No. 24-657

IN THE

Supreme Court of the United States

BRIAN FIREBAUGH, ET AL.,
Petitioners,

v.

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

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Our opening brief explained that the Protecting Americans from Foreign Adversary Controlled Applications Act is anathema to the First Amendment because it aims to shield Americans from nothing more than a potentially disagreeable mix of ideas. Forced to defend that objective, the government doubles down. Adding to its argument below that a ban on TikTok is needed to avoid "undermin[ing] trust in our democracy" and "exacerbate[ing] social divisions," C.A. Gov't Br. 35, 38, the government now tells this Court that TikTok must be banned—and petitioners' voices thereby restricted—to avoid "sow[ing] doubts about U.S. leadership." U.S. Br. 6. The Court should call this argument what it is: an affront to the constitutional history, tradition, and precedent that is part of what makes this country special.

It makes no difference that the government's fear is that a "foreign adversary" might be involved in pushing the objectionable speech to Americans. Nor does it matter that such involvement might be "covert." The most our customs and case law permit in those circumstances is a requirement to disclose foreign influence, so the people have full information to decide what to believe. Those concerns provide no basis to suppress speech altogether (through a forced sale or otherwise). Nor can data-security concerns or any other argument the government advances salvage the Act from invalidity. This Court should reverse.

ARGUMENT

I. The Act directly affects the First Amendment rights of American creators and users.

Rarely if ever has the Court confronted a free-speech case that matters to so many people. 170 million Americans use TikTok on a regular basis to communicate, entertain themselves, and follow news and current events. If the government prevails here, users in America will lose access to the platform's billions of videos. They will also lose their ties to the many communities that have developed on the platform. And for those Americans, like the creator petitioners, for whom TikTok is "the most powerful mechanism[] available to" make their "voice[s] heard," the closing of TikTok will profoundly limit their expression. *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

Turning a blind eye to these realities, the government argues that the Act "does not regulate the speech" of the creator petitioners at all. U.S. Br. 22. No judge below accepted this argument, and for good reason. A statute implicates the First Amendment when it is "directed at" speech, either "on its face" or "in its practical operation." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). The Act checks both boxes.

1. In its effort to evade First Amendment scrutiny, the government spends precious little time addressing the text of the Act. All the government does is cite § 2(a)(1) for the proposition that the Act "regulates service providers that support TikTok and other similar applications." U.S. Br. 22. That is of course true. But the Act does so in service of enforcing

restrictions on TikTok and other platforms that "enable[] 1 or more users" to "generate or distribute content that can be viewed by other users of" the platform and "view content generated by other users." Act § 2(g)(2)(A)(iii)-(iv). The creator petitioners are TikTok "users." The statute thus unquestionably impinges upon petitioners' First Amendment rights. *See* Creators' Br. 19-24.

The government's assertion (at 21) that the Act is designed to address "national-security concerns posed by the ownership and control of TikTok by a foreign adversary" does not alter this analysis. That is a purported *justification* for the Act's restriction on petitioners' free expression (which we address below). It does not change the reality that the Act itself directly regulates petitioners' speech, their ability to collaborate with the publisher and editor of their choice, and their ability to listen and learn from other Americans and individuals around the world.

2. Even leaving the text of the Act aside, the practical operation of the statute impinges upon petitioners' First Amendment rights. The government disagrees, contending that "petitioners do not have a constitutional right to speak on a TikTok platform that is controlled by a foreign adversary." U.S. Br. 22. But this response is misguided on multiple levels.

First, it does not matter that TikTok has a foreign owner. *American* creators have a First Amendment right to speak to other Americans in the United States with the assistance of a foreign publisher or other collaborator. For example, American authors have a right to publish in the Oxford University Press or *The Economist*; musicians have a right to post their music

on Spotify; and actors have a right to make movies with foreign directors. *See* Creators' Br. 22 & n.2. That same general principle applies here.

Second, it does not help the government that the Act prohibits collaborations only with entities linked to "foreign adversaries." Actors, for instance, have the same First Amendment right to make movies with Iranian director (and Academy Award winner) Asghar Farhadi as with Pedro Almodóvar. *See* Creators' Br. 22 n.2. That is the unmistakable legacy of *Whitney v. California*, 274 U.S. 357 (1927), and *Lamont v. Postmaster General*, 381 U.S. 301 (1965). The American speaker in *Whitney* was advocating in concert with "the Communist International of Moscow" to achieve the "overthrow of capitalist rule" in America. 274 U.S. at 363-65. And the American listeners in *Lamont* wanted to obtain copies of the Peking Review and other pamphlets from "foreign countr[ies] [and] foreign political part[ies]" promoting "social dissensions" or "social [or] political" disorder in the United States. 381 U.S. at 302 n.1, 304 (quoting 22 U.S.C. § 611(j) (1964)).

The government ignores *Whitney* entirely and tries to distinguish *Lamont* on the ground that "the Act," unlike the statute there, "would facilitate, not impede, the organic flow of ideas." U.S. Br. 48. This makes no sense. The Act would prevent petitioners and 170 million other Americans from exchanging ideas on TikTok and thereby engaging with audiences that are otherwise unavailable to them. Shuttering that platform unless it takes on a new owner whom the President declares free from influence of any "adversary" nation plainly imposes a burden on the

free flow of ideas. And even if the Act would, in the government's eyes, broaden and improve discourse on TikTok, that would not erase the First Amendment problem. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 741 (2024).

A more pedestrian analogy confirms the First Amendment's obvious applicability here. Imagine an American who paints landscapes wants to display and publicize her art in New York. She decides that the best company to act as her publisher is an American company that has a Russian corporate parent. In the publishing contract, the company includes a paragraph saying that it has agreed to give the Russian government the authority to rearrange (without disclosure to the artist) where her paintings are hung in galleries. The artist agrees to this provision, still believing that the company is best positioned to disseminate her work. Surely the First Amendment would stand in the way of the government voiding that contract on the ground that Russia is an adversary nation that should not be allowed to express itself in this country. The artist has a right to collaborate in this country with the editor and publisher of her choice.

Of course, the Chinese government has no comparable power here, *see* TikTok Br. 48, and content on TikTok includes not just artistic offerings but also political speech and the like. But those differences only magnify the First Amendment interests at stake. *See* Creators' Br. 46-47.

Third, the Act's divestiture provision does not alter this analysis. The question whether divestiture is feasible is a factual one, and the government is

careful never to dispute that it is infeasible here—making the Act a ban in all but name. *See* U.S. Br. 27-28. In any event, divestiture would, by definition, change TikTok's ownership, and a media publication's ownership structure affects its editorial perspective and operation. Thus, if Congress ordered *The Washington Post* or X to divest its ownership, that would impinge upon the rights of content creators wanting to speak and listen through those platforms with their current leadership. So too here. *See* Creators' Br. 27-29.

3. For all these reasons, the government is mistaken in likening the Act to the "incidental burden" on speech imposed in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986); the conduct restriction in *United States v. O'Brien*, 391 U.S. 367 (1968); and the time, place, and manner restriction in *Kovacs v. Cooper*, 336 U.S. 77 (1949). *See* U.S. Br. 22-27.

Arcara's "incidental burden" doctrine applies to laws "of general applicability" that regulate only non-expressive conduct and do not "singl[e] out those engaged in expressive activity." *Arcara*, 478 U.S. at 705-07. Accordingly, prostitution that happens to take place at a bookstore can be regulated under general nuisance law. *Id.* at 705. The law in this case, however, is not one of general applicability. That is, the law is not a general ban on foreign ownership of U.S. businesses or even of businesses generally having prominent online presences. Instead, it singles out social-media platforms for their expressive activity—and ByteDance's platforms, including TikTok, in particular.

Nor does the *O'Brien* doctrine or the time, place, and manner rubric apply where the government targets free expression. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386-87 (1992); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). No doubt aware of this, the government avers that "there is nothing necessarily expressive about choosing to post on a social-media platform" owned by ByteDance instead of another such platform. U.S. Br. 25. But as should be clear by now, that is wrong. Ownership matters. There is consequently an expressive element to choosing to post on X as opposed to its predecessor, Twitter—just as there is now between posting on X instead of competitors Threads, Truth Social, or Bluesky. The Act restricts petitioners' right to free expression in that respect.

It is thus irrelevant to the First Amendment's applicability here that petitioners "remain free under the Act to say whatever they would like … on numerous other social-media platforms." U.S. Br. 22; *see id.* at 23, 27. The government never denies that TikTok is a unique platform, having a distinct look and feel and enabling Americans to exchange ideas with otherwise unreachable audiences. Nor could the government deny this obvious reality, which is amply substantiated in other briefing. *See* Creators' Br. 8-9, 21-22; Amicus Br. of Donald J. Trump 16-17.

This case is unlike *Kovacs* for another reason as well. The Court in that case upheld a municipal ordinance prohibiting the use of "sound trucks" in part because speakers could get their message out in other ways, including by "human voice" on the very same city streets. 336 U.S. at 89 (plurality opinion).

There is nothing distinctive about speech through loudspeakers on top of cars; they simply make spoken words louder. *Id.* at 87-89. Social media, by contrast, does not merely increase the volume of users' speech. It is an entirely different class of speech—indeed, the "most important" place for the daily "exchange of views" in our society. *Packingham*, 582 U.S. at 104. And TikTok is a distinctive platform within that class. *See* Creators' Br. 8-9, 21-22.

If anything, this case is like *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). There, the Court invalidated a ban on yard signs, holding the ban could not be upheld as a mere time, place, and manner restriction. The Court explained that the ban closed off a distinct "medium of communication" with substantial roots in "our culture and our law." *Id.* at 50, 58. The Act does all this and more. It deprives petitioners and other creators of their ability to use a "modern public square," *Packingham*, 582 U.S. at 107, and to engage with otherwise inaccessible audiences about the entire range of issues of the day. The Act therefore directly restricts petitioners' First Amendment rights.

II. The Act targets speech based on content and viewpoint.

Continuing to protest what is apparent from the Act and precedent, the government denies that the Act's restriction on speech is content- and viewpoint-based (and therefore that strict scrutiny is required). None of the government's arguments is convincing.

1. The government contends that "[n]othing in the text or operation of the Act discriminates based on content." U.S. Br. 25. That is not correct. As already

explained, this statute applies only to platforms hosting user-generated "content," and it distinguishes between social-media platforms and websites hosting other content, such as "product reviews" and "travel information." Act § 2(g)(2)(B); *see* Creators' Br. 26. The Act also focuses on speech platforms Congress believed could air or promote views supposedly harmful to American interests, targeting applications owned by ByteDance, plus other social-media platforms only to the extent they are controlled by an "adversary" to the United States. Act § 2(g)(3)(B)(i); *see* Creators' Br. 25. Those distinctions—between different categories of content, and different viewpoints within those categories—are the hallmark of a strict-scrutiny case.

The government's only response to the statute's product-and-travel-review carve-out is to compare it to qualifications in the statutes in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), and *Burson v. Freeman*, 504 U.S. 191 (1992). *See* U.S. Br. 43-44. But both of those cases found that the challenged laws "regulate[d] speech on the basis of its content," and so applied strict scrutiny. *Humanitarian Law Project*, 561 U.S. at 27; *see Burson*, 504 U.S. at 198 (plurality opinion) ("facially content-based restriction"). These precedents therefore do not assist the government in avoiding strict-scrutiny review. They in fact confirm that standard applies here.

2. The government's arguments in this litigation only underscore that the Act cannot be "justified without reference to the content of the regulated speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 164

(2015) (citation omitted). The government's brief emphasizes that the "Executive Branch determined" that the platform might be used for "censorship, propaganda, or other malign purposes," including to "sow doubts about U.S. leadership," "undermine democracy," and "magnify U.S. societal divisions." U.S. Br. 6 (quoting J.A. 634, 647). At the same time, the government denies that the Act's "true motive was to suppress particular content or viewpoints." *Id.* at 26.

Both claims cannot be right. Speech that "sow[s] doubts about U.S. leadership," speech that "undermine[s] democracy," and speech that "magnif[ies] U.S. societal divisions" is speech of a particular viewpoint. Indeed, the Court has previously held that suppressing expression that "cast[s] doubt" on "national unity" is a viewpoint-based restriction on speech. *Texas v. Johnson*, 491 U.S. 397, 413 (1989); *see also Snyder v. Phelps*, 562 U.S. 443, 455-57 (2012) (regulating speech suggesting "that God is killing American soldiers as punishment for the Nation's sinful policies" is viewpoint-based).

That leaves the government resorting to wordplay about "interests" and "views." U.S. Br. 26. There is no meaningful difference, however, between a law targeting speech in the "interests of" a particular speaker—say, a political or religious leader—and a law targeting speech promoting the "views" of that speaker. That is so even if that speaker might sometimes choose to air shifting or seemingly contradictory sets of ideas to further his goals—as politicians, for example, have been known to do. *See* Creators' Br. 25-26.

The government retorts that "nothing in the Act prevents exactly the same mix of content and viewpoints from being expressed on a post-divestiture TikTok." U.S. Br. 38. But the entire premise of regulating TikTok to prevent "covert content manipulation," *id.* at 24, is that the government has a compelling interest in controlling the "mix of content" that TikTok users might one day see. And there is an irreconcilable tension between the government's claim that it needs to prevent TikTok from being used to sow "doubts about U.S. leadership" or to "undermine democracy," *id.* at 6, and its denial that only speech of particular viewpoints sows such doubt.

At the very least, the government's defense of the Act confirms that the Act is content-based. Speech that might undermine U.S. interests in favor of China's geopolitical goals is, at minimum, a content-based category. *See Reed*, 576 U.S. at 169; Creators' Br. 26. Indeed, the Act's product-review carve-out confirms that the Act targets online speech only on certain topics. So even if the government could draw some ephemeral line between "interests" and "views," the Act would still be subject to strict scrutiny.

III. The Act fails strict scrutiny.

A. The government cannot ban speech to guard against "covert content manipulation."

As this Court held just last Term, Congress has no "valid, let alone substantial" interest in policing what mix of speech is featured on a social-media platform. *NetChoice*, 603 U.S. at 740. The government's suggestion here that it wants to regulate the mix of speech on TikTok for national-security reasons does

not alter this conclusion. National-security concerns justify restricting speech only where the government seeks to avert a concrete, imminent threat. Here, however, the asserted problem is simply that content on TikTok might persuade Americans of different social or political views. Our history, tradition, and precedent render the goal of limiting such speech constitutionally illegitimate.

1. The First Amendment's "fixed star" is that the government cannot regulate speech to favor any particular perspective in social or political discourse. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet absent from the government's brief is any attempt to connect its content-manipulation interest to any real-world harm. The government nowhere argues that "imminent harms" like a military offensive will occur if the speech mix on TikTok is altered to favor divisive, supposedly anti-American material. *Humanitarian Law Project*, 561 U.S. at 35.

Nor would any such argument be plausible under the Court's precedents. As our opening brief explained (at 44), the most salient and provocative type of content on TikTok that China could promote to foster division—for example, videos criticizing America on one basis or another—is content that the Court has found constitutionally protected. That is because any disagreeable ideas that such videos advocate can be addressed by "opportunity for full discussion." *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring). And that is to say nothing of TikTok's more typical fare—song remixes, fashion trends, and so on. Such videos have minimal if any geopolitical implications, and are all the more amenable to counterspeech.

The government nonetheless insists that its content-manipulation concern is "entitled to deference." U.S. Br. 46-47 (quoting *Humanitarian Law Project*, 561 U.S. at 33). But *Humanitarian Law Project* only underscores the unprecedented nature of the Act. In that case, the Court credited the government's prediction that allowing certain speech would "imminent[ly]" support "terrorist activities." 561 U.S. at 35-36; *see also Bridges v. Wixon*, 326 U.S. 135, 147-48 (1945) (indicating foreign political speech in this country is protected unless it advocates "overthrowing the government by force and violence"). Here, as just explained, the government points to no tangible harm analogous to terrorism; it is concerned only about the force of ideas. And the government's assertion that the Chinese government might exploit TikTok "when the time is ripe" falls, in any event, far short of describing an imminent risk. U.S. Br. 47. Whatever deference is due governmental risk assessments, the First Amendment does not permit the suppression of speech to prevent Americans from being persuaded of politically disagreeable beliefs in the indefinite future.

2. The government musters no serious response to our argument that our Nation's history and tradition decisively reject governmental efforts to bar speech made in conjunction with foreign entities based simply on its power to persuade. *See* Creators' Br. 33-40; Creators' Appl. 18-25.

Indeed, the government's brief is in denial of that tradition. For example, the government charges that the First Amendment would not have required "Soviet ownership and control of American …

channels of communication" during the Cold War. U.S. Br. 40. But in fact, the United States tolerated the publication of *Pravda*—the prototypical tool of Soviet propaganda—in this country at the height of the Cold War. Creators' Br. 36. And the rest of our Nation's 250-year history, as reflected in this Court's precedents, is to tolerate foreign-influenced speech where Americans are involved in creating or disseminating it, or simply wish to hear it in this country. *Id.* at 37-40; *see, e.g.*, *Meese v. Keene*, 481 U.S. 465, 480 (1987); *Lamont*, 381 U.S. at 304.

The government's only response is to invoke laws entirely unlike this Act. First, the government points (at 39) to laws regulating foreign ownership of "banks," "dams," "reservoirs," "nuclear facilit[ies]," "undersea cable[s]," and "air carriers." Those statutes, however, have nothing to do with protected expression. And even generally applicable laws relating to foreign commerce contain exceptions for "information." 50 U.S.C. § 1702(b)(3) (IEEPA).

The government also invokes the statute authorizing the Committee on Foreign Investment in the United States (CFIUS) to prohibit foreign "mergers, acquisitions, and takeovers" of U.S. companies that present national-security concerns. 50 U.S.C. § 4565(a)(B)(i). The CFIUS statute only protects U.S. assets from foreign acquisition. Consequently, it does not hinder a foreign-owned speech platform that "grew organically" from operating in the United States (somewhat akin to the activity at issue in *Lamont*)—as the Executive Branch explained in urging Congress to pass the Act. J.A. 785. In any event, the government points to no

example of the CFIUS statute being used to prevent the foreign acquisition of any expressive entity on the ground that it might affect the speech content Americans see or hear.

The government's only speech-adjacent example is the prohibition on foreign entities acquiring "radio licenses" for the broadcast spectrum. U.S. Br. 39; *see* 47 U.S.C. § 310(b)(3). But those laws rest on "special justifications"—most notably, the "scarcity of available frequencies" and the concomitant necessity of licensing. *Reno v. ACLU*, 521 U.S. 844, 868 (1997); *see* Creators' Br. 36. That is, "there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994). In the context of that inescapable need to regulate, Congress may choose to allocate licenses—which, after all, constitute U.S.-based property interests—to domestic speakers. *See* Amicus Br. of First Amendment and Internet Law Professors 18-20; *see also* Creators' Br. 42 (similar non-speech considerations for wired transmission lines).

The broadcast-spectrum-specific "factors are not present in cyberspace." *Reno*, 521 U.S. at 868-69. Nor do they pertain to other mediums—like written pamphlets or motion pictures, and even cable television—where the Court has permitted Americans to hear foreign ideas, *see Turner*, 512 U.S. at 637; *supra* at 13-14. In other words, the narrow tradition of regulating broadcast media is an

"historical outlier," U.S. Br. 39, that does not apply in this case. The relevant history and tradition cuts decisively against the Act.

As a final, half-hearted historical pitch, the government inserts a quotation from *The Federalist*. Undeniably, "security against foreign danger is an avowed and essential object of the American Union." U.S. Br. 40 (quoting *The Federalist No. 41*, at 269 (Madison) (Jacob E. Cooke ed. 1961) (alterations adopted)). The question in this case, however, is whether America is more secure when it puts faith in the power of counterspeech to "avert the evil [of speech threatening to our democracy] by process of education," *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring), or instead seeks to suppress speech potentially contrary to American ideals. That is the "choice … that the First Amendment makes for us." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

3. The government also seeks to set the Act apart from historical antecedents because it focuses on "*covert* manipulation." U.S. Br. 40-41. But concerns about covert influence are not new either. As our opening brief explained, the American tradition provides a consistent answer in circumstances where a foreign actor seeks to influence the United States from the shadows. Creators' Br. 36, 38. That answer is disclosure. *Id.* Hence, Americans wishing to advance the interests of foreign powers must tell the public that they are serving foreign aims. 22 U.S.C. § 612 (FARA). And in *Meese v. Keene*, the Court approved a similar disclosure requirement applicable

to foreign-government-produced films. 481 U.S. at 468.

The government offers little to justify veering from that well-trod path. It complains that it would be "useless" to tell users that "the PRC *could*, at some unspecified point, engage in manipulation." U.S. Br. 41 (citing J.A. 687-89). But there is no evidence Congress determined such a disclaimer would be ineffectual, and there is no good reason it would be. The point of the First Amendment is that "the best test of truth is the power of thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). So, if the worry is that Americans do not know the government thinks the curation of videos on their TikTok feeds might be influenced by the Chinese government, providing that information would fully address that risk without any need for censorship.

4. The government's final gambit is to point out that "the First Amendment obviously would forbid the United States from coercing TikTok into covertly manipulating content to serve the government's own ends." U.S. Br. 48 (citing *Murthy v. Missouri*, 603 U.S. 43 (2024)). But the government's invocation of *Murthy* just reinforces the illegitimacy of its mission here. Precisely because the First Amendment bars the United States from "procur[ing] social-media censorship of disfavored content," this Court "should be deeply concerned about setting a precedent that could create a slippery slope toward global government censorship of social-media speech," even where it might be influenced by foreign adversaries. Amicus Br. of Donald J. Trump 16-17. If the Court is

unwilling here to reaffirm the power-to-persuade principle, then it is hard to see how we might reasonably expect the rest of the world to adhere or aspire to it.

B. The Act cannot be sustained on data-security grounds.

The government's data-security arguments likewise falter.

1. For the first time in this litigation, the government argues the Court can ignore the content-manipulation rationale and sustain the Act solely on data-security grounds. *See* U.S. Br. 35. This argument is wrong for two independent reasons.

First, under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), permissible motivations cannot save a law enacted for a reason that itself violates the First Amendment. *Id.* at 287; *see* Creators' Br. 48. So if (as shown above) the content-manipulation rationale is constitutionally illegitimate, that is the end of the case.

The government responds to *Mt. Healthy* with an argument that is no response at all. The government argues that *Mt. Healthy* does not apply because the covert-content-manipulation justification "is not constitutionally prohibited." U.S. Br. 37. But—as explained above, in our opening brief, and in our application to this Court—the covert-content-manipulation rationale *is* an impermissible (or, to use the Court's words, is not a "valid") reason to suppress speech. *NetChoice*, 603 U.S. at 740. That is because it seeks to bar Americans from hearing ideas based on those ideas' persuasive power—the very thing the

First Amendment forbids. *See* Creators' Br. 29-47; Creators' Appl. 28-30; *supra* at 12-14.

The government also contends that the *Mt. Healthy* framework should not apply when considering an act of Congress. U.S. Br. 36. But this Court has previously applied *Mt. Healthy* to legislative acts. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985). And it has had little trouble concluding that legislation enacted "because of" an improper purpose cannot be saved by tacking on a supposedly neutral rationale. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 539, 540 (1993). If the text and structure of the Act made clear that Congress targeted TikTok because too many Black people or Catholics were using the platform, surely a resort to data-security concerns would not save the statute. The same is true here, where the government's content-manipulation rationale is anathema to the First Amendment.

Second, the government cannot show that the Act would have been passed based solely on data-security concerns. Recall that Congress conditioned divestiture on a clean break from the current ownership not only with respect to data sharing but also with respect to the "content recommendation algorithm." Act § 2(g)(6)(B). That requirement does nothing to ensure any data-security protection. A Congress concerned solely with data security thus would not have enacted this law. *See* Creators' Br. 47-50. Likewise, a Congress focused on data security would not have made the general statutory provisions applicable only to social-media companies, excepting review-focused platforms and e-commerce sites that

harvest copious amounts of data from tens of millions of Americans. *See supra* at 8-9.

The Court therefore has no need to conduct "a counterfactual analysis" to determine whether a Congress free of the impermissible content-manipulation goal would have enacted the same law. U.S. Br. 36. The answer follows directly from "using ordinary interpretive techniques," *Ross v. Blake*, 578 U.S. 632, 642 n.2 (2016), and the mismatch between the Act and any data-security concern.

At any rate, the government's allegation (at 32)—that TikTok has a unique "track record of taking action at the behest of the PRC"—only underscores that data-security arguments are just the tail seeking to wag the dog. The "record" the government points to relates to ByteDance allegedly manipulating content (outside the United States). U.S. Br. 5 (quoting J.A. 644). The government, however, points to no similar charges related to any data-security issue—and indeed, concedes that China has never coerced ByteDance into misappropriating TikTok user data. J.A. 640. And when the government does give examples of China-related data-security breaches, they involve all manner of entities, not social-media platforms like TikTok. *See* U.S. Br. 29-30. This further shows that the Act cannot be treated simply as an attempt to protect data security, as opposed to an effort at least in part to police the speech content on TikTok.

This is not just a problem of "underinclusiveness." U.S. Br. 33. Statutes may not "single[] out" expressive entities for regulatory burdens having nothing to do with speech. *Ark. Writers' Project, Inc. v. Ragland*,

481 U.S. 221, 234 (1987); *see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983). Consequently, even if the Act's focus on TikTok and other expressive entities reflected nothing more than a lack of interest in addressing data security "in one fell swoop," U.S. Br. 33 (citation omitted), the Act would still run afoul of this long-established First Amendment restriction. *See* Creators' Br. 50. The government, in fact, offers no answer at all to this precedent.

2. If the Court reaches the issue, forcing the closure of TikTok is not the least-restrictive means of addressing any data-security concern.

Our opening brief explained that Congress had an obviously less speech-suppressive means of preventing ByteDance from sharing data with China: simply prohibiting ByteDance from sharing data with China. That is the approach Congress took elsewhere in the same omnibus package, forbidding "data broker[s]" from sharing Americans' "identifiable sensitive data" with foreign adversaries. Protecting Americans' Data from Foreign Adversaries Act of 2024, Pub. L. No. 118-50, Div. I, § 2(a), 138 Stat. at 960; *see* Creators' Br. 51.

The government suggests that this prohibition is not good enough for ByteDance because of the Executive Branch's "lack of trust" in the platform. U.S. Br. 34. But there is no evidence the political Branches made any such determination. At any rate, statutory prohibitions are not premised on "trust"; they rest on the power of the Executive Branch to investigate and punish any breaches. The data-broker law, for example, authorizes the Federal Trade

Commission to file enforcement actions and obtain hefty penalties for any breach. Pub. L. No. 118-50, Div. I, § 2(b), 138 Stat. at 960; *see* 15 U.S.C. §§ 45(m), 57a. Those coercive tools do not rely on the government's belief that the subjects of its investigations are telling the truth. So it is puzzling for the government to contend that its ordinary enforcement powers are insufficient here. It is all the more puzzling when the Act itself contains provisions that Congress presumably thought adequate for all "foreign adversary controlled applications" besides those owned by ByteDance. *See* TikTok Br. 51-54.

Finally, the government errs in denying (at 35) that disclosure would address its data-security concerns. The data-security problem arises only insofar as American users choose to share sensitive "user data" with TikTok. U.S. Br. 34. If fewer users elected to share such data, there would be less information—indeed, perhaps hardly any at all—that, according to the government, "the PRC could compel ByteDance" to provide. *Id.* So if the government believes that it has cogent reasons that individuals should not share their data with TikTok, requiring TikTok to disclose those reasons is a less-restrictive means than banning the platform entirely. *See* Creators' Br. 51-53.

IV. The Court should not consider any classified evidence.

If the Act is unconstitutional as applied to petitioners, the government recognizes that the Court should reverse and enjoin its operation to ByteDance and TikTok. U.S. Br. 49 n.*. But the government suggests that, before issuing any such judgment, the

Court should consider classified evidence it proffered below. *Id.* at 48-49.

The Court should reject that entreaty. This is "a court of review, not of first view." *NetChoice*, 603 U.S. at 726 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). And the D.C. Circuit explicitly declined to rely on any classified materials and upheld the Act solely "based upon the public record." J.A. 65. If that holding is erroneous, this Court should reverse without considering any classified evidence.

All the more so because "[c]ommon sense tells us that secret decisions based on only one side of the story will prove inaccurate more often than those made after hearing from both sides." *Kaley v. United States*, 571 U.S. 320, 355 (2014) (Roberts, C.J., dissenting). Petitioners accordingly argued below that any classified evidence "used to prove the Government's case must be disclosed to the [petitioners] so that [they have] an opportunity to show that it is untrue," such as by allowing cleared counsel to access and respond to the government's *ex parte* submissions. *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *see* CADC Doc. 2068242 at 4-32 (Aug. 5, 2024). The D.C. Circuit did not resolve the parties' dueling arguments in that regard, and the question has not been briefed in this Court. It is not even necessarily within the question presented.

A reversal of the judgment below should end the case. The government does not contend that the *ex parte* evidence would enable it to make new arguments—only that the evidence would bolster rationales for shutting down TikTok. U.S. Br. 48. If those rationales are legally invalid, then the Act

violates the First Amendment, full stop. But if this Court's opinion somehow leaves room for the possibility that classified evidence might make a difference, the Court should make the injunction a temporary one and remand for any further proceedings that may be necessary.*

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

* If the Court does not issue a decision before January 19, 2025, the Court should likewise temporarily enjoin the Act's application. *See* Creators' Appl. 32-37 (explaining why the equities favor temporary relief).

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