No. 24A587

In The

Supreme Court of the United States

TikTok Inc., and ByteDance Ltd.,

Applicants,

v.

Merrick B. Garland, in his Official Capacity as Attorney General of the United States,

Respondent.

On Emergency Application to the Hon. John G. Roberts, Chief Justice of the Supreme Court, for Injunction Pending Supreme Court Review,

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BRIEF, AMICUS CURIAE OF BROXTON CAPITAL ADVISORS IN SUPPORT OF APPLICANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICI CURIAE

Broxton Capital Advisors and its' manager, R. Allen Cooke (Broxton), in the ordinary course of business and for entertainment, utilize TikTok Inc. to create, receive, store, access, and distribute copyrighted content valued at thousands of dollars. Through the TikTok Terms of Service Agreement, Broxton is provided a limited interest or property right in TikTok to receive, store, access, and distribute copyrighted content. Broxton exclusively owns its' user account and may enjoy, possess and dispose of the account. The Agreement also creates a valuable network for Broxton and an easement in which to distribute and access content to and from hundreds of millions of persons that are similarly situated on the TikTok and other platforms. The recently enacted ''Protecting Americans from Foreign Adversary Controlled Applications Act" (The Act) prohibits TikTok and its valuable services, including the storage of Broxton's copyrighted content, through various mechanisms, in order to protect the United States. Since Broxton also utilizes, in the ordinary course of business and for entertainment, other companies similar to TikTok, it is possible that these companies could be designated as unlawful through the broad language of The Act. Broxton has an interest in preserving TikTok and other companies from the Respondents by supporting the Applicants. If The Act survives this courts scrutiny, it will create the burden of having to correctly guess what the next target of The Act will be and require preemptive or post haste action to attempt to move stored copyrighted content and identify new networks to store and access material. It also could be used to further silence satire and scrutiny of the proponents of The Act. Broxton thus supports Applicants in challenging The Act.

SUMMARY OF ARGUMENT

The Act creates a system of prior restraints that results in the largest content censure attempt in history. The Act also bypasses judicial process by awarding punishment before due process is allowed and TikTok U.S.A. is a domestic person. The implementation of The Act against any particular company is based on a determination by the president §2 (3)(B)(i & ii). The target company or companies then "may" file "A petition for review" but only in the Court of Appeals for the District of Columbia Circuit. The definition of "foreign adversary controlled application" is broad enough to cover any company, domestic or foreign. And since the company could be "indirectly" controlled by a "foreign adversary" no ownership by the supposed foreign adversary is necessary. The Act specifically names ByteDance & TikTok, as a "foreign adversary controlled application" but the companies fail the definition for being so in H.R. 7521 [Pg 7 (g) (1) (A,B & C)]. Evidence was presented that the companies are incorporated in the Cayman Islands, with headquarters in Los Angeles and Singapore, are not owned in any part by the Chinese government and have not received any Chinese government requests for data (not controlled). No evidence of direct or indirect control by a foreign adversary, for TikTok and ByteDance, was presented. So, The Act conveniently directly names TikTok and ByteDance as foreign adversary controlled applications. The effect of The Act is to halt the publication capability of TikTok and ByteDance and any other entity that is "determined" by the president to be foreign adversary controlled. In addition, The Act has the effect of taking Broxton's property.

Besides the avoidance of due process and the taking of property, The Act itself is recognizable as a prior restraint on free speech, which requires a "heavy burden" based possibly on an imminent and compelling threat or possibly an exciting clear and present danger. And due to the

magnitude of the censure powers bestowed by The Act, one would naturally expect a metaphorical large serving prime rib to quench the burden of "why" but instead we are barely afforded a single grain of rice which is heralded as sufficient for so many reasons. And then we are threatened with massive fines to compensate for the lack of constitutional validity. The Act predictably relies on huge penalties, $5,000 per user in some circumstances and $500 in others that can be applied to numerous types of entities that assist TikTok. $5,000 per user would equal an $850 billion fine for TikTok.

The primary proposition of The Act is to "protect" Americans from data collection and possible mal use. However as provided to the court below, the data collected in question is unclassified data on individuals used for targeted advertising and the collection and dissemination of this type of data is standard business practice for any web site or company that utilizes the internet. The data is only collected voluntarily and is outlined in the TikTok user agreement. The same exact type of data and much more, is today generically collected, sold, exchanged and distributed simultaneously worldwide by thousands of entities every minute and is widely commercially available for sale or exchange to any person in every jurisdiction in the world directly or indirectly through proxy. Using this process allows companies such as Google, Facebook and TikTok the ability to offer their service for free and make necessary revenue from selling the data and advertising. This business model is standard business practice and overwhelmingly popular with consumers. TikTok is a single participant. So, the data that the Respondents deem to protect would still be commercially available if TikTok disappeared tomorrow. And any country, including any Asian one, could still access any of the commercially available data. So, the grain of rice argument we are provided is moot.

ARGUMENT

A. The Act Fails to Surpass the Required Burden for previous restraint

Previous restraint was recognized during the construction of the First Amendment and is recognized to have been influenced by Sir William Blackstone. Blackstone: “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.” The Act has the effect of restricting all speech on any entity that is deemed to be a “foreign controlled application” under the guise of preventing harm and protecting Americans. So, it is quite possible that The Act could be used to turn off or “threaten” to turn off any publisher in order to gag particular content. It is not controversial that the Respondents, other supporters of The Act and benefactors of the proponents have been the regular subjects of satire and scrutiny on TikTok. So, whether or not The Act can be strictly defined as a prior restraint, it has the same effect and seems to exist within the same.

The Supreme Court affirmed that the government cannot censor the press in Near v. Minnesota. In this case, the Supreme Court interpreted the First and Fourteenth Amendments to forbid "previous restraints" upon publication of a newspaper. "Previous restraints"--or in current terminology, "prior restraints”--suppress the freedom of the press to publish without obstruction and recognize that lawsuits or prosecutions for libel are "subsequent punishments." Near v. Minnesota, 283 U.S. 697 (1931)

The Pentagon Papers case affirmed “no prior restraint” and free press role in democracy. In the "Pentagon Papers" case, the U.S. government attempted to enjoin the New York Times and

the Washington Post from publishing classified documents that would interfere with foreign policy and prolong the war. This court found that these assumptions were too speculative and could not overcome the strong presumption against prior restraints. New York Times Co. v. United States, 403 U.S. 713 (1971).

In New York Times Co. v. United States this court cited: Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), Near v. Minnesota, 283 U.S. 697 (1931) and Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), citing the heavy burden requirement "any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity" and "the Government thus carries a heavy burden of showing justification for the imposition of such a restraint."

In the case of Bantam Books, Inc. v. Sullivan, as with The Act, a state commission created to take preventative action to stop juvenile delinquency, carried out this responsibility by threatening the distributors of material deemed to be "objectionable" (books) with prosecution in an attempt to suppress obscene material. This court held that the actions of the Commission violated the First Amendment by creating an unconstitutional system of informal censorship. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)

B. The Data Collection Argument is in Fact Moot

The data that is the subject of The Act is used mainly in targeted advertising and one person's data can be collected, exchanged or consulted well over 100 times in any given day by multiple entities. This type of data is not classified and is commercially available worldwide. Although Respondents seem to feign futility and frustration in controlling TikTok the above fact was not

controversial in their brief. The existing economy in individual data and its widespread collection and distribution by thousands of companies worldwide to any person prevents H.R. 7521 from ever being effective. Importantly there is no allegation or evidence provided of systemic spyware or malware deployed by the applicant to collect data in excess of what is provided for in the user agreement.

H.R. 7521 does not prevent the collection and distribution of data to a foreign adversary. In addition, the Respondents fail to mention that already available and unquestionably effective methodologies exist for preventing the unwanted collection of unclassified data through TikTok. There are tools available within the application to turn off or reduce some data collection and employers may prevent their employees from using or downloading the application and persons may decide against using or downloading the application. Many governments, private companies and corporations ban the use of specific types of software including TikTok . However, most governments, private companies and corporations allow thousands of other applications, that collect data, unfettered access to the same individual. So, in most cases the same data and more is collected, because it is standard business practice, and then made available worldwide commercially. Governments, private companies and corporations can and do ban individual applications for their employees. Users can turn off reduce or reduce some data collection in their TikTok application. Respondents and proponents of The Act could collectively act to classify some or all of the data. These tools are already available, effective and in use, thus making The Act unnecessary.

There is no possibility that The Act will affect the availability or access to what data is generically collected, sold, exchanged and distributed simultaneously worldwide by thousands of entities every minute. The same data is widely commercially available to any person in every

jurisdiction in the world directly, or indirectly through proxy. TikTok is only one single participant. Any decision on The Act that this court provides cannot affect the availability of the massive amounts of identified unclassified data to any entity. This renders the primary argument for and "stated" purpose of The Act moot as no relief can be fashioned that will make The Act effective.

In Defunis V. Odegaard the Supreme Court held that the case was moot. The Court noted that Defunis would graduate regardless of any decision regarding the school's admission policy. Therefore, the plaintiff no longer had an actual controversy against the school - it had admitted him, and he would graduate. Additionally, no matter how the Court decided the case's merits, it could not grant the plaintiff any relief that would have any effect. DeFunis v. Odegaard, 416 U.S. 312 (1974)

C. The Communicative Property of Free Speech

Another stated purpose of The Act is to prevent the spread of propaganda by the Chinese government. This argument seems to ignore the communicative properties of the first amendment. Simultaneously, any foreign government agent may legally buy advertising, operate websites, maintain presence on social media, hand out pamphlets or give speeches filled with propaganda, so again this argument is also moot as well. DeFunis v. Odegaard, 416 U.S. 312 (1974). In addition, the Supreme Court held that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." Board of Education v. Pico, 457 U.S. 853 (1982)

D. The Act Could be Applied to any Entity

As stated, under The Act, companies subject to the provisions and punished will be solely determined by the president. This is the clear legislative intent. "Every word within a statute is there for a purpose and should be given its due significance. it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' "Russello v United States, 464 US 16, 23, 78 LEd 2d 17, 104 S Ct 296 (1983). If a company is subject to The Act "or any action, finding, or determination" of The Act, it must then file a petition in the 12th Circuit, but the sweeping provisions of The Act can take effect 180 days after presidential determination. So even if The Act is misapplied the subject company may not survive. Thus, The Act can be used to threaten and intimidate any company. The Act should be struck down solely on this facet.

E. Other Arguments

A third falsehood is TikTok is owned or controlled by China and would attempt to violate U.S. law in order to comply with any request by the Chinese government. According to the evidence made available to the 12th district:

> TikTok's parent company, ByteDance, was founded by Chinese entrepreneurs. ByteDance is a privately-held global company, roughly 60 percent owned by global institutional investors (such as Blackrock, General Atlantic, and Susquehanna International Group), 20 percent owned by the company's founders, and 20 percent owned by its employees—including over 7,000 U.S.-based employees. It is not owned or controlled by any government or state-controlled entity.

Uncontroverted evidence shows that TikTik does not meet the definition of a foreign controlled application. Extensive evidence presented demonstrates that TikTok attempts to comply with the laws and regulations of the different jurisdictions it conducts business in, as do all of the international corporations. We humbly submit that it seems too speculative to assume that TikTok would do otherwise. New York Times Co. v. United States, 403 U.S. 713 (1971).

F. Conclusion

The Act removes, destroys and takes the property of Broxton and other users and avoids due process for the Applicants. The ban impermissibly infringes on the TikTok content providers, editors and consumers' first amendment rights. While the executive and congress should have an unquestionably strong interest in protecting the public, Respondents have failed to show, by either logic or data that The Act advances that interest or any interest. The Act uses widely disseminated unclassified data as a target and reason for the legislation, but The Act is worthless and has no effect because the same exact data and much more is widely available worldwide.

The information collected by TikTok is collected by almost every web site worldwide and is standard business practice. For example, one can buy all the income levels, home values, addresses, phone numbers, home loan amounts, age and much, much more for individuals in any zip code. For instance: the television video on demand service Pluto, owned by Paramount Networks, may consult its own database as well as two to three other exchanges for data before deciding on and showing one commercial to an individual. Since this evidence that the data collected by TikTok is unclassified generic data and the same data as collected by other entities was submitted and was not controversial, the central argument used to satisfy respondent's heavy

burden for The Act was and is in fact moot. The Act is buttressed by other faulty arguments here and there that also fail.

The legislature and executive office have stormed headlong into a new regulatory arena. The mechanisms and classifications in The Act make any company susceptible to its provisions. If this “Act” stands it can be used to declare almost any company unlawful. Since an accused company then must seek redress in the court system which could take months or years, a target could fail due to the challenges to attain redress.

An additional concern may be the recent reports of the cognitive decline of the president before and during the signing of The Act.

While the executive and congress should have an unquestionably strong interest in protecting the public, they have failed to show, by either logic or data, that The Act advances that interest or any interest other than the removal of content. What is apparent is that many of the Respondents, supporters, proponents and benefactors of the proponents of The Act have been the subject of satire and scrutiny on TikTok. These parties want nothing more than to turn TikTok into a modern-day Cicero. However, these modern-day Mark Anthonys fail in providing any reasoning for imposing the burden of The Act other than silencing their own critics. So, we pray to the court to agree with the applicants thus sparing Broxton from being “protected” by the Protecting Americans from Foreign Adversary Controlled Applications Act.