

No. 24-656

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IN THE  
**Supreme Court of the United States**

TIKTOK INC. AND BYTEDANCE LTD.,  
*Petitioners,*

v.

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

\_\_\_\_\_  
BRIAN FIREBAUGH, ET AL.,  
*Petitioners,*

v.

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

\_\_\_\_\_  
BASED POLITICS INC.,  
*Petitioner,*

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 D.C. Circuit**

**BRIEF OF SOCIAL AND RACIAL JUSTICE  
NONPROFITS AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS**

KATHLEEN R. HARTNETT  
COOLEY LLP  
3 Embarcadero Center  
20th Floor  
San Francisco, CA 94111  
(415) 693-2000

TRAVIS LEBLANC  
MATT K. NGUYEN  
*Counsel of Record*  
ROBERT H. DENNISTON  
COOLEY LLP  
1299 Pennsylvania Ave. NW  
Suite 700  
Washington, DC 20004  
(202) 842-7800  
mnguyen@cooley.com

*Counsel for Social and Racial Justice Nonprofits*

[Additional Counsel Listed on Inside Cover]

JAMIE D. ROBERTSON  
COOLEY LLP  
110 N. Wacker Drive  
Suite 4200  
Chicago, IL 60606  
(312) 881-6500

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<i>Hassan v. City of New York</i> , 804 F.3d 277 (3d Cir. 2015) .....	22

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<i>Turner Broad. Sys., Inc. v. FCC</i> , 520 U.S. 180 (1997).....	18, 26

## TABLE OF AUTHORITIES—Continued

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Public Redacted Government Appendix, <i>TikTok Inc. v. Garland</i> , Nos. 24-1113, 24-1130, 24-1183 (D.C. Cir. July 26, 2024).....	3, 10, 17, 25, 26
<b>OTHER AUTHORITIES</b>	
<i>AAJC Joins Letter Urging Social Media Platforms to Fight Disinformation in Advance of Upcoming Mid-Term Elections</i> , ADVANCING JUSTICE—ASIAN AMERICAN JUSTICE CENTER (May 17, 2022), <a href="https://advancingjustice-aajc.org/publication/advancing-justice-aajc-joins-letter-urging-social-media-platforms-fight-disinformation">https:// advancingjustice-aajc.org/publication/ad vancing-justice-aajc-joins-letter-urging- social-media-platforms-fight-disinforma tion</a> .....	14-15
AZ AANHPI (@aasaanhpiforequity), TIKTOK (May 27, 2023), <a href="https://tiktok.com/t/ZPRKWxgwU">https://tiktok.com/t/ZPR KWxgwU</a> .....	5
Carrie Back, <i>How Indigenous Creators Are Using TikTok to Share Their Cultures</i> , TRAVEL+LEISURE (Oct. 21, 2022), <a href="https://travelandleisure.com/culture-design/how-indigenous-creators-use-tiktok-to-share-their-cultures">https:// travelandleisure.com/culture-design/how- indigenous-creators-use-tiktok-to-share- their-cultures</a> .....	8
Denny Agassi, <i>The TikTok Ban Could Be a Huge Blow to the LGBT+ Community— Here’s Why</i> , RECKON (Mar. 15, 2024, 5:05 PM), <a href="https://reckon.news/lgbtq/2024/03/the-tiktok-ban-could-be-a-huge-blow-to-the-lgbt-community-ty-heres-why.html">https://reckon.news/lgbtq/2024/03/the- tiktok-ban -could-be-a-huge-blow-to-the- lgbt-communi ty-heres-why.html</a> .....	8

## TABLE OF AUTHORITIES—Continued

	Page(s)
President Donald J. Trump (@realdonaldtrump), TIKTOK, <a href="https://tiktok.com/@realdonaldtrump">https://tiktok.com/@realdonaldtrump</a> .....	22
Emily Schmall, <i>Women Talk Through Their Abortions on TikTok</i> , N.Y. TIMES (Apr. 18, 2024), <a href="https://nytimes.com/2024/04/17/us/politics/abortion-tiktok-videos.html">https://nytimes.com/2024/04/17/us/politics/abortion-tiktok-videos.html</a> ....	8
Executive Order No. 9066 (1942).....	20-21
H.R. Comm. on Energy & Com., PAFACA, H.R. Rep. No. 118-417 (2024).....	14
James Broughel, <i>TikTok Is a Beacon of Democracy in the Social Media Landscape</i> , FORBES (Apr. 19, 2024), <a href="https://forbes.com/sites/jamesbroughel/2024/04/19/tiktok-is-a-beacon-of-democracy-in-the-social-media-hellscape/">https://forbes.com/sites/jamesbroughel/2024/04/19/tiktok-is-a-beacon-of-democracy-in-the-social-media-hellscape/</a> .....	5
Jeffrey Gottfried, <i>Americans' Social Media Use</i> , PEW RSCH. CTR. (Jan. 31, 2024), <a href="https://pewresearch.org/internet/2024/01/31/americans-social-media-use/">https://pewresearch.org/internet/2024/01/31/americans-social-media-use/</a> .....	4-5
John Herrman, <i>TikTok Is Shaping Politics. But How?</i> , N.Y. TIMES (June 28, 2020), <a href="https://nytimes.com/2020/06/28/style/tiktok-teen-politics-gen-z.html">https://nytimes.com/2020/06/28/style/tiktok-teen-politics-gen-z.html</a> .....	5
Kamala Harris (@kamalaharris), TIKTOK, <a href="https://www.tiktok.com/@kamalaharris...">https://www.tiktok.com/@kamalaharris...</a>	22

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Legislation to Protect American Data and National Security from Foreign Adversaries: Hearing Before the H. Comm. on Energy and Commerce, 118th Cong. (2024), <a href="https://congress.gov/118/chrg/CHRG-118hhr55083/CHRG-118hhr55083.pdf">https://congress.gov/118/chrg/CHRG-118hhr55083/CHRG-118hhr55083.pdf</a>.....</i>	15, 23
Marah (@marah_snoobar), TIKTOK (Feb. 26, 2024), <a href="https://tiktok.com/@marah_snoobar/video/7339991627345481006">https://tiktok.com/@marah_snoobar/video/7339991627345481006</a> .....	7
Michael Wines, <i>Arizona Review of 2020 Vote Is Riddled with Flaws, Says Secretary of State</i> , N.Y. TIMES (Sep. 24, 2021), <a href="https://nytimes.com/2021/05/06/us/arizona-vote-count-republicans.html">https://nytimes.com/2021/05/06/us/arizona-vote-count-republicans.html</a> .....	25
Monica Anderson et al., <i>Teens, Social Media and Technology 2023</i> , PEW RSCH. CTR. (Dec. 11, 2023), <a href="https://pewresearch.org/internet/2023/12/11/teens-social-media-and-technology-2023/">https://pewresearch.org/internet/2023/12/11/teens-social-media-and-technology-2023/</a> .....	5
MPAC (@mpacntl), TIKTOK (May 22, 2024), <a href="https://tiktok.com/t/ZPRK7F9yM">https://tiktok.com/t/ZPRK7F9yM</a> .....	7
NextShark (@nextshark), TIKTOK (Feb. 1, 2024), <a href="https://tiktok.com/@nextshark/video/7330815984284093727">https://tiktok.com/@nextshark/video/7330815984284093727</a> .....	23
Nicholas Wu & Daniella Diaz, <i>House Progressives Signal Opposition to TikTok Bill</i> , POLITICO (Mar. 12, 2024), <a href="https://politico.com/live-updates/2024/03/12/congress/progressives-oppose-tiktok-bill-00146549">https://politico.com/live-updates/2024/03/12/congress/progressives-oppose-tiktok-bill-00146549</a> .....	24

## TABLE OF AUTHORITIES—Continued

	Page(s)
OK COOL, <i>How TikTok Became a Haven for the Queer and Questioning Youth of Today</i> , LINKEDIN (Oct. 30, 2022), <a href="https://www.linkedin.com/pulse/how-tiktok-became-haven-queer-questioning-youthtoday-ok-cool/">https://www.linkedin.com/pulse/how-tiktok-became-haven-queer-questioning-youthtoday-ok-cool/</a> .....	7
Olayemi, <i>TikTok Ban: Impact on Muslim Society</i> , COVERMECUTEE BLOG (Apr. 29, 2024), <a href="https://covermecutee.com/blogs/news/tiktok-ban-impact-on-muslim-society...">https://covermecutee.com/blogs/news/tiktok-ban-impact-on-muslim-society...</a>	6-7
Ryan Adamczeski & Ariel Messman-Rucker, <i>LGBTQ+ TikTokers: Banning App Will “Eliminate” Online Communities &amp; Activism (Exclusive)</i> , ADVOCATE (Mar. 15, 2024, 3:23 PM), <a href="https://www.advocate.com/exclusives/lgbtq-tiktok-ban-response..">https://www.advocate.com/exclusives/lgbtq-tiktok-ban-response..</a>	8
Sahil Kapur, Frank Thorp V. & Kate Santaliz, <i>TikTok Ban’s Fate Is Uncertain in the Senate, Where There Is Less Urgency to Act</i> , NBC NEWS (Mar. 14, 2024, 9:36 AM), <a href="https://nbcnews.com/politics/congress/tiktok-bans-fate-uncertain-senate-less-urgency-act-rcna143162.....">https://nbcnews.com/politics/congress/tiktok-bans-fate-uncertain-senate-less-urgency-act-rcna143162.....</a>	24
SikhColouring (@sikhcolouring), TIKTOK (Oct. 30, 2022), <a href="https://tiktok.com/@sikhcolouring/video/7160395432747633926.....">https://tiktok.com/@sikhcolouring/video/7160395432747633926.....</a>	7-8
Suhanee Mitragotri, <i>How TikTok Has Helped Build Community Among AA+PIs</i> , JOYSAUCE (June 3, 2024), <a href="https://joysauce.com/how-tiktok-has-helped-build-community-among-aapis.....">https://joysauce.com/how-tiktok-has-helped-build-community-among-aapis.....</a>	6

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>TikTok: Connecting and Bridging Gaps Between Religious Youth of All Faiths</i> , HARTFORD INTERNATIONAL UNIVERSITY: BLOG (May 14, 2021), <a href="https://blog.hartfordinternational.edu/2021/05/14/building-interfaith-understanding-among-religious-youth-through-tiktok/">https://blog.hartfordinternational.edu/2021/05/14/building-interfaith-understanding-among-religious-youth-through-tiktok/</a> .....	7
<i>TikTok: How Congress Can Safeguard American Data Privacy and Protect Children from Online Harms: Hearing before the H. Comm. on Energy and Commerce</i> , 118th Cong. (2023), <a href="https://www.congress.gov/118/chrg/CHRG-118hrg53839/CHRG-118hrg53839.pdf">https://www.congress.gov/118/chrg/CHRG-118hrg53839/CHRG-118hrg53839.pdf</a> .....	24
TIKTOK, ICWA Videos, <a href="https://tiktok.com/discover/icwa-videos">https://tiktok.com/discover/icwa-videos</a> .....	8
TIKTOK, Indigenous Mental Health, <a href="https://tiktok.com/discover/indigenous-mental-health">https://tiktok.com/discover/indigenous-mental-health</a> .....	8
TIKTOK, #StopAsianHate, <a href="https://tiktok.com/tag/stopasianhate">https://tiktok.com/tag/stopasianhate</a> .....	7
Wagon Burner (@oodhamboiii), TIKTOK (Feb. 23, 2023), <a href="https://tiktok.com/@oodhamboiii/video/7203470025469021482">https://tiktok.com/@oodhamboiii/video/7203470025469021482</a> .....	9

## **INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici curiae* are fifteen social and racial justice nonprofit organizations that serve communities across the United States. Many amici rely on TikTok as an important platform for educating, building awareness, and disseminating news to their communities; organizing politically to bolster democratic participation; freely practicing their faith; fostering solidarity and engagement in and among marginalized groups; dismantling biases, discrimination, and dehumanization; challenging falsehoods and disinformation; and promoting laws, policies, and practices that advance civil liberties and freedoms for all. All amici also represent communities that use TikTok for these purposes. The identities and descriptions of amici are listed in the Brief's Appendix.

Although amici represent many different groups and causes, amici universally agree that TikTok empowers diverse communities to engage in First Amendment-protected expression, and the Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, 138 Stat. 955 (Apr. 24, 2024) (“PAFACA” or the “TikTok Ban”) would suppress that expression. Amici also harbor serious misgivings that the Government's stated rationale for censoring 170 million U.S. voices on TikTok arises from, and perpetuates, our nation's history of weaponizing pretextual national security concerns to demonize immigrants

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than amici, its members, or its counsel contributed money intended to fund the preparation or submission of the brief.

and minorities. As nonprofits that care about ensuring that TikTok remains a vibrant platform for free expression for all, amici have a strong interest in this Court holding that the TikTok Ban violates the First Amendment.

## INTRODUCTION

TikTok is a modern-day digital town square that empowers diverse communities, often neglected by other media outlets, to share their voices with people throughout America and across the world. Through TikTok’s democratizing reach, amici and their communities build solidarity, reach new audiences, challenge stereotypes, and contribute to pressing conversations. The many groups that amici represent value TikTok as a one-of-a-kind platform for free expression—speech, publication, petitioning, political advocacy, news dissemination, religious observance, and more.

The TikTok Ban imposes an unprecedented prior restraint on free speech, discriminates on content and viewpoint, and is rooted in unlawful racial profiling. Despite acknowledging that the TikTok Ban would stifle the First Amendment-protected expression of 170 million U.S. users, including the communities that amici represent, the D.C. Circuit nevertheless concluded that that TikTok Ban survives strict scrutiny—the most exacting standard of review under the First Amendment. And by its own admission, the D.C. Circuit did so based on unquestioning deference to the Government’s claimed national security interest.

The D.C. Circuit’s judgment must be reversed, including because the Government’s supposedly compelling interests crumble under scrutiny. Sworn declarations by senior U.S. national security officials have conceded that, even after many years of

investigating TikTok, the Government to this day has “no information that the PRC has done [any malign activity] with respect to the platform operated by TikTok in the United States.” Public Redacted Government Appendix 4, *TikTok Inc. v. Garland*, Nos. 24-1113, 24-1130, 24-1183 (D.C. Cir. July 26, 2024) (“Gov’t App.”). Of course the U.S. and Chinese governments have divergent interests. Fatal to the Government’s position, however, is its assumption that private persons and companies with some link to Asia—namely, TikTok and its CEO—are, without evidence, proxies for the Chinese government. That supposition not only is unsubstantiated, but it reeks of racial profiling and discrimination antithetical to our Constitution.

As this Brief explains, the TikTok Ban is the latest in a long history of federal directives using national security as a pretext for violating the rights of Asian Americans, Native Hawaiians, and Pacific Islanders (“AANHPIs”) and other minority groups. Here, remarks by Members of Congress reveal that anti-AANHPI stereotypes pervaded legislative consideration of the TikTok Ban. Given these undertones, this Court should examine with skepticism any assertion that the TikTok Ban is, as strict scrutiny demands, narrowly tailored to protect national security.

In the absence of *any* evidence of a threat posed by TikTok, the Government is instead left to rely on the “potential threat” of “censorship or manipulation” on the platform that theoretically “could” manifest someday that may then pose a “risk” to national security. Gov’t App. 4. But that content- and viewpoint-based rationale makes no sense. For one, the cure to hypothetical censorship is not actual censorship by the Government. For another, attenuated speculation is far too thin a



need to overcome intermediate scrutiny, much less the rigors of strict scrutiny. Simply put, the D.C. Circuit's endorsement of the TikTok Ban has watered down the most protective standard in our Constitution.

Accordingly, this Court should reverse the D.C. Circuit and rule that the TikTok Ban violates the First Amendment.

## ARGUMENT

### **I. TikTok is a platform where 170 million U.S. users engage in a wide array of protected expression.**

In today's digital age, "vast democratic forums of the Internet' in general, and social media in particular," represent many of the "most important places . . . for the exchange of views." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (citation omitted). TikTok functions as a modern-day town square accessed by 170 million U.S. users for "a wide array of protected First Amendment activity" reaching all corners of the globe. *Id.* at 105. U.S. users rely on TikTok to "express themselves, learn, advocate for causes, share opinions, [and] create communities." Petition for Review and Complaint for Declaratory and Injunctive Relief, ¶ 1, *Firebaugh v. Garland* No. 24-1130 (D.C. Cir. May 14, 2024).

This reality rings true for amici and the communities they represent. TikTok's most avid U.S. users include young and diverse people. Pew Research surveys indicate that 63 percent of teens and 62 percent of adults under 30 use TikTok, and that people of color disproportionately use TikTok.<sup>2</sup> While often

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<sup>2</sup> Jeffrey Gottfried, *Americans' Social Media Use*, PEW RSCH. CTR. (Jan. 31, 2024), <https://pewresearch.org/internet/2024/01/>

left out of the conversation by entrenched media outlets, diverse users can engage in protected expression on TikTok on a scale never before imagined possible. *See Alario v. Knudsen*, 704 F. Supp. 3d 1061, 1077 (D. Mont. 2023) (“TikTok is not interchangeable with other social media applications.”).

TikTok also empowers diverse groups with unparalleled opportunities to develop their membership, advocate on behalf of communities, and participate in worldwide discourse—placing marginalized views squarely before new audiences to break down stereotypes that persist in America and globally.<sup>3</sup> This reach is only possible because TikTok “is particularly effective at surfacing content from a wide range of users, regardless of their follower count or prior popularity.”<sup>4</sup> With its algorithm, U.S. users’ videos are “seen by hundreds or even thousands of strangers”: “This democratization of reach is a refreshing departure from the entrenched hierarchies that can be found on other social media platforms.”<sup>5</sup> Thus, TikTok

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31/americans-social-media-use/; Monica Anderson et al., *Teens, Social Media and Technology 2023*, PEW RSCH. CTR. (Dec. 11, 2023), <https://pewresearch.org/internet/2023/12/11/teens-social-media-and-technology-2023/>; John Herrman, *TikTok Is Shaping Politics. But How?*, N.Y. TIMES (June 28, 2020), <https://nytimes.com/2020/06/28/style/tiktok-teen-politics-gen-z.html> (TikTok enables “millions of young Americans” to engage in “ideological formation” and “activism.”).

<sup>3</sup> *See, e.g.*, AZ AANHPI (@azaanhpi), TIKTOK (May 27, 2023), <https://tiktok.com/t/ZPRKWxgwU> (teaching about AANHPI history and discriminatory laws like the Chinese Exclusion Act).

<sup>4</sup> James Broughel, *TikTok Is a Beacon of Democracy in the Social Media Landscape*, FORBES (Apr. 19, 2024), <https://forbes.com/sites/jamesbroughel/2024/04/19/tiktok-is-a-beacon-of-democracy-in-the-social-media-hellscape/>.

<sup>5</sup> *Id.*

empowers users “with a voice that resonates farther than it could from any soapbox.” *Packingham*, 582 U.S. at 107 (citation omitted).

TikTok’s transformative role in education, empowerment, activism, and civic engagement cannot be overstated. One AANHPI user, known for skits on queer, intersectional identity, stressed: “TikTok has provided them with an opportunity to see [AANHPI] representation that they never saw when they were younger.”<sup>6</sup> Another added:

It wasn’t so long ago that [AANHPIs] were siloed as they grappled with these feelings [of not fitting in], particularly for individuals in small towns with few other [AANHPIs]. . . . [C]reators who post videos about trauma, celebration, or funny stories from their [AANHPI] experience have comment sections filled with “OMG YES” or “thank god I’m not the only one.” . . . [W]e haven’t had a platform on which we could share these experiences so wholly until TikTok.<sup>7</sup>

Along similar lines, TikTok represents “a melting pot of voices, showcasing the rich tapestry of Muslim experiences in America.”<sup>8</sup> Many American Muslims cherish TikTok as a means to build awareness about their culture and religion as “TikTok offers a creative outlet to defy stereotypes”—which is “empowering

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<sup>6</sup> Suhanee Mitragotri, *How TikTok Has Helped Build Community Among AA+PIs*, JOYSAUCE (June 3, 2024), <https://joysauce.com/how-tiktok-has-helped-build-community-among-aapis>.

<sup>7</sup> *Id.*

<sup>8</sup> Olayemi, *TikTok Ban: Impact on Muslim Society*, COVERMECUTEE BLOG (Apr. 29, 2024), <https://covermecutee.com/blogs/news/tiktok-ban-impact-on-muslim-society>.

considering the racial profiling and stereotypes many Muslim people face, in particular black and immigrant Muslims.”<sup>9</sup> So, for this community, “TikTok isn’t just another social media platform; it’s a vibrant digital canvas where they can express their culture, faith, and identity in creative and empowering ways.”<sup>10</sup> Through TikTok, “Muslims can reclaim their narrative and foster understanding across cultures.”<sup>11</sup> And in tandem with community-building, TikTok also enables users globally to witness and condemn racism, xenophobia, and hate crimes against their communities.<sup>12</sup>

Unsurprisingly, TikTok is also instrumental for women, LGBTQ+ folks, Native Americans, religious groups, and others as they engage in free expression, solidarity, and advocacy—especially in response to restrictive efforts targeting their communities.<sup>13</sup>

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<sup>9</sup> *TikTok: Connecting and Bridging Gaps Between Religious Youth of All Faiths*, HARTFORD INTERNATIONAL UNIVERSITY: BLOG (May 14, 2021), <https://blog.hartfordinternational.edu/2021/05/14/building-interfaith-understanding-among-religious-youth-through-tiktok/>; see Marah (@marah\_snoubar), TIKTOK (Feb. 26, 2024), [https://tiktok.com/@marah\\_snoubar/video/7339991627345481006](https://tiktok.com/@marah_snoubar/video/7339991627345481006) (video showing table setting for Ramadan).

<sup>10</sup> Olayemi, *supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., TIKTOK, <https://tiktok.com/tag/stopasianhate> (showing over 339,000 posts on #StopAsianHate); see MPAC (@mpacntl), TIKTOK (May 22, 2024), <https://tiktok.com/t/ZPRK7F9yM> (video showing amici Muslim Public Affairs Council alerting DOJ to uptick in hate crimes targeting American Muslims).

<sup>13</sup> See OK COOL, *How TikTok Became a Haven for the Queer and Questioning Youth of Today*, LINKEDIN, (Oct. 30, 2022) <https://www.linkedin.com/pulse/how-tiktok-became-haven-queer-questioning-youth-today-ok-cool/>; SikhColouring (@sikhcoloring), TIKTOK (Oct. 30, 2022), <https://tiktok.com/@sikhcolouring/vide>

Reproductive rights advocates use TikTok to fight for gender and reproductive freedom.<sup>14</sup> Many youth in non-supportive environments experience affirming LGBTQ+ role models only on TikTok.<sup>15</sup> Given the LGBTQ+ community’s diaspora-like nature, many need TikTok to advocate “against the anti-LGBTQ+ legislation sweeping the nation.”<sup>16</sup> Native tribes too use TikTok to connect, share, educate, and advocate.<sup>17</sup> As an example, one Tohono O’odham Nation member posted a video with 4 million views condemning state-

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o/7160395432747633926 (video explaining religious significance of Sikh turbans).

<sup>14</sup> Emily Schmall, *Women Talk Through Their Abortions on TikTok*, N.Y. TIMES (Apr. 18, 2024), <https://nytimes.com/2024/04/17/us/politics/abortion-tiktok-videos.html>.

<sup>15</sup> Denny Agassi, *The TikTok Ban Could Be a Huge Blow to the LGBTQ+ Community—Here’s Why*, RECKON (Mar. 15, 2024, 5:05 PM), <https://reckon.news/lgbtq/2024/03/the-tiktok-ban-could-be-a-huge-blow-to-the-lgbt-community-heres-why.html>.

<sup>16</sup> Ryan Adamczeski & Ariel Messman-Rucker, *LGBTQ+ TikTokers: Banning App Will “Eliminate” Online Communities & Activism (Exclusive)*, ADVOCATE (Mar. 15, 2024, 3:23 PM), <https://www.advocate.com/exclusives/lgbtq-tiktok-ban-response>; Agassi, *supra* note 15.

<sup>17</sup> *See, e.g.*, TIKTOK, <https://tiktok.com/discover/icwa-videos> (showing numerous posts discussing ICWA); TIKTOK, <https://tiktok.com/discover/indigenous-mental-health> (showing numerous posts discussing “Indigenous Mental Health”); Carrie Back, *How Indigenous Creators Are Using TikTok to Share Their Cultures*, TRAVEL+LEISURE (Oct. 21, 2022), <https://travelandleisure.com/culture-design/how-indigenous-creators-use-tiktok-to-share-their-cultures>.

sponsored separation of Native children before the Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069 (1978).<sup>18</sup>

These are but a few of countless examples that powerfully illustrate how diverse communities value TikTok as they proudly connect, engage, educate, and advocate through free expression well-within the heartland of the First Amendment. As these examples show, TikTok functions as a quintessential public square.

## **II. The TikTok Ban violates the First Amendment.**

The D.C. Circuit’s decision upholding the TikTok Ban allows the Government to shut down a vital forum for the protected expression of 170 million U.S. users, including amici’s communities. Although the D.C. Circuit correctly held that the TikTok Ban implicates the First Amendment and must withstand strict scrutiny, *TikTok, Inc. v. Garland*, --- F.4th ----, 2024 WL 4996719, at \*9 (D.C. Cir. Dec. 6, 2024),<sup>19</sup> it severely misapplied that standard in at least three ways.

**First**, the court gave short shrift to the fact that the TikTok Ban imposes an unprecedented prior restraint by silencing all voices across a platform synonymous with free expression. *Id.* at \*18. **Second**, the court downplayed the TikTok Ban’s content and viewpoint discrimination as only “marginal[],” *id.* at \*33 (Srinivasan, C.J., concurring in part), even when the

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<sup>18</sup> Wagon Burner (@oodhamboiii), TIKTOK (Feb. 23, 2023), <https://tiktok.com/@oodhamboiii/video/7203470025469021482>.

<sup>19</sup> *Accord Alario*, 704 F. Supp. 3d at 1074 (“Without TikTok, [U.S. users] are deprived of communicating by their preferred means of speech, and thus First Amendment scrutiny is appropriate.”).

record establishes that Congress passed the TikTok Ban to counter the hypothetical prospect that certain content and/or viewpoints on the platform could experience “censorship or manipulation” in the future. Gov’t App. 4. **Third**, the court improperly deferred to the Government’s hypothetical national security interests. *TikTok*, 2024 WL 4996719, at \*13–14. Such deference was particularly inappropriate given the Government’s sworn concession that it has “no information” to date of any nefarious conduct by the Chinese government on TikTok, Gov’t App. 4; the Government’s long history of infringing on the rights of minority communities using pretextual national security concerns; and the Government’s supposition (lacking any evidence whatsoever) that private persons and companies of Asian origin are necessarily puppets of the Chinese government. Simply put, the Government’s undeniable racial profiling raises serious questions about its claimed national security rationale.

**A. The TikTok Ban, by censoring an entire forum, constitutes a prior restraint subject to the most exacting scrutiny.**

Laws like the TikTok Ban that “deny use of a forum in advance of actual expression” constitute prior restraints on speech and publication and are categorically barred except in compelling circumstances not present here. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975); *see Alexander v. United States*, 509 U.S. 544, 550 (1993). Any prior restraint “bear[s] a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). To overcome this presumption, the Government must provide concrete evidence that the prior restraint prevents harm whose “degree of imminence [is] extremely high,” *Landmark Commc’ns, Inc. v. Virginia*,

435 U.S. 829, 845 (1978), and that it is tailored “in the narrowest of terms” to achieve the Government’s “pin-pointed objective” underpinned by “essential needs of the public order,” *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968).

Quite notably, the TikTok Ban’s outright prohibition on expression dwarfs historical analogs that the courts have correctly voided as prior restraints. *See, e.g., Bantam Books*, 372 U.S. at 70 (commission designating books as obscene, without explicitly barring distribution, was an unlawful prior restraint). Starting on January 19, 2025, PAFACA will operate as a gag order prohibiting all U.S. users, including amici and their communities, from watching, sharing, or publishing any content on TikTok at all. In purpose and effect, the TikTok Ban constitutes a total suppression of speech, news, petitioning, advocacy, religious practice, and other protected expression. As a “system of informal censorship” of all U.S. users on the presumption that continued use of the platform threatens national security, the TikTok Ban is thus an unconstitutional prior restraint. *Id.* at 71.

Here, the D.C. Circuit resisted characterizing the TikTok Ban as a prior restraint because, following mandated divestiture, any “new owners *could* circulate the same mix of content as before without running afoul of the [TikTok Ban].” *TikTok*, 2024 WL 4996719, at \*18 (emphasis added). In doing so, it failed to recognize that the TikTok Ban effectuates a censorship regime against all protected speech across the platform *unless and until* those hypothetical “new owners” purchase TikTok and, if they so desire, choose to “circulate the same mix of content as before.” *Id.*; *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.) (“The loss of First Amendment freedoms, for even



minimal periods of time, unquestionably constitutes irreparable injury.”).

“A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen.” *Packingham*, 582 U.S. at 104. Here, the D.C. Circuit’s reasoning turns the First Amendment on its head, because 170 million U.S. users including amici and their communities have ***already made*** the deliberate choice to produce and consume content curated by their chosen editor—TikTok, under its current ownership and editorial practices. *Moody v. NetChoice*, 603 U.S. 707, 738 (2024) (“[M]ajor social-media platforms are in the business, when curating their feeds, of combining ‘multifarious voices’ to create a distinctive expressive offering (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995))); *Hurley*, 515 U.S. at 570 (“[E]dited compilation[s] of speech generated by other persons . . . fall squarely within the core of First Amendment security.”).

Thus, and contrary to the D.C. Circuit’s ruling, whether the TikTok Ban is effected by shutting down the platform or mandating divestiture, the constitutional injury is the same: PAFACA imposes “a disproportionate burden upon those engaged in protected First Amendment activities” that currently flourish on TikTok each and every day. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704 (1986). And, as amici know, the harmful effects of this mass censorship will fall most acutely on underrepresented groups that have long been neglected by more established media. *See supra* Section I. It is these groups, including those represented by amici, that rely on TikTok most to build community, reach wider audiences, and engage in other protected expression.

Even were Congress’s claimed rationale more than pretext (though it is not), *see infra* Section II.C.2, generalized national security concerns cannot justify censoring **all** protected expression on a platform. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) (“The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”). That is because the Government has not offered evidence that TikTok’s operation in the United States on or after January 19, 2025, will result in “imminen[t]” harms to national security. *Landmark Commc’ns*, 435 U.S. at 845. Nor has the Government demonstrated that its overbroad ban of an entire platform for free expression is “pin-pointed” to accomplish “the essential needs of the public order.” *Carroll*, 393 U.S. at 183. Thus, as a prior restraint on speech and publication for 170 million U.S. users, the TikTok Ban tramples on core First Amendment protections.

**B. The TikTok Ban engages in content and viewpoint discrimination, requiring strict scrutiny.**

The First Amendment prohibits “restrict[ing] expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). “Content-based regulations are presumptively invalid.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Nor may the Government suppress ideas through “viewpoint discrimination,” which is a more “egregious form of content discrimination.” *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019) (citation omitted); *see Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 187 (2024) (“[V]iewpoint

discrimination is uniquely harmful to a free and democratic society.”).

“A speech-restricting statute is ‘content-based’ if it, ‘by its very terms, singles out particular content for differential treatment.’” *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020) (citation omitted). Contrary to the D.C. Circuit’s conclusion that the TikTok Ban engaged in only “marginal[]” content and viewpoint discrimination, *TikTok*, 2024 WL 4996719, at \*33 (Srinivasan, C.J., concurring in part), PAFACA’s text and legislative history confirm Congress’s intent to discriminate on content and viewpoint. For one, the TikTok Ban distinguishes on speech content by exempting any website or application “whose primary purpose is to allow users to post product reviews, business reviews, or travel information and reviews.” PAFACA, § (2)(g)(2)(B).

Even worse, the TikTok Ban “goes even beyond mere content discrimination, to actual viewpoint discrimination.” *R.A.V.*, 505 U.S. at 391. During consideration of PAFACA, a House report observed that TikTok **could** be used to “push misinformation, disinformation, and propaganda.” H.R. Comm. on Energy & Com., PAFACA, H.R. Rep. No. 118-417, at 2 (2024). But disinformation appears on every social media platform—indeed, **any** forum for expression. Moreover, the mere fact that some social media users may engage in disinformation does not justify a sweeping prohibition for the vast majority of users who use TikTok to engage in protected expression, including educating their communities and counteracting that very disinformation.<sup>20</sup> *See Meese v. Keene*, 481 U.S. 465, 481 (1987)

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<sup>20</sup> Social and racial justice groups like amici actively combat abuses across all media—including disinformation targeting marginalized communities. *See, e.g., AAJC Joins Letter Urging Social Media Platforms to Fight Disinformation in Advance of*

(“[F]air, truthful, and accurate speech” is “the best remedy for misleading or inaccurate speech.”). Congress’s belief that disfavored speech may appear or that TikTok’s content curation allegedly fails to “embrace American values . . . like freedom of speech, human rights, the rule of law, [and] a free press”<sup>21</sup> is precisely the viewpoint discrimination the First Amendment forbids. *R.A.V.*, 505 U.S. at 391; see *Iancu*, 588 U.S. at 399 (Alito, J., concurring) (“Viewpoint discrimination is poison to a free society.”).

The following hypotheticals lay bare the inescapable reality that PAFACA discriminates on the basis of content and viewpoint. First, if U.S. users of a platform identical to TikTok in every way (aside from its name) instead solely “post[ed] product reviews, business reviews, or travel information and reviews,” PAFACA, § (2)(g)(2)(B), then that hypothetical platform would be categorically exempt from PAFACA.

And second, if a foreign government were to ban a social media platform because that platform indisputably “embrace[s] American values . . . like freedom of speech, human rights, the rule of law, [and] a free press” it would be rightly criticized for viewpoint discrimination. While the laws of that foreign country

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*Upcoming Mid-Term Elections*, ADVANCING JUSTICE—ASIAN AMERICAN JUSTICE CENTER (May 17, 2022), <https://advancingjustice-aajc.org/publication/advancing-justice-aajc-joins-letter-urging-social-media-platforms-fight-disinformation>.

<sup>21</sup> *Legislation to Protect American Data and National Security from Foreign Adversaries: Hearing Before the Comm. on Energy and Com.*, 118th Cong. 3 (2024), <https://congress.gov/118/chrg/CHRG-118hhr55083/CHRG-118hhr55083.pdf> (statement of Rep. Cathy McMorris Rodgers, Chairwoman, H. Comm. on Energy & Com.) (claiming PAFACA is necessary since TikTok does not “embrace American values”).

may not prohibit its government from enacting an analog to PAFACA, our Constitution embraces a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Consequently, the TikTok Ban discriminates on content and viewpoint—selectively choosing winners and losers based on the Government’s preferred speakers and speech—in violation of the First Amendment, thereby necessitating the most exacting level of scrutiny. *R.A.V.*, 505 U.S. at 391 (“The First Amendment does not permit [the Government] to impose special prohibitions on those speakers who express views on disfavored subjects.”).

**C. The TikTok Ban fails any level of heightened scrutiny, particularly given the racial stereotypes animating the law.**

As explained in Section II.B *supra*, the TikTok Ban must undergo strict scrutiny because it constitutes a prior restraint on protected expression and discriminates based on content and viewpoint. *R.A.V.*, 505 U.S. at 395–96; *Bantam Books*, 372 U.S. at 70; *TikTok*, 2024 WL 4996719, at \*10 (finding “it clear that some level of heightened scrutiny is required” and applying strict scrutiny). Under strict scrutiny, the Government must “prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (cleaned up).

The D.C. Circuit misapplied this standard by deferring to, as opposed to independently scrutinizing,

the Government's justifications for the law. But the TikTok Ban cannot survive even *intermediate scrutiny*, and thus fails strict scrutiny: it uses national security as a pretext for racial profiling, and the Government's speculative rationale cannot support its unprecedented restraint on the rights of 170 million U.S. users.

**1. Although strict scrutiny applies, the D.C. Circuit did not apply any heightened scrutiny.**

For starters, the D.C. Circuit claimed to apply strict scrutiny, even as it repeatedly cited the “deference we owe [to the Government’s] judgment.” *TikTok*, 2024 WL 4996719, at \*13, \*15. Such deference is improper under strict scrutiny. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (“The whole point of strict scrutiny is to test the government’s assertions.”). Even when the Government gestures at national security, this Court has clarified that independent judicial review is imperative given the ever-present “danger that [the Government] will disregard constitutional rights in [its] zeal to protect the national security.” *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985).

Deference is especially inappropriate where, as here, the Government has expressly admitted that it has “no information that the PRC has done [anything] with respect to the platform operated by TikTok in the United States.” Gov’t App. 4. The Government asserts only that the Chinese government “could” someday use TikTok for nefarious purposes, Gov’t App. 26, conceding that it “lacks specific intelligence that shows the PRC has in the past or is now coercing TikTok into manipulating content in the United States.” *TikTok*, 2024 WL 4996719, at \*19. In other words, the Government has proffered no credible evidence of actual harms to

national security aside from rank speculation. *Cf. Dep't of Com. v. New York*, 588 U.S. 752, 755 (2019) (scrutinizing the Government's claimed rationale given its "significant mismatch" with the evidence).

Such "conjectural" harms cannot justify the TikTok Ban's vast restraint on protected expression by 170 million U.S. users. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality op.) (Government "must demonstrate that the recited harms are real, not merely conjectural"). By failing to scrutinize the hypothetical nature of the Government's interests, the D.C. Circuit's ruling fell far short of what intermediate, much less strict, scrutiny demands. *Id.*

In fact, the Government's speculative assertions reaffirm that the TikTok Ban fails even intermediate scrutiny and thus cannot meet strict scrutiny's exacting standard. *See Recht v. Morrissey*, 32 F.4th 398, 410 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 527 (2022) ("[A] law failing intermediate scrutiny would also fail strict scrutiny. After all, if you can't ski a blue run successfully, you obviously can't tackle a double black diamond."). Under intermediate scrutiny, the Government must, but has failed to, prove the TikTok Ban "advances important governmental interests unrelated to the suppression of free speech"; and any "incidental" burden on speech is no greater "than is necessary to further that interest." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 186, 189 (1997).

**2. The TikTok Ban’s historical context reveals that the Government’s justifications are pretext for racial discrimination, such that the law fails any heightened scrutiny.**

Under intermediate scrutiny, the Government must articulate the Government’s important interest advanced by the TikTok Ban, backed by evidence. *See NetChoice*, 603 U.S. at 740. As explained, the Government has asserted only conjectural interests insufficient to overcome the rigors of any heightened scrutiny. *See supra* Section II.C.1. Additionally, the historical context leading up to its passage suggests that racial profiling animated the TikTok Ban, which provides an independent basis to conclude the Ban fails any heightened scrutiny.

While the Government characterizes the TikTok Ban as ordinary national security legislation, key historical context provides powerful evidence that anti-AANHPI sentiment motivated its passage. As such, this Court should closely examine the Government’s asserted interests when the lack of evidence and the TikTok Ban’s gross overbreadth and underinclusiveness raise serious doubts about the candor of that rationale.

Underlying the TikTok Ban is the Government’s reflexive and discriminatory assumption that TikTok, its CEO, and its employees are proxies for the Chinese government, simply because some have a link to Asia. *Cf. Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995) (“[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race.”). But the Constitution prohibits racial profiling as a basis to suppress protected speech. *See, e.g., R.A.V.*, 505 U.S. at 391–92. The Government has **no** interest, much less an important or compelling



one, in racial profiling. *Cf. City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (Animus-based laws are unconstitutional because the Government has no valid interest in exploiting “negative attitudes, or fear” about a group.).

Amici are all too aware from painful historical experience that the Government has attempted to undermine the civil liberties of AANHPIs and other minorities based on national security justifications that courts have later found to be pretextual, discriminatory, and unlawful. Given this historical context, this Court should view the Government’s speculative national security interest here with skepticism, not deference. *Vill. Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (“When there is a proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference is no longer justified.”).

Throughout our nation’s history, the Government has repeatedly cited speculative national security concerns to justify unconstitutional restraints on civil liberties. In 1882, Congress passed the Chinese Exclusion Act grounded in the (baseless) assertion that AANHPIs “endanger[] the good order.” Pub. L. 47-126, 22 Stat. 58 (1882). The Court’s now-derided ruling in *Ping v. United States* favorably cited Congress’s conjectural claim that “the presence of foreigners of a different race in this country, who will not assimilate with us, [is] dangerous to its peace and security” to uphold the Act. 130 U.S. 581, 606 (1889). Half a century later, during World War II, President Franklin D. Roosevelt issued Executive Order (“E.O.”) No. 9066, authorizing incarceration of over 100,000 persons of Japanese heritage in concentration camps, without due process, based on the speculative claim that they

would “sabotage” our “national-defense.” E.O. No. 9066 (1942); *Korematsu v. United States*, 323 U.S. 214, 216–17 (1944), *overruled by Trump v. Hawaii*, 585 U.S. 667, 710 (2018).

But there, the Government had zero evidence that U.S. persons of Japanese ancestry posed any threat whatsoever. Instead, its national security rationale was—as Congress and this Court expressly acknowledged decades later—conjectural and ultimately pretext for racial profiling and “unlawful” discrimination “solely and explicitly on the basis of race.” *Hawaii*, 585 U.S. at 710; *see id.* (“*Korematsu* was gravely wrong the day it was decided.”); Civil Liberties Act of 1988, Pub. L. 100-383, 102 Stat. 903, 903–04 (Japanese internment was a “grave injustice . . . without adequate security reasons and without any acts of espionage or sabotage . . . motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.”). Although those cases involved equal protection challenges, the same searching scrutiny applies under the First Amendment when the Government’s rationale for the TikTok Ban turns on the pernicious stereotype that AANHPIs, by virtue of their race, ancestry, or national origin, are disloyal to the United States and beholden to a foreign government.

Sadly, the risk of unconstitutional restraints on civil liberties undergirded by “hysteria, and a failure of political leadership” has bled seamlessly into the modern era. *See id.* For example, after the horrific 9/11 terrorist attacks, the Government deployed investigatory tools to surveil innocent American Muslim, Arab, and South Asian communities under the guise of national security based on speculation, leading the Third Circuit to conclude that the American Muslim plaintiffs had adequately alleged a constitutional

violation that they were surveilled “not because of any reasonable suspicion of wrongdoing (or other neutral criterion) but solely because of their Muslim religious affiliation.” *Hassan v. City of New York*, 804 F.3d 277, 294, 297 (3d Cir. 2015).

Accordingly, our nation’s history of using so-called national security laws as pretext to infringe on the civil rights of marginalized communities counsels extreme caution and scrutiny of the Government’s claimed national security rationale for the TikTok Ban.<sup>22</sup> *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (“History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.”). By crediting the Government’s national security interest supported solely by pure conjecture, the D.C. Circuit failed to apply that the searching review of the Government’s proffered justification that heightened scrutiny demands. *See S. Bay United Pentecostal*, 141 S. Ct. at 718.

Tellingly, the D.C. Circuit quickly dismissed statements by Members of Congress that highlight the racial profiling and discriminatory intent underlying the TikTok Ban as mere “stray comments from the congressional proceedings.” *TikTok*, 2024 WL 4996719, at \*18. But recent precedent from this Court makes clear that the statements and intent of legislators rightly

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<sup>22</sup> Ironically, the presidential candidates of both major parties regularly used TikTok during the 2024 election to engage in political speech, underscoring the First Amendment implications of the TikTok Ban and casting even greater doubt on any claimed threat posed by TikTok. *See* President Donald J. Trump (@realdonaldtrump), TIKTOK, <https://tiktok.com/@realdonaldtrump>; Kamala Harris (@kamalaharris), TIKTOK, <https://www.tiktok.com/@kamalaharris>.

inform whether a law that suppresses protected expression fails First Amendment scrutiny. *NetChoice*, 603 U.S. at 740–42 (analyzing such statements); cf. *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 34 (2020) (“contemporary statements by members of the decisionmaking body” may offer evidence of “disparate impact” (citation omitted)).

Here, discriminatory animus pervaded Congress’s consideration of the TikTok Ban. Most prominently, in a now-infamous colloquy between a senator and TikTok CEO Shou Chew during a Senate hearing, that senator repeatedly presumed that Chew—a Singaporean citizen whose wife and children are U.S. citizens—was a national security threat and a puppet of the Chinese government. Chew consistently (seven times) reminded the senator that he is Singaporean with no affiliation to the Chinese government. This exchange went viral on TikTok and other media, leading to global derision of the senator’s racial profiling of Chew.<sup>23</sup>

Other Member remarks more subtly, but no less tellingly, leveraged harmful anti-AANHPI stereotypes to cast TikTok and its U.S. employees as “un-American.” As one example, a House committee chair insisted that PAFACA is necessary because TikTok “will [n]ever embrace American values . . . like freedom of speech, human rights, the rule of law, a free press, and others.”<sup>24</sup> Another Member shared his assumption, without any evidence, that “[t]here are a fair number

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<sup>23</sup> See, e.g., NextShark (@nextshark), TIKTOK (Feb. 1, 2024), <https://tiktok.com/@nextshark/video/7330815984284093727>.

<sup>24</sup> *Legislation to Protect American Data and National Security from Foreign Adversaries: Hearing Before the H. Comm. on Energy and Com.*, 118th Cong. 3 (2024), <https://congress.gov/118/chrg/CHRG-118hrg55083/CHRG-118hrg55083.pdf> (statement of Rep. Rodgers).

of [TikTok] employees who are members of the [Chinese government].”<sup>25</sup> Such ignorant remarks mischaracterizing AANHPIs as perpetual foreigners who owe their allegiance to foreign powers leave little doubt that anti-AANHPI animus, in large part, motivated the TikTok Ban. *See Regents of the Univ. of Cal.*, 591 U.S. at 34 (plurality op.) (“[A]nimus” may be established by “a plausible inference that an ‘invidious discriminatory purpose was a motivating factor’ in the relevant decision.” (quoting *Arlington Heights*, 429 U.S. at 264–65)).

Crucially, Members from across the political spectrum raised concerns that the TikTok Ban exacerbates anti-AANHPI discrimination. One Member observed that PAFACA arises out of “hysteria of banning everything China, which I think isn’t good.”<sup>26</sup> Another Member stressed: “I also have serious concerns regarding the First Amendment, but ***I also think this is simply just fomenting anti-Asian and Chinese sentiment.***”<sup>27</sup>

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<sup>25</sup> *TikTok: How Congress Can Safeguard American Data Privacy and Protect Children from Online Harms: Hearing before the H. Comm. on Energy and Com.*, 118th Cong. 115 (2023), <https://www.congress.gov/118/chrg/CHRG-118hhr53839/CHRG-118hhr53839.pdf> (statement of Rep. H. Morgan Griffith).

<sup>26</sup> Sahil Kapur, Frank Thorp V. & Kate Santaliz, *TikTok Ban’s Fate Is Uncertain in the Senate, Where There Is Less Urgency to Act*, NBC NEWS (Mar. 14, 2024, 9:36 AM), <https://nbcnews.com/politics/congress/tiktok-bans-fate-uncertain-senate-less-urgency-act-rcna143162> (quoting Sen. Rand Paul).

<sup>27</sup> Nicholas Wu & Daniella Diaz, *House Progressives Signal Opposition to TikTok Bill*, POLITICO (Mar. 12, 2024), <https://politico.com/live-updates/2024/03/12/congress/progressives-oppose-tiktok-bill-00146549> (quoting Rep. Ayanna Pressley) (emphasis added). As these Members rightly warned, states have leveraged similar stereotypes to target AANHPIs in recent years. Montana’s TikTok ban was enjoined for “the pervasive undertone of anti-Chinese sentiment.” *Alario*, 704 F. Supp. 3d at 1078. The

Collectively, evidence of racial profiling by Members who voted for the TikTok Ban and concerns about anti-AANHPI animus raised by other Members who criticized it cast significant doubt on whether the Government's claimed national security interests (given the lack of any evidentiary basis aside from conjecture) reflect anything more than pretext for racial discrimination and suppression of protected expression.

Although Congress hypothesized, and the Government now asserts, that TikTok's widespread popularity means that China could attempt to seek U.S. user data, the Government has admitted in sworn declarations that it has "no information" China ever circumvented TikTok's existing data protections for U.S. users. Gov't App. 4. Nor has the Government shown that other companies are somehow immune to similar concerns, or that any manner of less-restrictive alternatives would fail to address the Government's supposed concerns. And yet, the D.C. Circuit found that the TikTok Ban passes strict scrutiny based on the Government's repeated references to the Chinese government's generalized hostility towards the United States—wholly unmoored to TikTok, a private U.S. company.

That cannot be the law. Heightened scrutiny must bar the Government from discriminating against those

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Eleventh Circuit enjoined a Florida law limiting property ownership by persons of Chinese descent for similar reasons. *Shen v. Comm'r, Fla. Dep't of Agric.*, No. 23-12737, 2024 U.S. App. LEXIS 2346 (11th Cir. Feb. 1, 2024). And post-2020 election, Arizona ordered a conspiracy-riddled audit of the 2020 election based on the nonsensical theory that "bamboo ballots" were "flown in from Southeast Asia." Michael Wines, *Arizona Review of 2020 Vote Is Riddled with Flaws, Says Secretary of State*, N.Y. TIMES (Sept. 24, 2021), <https://nytimes.com/2021/05/06/us/arizona-vote-count-republicans.html>.

with AANHPI ancestry, or from eradicating a public forum used by 170 million U.S. users based on threadbare national security concerns for which the Government has “no information,” Gov’t App. 4, and “lacks specific intelligence.” *TikTok*, 2024 WL 4996719, at \*19; see *Turner Broad. Sys.*, 512 U.S. at 664 (plurality op.); *City of Cleburne*, 473 U.S. at 448. If not, then amici shudder at the fatal restraints on civil liberties that the Government could enact using similarly speculative and generalized concerns as pretext for discrimination. So, unlike the D.C. Circuit’s pliant approach, this Court has every reason to find that the Government’s claimed national security interests, riddled with racial profiling and speculation, fail to justify the TikTok Ban’s sweeping prohibition on speech under any heightened scrutiny.

### **3. The Government’s justifications for the TikTok Ban do not justify its burden on speech.**

As discussed above, the TikTok Ban is subject to strict scrutiny but fails any level of heightened scrutiny. Indeed, even assuming, as the D.C. Circuit concurrence contends, that intermediate scrutiny applies (it does not), the Government cannot meet its burden to prove that the TikTok Ban imposes only an “incidental” burden on protected expression no greater “than necessary to further” an important governmental interest. *Turner Broad.*, 520 U.S. at 186, 189; see *TikTok*, 2024 WL 4996719, at \*28 (Srinivasan, C.J. concurring).

Indeed, the TikTok Ban is so overbroad that it silences *all* speech and publication by 170 million U.S. users, including communities that amici represent, across “an entire medium of expression.” *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (expressing “particular concern with laws that foreclose an entire medium of

expression”). If data security, propaganda, or censorship concerns truly motivated the TikTok Ban, numerous other avenues exist to address those issues surgically, without the blunderbuss approach that eliminates a digital public square and leaves the First Amendment-protected expression of 170 million U.S. users as acceptable casualties. *See Reno v. ACLU*, 521 U.S. 844, 885 (1997) (“[F]reedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”); *N.Y. Times*, 403 U.S. at 718 (Black, J., concurring) (Courts may not disregard the “First Amendment’s emphatic command . . . in the name of ‘national security.’”). Once again, the D.C. Circuit’s opinion improperly acceded to the Government’s say-so that no other means could effectively vindicate its claimed national security interests. *TikTok*, 2024 WL 4996719, at \*13. But that is not what heightened scrutiny requires. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792–95 (1978) (rejecting a speech-restricting law driven by a supposedly “‘compelling’ interest” because the law was “underinclusive and overinclusive,” despite the government’s arguments to the contrary).

Consequently, even under intermediate scrutiny, the TikTok Ban runs fatally afoul of the First Amendment because the Government has failed to prove an important governmental interest supported by evidence beyond speculation and racial profiling, and because the means chosen by the Government to further that interest sounds the death knell for a platform on which 170 million U.S. users engage in protected expression. *Accord Alario*, 704 F. Supp. 3d at 1077 (Montana’s TikTok ban “does not pass intermediate scrutiny review.”). And since the TikTok Ban fails intermediate scrutiny, it too fails strict scrutiny. *Recht*, 32 F.4th at 410; *Yim v. City of Seattle*, 63 F.4th 783, 793 (9th Cir. 2023).



**CONCLUSION**

For the foregoing reasons, the Court should reverse the D.C. Circuit and hold that the TikTok Ban violates the First Amendment.

Respectfully submitted,

KATHLEEN R. HARTNETT  
COOLEY LLP  
3 Embarcadero Center  
20th Floor  
San Francisco, CA 94111  
(415) 693-2000

JAMIE D. ROBERTSON  
COOLEY LLP  
110 N. Wacker Drive  
Suite 4200  
Chicago, IL 60606  
(312) 881-6500

TRAVIS LEBLANC  
MATT K. NGUYEN  
*Counsel of Record*  
ROBERT H. DENNISTON  
COOLEY LLP  
1299 Pennsylvania Ave. NW  
Suite 700  
Washington, DC 20004  
(202) 842-7800  
mnguyen@cooley.com

*Counsel for Social and Racial Justice Nonprofits*

December 27, 2024

## **APPENDIX**

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**APPENDIX – LIST OF *AMICI CURIAE***

**Arizona Asian American Native Hawaiian and Pacific Islander for Equity Coalition** (“AZ AANHPI”), a nonprofit, strives for equity and justice by building community power through organizing, civic engagement, and youth empowerment. AZ AANHPI and its members use TikTok to engage with AANHPI youth and amplify AANHPI voices, values, and concerns in Arizona and across the United States.

**Asian Americans Advancing Justice Southern California** (“AJSOCAL”) is the nation’s largest legal and civil rights organization for AANHPIs. Through community outreach, advocacy, and litigation, AJSOCAL advances civil and human rights for AANHPI communities, and promotes a fair and equitable society for all. AJSOCAL has an interest in ensuring that the Government cannot use national security as pretext to trample on the rights of AANHPIs and other Americans.

The **Asian American Federation** (“AAF”) is a New York-based nonprofit dedicated to raising the influence and wellbeing of AANHPIs through research, policy advocacy, public awareness, and organizational development. Since its 1989 founding, AAF has become a beacon of leadership for over 70 member organizations and 1.5 million Asian New Yorkers. In 2020, AAF launched its Hope Against Hate campaign to combat anti-AANHPI violence. AAF has an interest in fighting policies and rhetoric that contribute to anti-AANHPI violence and discrimination.

The **Calos Coalition** (“Calos”) is a nonprofit dedicated to uplifting the trans community and denouncing genocidal rhetoric. Calos seeks to leverage initiatives and platforms like TikTok to showcase trans joy,

positivity, and excellence, knowing that trans joy can conquer hate.

**Chinese for Affirmative Action** (“CAA”) is a nonprofit founded in 1969 to protect the civil rights of Chinese Americans and to advance multiracial democracy in the United States. Today, CAA is a voice in and on behalf of the broader AANHPI communities. CAA advocates for systemic change that protects immigrant rights, promotes language diversity, and remedies racial and social injustice. CAA fights against government scapegoating of AANHPIs because racial profiling, under the guise of national security, is unjust.

**GLAAD**, a nonprofit founded in 1985, rewrites the script for LGBTQ acceptance. GLAAD tackles tough issues to shape the narrative leading to positive cultural change. GLAAD’s Social Media Safety (“SMS”) program researches, monitors, and reports on issues facing LGBTQ users—focusing on safety, privacy, and expression. The SMS program combats anti-LGBTQ hate and disinformation and has worked with platforms and companies on significant LGBTQ policy and product developments.

The **LGBT Technology Institute** (“LGBT Tech”) is a nonprofit dedicated to promoting technology adoption and advocacy within the LGBTQ+ community. LGBT Tech encourages early adoption and use of cutting-edge, new, and emerging technologies by providing information, education, and strategic outreach. LGBT Tech advocates for policies benefitting the LGBTQ+ community. To that end, LGBT Tech files in cases like this one which raise issues of concern to the LGBTQ+ community.

The **Muslim Public Affairs Council** (“MPAC”), a nonprofit, has worked since its 1988 founding to

enhance American pluralism, improve understanding of American Muslims, and speak out on policies that affect American Muslims and other marginalized groups. MPAC and its members use TikTok to elevate more nuanced portrayals of Muslims in America, collaborate with other communities to encourage civic engagement, and preserve democratic ideals enshrined in the Constitution.

The **National Hispanic Media Coalition** (“NHMC”) was founded to eliminate hate, discrimination, and racism toward Latine communities and believes in Fortifying Human Rights and Building Power for all communities. NHMC seeks to educate and increase Latine visibility from policy work in Washington, D.C., to media advocacy work in Hollywood, where NHMC collaborates, creates, and connects Latine talent with the entertainment industry. NHMC focuses on all forms of media because it is one of the most influential and powerful institutions that shapes society’s attitudes, values, and beliefs.

**OCA-Asian Pacific American Advocates of Greater Seattle**, a nonprofit founded in 1995, advances the wellbeing of AANHPIs by advocating for social justice, equal opportunity, and fair treatment; promoting civil participation, education, and leadership; advancing coalition- and community-building; and fostering cultural heritage in Seattle.

**OCA-Asian Pacific American Advocates: San Francisco**, a nonprofit founded in 1989, advances the wellbeing of AANHPIs by advocating for social justice, equal opportunity, and fair treatment; promoting civil participation, education, and leadership; advancing coalition- and community-building; and fostering cultural heritage in the San Francisco Bay Area.

**OCA-Greater Philadelphia**, a nonprofit, is dedicated to embracing the hopes and aspirations of AANHPIs and advocating on civil rights and AANHPI issues in the Southeastern Pennsylvania area. It is a chapter of the national OCA-Asian American Advocates formed in 1973.

**Sadhana: Coalition of Progressive Hindus**, a grassroots nonprofit founded in 2011, advocates for the heart of Hinduism: *ekatva* (oneness of all), *ahimsa* (peace and nonviolence), and *seva* (commitment to service and struggles for justice). Sadhana uses social media to empower Hindu Americans to speak up whenever justice is denied—with key priorities including environmental justice, racial and economic justice, gender equity, immigrant rights, and anti-casteism.

The **South Asian Legal Defense Fund** (“SA LDF”), a nonprofit, uses the power of law, narrative, and community to defend and advance the full dignity and rights of South Asian people in America.

**Stop AAPI Hate** is a national nonprofit coalition that tracks and responds to incidents of hate and harassment against AANHPIs in the United States. Since the COVID-19 pandemic began, AANHPIs across the United States have submitted more than 12,000 reports of hate incidents. Stop AAPI Hate’s work addresses the root causes of anti-AANHPI hate, such as dismantling “perpetual foreigner” stereotypes and counteracting the systemic impacts of hate, including national security scapegoating of AANHPIs. Stop AAPI Hate’s 2022 report, “The Blame Game,” spotlights how political rhetoric has been consistently employed, over decades, to hurt our communities.