No. 24A____

IN THE

Supreme Court of the United States

TIKTOK INC. AND BYTEDANCE LTD.,

Applicants,

v.

MERRICK B. GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit

EMERGENCY APPLICATION FOR INJUNCTION PENDING SUPREME COURT REVIEW

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CORPORATE DISCLOSURE STATEMENT, PARTIES TO THE PROCEEDINGS, AND RELATED PROCEEDINGS

Applicants, who were Petitioners in the lead case in the D.C. Circuit (*TikTok Inc. v. Garland*, No. 24-1113), are TikTok Inc. and ByteDance Ltd. Pursuant to Rule 29.6, Applicant TikTok Inc. is a wholly owned subsidiary of TikTok LLC; TikTok LLC is a wholly owned subsidiary of TikTok Ltd.; and TikTok Ltd. is a wholly owned subsidiary of Applicant ByteDance Ltd., a privately held corporation. No publicly traded company owns 10% or more of Applicants' stock.

Respondent, who was Respondent in the D.C. Circuit, is Merrick B. Garland, in his official capacity as Attorney General of the United States.

Related proceedings, consolidated in the D.C. Circuit, are *TikTok Inc. v. Garland*, No. 24-1113 (D.C. Cir.), consolidated with *Firebaugh v. Garland*, No. 24-1130, and *BASED Politics Inc. v. Garland*, No. 24-1183.

Petitioners in the consolidated proceedings were Brian Firebaugh, Chloe Joy Sexton, Talia Cadet, Timothy Martin, Kiera Spann, Paul Tran, Christopher Townsend, and Steven King (Petitioners in *Firebaugh v. Garland*, No. 24-1130); and BASED Politics Inc. (Petitioner in *BASED Politics Inc. v. Garland*, No. 24-1183).

The D.C. Circuit's opinion and judgment denying petitions for review entered December 6, 2024. The D.C. Circuit's order denying injunction pending Supreme Court review entered December 13, 2024.

A parallel challenge remains pending in the D.C. Circuit. *Kennedy v. Garland*, No. 24-1316.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT:

Pursuant to Rule 22 of this Court and 28 U.S.C. § 1651, Applicants TikTok Inc. and ByteDance Ltd. respectfully request an injunction against enforcement of the Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, div. H (2024) (the Act), pending this Court's review of the D.C. Circuit's judgment upholding the Act. Applicants sought this interim relief from the D.C. Circuit—which had exclusive original jurisdiction—but it denied relief. App. 93a.

INTRODUCTION

Congress has enacted a massive and unprecedented speech restriction. TikTok is an online platform that is one of the Nation's most popular and important venues for communication. TikTok is provided in this country by TikTok Inc., an American company that is indirectly owned by ByteDance Ltd., a Cayman holding company majority-owned by institutional investors. The Act bans Applicants from operating TikTok domestically. The Act will take effect on January 19, 2025, shutting down TikTok for its more than 170 million monthly American users. The D.C. Circuit held that the Act is one of the rare laws that can survive strict scrutiny; and it did so based on Congress's purported concerns about potential "risks" that China could exercise malign influence over the American platform through Applicants' foreign affiliates. App. 32a-33a. This Court should grant an injunction pending further review.

The equitable factors decisively favor a temporary injunction. The Act will shutter one of America's most popular speech platforms the day before a presidential inauguration. This, in turn, will silence the speech of Applicants and the many

Americans who use the platform to communicate about politics, commerce, arts, and other matters of public concern. Applicants—as well as countless small businesses who rely on the platform—also will suffer substantial and unrecoverable monetary and competitive harms. Applicants and the public will therefore suffer immediate irreparable injury absent interim relief.

Before all that happens, there is a strong public interest that this Court have the opportunity to exercise plenary review. This case raises novel constitutional questions of profound significance for the entire Nation. And this Court is the only forum for appellate review under the Act. An interim injunction is also appropriate because it will give the incoming Administration time to determine its position, as the President-elect and his advisors have voiced support for saving TikTok.

An injunction will not materially harm the Government. There is no imminent threat to national security. That is particularly clear since (1) Congress itself delayed the Act's effective date for 270 (and potentially 360) days, Sec. 2(a)(2)-(3); and (2) the Government's own defense of the Act asserts only that China "could" engage in certain harmful conduct through TikTok, not that there is any evidence China is currently doing so or will soon do so, *see* C.A. Gov't App. 26. A modest delay in enforcing the Act will create breathing room for this Court to conduct an orderly review and the new Administration to evaluate this matter—before this vital channel for Americans to communicate with their fellow citizens and the world is closed.

Especially given this lopsided equitable balance, the prospect that this Court will grant certiorari and reverse is sufficiently high to warrant the brief pause needed

to create time for further deliberation. The D.C. Circuit's holding that this unprecedented law satisfies strict scrutiny is indisputably cert-worthy. Speech restrictions have survived the Constitution's most demanding standard only in rare and narrow circumstances. This Court should ensure that this critical protection has not been diluted by a decision upholding a law banning a speech platform used by half the country. To be sure, the D.C. Circuit portrayed its decision as "fact-bound," saying there is "persuasive evidence" of "national security risks" identified by the Government in "the public record." App. 32a, 58a, 65a. But the court ignored critical gaps in the record before Congress during the Act's hasty passage. Worse still, the court's flawed legal rationales would open the door to upholding content-based speech bans in contexts far different than this one. Fear-mongering about national security cannot obscure the threat that the Act itself poses to all Americans.

On the merits, the D.C. Circuit started on the right path by assuming that the Act is subject to strict scrutiny. App. 31a. The Government conceded that TikTok Inc. is a *bona fide* "domestic entity operating domestically" that is "engaged in expressive activity" through "the curation of content on [the platform]." App. 26a-27a. Nor can the Government credibly dispute that the Act imposes a content-based restriction on TikTok Inc. The Act applies only to "covered" applications and websites like TikTok that make the expressive choice to "enable[] … users to generate or distribute content," App. 16a & n.4 (quoting Sec. 2(g)(2)(A)(iii)). The Act then "singles out TikTok … for disfavored treatment," App. 26a, by banning Applicants from operating TikTok without giving them the benefit of procedural and substantive

standards afforded to other covered speakers, Sec. 2(g)(3)(B). Moreover, as the D.C. Circuit stressed, the Act "cannot be justified without reference to the content of the regulated speech," as one of the Government's asserted concerns about Chinese influence itself "reference[s] the content of TikTok's speech." App. 29a-30a. Because TikTok Inc. is a U.S. company exercising editorial discretion over a U.S. speech platform, the First Amendment fully protects it from Congress's attempt to ban its operation of the platform based on its purported susceptibility to foreign influence. Strict scrutiny applies here just as it would if Congress banned a specified American citizen from operating a particular American newspaper merely because a foreign nation might be able to control what he printed or misuse his subscriber data.

The D.C. Circuit went fundamentally astray, however, in concluding that the Act survives strict scrutiny. *First*, it held that Congress could ban Applicants' operation of TikTok based on the risk of "covert" manipulation of content by China. App. 54a. But as in all strict-scrutiny cases, the Government bears the burden of proof. And here, neither Congress, the Government, nor the D.C. Circuit identified any evidentiary basis to declare that the "covert" nature of any such risk could not be remedied through an express disclosure. That is how the First Amendment requires the Government to address a concern that the public is being misled about who is behind the speech they receive. *Second*, the court also held that Congress could single out TikTok as presenting the "most pressing concern" that China could improperly obtain U.S. user data collected by websites and applications. App. 42a. But the Act inexplicably exempts numerous websites and applications that present no less risk

(if not greater risk). Such underinclusion typically forecloses a determination that a law substantially advances the interest asserted, as required to satisfy strict scrutiny.

Indeed, when this gross overbreadth as to covert Chinese content manipulation is paired with this gross underinclusion as to data security, the strong combined inference is that Congress passed the Act for a different reason entirely: It targeted TikTok based on disagreement with the substance of the content posted by TikTok's users and alleged editorial choices by TikTok Inc. in disseminating that content. A House committee report and statements by individual Members all confirm as much. Yet Congress has no legitimate interest in interfering with the U.S. ownership of an expressive platform to alter its content—whether or not Congress deems some such content foreign propaganda. This Court has already made that clear, and it is likely to reaffirm that fundamental principle here.

For these reasons and others discussed below, this Court should grant a temporary injunction. The injunction should prevent Respondent from enforcing the Act with respect to the applications of TikTok Inc. and ByteDance Ltd., pending the timely filing and ultimate disposition of a petition for a writ of certiorari and any resulting merits review. Furthermore, this Court may wish to consider construing this application as a certiorari petition and granting it. Finally, because Applicants would need a period of lead time before January 19, if the injunction were denied, to coordinate with their service providers to perform the complex task of shutting down the TikTok platform only in the United States, *see* App. 113a-114a, they respectfully request that the Court rule on this application by January 6.

QUESTION PRESENTED

Whether the Act is unconstitutional as applied to TikTok Inc. and ByteDance Ltd. because it categorically and uniquely prohibits them from operating the TikTok speech platform and other applications in this country.

OPINION BELOW AND PROVISIONS INVOLVED

The D.C. Circuit's opinion is available at 2024 WL 4996719 and reproduced at App. 1a. The D.C. Circuit's order denying an injunction pending Supreme Court review is unreported and reproduced at App. 93a. The Act is reproduced at App. 95a. Relevant constitutional provisions are reproduced at App. 102a.

JURISDICTION

The D.C. Circuit had exclusive original jurisdiction pursuant to Section 3(b) of the Act. Applicants filed suit on May 7, 2024. C.A. Pet. for Rev. The D.C. Circuit denied the petition on December 6, 2024. App. 65a. Applicants then sought an injunction pending this Court's review, which the D.C. Circuit denied on December 13. App. 93a. This Court has jurisdiction under 28 U.S.C. § 1254(1), and it may grant the requested relief under the All Writs Act, 28 U.S.C. § 1651(a).

STATEMENT

A. TikTok Is A Speech Platform Used By 170 Million Americans

TikTok is a widely used online platform for creating, sharing, and viewing videos. C.A. Petrs. App. 802. Launched in 2017, TikTok has more than 170 million monthly American users and more than 1 billion users worldwide. *Id.* at 804-05.

Americans use TikTok to communicate about all manner of topics—politics and religion, sports and entertainment, and more. Seventeen percent of U.S. adults regularly get news from TikTok.[1] "[S]cores of politicians," including both major presidential candidates, spoke on TikTok in the lead up to the recent election, leading traditional media outlets to dub it "the TikTok election."[2]

Content on TikTok is viewed primarily through its "For You" feed, which presents users with videos curated specifically for them by TikTok's innovative technology, including its proprietary recommendation engine. C.A. Petrs. App. 807. TikTok's recommendation engine is customized for TikTok's various global markets, including the United States. *Id.* at 817. The recommendation engine for the U.S. TikTok platform is stored on the servers of a U.S. company, Oracle Corporation, in the United States. C.A. Petrs. Supp. App. 901. Oracle has full access to review the TikTok platform source code. C.A. Petrs. App. 824.

Because TikTok is a globally integrated platform, users in the United States can seamlessly access content created around the world, and vice versa. *Id.* at 804. In 2023, TikTok users in the United States uploaded more than 5.5 billion videos that were viewed more than 13 trillion times—half of these views by users outside the United States. *Id.* at 805. That same year, TikTok users in the United States viewed

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[1] Rebecca Leppert & Katerina Eva Matsa, *More Americans – especially young adults – are regularly getting news on TikTok*, Pew Rsch. Ctr. (Sept. 17, 2024), https://perma.cc/DZM7-UNWD.

[2] Sapna Maheshwari & Madison Malone Kircher, *The Election Has Taken Over TikTok. Here's What It Looks Like.*, N.Y. Times (Oct. 21, 2024), https://perma.cc/5SCL-XNWC.

content from outside the United States more than 2.7 trillion times, accounting for more than a quarter of all video views in the United States. *Id.*

TikTok is provided in the United States by TikTok Inc.—an American company incorporated and headquartered in California, with thousands of U.S. employees. *Id.* at 801. TikTok Inc.'s ultimate parent is ByteDance Ltd., a privately held holding company incorporated in the Cayman Islands that owns subsidiaries around the world, including in China. *Id.* Approximately 58% of ByteDance Ltd. is owned by global institutional investors; 21% is owned by its workforce; and 21% is owned by one of its founders, Zhang Yiming, a Chinese national who lives in Singapore. *Id.* at 802. TikTok is offered in more than 170 countries, but it is not offered in mainland China. *Id.* at 803. No arm of the Chinese government has an ownership stake—directly or indirectly—in TikTok Inc. or ByteDance Ltd. *See id.* at 801-02.[3]

Like all social-media and entertainment platforms, TikTok faces important policy and operational challenges, including data security, content moderation, and protections against improper influence. The undisputed record reflects that "TikTok's approach for dealing with these issues is in line with—and in many respects markedly better than—industry best practices." *Id.* at 788. Among other things, TikTok publishes monthly reports describing its efforts to combat "covert influence operations" on the platform. *Id.* at 814 & n.5.

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[3] In this Application, "ByteDance Ltd." refers to the Cayman holding company. "ByteDance" refers to the ByteDance group, including ByteDance Ltd. and subsidiaries and controlled affiliates. "TikTok Inc." refers to the U.S. corporate entity that provides the TikTok platform in the United States. "TikTok" refers to the online platform, including the mobile application and web browser experience.

B. Applicants Worked To Address The Government's National-Security Concerns

Applicants have worked cooperatively with the Government to address concerns it has raised about the TikTok platform since 2019. From January 2021 to August 2022, Applicants and the Committee on Foreign Investment in the United States (CFIUS) engaged in an intensive, fact-based process to develop a National Security Agreement (NSA) responsive to the Government's concerns that China might be able to manipulate content on TikTok or access U.S. user data. *See* C.A. Petrs. App. 731-33, 756, 820-22. The result was an approximately 90-page draft NSA with detailed annexes. *Id.* at 157-260, 733.

As explained by Christopher Simkins, a former Senior Counsel at the Department of Justice who led the agency's participation in many CFIUS matters, the NSA "effectively mitigates national security risk associated with" TikTok through "reliance on multiple trusted third parties," "complex and thorough technical mitigations," and "unprecedented oversight, monitoring, and very rigorous enforcement mechanisms." *Id.* at 756. All protected U.S. user data (as defined in the agreement) would be stored in the cloud environment of a U.S.-government-approved partner, Oracle. *Id.* at 206. That data would be overseen by a new entity, TikTok U.S. Data Security, supervised by a special board comprised entirely of members subject to U.S. government approval. *Id.* at 169-70. The NSA would guard against foreign manipulation of TikTok's content-moderation practices, recommendation engine, and other source code. *Id.* at 189-201. The NSA authorizes significant monetary and other penalties for non-compliance. *Id.* at 230.

During the negotiations, Applicants began to voluntarily implement many of the NSA's measures. *Id.* at 822. That effort, sometimes referred to as "Project Texas," has cost Applicants more than $2 billion to date. *Id.* The NSA was never signed, however, because CFIUS ceased substantive engagement regarding the NSA in September 2022, without explaining why it was doing so. *Id.* at 417. Instead, in March 2023, CFIUS representatives informed Applicants that "senior government officials" demanded divestment—again without explaining why the NSA was insufficient. *Id.* at 417, 421. Yet the Government never provided meaningful responses to Applicants' objections to the feasibility of divestment. *Id.* at 418-24.

C. Congress Banned Applicants From Operating TikTok

On April 24, 2024, President Biden signed the Act into law as part of must-pass appropriations legislation that included aid for Israel and Ukraine. *See generally* Pub. L. No. 118-50. The Act prohibits various entities, including both mobile application stores and internet hosting services, from providing services to "foreign adversary controlled applications." Sec. 2(a)(1). Section 2(g)(3) creates two classes of "foreign adversary controlled applications" covered by the Act.

The first class singles out one corporate group: "ByteDance[] Ltd.," "TikTok [Inc.]," and affiliates. Sec. 2(g)(3)(A). The Act automatically deems any application they operate a "foreign adversary controlled application." *Id.*

The second class creates standards and procedures for the President to designate "foreign adversary controlled applications." Sec. 2(g)(3)(B). An application must be operated by a "covered company" that is "controlled by a foreign adversary."

Sec. 2(g)(3)(B)(i). A company is "controlled by a foreign adversary" if it is domiciled or based in a listed adversary country, is at least 20% owned by such persons, or is "subject to the direction or control of" such persons. Sec. 2(g)(1). A "covered company" operates an application that, *inter alia*, allows "users to generate or distribute" "text, images, videos, real-time communications, or similar content." Sec. 2(g)(2)(A). A company is exempt, however, and its applications may not be designated, if it "operates a[n] [application] whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews." Sec. 2(g)(2)(B).

If these standards are met, the President may designate an application if he concludes that the company that operates it "present[s] a significant threat to the national security of the United States." Sec. 2(g)(3)(B)(ii). The President must issue "a public notice" and submit a "public report to Congress" 30 days in advance, describing, *inter alia*, "the specific national security concern involved." *Id.* The President's determination is subject to judicial review. Sec. 3(a).

The Act exempts a "foreign adversary controlled application" from its prohibitions if the company that operates the application executes a "qualified divestiture." Sec. 2(c)(1). To qualify, the President must determine that a divestiture (i) results in the application "no longer being controlled by a foreign adversary," and (ii) "precludes the establishment or maintenance of any operational relationship" between the application's U.S. operations "and any formerly affiliated entities that are controlled by a foreign adversary." Sec. 2(g)(6).

For applications operated by Applicants, the Act's prohibitions take effect 270 days from enactment—*i.e.*, on January 19, 2025. Sec. 2(a)(2)(A). The President may extend this deadline, but only for 90 days maximum, and only if he determines that certain conditions are met. Sec. 2(a)(3). Congress also included a severability clause: if the Act's TikTok-specific provision is held invalid, it would not affect the potential application to TikTok of the Act's generally applicable provision. Sec. 2(e).

If the Act's prohibitions take effect, they will "render the TikTok platform inoperable in the United States." C.A. Petrs. App. 824-25. The Government does not contest record evidence that a "qualified divestiture" is technologically, commercially, and legally infeasible, particularly within the Act's timeframe. *See* C.A. Gov't Br. 60-61; C.A. Petrs. App. 611-16, 649-50, 686, 830-33.

D. Legislators Offered Varying Justifications for Banning TikTok

Unlike other instances where Congress has legislated in sensitive First Amendment areas, it enacted no "specific findings" or statements of purpose. *Compare, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 29 (2010).

The Act's only written legislative history is a House committee report, which focused on the potential that "foreign adversary controlled applications[] such as TikTok" "can be used" by adversaries "to collect vast amounts of data on Americans, conduct espionage campaigns, and push misinformation, disinformation, and propaganda on the American public." H.R. Rep. No. 118-417, at 1-2 (2024). The Report briefly mentioned Project Texas, but offered no indication that Congress had

received the draft NSA and considered its full range of measures, or considered any other alternatives to a ban, such as disclosures about identified risks. *See id.* at 4-5.

During congressional deliberations, legislators expressed varying (misguided) concerns about TikTok, including grounds that openly discriminated based on viewpoint and content: *e.g.*, "exposes children to harmful content," C.A. Petrs. App. 553 (Sen. Cotton); "restricts" "topics that are sensitive to the Chinese Government, including Tiananmen Square, Uighurs, and the Dalai Lama," *id.* at 118 (Sen. Cantwell); "trends" like "the glorification of Hamas terrorists" and "young people 'discover[ing]' the wisdom of Osama bin Laden," *id.* at 50 (Sen. McConnell); "400-to-1 ratio" between Instagram and TikTok "for content that blames China for this pandemic," *id.* at 126 (Sen. Ricketts); "the number of posts for one perspective versus another that we are seeing," C.A. Redacted Tr. of Mar. 7, 2024 House Energy & Com. Comm. Hr'g 105 (Rep. Soto); and fears that in the future "TikTok videos will be promoting that Taiwan ought to be part of China," C.A. Petrs. App. 566 (Sen. Warner). At a closed hearing, a government official testified that it was "striking to what degree th[e] narratives [on TikTok] are resonating with young people in America." C.A. Redacted Tr. 129.

Representative Krishnamoorthi, one of the lead sponsors, explained that the Act attracted support because TikTok "show[ed] dramatic differences in content relative to other social media platforms." C.A. Petrs. App. 562. Immediately after enactment, Senator Romney stated that the reason for "such overwhelming support for us to shut down potentially TikTok" is that "[i]f you look at the postings on TikTok

and the number of mentions of Palestinians relative to other social media sites, it's overwhelmingly so among TikTok broadcasts." *Id.* at 596.[4]

E. D.C. Circuit Proceedings

Applicants filed a petition for review in the D.C. Circuit, which has exclusive original jurisdiction over challenges to the Act. Sec. 3(b). Applicants raised claims under the First Amendment and other constitutional provisions. C.A. Pet. for Rev. Two groups of content creators filed separate actions, which were consolidated with Applicants' case; a third group, including Robert F. Kennedy, Jr., filed a separate petition for review that has not yet been adjudicated. *See supra* at i.

The Government advanced two justifications for the Act: that China may, in the future, (1) "covertly manipulate the application's recommendation algorithm to shape the content" on TikTok, C.A. Gov't Br. 35, or (2) access users' data, *id.* at 27. The Government's evidentiary submission consisted of declarations from employees in the Office of the Director for National Intelligence, the Federal Bureau of Investigation, and the Department of Justice. These declarations conceded that the Government had "no information that" China has "coerce[d] ByteDance or TikTok to covertly manipulate the information" on TikTok in the United States, C.A. Gov't App. 4, and that China is "not reliant on ByteDance and TikTok to date" to "engage in … theft of sensitive data," *id.* at 16. Instead, the Government cited the "potential risk" that TikTok "could" be used by China. *Id.* at 26.

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[4] Allegations that TikTok has amplified support for either side of the Israeli-Palestinian conflict are unfounded. C.A. Petrs. App. 781-84. The allegation was nonetheless a substantial focus of congressional deliberations.

The Government filed more than 15% of its merits brief and nearly one third of its declarations *ex parte*. C.A. Gov't Br.; C.A. Gov't App. The unredacted portions of these submissions made various factual errors, including that TikTok collects "precise" location information from users (it does not), that TikTok's U.S. recommendation engine "resides" in China (it does not), and that U.S. user data is sent to China to train the algorithm (it is not). *See* C.A. Petrs. *Ex Parte* Opp'n 13-18; C.A. Petrs. Reply Br. 21-22, 25-26.

On December 6, the D.C. Circuit denied Applicants' petition for review. The court held that the Act triggers heightened scrutiny under the First Amendment. App. 24a-27a. Judges Ginsburg and Rao assumed that strict scrutiny applies, App. 27a-31a, but held that the Act survives it, App. 32a-57a. Chief Judge Srinivasan concurred in part and in the judgment, concluding that the Act is subject to, and satisfies, intermediate scrutiny. App. 66a. The court also rejected Applicants' other claims. App. 57a-64a. Although the D.C. Circuit granted the Government's motion to file materials *ex parte*, it emphasized that it upheld the Act based on only the public record. App. 64a-65a & n.11.

Applicants promptly sought emergency interim relief from the D.C. Circuit on December 9, one business day after its opinion, and agreed to fully brief the motion by December 12. The motion was denied on December 13, App. 93a, and Applicants sought relief in this Court the next business day.

REASONS FOR GRANTING THE APPLICATION

In determining whether to grant an injunction pending further review, this Court considers whether the applicant is "likely to prevail" on the merits; whether denying relief "would lead to irreparable injury"; and whether "the public interest" supports granting relief, after balancing the equities. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam). Where the injunction is sought pending the filing of a petition for a writ of certiorari, likelihood of success "encompass[es] … a discretionary judgment about whether the Court should grant review." *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

While "[t]his Court has used different formulations" for assessing the merits in the context of "emergency relief," "likelihood of success" is best viewed "as equivalent to a fair prospect of success." *Labrador v. Poe*, 144 S. Ct. 921, 929 n.2 (2024) (Kavanaugh, J., concurring). This Court has sometimes required more—that "the legal rights" be "indisputably clear"—but it has done so in recognition that it would be "grant[ing] judicial intervention that has been withheld by lower courts." *See, e.g.*, *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers). That rationale is inapposite: the D.C. Circuit exercised original jurisdiction, making this Court the first-level appellate tribunal. Such courts do not apply a heightened merits standard to injunctions pending appeal. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021) (per curiam) ("[t]he Ninth Circuit's failure to grant an injunction pending appeal was erroneous" because applicants were "likely to succeed on the merits"). In fact, *no* court has yet weighed the equities here: the D.C. Circuit

declined to make its own equitable judgment so as to "preserv[e] the Supreme Court's discretion to determine whether and to what extent to grant any interim injunctive relief." App. 94a. Moreover, this Court has granted injunctive relief without requiring a heightened merits showing where withholding relief would effectively preclude any meaningful review. *See, e.g.*, *Tandon*, 141 S. Ct. at 1296-97 (COVID restrictions on religious exercise); *Roman Cath. Diocese*, 141 S. Ct. at 66-68 (same).

Under any standard, Applicants are entitled to an injunction pending this Court's review. They will likely prevail because the D.C. Circuit's decision upholding the Act is unquestionably cert-worthy and manifestly erroneous. Congress's unprecedented attempt to single out Applicants and bar them from operating one of the most significant speech platforms in this Nation presents grave constitutional problems that this Court likely will not allow to stand. Yet both Applicants and the public at large will suffer massive irreparable injury if, while further review is sought, TikTok is shuttered on January 19, destroying the business and closing a vital channel of communication used by more than 170 million Americans every month. And the public interest demands that this Court exercise appellate review before those harms are visited on the Nation—especially since a modest delay is consistent with the structure of the Act, will impose no meaningful harm on the Government or national security, and will give the incoming Administration an opportunity to evaluate the matter for itself. Given these lopsided equities and the serious merits questions, an injunction pending this Court's review is plainly warranted.

I. APPLICANTS ARE SUFFICIENTLY LIKELY TO PREVAIL IN THIS COURT

A. This Court Will Likely Grant Certiorari

A federal law singling out and banning a speech platform used by half of Americans is extraordinary. If the constitutionality of this Act is not "an important question of federal law that … should be[] settled by this Court," Sup. Ct. R. 10(c), it is difficult to imagine what is.

The consequences of this case are enormous. As the D.C. Circuit acknowledged, the Act will force "millions" of Americans to "find alternative media of communication," App. 65a—even though for many, TikTok is irreplaceable, C.A. Petrs. App. 809-10. "[M]any Americans" will "lose access to an outlet for expression, a source of community, and even a means of income." App. 92a (Srinivasan, C.J., concurring in part). And all this will occur on the eve of a presidential inauguration.

The dangerous precedent established below equally merits review. The D.C. Circuit upheld a law that expressly "singles out" an American company "engage[d] in expressive activity" "for disfavored treatment." App. 26a. It rested on the premise that information on an American speech platform that might influence Americans threatens national security, simply because of the potential future involvement of a foreign adversary. App. 47a. And it applied a watered-down version of strict scrutiny that will make speech restrictions far easier to sustain even outside the national-security context. *See infra* at Part I.B.2. This Court is likely to determine for itself whether this first-of-its-kind law should be upheld and serve as a model for future speech regulation.

Certiorari is especially warranted given the case's unusual posture. By vesting the D.C. Circuit with exclusive jurisdiction, Sec. 3(b), Congress precluded a circuit split from emerging. And by requiring any challenge to the Act to originate in the D.C. Circuit, Sec. 3(a), appellate review will occur in this Court or not at all.

B. This Court Will Likely Reverse

1. The Act is subject to strict scrutiny

The D.C. Circuit correctly assumed that strict scrutiny applies. App. 24a.

a. The Government does not dispute that the Act burdens the protected expression of TikTok Inc. "The Government concedes, as it must …, that the curation of content on TikTok is a form of speech." App. 26a. TikTok "combin[es] multifarious voices to create a distinctive expressive offering." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2405 (2024) (cleaned up). TikTok Inc. conducts "content moderation," enforcing "a publicly available collection of rules and standards" intended "to create a welcoming and safe experience for [its] users." C.A. Petrs. App. 811. It engages in "content recommendation," using an algorithm to "match[] users with content they are predicted to like." *Id.* at 815-17. And it "promot[es] and filter[s]" limited amounts of content to foster "diverse and high-quality content." *Id.* at 817-18. Where, as here, "social-media platforms create expressive products, they receive the First Amendment's protection." *NetChoice*, 144 S. Ct. at 2393.

Moreover, the Government concedes that "TikTok[] Inc.," the California corporation that provides the TikTok platform in the United States, is a *bona fide* "domestic entity operating domestically." App. 10a, 27a. The Government does not

dispute that expressive policy choices regarding the moderation and promotion of content for U.S. TikTok users are made by TikTok Inc. employees in the United States. C.A. Petrs. App. 811-19. And it expressly disavowed any argument that the courts in this case "should 'pierce the corporate veil' or 'invoke any other relevant exception' to the fundamental principle of corporate separateness." App. 27a (quoting *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 435-36 (2020)); *see* C.A. Oral Arg. 1:30:28, 1:34:52. Accordingly, the D.C. Circuit rightly rejected any suggestion that TikTok Inc. "has no First Amendment rights" merely "because [it] is wholly owned by ByteDance, a foreign company." App. 27a.

b. Nor can the Government credibly dispute that strict scrutiny applies to the Act's burdening of TikTok Inc.'s protected expression. "[S]trict scrutiny applies" whenever the "justification for the law [is] content based." *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015); *see Texas v. Johnson*, 491 U.S. 397, 410 (1989) (strict scrutiny applies where "interest is related to expression"). And as the D.C. Circuit rightly emphasized, the Act "cannot be justified without reference to the content of the regulated speech": the Government's asserted concern about China's "ability to manipulate content covertly on the TikTok platform" *itself* "reference[s] the content of TikTok's speech." App. 29a-30a (cleaned up); *see* C.A. Gov't Br. 35 ("China may … covertly manipulate the application's recommendation algorithm to shape the content that the application delivers to American audiences.").

The Act's text and structure reinforce that this is a content-based speech restriction subject to strict scrutiny. A law "imposes more than an incidental burden

on protected expression" when, "on its face and in its practical operation," it "imposes a burden based on the content of speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Here, the Act targets *only* applications like TikTok that "enable[] … users to generate or distribute content," Sec. 2(g)(2)(A)(iii)—*i.e.*, "platforms [that] make choices about what third-party speech to display and how to display it," *NetChoice*, 144 S. Ct. at 2393. While the Act is structured as a restriction on certain forms of foreign control, "the conduct triggering" that restriction still "consists of communicating a message." *Humanitarian Law Project*, 561 U.S. at 28; *see Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (invalidating content-based escrow requirement for book-sale proceeds). Regardless of Congress's *motive*, the Act "directly and immediately" regulates based on applications' content. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

Even worse, as the D.C. Circuit recognized, "the Act singles out TikTok … for disfavored treatment." App. 26a. The Act's prohibitions automatically apply to any application operated by ByteDance Ltd. or TikTok Inc., depriving Applicants of the opportunity to contest their coverage under the standards and procedures available to the speakers operating all other applications. *Compare* Sec. 2(g)(3)(A), *with* Sec. 2(g)(3)(B). But "impos[ing] a burden based on the … identity of the speaker," *Sorrell*, 564 U.S. at 567, "contradict[s] basic First Amendment principles," *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 812 (2000).

Given all this, the D.C. Circuit had little difficulty "reject[ing] the Government's ambitious argument that this case is akin to *Arcara v. Cloud Books,*

Inc., 478 U.S. 697 (1986), and does not implicate the First Amendment at all." App. 25a. Unlike "[e]nforcement of a generally applicable law unrelated to expressive activity," "the Act singles out TikTok, which engages in expressive activity, for disfavored treatment." App. 26a.

To be sure, the panel majority only assumed strict scrutiny applies, suggesting "reasons intermediate scrutiny may be appropriate under these circumstances." App. 31a. But none of them makes sense. For example, the majority observed that the Act's "TikTok-specific provisions" address "control by a foreign adversary" without referencing any content on TikTok. App. 28a. But the Act leaves *most* adversary-controlled applications unregulated and uses *content-based* criteria to determine which applications are generally covered. Sec. 2(g)(2)(A). That the Act singles out TikTok for especially unfavorable treatment within that content-based set of covered applications makes things worse, not better. Likewise, observing that strict scrutiny "'is unwarranted when the differential treatment is justified by some special characteristic of the particular medium being regulated,'" the majority described TikTok as having the "special characteristic" of having been "designated by the political branches as a foreign adversary controlled application." App. 29a (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 660-61 (1994)). But the majority did not identify anything "special" that "justified" treating TikTok, and social-media platforms more generally, differently from all other applications with respect to alleged foreign adversary control. Saying TikTok is "special" *because* Congress singled it out turns this Court's speaker-discrimination cases on their head. Finally,

the majority posited that the Government's fear of "covert[]" content manipulation could be "[u]nderstood" as "wholly consonant with the First Amendment." App. 30a-31a. But that is question-begging: courts must *first apply* strict scrutiny to *determine whether* this content-based justification can sustain the Act.

Chief Judge Srinivasan suggested that intermediate scrutiny was warranted based on the "longstanding regulatory history" of "restrictions on foreign control … in the communications arena." App. 70a. But "broadcast" media is "special" because of bandwidth scarcity, *see id.*, and so receives lesser First Amendment protection than "the vast democratic forums of the Internet," *Reno v. ACLU*, 521 U.S. 844, 868 (1997). And in actuality, history and tradition show that this Nation's constitutional commitment to "uninhibited, robust, and wide-open debate and discussion" includes even supposed foreign "propaganda." *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (cleaned up); *accord Meese v. Keene*, 481 U.S. 465, 480 (1987).

2. The Act fails strict (or any heightened) scrutiny

While the D.C. Circuit applied strict scrutiny in name, in application it rendered that standard a shadow of its normal self. Strikingly, the court drew inspiration from a decision applying arbitrary-and-capricious review to uphold a non-speech-related regulation—a case the court surprisingly deemed "much like" this one. App. 40a-41a (discussing *Pac. Networks Corp. v. FCC*, 77 F.4th 1160 (D.C. Cir. 2023)). Real strict scrutiny, however, looks nothing like APA review.

When this Court applies strict scrutiny—the Constitution's most demanding standard—it nearly always strikes the law down. The three rare exceptions involved

laws banning limited, strictly defined categories of speech. Shuttering one of the Nation's most popular speech platforms, by contrast, is not "carefully drawn to cover only a narrow category of speech," *Humanitarian Law Project*, 561 U.S. at 26 (ban on aiding terrorist organizations); a restriction on "a narrow slice of speech," *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 452 (2015) (judicial-election fundraising); or a "minor geographic limitation," *Burson v. Freeman*, 504 U.S. 191, 210 (1992) (plurality op.) (polling-place restriction). The massive and unprecedented restriction of speech on TikTok—speech that the Government concedes is fully protected, C.A. Gov't Br. 60—reinforces the importance of applying strict scrutiny with its full rigor.

a. Content-Manipulation Interest. The D.C. Circuit held that Congress had a legitimate interest in preventing China from *covertly* manipulating content on TikTok. App. 30a. But Congress instead had the broader, illegitimate interest in *itself altering the content* on TikTok by changing who operates it. After all, *banning* Applicants from operating TikTok sweeps far more broadly than necessary to address any concern that TikTok users are being *misled* about who is behind the content.

Under any heightened scrutiny, a law must advance interests "unrelated to the suppression of free speech." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997). "[C]orrect[ing] the mix of speech" on "social-media platforms," however, is "very much related to the suppression of free expression." *NetChoice*, 144 S. Ct. at 2407. Nor does the Government have a legitimate interest in "control[ling] the flow of ideas to the public" *even if* they are "[foreign] political propaganda." *Lamont*, 381 U.S. at 306-07. TikTok Inc., a U.S. speaker, may exercise *its* editorial discretion by

choosing to use a recommendation engine for the U.S. TikTok platform that the Government (wrongly) alleges may reflect foreign influence. If Americans find the views expressed on TikTok influential, that is the First Amendment in action. *See Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 770 (1976) ("information is not in itself harmful"; "the First Amendment makes for us" the "choice[] between the dangers of suppressing information[] and the dangers of its misuse"); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment….").

The D.C. Circuit faulted Applicants for "incorrectly fram[ing]" the Act's justification as "suppressing propaganda and misinformation," when "in fact" it is "the risk of [China] *covertly* manipulating content on the platform." App. 42a (emphasis added). But "misinformation, disinformation, and propaganda" was a central concern of the only committee report on the Act. H.R. Rep. No. 118-417, at 2. It accused TikTok of ensuring "specific videos" achieve a certain number of views, objected that TikTok could be used to amplify "false information," and worried that TikTok might agree to "shape the content … to suit the interests" of China. *Id.* at 8-9. None of that concerns *covert* Chinese manipulation, and neither did the content-and-viewpoint-based objections raised by various Members of Congress. *See supra* at 13-14. They are objections to the mix of content posted by TikTok users and (false) assertions about editorial choices by TikTok Inc. in disseminating that content. The Government's "covert manipulation" framing was emphasized only after the fact by

lawyers—with no support in statutory text. The Government never met its burden of "show[ing] that th[is] alleged objective was the legislature's actual purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (cleaned up).

Even if Congress has a legitimate concern that a U.S. entity's speech is covertly on behalf of, or manipulated by, a foreign government, the First Amendment *still* prohibits an outright ban. As this Court has repeatedly held, "disclosure" is the "less restrictive alternative" typically required to remedy misleading sources of speech. *Citizens United v. FEC*, 558 U.S. 310, 369 (2010). Even in the context of American citizens serving as *actual agents* for foreign governments, Congress eschewed a prohibition on speech in favor of a registration-and-disclosure regime—by appropriately "label[ing] information of foreign origin," "our people, adequately informed, may be trusted to distinguish between the true and the false." *Meese*, 481 U.S. at 469-71, 480 n.15 (cleaned up). At the very least, the Government bears the burden of proving that disclosure would be insufficient. *Reno*, 521 U.S. at 879. Here, however, the Government put forth no evidence—zero—that it even considered this time-tested alternative rather than the massively overbroad approach of banning Applicants from operating TikTok. This strongly suggests that Congress's true concern was the content itself, not the "covert" nature of any potential manipulation.

In its nearly 60-page opinion, the D.C. Circuit devoted one *ipse dixit* sentence to disclosure: "[C]overt manipulation of content is not a type of harm that can be remedied by disclosure." App. 54a. That assertion, however, is manifestly wrong. The risk that a listener will be misinformed about the source of speech is *exactly* the

type of harm disclosure remedies. The D.C. Circuit gave no explanation why it would be inadequate, for example, to include a conspicuous warning on the TikTok platform telling users what the Government told the court: "[The Government believes] there is a risk that [China] may coerce … TikTok to covertly manipulate the information received by … Americans." C.A. Gov't App. 4. Congress has often used disclosures to inform Americans about the speech they receive. *See, e.g.*, 22 U.S.C. § 614(b) (requiring a "conspicuous statement" saying "materials are distributed by the agent on behalf of the foreign principal"). And the Government has specifically advocated for warnings on social-media applications as a means of informing users.[5]

To be clear, Applicants believe that such a warning would be unwarranted in this context. But the key point for now is that this much-less-restrictive alternative forecloses the Government from justifying the far-more-draconian remedy of banning Applicants from operating TikTok at all. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730-31 (2014). To repeat, if Americans, duly informed of the alleged risks of "covert" content manipulation, choose to continue viewing content on TikTok with their eyes wide open, the First Amendment entrusts them with making that choice, free from the Government's censorship. And if the D.C. Circuit's contrary holding stands, then Congress will have free rein to ban any American from speaking simply by identifying some risk that the speech is influenced by a foreign entity.

[5] Vivek H. Murthy, *Surgeon General: Why I'm Calling for a Warning Label on Social Media Platforms*, N.Y. Times (June 17, 2024), https://www.nytimes.com/2024/06/17/opinion/social-media-health-warning.html.

b. Data-Protection Interest. The D.C. Circuit also held that Congress had an interest in preventing China from misappropriating the data of U.S. TikTok users. App. 33a. That cannot sustain the Act either.

Since the Government, as noted above, "justifies the Act in substantial part by reference to a foreign adversary's ability to manipulate content," App. 25a, and that interest is impermissible, the Act fails unless Congress would have passed it "even in the absence of" the improper motive. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Yet the Government has never even tried to prove that Congress would have passed the Act for data-protection reasons alone. Nor did it ever argue that the Act could be sustained solely on this ground. App. 31a n.8, 78a.

In any event, any data-protection interest is so underinclusive that it "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011). The Act *categorically exempts* adversary-controlled applications that either (1) do not have user-generated or user-shared content, or (2) have the primary purpose of allowing users to post certain types of reviews, even though they each have the same ability to collect user data. Sec. 2(g)(2).

While strict scrutiny does not require "address[ing] all aspects of a problem in one fell swoop," it also does not permit "fail[ing] to regulate vast swaths of conduct that similarly [imperil] [the Government's] asserted interests." *Williams-Yulee*, 575 U.S. at 448-49. "[T]he type and amount of data that TikTok collects from U.S. users" is "comparable" to other applications with equivalent alleged China connections. C.A.

Petrs. Supp. App. 875 (cleaned up); *see* C.A. Petrs. App. 770-71. Indeed, a report by the "U.S.-China Economic and Security Review Commission" warned of "Chinese e-commerce platforms" growing "a dominant U.S. market presence" while "struggl[ing] to protect user data." C.A. Petrs. App. 531-32. These platforms "draw[] on" a wealth of data to predict commercial trends, including "customer data and search history" as well as users' "data and activity from other apps." *Id.* at 532. The D.C. Circuit disregarded all this evidence when it declared that "TikTok does not identify any company operating a comparable platform in the United States with equivalent connections to [China]." App. 42a.

c. Less-Restrictive Alternatives. "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to *prove* that the alternative will be ineffective." *Playboy*, 529 U.S. at 816 (emphasis added). The "breadth" of a speech restriction "imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective." *Reno*, 521 U.S. at 879. Even under intermediate scrutiny, the Government must "show[] that it seriously undertook to address the problem with less intrusive tools readily available to it." *McCullen v. Coakley*, 573 U.S. 464, 494 (2014). This Court thus routinely invalidates laws under both intermediate and strict scrutiny where "there is no hint that the Government even considered … other alternatives." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002); *see Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("[T]he congressional record contains no legislative findings that would justify us in concluding that there is no

constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest[.]"). Here, there are myriad less-restrictive alternatives, yet no evidence the Government even considered them, let alone found them wanting.

(i) As noted, the D.C. Circuit dismissed disclosure as an alternative means of addressing covert content-manipulation concerns. *See supra* at 26-27. Yet disclosure is plainly less restrictive than banning outright the speech of Applicants and the 170 million Americans who wish to use the TikTok platform they operate: "[D]isclosure requirements trench much more narrowly" on First Amendment rights "than do flat prohibitions on speech." *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). An appropriately visible disclosure that the Government believes content on TikTok may be manipulated by a foreign adversary would render non-"covert[]" any "shap[ing of] the content that American users receive." C.A. Gov't Br. 2. The Government was required to use this less-restrictive alternative or "prove" it would have been "ineffective to achieve its goals." *Playboy*, 529 U.S. at 816. But nothing in the record suggests that it even *considered* this alternative.

(ii) Nor did the D.C. Circuit confront less-restrictive alternatives to address data-security concerns. As part of the same legislation containing the Act, Congress barred "data broker[s]" from "mak[ing] available personally identifiable sensitive data of a United States individual" to certain countries and entities. Pub. L. No. 118-50, div. I, § 2(a) (2024). Rather than banning TikTok, Congress could have applied this prohibition more broadly, not just to "data broker[s]." *See* C.A. Petrs. App. 768-

69. Again, however, nothing in the record shows that the Government considered this "readily available" "less intrusive tool[]." *McCullen*, 573 U.S. at 466.

(iii) The same is true of the comprehensive National Security Agreement. Starkly illustrating its flawed approach, the D.C. Circuit deferred to "the Executive's judgment" that the NSA was an inadequate alternative. App. 49a-50a. But *Congress* banned TikTok, so *Congress* was required to consider alternatives. The court merely assumed that Congress was "familiar[]" with the NSA because "Executive Branch officials briefed congressional committees several times." App. 52a-53a. But nothing in the public record suggests the key elements of the Agreement were addressed. The point of the NSA's "unprecedented" measures—including the ring-fenced storage of U.S. data in the Oracle cloud, an industry-leading approach—was to act in "combination" to produce a "technically secure mitigation scheme." C.A. Petrs. App. 756; *see id.* at 774, 823. The Court upheld the Act without requiring the Government to prove that Congress even knew about this package of measures, much less that Congress "found it wanting," App. 53a.

(iv) At minimum, "the generally applicable provisions of the Act," App. 58a, are *themselves* a less-restrictive alternative. Every other application accused of being "controlled by a foreign adversary" can invoke statutory procedures and standards to oppose a ban. Sec. 2(g)(3)(B). Congress necessarily found that approach adequate to address any security threat posed by adversary-controlled applications. Only TikTok is "singled out" for the "differential treatment" of an automatic ban. App. 58a.

The court tried to justify this by characterizing TikTok alone as posing an "immediate threat." *Id.* Yet the Government did not treat TikTok that way. It deliberated "[f]or years." C.A. Gov't Br. 1. The current Administration commenced discussions with Applicants in 2021 but went silent for long stretches; and Congress itself delayed the Act's effectiveness for an arbitrarily chosen 270 days, including through a presidential election, with the possibility of an additional 90 days. *See infra* at Part III.B. Moreover, the generally applicable process can be completed with just 30 days' notice to Congress, Sec. 2(g)(3)(B)(ii)(II)—a small fraction of the delays built into the Act itself, on top of Congress's pre-enactment delays. A need for unusual haste is not a plausible explanation for singling out TikTok.

Even more dubious is the notion that immediacy required different *substantive* standards. Other applications cannot be designated unless they satisfy specific ownership standards. Sec. 2(g)(1). Those standards would not be met for TikTok, were they applicable. Adversary control can be established by 20% ownership by a person "domiciled in" China, Sec. 2(g)(1)(A)-(B), but ByteDance Ltd. is 21% owned by a Chinese national domiciled in Singapore, C.A. Petrs. App. 802. Nowhere did the D.C. Circuit find that Applicants are "controlled by a foreign adversary" under the Act's generally applicable definition. Congress just made that irrelevant—Applicants are adversary-controlled because Congress said so, and Applicants alone are denied any standard, finding, administrative process, or judicial review on that issue.

The general provisions thus constitute an obvious less-restrictive alternative available in the Act itself, which Congress denied to TikTok without any explanation.

See Hobby Lobby, 573 U.S. at 730-31. The Act fails First Amendment scrutiny on this ground alone. That conclusion is reinforced by the basic command of equal protection: "[A]ll persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Congress defined a class of applications of concern—"foreign adversary controlled applications"—yet treated TikTok worse than every other alleged member of that class. "Nowhere are the protections of the Equal Protection Clause more critical than when legislation singles out one or a few for uniquely disfavored treatment." *News Am. Pub., Inc. v. FCC*, 844 F.2d 800, 804, 813-14 (D.C. Cir. 1988) (law that targeted "a corporation controlled by K. Rupert Murdoch" "with the precision of a laser beam" offended the Constitution at the "intersection" of First Amendment and Equal Protection principles).

d. Proper Evidentiary Burden. Strict scrutiny demands "hard evidence," not "anecdote and supposition," *Playboy*, 529 U.S. at 819, 822, or "ambiguous proof," *Brown*, 564 U.S. at 800. And when there are "substantial factual disputes," the Government must "shoulder its full constitutional burden of proof." *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004). Yet the D.C. Circuit repeatedly failed to apply this evidentiary burden with the rigor demanded by the First Amendment. Instead, it brushed aside the Government's mistakes as "quibbles," App. 39a; uncritically accepted conclusory assertions, App. 47a; and disregarded factual errors and analytical gaps in the Government's *post hoc* critiques of the NSA, *see* C.A. Petrs. Supp. App. 837-69, deeming them unreviewable "judgments," App. 50a-51a. This is not heightened scrutiny—whether strict or intermediate—in any meaningful sense.

A revealing example of the court's lax scrutiny is its reliance on a key claim by the Government: "ByteDance and TikTok Global have taken action in response to PRC demands to censor content *outside* of China." App. 36a, 47a (quoting C.A. Gov't App. 17). The court faulted Applicants for not "squarely den[ying]" this, finding their "silence" "striking." App. 47a. In fact, Applicants did respond, pointing out that it was not clear what the Government intended to allege through this vague statement, and that it was possible the Government was misinterpreting common industry practices in responding to takedown requests. C.A. Petrs. Supp. App. 882-84 & nn. 56-57; *cf. Murthy v. Missouri*, 144 S. Ct. 1972, 1993 (2024). When the government has made concrete allegations of actual censorship, TikTok has investigated and refuted them. *See TikTok Inc. v. Trump*, No. 20-CV-2658, Dkt. 43-5 ¶¶ 19-24 (D.D.C. 2020). But here, Applicants could not more specifically refute a generic assertion when *all* the supporting detail was submitted *ex parte*. *See* C.A. Gov't App. 17-18.

Doubtless aware of the serious problems with relying on the Government's secret evidence without providing any meaningful opportunity for adversarial testing, C.A. Petrs. *Ex Parte* Opp'n 9-25, the D.C. Circuit declined to do so. Instead, it upheld the Act based only on the "public record." App. 65a. The court therefore based its decision in part on bare factual assertions by the Government lacking evidentiary support. That is not strict scrutiny in any recognizable form.

3. The Act additionally violates the Bill of Attainder Clause

By singling out TikTok Inc. for worse treatment than all other application providers, Congress also violated the Bill of Attainder Clause. This Court has given

"broad and generous meaning to the constitutional protection against bills of attainder." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 469 (1977). It has invalidated far-less-punitive laws effectively banning select persons or groups from their chosen businesses. *See United States v. Brown*, 381 U.S. 437, 447 (1965); *United States v. Lovett*, 328 U.S. 303, 315 (1946); *Cummings v. Missouri*, 71 U.S. 277, 323 (1866).

The D.C. Circuit viewed the Act as dissimilar from historical attainders because it requires only "a sale" as a "condition of continuing to operate." App. 61a. But even if the TikTok platform could continue under new ownership, TikTok Inc. would still be banned from operating the platform—not through application of the Act's standard process, but through "trial by legislature." *Brown*, 381 U.S. at 442; *see* C.A. Amicus Br. of Prof. Matthew Steilen, at 22-23.

II. APPLICANTS WILL SUFFER IRREPARABLE INJURY WITHOUT AN INJUNCTION

Starting on January 19, the Act will inflict extreme harm on Applicants by banning their operation of TikTok in the United States, on the eve of a presidential inauguration. As the Government admits, the Act's prohibitions will "depriv[e]" Applicants of third-party services that "would practically preclude" TikTok "from continuing to be widely offered to American users." C.A. Gov't Br. 11. This will cause TikTok's American base of 170 million monthly users and creators to lose access to one of the country's most popular speech platforms, destroy TikTok's ability to attract advertisers, and cripple TikTok's ability to recruit and retain talent. Even if the ban later lifts, a temporary shutdown will irreparably harm Applicants in several ways.

Constitutional Violations. As discussed above, the Court will likely conclude that the Act, as applied to TikTok, violates the First Amendment. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese*, 141 S. Ct. at 67.

Loss of Users and Creators. Even a temporary shutdown will have devastating effects on TikTok Inc.'s business, which depends on its ability to attract and retain users and creators. App. 106a-107a; *see Reuters Ltd. v. United Press Int'l*, 903 F.2d 904, 908 (2d Cir. 1990). If the platform becomes unavailable on January 19, TikTok will lose its users and creators in the United States. Many current and would-be users and creators—both domestically and abroad—will migrate to competing platforms, and many will never return even if the ban is later lifted. App. 110a-112a.

Applicants estimate that a one-month shutdown would cause the platform to lose approximately one third of its daily users in the United States. App. 111a-112a. A longer shutdown would result in an even greater loss. *Id.* This harm is irreparable. *See In re NTE Conn., LLC*, 26 F.4th 980, 991 (D.C. Cir. 2022).

Harms to Revenue, Commercial Relationships, and Competitive Position. The Act will also cause extreme and unrecoverable harm to TikTok Inc.'s business. Substantial economic harm is irreparable when it is "nonrecoverable," including because of sovereign immunity. *See, e.g.*, *Ohio v. EPA*, 144 S. Ct. 2040, 2053 (2024); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

Even a temporary shutdown will cause TikTok to lose advertisers and commercial partners. This will result in an enormous loss of revenue during the

shutdown, as well as reverberating harms to TikTok's relationships and competitive position with commercial partners and advertisers. App. 107a-110a; C.A. Petrs. App. 826-27. Applicants estimate that even a one-month shutdown would result in a 29% loss of total targeted global advertising revenue for 2025. App. 107a-108a. Being placed at a "competitive disadvantage" in this way is irreparable. *Ohio*, 144 S. Ct. at 2053; *see In re NTE*, 26 F.4th at 991.

The Act will also dramatically harm TikTok's reputation—with users, creators, advertisers, and current and prospective employees—in the United States and worldwide. App. 110a, 113a; C.A. Petrs. App. 826-27; *see Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962).

Recruiting and Retention Harms. Applicants operate in a highly competitive market for talent, including for software engineers. App. 113a. A temporary shutdown of TikTok will likely result in current and prospective employees accepting offers from competitors. *Id.* Even if the shutdown is later lifted, it will be difficult to recruit those employees back. *Id.*; *see Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

III. THE BALANCE OF EQUITIES DECISIVELY FAVORS AN INJUNCTION

A. The Public Interest Strongly Supports An Interim Injunction

The public interest demands a temporary injunction against the Act's restriction of the First Amendment rights of Applicants and 170 million Americans. "Vindicating First Amendment freedoms is clearly in the public interest." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005).

TikTok is used by regular citizens, businesses, and politicians alike—including, in the most recent presidential election, by both major-party candidates to communicate with voters. *See supra* at 6-8; C.A. Redacted Tr. 39; C.A. Petrs. App. 804-05. Absent relief, all of these individuals will "lose access to an outlet for expression, a source of community, and even a means of income," App. 92a, at a critical moment in our Nation's history. *See also* App. 107a-109a.

Beyond those weighty First Amendment interests, other public-interest factors overwhelmingly support a temporary injunction. Perhaps most significantly, before the irreparable harms to Applicants and the public materialize, the Court should have an opportunity to review the D.C. Circuit's resolution of the significant constitutional questions presented by this unprecedented law. That is particularly important because the D.C. Circuit sat as a trial court, meaning that this Court will provide the only appellate review of the judgment upholding the Act. The public interest calls for this Court, rather than the D.C. Circuit, to be the final word in discharging the "gravest and most delicate duty" of the Judicial Branch: "judging the constitutionality of an Act of Congress." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009).

The public interest in ensuring that TikTok is not banned without this Court's review is particularly strong because the Act will take effect just one day before the inauguration of a new President. The Act grants the President and Attorney General broad discretion over the timing and implementation of its provisions. *See* Sec. 2(a)(3), 2(d)(2), 2(g)(6); *see also* U.S. Const. art. II, § 3. And there is a reasonable

possibility that the new Administration will pause enforcement of the Act or otherwise seek to mitigate its most severe potential consequences. It has been widely reported, for example, that the incoming Administration "is expected to try to halt" the ban.[6] President-elect Trump has publicly announced "I'm gonna save TikTok";[7] his incoming National Security Advisor stated that "[w]e absolutely need to allow the American people to have access to that app";[8] and one of his announced nominees for a Cabinet post has separately challenged the Act, *see supra* at 14.

It would not be in the interest of anyone—not the parties, the public, or the courts—for the Act's ban on TikTok to take effect only for the new Administration to halt its enforcement hours, days, or even weeks later.

B. An Interim Injunction Will Not Materially Harm The Government

On the other side of the equitable balance, the Government would suffer no meaningful harm from a modest delay that temporarily preserves the status quo.

The Government claims to have harbored its concerns about TikTok "[f]or years," C.A. Gov't Br. 1, and the current Administration's discussions with TikTok began in 2021, *see* C.A. Petrs. App. 413, 417, yet Congress did not act until April 2024. Moreover, once Congress eventually acted, it delayed the Act's effective date for 270 days, with the potential of an additional 90-day delay. Sec. 2(a)(2)(A), 2(a)(3). That

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[6] *See, e.g.*, Jeff Stein et al., *Trump expected to try to halt TikTok ban, allies say*, Wash. Post (Nov. 12, 2024), https://www.washingtonpost.com/business/2024/11/12/trump-tiktok-ban-sale/.

[7] *Id.*

[8] Ian Hanchett, *Waltz: Trump 'Wants to Save TikTok', but Wants to Protect Data*, Breitbart (Dec. 7, 2024), https://perma.cc/4AVE-XT64.

period of delay covered a presidential election in which both major-party candidates prominently participated in the public discourse on TikTok. And nothing in the legislative record suggests a reason why Congress opted for the particular timelines it set—timelines that were indisputably too truncated for Applicants to effectuate a qualified divestiture before January 19. *See* C.A. Redacted Tr. 146-47 (colloquy between Member of Congress and government official expressing uncertainty as to why a particular timeline was chosen); C.A. Petrs. App. 648; App. 46a. Congress's decision to delay implementation confirms that there is no compelling public interest requiring an immediate shutdown of one of the Nation's largest speech forums.

To the contrary, the Act's timelines reflect that the asserted national-security threat is not imminent. The Government admits that in the years it has had concerns about TikTok, it has found no evidence that any foreign adversary has manipulated the content Americans see or misappropriated their private data. C.A. Gov't App. 4, 16, 26. It instead justifies the Act based on a "potential risk" of what "could" happen in the future. *Id.* at 26. Regardless of whether any future risk is sufficient to justify the Act on the merits, it does not support precipitously and irreversibly changing the status quo on January 19, before this Court and the new Administration can conduct an orderly review.

CONCLUSION

This Court should enjoin Respondent from enforcing the Act with respect to the applications of TikTok Inc. and ByteDance Ltd., pending the timely filing and ultimate disposition of a petition for a writ of certiorari and any resulting merits review. Applicants respectfully request relief by January 6, 2025, to provide mobile application stores and internet hosting providers time to conform their conduct before January 19. At minimum, the Court should issue a temporary administrative injunction if it has not decided this application by January 6, barring enforcement until 13 days after any decision denying this application.

Respectfully submitted,

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