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CHIEF JUDGE SRINIVASAN: Good morning, Counsel.
Mr. Pincus, please proceed when you're ready.

ANDREW J. PINCUS (on behalf of TikTok petitioners): Good morning, Your Honor.
Thank you and may it please the Court.
The law before this Court is unprecedented and its effect would be staggering.
For the first time in history, Congress has expressly targeted a specific US speaker banning its speech and the speech of 170 million Americans.
The law is subject to strict scrutiny and the government bears the burden of proving its constitutionality.
Its arguments fail as a matter of law for two fundamental reasons.
First, the government's asserted interest in addressing what it calls content manipulation, is facially illegitimate.
Speech regulations cannot be justified on content or viewpoint grounds.
And the gross under-inclusiveness of the data security interest fatally undermines it as a stand-alone justification.
Second, this law is just like the one invalidated by this court in News America.
No compelling reason justifies Congress acting like an enforcement agency and specifically targeting petitioners.
Congress excluded petitioners and only petitioners from the more protective general standard that the executive branch must apply to every other speaker it seeks to classify as a national security risk.
This law imposes extraordinary speech prohibition based on indeterminate future risks, notwithstanding the obvious less restrictive alternatives.
The government has not come anywhere near satisfying strict scrutiny.

CHIEF JUDGE SRINIVASAN: So one matter in the case that you didn't mention, as far as I could detect in that, is the fact that the initial operative incidence of the law is predicated on the idea that there's, the curation is occurring abroad.
So it's a foreign entity abroad who's engaging in the curation that's causing the content manipulation that you highlighted.
How does that factor into the analysis from your perspective?
Because I think that the government's point is, sure, you've got your point about content moderation, content manipulation.
And that comes up in a lot of cases, including in NetChoice in the Supreme Court.
But this case is different because it involves something that's happening abroad.
And what we're worried about is the effect of something that happens abroad, and when it's a foreign organization, they don't have a First Amendment right to object to a regulation of their curation.

MR. PINCUS: Well, a couple of answers to that, Your Honor, if I can walk through them.

I think the first step is TikTok, Inc.
is a US entity that engages in speech.
It curates third-party content, just as the NetChoice, and it engages in its own speech.
So the speech here that's being banned, we would say, or at the minimum burdened, is the speech of the US speaker.
I think the government tries to argue that because TikTok, Inc.
ultimately has a foreign owner, that that somehow affects whether TikTok, the US entity, has First Amendment rights.
That can possibly-

CHIEF JUDGE SRINIVASAN: I don't think they're arguing that.
I think what they're saying is TikTok, Inc.
may well have First Amendment rights, and does.
But TikTok, and TikTok, Inc.
can continue to curate to its heart's content.
But what it can't do is do that while it's owned by China, because we're worried about what China does, vis-a-vis TikTok, Inc.

MR. PINCUS: Okay, well, let me, I want to get to the bottom line of your honor's question, but I want to correct the premise.
It's not owned by China.
The owner of TikTok, Inc.
It's ByteDance limited.
It's a Cayman Islands holding company that's owned by-

CHIEF JUDGE SRINIVASAN: Subject to Chinese control.
They're subject to Chinese control.

MR. PINCUS: Well, they argue that, but I think the critical issue here is what they're saying is because there is the possibility of future Chinese control, right?
They don't claim anything has happened yet.
They claim there's future Chinese control and therefore we can burden in a very significant way the speech of a US entity and its users, which by definition is fully protected speech.
So, in order to say that they can do that, essentially take away the speaker rights of a US entity, they surely have to meet strict scrutiny.
So, even if the court concludes that the foreign government manipulation is not subject to the First Amendment, I think there are questions about that.
No court has held that.
The most the courts that the United States has ever done before is to say that foreign speech has to be labeled.
But, I don't think the court has to...

CHIEF JUDGE SRINIVASAN: Isn't that what the Supreme Court said in USAID?

MR. PINCUS: I don't think so, Your Honor.
I think what USAID said is that speech outside the United States by non-U.S.

entities is not protected.
So, there were two elements there.
They aren't here.
We're talking about speech in the United States.
But, as I say, even if the court...

CHIEF JUDGE SRINIVASAN: I'm just saying if the curation that's being worried about is the assertion of control by the Chinese government in China, then that fits within the USAID.

MR. PINCUS: I don't think so, Your Honor, because it's still speech coming to the United States.
I think it raises a complicated question that courts really haven't addressed.
But, as I say, I don't think the court has to go that far, although we advocate that.
I think the court...
What's clear here is the burden of the government saying, because of this indeterminate future risk, we can impose burdens on speech, that there's no dispute, it's 100% protected by the First Amendment.
That requires strict scrutiny.

JUDGE RAO: Mr. Pincus, what is the best evidence that TikTok US or TikTok Inc.
is engaged in its own expressive activity, expressive activity that's not controlled by ByteDance?

MR. PINCUS: Well, A, it's a US entity.
B, we have in the West.

JUDGE RAO: It is a US entity.

MR. PINCUS: It is a US entity.
And open society essentially establishes a presumption that we respect the corporate form.
The government is not arguing that there's a sham here.
So I think that's the starting point.
But I think the record also makes clear that the curation occurs in the United States.
The record is clear that-

JUDGE RAO: The Presser Declaration?

MR. PINCUS: Sorry?

JUDGE RAO: The Presser Declaration?

MR. PINCUS: The Presser Declaration, exactly, Your Honor.
At the pages 799 to 800 and 812, it makes clear that content moderation occurs in the United States.
And there's no dispute that the TikTok, Inc.'s own posts are in the United States.
It's own speech.
And of course, there's a lot of US users' speech that is on the platform.

So I think all of those things together, combined to say there's no showing here and no argument here that there's some kind of a sham with respect to the content moderation that's occurring now. The government's argument is there might, something might happen in the future.

JUDGE RAO: Even if there's not a sham, I mean, what about our case from 1988 Palestine, 1988 Palestine Information Office?
Are you familiar with that case?

MR. PINCUS: I don't think I am, Your Honor, unfortunately.
I apologize.

JUDGE RAO: The government doesn't cite it, which I was a bit surprised about, but it's a case from 1988, Judge Mikva, joined by judges Starr and Silberman.
And there, I think this circuit essentially said that the fact that the Palestinian Palestine Information Office, which was an entity in the United States, could be shut down by the State Department in part because of its affiliation as a foreign mission of the PLO, which is a designated terrorist organization.
And our circuit seemed to suggest very strongly that the control or the relationship itself was part of the strong justification for what the government did.
You're not familiar with that case then?

MR. PINCUS: I'm not familiar with that case, Your Honor.
Happy to address it in a supplemental brief.
But I think even from Your Honor's recitation of the facts, the government isn't arguing here that there's control now, either by China or by Dance Limited.
I do think just stepping back from China and talking about Your Honor's question about whether foreign ownership by itself.

JUDGE RAO: But Justice Barris suggests that this might make a difference in her separate opinion in that choice.

MR. PINCUS: She did, Your Honor, but it would really have quite far flowing ramifications as we talk about in our brief.
There are lots of US speakers, Politico, Business insider.
We talk about Reuters.
We talk about a lot of them in our brief.

JUDGE RAO: They're owned by foreign entities and not foreign adversaries.

MR. PINCUS: Well, I think the question...
I don't think that affects the First Amendment question.
That might affect strict scrutiny.
So I think it's very important in this case to take things in stages.
Are there protected rights that are burdened?
Does that burden trigger strict scrutiny?
And then we can look at the justifications and see if they hold up.

But I think at the first stage, are there First Amendment rights that are being burdened?
Even the government doesn't argue that TikTok Inc has no First Amendment rights.
They make this brief argument about foreign ownership making a difference.
But as I say, mere foreign ownership can't possibly be a justification because it would turn the First Amendment on its head.
We have lots of publications that are owned by foreign entities.
And to say, your foreign ownership casts your First Amendment rights into doubt, or in a deprivation case or a government regulation case, it's open to explore the interactions between the foreign owner and the US speaker to see precisely what speech is controlled and what's not would really fundamentally change First Amendment analysis and a lot of issues.
And it's what open society rejected.
Open society basically said, we're going to presume that there is corporate separateness.
It may be that in that case, there was a showing of control that was satisfied.
But here, there's no showing certainly that the fight band's limited, which as I say is-

JUDGE RAO: That's interesting because in that case, the court defers to the fact that the government thought there was foreign control.
But anyway, so even if we assume that TikTok US has First Amendment rights as a US corporation, why wouldn't we apply intermediate scrutiny?
Because the act itself arguably regulates both conduct, which is foreign ownership, but also incidentally burdens the expressive activity.
I know you won't accept that characterization, but why is that wrong?

MR. PINCUS: I really don't hear because a couple of reasons.
I think what was clearly targeted here was the TikTok platform, a speaker.
And I think when an individual speaker is targeted by a law, courts have said that that's enough to trigger strict scrutiny.
I mean, News America stands for that proposition.
Once the court concluded in News America that the law targeted only News America and wasn't going to apply to anyone else, it went right to heightened scrutiny.
Now, in that case, the heightened scrutiny was intermediate because it was the broadcast context.
But I think the analogy fits here.
And Citizens United gives the reason for that distinction.
It makes clear, what it says is, there's such a risk of content and viewpoint based discrimination when you target a specific speaker that we have to apply strict scrutiny.
The second reason, the justification here is viewpoint.
And so that by itself, Reed says, triggers strict scrutiny.
But I want to go back to just one more answer to your prior question, which is you said in the Palestinian case, there had been a determination.
We don't really know what was determined here.
Because this was Congress enacting a statute that has no findings.
It doesn't say why Congress did what it did.
It targeted TikTok.
And the record here indicates that although the government says future covert manipulation by China is the risk, is the justification, the record is certainly not that clear.

JUDGE RAO: And we've never held that Congress is required to enact findings in order.
I mean, in some sense, the finding is the fact that they passed a law under Article 1, Section 7, designating TikTok for this treatment.
I mean, there's no requirement that Congress needs to put in a statute its findings.

MR. PINCUS: Totally agree, Your Honor, there's no general requirement.
But I think as the court, it is not the EPA.
But that's part of the problem in the statute.
Just to, I guess, two answers.
The problem here is the statute doesn't say, and it's not a statute that sets up a general rule where you can sort of say from the general rule, usually what happens in the enforcement context is Congress sets up a general rule.
Fatal challenges are hard because the general rule has some principles.
And the applications occur in enforcement actions by the executive branch where there are specific findings and specific basis to judge what happened.
That didn't happen here.
And the record, to the extent we want to go beyond the words of the statute, which is to say, just say TikTok, it doesn't say why.
Looking at the record, the record is suffused with much broader content justifications than when the government tries to supply.

CHIEF JUDGE SRINIVASAN: So on the content modification rationale, there's another rationale too.
There's the data security one.
And let's just assume for present purposes, I know you resist the assumption and I can understand why, but just for hypothetical purposes, let's just assume the law was only undergirded by the data security rationale.
So the content manipulation, the concerns about content manipulation just drop out.
If the law was only undergirded by the data security rationale, do you think strict scrutiny applies?

MR. PINCUS: I think it still does because it's targeted a specific speaker.
If a law singled out the New York Times Company and said, you're going to have to meet special workplace safety rules or special overtime rules, no one would say, oh, we're not going to apply strict scrutiny because there's a justification for workplace safety.
There would be a significant argument about whether that's what you want.

CHIEF JUDGE SRINIVASAN: The specific speaker is TikTok US.
Yes.
I think what the government would say about that and we'll hear from the government, but I think what the government would say is we're not targeting TikTok US.
Qua TikTok US.
We only care about TikTok US to the extent that it's subject to Chinese control.
So TikTok US can continue to be TikTok US full board as long as it's no longer subject to Chinese control.
The way that that happens is to have a divestiture.

But apart from that, TikTok US is totally fine with us.

MR. PINCUS: But I think, Your Honor, the problem is, I mean, I guess we have two answers to that.
One is divestiture is indecisible here for the reason that Professor Milch indicates.
And so this isn't just about divestiture.
It's really about a ban.
But even if there in some theoretical world, divestiture would be possible, there's still a burden on TikTok US.
It costs different speeches required.
The statute says you can't bring in the foreign user content that is a critical part of TikTok.
Your speech would have to be different.
You can't use this recommendation engine.
That would make your content moderation different.
So and the costs of divestiture by themselves are burden on TikTok.
Just the kind of burden that Minneapolis Star and other Supreme Court cases have said that triggers script rootening when you single out a speaker.

CHIEF JUDGE SRINIVASAN: So can I ask this question then, if under your rationale, suppose the United States is at war with the country.
And then there's a question about whether that foreign country can own a major media source in the US while the war is going on.
Is your submission that Congress can't bar the enemy's ownership of a major media source in the US.?

MR. PINCUS: I think we would still be in the world of strict scrutiny.
Maybe that would be a sufficient justification.
But I think we would still have to look at those rationales and decide that they were sufficient.
And when you're at war, probably they would.
But that's a couple of things to say here.
That's certainly not the rationale that they're giving.
And just to sort of finish up my answer, I think in the divestiture context, we still have a burden on the US speaker's rights.
I just want to return to your data privacy question, because I also want to say it would be impermissible for the under inclusiveness reason that we cite in our brief.
The statute, if you look at the broad statute, I mean, it's singling out TikTok is pretty under inclusive by itself.
But even if you want to consider the broader statute, there's an exclusion.
It only applies to sites that host user content.
There's the business review exclusion that we claim, we have a little dispute with the government about what that means.
The plain language seems to say, if you're a company that has a business review app, then you're entirely out of the statute.
But even if you read it the way that that's certainly a shocking content based distinction that undermines the data privacy interests.

But even if you just read it as having a business review app by itself is excluded, those exclusions exclude e-commerce sites.
As we say in our brief, there are very significant e-commerce sites based in China and other places that collect much more data than TikTok does, very sensitive data.
The record refers to one of them that was cited by a US commission as a possible danger and they are categorically excluded.

CHIEF JUDGE SRINIVASAN: So I just want to understand the implications of your positions. And if we're not at war, I'm not suggesting that we are, but just to understand how the way you view the case would play out.
If we were at war, if the United States was at war with, say, China, and what the law did was to bar Chinese ownership of, say, ABC, because China wants to buy ABC, and Congress and the National Security Establishment is worried about the repercussions of that.
And so it says ABC can continue to be ABC to its heart's content.
The one thing it can't do is be subject to Chinese control in a time when we're at war with China because we're worried, because if China is in control of it, then it could engage in content manipulation of a type that's going to be problematic vis-a-vis US interests.
Your view is that strict scrutiny would apply to that.
And the government would have to-

MR. PINCUS: Let me say, your example is ABC.
They have, if that's the television network and its licenses, that's a slightly different world.
But let's just assume it's someone who's not being regulated because of their broadcast.

CHIEF JUDGE SRINIVASAN: Okay.
Right.
Right.
Take the broadcast.
A major media source.
And then-

MR. PINCUS: I think strict scrutiny would be the question.

CHIEF JUDGE SRINIVASAN: under strict scrutiny, one of the points that you've made repeatedly and understandably is that the concern here appears to be directed at something that could happen in the future, not something that's necessarily happening now.
So let's just say that that's true in the war context too.
There's no particular reason to know what's happening right now.
It's a concern about the future.
Would that necessarily mean that strict scrutiny is unsatisfied?
And so therefore...

MR. PINCUS: I think it would depend on the facts.
It might depend on the facts regarding the ownership.
I think there are a couple of questions embodied in your question.
One is whether this is a sufficient compelling interest.

Even if it is, there's a less restrictive means question.
And I think a critical point that we make, and that's true throughout the law, is the government's solution to foreign propaganda in every other context has been disclosure.
It has not been a ban.
The Meese case talks about that.
And in footnote 15 has a very sort of fulsome and explanation why.
That our view in America is, if speech is made clear, then Americans can decide and the answer to speech is more speech.

CHIEF JUDGE SRINIVASAN: The disclosure idea might depend on the voluntary cooperation of the very control that you're worried about.

MR. PINCUS: Well, I don't think so, Your Honor, because I mean, I don't know what the disclosure would be.
Obviously, the government would have to show the predicate of the risk of Chinese control.

CHIEF JUDGE SRINIVASAN: And you'd have to know that the manipulation is going on, right?

MR. PINCUS: Well, the government, I mean, in a hypothetical world, maybe, I guess this is how I think the process would proceed.
The first question would be, is this a sufficiently compelling interest?
And, you know, there really isn't a precedent for a court finding government regulation of protected speech, which is what's going on here, because we still have a lot of protected speech, in the general sense, is a compelling interest sort of ever.
So, that would be a pretty shocking and big step.
But assuming you could get over that step, then I think the next question would be, is the risk of control, since we're talking about the future, imminent?
And I don't think imminent here, that's the word that holder and Pentagon papers use.
And I don't think that's necessarily imminent in terms of happening tomorrow.
I think it's imminent in the sense that the government is arguing here, which is that China could do this at will, that's our risk.
China could do this at will, so we have to act now.
And I think that has to be shown as a factual matter.
And I think that would require us to be sort of working through this type of this case, the court to delve into the factual record and see if that's true, given the protections that are in place and the less restrictive means protections that we argue could be in place.
I mean, we don't want our content.
TikTok, Inc. and ByteDance do not want the content to be controlled.
That's why they not only negotiated the National Security Agreement, it's why they've implemented it voluntarily, including a number of provisions that go to this issue.
So the government have to show imminent in terms of China being able to do what it will, notwithstanding the possibility of technological protection.
And then the question would be disclosure.
And I think the government, if it met those tests, would then have to come forward with a possible disclosure.

You know, Zauderer sets the test.
There's a compelled speech element.
But that's what the government has done in other contexts where there's disclosure, movies, television, printed material.
And I think NetChoice sort of points the way that for the government to say that disclosure won't work here, requires some quite dramatic showing because the court's general approach has to say, we treat these media the same.
Now, maybe in some hypothetical world, the government could show that.
But they certainly, there's nothing in this record.
And I think the critical thing, again, for looking at a statute-

JUDGE RAO: Is your argument, though, then, that if the government is concerned about covert influence by a foreign adversary, it has to, disclosure is always the least restrictive means?
I mean, that would seem to me quite a remarkable determination to make for this court, under holder and other precedents.

MR. PINCUS: Well, it certainly would have to show that a reason why it isn't the least restrictive means, and remember, the actor here is Congress, and Congress didn't even, as far as we know, consider disclosure.
And Sable and Playboy Enterprises say Congress has to consider less restrictive means.
And so for that reason alone, there's a problem that this course is invalid.
Whether the government could, in a hypothetical case, where there was actually a reasoned decision record, say we've looked at disclosure, here are the possibilities, we've actually concluded it doesn't work.

JUDGE RAO: I mean, if the concern is data protection and covert influence by foreign adversary, how would disclosure be?
I mean, disclosure, if you're under your view that the only reason for this law is propaganda, maybe disclosure addresses that.
But that, you know, I mean, the act is not even aimed at expressive activity directly.
It's aimed at foreign ownership of a US corporation.

MR. PINCUS: Well, just to take your last point, first, as I said, Your Honor, we think it is aimed at expressive activity.
The entire just the justification relates to expressive activity.
It Tik-Toks, it singles out a specific speaker and the whole debate, the Justice Department went up to Congress and said-

JUDGE RAO: And a minimum, though, this act regulates both, okay, say it regulates expressive activity because it directly targets TikTok US., but it is also regulating foreign ownership, which is a separate non-expressive interest of the government.
So with those combinations, why shouldn't we apply the O'Brien framework, for instance?

MR. PINCUS: Because this is not a statute that's generally regulating foreign ownership.
It's regulating foreign ownership, the provision we're talking about, foreign ownership only of a particular speaker.

O'Brien was upheld because the law there regulated a whole range of activity, the court said, and incidentally, it might fall on speech.
Here, the regulation falls directly and the burden falls directly on a speaker.
Whether you think of it as divestiture or as a ban, the burden falls on the single-doubt speaker, and that distinguishes from O'Brien and O'Cara and all those other cases.

CHIEF JUDGE SRINIVASAN: Would you think you lose under O'Brien?

MR. PINCUS: Excuse me?

CHIEF JUDGE SRINIVASAN: I mean, you're resisting O'Brien.
Of course, you'd rather have strict scrutiny, but would you have an argument under O'Brien that you said the laws are out?

MR. PINCUS: I think we'd still have arguments under O'Brien.
I think the same arguments we're making would be strong enough, but I think the government mentions these.

CHIEF JUDGE SRINIVASAN: Because one of the criteria under O'Brien is whether the law is related to the suppression of free expression.

MR. PINCUS: That's why we get out of O'Brien, because it's a law related to the suppression of expression.
That's what Texas.

CHIEF JUDGE SRINIVASAN: That means that O'Brien is not satisfied.
It doesn't mean you get out of O'Brien.
That's what happens in NetChoice.
That's one of the criteria under which a law survives O'Brien scrutiny.
Your argument would be, I would assume, that the law can't survive O'Brien scrutiny, because if it's related to the suppression of free expression, then it's invalid.

MR. PINCUS: Yeah.
I think we're just talking about a doctrinal difference here.
I think the law is out of O'Brien and subject to strict scrutiny because it's not incidental.
If I can just go back to Judge Rao's-

SENIOR JUDGE GINSBURG: Hey, before you do that.
You started off, not started off earlier on, said that curation would occur in the United States under TikTok's NSA proposal, correct?
And the NSA proposal is more or less reflected in Project Texas, isn't it?

MR. PINCUS: Project Texas has implemented some, but not all of the protections in the NSA.

SENIOR JUDGE GINSBURG: And the curation, the instrument of curation is the so-called recommendation engine, is that correct?

MR. PINCUS: There are multiple forms of curation, Your Honor.
Some is our content-

SENIOR JUDGE GINSBURG: Is that one of them?

MR. PINCUS: That is one of them, but not the only one.

SENIOR JUDGE GINSBURG: Here's a little later in the Presser Declaration.
Project Texas contemplates that source code supported in the TikTok platform, including the recommendation engine, will continue to be developed and maintained by ByteDance subsidiary employees including in the United States and in China.
So the curation is not entirely in the United States.

MR. PINCUS: Well, I guess a couple of answers to that.
First of all, the curation...
Okay.
Well, there's review of those changes to the recommendation engine in the United States, but the recommendation engine is not the only form of curation.
In the United States, there are also changes made to how the recommendation engine works that are US specific.
Those relate to the content, the community guidelines.

SENIOR JUDGE GINSBURG: Insofar as the changes are originating in China, they would be subject to review before being implemented in the US.
I review through the TTD USA.

MR. PINCUS: They are not reviewed before they are implemented, but they are reviewed and subject to recall.
But I think the critical point is those changes to the code are not the sole content moderation activities.
The US recommendation engine also takes account of the determinations about what is acceptable content in the US.
How should that content be treated?

SENIOR JUDGE GINSBURG: But in order to apply what you just said, they have to look at what's coming down from Beijing and decide whether it comports with what's acceptable in the US.

MR. PINCUS: Well, some of what they do is just done in the US.
It's true that the source code, but I think, Your Honor's point, I guess I just have to say there are many, many US companies that use source code that's developed in China.
The Weber Declaration talks about that in detail.

SENIOR JUDGE GINSBURG: Any of them involve apps that reach whatever it is, a million people a month?

MR. PINCUS: I'm sorry?

SENIOR JUDGE GINSBURG: Do any of them involve apps that reach 10 million people a month?

MR. PINCUS: Yes, many of them.

SENIOR JUDGE GINSBURG: Why is it I could not find, I'm thinking, in any of the briefs, indeed in the declarations and so on, any reference to another company that would be subject to the second procedure provided in the statute, the alternative procedure that ends with a presidential determination?

MR. PINCUS: Well, Your Honor, we didn't try to identify one, but certainly one of the reasons-

SENIOR JUDGE GINSBURG: We did assert that there were several, but well, at least implied that by saying every other company would be subject to the second type of procedure.
Is there such a company?

MR. PINCUS: Well, I think we don't know what companies, Your Honor.
I mean, I guess two answers.

SENIOR JUDGE GINSBURG: Surely, by chance, knows who they're-

MR. PINCUS: Well, we don't know what companies the US government is gonna say are subject to foreign adversary control.
I think that's one of the problems with this statute, is that the US government could say, here is platform X.
We think that they are subject to control by Russia.
We're looking at their content.
We think they're too susceptible to infiltration by Russia, and therefore, they have to be moved to a new owner, even if the parent is a US owner, because that risk is too great.
So, we don't know what websites the government might argue, but I think the other critical question is one of the reasons is the exemption of e-commerce sites.
We do talk about two Chinese, two e-commerce sites that would certainly meet all of the other criteria in the law, but that are exempted because of the business review exemption.
Those sites, we don't know, but certainly those sites could well be susceptible to the government's action, but they've been excluded by Congress.

SENIOR JUDGE GINSBURG: And that with respect to your earlier colloquy, particularly with Judge Rao, I'm not sure if you did, but if you wouldn't mind again, telling me why this is any different than the, from a constitutional point of view, than the statute precluding foreign ownership of a broadcasting license.

MR. PINCUS: Because the court has said that those, that a lesser standard of scrutiny applies to broadcast licenses.

That's been a justification of all of those decisions.
Is the spectrum scarcity and lesser scrutiny, prohibits, excuse me, permits a greater degree of government control.
So those decisions, because we, well, you're certainly applies here.

SENIOR JUDGE GINSBURG: Okay, what about the other dozen or 15 statutes that prohibit foreign control, that don't have to do with spectrum?
An outdated idea, the spectrum.

MR. PINCUS: Well, nuclear waste sites, the government sites a few, those don't implicate first amendment interests at all.
So the fact that the government says no foreign ownership of a nuclear waste site, there's no first amendment issue in saying requiring divestiture of it.

SENIOR JUDGE GINSBURG: So it all depends upon your, or accepting your view, that there is a first amendment issue here because not withstanding the foreign control potential, we have a US speaker.

MR. PINCUS: I think that's right, Your Honor, and I think that's a fundamental, fundamentally important question.

CHIEF JUDGE SRINIVASAN: Can I just ask about the broadcast idea?
So if we're in the land of allocating broadcast spectrum space, and the rationale for not allowing foreign ownership in that context is we're worried about foreign ownership begetting foreign propaganda.
Would that in your view be something that needs to be justified by strict scrutiny?
If that's the rationale, the rationale is we're not going to allocate this slice of spectrum to either foreign control or an entity that's subject to foreign control.
That seems to be fine because that's what the law does and it's been sustained.
But the rationale for that is it's because we're worried that if that happens, it'll beget foreign propaganda.

MR. PINCUS: I think if that's the justification strict scrutiny might well apply, there might again, it might be satisfied because of the scarcity rationale that also applies.
But I do think once you get into viewpoint basis, I mean, even in holder, the court said, you know, very targeted speech, a very targeted congressional restriction, the court said strict scrutiny applies.
This is a, this is a restriction.

CHIEF JUDGE SRINIVASAN: But the speech that was an issue in holder wasn't foreign speech.
I mean, it had implications abroad to be sure, but what was going on was it was lessons that were being taught.
There wasn't a question about the analysis being different because what was being targeted was foreign control or even foreign adversary control.
So obviously-

MR. PINCUS: Yeah, I just think, Your Honor, if the premise of a lesser standard is foreign control, then surely the foreign control has to be demonstrated by some strict scrutiny standard because you're then taking away the rights of the US speaker.
So if the premise of applying a lesser standard is foreign control, I think you're still in strict scrutiny because the consequence of that is totally taking away the First Amendment rights of the speaker and the government really doesn't argue that.
I really want to draw a distinction between foreign ownership and foreign control.
I think foreign ownership, for the reasons I said in our colloquy before, would be a pretty shocking change here.
Just to go back to Judge Rao's question for a minute about disclosure, I think disclosure has been the historic answer for covert content manipulation.
That's what the statuted issue in Measley Keene talked about.
Just identify the source and then Americans can make the choice.
That's exactly what happened.
Again, I'm not saying there might, in some hypothetical world, be possible in some situation to say that that doesn't work, but that's certainly been what happens.
And we're not saying that covert-

JUDGE RAO: How do you identify covert influence in a code that they estimate, you know, like the source code, they say it would take three years to just review the existing source code, much less any updates to the code.
So how are you supposed to have disclosure or verified disclosure in that sort of circumstance?

MR. PINCUS: Well, Your Honor, it might be that the disclosure is just the risk of, that the government says there's a risk to control.
Maybe the disclosure doesn't have to be targeted.
I don't know exactly what it could be.
But again, we haven't had any exploration here of even if there is control on a record that this court can review, let alone whether disclosure could work.
Maybe the government would come up with some arguments they wouldn't work.
I don't think they could.
But let me turn for a minute to News America, because I think that really is a route and explains the problem here.
News America was a case where the court said, this statute, even in the broadcast context, targets a specific speaker.
We therefore are going to apply heightened scrutiny, and we don't see any reason why Congress exempted this individual speaker from the general rule about when you can get discretionary waivers from the FCC, and therefore we're going to invalidate a prohibition on that.
And this case seems to us to be on all fours with that.
Here we have a specific US speaker targeted.
It's been exempted from a general process that answers a lot of the conundrums that are before this court.
What about less restrictive alternatives?
What actually is the basis for finding, alleging government control?
Here's a record.

Here's a reason decision that can be reviewed.
And then this court can review it.
We'd have a lot of the same legal arguments, but part of the issue in this case, and we think it's a constitutional flaw, not just a problem, is that Congress didn't do any of the things that the First Amendment requires.

JUDGE RAO: Mr. Pincus, just go ahead.
I mean, if, I understand, of course, you think strict scrutiny applies, but assume for a moment that O'Brien is the framework and intermediate scrutiny applies.
What is your best argument that ByteDance TikTok can win under that level of scrutiny?

MR. PINCUS: Well, we still think under intermediate scrutiny, there's a requirement to look at alternatives, and there's no indication that Congress looked at the alternatives here.
There's no indication that disclosure-

JUDGE RAO: Well, there's alternatives, but it doesn't have to be the least restrictive means.

MR. PINCUS: They have to be considered, but they weren't even considered.
I do think going back to a broader problem in this case, we have a real threshold question about-

JUDGE RAO: You're not challenging the government's interest as substantial under intermediate scrutiny, just the tail.

MR. PINCUS: No, I am challenging the government's interest in scrutiny.
That puts out what I was about to say is that the government, as I said, has plucked out this very targeted interest.
But I think if you look at what Congress talked about, the problem here is that there was a lot of discussion about content, the imbalance of content on Tic-Tac at times where the government concedes, there's no foreign manipulation whatsoever.
I think figuring out what Congress's actual purpose was here, that's the test that the Supreme Court has set up in First Amendment cases.
It is very problematic because we really don't know.
The government is defending this very, very narrow or arguing that it's a very, very narrow interest here, but the record is suffused with comments by legislators both in the House and Senate about the supposedly imbalance about Palestinians and Hamas, all kinds of current events.
Now, we have Mr. Weber in his declaration explains why those allegations of imbalance are wrong, but they clearly motivated Congress in a significant way.
It's another reason why the availability of the general standard and the real tainted problems with the specific TikTok provision sets up an alternative where if the government thinks that it can establish a record based on the argument that it's culled together, let it put together that record, look at the less restrictive alternatives that have not been addressed, and also frankly consider the facts.
Another sort of issue in this case is to rule for the government.

JUDGE RAO: I feel like you're arguing for us to remand without vacator to Congress for more findings.

MR. PINCUS: I don't think so.

JUDGE RAO: It's a very, very strange framework.
I mean, I know Congress doesn't legislate all the time, but here they did.
They actually passed a law, and many of your arguments want us to treat them like they're an agency.
It's a very strange framework for thinking about our first branch of government.

MR. PINCUS: I think it's an unusual law, though, Your Honor.
It's a pretty unusual law, an unprecedented law, as far as we know, that specifically targets one speaker.
We can't find, and bans, generally, this isn't Kaspersky or one of these laws that talk about government procurement or the use of government funds.
This is a law that broadly regulates and targets that regulation of one speaker.
That's pretty unusual, and I do think News America supplies the paradigm.
Now, in News America, the court didn't say we're rebanding to the FCC, but the functional effect of its decision was to say the FCC will apply the general standard and then if there's a problem, we'll figure it out.
So I'm not saying we're rebanding to Congress.
I'm saying exactly what the News America court says.

SENIOR JUDGE GINSBURG: It's a rather blinkered view that the statutes just singles out one company.
It describes a category of companies, all of which are owned by or controlled by adversary powers and subjects one company to an immediate necessity because it's engaged in two years of negotiation with that company, held innumerable hearings, meeting after meeting after meeting, an attempt to reach an agreement on a national security arrangement, which failed.
That's the only company that sits in that situation that is so advanced in its negotiations and its relationship to the government that it's exhausted any further possibility of relief through the second procedure.

MR. PINCUS: Well respectfully, Your Honor, I guess I have two answers to that.
One is...

SENIOR JUDGE GINSBURG: As usual, Mr. Pincus.

MR. PINCUS: Sorry, I just want to give the court multiple reasons.
The generally applicable standard is more protected for companies.
It gives them a statement of reasons for this court to review.
It has the business review exclusion.
We can debate about what it means.
Maybe it's broad and it says...

SENIOR JUDGE GINSBURG: Maybe so, but that's not...
You're not making the claim to have that exclusion.

MR. PINCUS: Well, it's not an option for us.
If we were in that generally applicable standard, something that's certainly possible, there's a lot of review content on TikTok.
Business, travel, product reviews, TikTok...

SENIOR JUDGE GINSBURG: And we can come back, I suppose.

MR. PINCUS: I don't think so, Your Honor.
The statute is an absolute bar.
Other companies could say...

SENIOR JUDGE GINSBURG: It's an absolute bar on the current arrangement of control.

MR. PINCUS: Yes, but under the generally applicable standard, that arrangement of control won't be disturbed if the exclusion applies.
So that's something that's not available to us.

SENIOR JUDGE GINSBURG: That's essentially an equal protection argument, correct?

MR. PINCUS: No, I...

SENIOR JUDGE GINSBURG: Equal protection heightened with a sort of First Amendment flavor enhancer.

MR. PINCUS: Exactly the argument that was in News of America, Your Honor.
what the court said is we're looking at the First Amendment, equal protection with a little flavor and a little bit of tanger.

SENIOR JUDGE GINSBURG: You know, talking about levels of scrutiny, which I'm not sure we need to sort of waste all this time on, frankly, or use all this time on.
There's certainly, there's no precedent, no case going either way involving a designated adversary nation.
Surely that might have something to do with the level of scrutiny that a court should apply to a judgment by the Congress about a foreign power.

MR. PINCUS: I think that the issue, I think that might apply at the, just at whether strict scrutiny is satisfied, but as I said before, the problem here is the predicate isn't just, this is not claimed to be all the speech of the designated foreign adversary.
Maybe that would be a different situation.
Might not be, but we don't have to decide that.
What's claimed here is there might be some influence on this fully protected US.
Speaker in the future, and therefore we can burden a fully protected speech.
So the predicate controlled is what the government has to establish.

And I think our argument is it has to meet a really high standard to do that, because what it's doing is taking away the rights of an American speaker.

SENIOR JUDGE GINSBURG: You're quibbling with whether there's actual Chinese potential control, that the company could not be directed to do something or refrain from doing something?

MR. PINCUS: I think that is one of our arguments, yes.
Whether it's possible and whether the protections...

SENIOR JUDGE GINSBURG: That's your interpretation of Chinese law?

MR. PINCUS: Well, I don't think the government claims Chinese law could do that.
I think their claim, I may be wrong, is mostly related to the data privacy part of the equation.
But I think that our conclusion is...

SENIOR JUDGE GINSBURG: They argued flat out that being subject to Chinese control, the company, it's a misfortune perhaps for the company, would have to and would certainly comply with the requirement with respect either to content manipulation or to hoovering up information.

MR. PINCUS: I don't think the government has established that yet.
We haven't seen what's in the confidential secret submissions, but I don't think they've established it even as a matter of Chinese law.
But even if they do, I think then the question is, do these two justifications apply or is there some less restrictive means?
And that hasn't been decided.
It was a question even in holder, that was an issue.

CHIEF JUDGE SRINIVASAN: Let me make sure my colleagues don't have additional questions for you because we still have to hear from the users and we'll definitely give you some rebuttal time.
We'll give you rebuttal time, Mr. Pincus.
Thank you.
Mr. Fisher.

JEFFREY L. FISHER (on behalf of TikTok creator petitioners): Morning, may it please the court—The creator's fundamental submission in this case is that wholly independent of TikTok and the company's interests that are at play here, the act here directly implicates the First Amendment rights of American speakers to speak, associate, and listen to free expression in this country.
Any other holding would prevent American writers from publishing in Politico or Al Jazeera, would prohibit American musical artists from posting their music on Swedish-owned Spotify, or would prevent American filmmakers, be able to allow Congress to prevent American filmmakers from creating documentaries to be edited and aired on the BBC.
Our arguments on the compelling interest and narrow tailoring side of the case, do parallel TikToks to a great extent.

But I do want to emphasize that the government's content manipulation rationale is wholly illegitimate and invalid and anathema to the First Amendment, and it itself taints the entire act.
If you could, as Chief Judge Sri Srinivasan hypothesized, isolate just the data privacy, that itself would also be not a compelling interest and not narrowly tailored.
Taking a step back, it is truly striking.

SENIOR JUDGE GINSBURG: What is the creator's interest in that aspect of the case?

MR. FISHER: In the data privacy aspect of the case?
Well, the creator's interest here is the First Amendment right to publish and coordinate with their publisher of choice in the NetChoice sense of TikTok.
And so if you work all the way down through strict scrutiny to the government's purported interests, we think the data security interest is invalid for a couple of reasons.

SENIOR JUDGE GINSBURG: I think we're talking about the concern of the government with hoovering up all the information about American users, including your speakers.

MR. FISHER: Right.
So we just think that is an insufficient justification to satisfy certainly strict scrutiny, and even if we were in a world of intermediate scrutiny, and for a couple of reasons.
One is, as the company has elaborated in its briefing, the government's arguments themselves are overblown.
Geo-locational information is not gathered to the extent the government asserts.
Contact lists are not given to the company unless the users opt in to that.
And in general, there's a real problem with the government's data security argument, particularly from my client's standpoint, because those are voluntary acts.
These are opt-in procedures to share your data if you wish.
So that's the first problem.
The more dramatic problem, though, if I could really emphasize this, is that even if you could isolate data security, under the Arkansas riders Project and Minneapolis Star Cases, that would have to be subjected to strict scrutiny because you have a law that is singling out speakers.
It is singling out media and the press in the way that triggers strict scrutiny in those cases.
And there's no way, if I could just add one quick thing, and I want to answer your question, there's no way that could satisfy strict scrutiny, given all the exclusions Mr. Pincus has deprived with e-commerce and all the rest.

SENIOR JUDGE GINSBURG: So they opt in for sharing your data.
The users ask, do you want to share your data?
That doesn't mean sharing it with ByteDance, right?
The problem is, ByteDance is going to have, or TikTok is going to have the information.
The question is, do you want us to be able to share it with others?
Is that correct?

MR. FISHER: Well, I think that, yes, you understand you're sharing your data with TikTok and public information who TikTok is ultimately owned by.
It's a company called ByteDance.

So it's wholly voluntary on the user's part.
But it's really the under inclusivity in a world of strict scrutiny, which has to be applied under Minneapolis Star and the Arkansas riders Project.
That sinks the government ship on the data security side.

JUDGE RAO: Mr. Fisher, does your argument depend on a conclusion that divestiture is impossible?

MR. FISHER: No, it doesn't.
I think it is.
It seems like the record shows that it's impossible, and I'm not sure how much the government pushes against this.
But even if it were possible, for two reasons, we would still...

JUDGE RAO: So what would be the creator's interest in TikTok US being owned by ByteDance?

MR. FISHER: Well, our interest is in working with the publisher and editor of our choice, including the current ownership, which works very well for our creators.
You couldn't tell an American writer they wouldn't have a First Amendment interest in working with Twitter owned by a particular individual or if Fox News was required to divest from over Vodar.

JUDGE RAO: Do you have a First Amendment interest in who owns TikTok?

MR. FISHER: Yes, that is who the publisher is, ultimately, you could say.
And so the act directly singles out...

JUDGE RAO: Does that argument bolster the government's argument, though, that TikTok US is controlled by a Chinese headquartered company?

MR. FISHER: Well, I think that you have to walk through this step by step.
So, you've asked, do we still have a First Amendment interest in a particular owner or publisher?
Absolutely yes.
No case that I'm aware of has ever suggested that simply a speaker or publisher does not implicate First Amendment.

JUDGE RAO: But a lot of the argument depends on TikTok US being a separate corporate entity, right?

MR. FISHER: I think a lot of the argument does depend on it, particularly from a company.

JUDGE RAO: So it remains a separate entity.
It just, its ownership changes.

MR. FISHER: No, no, no, but I want to emphasize, even if I would spot the government, all of that, and say all the way down to control, which we don't think is in the record in this case, we would still have a First Amendment interest of working with whatever foreign publisher, foreign-owned publisher we want.
And all the hypotheticals I've just given you, from Politico to Al Jazeera to Oxford University Press, all the way down.
And I want to emphasize, Judge Rao, this goes to Judge Ginsburg, you asked about foreign adversaries and foreign governments.
There are absolutely Supreme Court cases, Lamont and Whitney, first and foremost, that hold that even working, even American speakers speaking in conjunction with foreign governments who are a hostile to this country.
That is the holding of Lamont.

CHIEF JUDGE SRINIVASAN: So in the broadcast context, then, would you say that there's a First Amendment interest in making sure that broadcast spectrum is subject to foreign control if there are users who would like to work with the foreign controlled license?

MR. FISHER: I think the way you were describing in your back and forth with Mr. Pincus got it right in the end, which is simply saying rules about foreign ownership, simplicity are okay as a matter of the First Amendment.
But if the government were sorting between viewpoints, even as according to who is more hostile to this country or their views of communist nations, again, that brings us right back to Lamont.
It brings us right into Whitney.
Remember that the speaker in Whitney was a member of the American Communist Party working in conjunction to espouse the Moscow principles laid down in the manifesto that Justice brandeis describes.

CHIEF JUDGE SRINIVASAN: So then if that's the relevant distinction, and then it's not enough for the government to say in the broadcast context, we're just going to exclude foreign ownership, period.
You'd say, we have to explain why.
Why do you want to exclude foreign ownership?
It's not enough for you just to say you want to exclude foreign ownership and then win on that basis.
Because if the reason you want to exclude foreign ownership relates to a concern about the content implications of the foreign ownership, then that might not be permissible.

MR. FISHER: Well, look, let me just give a quick preface and then give you your answer.
I don't want to get too far into broadcast because ACLU vs.
Reno makes very clear that the world of the internet and the unlimited marketplace of ideas on the internet is very different from broadcast.
So I think whatever you say here wouldn't bleed over to broadcast.
On the broadcast side, to answer your question, I think that if the government came in and said we're worried about the viewpoint of the speaker, not just the foreign ownership, that would be a problem.

It would be something that I don't think the US.
Supreme Court has ever said that is okay.

CHIEF JUDGE SRINIVASAN: And as I said, even though that was, as I understand it, that was the reason from the very beginning, with the Communications Act, that was the reason that Section 310 excludes foreign ownership is a concern about foreign propaganda.

MR. FISHER: Well, I think that again, you'd have to trace that back and ask whether that's still the justification today, if that were what happened in the past.
You'd have to ask whether the government has other arguments in those sorts of cases.
There'd be a lot to work through in that case.
But I think it's fair to stand here at the podium and say, the US.
Supreme Court nor this court has never said that content-based restrictions or I'm sorry, viewpoint-based restrictions among foreign speakers is a legitimate interest to pursue into the First Amendment.
Meese against Kane, the Supreme Court stressed, and actually Solicitor General Freed in that case, stressed to the Supreme Court, that was exactly what saved that law in that case, was that foreign propaganda was described by Congress in entirely content-neutral terms.
So the government didn't even make the argument in Meese against Kane or in Lamont, that the government is making here, that a foreign speaker or a foreign government can be suppressed from ownership or speaking or curation or any of these other First Amendment activities based on their viewpoint.
But remember, the reason I'm standing at the podium here is that this isn't just a case about a foreign speaker.
If this were a case like Lamont, just about foreign speakers and Americans wanting to hear that, I think you'd already have a victory for the American listeners under Lamont.
Certainly, no Supreme Court case has ever held to the contrary, and there's no history and tradition in our country of banning US speakers from hearing from foreign governments, even if they're hostile to our country, simply to express their ideas.
But that's not even this case.
This case is American speakers like the creators, like base politics, who want to speak to other Americans on an American platform, and at the very most, can be alleged to say they want to coordinate with a foreign publisher when they do so.

CHIEF JUDGE SRINIVASAN: Can I ask about that Lamont?
So if we look at Justice Barrett's concurrence in NetChoice, it clearly presumes in her view that foreign control changes the equation under the First Amendment.
And if that's so, is Lamont always a trump card?
Can Lamont just always kick in and say, even if there's an ability to deal with foreign control, vis-a-vis the foreign speaker, because the foreign speaker doesn't have First Amendment rights, it turns out that that's going to be an illusory ability on the part of the government, because you can always bring into play the US recipients and their rights kick in.

MR. FISHER: So let me start with Justice Barrett's concurrence and explain how this all sorts out.

So really, all she said is foreign ownership might change things under the Open Society case, which is true as far as it goes.
It's a question to ask, a fairly fair question.
But I think the way I distinguish Open Society on the one hand and Lamont and all the things I'm describing on the other is Open Society is just about a foreign speaker speaking abroad.
That's what that case is about, full stop.
There is no First Amendment interest in foreign speakers speaking abroad.
But once that speech is directed into the United States, and certainly once that speech is in concert with other Americans and indeed propagated by other Americans, the speech on TikTok is not Chinese speech.
It is American speech that at most is curated by a foreign company and the government says potentially by a foreign government as well.
But it's American speech.
You're way, way, way on the First Amendment protective side of the equation, and we even have a much stronger case than Lamont.
So, all Justice Barrett, I think, is saying in that choice is, oh, let's ask that question when it comes up.
But when you have speech inside the United States, our history and tradition is we do not suppress that speech because we don't like the ideas.
If I could just give one more example.

CHIEF JUDGE SRINIVASAN: We got to apply more time to just to continue the hypothetical and curious about your reaction to that.
So if the rationale for this, for barring foreign ownership of a media establishment is a concern about what that is going to produce vis-a-vis content, and we're in a time of conflict with a foreign adversary, would you say that the US., there's definitely a protest here against the wars is completely protected under the First Amendment.
So that viewpoint would be one that American listeners might well have an interest in hearing a lot about.
Would you say then in that situation, because of clients like yours, the American recipients, that a bar on foreign adversary ownership of a media establishment during war is invalid?

MR. FISHER: Leaving the broadcast question aside.

CHIEF JUDGE SRINIVASAN: Yeah, aside from broadcast.

MR. FISHER: Definitely strict scrutiny would apply, and I can imagine particularized facts where strict scrutiny might be satisfied in the heat of war depending on what exactly the content of the speech is.
But in a situation like this where we're not at war, and all we're talking about is so-called foreign propaganda, really, again, arranging American speech.

CHIEF JUDGE SRINIVASAN: But the negative pregnant ads, even in war, you wouldn't just accept that the government can prohibit foreign adversary control.

MR. FISHER: As I say, that might be the case.

But let me give you a couple of historical examples to show why.
Even that is a very hard question.
George Washington and his farewell address, one of the central themes of that farewell address was, beware of foreign influence.
Remember, France had supported Thomas Jefferson in the election, and George Washington told Americans, beware of foreign influence, be careful about foreign influences, and be careful about making your own association with foreigners.
Never did he suggest the answer was to suppress foreign speech.
Look at Farah, the case that the statue passed in a run up to World War II.
That was an issue in Meese against Kane.
Congress there dealt with foreign agents in the US spreading foreign propaganda in a run up to war, and that law, all it does is require disclosure.
It does not prevent Americans from, as the government in its most robust form of the argument would say, creators like the ones on TikTok do.
Then Lamont, again, in the height of the Cold War.
Again and again in our history, we have this.
And Judge Rao, you also asked about the Palestinian, the PLO case.

JUDGE RAO: I'm interested.
I mean, that case seems very similar because there you had American citizens who associated with the Palestine Information Office.
And our court said, you know, requiring that office to disband was only an incidental burden on their speech because they could continue speaking about Palestinian causes in other fora or even form other groups.
They just couldn't be.
They just couldn't be a foreign mission of a terrorist organization.

MR. FISHER: Right.
So I think you stressed the important part about that case, which is distinguishable from here, which is my understanding is the court, they're stressed.
We're not suppressing any speech here at all.
We're just preventing them from having this mission in this office.
So they can still speak.

JUDGE RAO: Why is that not analogous to what's happening here?
Right.
The Congress has decided that TikTok US cannot be owned by effectively a Chinese corporation.
And so that leaves creators that you represent free to continue speaking on TikTok US if they divest or on other platforms, or create a new platform, or any number of other ways they could continue sharing their content.

MR. FISHER: Right.
So remember, I think the facts would show that divestiture is impossible, but leaving that aside for the moment.

JUDGE RAO: But you said that your argument doesn't depend on it.

MR. FISHER: It doesn't.
So I just wanted to put a pin in that.
So there's a couple of big differences between what you're describing in this case.
So the first is that there are not interchangeable mediums for our clients to speak on.
I don't think the government seriously dispute the declarations that show that TikTok is unique in terms of how it looks and feels, the audience that people are allowed to reach.
So one of our clients reaches millions of people, has millions of followers on TikTok, has tried to work on other platforms, 10,000 or even fewer than 100 on YouTube are able to.
So there's a whole different audience that you wouldn't have had in that case.
You have whole different tools available, like CapCut and editing tools.
So the nature of the speech is different.
In the PLO case, I think you would have still been able to exercise all the same expression and reach the same audience.

JUDGE RAO: One of your arguments is that the creators want to work with their foreign owner, publisher of TikTok US and the rest, arguably in the in the Palestinian Information Office case, they wanted to work with the PLO and to represent the PLO in America.
That was the whole mission of that office.

MR. FISHER: But I don't take that-

JUDGE RAO: Maybe the interest in the in the Palestinian case is actually stronger.

MR. FISHER: So I don't take that case to say that speakers going forward there would not be able to speak in conjunction with the PLO in the United States.

JUDGE RAO: But they can't represent the PLO.

MR. FISHER: Well, I think I'm maybe going to get too far into the details.
But in this case, you know, our first and foremost argument is we're American speakers wanting to work with an American company, TikTok.
If you cut through that and say, well, what about ByteDance?
For all the reasons I've said, we have an argument, we have a fundamental interest in being able to work with the publisher and editor of our choice, even if it's a foreign editor or foreign publisher.
I mean, the implications of writing an opinion that accepts that argument from the government truly are staggering.
As we noted in our brief, democracy in America is written by a French author sent by the French government.
And if an American bookseller wanted to sell that, it would be quite surprising to have the government be able to answer that and say, Congress can ban American bookstores from selling democracy in America because it's written by a foreign author in conjunction with a foreign government.
Blackstone's commentaries could be banned.

JUDGE RAO: These examples don't really get to, I mean, we're not talking about banning Tocqueville in the United States.
I mean, we're talking about a determination by the political branches that there's a foreign adversary that is potentially exercising covert influence in the United States.
It's very different from selling a book.

MR. FISHER: I don't want to be histrionic, so let me walk through that.
As I take the government's opening argument and even the suggestion maybe that some members of the panel voiced about Justice Farrow's concurrence, the first argument is simply because there is foreign ownership in the TikTok chain.
That itself makes this not a First Amendment case or prevents First Amendment claims from being raised.
So that's my answer that I'm just giving.
That can't possibly be.

JUDGE RAO: Okay, so there's the First Amendment maybe, you know, covers this, right?
So the First Amendment covers this.

MR. FISHER: And then the question is, is the argument that the Supreme Court squarely represented NetChoice, that it is an impermissible government motive to regulate, to change the curation of speech on an internet platform, any different because you have a foreign owner?
And I think the answer has got to be no.
Certainly when you have American speakers, for all the reasons I've said, American speakers who are entitled to see that information under LeMont.

CHIEF JUDGE SRINIVASAN: Justice Barrett at least thought the answer to that question was yes, because you said is the analysis any different because you have foreign ownership?
But the entire premise of concurrence is that the analysis is different.

MR. FISHER: Well, I can't remember the exact words to use, but I think it's a question that you would ask.
So I think at the end of the day, let's just say the conclusion is no different, because under LeMont, under Whitney, under just basic history and tradition of this country, there's no example in law or judicial decisions of an American speaker being treated any differently because they want to associate with a foreign publisher or a foreign co-author or sell a foreign book as compared to an American one.
And then I think the last point...

SENIOR JUDGE GINSBURG: The statute doesn't apply to all foreign editors or publishers or what have you.
It applies to foreign publishers or editors from four specific adversaries.
So instead of saying foreign control, let's say adversary control.
At every point in your...
Think of it as adversary control and then go on.

MR. FISHER: So I think we're exactly at that same...

We're in strict scrutiny and we're asking now whether foreign adversary relationships or control make any difference.
And again, look at Lamont.
Lamont is about the Communist Party.
This case is allegedly about the Communist Party of China.
Look at Whitney.
The speaker there was for the Communist Party.

SENIOR JUDGE GINSBURG: Look at the Congress.

MR. FISHER: So the court has never suggested that.

SENIOR JUDGE GINSBURG: Look at the Congress making a decision that perhaps unlike the Soviet Union at the time that the case arose or Russia, that that country and three others are now adversaries.
Perhaps they were not then.
Now that we don't know, the Congress didn't speak to it until just now.

MR. FISHER: Well, I think just as a simple matter of history, the court can take judicial notice that the governmental actors in those cases were every bit as adverse to this country in those moments in history.

SENIOR JUDGE GINSBURG: Well, they want us to say that the Congress is, the provision of the statute designating the four countries is irrelevant to this case.
Say so.

MR. FISHER: No, no, no.
I'm not saying it's irrelevant.
And I totally take the court's question as being a very serious and important one.
And different countries in the world's history have resolved this question very differently.
But our history and tradition in this country is that, yes, you might grant Congress more leeway in a time of war, particularly, or maybe even with adversaries.
But as a matter of strict scrutiny, the notion that a foreign adversary is going to spread its ideas about political issues and social issues, which is exactly what the government says in its brief, has never in our history been a basis for suppressing speech in this country, even of the foreign governments, let alone of American speakers speaking on their own terms to other Americans.
I think the last thing, Judge Rao, you mentioned is covert.

JUDGE RAO: Does this act suppress the speech of a foreign corporation?
I mean, ByteDance would remain free to post, or to speak, or to do anything else in the United States.
It doesn't prevent ByteDance from doing that.
It doesn't suppress their speech.

MR. FISHER: No, it does.
The act by its terms, for instance, ByteDance, any app, ByteDance would own.

So certainly any application covered.
I think, Vindra, you also asked about O'Brien and the level of scrutiny.
I think that's part of my answer, is that let's just look at the text of the statute to ask whether or not strict scrutiny applies because it's content-based.
Thrice over, the statute is content-based.
Once it singles out Tic Tac and ByteDance for differential treatment from other owners or other publishers, so that's one reason.
The next reason is because it singles out social media interaction, generating, sharing, viewing text, images, videos, real-time communications, and similar content.
Content is in the statute.
And thirdly, because it targets the content recommendation engine that Tic Tac uses and says that even a successor in interest cannot use that content recommendation engine.
Again, going right in the teeth of NetChoice when it comes to curating.

CHIEF JUDGE SRINIVASAN: So NetChoice, I mean, there's been a suggestion that delving into doctrine is too much log geeked on.
But let me just do it for a second because I think it actually affects things in terms of the analysis.
So if we're not in strict scrutiny land, and we're in intermediate scrutiny land, which is a lesser level of review, and let's just say we're doing that because this case involves anomalous circumstances because it's congressional determination of foreign adversary status and that tilts the equation, and balancing of considerations suggests that you get in a lower tier of scrutiny, but not abandoning the first amendment altogether.
What's your answer there?
Because part of that analysis is that the justification for the law is unrelated to the suppression of expression.
So would your analysis be that, well, for the same reasons that we think the law is content-based, so strict scrutiny will apply, even if you foist intermediate scrutiny upon us, we would still say it fails intermediate scrutiny because the law's motivation is related to the suppression of expression.

MR. FISHER: So that's exactly my answer, yes.
I think that under Mount Whitney or Arlington Heights, that would be where actually you would stop, because once you have an impermissible motive behind the law, you don't even look at the data security.

CHIEF JUDGE SRINIVASAN: So that's what the NetChoice majority indicated was going on, what would go on there when they went on and talked about how you would analyze it.
And here's my question about that.
So it speaks in terms of related to the suppression of free expression.
And one way to potentially understand that is related to the suppression of protected free expression.
And if you're talking about the foreign organizations interests, you represent the users, I get that, the recipients.
But from the perspective of the foreign speaker, if those are unprotected by the First Amendment, because under Agency for International Development, they don't have a First Amendment claim to make, then could an argument be made that the law actually is not related to the suppression of

free expression, because what it's really trying to suppress is foreign ownership, and there's no First Amendment stake on that side.

MR. FISHER: I think I'd have two answers there on that particular one.
And then I want to do the rest of intermediate scrutiny as well.
But on that answer, I would say there's still two problems.
One is you still have under the Surrell concept, in practical operation, American speakers are silenced by, or their speech is certainly affected by this law.
So you can't get out of the First Amendment problem with that formalistic move.
Even if you wanted to isolate, Judge Srinivasan, the foreign speaker and make the argument you just made, I actually think then you'd still have an RAD type problem when it comes to the government discriminating among foreign speakers based on viewpoint.
So remember, the RAD principle is even in a world where you're dealing with totally unprotected speech, if the government is choosing and selecting and suppressing some based on viewpoint, but not others, Justice Scalia's opinion in that case says even then strict scrutiny.

CHIEF JUDGE SRINIVASAN: But you can do that if the reason that you're choosing a subcategory is related to the reason that the category has a lesser status.
And here the argument would be, well, the category is foreign speech.
The subcategory is foreign adversary control over a really important medium.
That's a related subcategory because what we're really concerned about is formability.

MR. FISHER: I think the way I would define the subcategory or the interest is the way the government puts it in its brief is the concern that the Chinese government is going to influence political discourse and ideas in this country, which I think is an impermissible motive, at least if you're outside of broadcast media world and regular First Amendment world.
If you want me to walk the rest of the way through intermediate scrutiny, I think that the content manipulation justification fails under intermediate scrutiny and then you should be done.
Arlington Heights says that if you have an impermissible motive behind a law, and just imagine TikTok was banned or imagine this divestiture provision was motivated, Congress said by the fact that one particular religion over another is being favored on the platform or too many people of one race or another are using the platform, but also data security.
I don't think we'd also, once you were done with that impermissible motive, the case would be over.
But let me, even on the data security side, even under intermediate scrutiny, you need to have some reasonable means and fit between the government's rationale.
And you just don't have that here because of the e-commerce sites that are left out, the other American technology companies that have Chinese subsidiaries that are left out.
You know, there's just woefully under-inclusive, which I think tells us.

CHIEF JUDGE SRINIVASAN: As to that, under holder, I mean, I think we extend a substantial degree of deference to the government's, to Congress's and the government's assessment of how the alternatives would work out and whether they're sufficient.
It may still not be enough in your view, but it's at least overlaid with a substantial degree of deference because of what the Supreme Court said in holder.

MR. FISHER: Yes, you can give the government some deference.
And yes, the government doesn't have to do everything, especially in an intermediate scrutiny world, but the government still has to come in and explain in reasonable terms why it has singled out one particular collector of data and excluded everybody else.
And I just don't think these e-commerce sites that millions of Americans visit as well and these many other platforms that would be susceptible to Chinese hackers or influence or whatever the facts may be, are meaningfully different from TikTok.
And I think what the government tells, I'm sorry, what the Supreme Court tells us when it comes to under-inclusive arguments is what that often is, is a signal that something else is at play.
And that's what we think is going on here.
And again, the government admits that it's the content manipulation rationale that also justifies, they say, justifies, motivates, we say, this law.
And that's where the problem is.
And then finally, in terms of intermediate scrutiny, again, we think there's just no way to get there under Merrigan's, I'm sorry, under Minnesota Star and Arkansas riders Project on the data security side.
But if you could, there's still not alternative means available to my clients for the reasons I've been describing that are laid out in the affidavits.
The audience is completely different in other platforms.
The tools and the feel of the medium of speech is completely different.
And just the identity of the editor and publisher can't be singled out and taken away from us.

CHIEF JUDGE SRINIVASAN: Okay.
Make sure my colleagues don't have additional questions for you now.
We'll give you a little bit of time for rebuttal as well.
Thank you, Mr. Fisher.
For the government now, Mr. Tenny.

DANIEL TENNY (on behalf of Merrick Garland): Thank you, Your Honor.
May it please the court—Daniel Tenny for the United States.
There's been a lot of discussion of what the government's motivations for this statute were and what its justifications are, so I'd just like to start up front by making this clear.
There are two primary ones.
First, TikTok is an application, and what it does is it gathers a lot of information from users of the application, both consumers of content and creators of content.
And it uses that information to try to assess what sorts of videos and other content is going to be of interest to consumers and what will keep them looking at the app.
They want to keep people's eyeballs on those screens so that they're continuing to consume the app.
And that requires the collection of data, and that data is commercially useful to them.
And in today's society, the collection of data is an important part of commercial and advertising, figuring out how to tailor to users' needs, how to target advertisements or other things to particular users.
The problem is that that same data is extremely valuable to a foreign adversary trying to compromise the security of the United States, knowing what Americans' patterns are, who their contacts are, where they go, who they interact with, what sorts of content interests them, what

sorts of content turns them off, would be quite valuable to a foreign adversary if we're trying to approach an American to try to have them be an intelligence asset, or if it was trying to figure out how to cater its messages to get messages supportive of Chinese national security rather than American.
That data security rationale underlines the act.
That has nothing to do with protected speech by American citizens.
That's a separate concern.
Now, the second rationale for the act is covert content manipulation by ByteDance.
I say by ByteDance deliberately because the point is, what is being targeted is a foreign company that controls this recommendation engine and many aspects of the algorithm that's used to determine what content is shown to Americans on the act.
And I think there was a quotation read from the declarations, from petitioners' declarations before about how that continues to happen in China rather than in the United States.
If you just read those declarations through, you'll find lots of them.
There's really no dispute here that the recommendation engine is maintained, developed, written by ByteDance rather than by TikTok US.
And that is what's being targeted.
So when the petitioners say, as they repeatedly did this morning, that, you know, this is targeting expression, to the extent that it's targeting expression, which isn't the exclusive thing.
But if you call the manipulation of the covert manipulation of content expression, which may be under NetChoice, if an American company was doing it, you would.
But if you're going to call that expression, it is not expression by Americans in America.
It is expression by Chinese engineers in China.

CHIEF JUDGE SRINIVASAN: Maybe we're going to the same place, but you've healthily isolated what seems to me to be doing all the work from the government's perspective.
Because under NetChoice, if we were talking about a US company, that's Heartland First Amendment, protected curation.
That's just what NetChoice says.
If everything under the government's perspective turns on the fact that bite dance is subject to Chinese control.
Because if it was US control, that's NetChoice.
That raises a serious First Amendment question.
And then when the way NetChoice did it, the rationale would be related to the suppression of free expression.
And let me just add one thing.
Take out the data security.
I know that that's in the case.
But just for purposes of this part of the analysis, just take that out and let's just focus on the content.
What the government itself rightly characterizes as content manipulation, once you put an interest in play that's called content manipulation, that sets off First Amendment alarm bells in the normal situation when you don't have foreign control in play.

MR. TENNY: I think I mostly agree with that statement, but I do have some caveats.
I mean, it's not just a question of control or ownership.

I mean, this is being done by by dance.
It's not just, we're not, I mean, I think we would have arguments and we might well win.
And I don't mean to suggest otherwise.
If the covert content manipulation that we were concerned about, we're done by TikTok US subjects to the oversight of by dance, I think we would have strong arguments there.
And again, I'm not trying to give away that case, but I'm just telling you that's not the case that you've got.
Because what we're talking about is that this is what's done by by dance outside the United States.
And the other side makes a big deal about the fact that the code is sort of deployed in the United States in the sense that the source code is written in China and that it's posted.
I mean, it's a little metaphysical to describe what it means for it to be, quote unquote, in the United States if it's in the cloud.
But the core point that we're making is the one that they've conceded, which is that this code is written in China.
And the determinations about how it should be changed, how it should be altered, which they say they do a thousand times a day.
They push up a new update.
All of that is done in China.
And I understood them to be weakly suggesting that...

CHIEF JUDGE SRINIVASAN: So I'm giving you all that.
I'm just assuming for these purposes that you're right on all that, that all the relevant stuff is going on in China.
My only point is that if that relevant stuff was going on in the US., that's a big problem for the government under NetChoice.

MR. TENNY: If the government were targeting the curation of content in the United States by US actors, that would be NetChoice.

CHIEF JUDGE SRINIVASAN: We're giving you that.
What you're doing is you're targeting curation in the same way.
It's just that the curation that's being targeted is happening abroad at the behest of a foreign actor.

MR. TENNY: Right, with the caveat that there's other rationales that you're focusing on discussing.
Yes, that's absolutely right.

CHIEF JUDGE SRINIVASAN: Right, so if we do that, then what's your answer to the proposition that even if we credit you in every respect on that score, and we assume that the foreign curator doesn't have a First Amendment claim because they're a foreign curator engaging in curation abroad and under agency for international development and other sources, that's not subject to First Amendment protection.
What's the answer to the proposition that, well, you still got US recipients, and the US recipients definitely have First Amendment interests in place, see cases like Lamont, and for those US

recipients, the exercise of foreign curation affects the mix of things that they're getting, and they want to have access to, by hypothesis, the curation that's occurring abroad.
And the fact that that's being denied subjects this to serious First Amendment scrutiny.
What's the answer to that?

MR. TENNY: I think when you're talking about recipients rather than speakers, the first case I would turn to is Murthy from the Supreme Court just this term, or this past term, where that was the claim that was made there.

CHIEF JUDGE SRINIVASAN: Well, they also, it's the entire complex of people who are in the second set of petitioners before us, because it includes not just recipients who take in TikTok content, but also creators of content that's then disseminated on TikTok, who are speakers in a way.
But it's just that they like doing it through a medium that's subject to the very control that you want to deny with the editorial control that's going on abroad.

MR. TENNY: I mean, we've got, we've now moved away from arguing that the government's justification is related to First Amendment activity, and we're already on incidental effects on other people's First Amendment rights, because the government isn't targeting those people, isn't saying, we don't want you to be able to post on this medium, we don't want you to be able to associate.
That's just something that happened to them.
And there, I think cases like Arcara and other cases, I mean, there are all sorts of circumstances.

CHIEF JUDGE SRINIVASAN: If you're invoking Arcara, then that means that the First Amendment just doesn't apply at all.
So it's not subject to First Amendment scrutiny at all, because you're focusing on foreign control.
And that means that the US users of TikTok, both US users who disseminate contact via TikTok and who take in content, that their First Amendment interests, which are the kind of interests that were in play in Vermont, just don't matter, because the First Amendment just doesn't apply at all.
That may well be the government's position.
I've detected a little bit of equivocation on that in the briefing, that is your position under our card that the First Amendment just doesn't apply at all.

MR. TENNY: We don't think you have to go nearly that far to resolve this case.

CHIEF JUDGE SRINIVASAN: But would you take that position?
I get that you think you'd win anyway, but I'm curious to know, would you take the position that actually the best answer is that the First Amendment just doesn't apply at all?

MR. TENNY: I guess it's helpful in thinking about these First Amendment questions to separate the various petitioners.
And I think the First Amendment, I mean, obviously, if you have a case like this, where the effects on expression are significant and we acknowledge that, it might sound like a striking proposition, but I'd like to just walk through the various petitioners.
So the first petitioner is ByteDance and TikTok themselves, and we sort of discussed that.

That's as far, okay.
And so then you have the content creator petitioners, and their speech may be affected, and we don't know yet what will happen if this law is upheld, whether ByteDance and TikTok in China will have a change of heart and come up with a way to sell the platform and continue to operate, or whether they want to forfeit whatever rights they would have to their extremely successful business.
But no matter which of those things happen, I mean, that really is an indirect effect of what's going on there, and going on here.
And you could say, well, it's a sufficiently significant incidental effect that will apply something akin to the O'Brien standard.
But there's a pretty good argument that you would say, I mean, in the same way, if ByteDance got shut down because they engaged in tax fraud or because they violated the import laws, and the result was that a very popular internet platform was shut down entirely, I don't think a content creator could come in and bring a First Amendment challenge and say, so as to that, it just seems there's the argument, I take it the other side would make is that's markedly different because if they violate the tax laws, it has nothing to do, the rationale for striking against that has nothing to do with content or expression.

CHIEF JUDGE SRINIVASAN: But here, at least with the content manipulation rationale, put data security to the side, but the content manipulation rationale, by its very terms, it has everything to do with content.
But the concern is that the curation is going to result in content that the government fears the consequences of because they think that there's going to be curation that's going to affect American consumers in a way that's going to be problematic for the U.S.'s interest, which may well be right, and we may well need to defer to that.
The question is, does the normal First Amendment calculus kicks in where in that situation what the system relies on is counter speech or different ideas?
Right.

MR. TENNY: I guess I would...
I do think that the best way to think about it is to think about whether it's protected expression rather than just expression.
The fact that it happens to be expression, but it's expression that's not protected by the First Amendment seems like a pretty big distinction.
And I think that for the same reason, the idea that in addition to some of the practical problems with counter speech in this area, the idea that the reflexive reaction that counter speech is the right answer tends to be relies on cases in which you're talking about protected expression rather than unprotected expression.
And I understand that the fact that this is unprotected expression that is justifying this in part again is something that complicates the analysis from these other cases.
That's part of why we think we so readily prevail under really any First Amendment standard, but certainly under O'Brien, that's why I led my answer by saying we're not asking the court necessarily to go that far.
But it is the case that if there is a concern, a range of national security of concerns, some of which have to do with unprotected expression, and there's certainly a good argument that the

First Amendment implications of that are materially lower, and maybe even if all you're targeting is unprotected expression, it will go all the way down.

CHIEF JUDGE SRINIVASAN: So when you say unprotected expression, so you mean that it's expression that because it's occurring abroad, cannot give rise to a successful First Amendment claim on the part of the person whose expression abroad is being restricted.
And if that's true, if that's the government's understanding of the natural fallout of that, then I take it that it could be the case that Congress could just pass a statute that says no foreign entity abroad can send speech into the United States.

MR. TENNY: I don't think so for various reasons.
I mean, the other side talks about the Lamont case a lot.
And what the Supreme Court said in Murthy about, you know, First Amendment standing of recipients of speech is that it requires this sort of close connection and Lamont was, you know, people were getting mail addressed to them and then the government was asking them to raise their hand and say, I want to receive the communist propaganda and the Supreme Court said that wasn't okay.
And so if, you know, obviously if somebody, we don't, obviously we're not here to quibble with Lamont, which is Supreme Court precedent, but it doesn't hurt our case here because, you know, what the Supreme Court said in Murthy itself was, if your interest is just this sort of, you know, sort of broader, oh, you know, there's a lot of things that I want to read and I'm sort of a general consumer, you know, they didn't even think they had standing in that case, much less sort of a strong First Amendment claim.
And so the point here is just if the speaker itself doesn't have a claim, it's strange to say, well, the listener does.

JUDGE RAO: So, I mean, maybe moving away from the creator petitioners to TikTok US.
I mean, so TikTok US is a US corporation.
I mean, it's a wholly owned subsidiary of ByteDance, but it is a US corporation.
I mean, what about the First Amendment interest there?
I mean, does the government recognize that TikTok US as a separate corporate entity has First Amendment rights?
You know, of content moderation and, you know, all the other things that, for instance, the Presser Declaration says occur by TikTok US.

MR. TENNY: Right.
Yes, but those are incidental.
I mean, TikTok US posts things on TikTok, they say, and they engage in some content moderation that occurs after the recommendation engine.
You know, the problem there is none of that is what's being targeted here.
I mean, they're saying that this is singling out a speaker, but that's not what we're going after.
And one way we know that is that-

JUDGE RAO: TikTok US is engaged in expressive activity, which I think you just said they are, at least of some sort, then the act does single them out, right?
It requires TikTok US to be, you know, divested of its foreign ownership.

MR. TENNY: I mean, it doesn't single them out because of their own First Amendment activity. It singles them out because I mean, there's no indication in this record that Congress said we don't like the things TikTok US is posting.
We don't like the way that TikTok US makes decisions about...

JUDGE RAO: Oh, but TikTok US is an entity engaged in expressive activity.

MR. TENNY: Well, but the books...

JUDGE RAO: So why is this case then not like Minneapolis Star?

MR. TENNY: I mean, it's a lot more like Arcara in that regard.
It was a bookseller and they weren't going to be able to sell their books.
And the Supreme Court said, well, I understand that the consequence of this is that you won't be able to sell your books.
But the reasons that the government is going after you has nothing to do with your books.

JUDGE RAO: The statute was a generally applicable statute against prostitution or places hosting unsavory activities.
But here, the act itself singles out TikTok.
And TikTok is, as you've said, an entity engaged in expressive activity.

MR. TENNY: I mean, obviously, whether it's the Congress that's doing the selecting or the executive branch, I'm not sure would affect the First Amendment analysis.
But just to answer your question as directly as I can, the relevant First Amendment question in terms of talking about who's targeted is whether there is a motivation for the statute or the act, whether that depends on the expressive activity of the regulated entity.
And so here, the expressive activity in which TikTok US engages is not creating the recommendation engine because that's done by ByteDance, not by TikTok US.
And the data stream is not expressive activity either.
And so we don't have a circumstance in which a US company has been targeted because of its expressive activity.
That's just not this case.

JUDGE RAO: Not because of its expressive activity, but it is an entity that engages in expressive activity, like a newspaper choosing editorials to run.

MR. TENNY: Right, or like a bookstore, which is what we had in our car.
And the point is that, you know, there are, I guess I'll make two points.
One is, you know, at most we would get to O'Brien, and that's what our car was a debate about O'Brien versus.
So we're not getting all the way to Sticks Friedman, no matter what.
But even just to take the point a step further, you know, there are, as our car pointed out, and I don't think could be seriously disputed, there are government actions all the time that target entities that engage in First Amendment activity.

And if they are, if the government actions are justified and motivated by things that do not target that expressive activity.

CHIEF JUDGE SRINIVASAN: But this one, I think that's.

JUDGE RAO: So you might satisfy intermediate scrutiny, but there's still a question about the fact that the First Amendment applies.
Because one of your arguments is that really doesn't apply at all.
I mean, when you talk about the bite dance and TikTok petitioners, your comment to the Chief Judge was, well, these are foreign companies.
And my point is, there's also an entity, TikTok US., which is an American corporation, which has its own First Amendment rights.
As an American corporation under AIT and other cases that, I mean, I guess another question is, is the government making an argument that the separation between TikTok US and bite dances is a sham, or that they're fully controlled by bite dance in a way that makes the corporate form not something we should pay attention to?

MR. TENNY: Well, we're not making that argument.
I do think it's-

JUDGE RAO: I think so.

MR. TENNY: The First Amendment, the application of the First Amendment is determined not by entities, but by activities.
So I think it's, you know, because all sorts of people could engage in First Amendment activity.
And, you know, if you put someone in prison because he robbed a bank and he happens to be a prominent speaker, nobody thinks that's a First Amendment claim.
So I think it's useful to talk about the activities here rather than the entities and the activity, the arguably expressive activity or the expressive activity that we're talking about in this case, that the United States government is targeting is the creation and maintenance of the recommendation engine and the content moderation that proceeds that is done by Vikings.
That's what the United States is concerned about.
That's expressive activity, but it takes place outside the United States.

CHIEF JUDGE SRINIVASAN: But it seems like what gives arguable force to the other side's First Amendment argument is that it's not just that the government is targeting curation that occurs abroad.
It's the reason the curation occurring abroad is being targeted.
And the reason is a concern about the content consequences of that curation in the US.
And when the reason itself, you call it content manipulation, when the reason itself is content manipulation, unlike, you brought up our car a number of times for totally understandable reasons, the reason there had nothing to do with the content.
It was about prostitution.
It didn't have to do with what the bookstore is selling of books.
It just happened to be that the prostitution was taking place at a bookstore.
Here, it's not a happen to be situation.

The whole reason for targeting the editorial curation that's occurring abroad is because of a concern about the speech consequences of that on US consumers.

MR. TENNY: I'd just like to be clear about this factually.
The other side cites what I assume they think are their best examples of members of Congress talking about this.
And I pulled these and I would encourage the court to do the same.
But I'll just read an example.
Senator Warner, this is at page 566 of the appendix.
It's cited at page 20 of the TikTok brief.
I think they quoted the portion that said, you know, all the TikTok videos will be promoting that Taiwan ought to be part of China.

CHIEF JUDGE SRINIVASAN: I take that point just to be clear.
I'm not talking about statements of individual legislators.
I'm talking about the government's own rationale as articulated by the government.
I'm just looking at your brief on page 36.
Congress reasonably acted to prevent this sort of content manipulation by a hostile foreign power, a foreign power's secret manipulation of the content on social media platforms to influence the views of Americans for its own purposes.
I'm just saying when the rationale is one that's bound up in a concern about influencing the views of Americans, that's different from a concern about prostitution at a bookstore because the concern here is about curation decisions abroad influencing the views of Americans, which is typically when you see that kind of language, you'd say that's a First Amendment concern because we're trying to stamp out something because it's influencing the views of Americans in a way that the government doesn't want the Americans' views to be influenced.
Usually, that's the type of thing that generates a First Amendment concern.

MR. TENNY: I guess to be, and I apologize for going back to the quote I was doing, but I hope you'll understand why.
There's a difference between saying we don't like the way the content turns out on this platform when China does it this way.
That would be saying, you know, here's content that we like and don't like.
That's different from saying we don't want China to be in charge of what this platform turns out.
And so what Senator Warner, the full quote of what he actually said, again, at 566 of the appendix, is they could switch the algorithm a little bit, and suddenly all the TikTok videos will be promoting that Taiwan ought to be part of China.
And the problem here, it's the covert content manipulation.

CHIEF JUDGE SRINIVASAN: Suppose it was potentially two US owners.
Just take foreign ownership out of play.
And suppose that what happened is the government has a social media platform that's owned by a company in the US.
And that company in the US., the government has concerns because that company in the US is potentially manipulating the information in a way that the government doesn't like.
And so what the government says is, I just want to stop that company from doing.

All I'm talking about is ownership of control.
I'm not talking about anything else.
I just want to switch that ownership from company A to company B.
There's no doubt that that would be a huge First Amendment concern, right?

MR. TENNY: Right, but that would be because the US company has First Amendment rights.
I mean, that is NetChoice, right?
In some sense, the US company has First Amendment rights, and it can have its algorithm at once.
And there, maybe you could do disclosure because maybe you could get, you know, as a US company regulated in the United States, you know, maybe there are less restrictive means.
But to say we want this Chinese company to tell us, you know, the whole point is that it's covert and we don't have a way to stop it from being covert because it's being done through incredibly complex computer code that no one, including Oracle who they want to hire, would understand.
And because it's being done in a foreign nation where we don't have, you know, we can't pass a law saying bite dance, make this or that disclosure about what their internal operations because they're off in China.
And those are the fundamental points.
I do want to, in a related vein, circle back to the point about, you know, they talk a lot about how like all the source code is reviewed.
I just want to say something about what that review entails.
And this is again from their own declarations.
If you look at the Simkins Declaration, it's at 741 of the appendix, paragraph 61.
It describes the purposes of the source code review.
And it's basically finding viruses or malware.
That's what they're doing.
They're saying, you know, we want to make sure this source code doesn't have a problem with it of a sort of computer programming sort.
I can read you the quote if you want, but it really does say that.
In the reply brief, it's more explicit.
In the reply, in the supplemental appendix at 842 paragraph 10.
The purpose of this source code review with respect to the recommendation engine is not necessarily to inspect how the recommendation algorithm makes decisions, which I understand is largely driven by content and user behavior, but rather to prevent a third party, including petitioners from covertly manipulating the recommendation engine once it is deployed by TikTok, QS, DS, and Oracle in the secure Oracle Cloud.
They're going at, is there a hacker, are they getting at it afterwards?
That's not what we're talking about.
What we're talking about is when they build it, when they create it, when they decide how it's going to work in China, and nobody's looking at that and nobody can.
It's farcical to suggest that with this two billion lines of codes, 40 times as big as the entire Windows operating system, changed 1,000 times every day, that somehow we're going to detect that they've changed it so that it favors a Chinese narrative as opposed to being a neutral expression of American ideas.
And they say one of the things they like about it, the content creator petitioners say, well, we think this is a sort of organic source, diverse and organic source of news.

The problem is China could decide one day, it doesn't want it to be that anymore.
And we would have no way of knowing that.
Users wouldn't be able to tell.
And that's fundamentally the problem.
And that is not solved.
It doesn't even purport to be solved by the proposed national security agreement, Project Texas or anything else.
And the same on the data security side.
There are just reams of information that are going back to China.
If you look, and this is under seal because of business information, so I won't tell you the particulars.
But if you look at the supplemental appendix, I think I've got the page number here, but maybe I don't.
Oh yeah, supplemental appendix pages 249 to 52.
This is the sealed appendix that was filed with their opening brief.
It's four pages in minuscule font of all the ways they're going to slice and dice the data that they're going to send back to China ostensibly for business purposes rather than anything nefarious.
But they're not sealing off the US application in any meaningful sense.
That's why the claims that this is all regulating US content.
No, this is about that there is so much happening in China outside the control of the United States that it poses a great national security risk.

CHIEF JUDGE SRINIVASAN: Can I just get back to the content manipulation?
I think it's an adjunct to what you were just talking about.
If there's a law before us that says, we're worried about foreign content manipulation, which is what we're worried about here.
We're about something more precise here too.
But let's just say it's a law that's worried about foreign content manipulation.
In order to address foreign content manipulation, because of a concern that the manipulation is going to quote, influence the views of Americans for their own purposes, meaning the purposes of the foreign country, we're going to require the divestiture of any company, any social media company that's subject to foreign control.
How would we analyze that as a First Amendment matter?

MR. TENNY: I mean, I think the...
I mean, it's so tricky to talk about what that's regulating because of its breadth.
And...

CHIEF JUDGE SRINIVASAN: I don't know if it's that tricky to understand what's regulating.
It's just saying that any company that's subject to 20% or more foreign control, anyone, not just China, but foreign control at all, has to divest because we're worried about content, foreign content manipulation.
How would we analyze that under the First Amendment?
Or would it just not even be a First Amendment question?

MR. TENNY: I mean, I guess the description of foreign content manipulation, I'm not sure where that would have come from for something that broad.
And obviously, the idea, to the extent that you could read such a statute as suggesting that some company operating in America, which is making all sorts of decisions for itself, we're labeling all of that foreign content manipulation, I'm not sure is something you could do.
So that seems like a very different situation.
I mean, here, there was a record both before Congress and there's a record before this court about precisely the content manipu...
The covert content manipulation that's being targeted and evidence that it in fact occurs abroad and that divestiture would solve it.
And that to the extent that their activity is occurring in the United States, Congress was careful to provide a mechanism.
They say China won't let them.
I'm not sure why that's supposed to make us feel better, but there's a mechanism to preserve what's going on in the United States to the consent, extent consistent with that rationale.
That seems quite different.
I don't know that you could, even if you said it was foreign content manipulation, I don't know that you could.

CHIEF JUDGE SRINIVASAN: So the difference, the reason why that law might be potentially problematic, whereas this one isn't in your view, is because of the record of the capacity of foreign content manipulation in fact to occur in these circumstances.

MR. TENNY: I think there are sort of, broadly speaking, you could distinguish that both in terms of the application of any form of First Amendment scrutiny that might apply, and in terms of what sort of scrutiny would apply.
So taking those one at a time, in terms of the application of any First Amendment scrutiny, it wouldn't have anything remotely resembling the national security record that we have here, in terms of a compelling interest or in terms of tailoring.
So obviously, if you were applying any form of First Amendment scrutiny, that would be markedly different.
In terms of what level of First Amendment scrutiny to apply, here we have a very robust record demonstrating that what is being targeted is not protected expression.
It doesn't sound like, from your hypothetical, you would have anything of that sort in that case.
It would seem like what's being targeted is something much more general that would sweep in lots of conduct, expressive conduct by Americans, ostensibly because it's influenced in some way, not articulated by foreign companies.
That just seems, it obviously is a lot broader, but it seems constitutionally significant that it's that much broader.
So you could distinguish it on both grounds.
And here, as I said, we have very strong arguments about the level of scrutiny that applies and also very strong arguments that any type of scrutiny, including strict scrutiny, given the national security concerns, would be satisfied.

SENIOR JUDGE GINSBURG: It would be very peculiar to have a statute that applied to all foreign ownership in this sort of, without that kind of a record, that would be including the four

other countries that make up the five I's with which we have the most intimate security arrangements.
That would include Canada, United Kingdom, New Zealand, and Australia, but also countries as to which we have other kinds of partnership for defense relationships, NATO and so on.
I mean, this is so clearly targeted, not just at TikTok and ByteDance, but at China.
The records that you've compiled is all about China.
Not even the other three adversary nations, they're not relevant here.

MR. TENNY: Right, exactly.
That is an important point that this is a very specific record about a very specific concern.

CHIEF JUDGE SRINIVASAN: That's the result under applying First Amendment scrutiny as opposed to whether the First Amendment kicks in and in what way in the first place.
It may be that the record and all the particular concerns affect the result.
But I was trying to understand the implications of the government's approach for the analytical method that we would use.
Can I ask one last question just about Lamont?
under Lamont, you have a situation in which the government was unable to do what it wanted to do there because of the First Amendment interests of the US listeners and the communist, as it was called, propaganda.
Could the response to that have been to adopt a law that just barred the propaganda from coming into the US in the first place?

MR. TENNY: I'm not sure how you would accomplish that.
The line that was discussed in Murthy and that was tied into the listener standing cases that the Supreme Court has had over the years was more tethered to whether there's a particularized relationship and whether they have some First Amendment interests.
You might be able to justify it, but in terms of someone having standing or a First Amendment claim, this case is so similar to Murthy that I would just urge the Court to lean there.
I mean, Murthy, people were saying, the content curation decisions that are made by the platforms affect the content that I read on the Internet on some particular topics and therefore, I have standing to challenge what I regard as impermissible government influence on those content manipulation decisions.
The Supreme Court said no.
I think that's what they're saying in this case.
In Lamont, it was something different.
It was saying, either I sent away and said, can you please send me this information or somebody sent me information and I want to receive it and I have to go to the Postal Service and tell them that I want to receive it.
That's just a totally different kind of a claim.

CHIEF JUDGE SRINIVASAN: I think the relevant difference there is that the affirmative act of saying that you want the information is what gave rise to the First Amendment injury there.

MR. TENNY: That's part of it.

Another part which the Supreme Court has emphasized in a number of cases is the connection between the foreign entity and the US entity.
They've required something pretty specific.
I mean, in Murphy, they described the prospect that any listener would have standing to challenge the inability of someone else to speak as startlingly broad.
And that was all US.
That entire case was in the United States.
And I think that combined with the idea from Agency for International Development about sort of exporting your First Amendment right, it just would be startlingly broad if you could say, well, I understand that the speaker has no First Amendment rights.
I understand I have no particularized connection to the speaker.
I'm just someone who wants to read what they say on the internet.
But now suddenly, even though they have no First Amendment claim, I do.
And that's what the Supreme Court rejected in Murphy in frankly, what should be a harder context because it was all in America.
And that's what the court should do here.
Unless there are further questions.

CHIEF JUDGE SRINIVASAN: Thank you, Mr. Tenny.
Mr. Pincus will give you three minutes for your rebuttal.

MR. PINCUS: Thanks very much, Your Honor.
I just want to start about the question about what happens in the US because the government is just flat wrong.
The court looks at the presser declaration, pages 812, 815, 817, 829, and the federal declaration, 901.
I'll say that again, 812, 817, 815, 829.
They talk about how the recommendation engine itself is influenced in the US.
It's trained in the US on US data.
It's modified in the US based on US content moderation decisions.
It is clearly embodies not just Chinese speech.
That's an issue.
But US speech by TikTok, Inc.
So the idea that there somehow is the ability to say, oh, this is just foreign, is just plain wrong.
Even if it were, I think that raises some questions.
Could a US speaker who wanted to show a foreign movie be told, no, that's unconstitutional and there's no strict scrutiny?
That seems wrong as well.
So then turning to your question, Your Honor, Chief Judge Sri Srinivasan was asking about what is this target?
The government talks about targeting foreign government manipulation.
But the question here, the first question is what's burdened?
And what's being burdened?
The government admits there is no foreign content manipulation now.
There may never be.

What's being burdened is US speech by US users and also as a result of the US decisions with respect to the content moderation engine.
I want to talk about the alleged hoovering up of information because it's just wrong.
The government talks about precise location data.
That's GPS data.
That's what that means.
The reason GPS data is important, as the Supreme Court said in Jones, is because it lets you create a dossier about people.
GPS data is not collected.
User content data, the user contact list data.
As Mr. Fisher says, it's voluntary, but more than that, it's anonymized.
The record makes clear it's anonymized.
The record 847 to 848.
The government says anonymization doesn't work.
That's talked about there too.
It's a standard technique that the US government uses all the time.
The government tries to make something about the fact that some provisions in the NSA prevent some parts of data, some data to be sent to China.
Some of that is data that is the result of e-commerce data.
There's an e-commerce site.
The law requires the collection of that kind of data.
The government didn't want in the negotiations, didn't raise that.
If that's an issue, we'd certainly be prepared to talk about it.
The other thing is I think the government's argument here is premised on the idea that Congress somehow made the determinations that the government relies on.
There's zero evidence of that.
That's the problem here.
Congress had a lot of reasons.
The government read one quote about the record.
There were numerous quotes about content currently on TikTok, non-manipulated content that were the concerns of Congress.
We just don't know what Congress did.
And in the First Amendment context, we've got to be pretty careful about what those rationales are.
It seems to me to invalidate the law here, the court can rely on existing precedent, News America, strict scrutiny, the failure to consider disclosure and other options.
Disclosure is an option here.
If the government, the disclosure doesn't necessarily, if the government could make the require showing have to target only the manipulated contact, there could be a general disclosure that the government fears there's manipulated content on this platform.
I'm not saying that would be right, but there certainly has been no attempt to figure out whether disclosure can solve the problem here.
The problem is, if you go the other way and rule for the government, you have to do some pretty unprecedented things.
You have to hold a content-based justification for general speech.
It is a sufficient justification.

That's something that holder does not support.
That was a very, very, very targeted.
And then the court has to say, it doesn't matter that Congress didn't consider less restrictive means, and the court has to resolve numerous factual disputes in a record that has no entity for the court to resolve them.
And we think that's a very, very significant barrier.

CHIEF JUDGE SRINIVASAN: Thank you, Mr. Pincus.
Fisher, we'll give you two minutes for your rebuttal.

MR. FISHER: Thank you.
I'd like to make four points about the First Amendment claim.
First, the government cites Murthy as suggesting that by clients and based politics as users, TikTok might not even have standing, let alone a First Amendment claim.
To use the government's own words, we have raised our hand and said, please give us information.
We follow other users.
We've joined various groups on the platform.
We're doing exactly what the male recipients did in Lamont.
Remember, that's not even the heart of our claim.
The heart of our claim is as our own speakers working with our editor and publisher of choice.
There's no suggestion we wouldn't have standing or anything less than a most severe First Amendment injury there.
Secondly, there was some conversation about, can we think about this law as having only an indirect effect on the creators?
The answer is absolutely not.
The law, by its terms, prohibits a certain publisher from publishing under its own content recommendation system online, and that is our publisher.
The very speech that the Act singles out, the social media type speech that uses in the quote that I read earlier, is our speech, and so the Act targets us directly.
Even if it didn't-

SENIOR JUDGE GINSBURG: Let me ask you about that.
Take the example of the case in which a bookstore was closed, couldn't meet code requirements, and ended up having to be closed.
And of course, the readers were the collateral victims of that.
So if, however, the bookstore is validly closed for that reason, or about to be, if the law says, that's fine, bookstore has to meet code, but it's not meeting it, you say then the readers would have the opportunity to enter, well, to be considered in that final decision, and sort of want an exception to the code, because it would impinge upon the readers.

MR. FISHER: I think there'd be standing there for the injury, but I think that would be a losing claim under ACARA for the reasons Chief Judge Srinivasan was discussing.
But also, just remember, even if it were not direct, as I've described, Surrell says you look at in practical operation, how the burden exists under the act, and our speech is being silenced, so we satisfy that.

Judge Rao, you asked about the covert nature of the alleged manipulation and how a disclaimer might work.
Let me say a couple of things about that.
One is, it just strikes this as an odd argument to say that an editor and publisher can be suppressed or people can be banned from working with editor and publisher simply because they might consult or be even controlled by other third parties.
Publishers in this country every day speak to US government officials and any number of other third parties to make their publication decisions, and that's never disclosed to the public and let alone even the author sometimes.
It just strikes as a very odd argument to begin with.
But even if it were an argument, you asked what a disclosure might look like, the government could issue its own warning, or maybe even as a company suggests in its brief something like a surgeon general warning on the platform itself from the creator's standpoint, and the user's standpoint, that would be a whole lot better than shutting down the platform if the government thought it was factually accurate and could justify a warning that says this might be influenced by Chinese government officials.
That would be a lot different to shutting down the platform, and that would fully meet the government's covert interests, to covert manipulation interests.
And then finally, Judge Ginsburg, I want to return to your question.
Isn't this unprecedented in a sense?
Foreign adversary, content manipulation, and the like.
And the answer is no.
Our country throughout history has come up against this problem.
Let me just isolate one example, which is the Whitney case.
In that case, the Supreme Court actually accepted the government's argument, the state of California's argument, that it could suppress speech of an American because it was spreading communist propaganda in conjunction with the Soviet Union and Russian officials.
And the court said it was allowed to do that because it was tending to incite crime, disturb the public peace, or endanger the foundations of organized government.
Now that majority opinion drew a separate opinion from Justice brandeis that has carried the day of history.
And that majority opinion has been inferred by the Supreme Court itself.
We urge the court not to go back down that road.
And for two reasons.
One is even the level of lawlessness and immanence described in that opinion is nowhere present in this case.
The most the government is here today to say is that China might someday influence the content on this platform that 170 million Americans use.
We are miles away from even the assertion of the majority in Whitney, let alone Justice brandeis' stint that carried the day and said, anything short of incitement to violence is protected speech in this country, even if done in conjunction with foreign actors.
And so that's the principle I leave the court with, whether it's foreign actors, whether it's US citizens or any combination of the two.
What we're talking about in this case are ideas and ideas about politics and social governance and baking and sports and agriculture.
And it is the tradition in our country to protect those ideas.

And that's what this act unfortunately does not do.

CHIEF JUDGE SRINIVASAN: Thank you, Counsel.
Thank you to all Counsel, we will take this case under submission.