expense to influence them …. Everyone knows the vast sums laid out in Europe for secret services." The risk of foreign involvement in American policy was close to an obsession at the convention, and undergirded several provisions of the Constitution designed assuming that foreign powers would actively try to gain influence.

In Federalist 68, Hamilton argued that the "most deadly adversaries of republican government" arose "chiefly" from "desire in foreign powers to gain an improper ascendant in our councils." The Federalist No. 68 (Alexander Hamilton). The foundation of our Constitution, as well as sovereignty generally, lies in the understanding that we have the power to protect against foreign interference and that the exercise of such power is not incompatible with the First Amendment.

Federal law has consistently prohibited foreign ownership of communications companies, and of infrastructure. As new technologies developed, new restrictions were put in place. Now, new technologies developed in the last twenty years have transformed the capacity for foreign interference. While 30 years ago it was functionally impossible for foreign governments to engage in local races for Congress, or to track the vulnerabilities of local officials millions of miles away without considerable cost, social media now makes it nearly frictionless for a foreign adversary to engage in hyperlocal politics directly.

If this Court rules in favor of Petitioners, it would open the door for known corporate affiliates of the Chinese, Russian, North Korean, and Iranian governments to weaponize our Constitution to spy on our population. But it would also call into question dozens of federal laws that limit foreign ownership of communications companies and infrastructure and challenge settled notions of sovereignty. This Court should resoundingly affirm Congress's authority to protect against foreign meddling in elections and foreign governmental ownership of infrastructure.

According to the logic of TikTok and *amici*, limits on communications infrastructure should be uniquely frowned upon; according to the logic of history, sovereignty, and practice, limits on communications infrastructure are uniquely necessary and presumptively valid.

The Protecting Americans from Foreign Adversary Controlled Applications Act ("PAFACAA" or the "Act") follows a traditional and constitutionally sound path to thwart that threat by placing foreign ownership

restrictions at the application layer. In this brief, we begin with a descriptive account of foreign ownership restrictions and explain how such restrictions have peacefully co-existed with the First Amendment for the nation's history.

ARGUMENT

I. The Right to Limit Foreign Governmental Meddling is Embedded in Our Constitutional Structure

Petitioners' Emergency Application for Injunction calls PAFACAA "unprecedented" with respect to how the United States addresses national security threats. Pet App. p. 1. This is categorically untrue.

In fact the United States has been restricting foreign ownership since its birth. What would be unprecedented is to *not* have restrictions on foreign ownership, because social media is both in the communications sector, which has long had foreign ownership restrictions, and infrastructure, which has also long had foreign ownership restrictions.

The right to protect against foreign government influence is embedded within our Constitution order. At the Constitutional Convention, there was little talked about as much as the threat of foreign meddling, and those discussions led to a series of structural restrictions on foreign power. Alexander Hamilton cautioned that "foreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue." James Madison, Notes on the Constitutional Convention (June 18, 1787), in 1 THE

RECORDS OF THE FEDERAL CONVENTION OF 1787 at 285 (Max Farrand ed., 1911) .

The Foreign Emoluments Clause bars federal officeholders from accepting "any present" or "Emolument" of "any kind whatever" from any foreign country, absent "the consent of the Congress." U.S. Const. art. I, § 9, cl. 8. Its purpose is to guard against "foreign influence of every sort." 3 Story, *Commentaries on the Constitution of the United States* 202 (1833). The Constitution also requires that our president be a natural-born citizen. Art. II, § 1, cl. 5. The high bar for treaty ratification in the Constitution grew out of James Madison's fear of "the power of foreign nations to obstruct our retaliating measures on them by a corrupt influence." The Records of the Federal Convention, doc. 8. The impeachment clause was successfully added to the Constitution because delegates persuaded others that the Executive could be corrupted by "foreign pay" and that, as Gouverneur Morris put it, "The Executive ought, therefore, to be impeachable for treachery" among other reasons. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 69 (rev. ed. 1937).

Article I, which includes the Foreign Commerce Clause grants Congress authority to "regulate Commerce with foreign nations." U.S. Const. art. I, § 8, cl. 3. "[F]rom the beginning[,] Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries." *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904); see also *SEC v. Jarkesy*, 144 S. Ct. 2117, 2132 (2024).

For 250 years, the sovereign right to protect against foreign ownership has been largely unquestioned.

The U.S. has consistently applied foreign ownership restrictions in the communications sector because of its direct link to our democracy and national security. Driven by fears that foreign adversaries would use their communications companies' radio monopolies to influence policy in the U.S., Congress passed the Federal Radio Act that authorized the Federal Radio Commission (now the Federal Communications Commission ("FCC" or "Commission")) to license radio companies, and added a 20% limit on foreign stockholding to the restrictions from the 1912 Act. Ganesh Sitaraman *The Regulation of Foreign Platforms*, 74 Stan. L. Rev. 1073 (2022). When Congress enacted the Communications Act of 1934, it created Section 310 of the Communications Act that prohibits a foreign government or its representative from holding any radio license. 47 U.S.C. § 310(a)-(b).

Moreover, Section 214 of the Communications Act allows the Commission to act on applications filed by carriers to provide international telecommunications service and transfer or assign existing authorizations. 47 U.S.C. § 214. The international portion of Section 214's process ensures that the U.S. market is protected against potential anti-competitive behavior by a carrier with market power in a foreign country. 47 C.F.R § 63.21.

Court challenges to foreign ownership limitations have consistently failed. The FCC denied China Mobile's application to provide communications services in the United States under this provision, and the court upheld it. *China Telecom (Americas) Corp. v. F.C.C.*, 57 F.4th 256 (D.C. Cir. 2022). The D.C. Circuit found that it was constitutionally permissible for the FCC to use Section 214 to deny China Telecom the ability to operate domestic

and international transmission lines due to concerns about Chinese cyber threats targeting the U.S. *Id.* Courts have upheld the FCC using its Section 214 authority to revoke a carrier's license when its indirect ownership interests from a foreign adversary pose a national security threat. *Pacific Networks Corp. & ComNet (USA), LLC v. F.C.C., et al.*, 77 F.4th 1160 (D.C. Cir. 2023).

The FCC also used Section 254 of the Communications Act to deny Huawei and ZTE monies from its Universal Service Fund on national security grounds. The Fifth Circuit upheld the FCC's decision. *Huawei Tech., Inc., et al. v. F.C.C.*, 2 F.4th 421 (5th Cir. 2021). Similarly, Congress passed the Secure and Trusted Communications Networks Act of 2019, requiring the FCC to create a "covered" list of telecommunications equipment that pose a national security threat on the basis of the company's ownership interest. As these examples evince, the Act's approach is far from a departure and certainly not unprecedented.

In short, PAFACCA's national security justification is consistent with previous legislative efforts that have been upheld by the courts. The specific national security threat is starkly similar to the ones present in *China Telecom*, *Pacific Networks*, and *Huawei* in that the CCP's ability to control TikTok's platform is linked to their ownership interest. Indeed, as the lower court in this case discussed, "[t]he PRC has "pre-positioned" itself "for potential cyber-attacks against U.S. critical infrastructure by building out offensive weapons within that infrastructure."" *TikTok v. Garland*, 2024 WL 4996719 *p.14 (D.C. Cir. 2024) (citing *China Telecom (Ams.) Corp. v. FCC*, 57 F.4th 256, 262–63 (D.C. Cir. 2022)). Hence, this Act is "[c]onsistent with that assessment, the Government "has found persistent PRC

access in U.S. critical telecommunications, energy, water, and other infrastructure." *Id.*

TikTok's access to data is far more pervasive than that of Huawei or ZTE because of the app's ability to remotely access devices, engage in exfiltration data from photos, and covertly manipulate the information space. Those are the three core components that make the national security threat of foreign ownership today even more serious previous examples upheld by this court.

For those companies not operating under an FCC license, the U.S. has consistently used divestiture as the primary remedy to address national security concerns with respect to foreign ownership. For instance, the Department of Treasury's Committee on Foreign Investment in the United States ("CFIUS") is a U.S. federal interagency body that is authorized to review certain foreign investment transactions in the United States that pose a threat to national security under section 721 of the Defense Production Act of 1950, as amended, and Regulations Pertaining to Certain Investments in the United States by Foreign Persons. U.S. Dept. of the Treasury, *The Committee on Foreign Investment in the United States (CIFIUS)*, Website (last visited, Aug. 2, 2024), https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius#:~:text=The%20Committee%20on%20Foreign%20Investment%20in%20the%20United%20States%20(CFIUS),-You%20can%20now.

Transactions that may trigger CFIUS review include those that may involve certain critical technologies,

critical infrastructure, or sensitive personal data. This includes online and mobile apps, which was precisely the case for the LGBTQ-dating app Grindr. In that case, CFIUS required the Chinese owners, Beijing Kunlun Tech ("Kunlun"), to divest out of Grindr to quell the noted national security threats associated with Kunlun's relationship with the CCP. *See* Sarah Bauerle Danzman & Geoffrey Gertz, *Is It a Threat to US Security that China Owns Grindr, a Gay Dating App?*, Brookings (Apr. 8, 2019), https://www.brookings.edu/articles/is-it-a-threat-to-us-security-that-china-owns-grindr-a-gay-dating-app/. Interestingly, CFIUS did not provide any insight as to the specific national security threat Grindr posed to the U.S.—although some speculate that the agency was concerned with "the Chinese government's potential to [use Grindr to] blackmail Americans, potentially including American officials, with data from the app." Christopher Kane, *Before TikTok, the US Took Action Over National Security Concerns with Grindr*, National LGBT Media Association (Mar. 18, 2024), https://watermarkonline.com/2024/03/18/before-tiktok-the-us-took-action-over-national-security-concerns-with-grindr/.

The Act, however, would not allow for such governmental opacity by requiring far more transparency into the President's determination process than is required of CFIUS under current law. Indeed, it requires the President to put all of his further determinations to add an entity as a "covered company" for public comment and submit "a public report" to Congress at least 30 days before the determinations go into effect. Sec. 2(g)(3)(B)(ii).

Even more at odds with Petitioners' blanket assertion that the Act is novel or expansive in scope is the fact

that its legal remit is actually far *narrower* than the one present in the International Emergency Economic Powers Act ("IEEPA") (*i.e.*, the statute the Trump Administration leveraged to institute its Executive Order requiring ByteDance to divest the first time around). Section 1702(a) empowers the President to "investigate, regulate, or prohibit" any foreign transaction or transfers. 50 U.S.C.A. § 1702(a).

However, unlike IEEPA, PAFACAA's threshold for the President to determine that an app qualifies as an adverse foreign controlled applications is very high. Take, for example the Trump Administration's aforementioned executive order. While the E.O. uses the same direction or control language as the Act, it imposes zero limits on the definition of foreign adversary. Meaning it could be used to go after anyone that is tied to any country, including allies. The Act, on the other hand, requires a finding that the foreign adversary-controlled app poses a "significant threat to national security," and limits those threats to those caused by the governments of Iran, China, North Korea, and Russia. Sec. 2(g)(4).

PAFACCA's foreign ownership requirements are standard foreign ownership considerations and legal thresholds. For instance, PAFACCA requires adverse ownership of less than 20%. This is consistent with the FCC's requirement under Section 310(b)(3) of the Communications Act. Section 310(b)(3) prohibits foreign individuals, governments, and corporations from owning more than twenty percent of the capital stock of a broadcast, common carrier, or aeronautical radio station licensee. 47 U.S.C. § 310(b)(3). What is more, if the firm's foreign ownership exceeds 10%, then the FCC

refers any firm's national security concerns to a "Team Telecom" review—an interagency review process made up of national security expert agencies. *In the Matter of Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, IB Docket No. 16-155, Report and Order, 35 FCC Rcd. 10927 (2020); *see also*, E.O. 13913.

Additionally, the Act's requirement for the government to show that TikTok and ByteDance are not only owned by the foreign owner but also controlled by the adverse foreign government is consistent with a slew of other current foreign ownership requirements. For instance, the Act's use of "direction or control" is a common legal phrase, used in a variety of statutes. *See, e.g.*, 18 U.S.C. § 2339(B)(h); 15 U.S.C. § 4651(6)(B)(iii); 18 U.S.C. § 951(d); 22 U.S.C. § 611(c)(1); 18 U.S.C. § 175(b)(d)(G)(ii), (I); 15 C.F.R. § 7.2. This language has particular legal meaning and would require the government to "establish" that the adverse foreign government in fact "directed or controlled [the company's] actions." *See United States v. Chung*, 659 F.3d 815, 823 (9th Cir. 2011). This high bar means more than "simply [] acting in accordance with foreign interests or [] privately pledg[e] allegiance" to that foreign interest. *United States v. Alshahhi*, No. 21-CR-371 (BMC), 2022 WL 2239624, at *4 (E.D.N.Y. June 22, 2022). It requires actual evidence of control to make that determination.

PAFACCA requires the President to go through an extensive interagency process even to show that a particular app is owned by a statutorily defined set of governments and is controlled in the same way China owns TikTok.

One way to understand the PAFACCA is that it fills in the necessary gaps in our current federal law. The FCC has limited jurisdiction over communications systems. Indeed, the FCC's Section 214 authority only applies to "telecommunications services" that, at least for now, is limited to Internet service providers, devices, and telecommunications, not mobile or web-based applications. *See generally*, *In the Matter of Safeguarding and Securing an Open Internet, et al.*, WC Docket No. 23-320, Declaratory Ruling, et al, F.C.C. 24-52 (2024), https://docs.fcc.gov/public/attachments/FCC-24-52A1.pdf. The Act effectively covers the FCC's flank to ensure that our foreign adversaries cannot escape foreign ownership requirements by using apps outside of the FCC's jurisdiction.

CFIUS, too, is an unreliable authority to combat the national security issues at play because its authority hinges on particular transactions occurring. 31 C.F.R. § 800.213. To start, it is unclear how the agency determines what qualifies as a "covered transaction" and gives CFIUS fairly broad authority to approve or challenge a transaction without qualifying its decisions one way or the other. In December 2022, CFIUS determined that it did not have jurisdiction to review the proposed acquisition of North Dakota land by a Chinese company, Fufeng Group, with the intent to build a $700 million corn milling plant without providing a scintilla of information as to why. Pat Sweeny, *Fufeng 'Looks Forward' to Building GF Plant After CFIUS Says It Has 'No Jurisdiction'*, Knox Radio News (Dec. 13, 2022), https://knoxradio.com/2022/12/13/fufeng-looks-forward-to-building-gf-plant-after-cfius-says-it-has-no-jurisdiction/. Even if CFIUS determined

that a transaction qualifies, it has no authority to enforce compliance with its decisions, as they are mere voluntary restrictions. The Act takes care of both of these issues because the Act defines the specific transactions with which the government is concerned; Sec. 2(g)(3)(B)(i) (defining a "foreign adversary controlled application"), and provides the government the tools to enforce compliance. Sec. 2(d) (providing the Department of Justice the authority to enforce compliance with the President's or Congress's determination).

* * *

In sum, Petitioners' claims that the Act's measures are either novel or radical are flatly contradicted by multiple judicial and legislative precedents.

II. The Narrow Focus on Foreign Ownership of FACAA is Attuned to First Amendment Considerations

Petitioners assert that PAFACAA is a speech regulation that implicates the First Amendment. We discuss how the Act amounts to nothing of the sort and is consistent with traditional understandings of First Amendment doctrines.

As an initial matter, we exclude foreign citizens from myriad First Amendment activities. As then-District Court Judge (now Justice) Kavanaugh described, the Supreme Court "has drawn a fairly clear line: The government may exclude foreign citizens from activities 'intimately related to the process of democratic self-government.'" *Bluman v. FEC*, 800 F.Supp.2d (D.D.C. 2011) (citing *Bernal v. Fainter,* 467 U.S. 216, 220 (1984);

see also Gregory v. Ashcroft, 501 U.S. 452, 462 (1991); *Cabell v. Chavez-Salido,* 454 U.S. 432, 439–40 (1982)). The Supreme Court affirmed that decision. *Bluman v. FEC*, 565 U.S. 1104 (2012) (mem.).

Justice Kavanaugh is correct, as the U.S. has barred foreign citizens from becoming probation officers, *Cabell,* 454 U.S. at 439; teaching in public schools, *Ambach v. Norwick*, 441 U.S. 68, 75 (1979); and hiring them as police officers. *Foley v. Connelie*, 435 U.S. 291, 297 (1978). Justice Kavanaugh further explained in *Bluman* that "[i]t is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government." *Bluman*, 800 F. Supp.2d at 289.

In *Moody v. NetChoice*, this Court wisely chose not to make determinations about complicated questions of the interaction between the First Amendment and social media rights. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2393 (2024). *Moody* did signal, appropriately, that not all social media activity is protected, and simple analogies to newspapers would fail. Moreover, Justice Amy Barrett's concurring opinion signals that "…foreign persons and corporations located abroad" are not afforded the same protections under our Constitution as individuals or even domestic corporations. *Id.* In *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, the Court affirmatively stated that such a principle is "long settled law." 591 U.S. 430, 431 (2020).

Indeed, Justice Barrett's views in *NetChoice* are precisely why TikTok gave up the ghost on its First

Amendment claim altogether during oral argument at the D.C. Circuit. TikTok US (a U.S. company) admitted in open court that TikTok US does not control the algorithm. Joel Thayer, *TikTok v. Garland Oral Argument: Did TikTok Admit It Doesn't Have First Amendment Rights?*, Federalist Society (Oct. 9, 2024), https://fedsoc.org/commentary/fedsoc-blog/tiktok-v-garland-oral-argument-did-tiktok-admit-it-doesn-t-have-first-amendment-rights. Instead, TikTok further admitted that ByteDance (a Chinese company) controls the algorithm. *Id.* Furthermore, Chinese engineers get to change the algorithm, directly affecting what is shown in the U.S., without consulting with TikTok US; indeed, TikTok US doesn't even get to review those changes before they are implemented. *Id.* In other words, TikTok US isn't curating content or speaking on the app—China-based ByteDance is.

At TikTok's oral argument, Judge Sri Srinivasan reinforced that "when it's a foreign organization, they don't have a First Amendment right to object to a regulation of their curation." *See* Thayer, Federalist Society. Judge Douglas Ginsburg wrote that "TikTok never squarely denies that it has ever manipulated content on the TikTok platform at the direction of the PRC. Its silence on this point is striking given that 'the Intelligence Community's concern is grounded in the actions ByteDance and TikTok have already taken overseas.'" *TikTok*, at p. 20.

According to the Court's ruling in *Agency for Int'l Development*, this fact should be the coup de grâce for Petitioner's First Amendment defense. 591 U.S. at 431.

Even so, imposing foreign ownership restrictions on communications platforms is several steps removed

from free speech concerns, because the regulations are wholly concerned with the firms' ownership, not the firms' conduct, technology, or content. This is made evident by the U.S. notoriously imposing them on a wide array of foreign communications companies without raising a modicum of First Amendment scrutiny. As mentioned above, Congress passed the Secure and Trusted Communications Network Act of 2019, which directed the FCC to remove equipment associated with national security threats from American networks. Pub. Law No. 116-124. Accordingly, the Commission relied on the views of national security experts and banned Huawei from selling any more telecommunications equipment to rural customers that rely on federal subsidies. Similarly, the Commission has revoked the ability of Chinese-affiliated carriers China Telecom, ComNet, and Pacific Networks from interconnecting with American telecommunications networks and operating in the United States.

The courts have blessed these prohibitions. The Fifth Circuit turned aside Huawei's federal law and constitutional challenges. *See Huawei Technologies USA v. FCC*, 2 F.4th 421 (5th Cir. 2021). Courts consistently uphold the revocations of operational authorizations for the likes of China Telecom, ComNet, and Pacific Networks without a scintilla of concern towards a First Amendment violation. *See China Telecom (Americas) Corp. v. F.C.C.*, 57 F.4th 256 (D.C. Cir. 2022); *Pacific Networks Corp., et al. v. F.C.C.*, 77 F.4th 1160 (D.C. Cir. 2023).

Why?

Because the Act's restrictions do not raise concerns under the First Amendment because it is undoubtedly

a conduct regulation, not a content regulation. The interaction the Act takes issue with concerns the ownership interest of TikTok, not the First Amendment activity occurring on the platform. Indeed, the D.C. Circuit was correct when it stated, as was the case in *Pacific Networks*, "the PRC indirectly control[s TikTok] "through a web of foreign affiliates…" much in the same way it controls its telecoms, like Huawei, ZTE, and Pacific Networks. *TikTok*, at p. 17.

Courts have consistently distinguished between conduct and speech in applying the First Amendment. In *Arcara v. Cloud Books, Inc.*, for example, the New York state government shut down an adult bookstore for health violations because its owner used his store to facilitate prostitution. 478 U.S. 697 (1986). Even though we think of a bookstore as a quintessential venue for First Amendment activity, the Supreme Court ruled that the First Amendment did not prevent the government from shutting down the bookstore because the government was acting based on the owner's decision to engage in prohibited, non-speech conduct. *Id.* at 707.

As Justice Burger explained:

> The legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity. Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises. *Id.*

The Supreme Court in *Arcara* further delineated whether rational basis or enhanced scrutiny would control in cases that present some dimension of control over speech. It rightfully found that "every civil and criminal remedy imposes *some* conceivable burden on First Amendment protected activities." *Id.* at 706 (emphasis added). What ultimately matters to trigger enhanced scrutiny is "conduct with a significant expressive element that drew the legal remedy in the first place…or where a statute based on nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity[.] *Id*. at 707. Neither of those situations are applicable here.

The court below agreed. The D.C. Circuit in this case found that the Act's focus on privacy concerns places the justifications squarely with the ones present in *Arcara*. *TikTok v. Garland*, 2024 WL 4996719, p. 33 (2024) (concurring, Srinivasan, J.). Chief Judge Srinivasan correctly identified in his concurrence that "the data-protection rationale has nothing to do with the expressive activity taking place on the TikTok platform." *Id.* at 34.

Like the health regulation against the bookstore, the Act is indifferent to the content either TikTok or ByteDance host or promote. The Act's general applicability further demonstrates this by not limiting its application to social media companies. Indeed, the Act also captures a wide array of apps, such as food-delivery apps, online retailers, ride-sharing apps, etc. The text of the Act takes no issue with the content TikTok hosts or predicates its foreign ownership requirements on content-based considerations.

Finally, it is still content-neutral even when applying the Act's effect on TikTok's curation practices or

content manipulation. As Chief Judge Srinivasan stated, "Congress desires to prevent the PRC's secret curation of content flowing to U.S. users *regardless* of the topic, idea, or message conveyed." *TikTok*, 2024 WL 4996719 at 35. He goes on that "Congress's concern with covert content manipulation by a foreign adversary in any direction and on any topic—rather than on particular messages, subjects, or views—is evident in the Act's terms and design." *Id.* (citing *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *Turner Broadcast Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 646–49, 652 (1994). The fact that the Act painstakingly goes out of its way to not mention any particular type of content ensures that the Act does not "discriminate based on the topic discussed or the idea or message expressed[.]" *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 73-74 (2022) (citation omitted). In sum, there is absolutely no way to construe this Act as a content-based regulation given the Act's primary concerns are with the national security implications concerning TikTok's data management practices and who is pulling the levers behind the curation as opposed to the contents getting curated.

As the D.C. Circuit held, the First Amendment poses no bar to the Act or its enforcement, and finding otherwise would not only overturn decades of precedent, but would handcuff the ability of the United States to reign in large technology platforms that spy on the American people—hardly a result the framers of our Constitution would have envisioned. Hence, it is granting Petitioners' sought-after relief that would be a radical departure from how the United States operates with respect to foreign citizenship.

III. Even Though PAFCAA's National Security Justification Is Established, the Court Should Avoid Setting Precedent that Dilutes the Sovereign Interest When the Legislature Creates Foreign Ownership Restrictions

Social media is by far the most pervasive form of communication we have. Millions of Americans use these platforms every month. Users express their opinions and communicate with others about a wide range of social, political, and business issues. And each platform claims to have safeguards to protect the privacy and security of U.S. user data.

But of the more than a dozen social media platforms, only one has been repeatedly caught endangering the security of the United States: TikTok. TikTok's promises to protect the privacy and security of American data have proven hollow. Leaked audio from internal TikTok meetings shows that, at least through January 2022, engineers in China had access to U.S. data. Emily Baker-White, *Leaked Audio from 80 Internal TikTok Meetings Shows that US User Data Has Been Repeatedly Accessed From China*, BuzzFeedNews (June 17, 2022), https://bit.ly/3QXXf3n. "Everything is seen in China," said one member of TikTok's Trust and Safety team. *Id.* And eight different U.S. employees explained having to repeatedly turn to Chinese colleagues because U.S. staff "did not have permission or knowledge of how to access the data on their own." *Id.* Meanwhile, TikTok's parent ByteDance has admitted to tracking at least two U.S.-based journalists, Clare Duffy, *TikTok confirms that journalists data was accessed by employees of its parent company*, CNN (Dec. 22, 2022), https://cnn.it/3KYVYFB,

and reports show that ByteDance had in fact intended to use TikTok to monitor specific American citizens. Emily Baker-White, *TikTok Parent ByteDance Planned To Use TikTok To Monitor The Physical Location Of Specific American Citizens*, Forbes (Oct. 20, 2022), https://bit.ly/44sSvWw. The U.S. Department of Justice is investigating this spying. Alexander Mallin & Luke Barr, *DOJ investigating TikTok owners for possible surveillance of US journalists: Sources*, ABC News (Mar. 17, 2023), https://abcn.ws/47Pr2Bm.

These revelations are unsurprising to those who understand the intimate relationship between the Chinese government and large Chinese companies like ByteDance. To ensure alignment with Beijing's policies, ByteDance has had an internal party committee as part of its governance structure since 2017. Yaqiu Wang, *Targeting TikTok's privacy alone misses a larger issue: Chinese state control*, Human Rights Watch (Jan. 24, 2020), https://bit.ly/3EgQXEA. TikTok CEO Shou Zi Chew served as ByteDance's CFO for most of 2021 and before that was president of international operations for Xiaomi Technology, a software developer the Pentagon considers a "Communist Chinese military company." Jerry Dunleavy, *TikTok CEO's Chinese government ties in spotlight ahead of Capitol Hill testimony*, Washington Examiner (Mar. 23, 2023), https://bit.ly/44ovQuA.

Against this background, Congress determined that TikTok's malignancy concerned ByteDance's ownership interest and passed the Act, which places a restriction on foreign ownership on communications networks, in this case mobile and web-based apps, to combat national security threats posed by the governments of Iran, China, North Korea, and Russia owning those services.

In short, the government has sufficiently demonstrated the national security threat TikTok's relationship with ByteDance poses. However, we caution against a ruling limiting the U.S.'s ability to restrict foreign ownership if the facts do not perfectly align with specific instances at issue.

To reiterate, the legal pathway the Act takes is, frankly, a well-worn one to address threats of foreign influence in the economic sector. *Supra* I. However, the Petitioner's logic is that because the ownership targets communications infrastructure, as opposed to, say, land ownership, heightened scrutiny should apply. This view turns sovereignty concerns on its head. In communications infrastructure questions of sovereignty will always be most pronounced, where the government should have great leeway to simply prohibit foreign ownership, without the need for precise tailoring. In Petitioner's logic, the long-standing FCC rules against radio ownership should be subject to higher scrutiny than the multiple new laws against land ownership, but this makes no sense. Both land ownership and radio ownership restriction rules should be presumptively valid, absent some extraordinary showing that the intent of such laws was targeted to suppress a particular viewpoint of American citizens, without requiring states or the federal government to go through gymnastics to explain why sovereignty is a compelling interest.

This Court has not resolved the appropriate level of scrutiny for foreign influence laws, and the implications of any decision this Court makes are enormous, covering not only long-settled federal communications law, long settled election law, but reaches of law that this short

briefing time period will not uncover, along with myriad state land-foreign ownership laws.

For its case to hold water, Petitioner requires the Court to ignore that Congress's interests and authority to enact such foreign ownership restrictions are well-established and have been upheld by this Court. Specifically, Article 1, Section 8 of the Constitution confers authority onto Congress to regulate the instrumentalities of foreign and domestic commerce. U.S. Const. art. I, § 8. Indeed, the Constitution provides Congress with explicit authority to determine whether a foreign nation's enterprises have the privilege of accessing the United States's domestic market. This Court concluded that Congress Commerce Clause authority includes the ability to establish an "absolute prohibition of [] commerce." *Mulford v. Smith*, 307 U.S. 38, 48 (1939); *see also U.S. v. Carolene Products Co.*, 304 U.S. 144, 147 (1938). All Congress did here was exercise its well-established Article I power to regulate commerce. Congress found a national security risk in the distribution of applications controlled by foreign adversaries and regulated the ability to access those applications through the instrumentalities of commerce under certain conditions, specifically foreign ownership.

Generally, speech concerns, as the ones Petitioner alleges here, are inapplicable when the effects on speech are incidental to a statute's primary purpose. *See* Section II. To be sure, foreign commerce and national security are the quintessential examples of subject matters where Congress possesses the constitutional prerogative and the institutional expertise to identify unique risks and devise the appropriate regulatory response. Where Congress has weighed "sensitive and weighty interests of national

security and foreign affairs," that evaluation of facts are "entitled to deference." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010).

All this to say that here Congress acts on its authority to regulate commerce without implicating speech concerns. Thus, the statute should only be scrutinized to determine "whether Congress had a rational basis" for prohibiting entities in the United States from distributing applications affiliated with foreign adversaries. *See Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 258 (1964). Therefore, so long as Congress has acted on a rational basis, in light of the "facts and testimony before them," then any further judicial investigation "is at an end." *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964). It is clear Congress has met that burden.

Either way, we urge this Court to resolve this case in the narrowest way possible. Whatever the level of scrutiny may be, foreign ownership involves multiple different values, including security but *not limited to national security.* In particular, the deeply important, but more difficult to measure, value of sovereignty embedded in our Constitution is at stake whenever foreign influence laws are at issue.

* * *

In sum, Petitioners have put forward weak justifications when asserting that the Act is either an unprecedented act or a rapid departure from other similarly situated foreign ownership laws or that it violates the Constitution.

CONCLUSION

For all of the foregoing reasons, the Court should deny Petitioners' relief.

Respectfully submitted,

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