

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 TIKTOK, INC., ET AL.,)
4 Petitioners,)
5 v.) No. 24-656
6 MERRICK B. GARLAND,)
7 ATTORNEY GENERAL,)
8 Respondent.)
9 - - - - -
10 BRIAN FIREBAUGH, ET AL.,)
11 Petitioners,)
12 v.) No. 24-657
13 MERRICK B. GARLAND,)
14 ATTORNEY GENERAL,)
15 Respondent.)
16 - - - - -
17 Washington, D.C.
18 Friday, January 10, 2025

19
20 The above-entitled matter came on for
21 oral argument before the Supreme Court of the
22 United States at 10:08 a.m.

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24
25

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24-656, TikTok versus Garland, and the consolidated case.

Mr. Francisco.

ORAL ARGUMENT OF NOEL J. FRANCISCO
ON BEHALF OF PETITIONERS TIKTOK, INC., ET AL.

MR. FRANCISCO: Mr. Chief Justice, and may it please the Court:

Under the Act, one of America's most popular speech platforms will shut down in nine days. That shouldn't happen for three reasons.

First, TikTok incorporated as a U.S. company speaking in the United States. The Act requires it to go dark unless ByteDance executes a qualified divestiture. Whether you call that a ban or a divestiture, one thing is clear: It's a burden on TikTok's speech, so the First Amendment applies.

Second, the Act is content-based from beginning to end. It applies only to social media platforms that have user-generated content, except for business, product, and travel reviews. Within that content-based

1 universe, it singles out a single speaker for
2 uniquely harsh treatment, and it does so because
3 the government fears that China could, in the
4 future, indirectly pressure TikTok to
5 disseminate foreign misinformation and
6 propaganda.

7 Finally, the Act can't satisfy any
8 standard of scrutiny. The government has no
9 valid interest in preventing foreign propaganda.
10 And its fall-back that it seeks merely to
11 prevent covertness makes no sense since that
12 could be addressed with a risk disclosure.

13 The government's real target, rather,
14 is the speech itself, its fear that Americans,
15 even if fully informed, could be persuaded by
16 Chinese misinformation. That, however, is a
17 decision that the First Amendment leaves to the
18 people.

19 Given that, the government's data
20 security rationale cannot independently sustain
21 the Act. It is also grossly under-inclusive and
22 ignores the most obvious less restrictive
23 alternative: simply banning TikTok,
24 Incorporated, from sharing any sensitive user
25 data with anyone.

1 In short, this Act should not stand.
2 At a minimum, you should preliminarily enjoin
3 it, which will allow you to carefully consider
4 this momentous issue and, for the reasons
5 explained by the President-Elect, potentially
6 moot the case.

7 I welcome your questions.

8 JUSTICE THOMAS: Exactly what is
9 TikTok's speech here?

10 MR. FRANCISCO: TikTok, Your Honor,
11 uses an algorithm that, in its view, reflects
12 the best mix of content. What the Act does is
13 it says TikTok cannot do that unless ByteDance
14 executes a qualified divestiture. That's a
15 direct burden on TikTok's speech, much less of a
16 burden than the one that this Court struck down
17 in the Simon & Schuster case, where all the
18 author had to do was take a certain amount of
19 proceeds and put it into an escrow account for a
20 short period of time to satisfy a civil
21 judgment.

22 JUSTICE THOMAS: So why does a
23 restriction on ByteDance, which is not a
24 citizen, is not located in the U.S., a
25 restriction on TikTok?

1 MR. FRANCISCO: Because what the law
2 says to TikTok is that, TikTok, you cannot use
3 the algorithm that you prefer to use unless
4 ByteDance executes a qualified divestiture.

5 So the law, therefore, falls directly
6 on TikTok itself. It imposes a burden on
7 TikTok's speech, again, a much less -- a much
8 more significant burden than the one that was
9 struck down in Simon & Schuster. There --

10 JUSTICE THOMAS: So you're converting
11 the restriction on ByteDance's ownership of the
12 algorithm and the company into a restriction on
13 TikTok's speech. So why can't we simply look at
14 it as a restriction on ByteDance?

15 MR. FRANCISCO: Because -- because I
16 think the burden falls directly on TikTok. And
17 I can use a hypothetical that helps illustrate
18 the point. Suppose that China used its leverage
19 over Jeff Bezos's international empire,
20 including his Chinese businesses, to force
21 Wash -- the Washington Post to write whatever
22 China wanted on the front page of the Post.

23 Surely, the government couldn't come
24 in and say, Jeff Bezos, you need to either sell
25 the Washington Post or shut it down. That

1 wouldn't just violate Mr. Bezos's First
2 Amendment rights. That would also violate the
3 Washington Post's First Amendment rights because
4 they are ultimately the one that's suffering the
5 burden under that law because they have to go
6 dark and close up their books.

7 CHIEF JUSTICE ROBERTS: Counsel, you
8 began by saying this is a U.S. company operating
9 in the United States.

10 MR. FRANCISCO: Yes, Your Honor.

11 CHIEF JUSTICE ROBERTS: But the
12 ultimate company that controls it, ByteDance,
13 was found by Congress -- and I'll quote this --
14 "to be subject to Chinese laws that require it
15 to assist or" -- "or cooperate with the Chinese
16 government's intelligence work" and to ensure
17 that the Chinese government has the power to
18 access and control private data that the company
19 holds.

20 So are we supposed to ignore the fact
21 that the ultimate parent is, in fact, subject to
22 doing intelligence work for the Chinese
23 government?

24 MR. FRANCISCO: Well, Your Honor, I
25 don't think you are supposed to ignore that at

1 all, but I also don't think that it changes the
2 analysis for a couple of reasons.

3 Look, TikTok --

4 CHIEF JUSTICE ROBERTS: Well, just --
5 hold on a second. Well, as I said, you began by
6 saying this is a U.S. company operating in the
7 United States. And it seems to me that you're
8 ignoring the major concern here of Congress,
9 which was Chinese manipulation of the content
10 and acquisition and harvesting of -- of the
11 content.

12 MR. FRANCISCO: Sure. And I'll start
13 by saying that TikTok, Incorporated, is a United
14 States subsidiary operating in the United States
15 with its own set of free speech rights. I --

16 CHIEF JUSTICE ROBERTS: Do you dispute
17 the fact that ByteDance is a -- has ultimate
18 control of TikTok in its corporate organization?

19 MR. FRANCISCO: Yes, Your Honor, I do
20 dispute that, but I also don't think that it
21 matters because, even if China could exercise
22 overwhelming power against TikTok versus
23 ByteDance, I don't think it would change the
24 analysis. And I can take that Washington Post
25 hypothetical and ratchet it up a little bit to

1 help illustrate the point.

2 Let's suppose that the Chinese
3 government had actually taken the Bezos children
4 hostage and it was using that leverage in order
5 to force Bezos and the Washington Post to
6 publish whatever they wanted on the front page
7 of the Post. So China effectively has total
8 control.

9 I still don't think that Congress
10 could come in and tell Bezos either sell the
11 Post or shut it down because that would violate
12 Bezos's rights and the Washington Post's rights.

13 Maybe what they could do is come in
14 and say you need to disclose the fact that
15 you're under this amount of coercion so that the
16 people who are looking at the paper understand
17 it and can make their own assessment.

18 But I think the First Amendment rights
19 of both Bezos and the Post would be directly
20 implicated, notwithstanding that China, in that
21 scenario, has effectively total control over
22 what -- what -- what gets printed in the
23 Washington Post.

24 JUSTICE SOTOMAYOR: Counsel, let me
25 break this down. I understand your argument

1 that there is a First Amendment right that the
2 U.S. company has. I'll go that far with you,
3 okay --

4 MR. FRANCISCO: I'll take it.

5 (Laughter.)

6 JUSTICE SOTOMAYOR: -- because we're
7 affecting their ability to talk in some -- in
8 whatever way they choose. The Washington Post
9 could choose, without any influence or threat
10 against the children of Mr. Bezos, to promote
11 Chinese policy, and our First Amendment would
12 permit them to do that if they chose it
13 independently, correct?

14 MR. FRANCISCO: Yes.

15 JUSTICE SOTOMAYOR: Now the question
16 becomes -- so it's not -- that's just a given,
17 that they have a First Amendment right. The
18 next question is, assuming they do, what's the
19 level of scrutiny --

20 MR. FRANCISCO: Mm-hmm.

21 JUSTICE SOTOMAYOR: -- we apply?
22 Isn't that what the issue here is?

23 MR. FRANCISCO: That is certainly one
24 of the issues, Your Honor.

25 JUSTICE SOTOMAYOR: All right. So, if

1 we get to that side of the issue, that TikTok
2 U.S.A. has some sort of First Amendment right,
3 taking your example, if the government said no
4 speaker is free to speak under -- under a
5 criminal compulsion by someone else, because of
6 extortion, because of kidnapping, we are doing
7 this because it is the only way to ensure the
8 safety of people, that they are not going to be
9 kidnapped or threatened, their lives threatened.

10 You don't think that the government
11 has a compelling state interest in saying, if
12 there is a threat, a -- a physical criminal
13 threat against someone to do some activity, that
14 the government couldn't say: I'm not
15 questioning whatever the content is --

16 MR. FRANCISCO: Mm-hmm.

17 JUSTICE SOTOMAYOR: -- of that
18 activity. I'm simply saying we, in our
19 governmental powers, have a right to say: You
20 can't do that. You can't speak.

21 MR. FRANCISCO: Sure, Your Honor. So,
22 to take your question in pieces, I do think that
23 they would have a compelling interest in that
24 scenario to do something. But what I don't
25 think is that they could simply target speakers

1 and speech.

2 Take, for example, generally
3 applicable laws like the Trading --

4 JUSTICE SOTOMAYOR: So you think in
5 that situation that it -- that the only thing
6 the government could do is tell the Washington
7 Post: Disclose to the public that you are
8 saying this because you are being forced to?

9 MR. FRANCISCO: So, sure --

10 JUSTICE SOTOMAYOR: That that --
11 that's the only remedy the government could
12 undertake?

13 MR. FRANCISCO: No -- no, Your Honor,
14 but I want to make sure I understand the
15 hypothetical. The compelling interest is in
16 preventing this kind of compulsion, coercion,
17 and, ultimately, harm to children.

18 And I think that the government has a
19 lot of different ways they can address that
20 through speech-neutral laws. And I was going to
21 point to things like the Trading with the Enemy
22 Act or Russia sanctions. You can broadly say
23 and attack problems --

24 JUSTICE SOTOMAYOR: They haven't been
25 very effective.

1 MR. FRANCISCO: Well, be that as it --

2 JUSTICE SOTOMAYOR: We -- we're still
3 having people kidnapped. We're still having
4 coercion.

5 MR. FRANCISCO: And be that as it may,
6 you can say to Americans: You cannot
7 collaborate with our enemies at all, and if you
8 do that, you're going to be severely punished
9 for doing that. But what I don't --

10 JUSTICE SOTOMAYOR: All right. We can
11 go on to the effectiveness of the remedy.

12 MR. FRANCISCO: Mm-hmm.

13 JUSTICE SOTOMAYOR: But the point is,
14 I believe, that even if your First Amendment
15 rights are impinged and there is some
16 protection, the question is, is what -- at what
17 level of scrutiny --

18 MR. FRANCISCO: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: -- and whether
20 that -- the action is content-neutral or not.

21 MR. FRANCISCO: I -- I -- I agree that
22 that is the way that the analysis proceeds.
23 Here, we believe that the level of scrutiny
24 should be strict scrutiny, but --

25 JUSTICE KAVANAUGH: What -- what is

1 the relevance of the history? Chief Judge
2 Srinivasan, in his opinion in the D.C. Circuit,
3 emphasized that there is a long tradition of
4 preventing foreign ownership or control of media
5 in the United States --

6 MR. FRANCISCO: Sure.

7 JUSTICE KAVANAUGH: -- going back:
8 radio, television --

9 MR. FRANCISCO: Right.

10 JUSTICE KAVANAUGH: -- and what have
11 you. I would think, no matter the level of
12 scrutiny, that history has to be important, and
13 I want to get your response to it.

14 MR. FRANCISCO: Mm-hmm. I don't
15 actually think it's important in this context
16 because that history all arises in the context
17 of bandwidth scarcity. And, in that context,
18 you have the government that's in -- in the
19 position of doling out a limited number of
20 licenses.

21 And when you have to dole out a
22 limited number of licenses, you, by definition,
23 have to pick winners and losers, and when you
24 have to do that, you get a certain amount of
25 discretion. I think that's the whole basis of

1 those cases.

2 You can't really take those cases
3 and --

4 JUSTICE KAVANAUGH: Well -- keep
5 going.

6 MR. FRANCISCO: You can't really take
7 those cases and extend them to an area where
8 there is no scarcity, like the World Wide Web,
9 because, once you do that, there's really no
10 limiting principle. There's no reason why it
11 wouldn't also apply to really popular books or
12 magazines or newspapers or chains of newspapers.

13 The bandwidth scarcity, I think, is
14 really what justifies the greater discretion
15 that the government gets in that area.

16 JUSTICE ALITO: Mr. Francisco, let me
17 see if I can break this down.

18 Suppose that TikTok were outright
19 owned by the People's Republic of China. Would
20 you make the same argument?

21 MR. FRANCISCO: I wouldn't be making
22 the same argument, Your Honor. There, you
23 would --

24 JUSTICE ALITO: Why -- why not?

25 MR. FRANCISCO: Because, there, you

1 would have to confront a very different
2 question, whether a foreign government that was
3 speaking in the United States has First
4 Amendment rights. And I don't know that the
5 Court has ever addressed that.

6 But, here, we've got a U.S. company --
7 JUSTICE ALITO: No, I understand that.
8 I just want to see where you draw the line.

9 So it's true, the Court has never held
10 that a foreign government has free speech
11 rights. And if we were to hold that, I would
12 think it's because -- it would be because speech
13 by a foreign government, particularly one with
14 enormous resources, is not protected -- allowing
15 that is -- does not serve the underlying
16 interests of the First Amendment, which are,
17 among other things, fostering democratic
18 self-government and furthering the -- the
19 truth -- the search for truth.

20 So let's assume that that's -- we
21 start with that, all right? What if TikTok were
22 then not owned by the foreign government, but it
23 was undisputed that TikTok was totally
24 controlled by the foreign government, could not
25 do one thing without the approval of the foreign

1 government? That's different?

2 MR. FRANCISCO: I do think that it is
3 different, Your Honor. For example, you know,
4 I -- I've given the hypothetical that I've
5 given, but there are a lot of companies in this
6 country that have foreign owners, not just
7 companies like Politico, with -- which is German
8 owned, or Al Jazeera, which is partly owned by
9 the government of Qatar.

10 JUSTICE ALITO: Well, I -- I
11 understand that, but what would be the reason
12 for drawing that line?

13 MR. FRANCISCO: Sure. Because --

14 JUSTICE ALITO: If -- if there's a
15 good reason for saying that a foreign
16 government, particularly an adversary, does not
17 have free speech rights in the United States,
18 why would it all change if it was simply hidden
19 under some kind of contrived core -- corporate
20 structure?

21 MR. FRANCISCO: Because it is a U.S.
22 speaker.

23 I'll give you another example. AMC
24 movie theaters used to be owned by a Chinese
25 company. Under this theory, Congress could

1 order AMC movie theaters to censor any movies
2 that Congress doesn't like or promote any movies
3 that Congress wanted.

4 And I think the reason is that, here,
5 where it's conceded you actually have a bona
6 fide U.S. company, it is not simply a Chinese
7 cutout that is the Chinese government speaking
8 itself --

9 JUSTICE ALITO: All right. Let's say
10 that's not a complete --

11 MR. FRANCISCO: -- but an independent
12 United States company.

13 JUSTICE ALITO: Let's say this is not
14 a complete answer to -- to your First Amendment
15 argument, but would you be willing to concede
16 that this is a very important factor that should
17 be taken into account in deciding whether
18 there's a First Amendment violation?

19 MR. FRANCISCO: Well, Your Honor, I
20 think that it does help supply a compelling
21 governmental interest, but I still think you
22 have to march through the strict scrutiny
23 analysis and analyze their interests. I do not
24 think that they have a compelling governmental
25 interest in -- in -- in the manipulation of

1 content.

2 I think that is in the teeth of the
3 First Amendment. And if you look at the
4 government's brief and the rest of the record in
5 this case, that's really what it's focused on.
6 Their complaint is the fear that the content
7 could be critical of the United States
8 Government or -- or could undermine our
9 democracy.

10 Yes, Your Honor.

11 JUSTICE GORSUCH: Mr. Francisco, I
12 just wanted to follow up on -- on that line of
13 questioning with just some fact questions --

14 MR. FRANCISCO: Mm-hmm.

15 JUSTICE GORSUCH: -- because it seems
16 to me there are a couple of things that the
17 parties still dispute about facts in this Court,
18 which is a little unusual.

19 The government says that TikTok U.S.
20 has no authority or ability to alter the
21 algorithm or recommendation engine but must
22 simply follow ByteDance's directives. You
23 disagree with that in your reply brief.

24 MR. FRANCISCO: Yes, we do.

25 JUSTICE GORSUCH: Somebody has to be

1 right and somebody has to be wrong about that.
2 What's -- what's the fact -- what does the
3 record show on that?

4 MR. FRANCISCO: Well, Your Honor, we
5 are here on a record, and there is nothing in
6 the record that says that TikTok, like any other
7 subsidiary, doesn't have its own
8 independent-making authority. If you look at
9 their record cites, what they point to is the
10 ordinary types of control that a parent company
11 has over a subsidiary company. But it doesn't
12 change the fact that --

13 JUSTICE GORSUCH: All right. What is
14 the fact? Are you prepared to make a -- a
15 representation of the fact here?

16 MR. FRANCISCO: Yes, Your Honor. The
17 fact is that TikTok, Incorporated, as a U.S.
18 company, does have a choice over the algorithm.
19 Now it would be a incredibly bad business
20 decision for them to abandon this algorithm, and
21 they very doubtful would ever do it, but they
22 have that authority.

23 What they clearly have the authority
24 to do is shut down the platform in the face of
25 Chinese pressure. That's actually what they

1 agreed to do in the national security agreement.
2 I think that underscores why TikTok,
3 Incorporated, as a U.S. company, does have its
4 own set of First Amendment rights.

5 JUSTICE GORSUCH: Okay. And then
6 another fact question.

7 Before the D.C. Circuit, you -- you
8 argued that the Chinese government has made
9 clear in public statements that it would not
10 permit a forced divest -- divestment of the
11 recommendation engine. Does that mean that some
12 key component of the recommendation engine is
13 under Chinese control?

14 MR. FRANCISCO: No, Your Honor. What
15 it means -- and this might warrant a little more
16 explanation. What it means is that there are
17 lots of parts of the source code that are
18 embodied in intellectual property that are owned
19 by the Chinese government, and they would
20 restrict, like the United States restricts, the
21 sale of those types of things to foreign
22 governments.

23 It doesn't alter the fact that this is
24 being operated in the United States by TikTok,
25 Incorporated. So --

1 JUSTICE GORSUCH: Okay. I -- I got
2 it.

3 MR. FRANCISCO: Okay.

4 JUSTICE GORSUCH: I got it. And then
5 you represent that the divestiture is not
6 feasible within the Act's timeframe. I'm sorry
7 for these fact questions --

8 MR. FRANCISCO: Sure.

9 JUSTICE GORSUCH: -- but I just want
10 to understand what's before us.

11 MR. FRANCISCO: Yeah.

12 JUSTICE GORSUCH: Would it be feasible
13 in any timeframe? I -- I take the government
14 doesn't dispute that it's infeasible in the 270
15 days provided by law. But would it be feasible
16 at all?

17 MR. FRANCISCO: Your -- Your Honor, I
18 think, at least as we understand how they've
19 interpreted the qualified divestiture provision,
20 it would be exceedingly difficult under any
21 timeframe for two principal reasons.

22 The first is that there's a global
23 team of engineers that are some in China, some
24 in Europe, some in the United States, that
25 maintain and update the original source code.

1 And, as we understand their interpretation, a
2 qualified divestiture would prohibit any kind of
3 coordination with that global team of engineers.

4 The other reason is because, as we
5 understand how they're interpreting it, a
6 qualified divestiture would divorce the U.S.
7 platform from the global content. So, for
8 example, there are videos created in the United
9 States. There are videos created in Ireland.
10 In order to get global content, we need access
11 to the Irish videos. They need access to the
12 U.S. videos.

13 JUSTICE GORSUCH: I got that.

14 MR. FRANCISCO: We understand that
15 couldn't happen.

16 JUSTICE GORSUCH: Okay. So you think
17 it's probably not feasible in any timeline?

18 MR. FRANCISCO: Well, Your Honor, I
19 think it would be extraordinarily difficult.

20 JUSTICE GORSUCH: Okay. Last -- last
21 fact question. Then I'll yield the floor here.

22 The government admits that it has no
23 evidence that TikTok has engaged in covert
24 content manipulation in this country but says
25 that ByteDance has responded to PRC demands to

1 censor content outside of China in other
2 countries. Again, you deny that in your reply
3 brief. Somebody has to be right about that.

4 MR. FRANCISCO: Well -- well, Your
5 Honor, the problem there is everything that
6 follows what you just read is redacted, and so I
7 don't know what it says.

8 What the record shows is two things.
9 The record shows first what you just said: They
10 haven't done anything here in the United States
11 with respect to TikTok, Incorporated. And,
12 second, the record also shows through our
13 transparency reports that we haven't removed or
14 restricted content on the TikTok platform in
15 other parts of the world. And TikTok doesn't
16 operate in China. It operates in other parts of
17 the world. We haven't removed or restricted
18 content at the request of China. That's what we
19 put out in our regular transparency reports.

20 JUSTICE GORSUCH: Removed or
21 restricted, though, doesn't necessarily cover
22 covert content manipulation, though, right?

23 MR. FRANCISCO: Well, Your Honor, I'm
24 limiting my response to what's in the record.

25 JUSTICE GORSUCH: To what's in the

1 record? Okay.

2 MR. FRANCISCO: It's very difficult
3 for me to respond to things that I -- where I
4 don't know what the accusation is.

5 JUSTICE GORSUCH: I have other
6 questions about the secret evidence in this
7 case, but we'll get to that later.

8 MR. FRANCISCO: Yes, Your Honor.

9 JUSTICE GORSUCH: Thank you.

10 JUSTICE BARRETT: Mr. Francisco, can I
11 ask you a question about the relevant speech
12 here? So it strikes me that this is a little
13 different than your Bezos example because,
14 there, it's clearly content discrimination
15 because we're talking about the ability to post
16 particular articles versus other articles. Am I
17 right that the algorithm is the speech here?

18 MR. FRANCISCO: Yes, Your Honor.
19 The -- well, I would say it's -- you know, the
20 algorithm is a lot of things. The algorithm has
21 built within it -- it's -- it's basically how we
22 predict what our customers want to see.

23 JUSTICE BARRETT: The editorial
24 discretion?

25 MR. FRANCISCO: Yeah --

1 JUSTICE BARRETT: Yeah.

2 MR. FRANCISCO: -- the editorial
3 discretion. It also has built within it the
4 moderation elements. All of this kind of comes
5 together when the source code is translated into
6 executable code in the United States. In the
7 United States, that executable code is then
8 subject to vetting, review, moderation through
9 content moderation algorithms. And that -- so
10 it ultimately lands on the TikTok platform.

11 JUSTICE BARRETT: Got it. But what
12 we're -- what we're talking about as -- as in
13 NetChoice is the editorial discretion that
14 underlies the algorithm. And -- and I just want
15 to be clear. A lot of your examples talk about,
16 including the Bezos one --

17 MR. FRANCISCO: Mm-hmm.

18 JUSTICE BARRETT: -- the right of an
19 American citizen to repeat what a foreign entity
20 says or say, you know, I'm hitching my wagon to
21 China; I want to say everything China does.

22 Here, the concern is about the covert
23 content manipulation piece of the algorithm.

24 MR. FRANCISCO: Mm-hmm.

25 JUSTICE BARRETT: That is something

1 that ByteDance wants to speak, right?

2 MR. FRANCISCO: Well, Your Honor, I
3 think that ultimately it's TikTok's choice
4 whether to put it on the platform. And --

5 JUSTICE BARRETT: And you don't want
6 that? Are you -- is your client disclaiming
7 any --

8 MR. FRANCISCO: We -- we -- we
9 absolutely resist any kind of content
10 manipulation by China at all, but what I do want
11 to focus in on is what -- their asserted
12 interests here. They do talk about covertness.
13 But it can't possibly be that all they're
14 concerned about is mere covertness.

15 If all you were concerned about was
16 the covertness untethered from the underlying
17 content, that's something that could be easily
18 addressed through a risk disclosure.

19 JUSTICE BARRETT: But that goes to
20 scrutiny, the level of --

21 MR. FRANCISCO: Yes, Your Honor.

22 JUSTICE BARRETT: -- the application.
23 I'm trying to -- I mean, let's say that I agree
24 with you the First Amendment is implicated, and
25 I'm trying to figure out what level of scrutiny

1 applies.

2 MR. FRANCISCO: Sure.

3 JUSTICE BARRETT: And I'm trying to
4 figure out what content, if any, discrimination
5 is going on here. You know, there's a
6 disproportionate burden. I --

7 MR. FRANCISCO: Right.

8 JUSTICE BARRETT: Let's say that I
9 agree with you about that.

10 No one is preventing you -- I mean,
11 you're seeking access to a particular source
12 code engineering the recommendation feature.
13 It's -- it's the technology that you want.
14 You're not trying to repeat, as in the Bezos
15 example -- if we take the speech that the
16 government's concerned about to be the covert --
17 the covert content manipulation rationale,
18 you're not seeking to utter that speech.

19 MR. FRANCISCO: Well, what we're --
20 that's correct, Your Honor. What we are seeking
21 to do is use an algorithm that displays the
22 combination of content that we prefer our users
23 to see on the platform.

24 JUSTICE KAGAN: But is that --

25 JUSTICE BARRETT: And the government

1 doesn't care about that. I mean, the
2 government -- the government is fine with you
3 doing that. You can invent it yourself. It
4 doesn't even care what content that displays,
5 cat videos or whatever.

6 MR. FRANCISCO: Yeah, but -- but I
7 think that the way that the analysis has to
8 unfold is first you ask, is this law burdening
9 our speech? I think we agree --

10 JUSTICE BARRETT: Yeah.

11 MR. FRANCISCO: -- that the law is
12 burdening our speech. Then you have to look at
13 whether the law itself is somehow content-based,
14 not just what their motivations are but whether
15 the law is content-based. And, here, the
16 trigger for this law, the one thing that gets it
17 going, is if you operate a social media platform
18 that has user-generated content, unless that
19 content takes the form of a product, travel, or
20 business review.

21 Then, within that universe of content,
22 it says there's one speaker we're particularly
23 concerned about, and we're going to hammer home
24 on that one speaker. And then, just to make the
25 rubble bounce, they come in and tell us that one

1 of the reasons they're targeting that speaker is
2 because they're worried about the future content
3 on that platform, that it could in the future
4 somehow be critical of the United States or
5 undermine democracy, to pull examples from the
6 government's brief.

7 So I think there's no way to get
8 around the fact that this is a content-based
9 speech restriction and you do have to go
10 directly to what their interests are.

11 Now their principal interest is --
12 JUSTICE KAGAN: Could -- could I --
13 because I think I'm a little bit surprised by
14 one of the answers that you gave to Justice
15 Barrett. I had understood that TikTok's
16 essential complaint here is that they wouldn't
17 be able to use the algorithm that ByteDance has
18 invented and that they want to use the algorithm
19 that ByteDance has invented.

20 MR. FRANCISCO: One hundred percent.
21 And if I -- if I was unclear on that, Your
22 Honor, I apologize.

23 JUSTICE KAGAN: Okay. Because I
24 think --

25 MR. FRANCISCO: That is absolutely the

1 core of the claim.

2 JUSTICE KAGAN: -- what Justice
3 Barrett was saying to you is, like, what's the
4 problem here because ByteDance is a foreign
5 company. Or maybe this isn't what Justice
6 Barrett says; it's just what I say.

7 (Laughter.)

8 JUSTICE KAGAN: ByteDance is a foreign
9 company. And you started off with Justice Alito
10 saying, you know, well, we would be making a
11 different argument. And, of course, that's
12 true. I mean, I would think that Alliance for
13 Open Society makes it pretty clear that you have
14 to be making a different argument with respect
15 to a foreign state or a foreign company.

16 So let's -- let's say that they don't
17 have First Amendment rights. The only First
18 Amendment rights lie in TikTok, which does have
19 First Amendment rights. And I -- I guess my
20 question is, how are those First Amendment
21 rights really being implicated here?

22 This -- this statute says the foreign
23 company has to divest. Whether or not that's
24 feasible, however long it takes, TikTok still
25 has the ability to use whatever algorithm it

1 wants, doesn't it?

2 MR. FRANCISCO: No, Your Honor. And
3 their rights are implicated at a most basic
4 level. In 10 days, TikTok wants to speak. In
5 10 days, because this law was passed, TikTok
6 cannot speak unless ByteDance executes a
7 qualified divestiture.

8 That's not just ByteDance's choice.
9 That is a -- that is a condition --

10 JUSTICE KAGAN: Well, I realize --

11 MR. FRANCISCO: -- that's imposed by
12 law.

13 JUSTICE KAGAN: -- that it has -- it
14 definitely has effects on TikTok if ByteDance
15 acts in the way that you're assuming it will
16 act. So -- so this is not to say that the First
17 Amendment isn't involved because TikTok is going
18 to suffer some pretty severe incidental effects,
19 but they are incidental, aren't they?

20 Because the statute only says to this
21 foreign company divest or else and -- and leaves
22 TikTok with the ability --

23 MR. FRANCISCO: Right.

24 JUSTICE KAGAN: -- to do what every
25 other actor in the United States can do, which

1 is go find the best available algorithm.

2 MR. FRANCISCO: Yeah. I very much
3 disagree that the effects are incidental because
4 the way that this law works is it is only
5 triggered if somebody is engaging in speech
6 based on their content, user-generated content,
7 except for business, product, and travel
8 reviews. It then singles out a single speaker.
9 And you have the concession for the government
10 that one of the reasons they've singled out that
11 speaker --

12 JUSTICE KAGAN: That puts a lot of
13 emphasis on the idea of just like -- you know, I
14 think what you're basically saying is that all
15 speaker-based restrictions generate strict
16 scrutiny. I'm not sure that we've ever said
17 anything like that.

18 You know, let's put aside the
19 facial -- your argument that this is facially
20 content-based. It seems to me that your
21 stronger argument or at least the one that most
22 interested me was this argument of, look, if the
23 government is doing something specifically for
24 the purpose of changing the content that people
25 see, that has to be subject to strict scrutiny.

1 But I don't see that as -- as
2 affecting TikTok as opposed to as affecting
3 ByteDance, that --

4 MR. FRANCISCO: Well, no, no, I -- I
5 very much do see it as affecting TikTok because
6 they choose this algorithm because it reflects
7 the mix of content. The government's fear is
8 that China could come in and pressure TikTok,
9 TikTok, through ByteDance, to TikTok, to alter
10 that mix of content to make it too pro-Chinese
11 or too anti-American. That is very much
12 directly a content-based charge straight at
13 TikTok.

14 The other point I would like to --

15 JUSTICE KAGAN: I -- I hear you that
16 it might very well have that effect. I guess
17 what I'm suggesting is that the law is only
18 targeted at this foreign corporation, which
19 doesn't have First Amendment rights.

20 Whatever effect it has, it has. You
21 know, maybe ByteDance will figure out a way to,
22 like, put this on open source, and then TikTok
23 will be able to use the algorithm.

24 MR. FRANCISCO: So, Your Honor, if I
25 could take that on directly, because, to the --

1 I think TikTok has First Amendment rights. To
2 the extent ByteDance is speaking in the United
3 States, it, I believe, has First Amendment
4 rights.

5 If you conclude that neither has First
6 Amendment rights, then, surely, the creators
7 have First Amendment rights. But, if you take a
8 step back, what their position is is that none
9 of these entities -- this is the universe of
10 entities affected by this law -- none of these
11 entities have the authority to assert First
12 Amendment rights, which means that the
13 government really could come in and say: I'm
14 going to shut down TikTok because it's too
15 pro-Republican or too pro-Democrat or won't
16 disseminate the speech I want, and that would
17 get no First Amendment scrutiny by anybody.
18 That cannot possibly be the case, yet that is
19 the effect of their position.

20 The last point I'd like to emphasize,
21 though, is this law, like the Playboy case, like
22 the Hobby Lobby case, has built within it a less
23 restrictive alternative, which is the general
24 provision by definition designed to protect
25 against the very harm the government is

1 identifying.

2 Suppose New York State passes an
3 asbestos abatement law. They say: These types
4 of buildings have to abet -- abate asbestos. In
5 addition, New York Times, you have to abate
6 asbestos in your building. And they say: There
7 are two reasons for this. One, we want to abate
8 asbestos. Two, we hate the New York Times
9 editorial page.

10 Surely, at the very least, what you're
11 going to say is: You can't target The New York
12 Times directly. What you can do is throw them
13 into the general process.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 MR. FRANCISCO: We think that's the
17 minimum that should be done here.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. We -- we've been talking about
20 connection between the regulation of -- of
21 TikTok and the burden on expressive conduct.
22 And your basic position is that interfering with
23 the ownership of TikTok constitutes a direct
24 regulation of the expressive conduct of other --
25 other people.

1 What -- what is your best example in
2 our precedent of a situation where we've -- a
3 regulation of corporate structure or something
4 else has been treated as a direct regulation of
5 expressive conduct?

6 MR. FRANCISCO: The regulation of a
7 corporate structure as a --

8 CHIEF JUSTICE ROBERTS: Yeah.

9 MR. FRANCISCO: Your Honor, I -- I --
10 I don't have a case in my fingertips. I can
11 consider it when we come back on --

12 CHIEF JUSTICE ROBERTS: Well, I don't
13 have one at my fingertips or any other part of
14 my body.

15 MR. FRANCISCO: -- rebuttal. But I --
16 but I think it's quite clear, though, that if
17 you're saying to a company: You have to stop
18 talking unless somebody else does something, and
19 that's imposed by the force of law, it directly
20 affects that company's speech. That's --

21 CHIEF JUSTICE ROBERTS: Well, it's --
22 it's -- it's -- again, I don't -- I don't know
23 if it's directly affecting the company's speech
24 or the speech of third parties. And I'm not
25 sure what -- you know, where your -- your

1 emphasis is.

2 But, again, I'm not sure there's
3 another case where we've said that regulating a
4 company has -- should be -- others' expression
5 should be treated as direct imposition on their
6 speech in terms of a standard of review, for
7 example, when it's based on derivative
8 regulation of corporate structure of somebody
9 else.

10 MR. FRANCISCO: Well, Your Honor, I
11 think that it's -- I -- I would concede that
12 this is a pretty unprecedented case. I'm not
13 aware of any time in American history where the
14 Congress has tried to shut down a major speech
15 platform.

16 But I -- I think that if a law imposes
17 a -- a direct regulation on a third party that,
18 in turn, results in shutting down somebody
19 else's speech, and they do it for content-based,
20 viewpoint-based reasons, and, in particular, on
21 this record, because the speaker that is
22 ultimately being shut down, they don't like the
23 speech of that particular platform, that's a
24 real problem. So --

25 CHIEF JUSTICE ROBERTS: Well, it may

1 be a real problem or it may not. But I just am
2 wondering if there's any precedent where we have
3 that same connection and that it affects the
4 standard of review. For example, you would
5 treat it as a direct restriction on expression.
6 Even the only thing the law does is say, in this
7 case, somebody other than the Chinese government
8 has to own TikTok.

9 MR. FRANCISCO: So -- so -- so we
10 don't have any direct precedent along the lines
11 that you're citing, but we do have precedents.
12 We have cases like Arcara, and what Arcara says
13 is, if the law is totally speech-neutral, then
14 that's one thing. We have cases like O'Brien,
15 which say, if the law doesn't care about speech
16 but happens to draw in speech, that's another
17 thing.

18 Both of those cases make clear,
19 however, is that when the law is concerned with
20 the content of the speech, when the
21 justification is based on the content of the
22 speech -- that's cases like Reed too -- then you
23 do trigger strict scrutiny --

24 CHIEF JUSTICE ROBERTS: So then I
25 think your argument comes down to: Is this

1 direct concern with speech, or is it concern
2 with the potential for Chinese interference with
3 the level of interference in -- indirectly?

4 In other words, they're not coming
5 back -- the Chinese government -- TikTok doesn't
6 care what the people are saying on TikTok.
7 That's not the -- the concern. The concern is
8 that they are regulating a particular channel of
9 communication. And I just wonder if there's any
10 precedent for that type of thing.

11 They're not saying: We're going to
12 restrict this content and that content but not
13 this. They're just saying: We're going to be
14 in a position where we can control what happens,
15 whether it's based on expression, whether it's
16 based on anything else.

17 MR. FRANCISCO: So, Your Honor, I
18 disagree. And I think, if you take a step back
19 and look at this record, I think it is quite
20 clear that it is focused on both current and
21 potential future content on TikTok, TikTok,
22 Incorporated.

23 Here, you don't have just an act that
24 is based on speakers and speech. It's triggered
25 by speech. It's focused on a single speech or

1 TikTok -- speaker, TikTok, Incorporated.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas, anything further?

4 Justice Alito?

5 JUSTICE ALITO: What if Congress -- if
6 there were nothing in this Act about content
7 moderation or covert manipulation? What if it
8 was just about preventing what Congress viewed
9 as an enormously powerful, popular application
10 from gathering an arsenal of information about
11 American citizens, and they said: This is the
12 worst offender and we're going to require
13 divestiture by this offender?

14 Would there be a First Amendment
15 problem there? And if you think there would be,
16 what would the level of scrutiny be?

17 MR. FRANCISCO: Yes, there would be a
18 First Amendment problem if you had a law like
19 this that was only focused on speakers, those
20 who use user-generated content, other than
21 product, travel, or business reviews, and --

22 JUSTICE ALITO: Well, Congress --
23 Congress concludes that this particular entity
24 is the worst, this is the worst offender, and it
25 happens to be an entity that is involved with

1 speech.

2 MR. FRANCISCO: If all you had -- so I
3 want to make sure I understand the hypothetical.
4 The only provision you have is one that says:
5 This company has to shut down --

6 JUSTICE ALITO: Right.

7 MR. FRANCISCO: -- because of data
8 security.

9 JUSTICE ALITO: Right.

10 MR. FRANCISCO: I would have a
11 different set of arguments.

12 I think it would still implicate the
13 First Amendment, particularly where you have
14 strong evidence that they were being targeted in
15 part at least because of their speakers and
16 speech. Suppose Congress passed the law that
17 you posited --

18 JUSTICE ALITO: Well, all right, but
19 you're changing the -- you're changing the
20 hypothetical by -- by injecting congressional
21 concern about the content of the speech.

22 MR. FRANCISCO: Okay. Well, I'll put
23 that to the side.

24 JUSTICE ALITO: So what would your
25 argument be? It would be an equal protection

1 argument --

2 MR. FRANCISCO: No. No. I'd still be
3 saying --

4 JUSTICE ALITO: -- based on rational
5 basis? What --

6 MR. FRANCISCO: -- I'd still be saying
7 that Arcara itself makes clear that where a law
8 disproportionately burdens just a speaker, we
9 have to subject that to scrutiny to suss it out,
10 to suss out whether the asserted interest is the
11 actual interest.

12 There, the asserted interest is in
13 data security. I think I would have a couple of
14 arguments under whatever form of scrutiny you
15 wanted to apply, whether it is strict scrutiny
16 or intermediate scrutiny, in that context.

17 I would say first that that law is
18 dramatically under-inclusive because it
19 categorically exempts e-commerce apps that this
20 record shows have comparable ties to China --

21 JUSTICE ALITO: All right. You say --
22 you say -- I don't want to prolong this too
23 much. You -- you say this is not like Arcara, I
24 think primarily because you say that divestiture
25 requires the new company to cease using the

1 algorithm, right?

2 MR. FRANCISCO: No. I think it's not
3 like Arcara for a much more fundamental sense.

4 Arcara involved a totally
5 speech-neutral law. It didn't go after speakers
6 at all. If you had a law in Arcara that said
7 we're going to prohibit prostitution in
8 bookstores only, then I think that Arcara would
9 have come out differently. There would have at
10 least been, you know, some kind of intermediate
11 scrutiny, potentially strict scrutiny.

12 JUSTICE ALITO: All right. Well,
13 you're -- you're continuing --

14 MR. FRANCISCO: That's the law that I
15 think is your hypothetical.

16 JUSTICE ALITO: -- you're continuing
17 to walk away from the hypothetical that --

18 MR. FRANCISCO: I don't think so, Your
19 Honor.

20 JUSTICE ALITO: -- I proposed for the
21 purpose of narrowing in on what your -- on what
22 your argument is.

23 My -- I understood you to say that
24 it -- this -- that would not be a -- a solution
25 to the problem because one of Congress's

1 motivations was -- was the content -- was based
2 on the content of TikTok.

3 Am I wrong in that? Did I read your
4 argument incorrectly?

5 MR. FRANCISCO: Well, I think the -- I
6 want to make sure I understand what you're
7 saying. I certainly think that because one of
8 the motivations was content, that is an
9 enormously important fact.

10 I was trying to answer your
11 hypothetical where we were trying to take that
12 out of the mix.

13 And the reason why Arcara is different
14 is because Arcara didn't just simply say no
15 prostitution in bookstores. That's what your
16 hypothetical effectively says. It says no data
17 security problems in speakers or in this
18 particular speaker. And I think that that would
19 trigger at the very least intermediate scrutiny.

20 JUSTICE ALITO: All right.

21 MR. FRANCISCO: And then --

22 JUSTICE ALITO: Thank you. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: That gets to my

1 question, which is Justice -- the Chief Justice
2 asked you whether or not we've ever had a case
3 where pure ownership was at issue and not
4 speech. And I don't think we've had one like
5 that, you're right, but I don't think that your
6 question -- that the question gets to the
7 essence of your argument, is it? The essence of
8 your argument is you're being asked to divest
9 because of speech, correct?

10 MR. FRANCISCO: Correct.

11 JUSTICE SOTOMAYOR: All right. So, if
12 I get past that, if I go to Justice Alito's
13 point, which is I don't think it's just about
14 speech, it's about data control --

15 MR. FRANCISCO: Mm-hmm.

16 JUSTICE SOTOMAYOR: -- if it's about
17 data control -- and assume for the sake of
18 argument that I believe intermediate scrutiny
19 applies --

20 MR. FRANCISCO: Mm-hmm.

21 JUSTICE SOTOMAYOR: -- to the data
22 control provision --

23 MR. FRANCISCO: Mm-hmm.

24 JUSTICE SOTOMAYOR: -- then your
25 arguments would be different, wouldn't they?

1 They would be under-inclusiveness, they would be
2 other arguments, correct?

3 MR. FRANCISCO: Well, Your Honor, I
4 think they'd be very similar because I think the
5 nature of our arguments work just as well under
6 intermediate and strict scrutiny.

7 JUSTICE SOTOMAYOR: All right.

8 MR. FRANCISCO: If I could unpack that
9 a little?

10 JUSTICE SOTOMAYOR: No, I'm not going
11 to --

12 MR. FRANCISCO: Sure.

13 JUSTICE SOTOMAYOR: Because we're
14 going to run out of time, because we're going to
15 need to figure out what intermediate scrutiny
16 means. But I'm not sure it means what you do,
17 which is I don't think any of our cases have
18 ever suggested that we have to use the least
19 restricted means under intermediate scrutiny.
20 In fact, our cases have said --

21 MR. FRANCISCO: Mm-hmm.

22 JUSTICE SOTOMAYOR: -- we have to use
23 a reasonable means.

24 MR. FRANCISCO: And if I can respond
25 to that point specifically, I completely agree

1 it's not a least restrictive means alternative,
2 Your Honor. But you do have to at least
3 consider alternatives.

4 Here, if the concern -- let's take the
5 data security concern, which you put your finger
6 on.

7 JUSTICE SOTOMAYOR: Well, I -- I know
8 you want to keep going on, but I can't let you
9 because I can't monopolize the argument, okay?
10 But let me just get to the bottom of that, all
11 right?

12 You seem to suggest that Congress has
13 to actually look at all of the alternatives and
14 say no. I don't think we have a case that says
15 that.

16 MR. FRANCISCO: I -- I am not
17 suggesting --

18 JUSTICE SOTOMAYOR: If from the record
19 it's clear that alternatives won't be adequate
20 for whatever set of reasons, isn't that enough?

21 MR. FRANCISCO: If the record were
22 clear on that, that might be enough.

23 JUSTICE SOTOMAYOR: Okay. Now -- I
24 take that.

25 MR. FRANCISCO: But, here, on the

1 key --

2 JUSTICE SOTOMAYOR: Now let me go to
3 the next question and the last.

4 MR. FRANCISCO: If -- if I could, Your
5 Honor, just one sentence?

6 JUSTICE SOTOMAYOR: Mm-hmm.

7 MR. FRANCISCO: If, on the key less
8 restrictive alternatives, they had actually
9 considered them and said what you suggested,
10 this would be a different case. But our point
11 is that on the key most obvious less restrictive
12 alternatives, a law, for example, that simply
13 prohibits TikTok, Incorporated, from sharing any
14 sensitive user data with ByteDance or anyone
15 else, there's nothing in the record that
16 suggests they even considered it.

17 JUSTICE SOTOMAYOR: That's because
18 there --

19 MR. FRANCISCO: And that's why it
20 would fail under even intermediate scrutiny.

21 JUSTICE SOTOMAYOR: We have -- we have
22 a different problem, which is that the record
23 shows that there is no sharing that could happen
24 that wouldn't put the data at security.

25 MR. FRANCISCO: That's --

1 JUSTICE SOTOMAYOR: But we can go past
2 that.

3 MR. FRANCISCO: -- that's incorrect
4 actually.

5 JUSTICE SOTOMAYOR: No, because the
6 NSA doesn't. What's very clear --

7 MR. FRANCISCO: I'm not talking about
8 the NSA.

9 JUSTICE SOTOMAYOR: Or even anything
10 else. But putting that aside, one last
11 question.

12 Assuming that the covert manipulation
13 issue is one, I think that what remains is, to
14 the Chief's question and Justice Alito's
15 questions, if the covert manipulation is a
16 concern, then the question becomes what kind of
17 burden does it put on TikTok U.S.A.

18 And I think your point is that that
19 requires strict scrutiny because it doesn't
20 permit them to speak to the Chinese government
21 through the algorithm and promote whatever
22 speech it wants to promote through the
23 algorithm, correct?

24 MR. FRANCISCO: It doesn't prohibit --
25 permit them to speak to the American public

1 through the algorithm --

2 JUSTICE SOTOMAYOR: Right.

3 MR. FRANCISCO: -- and promote
4 whatever type of speech they want to promote on
5 the algorithm. And I also think that this
6 covert manipulation is a little bit odd.
7 They're not concerned just with covertness. If
8 all you were concerned with is secret --

9 JUSTICE SOTOMAYOR: I'm going to ask
10 the SG about that, how you disentangle the two
11 things.

12 MR. FRANCISCO: Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?
14 Justice Gorsuch?

15 Justice Kavanaugh?

16 JUSTICE KAVANAUGH: Just on the data
17 collection interest, I think Congress and the
18 President were concerned that China was
19 accessing information about millions of
20 Americans, tens of millions of Americans,
21 including teenagers, people in their 20s, that
22 they would use that information over time to
23 develop spies, to turn people, to blackmail
24 people, people who, a generation from now, will
25 be working in the FBI or the CIA or in the State

1 Department.

2 Is that not a realistic assessment by
3 Congress and the President of the risks here?

4 MR. FRANCISCO: Well, Your Honor, I'm
5 not disputing the risks. I'm disputing the
6 means that they've chosen. One way, the most
7 direct way to address that, all of this user
8 data sits on data servers in Virginia controlled
9 by Oracle.

10 I'm not talking about the national
11 security agreement. What I'm talking about is a
12 law that simply says to TikTok, Incorporated,
13 and its U.S. employees, you cannot share that
14 user data with anybody. You can't give it to
15 ByteDance. You can't give it to China. You
16 can't give it to Google. You can't give it to
17 Amazon. You cannot give it to anybody under
18 threat of massive penalties.

19 They never even considered that most
20 obvious alternative. And so, whether you apply
21 intermediate scrutiny or strict scrutiny, it's
22 not a least restrictive means test, but you've
23 got to at least consider the most obvious
24 alternative.

25 JUSTICE KAVANAUGH: So you acknowledge

1 the risk that Congress and the President were
2 concerned about. You're just saying the means
3 they chose to address that risk were incorrect?

4 MR. FRANCISCO: So I -- I --

5 JUSTICE KAVANAUGH: Not permissible?

6 MR. FRANCISCO: -- I mean, I certainly
7 acknowledge the risk, but I think there are lots
8 of reasons, not just the one I just gave, but
9 there are lots of reasons why that risk still
10 can't justify the law. When it sits alongside
11 of the impermissible covert manipulation risk, I
12 think it falls under Mt. Healthy. It's no
13 different if they came in and said we passed
14 this law, one for data security --

15 JUSTICE KAVANAUGH: I -- I understand
16 that, but just on the -- on the data collection,
17 that seems like a huge concern for the future of
18 the country.

19 MR. FRANCISCO: And, Your Honor,
20 again, it is a concern -- two responses.

21 First, it is a concern that can be
22 addressed directly. The reason why there's no
23 evidence in this record about whether that kind
24 of direct prohibition on TikTok, Incorporated,
25 from sharing sensitive user data with anybody,

1 including ByteDance, the reason why the record
2 is devoid of any evidence of that is because
3 Congress never considered the other side of the
4 balance.

5 And that's the minimum that Congress
6 has to do under the First Amendment. It's got
7 to at least consider the -- the consequences of
8 shutting down a speech platform used by 170
9 million Americans against the benefits of an
10 alternative like simply saying to TikTok's
11 employees, you're essentially going to get
12 massive fines, potentially jail sentences, if
13 you share any of that sensitive user data with
14 anybody, not TikTok, not ByteDance -- I'm sorry,
15 not ByteDance, not China, not anybody else in
16 the world. Yet there's nothing in this record
17 that suggests they even considered that
18 alternative.

19 JUSTICE KAVANAUGH: What happens after
20 January 19th if you lose this case? Can you
21 just spell that out?

22 MR. FRANCISCO: At least as I
23 understand it, we go dark. Essentially, the
24 platform shuts down.

25 JUSTICE KAVANAUGH: Unless there's a

1 divestiture?

2 MR. FRANCISCO: Unless there's a
3 divestiture. Unless --

4 JUSTICE KAVANAUGH: A presidential
5 extension --

6 MR. FRANCISCO: -- President Trump
7 exercises his authority to extend it by not --
8 but he can't do that on January 19th. On
9 January 19th, we still have President Biden, and
10 on January 19th, as I understand it, we shut
11 down.

12 It is possible that come January 20th,
13 21st, 22nd, we might be in a different world.
14 Again, that's one of the reasons why I think it
15 makes perfect sense to issue a preliminary
16 injunction here and simply buy everybody a
17 little breathing space.

18 This is an enormously --

19 JUSTICE KAVANAUGH: What do you mean
20 by "shut down" too? Can you just spell that
21 out?

22 MR. FRANCISCO: So --

23 JUSTICE KAVANAUGH: If -- if you can.

24 MR. FRANCISCO: -- the app -- one, the
25 app is not available in the app stores. That's

1 at a minimum. But, in addition, what the Act
2 says is that all of the other types of service
3 providers can't provide service either.

4 Now there's enormous consequences for
5 violating that for the service providers. So,
6 essentially, you know, what they're going to say
7 is that, you know, I think, we're not going to
8 be providing the services necessary to have you
9 see it. So it's essentially going to stop
10 operating.

11 I think -- I think that's the
12 consequence of this law, which, again, is why a
13 short reprieve here would make all the sense in
14 the world. It's an enormously consequential
15 decision, and it -- and -- and I think all would
16 benefit if it weren't necessary.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: So I just want to --
21 just kind of following up on Justice Kavanaugh's
22 questions. Let's say I agree with you that some
23 level of scrutiny applies and --

24 MR. FRANCISCO: Mm-hmm.

25 JUSTICE BARRETT: -- I'm trying to

1 figure out which level of scrutiny applies, and
2 I'm trying to figure out if there's content
3 discrimination.

4 And let me ask you a different
5 question than I did before --

6 MR. FRANCISCO: Mm-hmm.

7 JUSTICE BARRETT: -- about the
8 algorithm. I mean, you keep saying "shut down."
9 The law doesn't say TikTok has to shut down. It
10 says ByteDance has to divest.

11 If ByteDance divested TikTok, we
12 wouldn't be here, right? If -- if -- if
13 ByteDance was willing to let you go and willing
14 to let you take the source code with you, that
15 would be fine, right? We would not be here?

16 MR. FRANCISCO: Well, Your Honor, if
17 ByteDance divested, then the law wouldn't fall
18 on TikTok. But the law will -- the law, not
19 ByteDance. The law requires TikTok to shut
20 down.

21 JUSTICE BARRETT: But that's because
22 of ByteDance's choice, right?

23 MR. FRANCISCO: Well, it --

24 JUSTICE BARRETT: I mean, this is like
25 Justice Kagan's point. I mean, I'm trying to

1 figure out how we account for the reality of
2 third-party choices, and --

3 MR. FRANCISCO: Mm-hmm.

4 JUSTICE BARRETT: -- the choices of
5 third parties, that's the whole reason for the
6 law being passed in the first place.

7 MR. FRANCISCO: Yeah, Your -- Your
8 Honor, I -- I -- I still don't -- I -- I think
9 that the way the analysis works is: Step 1, is
10 there a First Amendment violation?

11 JUSTICE BARRETT: Right.

12 MR. FRANCISCO: Step 2, you get to the
13 question that we're grappling with: What
14 standard of scrutiny do you apply?

15 Typically, what you do is you ask: Is
16 this law content-based? Is it content-based on
17 its face? Is it content-based in its decision?

18 Here, we know it's content-based on
19 its face because it says what it says. We know
20 it's content-based in its motivation because the
21 government concedes it's content-based in its
22 motivation.

23 JUSTICE BARRETT: Well, that's not
24 quite what I'm asking. I mean, let's see.

25 MR. FRANCISCO: I think --

1 JUSTICE BARRETT: That's the dispute
2 between you --

3 MR. FRANCISCO: Yeah.

4 JUSTICE BARRETT: -- and the
5 government, is, is it content-based if it's
6 about divestiture and not about telling TikTok
7 what content it can display on the platform.

8 MR. FRANCISCO: And I think it has to
9 be because that's -- I think that that really
10 goes to the first question: Does the burden
11 fall on the speaker? If the burden falls on the
12 speaker, that triggers the speaker's First
13 Amendment rights.

14 But the law is, in fact,
15 content-based, whether it comes in the form of a
16 divestiture or something else, when the law
17 specifically says it's content-based. We're
18 worried about the content on the platform and
19 when the government tells you that one of our
20 reasons -- one of the things that we're worried
21 about is TikTok, not ByteDance, but TikTok,
22 Incorporated, and TikTok in the United States
23 will, absent the divestiture, have a mix of
24 content that we find objectionable. They will
25 mix around their videos in a way that is too

1 pro-Chinese or too anti-American.

2 JUSTICE BARRETT: Okay. Let me --

3 MR. FRANCISCO: And that is TikTok,
4 the platform.

5 JUSTICE BARRETT: -- let me just ask
6 you one last question. Why is it impossible to
7 divest in the 270 days, even assuming that the
8 Chinese government hadn't said you couldn't?

9 MR. FRANCISCO: Mm-hmm. Sure. And
10 this is the exchange I was having with Justice
11 Gorsuch. There are -- there are two basic
12 reasons.

13 The first is that the underlying
14 source code, that's the source code that comes
15 in here and then has to be converted and
16 executed and --

17 JUSTICE BARRETT: But -- but that's
18 what Justice Gorsuch said, just not ever.

19 So it's not really that you can't do
20 it within the timeframe. It's that you really
21 couldn't ever divest because you never are going
22 to get the source code.

23 MR. FRANCISCO: So -- well, let me
24 unpack that a little bit. No, it's that with
25 the underlying source code, it takes a team of

1 engineers to update and maintain that. It would
2 take us many years to reconstruct a brand-new
3 team of engineers to do that with respect to the
4 source code.

5 With respect to the sharing of
6 content, that was the --

7 JUSTICE BARRETT: Yeah.

8 MR. FRANCISCO: -- different reason.
9 In theory, we could kind of send our salesmen
10 around the world, go to Ireland, go to Finland,
11 go to every country, and say: Look, you used to
12 automatically get our content, but now you've
13 got to separately sign up for our platform.

14 JUSTICE BARRETT: Okay. So last --
15 last point. Let me make sure I understand what
16 you're saying.

17 It's not that you couldn't execute the
18 disentanglement. You could say: We're
19 independent. You just can't re-create TikTok in
20 any kind of way --

21 MR. FRANCISCO: Well, I think that --

22 JUSTICE BARRETT: -- as I recall.

23 MR. FRANCISCO: -- any new TikTok
24 would be a fundamentally different platform with
25 different content, which is yet another reason

1 why I think this is a content-based restriction
2 that falls directly on TikTok, Incorporated,
3 itself and our platform.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: So I guess I'm back
7 to some of the questions that Justice Barrett
8 and Justice Kagan asked about the sort of
9 threshold issue that you point out, which is, is
10 there a burden on the speaker.

11 I'm trying to understand what the
12 burden is that you are articulating and whether
13 it really isn't about association and not
14 speech. You say -- you have in your brief some
15 cases that talk about American speakers being
16 free to choose whether to affiliate with foreign
17 organizations. And the colloquy you had with
18 Justice Kagan made me think that what you're
19 really complaining about is the inability to
20 associate with ByteDance and its algorithm, that
21 it's not really about, you know, TikTok came up
22 with its own algorithm or bought an algorithm
23 from some other company or devised it or
24 whatever. This law would have nothing to do
25 with them from your perspective.

1 But the problem I think you're
2 articulating -- and this is -- I -- I'm seeking
3 your clarification.

4 MR. FRANCISCO: Mm-hmm. Sure.

5 JUSTICE JACKSON: The problem I think
6 you're articulating is that you want to use
7 ByteDance's algorithm and, therefore, associate
8 with ByteDance, and Congress has prohibited that
9 by requiring divestiture.

10 So isn't this really a right of
11 association case under the First Amendment?

12 MR. FRANCISCO: I -- I think it's -- I
13 think it's both, Your Honor. I do think that
14 that is a component of it. We want to use the
15 algorithm that we think reflects the best mix of
16 content. That's the algorithm that reflects the
17 best mix of content.

18 What this law says is we can't do that
19 unless ByteDance exercises a qualified
20 divestiture. But I also think more directly
21 what this law does is it says to TikTok,
22 Incorporated, if ByteDance doesn't exercise a
23 qualified divestiture, you have to go mute. You
24 cannot speak at all. Full stop, period.

25 JUSTICE JACKSON: No, I don't think it

1 says that, though. I mean, if -- if -- if
2 TikTok were to, post-divestiture or whatever,
3 pre-divestiture, come up with its own algorithm,
4 right, then, when the divestiture happened, it
5 could still operate.

6 MR. FRANCISCO: I think --

7 JUSTICE JACKSON: It doesn't say,
8 TikTok, you can't speak.

9 MR. FRANCISCO: -- I -- I think that's
10 theoretically correct, Your Honor.

11 JUSTICE JACKSON: Right. But --
12 but --

13 MR. FRANCISCO: But I think that also
14 underscores the content-based nature of the
15 restriction. We have to change our speech.

16 JUSTICE JACKSON: No, but the fact --
17 excuse me. The fact that that's true suggests
18 that you're wrong about the statute being read
19 as saying, TikTok, you have to go mute, because
20 TikTok can continue to operate on its own
21 algorithm, on its own terms, as long as it's not
22 associated with ByteDance.

23 So isn't this really just all about
24 association?

25 MR. FRANCISCO: Your Honor, I think it

1 is partly about association, but I'm going to
2 take another shot at explaining why it's not
3 just about association.

4 JUSTICE JACKSON: Okay. Well, let me
5 just take you down the association path for a
6 second because, if it is about the association
7 of TikTok with ByteDance, then don't we have
8 cases that seem to undermine your view that
9 Congress can't do this?

10 I mean, I thought we had cases about
11 Congress prohibiting association with terrorist
12 organizations, prohibiting association with
13 foreign adversaries. And so why doesn't this
14 fall into that kind of group of -- of our
15 jurisprudence?

16 MR. FRANCISCO: Well -- well, at least
17 as I understand all of those cases, they applied
18 strict scrutiny. The -- the -- the material
19 support statute most definitely applied strict
20 scrutiny.

21 JUSTICE JACKSON: And -- and
22 ultimately upheld the law, so fine.

23 MR. FRANCISCO: But -- but -- sure.
24 And if -- I think, if we go down the strict
25 scrutiny road here, I don't see that this law

1 can possibly be satisfied under the interests
2 that they assert here.

3 But I do want to emphasize why this is
4 also about TikTok's speech. Even under your
5 hypothetical, where, theoretically, they can say
6 something differently than they are say --
7 saying today, that in and of itself is a direct
8 restriction on TikTok's speech.

9 They can't engage in the speech they
10 want to engage in. They have to engage in a
11 different kind of speech, the speech they don't
12 want to engage in. That is a direct burden on
13 TikTok, Incorporated's speech --

14 JUSTICE JACKSON: All right.

15 MR. FRANCISCO: -- wholly apart from
16 association.

17 JUSTICE JACKSON: I think I understand
18 that argument.

19 Let me ask you a question about your
20 colloquy with Justice Kavanaugh. Did I
21 understand you to concede that there is a
22 compelling interest and that the problem is
23 really tailoring?

24 I mean, you said: I understand the
25 risks. I don't hear you suggesting that the

1 risks don't exist. So it sounds like we've
2 gotten past -- even if we're in strict scrutiny
3 world, we've gotten past the compelling interest
4 part of this.

5 MR. FRANCISCO: No, Your Honor. What
6 I was saying is that if all you had, standing
7 alone, were the data security, that would be a
8 different case.

9 Here, when you have the content
10 manipulation sitting right alongside of the data
11 security, that taints the data security
12 rationale. If Congress came in and said: We're
13 passing this law for two reasons -- one, we
14 really care about data security, and, two, we
15 hate the speech on TikTok -- the data security
16 wouldn't alone sustain that law.

17 Under cases like Mt. Pleasant, it
18 would speak in both --

19 JUSTICE JACKSON: I understand. But
20 why -- why -- you're equating we don't want
21 foreign adversaries to be able to manipulate the
22 content on this platform, you're equating that
23 with we hate the content, and I'm just trying to
24 understand why.

25 MR. FRANCISCO: Be -- be -- sure.

1 Because content manipulation is, by definition,
2 a content-based distinction.

3 Look, everybody manipulates content.
4 There are lots of people who think CNN, Fox
5 News, The Wall Street Journal, The New York
6 Times, are manipulating their content. That is
7 core protected speech. That's why they put so
8 much weight on this mere covertness. But --

9 JUSTICE JACKSON: Right, but that's --
10 that -- but that analysis is just about
11 content-based versus content-neutral and,
12 therefore, whether you apply strict scrutiny.

13 I'm in the strict scrutiny world.

14 MR. FRANCISCO: Mm-hmm.

15 JUSTICE JACKSON: Okay? I'm assuming
16 that you're right that strict scrutiny applies,
17 and now prong number one in that world is do --
18 does the government have a compelling interest.

19 MR. FRANCISCO: And --

20 JUSTICE JACKSON: And so I'm trying to
21 understand why the government's argument that we
22 have data manipulation concerns, which I
23 understood you in colloquy with Justice
24 Kavanaugh to say is a risk, and we are
25 concerned, based on what Justice Gorsuch says

1 when he's looking at the facts, you know, that
2 the government contends that there's this real
3 problem with this foreign adversary doing
4 manipulation in other places, are you saying
5 those are not compelling government interests?

6 MR. FRANCISCO: I am 100 percent
7 saying that content manipulation is not just not
8 a compelling governmental interest, it is an
9 impermissible governmental interest. You could
10 not go to CNN or Fox News and say we're going to
11 regulate you because you're manipulating the
12 content in the way that we don't like. That is
13 per se impermissible.

14 JUSTICE JACKSON: Okay.

15 MR. FRANCISCO: That is why --

16 JUSTICE JACKSON: Can I just ask you
17 one last thing? You -- you say with respect to
18 the tailoring issue that disclosure, you think,
19 is a possible more narrowly tailored way of
20 handling some of this.

21 And I guess I'm just wondering whether
22 disclosure under this Court's case law and the
23 law of other lower courts doesn't carry its own
24 First Amendment complications, that don't we
25 have -- wouldn't we have compelled speech

1 problems if disclosure was required in this
2 situation?

3 MR. FRANCISCO: Sure, Your Honor.

4 Now, look, I might think so because I think that
5 the factual predicate is wrong, but they think
6 the factual predicate is right. And if the
7 factual predicate is right, then there are no
8 First Amendment problems at all under Zauderer
9 and the cases that you're suggesting.

10 And that underscores the larger
11 problem here. Not all disclosures are perfect.
12 I'm not here to argue that they are. But you've
13 always got to consider what the alternative is.
14 And, here, the alternative is shutting down one
15 of the largest speech platforms in America.

16 The reason there's no evidence in this
17 record as to disclosures is because Congress
18 never even undertook that balancing in the first
19 place --

20 JUSTICE JACKSON: Thank you.

21 MR. FRANCISCO: -- the bare minimum
22 that has to be done before we take an
23 unprecedented -- unprecedented step of shutting
24 down the voices of 170 million Americans.

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Fisher.

4 ORAL ARGUMENT OF JEFFREY L. FISHER
5 ON BEHALF OF PETITIONERS BRIAN FIREBAUGH, ET AL.

6 MR. FISHER: Mr. Chief Justice, and
7 may it please the Court:

8 Wholly apart from the companies' legal
9 interests here, the Act directly restricts the
10 rights, the First Amendment rights, of American
11 creators to participate and speak in what the
12 Court a little less than a decade ago called the
13 modern public square and what you might say
14 today is the most vibrant speech forum in the
15 United States of America.

16 And the Act, therefore, is inescapably
17 subject to strict scrutiny because of the First
18 Amendment implications. And the Act fails that
19 test and, indeed, any level of scrutiny under
20 this Court's case law because the Act and the
21 reasons behind it defy our history and
22 tradition, as well as precedent.

23 American creators have long and always
24 enjoyed the right to speak in conjunction with
25 foreign speakers or work with foreign

1 publishers. Americans even have the right under
2 the Lamont case to receive information from
3 foreign speakers, indeed, foreign governments.
4 The -- so that leaves the -- the government with
5 this implication in its -- in its use of the
6 phrase "national security" in this context. But
7 that just simply doesn't change the calculus.

8 Throughout our history, we have faced
9 ideological campaigns by foreign adversaries.
10 Yet, under the First Amendment, mere ideas do
11 not constitute a national security threat.
12 Restricting speech because it might sow doubt
13 about our leaders or undermine democracy are the
14 kind of things our enemies do. It is not what
15 we do in this country. And so we think the
16 Court should reverse.

17 And I would welcome the Court's
18 questions.

19 JUSTICE THOMAS: How exactly is -- are
20 the creators' speech being impeded?

21 MR. FISHER: So two ways, Justice
22 Thomas. First, I'd just point you to the text
23 of the statute, which directly regulates text,
24 images, communicate -- real-time communications,
25 videos. My clients, the creators, are the ones

1 creating that speech and posting it to speak to
2 other Americans.

3 JUSTICE THOMAS: But it doesn't say
4 anything about creators or people who use the
5 site. It's only concerned about the ownership
6 and the concerns that data will be manipulated
7 or there will be other national security
8 problems with someone who's not a citizen of
9 this country or a company who's not here.

10 MR. FISHER: So there's two ways, and
11 I think the Sorrell case is where you look for
12 the analysis of the First Amendment burden here.
13 As I said, the text of the statute regulates our
14 speech. And then you point out ownership, and
15 this was talked about a lot in the first part of
16 the argument here, so let me be very clear.

17 American creators have a right to work
18 with the publisher of their choice. So imagine
19 somebody wanted to work on -- post speech on
20 Twitter, now known as X, and Congress passed a
21 law saying we don't like the current owner of X.
22 The current owner of X has to sell that platform
23 or else it has to shut down.

24 People who post on that platform and
25 who, indeed, some of them make a living

1 commentating, engaging on current events, news,
2 politics, would have a First Amendment claim --

3 JUSTICE THOMAS: But --

4 MR. FISHER: -- to work with that
5 particular publisher.

6 JUSTICE THOMAS: -- using that
7 argument, you could have said that about the
8 breakup of AT&T. You could say that about the
9 foreign -- foreign -- limitations on foreign
10 ownership of broadcast companies.

11 MR. FISHER: Well, no -- I think that
12 you have to dig a little deeper than that,
13 Justice Thomas. It's not mere foreign ownership
14 and it's certainly -- the broadcast cases I'll
15 get to in a moment. But it's foreign ownership
16 because of a particular perspective.

17 If you boil it down to an essence, the
18 owner of a print media or online media
19 publication is -- is the essence of the
20 viewpoint of that publication. The current
21 owner of X or the current owner of Fox News or
22 the current owner of MSNBC has a particular
23 perspective. And working with that particular
24 platform is shot through with the ownership from
25 top to bottom.

1 JUSTICE JACKSON: But why couldn't
2 Congress prohibit Americans from associating
3 with certain foreign organizations that have
4 interests that are hostile to the United States?
5 I mean, I thought that's what Holder versus
6 Humanitarian Law Project allowed, so I don't
7 really understand what you mean.

8 MR. FISHER: Right. So I'm glad
9 you're bringing that up.

10 JUSTICE JACKSON: Yes.

11 MR. FISHER: So, when it comes to
12 national security, you are right that Congress
13 can prohibit Americans, to use that case as an
14 example, from associating with terrorist
15 organizations or other organizations that pose a
16 clear and present danger to this country.

17 This case, Justice Jackson, is
18 fundamentally different. What the government
19 tells you in its own brief that it is worried
20 about here are the ideas that might be expressed
21 on TikTok. We might undermine U.S. leadership.
22 We might sow doubts about democracy. We might
23 have pro-China views.

24 And so, if you look to whether that is
25 a legitimate interest, my fundamental

1 submission -- and this, I think, goes to the
2 last colloquy you were having with Mr.
3 Francisco -- is that is an impermissible
4 government interest. And you look throughout
5 our history and tradition, and I think the place
6 I would point you most directly would be the
7 opinions of Justice Brandeis in Whitney and
8 Justice Holmes in Abrams --

9 JUSTICE JACKSON: I guess I don't
10 understand how that's distinguishable from
11 what's happening in Holder, and -- and so can
12 you just say a little bit more?

13 MR. FISHER: It's -- it goes to the
14 nature of the national security threat. So my
15 position is the government just doesn't get to
16 come in and say national security and the case
17 is over or you don't get to associate. You have
18 to dig underneath what is the national security
19 claim. And what Justice Holmes said in his
20 Abrams dissent -- and I know that was a dissent,
21 these are hard issues, but that has been
22 vindicated over time -- is that it's not enough
23 to say national security. You have to say what
24 is the real harm. Is it -- you know, is it
25 terrorism? Is it where -- where our battleships

1 are located?

2 JUSTICE JACKSON: But Justice
3 Kavanaugh --

4 MR. FISHER: Is it war?

5 JUSTICE JACKSON: -- Justice Kavanaugh
6 presented a number of potential risks, right,
7 with -- with foreign adversaries using covert
8 manipulation of the data platforms that are
9 being used by youths today that would then make
10 it more likely that people would turn into spies
11 and do terrible things to the United States.
12 This is a hypothetical, but --

13 MR. FISHER: Yeah.

14 JUSTICE JACKSON: -- you know what I'm
15 saying?

16 MR. FISHER: I -- I get it. So I
17 think, if I understood Justice Kavanaugh
18 correctly, he was talking about the data
19 security arguments. Let me just pull these
20 apart.

21 You first have an argument -- and the
22 government itself separates these two arguments
23 in its brief. The first argument and the one
24 I'm focusing on initially is the content
25 manipulation argument, and that argument is that

1 our national security is implicated if the
2 content on TikTok is anti-democracy, undermines
3 trust in our leaders. They use -- they use
4 various phrases like that in their brief. So my
5 primary submission is that is an impermissible
6 government interest that taints the entire Act.

7 Now there's a secondary argument the
8 government makes, and we say you don't even get
9 to that because, once you have an impermissible
10 motive like that, the law is unconstitutional.

11 But, even if you could get to that,
12 Justice Jackson, I do grant that data security
13 in -- in the way Justice Kavanaugh spelled it
14 out is compelling. That is compelling. But
15 that's not the question. You just don't ask in
16 the air, you know, was Congress worried about
17 data security or could it reasonably worry -- be
18 worried about data security? You say, can this
19 Act, the Act before you, be sustained on data
20 security grounds?

21 And our answer to that has to be no.
22 You don't have to look any further than the
23 divest -- the -- the divestiture provision
24 itself, which says that the content
25 recommendation algorithm cannot be used in the

1 future. Well, that has nothing to do with data
2 security. So the core feature of the
3 divestiture provision is going at content
4 manipulation, which I say is impermissible. You
5 can't -- you can't uphold that under data
6 security grounds.

7 And the rest of the Act, when you look
8 at the covered companies provision, Justice
9 Jackson, if this were primarily a data security
10 law, what you think you'd find is, what kind of
11 data is procured? How is it stored? Is it
12 shared? Those are the things you think you'd
13 find under covered companies.

14 But you don't find that. What you
15 find is, are text images shared? Is content
16 being shared between users? Is it being created
17 and posted in a social media platform?

18 So I don't dispute for one second that
19 data security is a very important thing, and
20 Congress in this very law regulated data
21 security in other ways with the -- with data
22 brokers. That's perfectly permissible. But the
23 question before you today is narrower. The
24 question is, is this law before you sustainable
25 on data security grounds? And that answer has

1 to be no.

2 JUSTICE GORSUCH: Mr. --

3 CHIEF JUSTICE ROBERTS: Congress
4 doesn't care about what's on TikTok. They don't
5 care about the expression. That's shown by the
6 remedy. They're not saying TikTok has to stop.
7 They're saying that the Chinese have to stop
8 controlling TikTok.

9 So it's -- it's not a direct burden on
10 the expression at all. Congress is fine with
11 the expression. They're not fine with a foreign
12 adversary, as they've determined it is,
13 gathering all this information about the 170
14 million people who use TikTok.

15 MR. FISHER: Well, again, Mr. Chief
16 Justice, if I may, let me separate the -- the --
17 where you started, which was the content
18 manipulation, and then go to the data security
19 part of it.

20 So I understand --

21 CHIEF JUSTICE ROBERTS: Well, the
22 first part was not -- I'm not talking about the
23 content manipulation. I'm talking about the
24 content harvesting.

25 MR. FISHER: I -- I -- when you say

1 "content harvesting," do you mean people don't
2 know where the --

3 CHIEF JUSTICE ROBERTS: Well, they've
4 got all the information --

5 MR. FISHER: Yeah.

6 CHIEF JUSTICE ROBERTS: -- whatever
7 they -- whatever algorithms they want that has
8 access to the personal information or at least
9 information that is not readily available about
10 170 million Americans.

11 And whether they're going to use it in
12 10 or 15 years, when those people grow up and,
13 you know -- you know, have different jobs in
14 different places, or whether they're going to
15 use it now, that, at least as I look at the
16 Congressional Record, is what Congress was
17 concerned about.

18 MR. FISHER: Well, I think, though,
19 that --

20 CHIEF JUSTICE ROBERTS: And they're
21 not concerned about the fact that it is
22 available. As I said, the remedy is just
23 somebody else has to run TikTok.

24 MR. FISHER: Right.

25 CHIEF JUSTICE ROBERTS: So they're not

1 concerned about the content. They're concerned
2 about what the foreign adversary is doing.

3 MR. FISHER: So, if I may, I think I
4 still -- to answer your question properly, I
5 think I have to separate two things.

6 One is the content recommendation
7 algorithm, and that's what I was speaking about
8 a moment ago. That has nothing to do with data
9 security. That doesn't itself procure data.
10 That just determines what videos people see on
11 their feed on TikTok.

12 As to that, I think the answer is
13 inescapably that the government and Congress
14 itself was worried about content. The
15 government itself is here saying: National
16 security.

17 So, like, a mix of cat videos or dance
18 videos doesn't affect national security. No
19 matter what happens, the only thing that can
20 affect data security -- I'm sorry, national
21 security are the substance of those videos.

22 And when the government's pressed in
23 its briefing, it outright tells you that. It
24 says: What we're really worried about is sowing
25 doubts about U.S. leaders, et cetera. So let me

1 turn then to data security.

2 Yes, you know, there were various
3 Congresspersons, and in the record that we have
4 in the D.C. Circuit, there were conversation
5 about the problem of data security here. As I
6 said, I don't dispute that that is a valid
7 governmental interest.

8 So I think you address whether that
9 alone could sustain the Act in two steps.
10 First, you would ask: If you have an
11 impermissible motive and a permissible one, can
12 we sustain the Act based on the impermissible --
13 based simply on the permissible motive?

14 And I think, for the reasons
15 Mr. Francisco said and we lay out in our brief,
16 that alone, the answer is no under Hunter
17 against Underwood and other cases.

18 Even if you could get just to the data
19 security question, again, you'd have to ask the
20 question: Would this law have been passed by
21 Congress for data security reasons? Because
22 you're being asked to uphold a law based on that
23 single governmental interest. And when you look
24 through the provisions, like the content
25 recommendation algorithm provision, like the

1 covered company provisions, the answer's no.

2 And if you're still in doubt on that,
3 just go back to the under-inclusiveness problem.
4 Would a Congress really worried about these very
5 dramatic risks leave out a e-commerce site like
6 Temu that has 70 million Americans using it and
7 every bit the connection to the world of
8 Chinese --

9 JUSTICE KAVANAUGH: Does Congress have
10 to go all or nothing on that? I mean --

11 MR. FISHER: It -- it doesn't have to
12 go all or nothing, Justice --

13 JUSTICE KAVANAUGH: -- if they -- they
14 isolate a particular problem, then they could --
15 they might be getting to what you're talking
16 about next, who knows, but you're really sitting
17 up there and saying Congress would not pass the
18 divestiture law if data security were the only
19 interest. I mean --

20 MR. FISHER: So I'm saying it would
21 not have passed this divestiture law if -- if --
22 if data security were the only interest.

23 It's very curious why you just single
24 out TikTok alone and not other companies with
25 tens of millions of people having their own data

1 taken, you know, in the process of engaging with
2 those websites and equally, if not more,
3 available to Chinese control.

4 So I'm not trying to say that Congress
5 has to do everything at once. I'm trying to say
6 that once you've concluded that content
7 manipulation, for the reasons I've said, as a
8 matter of our history and tradition has to be
9 impermissible --

10 JUSTICE SOTOMAYOR: Is there another
11 site like this one that covers half the American
12 population?

13 MR. FISHER: I don't -- I don't think
14 just by way of sheer numbers, Justice Sotomayor,
15 that -- the answer has to be no.

16 JUSTICE SOTOMAYOR: All right. Now
17 put -- put --

18 MR. FISHER: But 70 million seems like
19 a lot.

20 JUSTICE SOTOMAYOR: A hundred and
21 seventy million is a lot, but put that aside.

22 MR. FISHER: Yeah.

23 JUSTICE SOTOMAYOR: And -- and -- and
24 then go to the next question, which is: How
25 many of these sites have all of the data

1 collection mechanisms that TikTok has?

2 From what I understand from the
3 briefs, not only is it getting your information,
4 it's asking, and most people give it permission,
5 to access your contact list, whether that
6 contact list has permitted them to or not. So
7 they can now have data about all of your
8 contacts and anything you say about them.

9 How many other sites gather
10 information by keystrokes to be able to do voice
11 and finger ID information if they choose? I
12 mean, there's a whole lot of data stuff that was
13 discussed in the brief that I don't think any
14 other website gathers. So wouldn't this be a
15 unique site? If I view the evidence that way,
16 how would this be under-inclusive?

17 MR. FISHER: Justice Sotomayor, I -- I
18 don't think a lot of the suppositions you're
19 making actually bear out. And, as Justice
20 Gorsuch was pointing out, one of, obviously, the
21 real challenges in this case is it comes to you
22 without an ordinary trial record compiled and
23 all the rest. So we have only limited amounts
24 of information. But, absolutely, these other
25 websites are taking much the same kind of

1 information, if not more.

2 And, as to the -- as to the contact
3 list thing, I think you also -- that points out
4 one other aspect of this. That is a voluntary
5 decision by an American user to share that
6 information.

7 You know, in the Riley case --

8 JUSTICE SOTOMAYOR: But not informed.
9 And even if informed, but he --

10 MR. FISHER: Well, but that could be
11 solved -- if you don't think it's informed, that
12 could be solved by a warning or disclosure.

13 JUSTICE SOTOMAYOR: Well, no, it can't
14 be because, for the United States, the threat of
15 using that information is what is at issue.
16 It's not whether the user thinks it's okay.
17 It's whether the U.S. believes that it could put
18 sites at issue.

19 But let me ask you one --

20 MR. FISHER: Mm-hmm.

21 JUSTICE SOTOMAYOR: -- last question
22 and fundamental question.

23 Assuming that content -- that
24 content-neutral data collection concerns were
25 Congress's -- is one of Congress's provisions,

1 divest because of this --

2 MR. FISHER: Mm-hmm.

3 JUSTICE SOTOMAYOR: -- why can't we
4 separate that out from how we analyze the
5 algorithm question?

6 And couldn't we sever the two
7 provisions to say: Divestiture is right, but
8 you can't force them not to discuss algorithm?

9 MR. FISHER: Well, I think the reason
10 why you can't do that is -- is -- is what
11 Mr. Francisco explained. I -- I direct you to a
12 case like Hunter against Underwood and just
13 analogize it to this situation.

14 If what you had is the government
15 saying: We -- we are shutting down TikTok or
16 requiring divestiture for two reasons, one,
17 because we think it helps the Democratic Party
18 too much and, number two, because we're
19 concerned about data, I think that first
20 interest would be a poison pill. That would be
21 an impermissible -- or because we think, you
22 know, there's too much pro-Catholic content on
23 TikTok.

24 I think there are some interests that
25 are just so constitutionally verboten that I

1 think that -- that just makes the Act
2 unconstitutional, and you can't go looking for
3 other interests.

4 You send it back to Congress: Look,
5 if you want to pass a data security law free and
6 clear of this impermissible interest, you go
7 ahead and do it.

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 JUSTICE GORSUCH: So, Mr. --

11 MR. FISHER: Can I say one other
12 thing, Justice Sotomayor, just because I think
13 it is also telling here that even if you didn't
14 buy that poison pill argument and you just asked
15 whether Congress would have passed this law,
16 something else that I think you might notice is,
17 even if all this Act goes into effect and the --
18 and the law goes through, TikTok gets to keep
19 all the data.

20 So wouldn't a data security law
21 require them to expunge that data or get rid of
22 it or something? I mean, it's a very weird law
23 if you're just looking at it through a data
24 security lens --

25 JUSTICE GORSUCH: Mr. --

1 MR. FISHER: -- and maybe Congress
2 could do better.

3 JUSTICE GORSUCH: -- Mr. Fisher, you
4 know, often we require divestiture for antitrust
5 reasons, for example. And, as I take it, your
6 argument here -- and we don't think of those as
7 normally implicating the First Amendment
8 interests of users or people who might speak
9 or --

10 MR. FISHER: Right.

11 JUSTICE GORSUCH: -- associate with
12 editors. And -- and the difference here is, as
13 I understand it, in your mind, that this law is
14 motivated by a content-based interest. Is -- is
15 that -- is that a fair summary?

16 MR. FISHER: I -- I think that -- the
17 only thing I would add to it is the prior step,
18 which it is -- it is regulating the speech
19 itself for content-based reasons, yes.

20 JUSTICE GORSUCH: Yeah. We don't do
21 that in the antitrust area --

22 MR. FISHER: Exactly.

23 JUSTICE GORSUCH: -- but you say this
24 law does.

25 MR. FISHER: Exactly.

1 JUSTICE GORSUCH: Okay. And -- and it
2 does on -- on the content -- covert content
3 manipulation side, do you think that's a
4 compelling interest or not? Forget about the
5 tailoring for a moment.

6 MR. FISHER: No. My point is is that
7 preventing content manipulation, whether it's
8 covert or not --

9 JUSTICE GORSUCH: Is simply not
10 compelling?

11 MR. FISHER: -- is -- is
12 impermissible. If what you mean by "content
13 manipulation" are the kinds of interests the
14 government is saying, like undermining trust in
15 our leaders --

16 JUSTICE GORSUCH: Yeah.

17 MR. FISHER: -- you know, undermining
18 trust in democracy --

19 JUSTICE GORSUCH: And that's Whitney
20 and Abrams in your mind?

21 MR. FISHER: -- that's Whitney and
22 Abrams. And, like, those cases --

23 JUSTICE GORSUCH: Got it. I got it.

24 MR. FISHER: Yeah.

25 JUSTICE GORSUCH: I got it.

1 JUSTICE KAGAN: So, Mr. Fisher --

2 JUSTICE GORSUCH: Just a couple more,
3 I'm sorry.

4 MR. FISHER: Yeah. Yeah.

5 JUSTICE GORSUCH: I'll finish up real
6 quick.

7 And so that would take us to the
8 tailoring question, and there, you say
9 disclosure and alerting Americans that there is
10 covert content manipulation possibility, putting
11 aside the -- the data collection part of it --

12 MR. FISHER: Yeah.

13 JUSTICE GORSUCH: -- telling Americans
14 that there -- there is content -- covert content
15 manipulation going on in TikTok or at least it's
16 possible.

17 And the government says that's just
18 simply not enough. And the D.C. Circuit did
19 too. And I wanted to give you a chance to
20 respond to that.

21 MR. FISHER: Right. So I think that's
22 the only aspect of the governmental interest
23 that could be permissible, the -- the covert
24 part.

25 And my answer, as you just said, is

1 disclosure solves that problem. And -- and --
2 and you have a law, a longstanding law which we
3 haven't talked about yet today, that gives you
4 that example. Again, under a
5 history-and-tradition test, you look at not just
6 precedent but laws and our traditions of our
7 country. Look at the Foreign Agent Registration
8 Act, passed -- passed in the run-up to World War
9 II, and the concern was Americans would be
10 controlled by foreign agents to speak and
11 advocate certain causes.

12 JUSTICE GORSUCH: We didn't ban them.
13 We just required disclosure.

14 MR. FISHER: You did not ban them.
15 All you did is require --

16 JUSTICE GORSUCH: Okay.

17 MR. FISHER: You, Congress.

18 JUSTICE GORSUCH: Yeah.

19 MR. FISHER: All Congress did was
20 require a disclosure.

21 JUSTICE GORSUCH: I certainly
22 wasn't -- I wasn't around for that.

23 (Laughter.)

24 JUSTICE GORSUCH: On the secret
25 evidence point, I'm concerned about the

1 government's attempt to lodge secret evidence in
2 this case without providing any mechanism for
3 opposing counsel to review it. And I expressed
4 that concern in Zubaydah, and I noted that there
5 are mechanisms to read in counsel and that other
6 countries, including our allies, often do that.
7 I just wanted to give you a chance to give me
8 your thoughts on that.

9 MR. FISHER: Yes, Justice Gorsuch. We
10 made all those arguments in the D.C. Circuit.
11 So there was a flurry of motion practice about
12 whether or not the government could rely on
13 classified evidence. Those motions were never
14 resolved.

15 What the D.C. Circuit did -- I think
16 you probably noticed from the decision -- is say
17 we're going to decide this case solely based on
18 the public record, and my understanding is
19 that's how it comes to this Court.

20 JUSTICE GORSUCH: It's interesting
21 that --

22 MR. FISHER: But, if the Court were
23 ever -- ever --

24 JUSTICE GORSUCH: It's interesting
25 that Congress hasn't acted in this field. I

1 mean, we have in the FISA area, you know, lots
2 of opportunity. They have regulated this area,
3 and it does seem like an area that Congress
4 might want to -- to pay attention to given the
5 increased appeals to secret evidence that the
6 government has made in recent years.

7 Last question for you. Could the new
8 administration after January 20th -- Mr.
9 Francisco suggested that it might -- be able to
10 extend the deadline even though -- if you were
11 to lose here by January 19th, is that possible
12 as you read the law?

13 MR. FISHER: I'm not sure it is. I'm
14 not sure -- maybe -- maybe that's a question for
15 the Solicitor General, but --

16 JUSTICE GORSUCH: Oh, it certainly is.
17 I --

18 (Laughter.)

19 JUSTICE GORSUCH: -- I thought maybe
20 I'd give you a chance too.

21 MR. FISHER: So, you know, as I
22 understand the law, it's 270 days unless
23 extended, and once that time runs, I'm not sure
24 you're talking about an extension anymore.

25 JUSTICE GORSUCH: Okay.

1 MR. FISHER: You know, there's ex post
2 facto law that --

3 JUSTICE GORSUCH: Yeah, yeah.

4 MR. FISHER: -- kind of does this
5 stuff.

6 JUSTICE GORSUCH: Got it. Thank you.

7 MR. FISHER: Yeah.

8 JUSTICE KAGAN: Can I take you back,
9 Mr. Fisher? Let's say I agree with you that if
10 you're talking about content manipulation,
11 that's an inherently content-based rationale for
12 acting. So, if Congress had passed a law that
13 says we hate the content manipulation that
14 TikTok is doing, that's strict scrutiny land,
15 and I don't know that the government can do
16 that, however important, you know, the -- the --
17 the interest.

18 But that's not what Congress is doing
19 here -- and this is the same kinds of questions
20 that I asked --

21 MR. FISHER: Mm-hmm.

22 JUSTICE KAGAN: -- Mr. Francisco --
23 because, if -- if -- let's take it as a given
24 that Congress actually can do whatever it wants
25 with respect to a wholly foreign corporation or

1 a foreign government.

2 MR. FISHER: Yeah.

3 JUSTICE KAGAN: And so Congress could
4 act with the intent to interfere with the
5 content manipulation that a foreign corporation
6 is doing. And so now we're in this strange
7 world where we're saying they can't act with
8 respect to TikTok. They could act with respect
9 to ByteDance.

10 Why isn't this Congress acting with
11 respect to ByteDance in the sense that all it's
12 doing is saying ByteDance has to divest, and
13 then TikTok can go about its business, use
14 whatever algorithm it wants, use whatever
15 content-moderation policies it wants, just like
16 everybody else does, choosing from everything
17 that's available on the open market?

18 MR. FISHER: So let me answer that
19 question in two parts from the perspective of
20 the creator Americans who want to use this
21 platform to speak to other Americans.

22 So the first thing is what the Act
23 does, as you said, Justice Kagan, is prevent us
24 from working with a application that is owned by
25 ByteDance that uses this algorithm. Well,

1 that's exactly what we want to do. That's our
2 editor and publisher of choice that we think
3 best disseminates our speech.

4 JUSTICE KAGAN: Yeah, but what I'm
5 saying to you is, if you just assume a world
6 without TikTok, that -- where it's only
7 ByteDance --

8 MR. FISHER: Yeah.

9 JUSTICE KAGAN: -- and you were trying
10 to -- you were trying to say, well, we really
11 want to work with ByteDance --

12 MR. FISHER: Yeah.

13 JUSTICE KAGAN: -- and Congress was
14 saying we think ByteDance presents national
15 security interests and they don't have First
16 Amendment rights, they're just a foreign
17 corporation, I think that in that case, the
18 government -- I mean, tell me if you think this
19 is wrong. It just doesn't matter --

20 MR. FISHER: Yeah.

21 JUSTICE KAGAN: -- that you have
22 creators who want to work with ByteDance because
23 ByteDance is a foreign corporation with no First
24 Amendment rights.

25 Is that what you're contesting?

1 MR. FISHER: So that is what I'm
2 contesting. So you said two things, though. So
3 I could be clear, there's two aspects. Do we
4 have a First Amendment right to work with a
5 foreign company or even a foreign country to
6 publish our speech? And then there's a national
7 security part that you put into that, which goes
8 to the justification.

9 JUSTICE KAGAN: Forget that.

10 MR. FISHER: Forget that. Yes. Let's
11 do that. So, if that is right, Justice Kagan,
12 then American creators have no right to -- to
13 make documentaries with the BBC. They can't --
14 they can't work with Al Jazeera if Congress
15 wants to prevent that. Any number of other
16 publications that are state-owned wholly or
17 partially.

18 And even under Lamont, remember, where
19 you're not even creating speech, you're just
20 listening, you know, that was speech from China
21 that the Court said you have a First Amendment
22 right to receive.

23 JUSTICE KAGAN: So would I be right to
24 say that your position is that because of the
25 users who want to associate and want to partner

1 with this foreign corporation, the foreign
2 corporation ends up having, in your view, the
3 exact same First Amendment rights as your users
4 do? In other words, it's -- it's irrelevant --

5 MR. FISHER: Yeah.

6 JUSTICE KAGAN: -- that the foreign
7 corporation doesn't have First Amendment rights.

8 MR. FISHER: I -- I don't think it's
9 irrelevant because you could imagine a situation
10 where no American distributor or speaker wants
11 to work with that.

12 But let me -- let me put it to you
13 this way: The Communist Manifesto written by
14 Karl Marx has no First Amendment standing on its
15 own in America, but if a bookstore wants to sell
16 that publication, I don't think Congress can
17 prevent it from doing so.

18 JUSTICE BARRETT: Well --

19 MR. FISHER: A --

20 JUSTICE BARRETT: Oh, sorry. Go
21 ahead.

22 MR. FISHER: No, I'm -- I'm fine.

23 JUSTICE BARRETT: No, no, no. It's --

24 JUSTICE KAGAN: I'm good.

25 JUSTICE BARRETT: Okay. So I want

1 to -- but I want to press you a little bit on
2 the distinction because, in Lamont, the --
3 the -- the prohibition worked directly on the
4 American, like you have to specifically request
5 this information that comes.

6 This is working -- kind of as Justice
7 Kagan's questions were -- were pressing you,
8 this is working on ByteDance. It's not saying
9 to your creators you can't post on ByteDance.
10 That's -- that's indirectly going to happen --

11 MR. FISHER: Right.

12 JUSTICE BARRETT: -- if ByteDance
13 chooses itself not to permit TikTok to walk away
14 with the code.

15 So does that matter, that distinction
16 between Lamont and this case?

17 MR. FISHER: No, for two reasons.

18 One, under the Sorrell case, you look
19 to not just the law itself but its practical
20 operation. And the practical operation does
21 prevent us from working with ByteDance. So
22 that's one answer.

23 And, you know, you bring up Lamont,
24 and Lamont's actually a very important case, as
25 I'm sure you all recognize here. It's important

1 to look not just at the Court's opinion but look
2 at the briefing in that case. The government
3 itself never came in and argued there's no right
4 to receive this information. That's the sort of
5 greater argument. All the government argued
6 was, of course, Americans have a right to
7 receive this, but it's just not so much of a
8 burden to require them to raise their hand to
9 get it.

10 So Archibald Cox, when he was the
11 Solicitor General, said to the Court quite
12 explicitly in the brief we're not even going to
13 make this argument because we think it's so
14 contrary to history and tradition. All we're
15 going to argue is the burden isn't enough.

16 Now what happened is the D.C. Circuit
17 kind of turned that upside down and said, oh,
18 Lamont's just a case about the burden. Well,
19 that's because that's the only argument the
20 government was even willing to make in this
21 Court. There was no argument that Americans
22 didn't have the right to hear that speech.

23 JUSTICE BARRETT: What about -- so I
24 think this goes to Justice Gorsuch's questions
25 about antitrust divestiture. Let's say that --

1 let's say that for antitrust reasons or -- or
2 let's even say not for that. Let's say, for
3 suspect First Amendment reasons, Congress tells
4 Jeff Bezos that he has to divest in the
5 Washington Post. You know, he can no longer own
6 the Post. And let's say that neither Bezos nor
7 the Post challenges that. But let's say that
8 you represent clients who really like the Post
9 as it was, who really want to keep receiving the
10 Post, who really want to publish op eds in the
11 Post.

12 MR. FISHER: Yeah.

13 JUSTICE BARRETT: Would you have
14 standing? Like, what kind of a claim would you
15 be making then?

16 MR. FISHER: I believe so, Justice
17 Barrett. And the Court has cited Lamont in
18 other cases in more recent years to say we've
19 recognized the right of American listeners to
20 receive information from others. And remember
21 even that is a lot -- that's only a small part
22 of the argument I'm making on behalf of the
23 creators.

24 You know, I don't mean to diminish
25 Mr. Francisco's arguments on behalf of the

1 company and ByteDance, but the core speech in
2 front of you in this case are the videos and
3 other forms of communication that people like my
4 clients are posting by the millions every day on
5 this platform to share with other Americans.

6 JUSTICE BARRETT: Can you win if -- is
7 it possible for you to win and Mr. Francisco to
8 lose? Or you rise or fall together?

9 MR. FISHER: No, I think it's
10 possible.

11 JUSTICE BARRETT: How?

12 MR. FISHER: I mean, I don't think we
13 should.

14 (Laughter.)

15 MR. FISHER: But -- but --

16 JUSTICE BARRETT: Well, is it possible
17 for you to win and him to lose? I mean, you
18 want to win.

19 MR. FISHER: Well, let me put it this
20 way: If you were to conclude that something
21 about the corporate ownership structure -- and I
22 think there was some conversation about this
23 earlier -- impeded Mr. Francisco from being able
24 to assert full-throated First Amendment rights
25 in this case, I would step in and say, well,

1 certainly, we can do that and get you to the
2 strict scrutiny.

3 And then the arguments pretty much
4 line up. Then you're in a question of, can the
5 government satisfy strict scrutiny? And I
6 think, Mr. Chief Justice, you asked about do we
7 have cases for this and that. I think that the
8 idea is, yes, we have cases that say once you're
9 in strict scrutiny that regulating the content
10 because you don't think it's going to be
11 pro-American enough or it's going to be too
12 pro-foreign interest is just verboten under the
13 First Amendment. That's the history and
14 tradition.

15 And, Justice Kavanaugh, when you asked
16 about the broadcast cases, they're grounded not
17 just in scarcity, but they're grounded in
18 scarcity in a particular way, and it has to do
19 with the absolute need Congress has for
20 licensing in a world of scarce resources. And
21 so that's the very small carveout that even in
22 Turner the Court wouldn't extend to cable
23 television that exists for broadcast licensing.

24 And if you look in the 200-plus years
25 of our country for any other example of foreign

1 ownership of media being regulated by Congress,
2 let alone being permitted in the case law, you
3 are not going to find it, and I think the reason
4 why is because everybody has understood that if
5 you're not in a world of scarcity where
6 licensing is impossible, you cannot give the
7 government and, in this -- in this more extreme
8 example, the President himself unbridled
9 discretion to choose who is a proper owner of a
10 speech platform in this country.

11 Because it is so hand-in-hand with
12 viewpoint, as I said earlier, any number of
13 owners of big media enterprises, whether they be
14 Americans or foreign citizens, could be accused
15 of having a particular viewpoint, but speakers
16 who engage in those platforms have choices they
17 can make.

18 And so, you know, on behalf of our
19 creator clients, we find it -- we find it not at
20 all satisfactory to be told: Well, look, just
21 go post somewhere else. You know, it's not
22 enough to tell a writer: Well, you can't
23 publish an op ed in the Wall Street Journal
24 because you can publish it in the New York Times
25 instead. Just like here, to say: You can

1 publish it on Instagram or some other platform,
2 not just TikTok.

3 TikTok has a distinct editorial and
4 publicational perspective, and it particularly
5 benefits people like my clients, who are not
6 famous people. They're not actors from
7 Hollywood who have a lot of people following
8 them. They're ordinary American citizens whose
9 content that they create on the platform gets
10 privileged by way of the quality of that
11 content.

12 And that's what's so powerful about
13 the platform. So whether you're an ordinary
14 American citizen or, I might add, whether you're
15 a presidential candidate in our last election,
16 if you want to reach new and different
17 audiences, TikTok is the place people go.

18 JUSTICE ALITO: Well, this may not
19 make any difference for constitutional purposes,
20 but just out of curiosity, I'd like you to
21 explain what the practical consequences would
22 likely be for your clients if TikTok went dark,
23 as Mr. Francisco put it.

24 There, I assume, is a great demand for
25 what TikTok provides, and if TikTok was no

1 longer there to provide what your clients really
2 want, is there a reason to doubt that some other
3 social media company would not jump in and take
4 advantage of this very lucrative market?

5 MR. FISHER: There are two reasons,
6 Justice Alito. One is many of the declarations
7 from my clients actually explain they have tried
8 on other platforms to generate the kind of
9 audience and engagement they've been able to on
10 TikTok, and they've fallen dramatically --

11 JUSTICE ALITO: Yeah, I know, they
12 haven't so far. And I'm just -- you know, I'm
13 just wondering whether this is like somebody's
14 attachment to an old article of clothing.

15 I mean, I really love this old shirt
16 because I've been wearing this old shirt, but I
17 could go out and buy something exactly like
18 that, but, no, I like the old shirt.

19 Is that what we have here, or is there
20 some -- some reason to think that only
21 ByteDance --

22 MR. FISHER: Yeah.

23 JUSTICE ALITO: -- has this -- can --
24 that ByteDance has devised this magical
25 algorithm that all of the geniuses at Meta and

1 all of these other social media companies, they
2 couldn't -- no matter, if they put their minds
3 to it, they couldn't come up with this magical
4 thing?

5 MR. FISHER: I -- I think,
6 empirically, the other companies have been
7 trying for a few years to catch up with TikTok
8 and replicate it and have been very
9 unsuccessful, and so that ought to tell you
10 something.

11 And so just imagine the algorithm here
12 as a collection of thousands of editors. You
13 know, imagine the floors of an office building
14 being filled with a collection of editors. You
15 could imagine a situation where that collection
16 of genius that is on a particular floor cannot
17 be replicated by another group of people.

18 JUSTICE ALITO: Okay. All right.

19 MR. FISHER: And that's kind of what
20 you have here.

21 JUSTICE ALITO: All right. I
22 understand that.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 Anything further, Justice Alito?

2 JUSTICE ALITO: Yeah, one other -- one
3 other question. I'm intrigued by your Mt.
4 Healthy, Hunter versus Underwood argument. I
5 mean, maybe you're right, but Mt. Healthy arose
6 in an entirely different context, where you're
7 trying to get to an employer's motivation.

8 Hunter verse -- versus Underwood
9 involved an extreme situation where the Court
10 looked at the records of a state constitutional
11 convention and came to the conclusion apparently
12 that racism was the only motivation for what was
13 done. But it does seem to me to be potentially
14 quite unworkable and contrary to what we've
15 generally said about legislative intent to apply
16 the Mt. Healthy framework to a congressional
17 enactment.

18 Do you -- do you -- do you recognize
19 or do you -- do you acknowledge that that would
20 be very difficult? Because, when an act of
21 Congress is passed, there could be more than 250
22 different motivations for the votes that were
23 cast by the members.

24 MR. FISHER: Mm-hmm. Yeah, I totally
25 understand that. And, in Hunter, the Court

1 actually engaged with that problem to some
2 degree, and what Hunter said is, to avoid that
3 problem, we're going to look just to two things.
4 One is the state's brief, which I would say is
5 the Solicitor General's brief by comparison
6 here, and the text of the law.

7 And, here, that's the only thing I
8 need to rely on to get you to the place that
9 they wouldn't have announced -- wouldn't have
10 enacted this --

11 JUSTICE ALITO: Well, it gets you to
12 the -- it gets you to the place that this was
13 part of what motivated Congress, but why does it
14 get you home?

15 MR. FISHER: Well --

16 JUSTICE ALITO: Particularly when
17 there's a severability clause in this Act.

18 MR. FISHER: -- it can't be only part
19 of it. It has to be enough to sustain the
20 entire Act or at least the parts that you
21 wouldn't sever from the Act.

22 And so I think the reason why is
23 because it's not just the content recommendation
24 algorithm part that can be theoretically, I
25 guess, severed out. It's also the covered

1 company provisions, and it's just the whole
2 approach of the statute that is based on
3 content, not on data security.

4 JUSTICE ALITO: All right. Thank you.

5 MR. FISHER: So -- okay.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 JUSTICE SOTOMAYOR: No. I'll save it
9 for the SG.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?
11 Justice Gorsuch?

12 Justice Kavanaugh?

13 Justice Jackson?

14 JUSTICE JACKSON: One quick question.
15 You -- you repeatedly say that from your
16 perspective, the government's motivation is that
17 the content might be too anti-American or too
18 pro-China, et cetera.

19 MR. FISHER: Uh-huh.

20 JUSTICE JACKSON: So that's why you
21 think this is a content-based restriction.

22 But I guess I'm curious if you would
23 say the same thing if the government had
24 articulated its rationale as saying, you know,
25 our motivation is to limit foreign -- foreign

1 interference --

2 MR. FISHER: Yeah.

3 JUSTICE JACKSON: -- in American
4 social media platforms or discourse. Isn't that
5 a different motivation --

6 MR. FISHER: I wouldn't -- I --

7 JUSTICE JACKSON: -- from the
8 standpoint of how we characterize this?

9 MR. FISHER: I agree, but then the
10 question I would ask if the government said
11 that, which I think kind of in the reply brief
12 maybe the government does say that, is that how
13 on earth are you then serving a national
14 security interest?

15 You know, if all you're doing is just
16 saying we don't like a foreign country
17 rearranging cat and dance videos, like, it's
18 hard to come in and make a national security
19 argument.

20 So the only way you get to national
21 security, which is the government's own
22 argument, is to look at the substance that's
23 being rearranged and say we don't like the way
24 the substance is going to be rearranged and --
25 and curated differently.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 General Prelogar.

5 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

6 ON BEHALF OF THE RESPONDENT

7 GENERAL PRELOGAR: Mr. Chief Justice,
8 and may it please the Court:

9 The Chinese government's control of
10 TikTok poses a grave threat to national
11 security. No one disputes that the PRC seeks to
12 undermine U.S. interests by amassing vast
13 quantities of sensitive data about Americans and
14 by engaging in covert influence operations, and
15 no one disputes that the PRC pursues those goals
16 by compelling companies like ByteDance to
17 secretly turn over data and carry out PRC
18 directives.

19 Those realities mean that the Chinese
20 government could weaponize TikTok at any time to
21 harm the United States. TikTok collects
22 unprecedented amounts of personal data. And, as
23 Justice Sotomayor noted, it's not just about the
24 170 million American users but also about their
25 non-user contacts, who might not even be

1 engaging with the platform.

2 That data would be incredibly valuable
3 to the PRC. For years, the Chinese government
4 has sought to build detailed profiles about
5 Americans, where we live and work, who our
6 friends and coworkers are, what our interests
7 are, and what our vices are.

8 TikTok's immense data set would give
9 the PRC a powerful tool for harassment,
10 recruitment, and espionage. On top of that, the
11 Chinese government's control over TikTok gives
12 it a potent weapon for covert influence
13 operations. And my friends are wrong to suggest
14 that Congress was seeking to suppress specific
15 types of content or specific types of
16 viewpoints.

17 Instead, the national security harm
18 arises from the very fact of a foreign
19 adversary's capacity to secretly manipulate the
20 platform to advance its geopolitical goals in
21 whatever form that kind of covert operation
22 might take.

23 The Act addresses the threat of
24 foreign adversary control with laser-like focus.
25 It requires only divestiture of TikTok to

1 prevent Chinese government control, and that
2 divestiture remedy follows a long tradition of
3 barring foreign control of U.S. communications
4 channels and other critical infrastructure.

5 So, no matter what level of First
6 Amendment scrutiny applies, this Act is valid
7 because it's narrowly tailored to address
8 compelling national security threats.

9 Now my friend, Mr. Fisher, just
10 emphasized and I acknowledge that millions of
11 Americans enjoy expressing themselves on this
12 platform. But the important thing to recognize
13 is that the Act leaves all of that speech
14 unrestricted once TikTok is freed from foreign
15 adversary control.

16 The First Amendment does not bar
17 Congress from taking that critical and targeted
18 step to protect our nation's security.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Is there any
21 difference between content manipulation by a
22 non-U.S. company as opposed to a U.S. company?
23 I didn't hear Mr. Fisher make a distinction
24 between the two.

25 GENERAL PRELOGAR: Yes. And I think

1 the important thing to recognize is that the Act
2 here is targeting covert content manipulation by
3 a foreign adversary nation.

4 Now I understand my friends to say --
5 JUSTICE THOMAS: What difference does
6 that make?

7 GENERAL PRELOGAR: The difference is
8 that there is no protected First Amendment right
9 for a foreign adversary to exploit its control
10 over a speech platform.

11 JUSTICE THOMAS: No, I mean the
12 difference -- the difference between covert and
13 non-covert.

14 GENERAL PRELOGAR: So I think that --
15 that Congress's concern with a covert operation
16 was that a foreign adversary could effectively
17 weaponize this platform behind the scenes in
18 order to achieve any number of geopolitical
19 goals.

20 Here -- here are some of the examples
21 that come to mind. One of the pages out of the
22 playbook here is for a foreign adversary to
23 simply try to get Americans arguing with one
24 another to create chaos and distraction in order
25 to weaken the United States as a general matter

1 and distract from any activities that the
2 foreign adversary --

3 JUSTICE KAGAN: I guess, what --

4 GENERAL PRELOGAR: -- might want to
5 conduct on the world stage.

6 JUSTICE KAGAN: -- what do you mean by
7 "covert," though? I mean, does "covert" just
8 mean it's hard to figure out how the algorithm
9 works? Because we could say that about every
10 algorithm.

11 GENERAL PRELOGAR: No. The covert
12 nature of it comes from the fact that it's not
13 apparent that the PRC is the one behind the
14 scenes pulling the strings here and deciding
15 exactly what content is going to be made to
16 appear on the site.

17 And another way that the PRC --

18 JUSTICE KAGAN: It's just because we
19 don't know that China's behind it? That's what
20 "covert" means?

21 GENERAL PRELOGAR: Well, I think --

22 JUSTICE KAGAN: It doesn't have
23 anything to do with the difficulty of figuring
24 out what the algorithm is doing? It's just
25 because people don't know that China is pulling

1 the strings? That's what "covert" means?

2 GENERAL PRELOGAR: What it means is
3 that Americans are on this platform thinking
4 that they are speaking to one another, and this
5 recommendation engine that is apparently so
6 valuable is organically directing their speech
7 to each other. And what is covert is that the
8 PRC, a foreign adversary nation, is instead
9 exploiting a vulnerability in the system to
10 suppress and silence views --

11 JUSTICE KAGAN: Well, that's all it
12 means, that, like, people don't know that
13 China's behind it? Like, everybody now knows
14 that China is behind it.

15 (Laughter.)

16 GENERAL PRELOGAR: No, but it -- but
17 it's the specific -- the specific content that's
18 being manipulated would be unapparent. And so I
19 think that --

20 JUSTICE KAGAN: Well, that's true of
21 every search engine. I mean, you can -- you can
22 take any of these algorithms, whether it's X or
23 whether it's, you know, you name it -- what are
24 the new ones, Bluesky -- I mean, none of
25 these -- none of these are apparent, right?

1 You -- you get what you get and you think that's
2 puzzling. And --

3 (Laughter.)

4 JUSTICE KAGAN: -- and it's all a
5 little bit of a black box. So you can't just
6 mean it's a black box, it's covert. They're all
7 black boxes. And if you just mean what's covert
8 is the fact that there's China behind it, I
9 mean, honestly, really, like, everybody does
10 know now that there's China behind it.

11 So I just don't get what this "covert"
12 word does for you.

13 GENERAL PRELOGAR: I think the problem
14 with just saying, as a general matter, China has
15 this capability and might at some point be able
16 to exercise it and manipulate the platform is it
17 doesn't put anyone on notice of when that
18 influence operation is actually happening, and,
19 therefore, it doesn't guard against the national
20 security harm from the operation itself.

21 JUSTICE GORSUCH: General, isn't that
22 a pretty paternalistic point of view? I mean,
23 don't we normally assume that the best remedy
24 for problematic speech is counter-speech? And,
25 you know, TikTok says it could even live with

1 a -- a disclaimer on its website saying this can
2 be covertly manipulated by China in case anybody
3 were left in doubt after today about that
4 possibility. So you're saying that won't work
5 because?

6 GENERAL PRELOGAR: That won't work
7 because it is such a generic generalized
8 disclosure that it wouldn't put anyone
9 reasonably on notice about when it's actually
10 happening. And the example I've --

11 JUSTICE GORSUCH: That's your best --

12 GENERAL PRELOGAR: -- been thinking
13 about is --

14 JUSTICE GORSUCH: -- that's your best
15 argument, is that the average American won't be
16 able to figure out that the cat feed -- feed
17 he's getting on TikTok could be manipulated even
18 though there's a disclosure saying it could be
19 manipulated?

20 GENERAL PRELOGAR: But imagine if you
21 walked into a store and it had a sign that said
22 one of one million products in this store causes
23 cancer. That is not going to put you on notice
24 about what product is actually jeopardizing your
25 health. And I think that's roughly equivalent

1 to the type of disclosure they're contemplating
2 here.

3 They brought up the example of the
4 Foreign Agents Registration Act, FARA.

5 JUSTICE GORSUCH: If that -- if that's
6 true --

7 GENERAL PRELOGAR: There, you have to
8 disclose the actual content.

9 JUSTICE GORSUCH: -- if that's true,
10 then wouldn't that be true for all social media
11 companies for all content? I mean, every
12 editor, every newspaper in its editorial room
13 makes decisions about what it's going to run and
14 how it's going to say it. And every algorithm
15 has preferences, whether it's domestic or
16 foreign. And nobody really knows exactly when
17 those editorial decisions are being made or how,
18 but they're generally aware, and we think that
19 that's enough.

20 GENERAL PRELOGAR: I think, though,
21 that there is a real risk that when a foreign
22 adversary has control of that kind of mechanism
23 and a speech platform in the United States, it
24 could weaponize -- weaponize that platform to
25 harm United States interests. And one of the

1 key ways that the PRC --

2 JUSTICE GORSUCH: That -- I'm --

3 I'm --

4 GENERAL PRELOGAR: -- flexes its
5 muscle is to suppress speech.

6 JUSTICE GORSUCH: General, I'm sorry
7 to interrupt you, but I'm -- again, I'm not --
8 not -- we're not arguing about the compelling
9 interest. We're arguing about the tailoring.

10 GENERAL PRELOGAR: Right. And so I
11 guess what I would say -- you began by saying
12 the -- the cure for concerning speech is
13 counter-speech. Here, I dispute the premise
14 that Congress was specifically concerned about
15 any particular subject or any particular
16 viewpoint. It wanted to close off the
17 capability of a foreign government.

18 But, in any event, it's very hard to
19 engage in counter-speech when you don't know
20 because someone is secretly manipulating the
21 platform behind the scenes. And, in particular,
22 what the PRC has the capability to do --

23 JUSTICE GORSUCH: Well, wouldn't the
24 same thing be true --

25 GENERAL PRELOGAR: -- is simply

1 silence American voices.

2 JUSTICE GORSUCH: -- with a newspaper
3 owned by a foreign company and a foreign
4 government? You wouldn't know when it's
5 exercising editorial discretion about this
6 article or that article or how it's doing it, so
7 maybe we just need to shut down the Oxford
8 University Press in America or, you pick it, any
9 other foreign-owned -- Politico I was told today
10 is owned by Germany.

11 GENERAL PRELOGAR: So what that --

12 JUSTICE GORSUCH: That would all be
13 okay on your theory so long as Congress
14 designates that country a foreign adversary?

15 GENERAL PRELOGAR: We are not asking
16 the Court to articulate bright-line rules to
17 govern all kinds of hypothetical situations.

18 JUSTICE GORSUCH: I -- I understand
19 that, but I am testing --

20 GENERAL PRELOGAR: And --

21 JUSTICE GORSUCH: -- I am testing your
22 argument.

23 GENERAL PRELOGAR: Yes. And in -- and
24 what I want to acknowledge is that sometimes the
25 Court has recognized that a speaker-based

1 preference might reflect a content-based
2 preference. And in the context of ownership of
3 a newspaper, for example, in part, because a
4 newspaper is a one-way channel of communication
5 and is generally understood to represent to some
6 extent its publisher's views, maybe the Court
7 would more readily infer that a regulation
8 targeting that is actually aiming to target
9 conduct -- content.

10 JUSTICE GORSUCH: Again, I'm talking
11 about the --

12 GENERAL PRELOGAR: But I don't think
13 that the Court could draw the same conclusion
14 here.

15 JUSTICE GORSUCH: -- I'm not talking
16 about the compelling interest or any of that.

17 GENERAL PRELOGAR: Right.

18 JUSTICE GORSUCH: I'm talking about
19 the tailoring. And -- and you're saying we have
20 no alternative but to stop this speech
21 altogether. We can't -- we can't rely on
22 disclosure. But you say that wouldn't apply to
23 Politico or to the Oxford University Press
24 because?

25 GENERAL PRELOGAR: In the circumstance

1 where you have a newspaper that is understood to
2 reflect its publisher's views, then you might
3 think that disclosure would be a more adequate
4 remedy there because it's not just holding
5 itself out as a forum for speech between other
6 people.

7 I think social media platforms do
8 raise distinct interests in this regard because
9 what people think when they're engaging with
10 TikTok is that it's organically feeding them
11 videos based on the recommendation engine. And
12 if actually China is behind the scenes engaging
13 in this kind of covert operation, it does
14 present a distinct national security risk.

15 Of course, the other big difference
16 with a newspaper is it's not likely to be
17 collecting sensitive personal information about
18 170 million-plus people and then having the
19 capacity to send that back to a foreign
20 adversary.

21 JUSTICE BARRETT: General Prelogar,
22 can I --

23 CHIEF JUSTICE ROBERTS: Counsel --

24 JUSTICE BARRETT: Oh. Go ahead.

25 CHIEF JUSTICE ROBERTS: -- I was just

1 going to say, did I understand you to say a few
2 minutes ago that one problem that Byte -- is
3 that ByteDance might be, through TikTok, trying
4 to get Americans to argue with each other?

5 GENERAL PRELOGAR: That it might be
6 just trying to foment disruption or --

7 CHIEF JUSTICE ROBERTS: If they do, I
8 say they're winning.

9 (Laughter.)

10 GENERAL PRELOGAR: That might very
11 well be true, Mr. Chief Justice, and I think the
12 point I'm trying to make is that China is a
13 foreign adversary nation that looks for every
14 opportunity it has to weaken the United States
15 and to try to threaten our national security.
16 And if it has control over this key
17 communications channel, it's hard to predict ex
18 ante exactly how it's going to use that as a
19 tool to harm our interests.

20 But we know it's going to try first
21 and foremost by seeking to get the data of these
22 American users, which would be of a piece of all
23 of the activity the PRC has already undertaken
24 to breach our laws, hack OPM, for example, and
25 exfiltrate the background files and security

1 clearances of 20 million government employees,
2 the breach of Equifax to get sensitive financial
3 data, Anthem to get sensitive healthcare data.

4 We know that the PRC has a voracious
5 appetite to get its hands on as much information
6 about Americans as possible, and that creates a
7 potent weapon here because the PRC could command
8 that ByteDance comply with any request it gives
9 to obtain that data that's in the hands of the
10 U.S. subsidiary.

11 CHIEF JUSTICE ROBERTS: Thank you.

12 JUSTICE ALITO: Suppose --

13 JUSTICE BARRETT: General Prelogar --
14 go ahead.

15 JUSTICE ALITO: Suppose that TikTok
16 had no connection whatsoever with any foreign
17 government. It was owned instead by an
18 immensely, immensely rich multinational
19 corporation, and Congress concluded that this
20 multinational corporation really has it in for
21 the United States and is going to use this
22 extremely popular platform to do everything it
23 can to undermine the United States in all the
24 ways in which you think that TikTok may -- may
25 pursue at the direction of the PRC.

1 Would this -- would that be the same
2 case?

3 GENERAL PRELOGAR: I think there would
4 be a first-order question of whether the
5 multinational corporation itself has First
6 Amendment rights.

7 JUSTICE ALITO: All right. It's a --
8 it's an American corporation.

9 GENERAL PRELOGAR: So, if it were an
10 American corporation, I think that -- and
11 Congress disagreed with the viewpoints or
12 content the corporation would display,
13 obviously, that's a direct regulation of
14 protected speech, and it would trigger strict
15 scrutiny.

16 I think that's different in kind from
17 what Congress was worried about here, which was
18 not regulating speech as such but instead
19 regulating foreign adversary control and --

20 JUSTICE ALITO: So your whole -- your
21 argument depends on the fact that what is at
22 bottom here is the -- the People's Republic of
23 China using TikTok. That's what your argument
24 depends on. If this were an American
25 corporation, it would be an entirely different

1 thing.

2 GENERAL PRELOGAR: Exactly. And the
3 reason we know this statute is different is
4 because all of the same speech that's happening
5 on TikTok could happen post-divestiture. The
6 Act doesn't regulate that at all. So it's not
7 saying you can't have pro-China speech, you
8 can't have anti-American speech. It's not
9 regulating the algorithm. TikTok, if it were
10 able to do so, could use precisely the same
11 algorithm to display the same content by the
12 same users.

13 All the Act is doing is trying to
14 surgically remove the ability of a foreign
15 adversary nation to get our data and to be able
16 to exercise control over the platform.

17 JUSTICE BARRETT: General Prelogar --
18 oh, sorry.

19 JUSTICE SOTOMAYOR: I'm sorry.

20 JUSTICE BARRETT: I just wanted you to
21 respond to Mr. Fisher's argument about the
22 rights of Americans to receive information, say,
23 from the PRC or anyone else and that even if
24 ByteDance did not itself have First Amendment
25 rights, that Americans would have a First

1 Amendment right to -- to receive that
2 information in the Lamont sense.

3 GENERAL PRELOGAR: Yes. So I think
4 that Lamont reflected a principle that there can
5 be a right of American listeners to receive
6 information. And if Congress is directly
7 regulating that based on disagreement with the
8 speech that's being sent into this country,
9 that's obviously going to trigger heightened
10 scrutiny under the First Amendment.

11 But, here, I think the users have to
12 be asserting a different type of interest
13 because what Congress was safeguarding against
14 was not the ability of TikTok to continue to
15 operate or the users to post content. It was
16 focused only on foreign adversary control.

17 And so the users would have to
18 demonstrate that they have some unqualified
19 First Amendment right to post on a platform
20 that's controlled by a foreign adversary, which
21 could use that access to then threaten our
22 nation's security by gathering data on tens or
23 hundreds of millions of Americans and also use
24 it for covert influence operations of whatever
25 form.

1 And I don't think there's a First
2 Amendment right to do that.

3 JUSTICE KAGAN: I was trying to think
4 of whether there's a historical analog here, and
5 this is what I came up with, and you can tell me
6 whether it's fallacious.

7 You know, in the mid-20th century, we
8 were very concerned about the Soviet Union and
9 what the Soviet Union was doing in this country.
10 And the Communist Party of the United States at
11 that time was integrally attached to the
12 Communist International, which was essentially a
13 Soviet operation, right?

14 So, if Congress had said: Well, it's
15 very nice, we can have the Communist Party
16 U.S.A., but it has to divest, it has to
17 completely divorce itself from the Comintern and
18 from any international ties that it has, do you
19 think that that would have been absolutely fine?
20 And so, if the answer is yes, yes, it would have
21 been fine, it's just like this case, or, if the
22 answer is no, why is it not like this case?

23 GENERAL PRELOGAR: So I guess I think
24 I would need to know info -- more information
25 about how the international organization is able

1 to exercise control over the American affiliate
2 and if it had the capacity, for example, to, in
3 an unqualified fashion, gather data from that
4 affiliate in a way that was going to jeopardize
5 our nation's security or --

6 JUSTICE KAGAN: Well, I'm talking more
7 about --

8 GENERAL PRELOGAR: Yeah.

9 JUSTICE KAGAN: -- sort of the
10 content. Let's put --

11 GENERAL PRELOGAR: Yeah.

12 JUSTICE KAGAN: -- the data collection
13 piece of this aside, which seems not very
14 pertinent to my 1950s analog.

15 But, you know, we were very concerned
16 about the kind of speech that the Communist
17 Party was making in the United States, and it
18 turns out that that content was pretty well
19 scripted someplace else.

20 GENERAL PRELOGAR: I think, if it was
21 specifically a concern about the content, then
22 that would trigger heightened scrutiny under the
23 First Amendment. We're not trying to run away
24 from that principle here. Instead, we're
25 making, I think, a narrower argument.

1 JUSTICE KAGAN: Well, then I think
2 that -- that you're a little -- I think you've
3 just given your thing away because content
4 manipulation is a content-based rationale.

5 We think that this foreign government
6 is going to manipulate content in a way that
7 will -- that concerns us and may very well
8 affect our national security interests. Well,
9 that's exactly what they thought about Communist
10 Party speech in the 1950s, which was being
11 scripted in large part by international
12 organizations or directly by the Soviet Union.

13 GENERAL PRELOGAR: I disagree that the
14 concern with covert content manipulation is
15 itself content-based or that it looks anything
16 like the kinds of laws this Court has previously
17 said are content-based.

18 The Court most recently in *City of*
19 *Austin* said you only have a content-based law
20 when Congress is setting out to discriminate
21 against particular subject matters or particular
22 viewpoints.

23 So it's not enough that the law is --
24 is regulating in the space that involves content
25 in some way. You have to have this motive by

1 Congress to actually want to suppress speech on
2 certain topics or certain viewpoints.

3 Here, Congress just wants to cut the
4 PRC out of the equation altogether, and all of
5 the same speech could continue to happen on the
6 platform.

7 It's like patching up a backdoor
8 vulnerability that the PRC has that we can't
9 totally see around all the corners to imagine
10 how it could use it against our interests, but
11 we know the PRC will do whatever it can to try.

12 And I think that is different in kind
13 from imputing to Congress some motive to
14 specifically get more speech on certain topics
15 or with certain viewpoints. You know, this law
16 was passed by broad bipartisan majorities in
17 both houses of Congress, and our legislatures --
18 our legislators don't always agree on
19 everything. I think it's unlikely that all of
20 them had exactly the same views about what's
21 good content on TikTok or what are good
22 viewpoints. They weren't united on that.

23 What they were united around was the
24 idea that it is a grave threat to our nation if
25 the PRC can itself behind the scenes be

1 controlling how this platform operates.

2 JUSTICE ALITO: Why doesn't this --
3 why doesn't this Act classify on the basis of
4 speaker?

5 GENERAL PRELOGAR: I do think that
6 when it comes to the PRC and ByteDance, you
7 could treat this as a speaker-based restriction.

8 JUSTICE ALITO: And aren't speech --
9 speaker-based restrictions almost always
10 viewpoint-based restrictions, content-based
11 restrictions?

12 GENERAL PRELOGAR: The Court has said
13 it depends. It hasn't applied an inflexible
14 rule that anytime you are regulating certain
15 speakers you are invariably regulating based on
16 content. Instead, the Court has said it
17 warrants closer consideration.

18 And, here, if you look at the U.S.
19 speakers, TikTok U.S. and the users, none of
20 them are being regulated in a way that suggests
21 its disagreement with their content. It's all
22 about what our foreign adversary is doing with
23 respect to the platform.

24 JUSTICE ALITO: It's hard for me to --
25 it's hard for me to think of situations, maybe

1 they exist, where a classification based on
2 speaker is not viewpoint- or content-based
3 restrictions.

4 I mean, somebody says Joe can't talk
5 anymore. We're going to shut Joe up. And we
6 don't know what he's going to say tomorrow or
7 two weeks from now. We don't know what he's
8 going to discuss. But whatever he says is bad
9 because Joe is a bad person.

10 I mean, that's -- that's viewpoint-
11 and content-based, isn't it?

12 GENERAL PRELOGAR: I think, when it
13 comes to a foreign adversary, it's not right to
14 view it that way, and the reason for that again
15 is this is a sophisticated adversary nation, and
16 we can't just simplistically say: Oh, what the
17 PRC is going to want is to see more pro-China
18 content on this app.

19 As Chief Judge Srinivasan observed,
20 there are various ways that the PRC could try to
21 create some kind of false flag operation and
22 actually promote anti-China content, not to
23 dictate how Americans should think about things
24 but simply to create some trumped-up
25 justification for a military or economic action

1 that the foreign adversary wants to take against
2 us.

3 And I don't think a concern with
4 trying to ward off that capability --

5 JUSTICE GORSUCH: Why -- why isn't
6 that -- why isn't that viewpoint or content
7 still? We don't know what the content's going
8 to be, but we know Joe is bad.

9 GENERAL PRELOGAR: Because I think the
10 better classification is to recognize that what
11 we're trying to prevent is not the specific
12 subject matter, the specific viewpoints, but the
13 technical capability of a foreign adversary
14 nation to use a communications channel against
15 this.

16 JUSTICE GORSUCH: I guess I'm just
17 struggling how covert content manipulation isn't
18 content-based restriction.

19 GENERAL PRELOGAR: So, again, it's
20 because --

21 JUSTICE GORSUCH: I mean, the word --
22 it's kind of hard to avoid the word "content" --

23 GENERAL PRELOGAR: I don't --

24 JUSTICE GORSUCH: -- and it's kind of
25 hard to avoid the word "viewpoint" here, isn't

1 it?

2 GENERAL PRELOGAR: I don't dispute
3 that it's related to content, but I don't think
4 it reflects Congress seeking to set out in
5 advance what kind of speech we should have
6 reflecting certain views on certain topics.

7 Instead, it's about trying to close
8 off a vulnerability that our foreign adversary
9 nation could exploit.

10 And I would be remiss if I didn't
11 point out that even if you thought this was
12 content-based, all that means is that we're in
13 strict scrutiny. And, as the D.C. Circuit
14 recognized here, we think that this law serves
15 compelling national security concerns that sound
16 in some of the same arguments that I'm making
17 here and that have a longstanding correspondence
18 to history and tradition --

19 JUSTICE GORSUCH: And then we get to
20 the --

21 GENERAL PRELOGAR: -- of trying to
22 prevent foreign control.

23 JUSTICE GORSUCH: -- and then we get
24 to the question whether there's a less
25 restrictive means, I get that, and whether

1 disclosure might suffice.

2 On -- on -- on -- on the data security
3 point, your friends on the other side make the
4 argument that if that were the concern, Congress
5 could ban TikTok U.S. from sharing data with
6 anyone on -- on pains of penalties that would
7 put people in prison and shut the company down
8 in the future, as the government did, for
9 example, with Arthur Andersen.

10 Why -- why isn't that a less
11 restrictive means available?

12 GENERAL PRELOGAR: So I was surprised
13 to hear Petitioner offer that up today because
14 there was a long course of discussion between
15 the executive branch and ByteDance and TikTok
16 leading up to Congress's enactment of this Act
17 that spanned over four years, an extensive
18 conversation about what limitations could be
19 placed to protect Americans' data.

20 And it was never a suggestion that
21 there would be any way to create a true firewall
22 that would prevent the U.S. subsidiary from
23 sharing data with the corporate parent.

24 And the reason for that sounds in the
25 technological features of this application. I

1 think there can be no reasonable dispute that
2 the source code development and the maintenance
3 of this algorithm rests in China, which is why
4 China has sought to try to control export
5 restrictions with respect to the algorithm. And
6 what that means is you need substantial data
7 flows between the companies in order to continue
8 to modify that algorithm, refine it and so
9 forth.

10 So I don't think that that was an
11 option ever on the table, including with respect
12 to the proposed national security agreement that
13 was insufficient in -- in protecting our data
14 privacy and security concerns.

15 JUSTICE SOTOMAYOR: That didn't come
16 across enough in the briefs. If we are in the
17 world of data protection as opposed to
18 content -- content control, I think the -- it's
19 hard to get around the post-divestiture
20 provision that says you can't do business with
21 them on the algorithm because that very much is
22 content-based. It's a content-based
23 restriction.

24 But what you're saying is you can't do
25 it for a data control reason, meaning that you

1 can't really run their algorithm without sharing
2 the very data that we are concerned about as a
3 threat, correct?

4 GENERAL PRELOGAR: That's right,
5 Justice Sotomayor. And you don't have to take
6 my word for it. You can look at the specific
7 terms of the national security agreement that
8 ByteDance itself proposed. The relevant
9 definition of the accepted data is at JA 239 to
10 240, and it references categories of information
11 that would of necessity, technological necessity
12 and business necessity, have to flow back to
13 China.

14 And the relevant categories are in the
15 sealed appendix, but I would really encourage
16 the Court to look this up because it's
17 eye-opening. It is at the court of appeals
18 sealed appendix, 249 to 252 and 254.

19 If you look at that information, it
20 was a wealth of data about Americans that was
21 going to have to go back to China in order for
22 the platform to just continue its basic
23 operations. And there's a -- a legitimate
24 commercial justification for that, but it
25 creates this gaping vulnerability in the system

1 because, once that data is in China, the PRC can
2 demand that ByteDance turn it over and keep that
3 assistance secret.

4 And the one final point on this is
5 that ByteDance was not a trusted partner here.
6 It wasn't a company that the United States could
7 simply expect to comply with any requirements in
8 good faith. And there was actual factual
9 evidence to show that even during a period of
10 time when the company was representing that it
11 had walled off the U.S. data and it was
12 protected, there was a well-publicized incident
13 where ByteDance and China surveilled U.S.
14 journalists using their location data -- this is
15 the protected U.S. data -- in order to try to
16 figure out who was leaking information from the
17 company to those journalists.

18 CHIEF JUSTICE ROBERTS: General, you
19 want us to look at that and you get to look at
20 it, but your friends on the other side don't get
21 to look at it. That doesn't seem fair.

22 GENERAL PRELOGAR: That's the sealed
23 appendix, Mr. Chief Justice, so it's their
24 information. They can look at it. It's just
25 under seal to protect their proprietary business

1 information.

2 CHIEF JUSTICE ROBERTS: Okay.

3 JUSTICE BARRETT: General, so I want
4 to go back to the discussion about content
5 discrimination and we're going to shut Joe up.
6 Here, it seems to me like we are saying to
7 ByteDance we want to shut you up. And so let's
8 say that I think that that is content
9 discrimination based on speaker.

10 Tell me -- if -- if I think that, tell
11 me if I have to conclude that it is also
12 speaker-based discrimination and content-based
13 discrimination for TikTok.

14 GENERAL PRELOGAR: No, it is not, and
15 the reason for that is because it would be an
16 anomalous principle to say that an entity
17 outside the United States that can't assert its
18 own First Amendment rights can somehow
19 manufacture that right through the expediency of
20 forming a U.S. subsidiary, especially one that
21 it wholly controls.

22 JUSTICE BARRETT: So you don't have to
23 stand on that argument that you were having with
24 Justice Alito and Justice Gorsuch to still have
25 your point about content discrimination?

1 GENERAL PRELOGAR: That's right. And
2 I think, if you're focusing in on the relevant
3 U.S. entities here, TikTok U.S. and the users
4 themselves, this Act isn't regulating them in
5 any way. It's not trying to dictate the
6 algorithm that TikTok U.S. can use. And, in
7 fact, Congress, I think, was doing everything it
8 could to preserve access to TikTok in the United
9 States, in recognition that Americans enjoy
10 expressing themselves and building community on
11 the site.

12 JUSTICE BARRETT: One last quick
13 question --

14 JUSTICE ALITO: Well, I don't know,
15 General --

16 JUSTICE BARRETT: Sorry, just one last
17 quick question.

18 JUSTICE ALITO: No, no, go ahead.

19 JUSTICE BARRETT: Justice Gorsuch had
20 asked your friends on the other side whether the
21 new administration on January 20th could extend
22 the deadline. What's the -- your position on
23 that?

24 GENERAL PRELOGAR: So I think it tees
25 up a statutory interpretation question of

1 whether there can be an extension after the time
2 period for divestiture has lapsed. I would
3 think the Court might start with its decision in
4 the HollyFrontier case, which did recognize the
5 ability to get an extension after a lapse like
6 that.

7 JUSTICE BARRETT: So it's your
8 position that they could?

9 GENERAL PRELOGAR: We have not run it
10 to ground, in part, because it's simply not
11 presented here, and I'm not prepared to take a
12 position on that statutory interpretation
13 question.

14 I do want to emphasize, though, that
15 my friends have pointed to January 19th or nine
16 days from now as a moment when TikTok might go
17 dark. At the outset, of course, Congress was
18 hoping to prompt a divestiture, but I think the
19 more important thing to -- to focus on now is
20 that even if that were to happen, Congress
21 specifically anticipated it and provided
22 authority to lift these restrictions as soon as
23 there's a qualified divestiture.

24 And the reason for that is because
25 foreign adversaries do not willingly give up

1 their control over this mass communications
2 channel in the United States, and I think
3 Congress expected we might see something like a
4 game of chicken, ByteDance saying we can't do
5 it; China will never let us do it.

6 But, when push comes to shove and
7 these restrictions take effect, I think it will
8 fundamentally change the landscape with respect
9 to what ByteDance is willing to consider, and it
10 might be just the jolt that Congress expected
11 the company would need to actually move forward
12 with the divestiture process.

13 JUSTICE ALITO: Well, that's --

14 GENERAL PRELOGAR: So it's not
15 irrevocable.

16 JUSTICE ALITO: That -- that's an
17 interesting point, and I hope Mr. Francisco or
18 Mr. Fisher, whoever's delivering the rebuttal,
19 will address it.

20 So, if we were to affirm and TikTok
21 were forced to cease operations on January 19th,
22 you say that there could be divestiture after
23 that point and TikTok could again begin to
24 operate the way -- continue to operate?

25 GENERAL PRELOGAR: That's exactly

1 right. There's nothing permanent or irrevocable
2 that happens on January 19th. And I think that
3 Congress might have thought that we get in a
4 situation here where a foreign adversary is
5 doing whatever it can to just not comply. It's
6 hoping the United States is going to blink first
7 through our court system or through the
8 executive branch getting cold feet about
9 enforcing the law. But Congress set a deadline
10 and I think it thought that deadline would have
11 a forcing function.

12 JUSTICE ALITO: Let me ask you a
13 question about your -- your effort to draw a
14 distinction between ByteDance's speech and
15 TikTok's speech.

16 So suppose that the -- the People's
17 Republic of China funds a movie and -- and there
18 is an entity in the United States, a U.S.
19 corporation, that thinks, wow, this is a great
20 movie. And while the PRC would not have a First
21 Amendment right to show it in the United States,
22 would you say that the American company would
23 not have a First Amendment right to do that
24 because whatever expression there is in that
25 movie, it's the PRC's expression; it's not their

1 expression?

2 GENERAL PRELOGAR: No. No, I wouldn't
3 make that argument. And I want to be really
4 careful --

5 JUSTICE ALITO: I thought that was the
6 argument that was being made. No?

7 GENERAL PRELOGAR: No. So our
8 argument is that this is not a direct regulation
9 of protected speech in the first place, or at
10 most, it would warrant intermediate scrutiny
11 because of the indirect effects that it might
12 have on the American users or on the U.S.
13 subsidiary. We're not suggesting that if
14 Congress sought to directly regulate and
15 prohibit speech in the United States based on
16 concerns about its content or viewpoint, that's
17 somehow immune from First Amendment scrutiny
18 just because it comes from a foreign source.

19 Obviously, that kind of law is going
20 to trigger strict scrutiny. And I imagine it
21 would be a different constitutional analysis
22 because it's hard to imagine the same profound
23 national security harms that would exist in that
24 scenario as compared to what we have here.

25 JUSTICE ALITO: Thank you.

1 JUSTICE JACKSON: General, isn't the
2 whole point of the divestiture requirement that
3 the content on TikTok would be different if it
4 was owned by a different company? I'm still
5 struggling with your insistence that this is
6 content-neutral versus content-based when we
7 have that kind of circumstance.

8 GENERAL PRELOGAR: The reason that I
9 am continuing to try to hold the line on that is
10 because there is nothing in the Act that would
11 directly dictate any different mix of content on
12 TikTok. The U.S. subsidiary could use the same
13 algorithm, show the same content by the same
14 users in exactly the same order. It's not about
15 trying to interfere with the U.S. subsidiary's
16 exercise of editorial judgment in any relevant
17 sense.

18 Instead, all Congress was doing was
19 homing in on the problems of having a foreign
20 adversary be able to interject itself and be
21 able to harvest the data or exercise --

22 JUSTICE JACKSON: But your friends on
23 the other side say that the motivation for doing
24 that is because the foreign adversary might
25 influence or change the content. So content

1 is -- I mean, content matters, doesn't it?

2 GENERAL PRELOGAR: I -- certainly, I
3 think that content was relevant to Congress's
4 concern about an adversary having control over
5 the communications channel. I think not, again,
6 because of any particular concern about
7 viewpoints or subjects --

8 JUSTICE JACKSON: But isn't that
9 relevance --

10 GENERAL PRELOGAR: -- but just that
11 this would be a --

12 JUSTICE JACKSON: -- isn't that
13 relevance enough to trigger at least some
14 scrutiny, a heightened scrutiny, from the
15 standpoint of our legal tests?

16 GENERAL PRELOGAR: I certainly
17 understand that intuition, and if the Court
18 thought that it were prudent to simply try to
19 rule narrowly here and not dictate broader First
20 Amendment principles, we have no problem with
21 the Court assuming that heightened scrutiny
22 applies. We think the law easily satisfies it.
23 We do think that intermediate scrutiny is a more
24 appropriate framework for this kind of law
25 that's not directly targeting protected speech.

1 But, in any event, there's a
2 compelling national security interest here, and
3 the law isn't just narrowly tailored; it's
4 precisely tailored. It's trying to fix the
5 thing that's creating the problem, which is the
6 PRC's involvement and the Chinese government's
7 ability to exercise this control over the
8 corporate entities.

9 JUSTICE KAVANAUGH: How are we
10 supposed to think about the two different
11 rationales here and how they interact, the data
12 collection rationale, which seems to me at least
13 very strong; the covert content manipulation
14 rationale, as the hypotheticals have
15 illustrated, raise much more challenging
16 questions for you about how far that goes.

17 And if that alone -- if you didn't
18 have the data collection piece, you only had the
19 covert content manipulation piece, and then
20 Mr. Fisher's point, Mr. Francisco's, that
21 Congress would not have enacted this just based
22 on the data collection rationale alone, just
23 your understanding of how the two arguments fit
24 together.

25 GENERAL PRELOGAR: Sure. And -- and

1 let me walk through our defense of the data
2 protection rationale and why we think it's a
3 full justification for this law and the Court
4 could stop there and then be responsive to their
5 arguments that somehow the interest in
6 preventing covert manipulation somehow taints
7 it.

8 So just on data protection, I think
9 that it should be beyond dispute that, of
10 course, our nation has an enormous interest in
11 keeping the sensitive data out of the hands of
12 our foreign adversary. And it should also be
13 beyond dispute that our foreign adversary has an
14 existing capability through its laws and through
15 the way that these companies are integrated to
16 get its hands on that data.

17 There is no question that Congress was
18 sincerely motivated by that concern. There's a
19 whole lead-up to the statute here where the
20 executive branch across two different
21 presidential administrations was expressing
22 concerns about the data problems. Congress was
23 extensively briefed on those problems.

24 It passed a companion data protection
25 statute at the same time that was intended to

1 prevent selling data to foreign adversary
2 nations. The statute is shot-through with
3 protections that I think are key to this concern
4 about closing off the vulnerability of access to
5 the data.

6 So that's a sincere justification for
7 Congress's desire here to act. We think it's a
8 compelling interest and it's narrowly tailored.

9 Then you get to the question of what
10 to do about the fact that there's also this
11 interest in covert content manipulation. And in
12 the First Amendment context, this Court in cases
13 like Heffron has made clear that once you have a
14 justification that satisfies the First
15 Amendment, you don't need to go further and look
16 at other justifications to decide whether they
17 would independently satisfy First Amendment
18 scrutiny.

19 So I think it's not necessary for the
20 Court to go on and probe whether it thinks that
21 covert content manipulation itself independently
22 justifies the law.

23 Now my friends say that's all fine and
24 good, but they think covert content manipulation
25 is just per se illegitimate. And I honestly

1 don't understand how that argument could carry
2 the day because just imagine if Congress passed
3 a law that said the PRC can't covertly
4 manipulate TikTok. Obviously, that law's not
5 going to violate any constitutional principle.

6 It's a laudable goal, I think, for our
7 legislature to protect us from foreign adversary
8 interference like that. And so there's nothing
9 something -- there's nothing that's in --
10 inherently impermissible about wanting to guard
11 against that risk.

12 Maybe you could say that it sweeps in
13 too much protected speech in the way it's
14 operationalized in the Act here, but there's
15 certainly no fundamental taint -- taint or
16 anything akin to racial discrimination to call
17 into question whether Congress could seek to
18 vindicate that as one of many interests.

19 So I guess, to just kind of bring it
20 all together, what I would say to the Court is
21 they have basically acknowledged that data
22 protection is a compelling interest. That was
23 Congress's real interest. It provides a
24 sufficient basis on its own to uphold this law.
25 The Court could say just that and -- and affirm.

1 JUSTICE SOTOMAYOR: I don't know how
2 we do that unless we accept your argument that
3 the post-divestiture provision that stops them
4 from conferring on the algorithm is not a speech
5 impediment, meaning it -- it's very hard for me
6 to say that it's not motivate -- to decide that
7 question, that it is a speech impediment and one
8 that on its face itself has to be analyzed
9 separately from the data.

10 GENERAL PRELOGAR: So, Justice
11 Sotomayor, let me begin by saying again that we
12 do think that an interest in preventing any
13 operational agreement between the U.S.
14 subsidiary and ByteDance, which is the relevant
15 provision you're talking about, is justified by
16 data protection alone. And that includes with
17 respect to cooperation on a content
18 recommendation algorithm specifically because of
19 the concern that it necessitates data flows
20 between the companies.

21 So I think that as a factual matter,
22 that could justify Congress enacting --

23 JUSTICE SOTOMAYOR: So, if it's --

24 GENERAL PRELOGAR: But, to the extent
25 that you think that actually the prohibition on

1 coordinating with respect to an algorithm
2 reflects some kind of impermissible
3 content-based problem with the statute, the
4 statute has a severability clause.

5 And I certainly don't think that it
6 would give the Court a basis to invalidate this
7 law or to -- or to stop it from operating with
8 respect to all of the provisions that operate to
9 protect data security. At most, it would
10 suggest that that little piece of the law has to
11 be on its own severed from the rest of how the
12 statute operates.

13 JUSTICE SOTOMAYOR: How does that
14 affect whether we would apply -- because,
15 assuming it's data protection, then I would
16 think that strict scrutiny wouldn't necessarily
17 apply. I could understand applying intermediate
18 scrutiny.

19 But how do we do that with respect to
20 this part, the algorithm issue? How do we get
21 to intermediate scrutiny with respect to that?

22 GENERAL PRELOGAR: The way you get to
23 intermediate scrutiny there is to recognize that
24 prohibiting foreign adversary control over the
25 operations of the platform, including with

1 respect to the fundamental backbone of the
2 system, is not based on any protected speech
3 or -- or content-based in the relevant sense.

4 I've been thinking of it as akin to
5 something like a piece of software you might
6 have on your phone that would allow the Chinese
7 government to listen in on every American
8 conversation. If Congress wanted to enact a law
9 that patched up that vulnerability and said you
10 can't use that piece of software or you can't
11 coordinate with Chinese companies with respect
12 to it, clearly, we would recognize that closing
13 off that capability of China is a laudable and,
14 in fact, compelling government interest.

15 And I think, when it comes to the
16 risks that foreign adversary control pose here,
17 it's similar in kind. It's simply trying to
18 prevent access by the Chinese government to the
19 TikTok system writ large, and that includes
20 through the use of the algorithm.

21 JUSTICE SOTOMAYOR: Thank you.

22 JUSTICE KAVANAUGH: Could the
23 president say that we're not going to enforce
24 this law?

25 GENERAL PRELOGAR: I think, as a

1 general matter, of course, the president has
2 enforcement discretion.

3 JUSTICE KAVANAUGH: And would that
4 then adequately -- would that be binding, in
5 other words, protect the regulated community
6 such that it could rely on that under due
7 process principles going forward?

8 GENERAL PRELOGAR: That raises a
9 tricky question, so I think there would be a
10 strong --

11 JUSTICE KAVANAUGH: Well, then it's
12 not going to be adequate, right?

13 GENERAL PRELOGAR: Well, I -- I think
14 there is a strong due process argument that the
15 third-party service providers could invoke if
16 there were enforcement action based on a period
17 of time when the president said the law wouldn't
18 be enforced. The con -- kind of canonical
19 case --

20 JUSTICE KAVANAUGH: They're not going
21 to take that risk unless they have the assurance
22 that a presidential statement of non-enforcement
23 is, in fact, something that can be fully relied
24 on because the risk is too severe otherwise,
25 right?

1 GENERAL PRELOGAR: I think that they
2 might judge that based on this Court's precedent
3 in the due process space and principles of
4 entrapment by estoppel, maybe they have a
5 sufficient safeguard here to allow them to
6 continue to operate.

7 I would think, even before a
8 non-enforcement policy were announced, of
9 course, the President-Elect would want to review
10 all of the updated national security information
11 that has come in over the last four years that
12 undergird Congress's judgment here.

13 But the final thing I would say is
14 that even if you think the third-party providers
15 are simply going to choose not to continue to
16 provide these services because it's too much of
17 a risk to take on, again, that's not anything
18 permanent or irrevocable, and that might be just
19 what the PRC and ByteDance need to start taking
20 seriously some of the -- the public reporting
21 about interest in acquiring the company.

22 JUSTICE ALITO: At one point, Mr.
23 Francisco suggested that what we might want to
24 do and what he would regard as certainly
25 preferable to a decision affirming on the merits

1 was -- is to issue an injunction pending, I
2 guess, consideration of what we now regard as
3 the -- as the cert petition that was filed here.
4 What do you think of that suggestion?

5 GENERAL PRELOGAR: So I think this
6 Court doesn't have any basis to enter a
7 temporary injunction unless it thinks
8 Petitioners are likely to succeed on the merits
9 of their First Amendment claim.

10 And, to be honest, you know, I -- I
11 would -- I think that there is no argument to be
12 made that you should find that likelihood of
13 success. This is an act of Congress. This
14 isn't some unilateral action by the executive
15 branch, but it actually was action in parallel
16 between the Executive and Congress where
17 Congress took action to close up a loophole in
18 some of our laws. The Executive had tried to
19 force divestiture of TikTok under the Trump
20 administration, but that had gotten tied up in
21 litigation about those authorities.

22 So Congress came in and provided
23 additional authority based on a substantial
24 record, including with respect to the data harm.
25 And I don't see any basis for this Court to

1 displace the deadline that Congress set without
2 finding that actually there is a potential First
3 Amendment problem here.

4 JUSTICE ALITO: Do -- do you think we
5 have the authority to issue an administrative
6 stay, as we have done in -- in other cases, or
7 do you think that the January 20 deadline
8 prohibits us from doing that?

9 GENERAL PRELOGAR: I don't think this
10 Court has a formal basis to not issue an
11 administrative stay if it believed that that was
12 necessary to assist in the Court's own
13 consideration of the case.

14 I would obviously defer to the Court
15 and whether it has a sufficient time to resolve
16 the case, but we are here ready to submit the
17 case today. And I think it is in the interest
18 of Congress's work and our national security to
19 resolve the case and allow the statute to take
20 effect.

21 JUSTICE ALITO: Can I just test
22 your -- to see whether your recollection of what
23 Mr. Francisco said about a warning is consistent
24 with mine? I did not hear him say -- he can
25 address this in -- in rebuttal -- that it would

1 be acceptable to his client if Congress had said
2 there has to be a stark warning on every TikTok
3 such as: Warning, Communist -- Communist China
4 is using TikTok to manipulate your thinking and
5 to gather potential blackmail material. Did you
6 hear him say that that would be okay?

7 GENERAL PRELOGAR: I don't think he's
8 made that concession, but, even if he had, I
9 don't think that would address the government's
10 national security concerns.

11 And one of the -- the points here is
12 that it's not just data privacy. So, even if
13 you could somehow put users on notice that the
14 PRC could obtain their data and they choose to
15 disregard that, it's not a data privacy
16 interest. It's a national security interest.

17 There's a distinct sovereign harm to
18 the United States if our foreign adversary could
19 collect this massive data set about 170 million
20 Americans. And, as Justice Kavanaugh touched
21 on, you know, there are a lot of teenagers using
22 TikTok today who might ignore a warning like
23 that and not really care, but they're going to
24 grow up and they might become members of our
25 military, they might become senior government

1 officials. And for the -- the Chinese
2 government to have this vast trove of incredibly
3 sensitive data about them I think obviously
4 exposes our nation as a whole to a risk of
5 espionage and blackmail.

6 JUSTICE ALITO: Thank you.

7 GENERAL PRELOGAR: I did want to touch
8 briefly on the questions about history and
9 tradition here because my friends have said
10 several times that the Communications Act of
11 1934, which we think is roughly analogous to the
12 type of restriction that Congress was seeking to
13 enact here, is justified entirely by concerns
14 about scarcity, how you can't have sufficient
15 bandwidth.

16 And I, of course, recognize that
17 scarcity is what created the need for a
18 licensing regime in the first place, but I think
19 it's important to clarify the historical record
20 here that in choosing to limit foreign control
21 of radio stations, of broadcast stations,
22 Congress specifically cited a concern about
23 national security. That is written into the
24 statute. National defense was one of the listed
25 purposes of having that kind of restriction.

1 And so I don't think my friends can
2 succeed in being dismissive of that concern
3 about history and tradition and what it shows
4 about the national security judgments that
5 undergird this law.

6 The one other factual point I wanted
7 to make to be responsive to a few points that my
8 friends have touched on relates to whether
9 TikTok U.S. has the ability to alter this
10 algorithm, whether divestiture is feasible, how
11 ByteDance has manipulated the platform in the
12 past.

13 With respect to the algorithm, I think
14 we're simply talking past each other. We don't
15 dispute that TikTok U.S. might engage in some
16 functions in the United States to customize the
17 algorithm for a U.S. audience. The thing we're
18 worried about is happening long before that,
19 over in China, where ByteDance is developing the
20 source code, creating the basic backbone and
21 functioning of the system, and is then blasting
22 out the algorithm for use by the various
23 subsidiaries in their home country.

24 So we're not seeking to regulate any
25 activity that TikTok U.S. is engaged in here.

1 Instead, what Congress is doing is trying to
2 close off the vulnerability of PRC access
3 abroad.

4 With respect to the feasibility of
5 divestiture, my friends have said it would have
6 been impossible to do this within 270 days. You
7 know, at the outset, obviously, there's no
8 inherent impediment to divesting a social media
9 company. We just saw Elon Musk buy X, or
10 Twitter, in about six months from offer to
11 completion.

12 And even with respect to this
13 particular company, I think my friends are not
14 well positioned to complain about the timeline
15 because they've been on notice since 2020 that
16 unless they could satisfy the federal
17 government's national security concerns,
18 divestiture might be required.

19 But, in any event, I don't think that
20 the Court should fault Congress for trying to
21 balance competing interests here in making sure
22 that there was a period for compliance and
23 trying to preserve access to the platform for
24 Americans while taking steps to safeguard
25 against the risk to national security.

1 Finally, with respect to the question
2 of whether ByteDance has taken action on the
3 PRC's demands, there is evidence in the record
4 that Congress consulted to demonstrate that
5 outside of China, ByteDance has taken action to
6 misappropriate data at the PRC's request. That
7 included efforts to track dissidents in Hong
8 Kong, protestors there, to track Uyghurs in
9 China itself. We know that ByteDance has
10 misappropriated U.S. data with respect to
11 surveilling of U.S. journalists. And there was
12 evidence in the record reinforcing the
13 conclusion that ByteDance has been asked by the
14 PRC to undertake efforts to censor content and
15 manipulate the platform at the behest of the
16 Chinese government.

17 So I don't think there is a factual
18 basis to dispute the record that Congress had
19 before it.

20 If the Court has no further questions.

21 CHIEF JUSTICE ROBERTS: Justice
22 Thomas?

23 JUSTICE SOTOMAYOR: I have a question.

24 General, if I understood correctly,
25 under President-Elect's first term, he passed an

1 executive order requiring divestiture, correct?

2 GENERAL PRELOGAR: That's right.

3 JUSTICE SOTOMAYOR: And this -- that
4 was challenged in court and stayed as a result
5 of him exceeding his executive power to do that.
6 But this bill followed a bipartisan
7 investigation, correct?

8 GENERAL PRELOGAR: Yes, that's right.

9 JUSTICE SOTOMAYOR: I am a little
10 concerned that a suggestion that a
11 president-elect or anyone else should not
12 enforce the law when a law is in effect and has
13 prohibited certain action, that a company would
14 choose to ignore enforcement on any assurance
15 other than the change in that law. But putting
16 that aside, on the 19th, if it doesn't shut
17 down, there is a violation of law, correct?

18 GENERAL PRELOGAR: Yes.

19 JUSTICE SOTOMAYOR: And whatever the
20 new president does doesn't change that reality
21 for these companies?

22 GENERAL PRELOGAR: That's right.

23 JUSTICE SOTOMAYOR: How long is the
24 statute of limitations in effect? Assuming that
25 they violated it that day and later continued to

1 violate it, but how long does the statute of
2 limitations exist for a civil violation --

3 GENERAL PRELOGAR: It --

4 JUSTICE SOTOMAYOR: -- of this sort?

5 GENERAL PRELOGAR: It would be a
6 five-year statute of limitations.

7 JUSTICE SOTOMAYOR: All right. Thank
8 you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Rebuttal?

12 REBUTTAL ARGUMENT OF NOEL J. FRANCISCO
13 ON BEHALF OF PETITIONERS TIKTOK, INC., ET AL.

14 MR. FRANCISCO: Thank you, Mr. Chief
15 Justice. Four points, all of which go to why we
16 think this would law -- law would fail whether
17 you apply intermediate scrutiny or strict
18 scrutiny.

19 I'd like to begin with the least
20 restrictive alternative, simply prohibiting
21 TikTok, Incorporated, from disseminating any of
22 the sensitive user data to anyone, including
23 ByteDance, under the threat of massive
24 penalties. That is definitely a less
25 restrictive alternative.

1 Now my friend pointed to the NSA
2 negotiations. Well, the sensitive user data
3 that we're talking about and that were of
4 concern in the NSA negotiations were not the
5 type of technical data that she's talking about.
6 The NSA did allow certain types of nonsensitive
7 technical data to go back and forth, but that
8 wasn't anybody's concern. And, as we say in
9 20 -- page 23 of our briefs, they simply cut off
10 the negotiations without ever raising those
11 concerns.

12 But, to be clear, if that's a concern,
13 sweep that into the ban too. Put in that
14 nonsensitive technical data into the ban too.
15 We'll deal with that. It's a lot better than
16 simply being forced to shut down. So that is
17 most definitely a less restrictive alternative
18 that would address data security.

19 We talked about the
20 under-inclusiveness in Temu and Shein, the two
21 large e-commerce sites. Justice Kagan, you
22 might have seen Temu during the Super Bowl. It
23 was heavily advertised. It's got -- it's one of
24 the most popular e-commerce applications in the
25 United States. It's got 70 million users.

1 Justice Sotomayor, you were asking
2 what they collect. This is from Joint Appendix
3 339 to 343, the U.S./China Economic and Security
4 Commission Review Report. Shein relies on
5 tracking and analyzing user data, draws on
6 customer data and search history with the
7 assistance of artificial intelligence
8 algorithms. It requests users share their data
9 and activity from other apps, including social
10 media. So they apparently go into your social
11 media apps and suck up all of the information.
12 Because they're e-commerce apps, they take
13 names, addresses, and credit card information.

14 If you look at the privacy policies on
15 their website, they were -- they collect
16 location data. It -- it looks like they might
17 even collect at some level GPS location data.
18 So they collect massive amounts of data.

19 Point 3: Their mere covertness
20 argument makes no sense for the reasons that the
21 Court explored. If mere covertness were the
22 issue, a disclosure would make perfect sense.
23 Yet they're not concerned about mere covertness.
24 They're concerned, as my friend suggested, with
25 getting Americans to argue with each other.

1 Well, you know, as far as I can tell, that's
2 what news organizations do in this country every
3 single day. That's what we call editorial
4 content. That's what we call content itself.
5 And so it's trained directly on the content.

6 But, even if you thought somehow that
7 the mere covertness were the issue, that
8 definitely could be addressed through a risk
9 disclosure. So the data-sharing ban, the risk
10 disclosure, those are obvious less restrictive
11 alternatives. And had the government considered
12 them and rejected them, we would be in a
13 different position. But, if you look at this
14 record, those are two less restrictive
15 alternatives that the government did not address
16 at all.

17 Whether you apply strict scrutiny or
18 intermediate scrutiny, that is fatal because,
19 under both standards, restricting speech has to
20 be the last resort, not the first one. And when
21 you fail to consider less restrictive
22 alternatives, you fail under either standard.

23 My final substantive point is we
24 absolutely think this Court has the authority to
25 enter an administrative stay. I didn't

1 understand my friend to disagree with that. We
2 think that given the enormity of this decision,
3 given the complexity of this case, it would make
4 perfect sense for this Court to enter an
5 administrative stay.

6 I also think you could enter a
7 preliminary injunction. Yes, likelihood of
8 success is one standard, but you don't have to
9 determine ultimate success. And, as you do in
10 other related contexts, like with respect to
11 stays, you often make clear that you're not
12 addressing the merits of the case. I think you
13 could do that here.

14 The bottom line, Your Honor, is this
15 case ultimately boils down to speech. What
16 we're talking about is ideas. And my friends on
17 the other side, when you cut through everything
18 else, are ultimately worried that the ideas that
19 appear on the TikTok platform could in the
20 future somehow manipulate Americans, could
21 somehow persuade them, could somehow get them to
22 think something that they ought not be thinking.

23 Well, that whole notion is at war with
24 the First Amendment. If the First Amendment
25 means anything, it means that the government

1 cannot restrict speech in order to protect us
2 from speech.

3 That's precisely what this law does
4 from beginning to end, whether you look at its
5 text, whether you look at the government's
6 justifications in its brief, where they talk
7 about being worried about speech criticizing our
8 leaders or undermining democracy.

9 It's what you see in the House report,
10 which turns specifically on the dangers of
11 misinformation, disinformation, and propaganda.
12 And it's what you see in this legislative record
13 writ large, which is saturated with objections
14 to -- to TikTok's existing content.

15 We ask that you reverse the Court
16 below. Thank you, Your Honor.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 The case is submitted.

20 (Whereupon, at 12:38 p.m., the case
21 was submitted.)

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25

Official - Subject to Final Review

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