No. 24-34

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAMANTHA ALARIO, HEATHER DIROCCO, CARLY ANN GODDARD, ALICE HELD, and DALE STOUT,

Plaintiffs–Appellees,

TIKTOK INC.,

Plaintiff–Appellee,

v.

AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana,

Defendant–Appellant.

On appeal from the United States District Court for the District of Montana — No. 9:23-cv-00056 and 9:23-cv-00061 (Hon. Donald W. Molloy)

BRIEF OF *AMICUS CURIAE* THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY IN SUPPORT OF PLATINTIFFS–APPELLEES

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that *amicus curiae* the Knight First Amendment Institute has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

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Interest of Amicus Curiae[1]

The Knight First Amendment Institute at Columbia University is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government. The Institute is particularly committed to protecting the vitality of online forums in which citizens communicate with each other and receive information about matters of public concern.

Introduction

The Knight First Amendment Institute at Columbia University submits this brief to make three points. First, the First Amendment protects Americans' right to access ideas, information, and media from abroad, including their right to access foreign-owned social media platforms like TikTok. Using a social media platform implicates multiple First Amendment rights—among them the rights to speak, to hear, to associate, and to inquire. Accordingly, any official effort to restrict

[1] No counsel for a party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. The parties have consented to the filing of this amicus brief.

Americans' access to a foreign-owned social media platform must survive First Amendment scrutiny. Second, the practice of restricting citizens' access to information, ideas, and media from abroad is one that has historically been associated with repressive regimes. For good reasons, the United States' own past efforts at restricting citizens' access to speech from abroad are recalled now with embarrassment and shame. Thus, history and experience supply ample cause for approaching restrictions on access to foreign media with wariness and distrust. Third, the First Amendment should be understood to foreclose the government from restricting citizens' access to foreign-owned media where, as here, doing so would not further a significant governmental interest and any legitimate governmental interest could be accommodated with less-restrictive means. Montana's TikTok ban cannot survive this scrutiny because the ban is both ineffective and unnecessary.

For the reasons below, the Knight Institute respectfully urges the Court to affirm the district court's grant of preliminary relief.

Argument

I. The First Amendment protects Americans' right to access ideas, information, and media from abroad—including foreign-owned social media platforms.

It is "well established" that the First Amendment "protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The Supreme Court first recognized that the public has a right to receive information over 80 years

ago in *Martin v. City of Struthers*, 319 U.S. 141 (1943). In that case, the Court invalidated a local ordinance that forbade persons "distributing handbills, circulars or other advertisements" from ringing doorbells or knocking on doors. *Id.* at 142 (citation omitted). While the Court recognized that the ordinance was aimed at "the protection of the householders from annoyance," it held that a blanket ban failed to accord "due respect for the constitutional rights of those desiring to distribute literature *and those desiring to receive it*." *Id.* at 144, 149 (emphasis added). The Court indicated that the right to receive information was central to its holding, noting that "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society." *Id.* at 146–47.

This right to receive information extends to information, ideas, and media from abroad. In *Lamont v. Postmaster General*, the Supreme Court struck down a law requiring individuals who wanted to receive communist propaganda "printed or otherwise prepared in a foreign country" to notify the post office in advance. 381 U.S. 301, 302 (1965) (citation omitted). The Court explained that this obligation unconstitutionally burdened recipients' First Amendment right to receive information, *id.* at 307—a right not diluted by the material's foreign origin or by the fact that it was "foreign government[]" "propaganda," *id.* at 308 (Brennan, J., concurring). To the contrary, the mail restrictions were unlawful precisely because they sought to "control the flow of ideas to the public." *Id.* at 306 (majority opinion).

Notably, the law was invalidated even though it did not bar individuals from accessing the relevant foreign speech altogether. The Court struck down the law because it burdened willing listeners with an "affirmative obligation," thereby interfering with the "'uninhibited, robust, and wide-open' debate and discussion . . . contemplated by the First Amendment." *Id.* at 307 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Since *Lamont*, the Supreme Court has repeatedly reaffirmed Americans' First Amendment right to access speech from foreign sources. In *Meese v. Keene*, for example, the Court considered a First Amendment challenge to a law requiring the plaintiff to identify three Canadian films he wished to exhibit as "political propaganda." 481 U.S. 465, 473 (1987).The Court rejected the plaintiff's claim only because it determined that, unlike in *Lamont*, the challenged statute "d[id] not pose *any* obstacle to [plaintiff's] access to the [foreign] materials." *Id.* at 480 (emphasis added). Likewise, in *Kleindienst v. Mandel* the Court reasoned that the government's exclusion of a Belgian journalist from the United States implicated the First Amendment rights of U.S. listeners who sought to meet with him. 408 U.S. 753, 764–65 (1972). Although the Court ultimately rejected plaintiffs' First Amendment challenge because of Congress's "plenary power to make rules for the admission of [noncitizens]," *id.* at 766 (citation omitted), it nevertheless reaffirmed that the "First

Amendment right to receive information and ideas" extends to information and ideas from abroad, *id.* at 762 (cleaned up).

Lower courts have likewise emphasized that the First Amendment's protections for receiving information and ideas extend to foreign speech and association. *See, e.g.*, *Teague v. Regional Comm'r of Customs*, 404 F.2d 441, 445 (2d Cir. 1968) ("[t]o the extent" that the challenged provisions "result in some limitation on the availability of publications and films originating in China, North Korea, and North Vietnam," they "impinge on First Amendment freedoms"); *Cernuda v. Heavey*, 720 F. Supp. 1544, 1554 (S.D. Fla. 1989) (the exhibition and auction of "paintings of Cuban origin" is "expression protected by the First Amendment"); *see also DKT Mem'l Fund Ltd. v. Agency for Intern. Dev.*, 887 F.2d 275, 295 (D.C. Cir. 1989) (association with foreigners implicates the First Amendment). The upshot of these cases is that the First Amendment protects Americans' right to access, engage with, and disseminate foreign speech and ideas, just as it protects the right to receive "domestic" information.

These protections encompass the right to engage with, and on, foreign-owned social media platforms. As an initial matter, the First Amendment protects online speech just as robustly as any other speech. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [online speech]."). Indeed, as the Supreme Court

noted in *Packingham v. North Carolina*, social media platforms are now "the most important places . . . for the exchange of views." 582 U.S. 98, 104 (2017). In *Packingham*, the Court considered a state law that forbade registered sex offenders from accessing social media websites on which minors may have accounts, including Facebook and Twitter. *Id.* at 101, 106–07. The Court recognized that use of social media is vital to the modern-day exercise of multiple First Amendment rights: speech, assembly, association, inquiry, and even the ability to petition the government for redress of grievances:

> Social media offers relatively unlimited, low-cost capacity for communication of all kinds. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics as diverse as human thought.

Id. at 104–05 (cleaned up). After emphasizing the importance of social media to modern public discourse, the Court invalidated the ban, finding it was not narrowly tailored to serve the state's interest in combating sexual abuse of minors. *See id.* at 105–06.

There is no question, then, that Montana's TikTok ban implicates the First Amendment rights of TikTok's Montanan users. By prohibiting access to TikTok,

Montana's ban "foreclose[s] [its citizens'] access" to the media they would otherwise seek out, thereby burdening the "legitimate exercise of First Amendment rights." *See id.* at 108. The ban precludes Montanans from publishing their own content on TikTok, and from viewing the content posted by others, organized and presented to them through the filter of TikTok's editorial decisions.[2] More broadly, the ban precludes Montanans who want to use TikTok from participating in an expressive community of their choosing, *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (recognizing a "right to associate for the purpose of engaging in those activities protected by the First Amendment").

That the ban does not preclude Montanans from using social media platforms other than TikTok is of no moment. Plainly, an American's right to read (say) the *Columbia Daily Spectator* can't be set aside on the grounds that she can read the *New York Post* instead. As the Court observed in *Reno*, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." 521 U.S. at 880 (quoting *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939)). The First Amendment protects Americans' right to access their preferred media, even if the government would prefer they access other media instead.

[2] *Cf.* Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. Free Speech L. 97, 112 (2021) ("[P]latforms are editors, and their editorial decisions are central to their functionality, their relationship to society, and their very existence.").

Perhaps this rule wouldn't apply if social media platforms were interchangeable expressive products, but social media platforms differ from one another in important ways. TikTok is distinctive in its focus on short videos. It is also distinctive in the editorial tools it provides to users—for example, tools that make it easy to splice videos together and to enhance content with a range of special effects. It has a different user base (and therefore a different audience, and expressive community) than other platforms do—TikTok has more than 150 million users in the United States, and nearly two billion users worldwide.[3] It is especially popular among young people.[4] And TikTok's algorithm, which determines which videos its users see, and in which order, is widely recognized to be significantly different from the ones used by (say) Facebook and YouTube and X.[5] *Cf. Baldwin v. Redwood City*, 540 F.2d 1360, 1368 (9th Cir. 1976) (different means of communication are "not entirely fungible").

[3] David Shepardson, *TikTok Hits 150 Million U.S. Monthly Users, Up From 100 Million in 2020*, Reuters (Mar. 20, 2023), https://perma.cc/8U56-9WEZ; Hannah Macready, *37 Important TikTok Stats Marketers Need to Know*, Hootsuite (Jan. 30, 2024), https://perma.cc/MPU6-UUNW.

[4] *See* Emily A. Vogels, Risa Gelles-Watnick & Navid Massarat, *Teens, Social Media and Technology 2022*, Pew Rsch. Ctr. (Aug. 10, 2022), https://perma.cc/M87W-GTH7; Jeffrey Gottfried, *Americans' Social Media Use*, Pew Rsch. Ctr. (Jan. 31, 2024), https://perma.cc/WU22-L9HM.

[5] *See, e.g.*, Alex Hern, *How TikTok's Algorithm Made It a Success: 'It Pushes the Boundaries'*, Guardian (Oct. 24, 2022), https://perma.cc/NQ7C-9JPR.

The First Amendment protects Americans' right to access foreign social media platforms. Accordingly, Montana's TikTok ban implicates the First Amendment rights of TikTok's Montanan users.

II. A TikTok ban would echo the practices of repressive governments, and past U.S. practices that history has discredited.

Restricting access to foreign media is a practice that has long been associated with repressive regimes. Before the Internet, shortwave radio technology enabled people to receive timely information from abroad—and thus became a threat to totalitarian governments. After World War II, the Soviet Union started jamming shortwave transmissions to deny its citizens access to potentially subversive information and ideas from abroad.[6] Targets of Soviet jamming included Radio Free Europe/Radio Liberty, the Voice of America, Deutsche Welle, Kol Israel, and Radio Beijing.[7] The Soviet Union was not alone in jamming foreign broadcasts: China jammed Radio Moscow, Taiwanese Radio, and the Voice of Vietnam.[8]

The collapse of the Soviet Union and the end of the Cold War brought new freedoms to Russia, but these freedoms have been seriously eroded in recent years,

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[6] *See* Rochelle B. Price, *Jamming and the Law of International Communications*, 5 Mich. J. Int'l L. 391, 391 (1984).

[7] James G. Savage & Mark W. Zacher, Free Flow versus Prior Consent: The Jurisdictional Battle over International Telecommunications, 42 Int'l J. 342, 347 (1987).

[8] *Id*.

and today the Russian government is again broadly restricting citizens' access to foreign media. Shortly after invading Ukraine in 2022, Russia blocked access to Facebook, Twitter, and major foreign news outlets.[9] Access to human rights organizations' websites has also been restricted.[10] Russia's close ally and neighbor Belarus, also a dictatorship, blocks various foreign news websites and increased such blocking after Russia invaded Ukraine.[11]

The notorious "Great Firewall" of China has for decades restricted Chinese citizens' access to foreign sources of online information. Leading news sites of foreign countries, such as the *New York Times*, and the British Broadcasting Corporation, are blocked.[12] An anticensorship group that tracks blocking in China reported that 175 of the 1000 most visited websites and social media platforms were blocked in China.[13] This includes popular American social media sites such as Facebook, Twitter, Instagram, and YouTube.[14] Just last month, the Chinese

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[9] Freedom House, *Freedom on the Net 2023: Russia*, https://perma.cc/XZ47-TFT3; Robert McMahon, *Russia Is Censoring News on the War in Ukraine. Foreign Media Are Trying to Get Around That*, Council on Foreign Rels. (Mar. 18, 2022), https://perma.cc/H7BU-BXZ3.

[10] Freedom House, *Freedom on the Net 2023: Russia*, supra note 9.

[11] Freedom House, *Freedom on the Net 2023: Belarus*, https://perma.cc/GL2E-T6QS.

[12] Freedom House, *Freedom on the Net 2023: China*, https://perma.cc/U9J5-2WGQ.

[13] *Id.*

[14] *Id.*

government ordered Apple to remove WhatsApp, Threads, Signal and Telegram from its app store in China.[15] In the case of WhatsApp, removal was "mostly symbolic," as access to the app had already been banned in China.[16]

Other rights-abusing regimes—in the Middle East, for example—also restrict their citizens' ability to access information from abroad. Iran blocks a wide array of international news websites and social media platforms.[17] Saudi Arabia blocks certain news sites affiliated with countries with which the Saudi government has tensions, such as Qatar, Iran, and Turkey.[18] Bahrain began blocking Qatari websites after cutting diplomatic ties with Qatar in 2017.[19] The day before Amicus filed this brief, Israeli Prime Minister Benjamin Netanyahu's government, which in recent years has conducted what the Israeli newspaper Haaretz has characterized as "an

[15] Aaron Gregg & Eva Dou, *Apple Pulls WhatsApp, Threads and Signal from App Store in China*, Wash. Post (Apr. 19, 2024), https://perma.cc/6Z63-YZ6U.

[16] *Id*.

[17] Freedom House, *Freedom on the Net 2023: Iran*, https://perma.cc/KG9C-DMG2.

[18] Freedom House, *Freedom on the Net 2023: Saudi Arabia*, https://perma.cc/422H-94KJ.

[19] Freedom House, *Freedom on the Net 2023: Bahrain,* https://perma.cc/EWK7-3FBQ.

assault on democracy,"[20] shut down the Israeli operations of the Qatari network Al Jazeera and pulled its television station off the air.[21]

To be sure, even the strongest democracies have sometimes sought to limit access to certain foreign media. In 2022, the European Union banned Russian broadcasters RT (formerly known as Russia Today) and Sputnik to block disinformation regarding Russia's invasion of Ukraine.[22] But such bans are rare in free and open societies, and the action against Russian broadcasters was widely criticized for some of the same reasons offered by Amicus here.[23]

The list of countries that have banned TikTok should itself be a kind of warning, because these countries do not share American values regarding the importance of a free and open Internet. According to a recent report, there are eleven

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[20] Dahlia Scheindlin, *Netanyahu's Assault on Democracy*, Haaretz (Aug. 8, 2023), https://perma.cc/7KLB-CH93.

[21] Tia Goldenberg & Jon Gambrell, *Israel Orders Al Jazeera to Close Its Local Operation and Seizes Some of Its Equipment*, Associated Press (May 5, 2024), https://perma.cc/ST7A-BEA6.

[22] Foo Yun Chee, *EU Bans RT, Sputnik Over Ukraine Disinformation*, Reuters (Mar. 2, 2022), https://perma.cc/ZH44-99ZP.

[23] See, e.g., Jacob Mchangama, *In a War of Ideas, Banning Russian Propaganda Does More Harm Than Good, Time* (Aug. 12, 2022), https://perma.cc/7GAB-DHY7; Mark MacCarthy, *Why a Push to Exclude Russian State Media Would Be Problematic for Free Speech and Democracy*, Brookings (Apr. 14, 2022), https://perma.cc/Q4G8-5XD8; Natali Helberger & Wolfgang Schulz, *Understandable, But Still Wrong: How Freedom of Communication Suffers in the Zeal for Sanctions*, London Sch. of Econ. (June 10, 2022), https://perma.cc/4KLY-ZVAM.

such countries, not counting those that merely disallow the app on government devices.[24] China, ironically, bans TikTok, allowing only a Chinese version called Douyin that is subject to heavy censorship.[25] The ten other countries with TikTok bans also restrict politically disfavored online material or restrict Internet access:

[24] Anna Gordon, *Here's All the Countries With TikTok Bans as Platform's Future in U.S. Hangs in Balance*, Time (Apr. 25, 2024), https://perma.cc/35ZD-J4UE.

[25] Claire Fu & Daisuke Wakabayashi, *There Is No TikTok in China, but There Is Douyin. Here's What It Is*, N.Y. Times (Apr. 25, 2024), https://perma.cc/QH2B-7MFV.

Afghanistan,[26] India,[27] Iran,[28] Jordan,[29] Kyrgyzstan,[30] Nepal,[31] North Korea,[32] Senegal,[33] Somalia,[34] and Uzbekistan.[35]

To be sure, the United States has itself sometimes restricted its citizens' access to foreign speech, but these efforts are recalled today with embarrassment and shame. Cold War restrictions blocked Americans from access to a wide array of political and cultural figures, as well as foreign materials from "enemy" countries. Congress has since repealed these provisions, whose main effect was to keep

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[26] Comm. to Protect Journalists, *CPJ Calls on Taliban to Drop Plans to Restrict Facebook Access in Afghanistan* (Apr. 8, 2024), https://perma.cc/7SAL-F8YT.

[27] Reporters Without Borders, *Modi Ramps Up Online Censorship in India* (Apr. 9, 2023), https://perma.cc/43HV-9N9N.

[28] Freedom House, *Freedom on the Net 2023: Iran*, supra note 17.

[29] Freedom House, *Freedom on the Net 2023: Jordan*, https://perma.cc/SZW5-Q2HG.

[30] Freedom House, *Freedom on the Net 2023: Kyrgyzstan*, https://perma.cc/H8DP-W2VU.

[31] U.S. Dep't of State, *Nepal 2022 Human Rights Report*, at 11–13, https://perma.cc/ZNX9-EK45.

[32] U.S. Dep't of State, *Democratic People's Republic of Korea 2022 Human Rights Report*, at 24–26, https://perma.cc/7XBJ-DQWP.

[33] Ngouda Dione, *Senegal Cuts Internet Again Amid Widening Crackdown on Dissent*, Reuters (Feb. 13, 2024), https://perma.cc/SRV4-ZKM9.

[34] U.S. Dep't of State, *Somalia 2022 Human Rights Report*, at 16–17, https://perma.cc/YF8N-3HAJ.

[35] Freedom House, *Freedom on the Net 2023: Uzbekistan*, https://perma.cc/5PAS-C7BA.

information from Americans and cause others to question our nation's dedication to its ideals.

In 1952, Congress passed the McCarran-Walter Act, which set forth a long list of categories of aliens who would be barred from entry to the United States. The list included anarchists, Communists, and affiliates of "any other totalitarian party," as well as persons whose "activities" would be "prejudicial to the public interest . . . of the United States."[36] Those subject to the bar for anarchists and Communists could receive a waiver upon approval by both the State Department and the Attorney General, but no waiver was available for denials under the "prejudicial to the public interest . . . of the United States" standard.[37] In passing the Act, Congress overrode the veto of President Truman, who had remarked in his veto message that "[s]eldom has a bill exhibited the distrust evidenced here for citizens and aliens alike."[38]

In practice, the Act was used to target a vast array of political and cultural figures. "From the time it was enacted in the fever of McCarthyism," said Senator Daniel Patrick Moynihan in 1987, "there has been an annual scandal. Some writer, some painter, some minister could not be allowed to enter the United States."[39] The

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[36] Pub. L. No. 82-414, § 212(a)(28), (27), 66 Stat. 163, 184–185 (1952).

[37] *Id.* § 212(d)(3), 66 Stat. 187 (1952).

[38] 98 Cong. Rec. 8084 (1952).

[39] Sidney Blumenthal, *Congress Lifts Political-Beliefs Bar to Aliens Under McCarran-Walter Act*, Wash. Post (Dec. 17, 1987), https://perma.cc/5ETL-5W5V.

Act kept out novelists such as Gabriel García Márquez, Czeslaw Milosz, Carlos Fuentes, Jorge Luis Borges, Graham Greene, and Doris Lessing. It kept out actors like Maurice Chevalier, Yves Montand and Simone Signoret. It kept out poets like Pablo Neruda. It kept out a former prime minister—Ian Smith of Rhodesia—and a future one—Pierre Trudeau of Canada. Persons on the left and the right were excluded—the latter including figures such as Smith, Ian Paisley of Northern Ireland and Roberto D'Aubisson of El Salvador. Even NATO's former vice supreme commander in Europe for nuclear affairs, Nino Pasti, was kept out of the United States after he criticized the Reagan administration's effort to install new missiles in Europe.[40]

It was perhaps predictable that the power to exclude individuals on the basis of viewpoints deemed dangerous by the government would be used eventually to exclude individuals who had done nothing more than disagree with U.S. policies, or criticize the U.S. government. Indeed, the list of individuals barred under the McCarran-Walter provisions included four winners of the Nobel Prize in

[40] *See id.*; *Deportation Bid Based on McCarthy-Era Law*, L.A. Times (Jan. 29, 1987), https://perma.cc/QM6D-7Y98; John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 Tex. L. Rev. 1481, 1496–97 (1988); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930, 930 (1987); David Margolick, *Bar Panel Urges End of Law that Limits Entry Into U.S.*, N.Y. Times (Apr. 4, 1984), https://perma.cc/P7FW-XXDC; Steven A. Holmes, *Legislation Eases Limits on Aliens*, N.Y. Times (Feb. 2, 1990), https://perma.cc/Z2DV-B3RS.

Literature.[41] The casual dismissiveness with which the Act was deployed was exemplified in the exclusion of Italian playwright Dario Fo. "Nobody in State thinks that Fo is going to foment revolution or throw bombs," said a State Department official to a reporter. "It's just that Fo's record of performance with regard to the United States is not good. Dario Fo has never had a good word to say about" the United States.[42]

Beyond limiting Americans' ability to access speech, the Act undermined America's ability to hold other nations accountable for repressing their citizens. Senator Moynihan observed that McCarran-Walter "made us seem hypocritical" and "made us easy to caricature and deride."[43] As the writer Larry McMurtry testified before Congress in 1989:

> In addition to the deleterious effects of this Act on the First Amendment rights of individuals, the very existence of ideologically-based legislation undermines the effectiveness and moral authority of American organizations such as PEN that are dedicated to promoting free and open communication "within all nations" and "between all

[41] See CJ Grossman, *The McCarran-Walter Act: War Against Margaret Randall and the First Amendment*, 27/28 Crime & Soc. Just. 220, 230 n.5 (1987).

[42] Statement of Arthur C. Helton, Exclusion and Deportation Amendments of 1983: Hearing Before the Subcommittee on Immigration, Refugees, and International Law of the Committee on the Judiciary, House of Representatives, Ninety-Eighth Congress, Second Session, on H.R. 4509 and H.R. 5227 (June 28, 1984), at 107–08 (quoting Erika Munk, *Cross Left*, The Village Voice (June 2, 1980) at 86), https://perma.cc/C77S-MYTR.

[43] Clifford D. May, *Washington Talk; A McCarthy Era Act, Used to Block Visits by Foreigners, Is About to Fall*, N.Y. Times (June 1, 1989), https://perma.cc/FQH5-Q8QB.

> nations" as they work to fulfill this mandate and aid writers who are persecuted regardless of national origin. How can we presume to be the "leaders of the free world" and criticize the more egregious practices of other governments when we fail to live up to the standards we set for ourselves – that serve as a model for the internationally recognized human rights standards against which all nations are judged?[44]

The practice of ideological exclusion gradually came to be regarded as irreconcileable with the core values of an open society. In 1975, the United States entered into the Helsinki Accords, an agreement among European countries, plus the United States and Canada, that aimed to further a détente between NATO and Warsaw Pact countries. The accords included a commitment by signatory states to facilitate travel between states.[45] In an effort to comply with the accords, Congress passed the McGovern Amendment in 1977, which modified the McCarran-Walter Act by providing that the State Department "should" recommend a waiver to the Attorney General of inadmissibility on the ground that the alien was inadmissible "by reason of membership in or affiliation with a proscribed organization."[46] In 1986, the D.C. Circuit held that the government could exclude someone on the separate grounds that admission would be prejudicial to the United States only if that

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[44] Testimony of Larry McMurtry, Free Trade in Ideas: Hearings Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, One Hundred First Congress, First Session (May 3, 1989), at 56, https://perma.cc/7DNH-W9HR.

[45] *See* Shapiro, *supra* note 40, at 931 n.13 (quoting *Conference on Security and Co-operation in Europe: Final Act*, 14 I.L.M. 1292, 1314 (1975)).

[46] *See* Pub. L. No. 95-105 § 112, 91 Stat. 844, 848 (1977).

determination was independent of the fact of membership or affiliation with a proscribed organization. *See Abourezk v. Reagan*, 785 F.2d 1043, 1058 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987). Congress passed legislation temporarily repealing the ideological exclusion provisions in 1987 and 1988 before repealing them permanently in 1990.[47] The Senate vote in favor of repeal was unanimous.[48]

Beginning during World War I, the United States also experimented with another means of limiting citizens' access to foreign ideas. In 1917, Congress enacted the Trading with the Enemy Act (TWEA) to control trade with Germany and the Austro-Hungarian Empire; its strictures were reactivated during World War II and the Korean War.[49] After the Korean War, the presidential designation of national emergency remained in effect, and "the temporary trade restrictions authorized by the TWEA were transformed into a permanent fixture of postwar American life."[50] In the late 1960s, "access to books, newspapers, magazines and films produced in North Vietnam and China was virtually cut off."[51] In 1977,

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[47] *See* Holmes, *supra* note 40.

[48] *Id*.

[49] *See* Pub. L. No. 65-91, 40 Stat. 411 (1917); Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 Wm. & Mary L. Rev. 719, 728–29 (1985).

[50] Neuborne & Shapiro, *supra* note 49, at 729.

[51] *Id.* at 730.

Congress limited the TWEA to wartime use while granting peacetime sanctions authority to the President through the International Emergency Economic Powers Act (IEEPA), and grandfathering in all existing sanctions then in effect.[52]

In 1981, the Treasury Department seized thousands of publications from Cuba destined for American readers and refused to allow delivery unless and until the intended recipients received individual import licenses from the Treasury Department.[53] Over 100 such intended recipients sued on, *inter alia*, First Amendment grounds.[54] The day before its response was due, the government capitulated and released the materials without requiring a license.[55] Subsequently, a 1985 trade embargo against Nicaragua expressly provided a general license for importing books and magazines, thus avoiding a First Amendment issue—and avoiding abridgments of Americans' right to receive information.[56]

To prevent subsequent sanctions from abridging freedom of speech, Congress in 1988 passed legislation, known as the Berman Amendment, to make clear that TWEA and IEEPA did not authorize restrictions on First Amendment-protected

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[52] Christopher A. Casey, Dianne E. Rennack & Jennifer K. Elsea, Cong. Rsch. Serv., R45618, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, at 8 n.57 (2024), https://perma.cc/X9GC-U9A4.

[53] *See* Neuborne and Shapiro, *supra* note 49, at 731.

[54] See *id*.

[55] See *id*.

[56] *Id.* at 730 n.47.

materials.[57] The 1988 amendment provided that the acts "do[ ] not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials."[58] As the accompanying House Report made clear, the Berman Amendment reflects "the principle that no prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First Amendment."[59]

It is no coincidence that, at roughly the same time, Congress both repealed the McCarran-Walter Act's ideological exclusion provisions and imposed First Amendment-based limitations on presidential sanctions authority. Both actions

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[57] Jarred O. Taylor III, *Information Wants to be Free (of Sanctions): Why the President Cannot Prohibit Foreign Access to Social Media Under U.S. Export Cannot Prohibit Foreign Access to Social Media Under U.S. Export Regulations*, 54 Wm. & Mary L. Rev. 297, 307 (2012).

[58] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 2502, 102 Stat. 1107, 1371–72.

[59] H.R. Rep. No. 100–40, pt. 3, at 113 (1987); *see also Cernuda,* 720 F. Supp. at 1547–53 (citing the House Report and holding that the Berman Amendment applied to original paintings); *Kalantari v. NITV, Inc.*, 352 F.3d 1202, 1205 (9th Cir. 2003) ("The Berman Amendment was designed to prevent the executive branch from restricting the international flow of materials protected by the First Amendment."). In 1994, Congress clarified that the Berman Amendment applied to informational materials "whether commercial or otherwise, regardless of format or medium of transmission" and adding further examples to the list of covered media. Pub. L. No. 103-236 § 525(b), (c), 108 Stat. 382, 474 (1994).

turned the page on ill-advised Cold War efforts to restrict the information and ideas to which Americans could have access. In 1986, Senator Charles Mathias introduced a bill that would have achieved both reforms at once. While Congress would eventually make these changes in separate pieces of legislation, Senator Mathias's floor statement upon introducing the bill cogently articulated the First Amendment values connecting the proposals:

> The thread that ties all of these changes together is an ideal embodied in the first amendment: The removal of barriers that inhibit the free exchange of ideas across international frontiers. . . .
>
> A free flow of information and ideas among American citizens is the foundation of our democratic society. . . . However, this liberty, secured by the first amendment, is thwarted by a number of laws which permit the Government to restrict the flow of information and the travel of individuals into and out of the United States.
>
> . . . . Diversity, dialog, and exchange of ideas are the life-giving elements—the water and air—of American tradition; exclusion, restriction, repression of ideas are the features of far more troubled, less confident nations.[60]

III. The First Amendment does not permit the government to ban access to foreign media where, as here, a ban will not materially further the state's interests and less restrictive alternatives are available.

Montana's TikTok ban should be subject to strict scrutiny for a combination of reasons: it operates as a prior restraint by prohibiting the publication and circulation of ideas on social media, *see Lovell v. City of Griffin*, 303 U.S. 444, 451–52 (1938) (holding ordinance unconstitutional because it prohibited the distribution

[60] 132 Cong. Rec. 6550 (1986) (statement of Sen. Charles Mathias).

of pamphlets, magazines, and other literature); it effectively "foreclose[s] an entire medium of expression," *see City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994); it targets a single expressive product, *see Minneapolis Star and Tribune Co. v. Minn. Com'r of Revenue*, 460 U.S. 575, 591–92 (1983); and it was motivated at least in part by a "disagreement with the message[s] . . . convey[ed]" on TikTok, *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (citation omitted); *see, e.g.*, Declaration of Rob Cameron Ex. B (House Judiciary Comm. Hearing Transcript) at 27, *Alario v. Knudsen*, No. CV-23-56-M-DWM (D. Mont. Nov. 30, 2023). But Montana's ban fails even intermediate scrutiny. This is because it does not materially further the state's asserted interest in consumer privacy and because less restrictive alternatives are readily available. *See City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (regulation that burdens First Amendment rights must, at a minimum, be "narrowly tailored to serve a significant governmental interest" (citation omitted)).

As an initial matter, Montana's ban is ineffective for the simple reason that intrusive data collection practices are ubiquitous online—yet Montana's ban applies only to TikTok. In fact, the collection of personal information is a hallmark of all popular online platforms, including American-owned ones. This includes large platforms like Facebook and Google, as well as small and seemingly innocuous apps,

many of which also collect information about users' off-platform activities. The ban on TikTok does essentially nothing to protect Montanans' privacy because other platforms collect essentially the same information that TikTok collects.

The ban is ineffective even if one focuses on the specific risks posed by data-collection by China because China and other foreign governments can readily purchase from commercial data brokers the same kind of information that TikTok collects about its American users. *See* Opinion and Order at 29, Alario v. Knudsen, No. CV-23-56-M-DWM (D. Mont. Nov. 30, 2023).[61] A recent report prepared for the Director of National Intelligence explains:

> There is today a large and growing amount of what the U.S. Intelligence Community (IC) refers to as "Commercially Available Information" (CAI). . . . The volume and sensitivity of CAI have expanded in recent years mainly due to the advancement of digital technology, including location-tracking and other features of smartphones and other electronic devices, and the advertising-based monetization models that underlie many commercial offerings available on the Internet. Although CAI may be "anonymized," it is often possible (using other CAI) to deanonymize and identify individuals, including U.S. persons.

[61] A former General Counsel to the National Security Agency explained in an op-ed published last year. Glenn S. Gerstell, *The Problem With Taking TikTok Away From Americans*, N.Y. Times (Feb. 1, 2023), https://perma.cc/DG2P-CDYB ("If it wanted to collect information on Americans, China could sidestep a [TikTok] ban and legally, though with a little more effort, purchase almost limitless amounts of information from data brokers who stockpile information about our online activities.").

> . . . . As a resource available to the general public, including adversaries, CAI also raises counter-intelligence risks for the IC.[62]

Professor Bruce Schneier, one of the country's leading computer security experts, expanded on this point in a declaration filed in another case:

> [T]here are legitimate concerns about the Chinese government's ability to access data held by Chinese companies and their subsidiaries[,]. . . . [but] China does not need TikTok to acquire sensitive data about Americans. It can easily purchase this information from data brokers, advertising aggregators, and other applications on the open market. Banning TikTok in an effort to stop the Chinese government from gathering information of intelligence value on American users is like trying to dam a river with a single stone. Even if one accepts [the] unsubstantiated claim that the Chinese government has unfettered access to TikTok's data, [there is] no evidence that [banning TikTok] will make it any harder for China to collect [Americans'] data . . . or to generate sophisticated insights about them. The critical question is: What could the Chinese government do with TikTok's data that it couldn't do without it? The answer: essentially nothing.[63]

Because banning TikTok does not meaningfully protect Americans' privacy, or meaningfully restrict China from accessing Americans' data, Montana's ban plainly "fails to advance" its stated interest. *Taxpayers for Vincent*, 466 U.S. at 812.

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[62] *Report to the Director of National Intelligence*, Off. of the Dir. of Nat'l Intel. Senior Advisory Grp., Panel on Commercially Avail. Info. (Jan. 27, 2022), at 1.

[63] Supplemental Declaration of Professor Bruce Schneier at 1–2, *Coal. for Indep. Tech. Rsch. v. Abbott*, No. 1:23-CV-783, 2023 WL 8582597 (Dec. 11, 2023). Professor Bruce Schneier is a cryptographer, security technologist, and writer who serves as a lecturer at the Harvard Kennedy School of Government and a fellow at the Berkman Klein Center for Internet and Society at Harvard University.

For this reason it fails First Amendment review whether it is evaluated under strict or intermediate scrutiny.

The ban also cannot withstand scrutiny for a second reason: substantially less-restrictive alternatives are readily available. For example, Montana could protect consumer privacy by passing a law to limit data collection by private companies and purchases and sales of personal data by data brokers. Unlike banning a single app, a comprehensive data privacy law would address overarching concerns about the collection and misuse of Americans' personal data—including, but not limited to, its export to China.[64] These measures would directly address and alleviate Montana's stated privacy concerns without restricting Americans' access to a popular medium of expression. That the state could satisfy its aims in this way makes clear that a "substantial portion of the burden on speech" imposed by a ban cannot be justified, and that the ban would not "advance [the state's] goals" in any meaningful way. *Ward*, 491 U.S. at 799.

Courts frequently invalidate "total ban[s]" on particular forms of expressive activity for precisely these reasons. *See Ward*, 491 U.S. at 799 n.7 (citing *Martin v. Struthers*, 319 U.S. 141 (1943)); *City of Ladue*, 512 U.S. at 55 (collecting cases). It is the "essence of narrow tailoring" that a restriction actually "focus[] on the source of the evils the [state] seeks to eliminate," and not "suppress a great quantity of

[64] *See* Gerstell, *supra* note 61.

speech that does not [itself] cause th[ose] evils." *Ward*, 491 U.S. at 799 n.7. In this case, the "evil" Montana seeks to address is the collection and use of Americans' personal data. This is caused by platforms' data collection practices and by the aggregation and sale of users' personal information; it does not result from the expressive aspects of online communications. Therefore, just as a total ban on handbilling is plainly overbroad in relation to the problems of "fraud, crime, litter, traffic congestion, or noise" that can result from handbilling, so too a total ban on TikTok is "substantially broader than necessary to achieve the interests justifying it." *Id.* (citing *Martin*, 319 U.S. at 145–46).

Indeed, for the reasons already stated, comprehensive privacy legislation would be significantly more effective at achieving Montana's stated aims. *See supra* at 24–26. A regulation is not narrowly tailored where, as here, no evidence indicates that the state's interest would be "achieved less effectively absent the regulation," *Ward*, 491 U.S. at 799 (citation omitted), and less intrusive measures *would serve that interest better*. Under these circumstances, there is no constitutionally adequate justification for abridging Americans' First Amendment right to access the platform.

Conclusion

For the reasons outlined above, the Knight Institute respectfully urges the Court to affirm the district court's grant of preliminary relief.

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