No. 24-34

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMANTHA ALARIO, *et al.*,

Plaintiffs–Appellees,

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 (Missoula)
Lead Case No. CV 23-56-M-DWM
Hon. Donald W. Molloy

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MONTANA, ELECTRONIC FRONTIER FOUNDATION, FREEDOM OF THE PRESS FOUNDATION, REASON FOUNDATION, AND CENTER FOR DEMOCRACY & TECHNOLOGY IN SUPPORT OF PLAINTIFFS–APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae American Civil Liberties Union, American Civil Liberties Union of Montana, Electronic Frontier Foundation, Freedom of the Press Foundation, Reason Foundation, and Center for Democracy & Technology state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: May 6, 2024

/s/ Patrick Toomey
Patrick Toomey

Counsel for Amici Curiae

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STATEMENT OF INTEREST

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Montana is the state affiliate of the national ACLU whose mission is to support and protect civil liberties within the state of Montana.

The Electronic Frontier Foundation ("EFF") is a member-supported, non-profit civil liberties organization that has worked for over 30 years to protect free speech, privacy, and innovation in the digital world. EFF, with over 35,000 members, represents the interests of technology users in court cases and broader policy debates surrounding the application of law to the Internet and other technologies.

Freedom of the Press Foundation ("FPF") is a non-profit organization that protects, defends, and empowers public-interest journalism. FPF regularly advocates against and participates in legal proceedings to oppose legislation, government policies and judicial orders that violate the First Amendment and undermine press freedom.

Reason Foundation ("Reason") is a non-partisan and non-profit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. Reason advances its

mission by publishing the critically acclaimed Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.org. To further Reason's commitment to "Free Minds and Free Markets," Reason has participated as amicus curiae in numerous cases raising significant legal and constitutional issues, including cases implicating free expression and social media platforms. *See, e.g.*, *Moody v. NetChoice, LLC*, 144 S. Ct. 478 (2023) (granting certiorari); *NetChoice, LLC v. Paxton*, 144 S. Ct. 477 (2023) (granting certiorari); *Gonzalez v. Google*, 598 U.S. 617 (2023).

The Center for Democracy & Technology ("CDT") is a non-profit public interest organization. For over 25 years, CDT has represented the public's interest in an open, decentralized Internet and worked to ensure that the constitutional and democratic values of free expression and privacy are protected in the digital age.

Amici have a long history of advocating for individuals' First Amendment rights, including when the government invokes national security interests. Particularly relevant here, the ACLU and EFF appeared as amici in *U.S. WeChat Users All. v. Trump*, No. 20-16908, 2021 WL 4692706 (9th Cir. Aug. 9, 2021), arguing, respectively, that the government's attempt to ban the mobile communications application WeChat in the name of national security violated the First Amendment, and that the ban would make users of WeChat *less* secure.

Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), amici certify that no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(2), the parties have consented to the filing of this brief.

INTRODUCTION

Montana's ban on TikTok—an application that hundreds of thousands of people in the state use to communicate, learn about the world, and express themselves—is unconstitutional. As the district court recognized, Senate Bill 419 "completely bans a platform where people speak." ER-20. It directly restricts protected speech and association, deliberately singles out a particular medium of expression for a blanket prohibition, and imposes a prior restraint that will make it impossible for users to speak, access information, and associate through TikTok. As a result, the statute triggers an especially exacting form of First Amendment scrutiny.

The district court correctly held SB 419 unconstitutional, but it reached that conclusion after applying only intermediate scrutiny under the First Amendment. While applying the proper standard should not change the outcome in this case, amici urge this Court to recognize that under the Supreme Court's and this Court's precedents, a higher level of First Amendment scrutiny governs here—and would apply to any other government attempt to ban Americans from accessing an entire medium of expression. Amici's brief sets out the First Amendment standards that apply to the State's effort to ban a social media platform like TikTok.

First, SB 419 constitutes a prior restraint on TikTok and its users, an especially disfavored means of restricting First Amendment rights. This is because

the statute will shut down the app, blocking hundreds of thousands of users in Montana, as well as TikTok itself, from engaging in protected expression "in advance of the time that [their] communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). As a result, the district court was required to apply an "extraordinarily exacting" form of strict scrutiny. *Columbia Broad. Sys., Inc. v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 729 F.2d 1174, 1178 (9th Cir. 1984).

Second, even if this Court did not apply strict scrutiny to SB 419, the State would still have to satisfy a strict narrow-tailoring requirement because the statute is a total ban on a unique and important means of communication. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). In these circumstances, courts apply an exacting standard: a total ban fails unless it "curtails no more speech than is necessary to accomplish its purpose." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).

Finally, the degree of judicial scrutiny that applies to SB 419 is not diminished by the State's national security and foreign espionage claims. As both the Supreme Court and this Court have made clear, the government's burden to justify an infringement on First Amendment rights is the same in the national security context as in any other. *See, e.g.*, *N.Y. Times Co. v. United States* ("*Pentagon Papers*"), 403 U.S. 713, 729–30 (1971). In fact, the judiciary has an

especially critical role to play in ensuring that the government meets its burden when national security is invoked.

Amici urge the Court to see SB 419 for what it is: a sweeping ban on free expression that triggers the most exacting scrutiny under the First Amendment. Applying the proper test, this Court should affirm the district court's order granting preliminary injunctive relief under the First Amendment.

ARGUMENT

I. Montana's TikTok ban targets core First Amendment activity.

In 2017, the Supreme Court recognized that the "most important places . . . for the exchange of views" are "the 'vast democratic forums of the Internet' in general . . . and social media in particular." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)). Applying this to the Internet of today, the district court acknowledged TikTok's role as an immensely popular social media platform, and correctly concluded that use of the app to share and receive ideas, information, and opinions with other users around the world lies "squarely within the First Amendment's protections." ER-17.

TikTok hosts a wide universe of expressive content, from musical performances and comedy to politics and current events. *See, e.g.*, Gene Del Vecchio, *TikTok Is Pure Self-Expression. This Is Your Must-Try Sampler*, Forbes

(June 6, 2020), https://perma.cc/6UJ6-JEPS. It offers Montanans and others thriving conversations about the state, with hashtags like #Montana, #bigskycountry, #lastbestplace, and #406 helping users engage with Montana's local leaders, learn about the state's best outdoor activities, and follow current events and politics, like the state's legislative session.[1]

And with over 150 million users in the United States and 1.6 billion users worldwide, TikTok is host to an enormous community that Montanans cannot readily reach elsewhere. This expansive reach allows users in Montana to communicate with people far beyond the state's borders—and vice versa. Recently, TikTok has been an essential platform for users in Montana to learn about and engage with the everything from the U.S. presidential election, to Russia's crackdown on press freedoms and its arrest of reporters like the *Wall Street Journal*'s Evan Gershkovich, to the devasting earthquake in Taiwan. *See, e.g.*, Will Weissert & Zeke Miller, *Biden Campaign Trumpets Joining TikTok, Despite His Own Administration's Security Concerns*, AP News (Feb. 11, 2024), https://perma.cc/GM4L-2UUD; MLPone (@mlpone), TikTok (Jan. 26, 2024), https://www.tiktok.com/@mlpone/video/7328586738249649439; ABC7LA

[1] *See, e.g.*, #montana, TikTok, https://www.tiktok.com/tag/montana (last visited May 6, 2024).

(@abc7la), TikTok (Apr. 4, 2024), https://www.tiktok.com/@abc7la/video/7354088675824635179.

TikTok plays an especially important and outsized role for minority communities seeking to foster solidarity online and to highlight issues vital to them. *See, e.g.*, Arlyssa Becenti, *Native TikTok Creators Worry a Ban Would Take Away Connections, Communities*, AZCentral. (Apr. 3, 2023), https://perma.cc/475N-D9NW; Bobby Allyn, *TikTok Pivots from Dance Moves to a Racial Justice Movement*, NPR (June 7, 2020), https://perma.cc/4CEX-CP46. For example, one Indigenous artist based in Montana, @supamantiktok, reaches over 92,000 followers on TikTok with videos showcasing not only his music and dance but also Indigenous hope, history, and resilience.[2] Also from Montana, Asian American and Indigenous activist @kyyen_lht uses her platform to amplify issues affecting tribal communities, such as recent violence committed against Indigenous women and young men, as well as the history and importance of the Indian Child Welfare Act.[3]

[2] *See, e.g.*, Supaman (@supamantiktok), TikTok (July 25, 2023), https://www.tiktok.com/@supamantiktok/video/7259916703394565418.

[3] *See, e.g.*, Kyyen LeftHandThunder (@kyyen_lht), TikTok (Mar. 6, 2023), https://www.tiktok.com/@kyyen_lht/video/7207543568930573610; Kyyen LeftHandThunder (@kyyen_lht), TikTok (Apr. 19, 2024), https://www.tiktok.com/@kyyen_lht/video/7359606133750811946.

TikTok is also a unique expressive platform for non-profits like amici, who would be cut off from TikTok users in Montana by SB 419's ban. Non-profits use TikTok to grow their base, communicate with their supporters, and elevate their causes, and TikTok specifically offers tools for non-profits to achieve these goals. *See* TikTok For Good, https://www.tiktok.com/forgood. The ACLU, EFF, and Reason, with over 173,000 followers and 3.1 million likes collectively,[4] use the platform for these purposes—to show the human impact of government policies, inform people of their rights, and alert their supporters to new legislation in Montana and elsewhere.[5]

Given the breadth of expressive activity on TikTok, the district court correctly recognized that "SB 419 implicates traditional First Amendment speech." ER-16. That's true both for the hundreds of thousands of Montanans who use the platform to exchange unique content with other TikTok users around the world,

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[4] *See* ACLU (@aclu), TikTok, https://www.tiktok.com/@aclu (last visited May 6, 2024); EFF (@efforg), TikTok, https://www.tiktok.com/@efforg (last visited May 6, 2024); Reason Magazine (@reasonmagazine), TikTok, https://www.tiktok.com/@reasonmagazine (last visited May 6, 2024).

[5] *See, e.g.*, ACLU (@aclu), TikTok (June 8, 2022), https://www.tiktok.com/@aclu/video/7107028718383533354; ACLU (@aclu), TikTok (June 13, 2023), https://www.tiktok.com/@aclu/video/7244323765520354606; ACLU (@aclu), TikTok (Feb. 27, 2023), https://www.tiktok.com/@aclu/video/7204964519834029354; ACLU (@aclu), TikTok (Apr. 27, 2024), https://www.tiktok.com/@aclu/video/7362596004002041118.

and for TikTok itself, which posts its own content and makes editorial decisions about what user content to carry and how to curate it for each individual user. ER-17 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995)); *cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (recognizing the First Amendment rights of book publishers to decide which books to publish).

Although the State argues that SB 419 regulates only conduct by TikTok, State Br. 24, the law plainly implicates the First Amendment. As the Supreme Court explained in *Minneapolis Star & Tribune Company v. Minnesota Commissioner of Revenue*, "facially discriminatory" regulations that "singl[e] out" a particular means of expression trigger First Amendment scrutiny. 460 U.S. 575, 576, 581, 585, 586, 591–92 (1983); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). SB 419 is precisely such a regulation. *See* ER-16–17 (district court explaining that SB 419 "targets one entity" and "implicates traditional First Amendment speech" of both TikTok and its users).

Contrary to the State's arguments, *Arcara v. Cloud Books* does not shield SB 419 from First Amendment scrutiny. 478 U.S. 697, 706–07 (1986). In *Arcara*, the Supreme Court held that the First Amendment did not immunize an adult bookstore from a public health regulation that applied generally, was directed at non-expressive conduct, and did not "single out [those] engaged in First

Amendment protected activities for the imposition of its burden." *Id.* at 705. But the Court was careful to note that First Amendment scrutiny *would* apply if instead (1) the regulation governed "conduct that has an expressive element"; or (2) it "imposed a disproportionate burden upon those engaged in protected First Amendment activities." *Id.* at 702–04; *see also* ER-15.

Both factors are present here. Unlike the generally applicable regulation in *Arcara*, SB 419 *deliberately targets* TikTok and its users, who are engaged in First Amendment-protected activity. ER-64. SB 419 also "ha[s] the effect of singling out" one platform and all of the speakers who use it "to shoulder its burden." 478 U.S. at 704 (citing *Minneapolis Star*, 460 U.S. 575); *see also HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019) (courts may consider "the inevitable effect of a statute on its face, as well as a statute's stated purpose," to determine whether it will have "the inevitable effect of singling out those engaged in expressive activity").

The State's content-based justifications for the ban make clear that the State is targeting speech it finds distasteful. *Cf. Arcara*, 478 U.S. at 707 n.3. The text of the law cites "dangerous" TikTok content, ER-63, and during House debates, legislators highlighted concerns that TikTok's curation of content on the app could promote viewpoints favorable to China. *See* SER-259–60, 286–87. The State's attempts to cast SB 419 as a generally applicable consumer-protection bill cannot

mask the ban's true purpose and effect: to single out and suppress speech on TikTok based on the State's anti-China political views.

II. SB 419 is a prior restraint subject to the most exacting scrutiny.

A. SB 419 is a prior restraint on TikTok and its users.

SB 419 is not only a regulation of expression, as the district court correctly found—it is a prior restraint, and therefore one of the most disfavored types of restrictions on speech.

"Prior restraint[s]" are "orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander*, 509 U.S. at 550. The "historical paradigm" of a prior restraint was the English system of licensing all presses and printers, which forbade printing without government permission. Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 544 (1977). But over time, the Supreme Court has recognized that prior restraints can take many other forms—ranging from administrative schemes that wield informal sanctions, like a state board that issues advisory notices about the suitability of books for minors, *see Bantam Books*, *Inc.*, 372 U.S. at 66–71, to a complete ban on publication, like a court injunction against the printing of a particular newspaper, *see Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

By barring expression *before* it is uttered, prior restraints prevent speech altogether, rather than merely chilling speech through risk of subsequent sanction. *See Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980). In *Nebraska Press Association v. Stuart*, the Supreme Court highlighted the defining features of prior restraints by contrasting them with subsequent punishments. The Court explained: "[i]f it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." 427 U.S. 539, 559 (1976). "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). As this Court summarized in *Cuviello v. City of Vallejo*, "a prior restraint stifles speech before it can take place." 944 F.3d 816, 831–32 (9th Cir. 2019).

Under Supreme Court and this Court's precedents, Montana's TikTok ban is a classic prior restraint. As the district court here acknowledged, the ban "completely shuts off TikTok to Montana users." ER-23. It bars TikTok and its users from posting content, and it bars TikTok from exercising curatorial and editorial judgment. In other words, SB 419 suppresses speech *before* it can take place. *See, e.g.*, *Cuviello*, 944 F.3d at 831–32.

In this respect, Montana's ban is analogous to court injunctions barring newspapers from publishing, which the Supreme Court has held to be unconstitutional prior restraints. In *Near*, for example, the Supreme Court invalidated a state statute authorizing an injunction against a newspaper's publication, reasoning that the Constitution "prevents previous restraints upon publication." 283 U.S. at 713. Similarly, in *Pentagon Papers*, the Court held that an order barring the *New York Times* from publishing the Pentagon Papers was an unconstitutional prior restraint. 403 U.S. at 729–30. Such prohibitions are, in the Supreme Court's words, "the essence of censorship." *Near*, 283 U.S. at 713.

Indeed, the State's prohibition here is even more sweeping than those in *Near* or *Pentagon Papers*. Montana has not merely forbidden particular communications or speakers on TikTok based on their content, but it has banned an entire platform—suppressing an extraordinary amount of protected expression in the process. It is as though, in *Near*, the state court had enjoined *all* local newspapers from future publication, or in *Pentagon Papers*, the lower court had shut down the *New York Times* entirely. And the impact is all the more significant because SB 419 bans a digital medium akin to those the Supreme Court has recognized allow "any person . . . [to] become a town crier with a voice that

resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997).[6]

The State attempts to evade First Amendment scrutiny by arguing that SB 419 is directed at TikTok, not its users. State Br. 29. That is incorrect as a factual matter, *see* SB 419 § 1(a) (prohibiting the "operation of tiktok by the company *or users*" (emphasis added))—and, in any event, it would not change the prior restraint analysis. ER-64. In *Bantam Books*, for example, the Supreme Court held that book publishers could challenge a state censorship scheme that purported "only to regulate [book] distribution," because, in practice, it also operated as a restraint on publishers. 372 U.S. at 64 n.6; *id.* at 67 (instructing courts to "look through forms to the substance" when assessing prior restraints that suppress speech).

The same is true here. By shutting down the platform in Montana, SB 419 "in fact" forecloses speech by TikTok's users, *id.* at 68, even if they may be able to express themselves elsewhere. *Cf. id.* at 64 n.6 (noting that Rhode Island

[6] The State appears to believe that the ban's broad sweep is a virtue, arguing that it is not "content-based," State Br. 39–40—but that claim cannot excuse a prior restraint. First, as Plaintiffs explain, SB 419 *does* discriminate based on content. *See* TikTok Br. 21–22; User Br. 25–28. But even if the TikTok ban were deemed content-neutral, the Supreme Court has never held that content discrimination is a required element of a prior restraint. *See, e.g.*, *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 417–19 (1971) (injunction barred group from pamphleting and picketing regardless of content).

commission did not claim jurisdiction over out-of-state publishers, who thus remained free to publish in other states). And the statute completely restrains TikTok itself, foreclosing its ability to speak to Montanans in a way that reflects its editorial judgment.

The district court declined to analyze the TikTok ban as a prior restraint, but it did so based on the flawed assumption that TikTok had to be users' sole means of communicating. ER-22–23. There is no such requirement. *See Keefe*, 402 U.S. 417–19 (injunction against leafletting and picketing was prior restraint even though protestors had other ways to protest); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 182–85 (1968) (injunction only against protests, but no other speech, in the county for 10 days).

But even if there were such a requirement, the speech and expression that Montanans watch, enjoy, and engage with on TikTok is unique and uniquely curated for them. As the district court rightly recognized, TikTok is not interchangeable with other social media apps, ER-23—and that is enough to show that Montana's ban on TikTok will "stifle[] speech before it can take place." *Cuviello*, 944 F.3d at 831–32; *see also* ER-33 (observing that "TikTok provides [users] a way to communicate with their audience and community *that they cannot get elsewhere on the Internet*" (citing, for example, ER-51–56, ER-57–61) (emphasis added)).

The district court's analysis rested on a misreading of *U.S. WeChat Users Alliance v. Trump*, 488 F. Supp. 3d 912, 916–17 (N.D. Cal. 2020), where the court held that the plaintiffs were likely to prevail on their claim that the government's WeChat ban was a prior restraint. There, the plaintiffs showed that language barriers limited the ability of many Chinese speakers to rely on other platforms, not that the ban eliminated their "sole means of communicating." *Id.* at 927. Indeed, the court in that case was concerned that banning the app would "*slow* or eliminate discourse." *Id.* at 926 (emphasis added).

Montana's TikTok ban embodies the particular dangers that the prior restraint doctrine was designed to prevent. It blocks far more speech than necessary to serve any legitimate (let alone compelling) purpose, banning TikTok's "operation" outright and alluding to concerns over "dangerous content" without ever defining it. SB 419 § 1(a), Preamble. ER-64. It also plainly raises the issue of political bias and motivation, singling out TikTok because of its foreign ownership even as other major social media platforms raise similar privacy and content-moderation issues. *Id.*; *see, e.g.*, Bess Pierre & R.J. Cross, *Demystifying TikTok Data Collection*, PIRG (June 15, 2023), https://perma.cc/VW5V-NU9H. SB 419 is exactly the type of law that warrants courts' special distrust of prior restraints.

B. Prior restraints are subject to extraordinarily exacting scrutiny.

Because SB 419 constitutes a prior restraint, this Court should apply "the most exacting scrutiny." *Smith v. Daily Mail Pub.*, 443 U.S. 97, 102 (1979); *see also Columbia Broad. Sys.*, 729 F.2d at 1178. Indeed, the purpose of the prior restraint doctrine is to apply "a heavy presumption" of constitutional invalidity to this especially harmful category of restrictions. *Bantam Books*, 372 U.S. at 63. Accordingly, both prongs of traditional "strict scrutiny"—the requirements that the challenged government action advance a compelling interest, and that it be narrowly tailored to achieve that interest—are heightened.

First, to pass constitutional muster, a prior restraint must do more than merely further a compelling interest; it must be necessary to further an urgent interest of the highest magnitude. *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978). The government must show that the harm it seeks to prevent is not only extremely serious but "direct, immediate, and irreparable," *Pentagon Papers*, 403 U.S. at 730 (Stewart, J., concurring); *see id.* at 726–27 (Brennan, J., concurring). The government must also show that the harm is not merely possible, or even probable, but that its "degree of imminence [is] extremely high" as demonstrated by a "solidity of evidence." *Landmark Commc'ns*, 435 U.S. at 845; *accord Craig v. Harney*, 331 U.S. 367, 376 (1947); *Levine v. U.S. Dist. Ct. for*

Cent. Dist. of Cal., 764 F.2d 590, 595 (9th Cir. 1985) ; *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1440 n.9 (9th Cir. 1984).

Second, when analyzing prior restraints, the Supreme Court has imposed an especially demanding form of the narrow-tailoring requirement. Prior restraints must be "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll*, 393 U.S. at 183. The government must show both that the prior restraint will serve its purpose, and that it is the only way to do so. *Neb. Press*, 427 U.S. at 562, 565, 569–70; *see Rosen v. Port of Portland*, 641 F.2d 1243, 1250 (9th Cir. 1981) ("Any 'prior restraint,' therefore, must be held unconstitutional, unless no other choice exists."). Thus, the government "carries a heavy burden of showing justification for the imposition of [] a [prior] restraint." *Keefe*, 402 U.S. at 419.[7]

[7] To the extent this Court has implied that some prior restraints are subject only to strict scrutiny, it has done so only in one narrow context: restrictions on company disclosure of classified government surveillance demands, which *Twitter, Inc. v. Garland* took pains to distinguish from "classic prior restraint[s]." 61 F.4th 686, 708 (9th Cir. 2023). Moreover, insofar as *In re National Security Letter* suggested in a footnote that prior restraints are not subject to extraordinarily exacting scrutiny, 33 F.4th 1058, 1076 n.21(9th Cir. 2022), it was mistaken. It ignored binding Supreme Court and Circuit precedents, *see, e.g.*, *Landmark Commc'ns*, 435 U.S. at 845; *Carroll*, 393 U.S. at 183; *Columbia Broad. Sys.*, 729 F.2d at 1178; *Rosen*, 641 F.2d at 1250; *Domingo*, 727 F.2d at 1440 n.9, and it misconstrued the precedents it did cite. *See Levine*, 764 F.2d at 595 (prior restraint may be upheld "only if the government establishes" that "the activity restrained poses either a clear and present danger or a serious and imminent threat").

For the reasons discussed by the TikTok users and the company, the State cannot meet its burden under this demanding standard, *see* TikTok Br. 24–26; User Br. 17–21, and the Court should therefore find that SB 419 not only fails intermediate scrutiny, but also extraordinarily exacting scrutiny as an impermissible prior restraint.[8]

III. SB 419 is a total ban on speech and subject to a heightened tailoring requirement.

If this Court does not classify SB 419 as a prior restraint or otherwise apply strict scrutiny, it still must apply exacting scrutiny because the government has imposed a "total ban" on TikTok, a unique and important medium of expression. Despite recognizing that "SB 419 completely bans TikTok in Montana," the district court failed to engage with the "total ban" analysis. ER-29.

In *City of Ladue*, the Supreme Court recognized a category of prohibitions on speech that cause "particular concern" because they "foreclose an entire medium of expression"—and so, like prior restraints, can silence too much speech. 512 U.S. at 55. The Supreme Court has struck down a variety of such bans, from "the distribution of pamphlets" to "handbills on the public streets" to "the door-to-door distribution of literature" to "live entertainment." *Id.* Even if the bans are

[8] Even if the Court declined to classify SB 419 as a prior restraint, strict scrutiny would still apply because the ban is content- and viewpoint-based. *See* TikTok Br. 21–22; User Br. 25–28.

"completely free of content or viewpoint discrimination, the danger [that they] pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* These restrictions, often called "total ban[s]," *see, e.g.*, *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762 (1988), consist of two elements: they completely "foreclose" speech, and they do so with respect to "an entire medium of expression," *i.e.*, a "means of communication that is both unique and important." *City of Ladue*, 512 U.S. at 54.

SB 419 has both of these elements. As discussed above, SB 419 completely forecloses users' speech on the app. And TikTok is a "unique and important" medium of expression. *Id.*; ER-32–33. The Supreme Court has explained that "[t]he widespread use of [a] method of communication by many groups espousing various causes atests [sic] its major importance." *Martin v. City of Struthers*, 319 U.S. 141, 145–46 (1943). A lack of practical substitutes and the medium's ease of use are also strong evidence of its importance. *See City of Ladue*, 512 U.S. at 57 (because "[r]esidential signs are [] unusually cheap[,] . . . for persons of modest means or limited mobility, a yard or window sign may have no practical substitute"); *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939). TikTok has all these qualities. It has an immense audience—nearly half of the U.S. population and even more users worldwide—that would be extraordinarily hard to replace.

ER-32–33. In addition, it offers a multitude of expressive and educational functions for many different groups, *see* Section I, *supra*, and is easy and free to use.

In considering the uniqueness and importance of TikTok, the Supreme Court's discussion of social media in *Packingham* is instructive. There, the Court addressed a prohibition on the use of social networking websites by people previously convicted of sex offenses. Calling "cyberspace" the "most important place[] . . . for the exchange of views," and noting that social media in particular "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard," the Court struck down the state's restriction as a "complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture." *Packingham*, 582 U.S. at 104, 107, 109. TikTok is similarly important in today's society and culture, with users—including hundreds of thousands in Montana—relying on it for sharing news, learning about the world, developing new skills, and countless other forms of expression. *See* John Brandon, *One Reason TikTok Is the Most Popular Social Media App of the Year So Far*, Forbes (Apr. 28, 2022), https://perma.cc/GE4M-8ERD.

Because it is a total ban, SB 419 is subject to more exacting judicial review than the intermediate scrutiny applicable to time, place, or manner restrictions. *See United States v. Grace*, 461 U.S. 171, 177 (1983). In *Packingham*, the Supreme

Court held that it did not need to determine what level of scrutiny governed the prohibitions at issue because they easily failed even intermediate scrutiny. 582 U.S. at 105–06. But in other cases, the Supreme Court has established that "regulations that . . . foreclose an entire medium of expression" are distinct from, and more suspect than, those that "merely shift the time, place, or manner of its use." *City of Ladue*, 512 U.S. at 56; *see also Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) ("The ordinance is comprehensive with respect to the method of distribution. . . . There is thus no restriction in its application with respect to time or place.").[9]

While time, place, or manner restrictions need not "be the least restrictive or least intrusive means" of achieving the government's objectives, *Ward*, 491 U.S. at 798, a total ban must "curtail[] no more speech than is necessary to accomplish [the State's] purpose," *Vincent*, 466 U.S. at 810. A complete ban can be narrowly tailored" only "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citation omitted). Because SB 419 is a total ban, and because SB 419 is undeniably

[9] Even cases suggesting that total bans are a subset of time, place, or manner restrictions hold that such bans fail intermediate scrutiny by not "leav[ing] open ample alternative channels of communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989); *see also Schad v. Mount Ephraim*, 452 U.S. 61, 75–76 (1981).

overbroad, TikTok Br. 38; User Br. 21–24, the district court should have subjected SB 419 to a heightened tailoring requirement.

IV. Claims of national security do not lessen the State's burden.

The State continues to defend SB 419 by citing purported national security concerns, including claims that TikTok is used for foreign espionage and subject to "the whims of the authoritarian [CCP]." State Br. 10; *see also* SB 419 Preamble. The district court was right to not let these dubious claims affect its First Amendment analysis. Setting aside whether a state can dictate its own national security policy vis-à-vis foreign powers, *see* TikTok Br. 40–48; User Br. 36–43, the mere incantation of "national security" cannot diminish the searching judicial scrutiny applicable here. If anything, it requires more skeptical review.

"The word 'security' . . . should not be invoked to abrogate the fundamental law embodied in the First Amendment." *Pentagon Papers*, 403 U.S. at 719 (Black, J., concurring). That is, "national-security concerns must not become a talisman used to ward off inconvenient claims—a label used to cover a multitude of sins." *Ziglar v. Abbasi*, 582 U.S. 120, 143 (2017). "Simply saying 'military secret,' 'national security' or 'terrorist threat' . . . is insufficient to [carry the government's burden]." *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007).

To the contrary, in matters of national security as elsewhere, courts must fulfill their "time-honored and constitutionally mandated roles of reviewing and resolving claims" alleging violations of civil liberties. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004). Indeed, meaningful review is *more* important where the government asserts a national security justification: "[g]iven the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985). Government officials may "disregard constitutional rights in their zeal to protect the national security," *id.*, giving in to the "temptation to dispense with fundamental constitutional guarantees[,]" *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963).

For these reasons, the invocation of "national security" requires vigilance by the courts, rather than deference. It does not alter the applicable First Amendment standards. "History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's [rationale] . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse." *In re Wash. Post Co.*, 807 F.2d 383, 391–92 (4th Cir. 1986). The Supreme Court's decision in *Pentagon Papers* is particularly instructive here. In analyzing a prohibition on publication of the Pentagon Papers during the Vietnam

War, the Court applied the same "heavy presumption against its constitutional validity," and held the government to the same "heavy burden" that applies to other prior restraints. 403 U.S. at 714. This Court has similarly recognized that "national security interests . . . are generally insufficient to overcome the First Amendment's 'heavy presumption' against the constitutionality of prior restraints." *Ground Zero Ctr. For Non-Violent Action v. Dep't of Navy*, 860 F.3d 1244, 1260 (9th Cir. 2017).

Likewise, as the Supreme Court has repeatedly held, even when national security concerns apply, "precision must be the touchstone of legislation […] affecting basic freedoms." *Aptheker v. Sec. of State*, 378 U.S. 500, 514 (1964). For example, in *United States v. Robel*, the Supreme Court struck down a statute barring members of the Communist party from employment in a federal defense facility, despite the government's national security rationale, citing "the fatal defect of overbreadth because [the statute] . . . [sanctions] association which may not be proscribed consistently with First Amendment rights." 389 U.S. 258, 266 (1967). Similarly, in *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937), the Court reversed as unconstitutional the defendant's conviction for involvement in a Communist meeting, observing that "[t]he greater the importance of safeguarding the community from incitements . . . , the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly[.]"

Regardless of which form of First Amendment scrutiny the Court applies, the State's invocation of national security is insufficient to justify SB 419's sweeping prohibition on speech and association.

CONCLUSION

Amici respectfully urge the Court to apply the extraordinarily exacting scrutiny required by the First Amendment and affirm the district court's decision granting the preliminary injunction.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 24-34

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