

No. 24-656, 24-657

In the
Supreme Court of the United States

TIKTOK, INC.,

Petitioner,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL.

Respondent.

BRIAN FIREBAUGH, ET AL.,

Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL.

Respondent.

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

**BRIEF OF AMICI CURIAE ADVANCING AMERICAN
FREEDOM; AMERICAN ASSOCIATION OF SENIOR
CITIZENS; AMERICAN VALUES; CATHOLICS COUNT;
CENTER FOR A FREE CUBA; CENTER FOR URBAN
RENEWAL AND EDUCATION (CURE); EAGLE FORUM;
FAMILY COUNCIL IN ARKANSAS; FRONTLINE; ALLEN
J. HEBERT, CHAIRMAN, AMERICAN-CHINESE
FELLOWSHIP OF HOUSTON; INTERNATIONAL
CONFERENCE OF EVANGELICAL CHAPLAIN
ENDORSERS; JCCWATCH.ORG; TIM JONES, FORMER**

SPEAKER, MISSOURI HOUSE, CHAIRMAN, MISSOURI CENTER-RIGHT COALITION; MEN AND WOMEN FOR A REPRESENTATIVE DEMOCRACY IN AMERICA; MOUNTAIN STATES POLICY CENTER; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; NORTH CAROLINA VALUES COALITION; MELISSA ORTIZ, PRINCIPAL & FOUNDER, CAPABILITY CONSULTING; SETTING THINGS RIGHT; 60 PLUS ASSOCIATION; PAUL STAM, FORMER SPEAKER PRO TEMPORE, NORTH CAROLINA HOUSE; STAND FOR GEORGIA VALUES ACTION; THE CONCORD FUND; ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS, 2018-2021, UNDER SECRETARY OF DEFENSE, 2017-2018; YANKEE INSTITUTE; AND YOUNG AMERICA'S FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Protecting Americans from Foreign Adversary Controlled Applications Act, as applied to Petitioners, Violates the First Amendment.

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law.¹ AAF “will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,”² and believes that America’s system of constitutional government, unique in the world, must be preserved and restored for the sake of American freedom. As the Founders understood, liberty depends on the proper balance of power among the people, their local and state governments, and the federal government. AAF files this brief on behalf of its 131,317 members throughout the United States.

Amici American Association of Senior Citizens; American Values; Catholics Count; Center for a Free Cuba; Center for Urban Renewal and Education (CURE); Eagle Forum; Family Council in Arkansas; Frontline; Allen J. Hebert, Chairman, American-Chinese Fellowship of Houston; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Men and Women for a Representative Democracy in

¹ No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

² Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

America; Mountain States Policy Center; National Center for Public Policy Research; North Carolina Values Coalition; Melissa Ortiz, Principal & Founder, Capability Consulting; Setting Things Right; 60 Plus Association; Paul Stam, Former Speaker Pro Tempore, North Carolina House; Stand for Georgia Values Action; The Concord Fund; Robert Wilkie; Secretary of Veterans Affairs, 2018-2021, Under Secretary of Defense, 2017-2018; Yankee Institute; and Young America's Foundation believe in preserving American freedom against foreign adversaries whose intention is to undermine American civilization.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

TikTok “is essentially digital fentanyl, a 21st century technological weapon. The app is so potent and addictive that TikTok is banned *within* China. The version of TikTok approved for use in China is watered down, free of an algorithm set for addiction, and focused on educational purposes.”³ The Founders, in their efforts to structure and limit the government so that it can effectively safeguard American liberty from threats foreign and domestic, did not inadvertently create a system in which the government is powerless to protect those freedoms from its foreign enemies. “[T]he founders recognized the darker side of human nature and attempted in the

³ Mike Pence, *TikTok is digital fentanyl and Congress, Biden must act before it's too late*, Fox News (Mar. 12, 2024, 5:00 AM) <https://www.foxnews.com/opinion/tiktok-digital-fentanyl-congress-biden-act>.

Constitution to forge a balance between liberty, for which they had fought a revolution, and order, which would protect the rights of all, not just the powerful.”⁴

President Donald Trump, President Joe Biden, and Congress, all with the benefit of classified briefings and information, concluded that the Chinese Communist Party (CCP) influence over TikTok was a national security threat so severe that it warranted action. The Constitution empowers Congress to defend our constitutional order, and it did so through the enactment of the Foreign Adversary Controlled Application App (FACAA). This Court should affirm the decision of the D.C. Circuit and rule for Respondents.

ARGUMENT

I. The Chinese Communist Party Threatens, and Is Threatened By, Free Speech.

The CCP is threatened by free speech and seeks to suppress it, even on American soil. In December 2024, Chen Jinping of New York City pled guilty to charges related to his operation of a secret CCP police station in the city.⁵ “Executive Assistant Director Robert Wells of the FBI’s National Security Branch said the case is a part of China’s larger efforts to

⁴ Lee Edwards, *The Conservative Revolution* 322 (Free Press 1999).

⁵ Kayla Jiminez, *A whole floor of a NYC building was a secret, ‘illegal police station’ for China: DOJ*, USA Today (Dec. 19, 2024) <https://www.msn.com/en-us/news/world/a-whole-floor-of-a-nyc-building-was-a-secret-illegal-police-station-for-china-doj/ar-AA1wb8BE?ocid=entnewsntp&pc=U531&cvid=40998d292cd84f669e1a07ef1b7cb134&ci=2>.

‘threaten, harass, and intimidate those who speak against their Communist Party.’”⁶

This opposition to free speech is not new. The year 1989, remembered in the free world as “the ‘Year of Miracles’ as the Berlin Wall fell and the façade of the Soviet Union began to crumble,” was a year that also showed “the true nature and brutality of the Chinese Communist Party.”⁷ That true nature of Communism⁸ was demonstrated by the CCP’s killing of peaceful protestors who were “[d]emanding a free press, government accountability, and genuine representation.”⁹ Even today, “the CCP censors any mention of its crimes on June 4 and oppresses its citizens who seek the truth.”¹⁰

More recently, the CCP has cracked down on Hong Kong protests after it took effective control of the city, violating its agreement to let it remain largely autonomous at least until the 2040s. This crackdown

⁶ *Id.*

⁷ Andrew Bremberg, *Tiananmen Square, 34 Years Later*, Victims of Communism Memorial Foundation June 1, 2023) <https://victimsofcommunism.org/tiananmen-square-34-years-later/>.

⁸ “Yet there is one experience which most sincere ex-Communists share, whether or not they go only part way to the end of the question it poses. The daughter of a former German diplomat in Moscow was trying to explain to me why her father, who, as an enlightened modern man, had been extremely pro-Communist, had become an implacable anti-Communist. It was hard for her because, as an enlightened modern girl, she shared the Communist vision without being a Communist. But she loved her father and the irrationality of his defection embarrassed her. ‘He was immensely pro-Soviet,’ she said, ‘and then—you will laugh at me — but you must not laugh at my father — and then — one night—in Moscow—he heard screams. That’s all. Simply one night he heard screams.’” Whittaker Chambers, *Witness* 13-14 (Regenery Publishing, Inc. 1978).

⁹ *Id.*

¹⁰ *Id.*

included the arrest of Jimmy Lai, founder of Apple Daily, a “pro-democracy newspaper” in Hong Kong.¹¹ Lai’s so-called trial, which will determine whether he spends up to the rest of his life in prison, is ongoing. *The Hong Konger*, Acton Institute’s documentary on Jimmy Lai, is banned by TikTok.¹²

Further, when Dr. Li Wenliang warned other doctors about COVID in December 2019, “he was summoned to the Public Security Bureau where he was told to sign a letter” accusing him of “‘making false comments’ that had ‘severely disturbed the social order.’”¹³ After Dr. Li’s death, one of the top trending hashtags on Chinese social media site Weibo was “We want freedom of speech.”¹⁴ As the BBC reports, “[b]oth hashtags were quickly censored,” with “hundreds of thousands of comments [having] already been wiped.”¹⁵

The CCP is also imprisoning as many as two million Uyghurs in what the State Department has classified as a genocide.¹⁶ The CCP seeks to advance

¹¹ Kanis Leung, *Hong Kong ex publisher Jimmy Lai testifies he didn’t ask Pence, Pompeo to take action against city*, Associated Press (Nov. 20, 2024) <https://apnews.com/article/hong-kong-jimmy-lai-national-security-trial-4364ca9635ff2d6601cddb172ff94fdb>.

¹² Isaac Willour, “The Trial of Jimmy Lai,” Religion and Liberty Online, (December 18, 2023), available at <https://rlo.acton.org/archives/125181-the-trial-of-jimmy-lai.html>

¹³ *Li Wenliang: Coronavirus kills Chinese whistleblower doctor*, British Broadcasting Company (Feb. 6, 2020) <https://www.bbc.com/news/world-asia-china-51403795>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Jennifer Hansler, Zamira Rahim, Ben Westcott, *US accuses China of ‘genocide’ of Uyghurs and minority groups in Xinjiang*,

this mass persecution through speech controls, as Li Lin found out the hard way.¹⁷ After visiting family in Xinjiang province, where the Uyghur roundup is happening, Li tweeted critically about the government abuse in the region and was arrested and ultimately sentenced to four years in prison for his statements.¹⁸

Finally, the CCP is also attempting to build out a social credit system that would enlist technology as well as “[f]ormal and informal informants of all kinds” to surveil and rate Chinese citizens on their behaviors and reward or punish them based on those scores.¹⁹

There is no reason to believe that when the CCP exercises influence over TikTok that it suddenly respects freedom. Yet the financial interests behind TikTok demand it to be shielded by the constitutional guarantees of that freedom. No one should be naïve about these pleas.²⁰

II. The First Amendment is Not an Open Door for the Enemies of Freedom.

CNN (Jan. 20, 2021) <https://www.cnn.com/2021/01/19/us/us-xinjiang-china-genocide-intl/index.html>.

¹⁷ Alice Su, *How Beijing silences Chinese voices against oppression*, Los Angeles Time (Apr. 1, 2021 3:00 AM) <https://www.latimes.com/world-nation/story/2021-04-01/china-xinjiang-uyghur-han-censorship-nationalism>.

¹⁸ *Id.*

¹⁹ Minxin Pei, *Xi Jinping’s high-tech surveillance state*, Australian Financial Review (Mar. 1, 2024 5:00 AM) <https://www.afr.com/world/asia/in-china-a-poor-social-score-affects-where-you-can-sleep-dine-or-live-20240222-p5f6y9>.

²⁰ “Wherever Communists are organized for power there is hostility, suspicion, insecurity, and disintegration.” Gerhart Niemeyer, “The Communist Mind” (1963) in William F. Buckley, Jr. and Charles R. Kesler, *Keeping the Tables: Modern American Conservative Thought*, 352 (2nd ed., Harper and Row Publishers, 1988).

The First Amendment, one of the many great achievements of the founding generation, prohibits Congress from, among other things, making any law that “abridge[es] the freedom of speech, or of the press.” U.S. Const. amend. I. Fundamentally, the First Amendment ensures that the government cannot silence speech that it does not like or push unsanctioned messages out of the marketplace of ideas.²¹ As this Court has said, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.” *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943),

Petitioners’ interpretation of the First Amendment would constitute sawing off the branch upon which that Amendment rests. If Petitioners’ argument were accepted, it would make it difficult if not impossible to prevent foreign governments from accomplishing such manipulation of Americans through noncoercive means.

“The TikTok platform has approximately 170 million monthly users in the United States,” App. at 38a, a little over half of all Americans. Recent Pew research found that 52% of TikTok users “say they regularly get news there,” up from a mere 22% in 2020.²² That suggests that over 88 million Americans every month are getting news from TikTok.

²¹ See, e.g. Brief of amici curiae Advancing American Freedom, et al., *Murthy v. Missouri*, 603 U.S. _____, No. 23-411 (2024) available at <https://advancingamericanfreedom.com/murthy-v-missouri/>.

²² Rebecca Leppert and Katarina Eva Matsa, *More young Americans – especially young adults – are regularly getting news*

TikTok, of course, does not force its users to accept certain beliefs or positions.²³ However, to say that it, and its ultimate authority, the CCP, are therefore not “prescribing what shall be orthodox in politics, nationalism, religion or other matters of opinion,” *Barnette*, 319 U.S. at 642, is tantamount to burying one’s head in the sand. If a quarter of Americans are getting news from TikTok, what that platform chooses to show, and how it chooses to show it, has the potential to massively impact how Americans think about the world.²⁴ “We would never have let Russia run the nightly news during the Cold

on *TikTok*, Pew Research (Sept. 17, 2024)

<https://www.pewresearch.org/short-reads/2024/09/17/more-americans-regularly-get-news-on-tiktok-especially-young-adults/>.

²³“On the other hand, destructive and irresponsible freedom has been granted boundless space. Society has turned out to have scarce defense against the abyss of human decadence, for example against the misuse of liberty for moral violence against young people, such as motion pictures full of pornography, crime, and horror. This is all considered to be part of freedom and to be counterbalanced, in theory, by the young people’s right not to look and not to accept. Life organized legalistically has thus shown its inability to defend itself against the corrosion of evil.”

Aleksandr Solzhenitsyn, “A World Split Apart: Solzhenitsyn’s Commencement Address, Harvard University. June 8, 1978,” found at <https://www.solzhenitsyncenter.org/a-world-split-apart>

²⁴ “Because instant and credible information is required, it becomes necessary to resort to guesswork, rumors, and suppositions to fill in the voids, and none of them will ever be refuted; they settle into the readers’ memory. How many hasty, immature, superficial, and misleading judgments are expressed every day, confusing readers, and are then left hanging?” [solzhenitsyncenter.org/a-world-split-apart](https://www.solzhenitsyncenter.org/a-world-split-apart).

Aleksandr Solzhenitsyn, “A World Split Apart: Solzhenitsyn’s Commencement Address, Harvard University. June 8, 1978,” found at <https://www.solzhenitsyncenter.org/a-world-split-apart>

War, and we certainly can't let China do the same now."²⁵

Acquiescing in the CCP to control the minds of young people would destroy the freedoms which advocates for status quo TikTok claim shield TikTok from a mandate to cut the strings from CCP's puppet. Cynically, China claims the First Amendment for itself while it works to rob Americas of their First Amendments inheritance.

For obvious reasons, TikTok's argument that the First Amendment's protections of speech shield it from the enforcement of the FACA turns the First Amendment on its head. Congress cannot restrict the freedom of speech. That prohibition extends to forcing a social media company to censor speech. *See Nat'l Rifle Ass'n v. Vullo*, 602 U.S. 175, 190 (2024) (“[A] government official cannot do indirectly what she is barred from doing directly.”); *Murthy v. Missouri*, No 603 U.S. ____, 23-411 at 24 (Alito, J., dissenting) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)) (“[T]he government may not coerce or intimidate a third-party into suppressing someone else's speech.”). Yet TikTok's assertion of what the First Amendment means would privilege the Chinese government or the government of any other nation to do what the American government cannot: censor Americans' speech or manipulate the information they see. This interpretation is as untenable as it is dangerous.

III. The D.C. Circuit Rightly Found that the FACA Would Meet Even Strict Scrutiny.

²⁵ Pence, *supra* note 3.

While Respondent correctly argues that the FACAA does not trigger strict scrutiny, the D.C. Circuit was also correct to determine that it meets even that higher standard of review. Strict scrutiny requires that the government show that a law is “narrowly tailored to serve a compelling state interest.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)).

The FACAA serves the compelling state interest of national security.²⁶ As the D.C. Circuit explained, the CCP is a major cyber security threat to the United States. App. at 34a. This threat includes its intent to gather information about Americans including “by penetrating the U.S. Government Office of Personnel Management’s system and taking ‘reams’ of personal data, stealing data on 147 million Americans from a credit-reporting agency, and ‘almost certainly’ extracting health data on nearly 80 million Americans for a health insurance provider.” *Id.* The CCP also accomplishes this “by investing in firms that have or have access to” sensitive information. *Id.* at 35. The Chinese government, in turn, through Chinese law, has access to data held by Chinese companies. *Id.*

²⁶ The dangers of TikTok are evident to America’s allies, many of which have banned TikTok from government-issued devices, citing threats to privacy and national security. NATO nations like Belgium, Denmark, France, the Netherlands, and NATO itself restricted access to TikTok to frustrate China’s subversive data mining and influence efforts. Additionally, all members of Five Eyes (the Anglosphere intelligence alliance of Australia, Canada, New Zealand, the United Kingdom, and the United States) placed some level of prohibition of TikTok use by government employees. Kelvin Chan, *These are the countries where TikTok is already banned*, AP News (Apr. 26, 2024 9:47 AM) <https://apnews.com/article/tiktok-bytedance-ban-china-india-376f32d78861e14e65ec4bc78e808a0d>.

The U.S. Government has found that “ByteDance and TikTok Global have taken action in response to PRC demands to censor content *outside* of China.” App. at 36a (emphasis in original) (internal quotation marks omitted).

Further, as the D.C. Circuit concludes, “[i]n this case, a foreign government threatens to distort free speech on an important medium of communication. Using its hybrid commercial strategy, the PRC has positioned itself to manipulate public discourse on TikTok in order to serve its own ends.” *Id.* at 43a. These dangers show that preventing TikTok from continuing to operate in the United States while under CCP control advance Respondent’s compelling interest in national security.

The FACA is also narrowly tailored to achieve the government’s national security objective. By applying the law only to foreign-adversary controlled, substantial media of communication (and including a divestiture exemption), “Congress addressed precisely the harms it seeks to counter and only those harms.” *Id.* at 48a. First, the FACA is not overinclusive because it only addresses those applications that directly impair the national security interest described above. Second, the FACA is not underinclusive because it requires divestiture which would allow TikTok to continue to operate without CCP control that is the basis of the law’s enactment. In fact, upon divestiture, “people in the United States would remain free to read and share as much PRC propaganda (or any other content) as they desire on TikTok or any other platform of their choosing. What the Act targets is the PRC’s ability to manipulate that content covertly. Understood in that way, the

Government's justification is wholly consonant with the First Amendment." App. at 30-31a. TikTok, owned and operated by a company not under the jurisdiction of the Peoples' Republic of China, Russia, Iran, North Korea or some other foreign adversary, would resolve that danger. Anything less than divestiture would undermine the Federal government's national security interest.

Thus, because the FACA meets the requirements of strict scrutiny, it does not violate the First Amendment and should be upheld.

IV. America is the Bulwark of Freedom and Western Civilization.

America, on the cusp of celebrating the 250th anniversary of winning its independence by the force of arms, cannot allow itself to be confused by an adversary that demands its own hostile actions beshielded from the law while not respecting the law or the civilization on which the law rests.

Western Civilization grows out of the ideas cultivated by "The Great Conversation," a millennia-long dialogue among the great minds of the West.²⁷ As Russell Kirk explained, the West is built on the ideas of Jerusalem, Athens, Rome, London, and the

²⁷ Robert M. Hutchins, *The Great Conversation: The Substance of a Liberal Education* 1 (1st ed., Mortimer Adler ed. 1952) ("The tradition of the West is embodied in the Great Conversation that began in the dawn of history and that continues to the present day. Whatever the merits of other civilizations in other respects, no civilization is like that of the West in this respect. No other civilization can claim that its defining characteristics is a dialogue of this sort. The goal toward which Western society moves is the Civilization of Dialogue.").

civilizations those cities represent.²⁸ These ideas are the “roots of order” that ensure that people as individuals and as a society can flourish.

The roots of order twist back to the Hebrew perceptions of a purposeful moral existence under God. They extend to the philosophical and political self-awareness of the old Greeks. They are nurtured by the Roman experience of law and social organization. They are entwined with the Christian understanding of human duties and human hopes, of man redeemed. They are quickened by medieval custom, learning, and valor. They grip the religious ferment of the sixteenth century. They come from the ground of English liberty under law, so painfully achieved. They are secured by a century and a half of community in colonial America. They benefit from the debates of the eighteenth century. They approach the surface through Declaration and Constitution. They emerge full of life from the ordeal of the Civil War.²⁹

²⁸ Russel Kirk, *The Roots of American Order* 6 (1st ed. 1977) (“Seeking for the roots of order, we are led to four cities: Jerusalem, Athens, Rome, and London. In Washington or New York or Chicago or Los Angeles today, the order which Americans experience is derived from the experience of those four old cities. If our souls are disordered, we fall into abnormality, unable to control our impulses. If our commonwealth is disordered, we fall into anarchy, every man’s hand against every other man’s.”).

²⁹ *Id.* at 472.

One of the many things that makes the Great Conversation a common grace is that any individual from any background from any part of the world can listen in and grow in his or her “Pursuit of happiness.” The Declaration of Independence para. 2 (U.S. 1776). Thus, Pericles was able to say of Athens, “We throw open our city to the world, and never by alien acts exclude foreigners from any opportunity of learning or observing.”³⁰

If this great conversation and the historic social order it has created are to continue to be the basis of civilization and not merely a relic of history, that conversation must not be allowed to be corrupted by foreign adversaries whose only objective is to confuse and destroy. The CCP, like communism in general, is antithetical to the West. The CCP’s opaque predations will only be held off by an America awakened to the dangers they pose. Congress and the President have exercised their legitimate power to defend America and Americans from that danger. This Court should rule for Respondents and uphold that stewardship of vigilance.

Conclusion

For the forgoing reasons, the Court should grant certiorari and rule for Respondent.

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³⁰ *The Complete Writings of Thucydides: The Peloponnesian War* 104 (Random House, Inc. 1951).

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