

**JUDICIAL UNDERREACH: *TikTok Inc. v. Garland's*
IMPLICATIONS FOR NATIONAL SECURITY AND FREE SPEECH**

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*Olivia Sharp is a 3L at the University of Colorado Law School where she focuses her research on First Amendment law and civil liberties litigation. Her work explores the tension between government regulation and digital freedom. In her article, Ms. Sharp examines the Supreme Court's decision in *TikTok Inc. v. Garland*, which upheld restrictions on foreign corporate ownership by applying a more relaxed "intermediate" level of judicial review. By tracing the case's legislative history, she places the ruling within a historical pattern of courts deferring to the government on national security grounds; a trend seen in landmark cases like *Korematsu* and the "Pentagon Papers" case. Ultimately, Ms. Sharp argues that the Court missed a vital opportunity to establish a modern framework for digital speech. She asserts that when national security is invoked, courts must apply the most rigorous scrutiny possible to ensure that the infrastructure of modern communication isn't inadvertently dismantled.

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I. INTRODUCTION

[1] This paper argues that the Supreme Court’s decision in *TikTok Inc. v. Garland* overlooked a critical opportunity to develop a robust First Amendment framework for evaluating national security threats in the context of modern digital speech. Although the Court upheld the TikTok bill under intermediate scrutiny and framed the legislation as a content-neutral regulation of foreign corporate ownership, it failed to meaningfully engage with the more profound and more complex national security concerns raised by continued foreign control over a central expressive platform.¹ In doing so, the Court not only narrowed its conception of the government’s interest but also left the First Amendment doctrine vulnerable to future erosion, allowing significant burdens on speech infrastructure to escape strict judicial scrutiny.

[2] First, this paper provides background on the TikTok bill itself by tracing its legislative history, bipartisan support, and the resulting national security and civil liberties debates.² Second, it outlines the First Amendment scrutiny framework, explaining how courts determine whether laws that affect speech are subject to strict scrutiny, intermediate scrutiny, or rational basis review. Third, it examines the Court’s reasoning in *TikTok Inc. v. Garland*, focusing on the majority’s choice to apply intermediate scrutiny and its deferential treatment of the government’s asserted interests.³ Fourth, it situates the case within the broader historical pattern of judicial responses to national security claims, analyzing *Korematsu v. United States*, *New York Times Co. v. United States*, and *Holder v. Humanitarian Law Project*.⁴

¹ *TikTok Inc. v. Garland*, 604 U.S. 56, 71–73 (2025).

² Protecting Americans from Foreign Adversary Controlled Applications Act, H.R. 7521, 118th Cong. (2024).

³ *TikTok Inc.*, 604 U.S. at 67 (2025).

⁴ See *Korematsu v. United States*, 323 U.S. 214 (1944), *abrogated by* *Trump v. Haw.*, 585 U.S. 667 (2018); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*); *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010).

Finally, it identifies key national security arguments the Court overlooked, examines amicus briefs and expert assessments, and explains why a fuller engagement with these concerns would have demanded a more rigorous scrutiny analysis.

II. THE TIKTOK BILL: LEGISLATIVE ORIGINS AND JUDICIAL PATHWAY

[3] In March 2024, Congress introduced a controversial but widely supported piece of legislation aimed at forcing the divestment of TikTok from its China-based parent company, ByteDance, or banning the app in the United States otherwise.⁵ This legislation, officially titled the Protecting Americans from Foreign Adversary Controlled Applications Act, quickly became known in the media and among the public simply as the “TikTok bill.” While marketed as a national security measure, the bill’s swift journey through Congress and the conversations it sparked revealed deeper tensions around technology, geopolitics, and free speech in the digital age.⁶

A. A New Legislative Strategy for Foreign-Owned Platforms

[4] At its core, the bill prohibits app stores and web-hosting services from distributing or supporting applications that are “controlled by a foreign adversary,” with specific reference to ByteDance and its popular social media platform TikTok.⁷ Further, it gives the President the authority to designate companies as foreign adversary-controlled, provided there is credible evidence of surveillance, data exploitation, or influence campaigns originating from such entities.⁸ Importantly, this legislation does not outright ban TikTok; instead, it creates a mechanism that would require ByteDance to divest TikTok within a specific time frame (initially set at 180

⁵ Protecting Americans from Foreign Adversary Controlled Applications Act, H.R. 7521, 118th Cong. (2024).

⁶ *Id.*

⁷ *Id.* § 2(g).

⁸ *See id.* § 2(g).

days) or face exclusion from U.S. digital markets.⁹ Unlike earlier attempts, the TikTok bill distinguished itself through a targeted focus and a time-bound framework.¹⁰ Rather than imposing a blanket ban from the outset, it provided a pathway for TikTok to continue operating in the U.S., so long as it severed ties with Chinese ownership.¹¹

[5] Lawmakers introduced the TikTok bill in the House of Representatives on March 5, 2024. In a rare show of efficiency, it advanced through the legislative process at a pace unusual for Congress.¹² The bill's language reflected input from both the intelligence and commerce committees, drawing on years of bipartisan concern about Chinese data practices and the growing influence of foreign-controlled platforms on online information ecosystems.¹³

⁹ *Id.* § 2(c).

¹⁰ *See* Protecting Americans from Foreign Adversary Controlled Applications Act, 15 U.S.C. § 9901 (2024) (establishing a 270-day divestiture window); *compare* Exec. Order No. 13,943 (Aug. 6, 2020) (attempting an immediate ban on WeChat transactions without a statutory divestment framework), *with* Exec. Order No. 13,971 (Jan. 5, 2021) (targeting eight Chinese software applications via broad executive authority). Unlike these earlier executive orders, which were primarily challenged for exceeding the President's authority under the International Emergency Economic Powers Act (IEEPA), the 2024 Act provides a specific, legislatively mandated timeline for the sale of the entity to a non-adversary owner.

¹¹ *See* Protecting Americans from Foreign Adversary Controlled Applications Act, H.R. 7521, 118th Cong. § 2(c) (2024).

¹² *Id.* The House of Representatives introduced the bill on March 5, 2024, and passed it on March 13, 2024—a period of only eight days; the Senate subsequently passed the measure as part of a broader foreign aid package on April 23, 2024, with the President signing it into law the following day.

¹³ *See 2024 Annual Threat Assessment: Hearing Before the H. Permanent Select Comm. on Intel.*, 118th Cong. (2024).

[6] Within just a week, on March 13, 2024, the bill passed the House with a vote of 352-65, reflecting a moment of bipartisan agreement.¹⁴ After clearing the House, the bill moved to the Senate, where lawmakers initially concentrated on adjusting the divestment timeline and refining the limits of executive authority. Following a series of revisions and classified security briefings, the Senate approved its version of the bill with similarly strong bipartisan support. President Biden signed it into law on April 24, 2024, setting the clock for divestment in motion.¹⁵

[7] Concerning the specifics of the legislation, the TikTok bill primarily targets technology platforms and service providers rather than individual users or influencers.¹⁶ The law directs its enforcement mechanisms at Apple, Google, and other app store operators, as well as internet infrastructure companies that provide services to foreign adversary-controlled applications.¹⁷ If TikTok fails to divest within the prescribed period, these companies will be legally required to cease offering the app on their platforms. The law also empowers the President to identify future applications that may pose similar risks, suggesting that TikTok may be the first, but not the last, target.¹⁸

[8] The language of the TikTok bill makes it clear that the government's concern isn't simply about content, but rather control. By focusing on ownership and the potential for coercive influence by foreign governments,

¹⁴ *Roll Call Vote 86*, LIB. OF CONG. (Mar. 13, 2024), <https://clerk.house.gov/Votes/202486> [<https://perma.cc/U2JR-9W7Q>].

¹⁵ Bobby Allyn, *President Biden Signs Law to Ban TikTok Nationwide Unless it is Sold*, NPR, <https://www.npr.org/2024/04/24/1246663779/biden-ban-tiktok-us> [<https://perma.cc/JZH4-HJZV>] (last updated Apr. 24, 2025, at 12:54 ET).

¹⁶ H.R. 7521 § 2.

¹⁷ *Id.*

¹⁸ *Id.* § 2(g).

the legislation aims to draw a line between open internet platforms and those under the control of coercive regimes.¹⁹

B. Bipartisan Momentum and National Security Concerns

[9] One of the most striking aspects of the TikTok bill was its bipartisan support. In an era of intense political division, lawmakers from both parties rallied around the idea that the U.S. needed to take stronger steps to protect its digital infrastructure and user data.²⁰ Democrats emphasized the national security and privacy risks associated with foreign-controlled platforms, especially ones with opaque data-sharing practices.²¹ Republicans echoed those concerns but also framed the bill as a response to broader anxieties about Chinese influence over American life and culture.²²

¹⁹ See H.R. REP. NO. 118-417 (emphasizing that the legislation is focused entirely on the ownership of an application by a foreign adversary country, rather than the content of speech it hosts).

²⁰ See Brian Fung, *House Passes Legislation that Could Ban TikTok in the US Amid High-stakes Vote on Foreign Aid*, CNN (Apr. 20, 2024, at 13:33 ET), <https://www.cnn.com/2024/04/20/tech/house-passes-legislation-that-could-ban-tiktok-in-the-us-amid-high-stakes-vote-on-foreign-aid/index.html> [<https://perma.cc/SBL8-QKUE>].

²¹ Press Release, Rep. Raja Krishnamoorthi, Bipartisan Coalition Introduce Legislation to Protect Americans from Foreign Adversary Controlled Applications, Including TikTok (Mar. 5, 2024), <https://democrats-selectcommitteeontheccp.house.gov/media/press-releases/krishnamoorthi-bipartisan-coalition-introduce-legislation-protect-americans> [<https://perma.cc/9REZ-Q7D2>].

²² Press Release, H. Select Comm. on the Chinese Communist Party, Bill to Protect Americans from Foreign Adversary Controlled Applications, Including TikTok (Mar. 5, 2024), <https://selectcommitteeontheccp.house.gov/media/bills/bill-protect-americans-foreign-adversary-controlled-applications-including-tiktok> [<https://perma.cc/LB8A-F8H3>].

[10] The TikTok bill's supporters ranged from national security experts to progressive lawmakers, each bringing different concerns to the table.²³ For conservatives and foreign policy hardliners, the TikTok bill was a long-overdue response to what they saw as a clear and growing threat: the Chinese government's access to personal data of over 170 million American users. These lawmakers pointed to China's national intelligence laws, which require companies like ByteDance to cooperate with government data requests, raising concerns about espionage, influence operations, and even blackmail.²⁴ Further, they framed TikTok as a digital backdoor into Americans' lives, a platform with the scale and reach to be exploited by a geopolitical rival.²⁵

[11] Progressive lawmakers, meanwhile, were less focused on the threat of espionage and more concerned with China's human rights abuses and authoritarian information controls. Some legislators pointed to the Chinese government's censorship of dissenting speech and its use of tech platforms to silence criticism of its actions in Xinjiang, Hong Kong, and beyond.²⁶ In this view, passing the bill was not only about safeguarding American users from surveillance but also about refusing to normalize or enable digital infrastructure shaped by repressive regimes. For proponents on both sides, TikTok symbolized something larger than a social media app; it was a proxy

²³ See, e.g., 170 Cong. Rec. H1166 (daily ed. Mar. 13, 2024) (statement of Rep. Nancy Pelosi) (characterizing the bill as an "attempt to make TikTok better" by removing Chinese Communist Party influence); see also, Press Release, House Select Comm. on the CCP, Bipartisan Coalition Introduce Legislation to Protect Americans From Foreign Adversary Controlled Applications (Mar. 5, 2024) (listing co-sponsors such as progressive Rep. Ritchie Torres (D-NY) alongside conservative Rep. Elise Stefanik (R-NY)).

²⁴ See H.R. REP. NO. 118-417, at 4 (2024) (discussing China's legal authority to compel data sharing from private companies).

²⁵ *Id.* ("The app can further be employed to help manipulate social discourse and amplify false information to tens of millions of Americans.").

²⁶ CONG.-EXEC. COMM. ON CHINA, 118TH CONG., ANNUAL REPORT 2023 250, 254, 275 (detailing censorship, surveillance, and repression linked to Chinese state actors).

for the broader struggle over who controls the digital communication landscape in the 21st century.

[12] Notably, President Biden, who had historically approached tech regulation with caution, publicly supported the measure.²⁷ His endorsement reflected a broader convergence of policy and political calculation. On one hand, the administration had spent years engaged in behind-the-scenes negotiations with ByteDance to reach a voluntary security agreement, only to conclude that the risks were unmanageable without complete divestiture.²⁸ At the same time, President Biden’s endorsement conveyed a political signal: a willingness to adopt a hardline stance toward China, particularly in an election year when foreign policy and digital privacy had become prominent issues. Backing the bill allowed the administration to claim action on both national security and data privacy, two areas where public sentiment had become increasingly wary of foreign tech influence.²⁹

²⁷ Despite early administrative efforts to replace Trump-era executive orders with broader data reviews, President Biden signaled a shift toward targeted legislative action on March 8, 2024, stating to reporters, “If they pass it, I’ll sign it.” See Amer Madhani, *Biden Says He’ll Sign Proposed TikTok Ban if Congress Passes It*, PBS NEWS (Mar. 8, 2024, 6:42 PM), <https://www.pbs.org/newshour/politics/biden-says-hell-sign-proposed-tiktok-ban-if-congress-passes-it> [<https://perma.cc/T3C3-9DFX>].

²⁸ *TikTok Inc. v. Garland*, 604 U.S. 56, 64–65 (2025) (describing failed negotiations between ByteDance and the U.S. government to resolve security concerns without legislation).

²⁹ This legislative push aligned with a period of heightened public concern; a March 2023 Pew Research Center survey found that 50% of Americans supported a TikTok ban, with 88% of adults expressing little to no confidence in Chinese social media companies’ ability to protect user privacy. See Laura Silver & Laura Clancy, *By More than Two-to-One, Americans Support U.S. Government Banning TikTok*, PEW RSCH. CTR. (Mar. 31, 2023), <https://www.pewresearch.org/short-reads/2023/03/31/by-a-more-than-two-to-one-margin-americans-support-us-government-banning-tiktok/> [<https://perma.cc/N5SJ-3N8A>].

[13] Outside of government spheres, the TikTok bill had its critics. Civil liberties organizations and some digital rights advocates raised concerns about its implications for free speech, warning that banning an entire platform could set a troubling precedent.³⁰ However, these objections ultimately did little to slow the bill's momentum, as concerns about data security and foreign interference prevailed. Nevertheless, opponents turned to the judiciary to continue the fight.

C. The Judicial Timeline: From the D.C. Circuit to the Supreme Court

[14] Directly following the bill's enactment, TikTok Inc. and a coalition of TikTok creators filed lawsuits challenging the law's constitutionality.³¹ The primary case, *TikTok Inc. v. Garland*, was filed in the United States Court of Appeals for the District of Columbia Circuit under the Act's expedited judicial review provisions, which directed that challenges proceed directly to the D.C. Circuit without first being heard in district court.³²

[15] The petitioners argued that the law violated the First Amendment by effectively banning a platform used by millions for expressive activities, and that the Act's focus on corporate ownership could not shield it from heightened constitutional scrutiny.³³ The government defended the law as a

³⁰ Press Release, American Civil Liberties Union, *ACLU Slams House for Latest Plan to Ban TikTok and Stifle Free Speech* (Mar. 5, 2024), <https://live-aclu-wp.pantheonsite.io/press-releases/aclu-slams-house-for-latest-plan-to-ban-tiktok-and-stifle-free-speech> [<https://perma.cc/MR9R-QD7A>].

³¹ See *TikTok, Inc.*, 604 U.S. at 67.

³² Protecting Americans from Foreign Adversary Controlled Applications Act, H.R. 7521, 118th Cong. § 3 (2024).

³³ Brief for Petitioners at 2–5, 18–22, *TikTok Inc. v. Garland*, No. 24-656 (U.S. 2024) (arguing that the Act's "foreign adversary control" standard is a "facially content-based" distinction because it exempts platforms primarily hosting "product reviews" or "travel information," thereby necessitating strict scrutiny).

content-neutral regulation designed to protect national security interests unrelated to the suppression of speech. The court held oral arguments on September 16th, 2024, and the case attracted significant attention from civil liberties organizations, national security experts, and tech industry stakeholders, many of whom submitted amicus briefs.³⁴

[16] On December 6th, 2024, the D.C. Circuit upheld the Act.³⁵ The court held that the law imposed only an incidental burden on speech, was subject to intermediate scrutiny under *United States v. O'Brien*, and was substantially related to the important governmental interest of protecting national security.³⁶ In doing so, the court emphasized Congress's findings on the risks posed by foreign-controlled platforms and gave the legislature's predictive judgments substantial deference.

[17] In response, TikTok Inc. and its co-petitioners immediately sought review by the Supreme Court. On October 1, 2025, the Supreme Court granted certiorari and heard arguments on an expedited basis in December. In its decision issued March 3, 2026, the Court affirmed the D.C. Circuit, adopting much of the lower court's reasoning but offering its own more narrowly framed rationale. The Court acknowledged the expressive interests at stake but treated the regulation as a content-neutral ownership restriction, subject to intermediate scrutiny. While several justices expressed reservations in concurring opinions, the majority opinion ultimately concluded that the law survived constitutional review.³⁷

³⁴ See, e.g., Brief for Former National Security Officials as Amici Curiae Supporting Respondents, *TikTok Inc. v. Garland*, 122 F.4th 930 (D.C. Cir. 2024).

³⁵ *TikTok Inc. v. Garland*, 122 F.4th 930, 930 (D.C. Cir. 2024).

³⁶ *Id.* at 948 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

³⁷ *TikTok Inc. v. Garland*, 604 U.S. 56, 62, 73, 80–81 (2025).

III. FIRST AMENDMENT SCRUTINY AND THE COURT'S ANALYTICAL APPROACH

[18] To understand how the Court evaluated the First Amendment challenge to the TikTok bill, it is essential first to understand the concept of “levels of scrutiny.” This is the legal framework courts use to determine whether a law that burdens constitutional rights, such as free speech, can withstand constitutional review.³⁸

[19] The courts use a tiered system of judicial scrutiny to assess whether a law that burdens speech is constitutionally permissible. They answer the question by examining how rigorously they must scrutinize the government’s justification for the law, and whether that justification is sufficient to override protected expressive interests. The threshold question in this analysis is whether the law is content-based or content-neutral.³⁹

[20] Courts consider a regulation content-based if it targets speech “because of the topic discussed or the idea or message expressed.”⁴⁰ Courts may treat even facially neutral laws as content-based if the government

³⁸ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994) (explaining that the applicable level of scrutiny depends on whether a law is content-based, which triggers “the most exacting scrutiny,” or content-neutral, which is subject to “intermediate scrutiny”). Under this tiered framework, courts evaluate the weight of the government’s interest and the “fit” of the regulation.

³⁹ See *Reed v. Town of Gilbert*, 576 U.S. 155, 163–65 (2015) (establishing that the “threshold question” in First Amendment analysis is whether a law is content-based on its face, which occurs whenever a regulation “draws distinctions based on the message a speaker conveys”). If a law is content-based, it is “presumptively unconstitutional” and subject to strict scrutiny, requiring the government to prove the law is the least restrictive means to achieve a compelling interest. *Id.* at 163. Conversely, if a law is content-neutral, meaning it is “justified without reference to the content of the regulated speech”, it is subject to intermediate scrutiny, a less rigorous standard that asks whether the law is narrowly tailored to serve a significant governmental interest. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁴⁰ *Reed v. Town of Gilbert, Ariz.* 576 U.S. 155, 163 (2015).

justifies them by referencing the content of speech or enacts them in response to a particular message.⁴¹ Courts then subject content-based regulations to the demanding standard of strict scrutiny, requiring the government to demonstrate that the law is narrowly tailored to serve a compelling governmental interest and that it uses the least restrictive means to achieve that goal.⁴²

[21] In contrast, content-neutral laws, such as regulations on the time, place, or manner of speech, are reviewed under intermediate scrutiny. This standard requires the government to demonstrate that the law advances an important governmental interest, that the interest is unrelated to the suppression of expression, and that the regulation does not substantially burden more speech than necessary.⁴³ Courts applying intermediate scrutiny grant the government more latitude, but still demand a meaningful fit between the law's goals and the means used to achieve them.⁴⁴

[22] Finally, some categories of speech, such as obscenity, true threats, and incitement, are considered unprotected by the First Amendment and may be regulated under rational basis review. In those cases, the government needs only to show that the law is rationally related to a legitimate interest.⁴⁵

[23] After determining the appropriate level of scrutiny, courts then evaluate how well the law is tailored to the asserted interest across all levels of review. Under strict scrutiny, this means the law must represent the least

⁴¹ *Id.* at 164 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

⁴² *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000); *Reed*, 576 U.S. at 171.

⁴³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Ward*, 491 U.S. at 798–99.

⁴⁴ *Ward*, 491 U.S. at 800.

⁴⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

restrictive means available.⁴⁶ Under intermediate scrutiny, the law must not be substantially broader than necessary to achieve its goal.⁴⁷ This tailoring inquiry ensures that the government does not restrict speech more than is warranted, even when acting in the name of public safety, order, or national security. Determining where the TikTok bill fits within this doctrinal framework, however, presents a more complex challenge.

A. Intermediate Scrutiny in National Security Cases

[24] Courts have long recognized national security as a compelling government interest that can justify restrictions on speech in extreme cases.⁴⁸ The Supreme Court has been historically deferential to the Executive Branch in this domain, particularly when foreign threats are involved. For example, in *Holder v. Humanitarian Law Project* (2010), the Court upheld a law that criminalized certain speech-related activities supporting terrorist organizations, even though the plaintiffs claimed their conduct involved only pure political expression.⁴⁹ There, the Court applied strict scrutiny but gave heavy weight to the government's assertions of security threats, even in the absence of direct evidence.⁵⁰ This deference often leads to what some scholars call “watered-down strict scrutiny,” a

⁴⁶ See *McCullen v. Coakley*, 573 U.S. 464, 478, 495 (2014) (noting that the government had to demonstrate that any alternative measures that burdened substantially less speech would fail to achieve the government's interests in order to satisfy the narrow tailoring requirement).

⁴⁷ See *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (asserting that when the interests of the government could be adequately served by a less restrictive alternative, the regulation would not be invalid if the means utilized were not substantially broader than necessary to achieve such interests).

⁴⁸ See *Zemel v. Rusk*, 381 U.S. 1, 15–17 (1965) (explaining that a direct and material interference with the safety and welfare of an area or nation as a whole may warrant restriction to the constitutionally protected right to travel to such an area).

⁴⁹ See *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010).

⁵⁰ *Id.*

situation where the Court says it's applying the most rigorous test, but in practice, gives the government the benefit of the doubt.⁵¹

[25] When the Supreme Court ultimately weighed in on the TikTok bill, it sidestepped the question of whether the law directly targeted speech, instead framing the case as a regulation of conduct, specifically, foreign ownership of technology platforms with national security implications.⁵² Because the law did not explicitly restrict speech based on content or viewpoint, the Court declined to apply strict scrutiny.⁵³ Instead, it leaned on the *O'Brien* framework, opting for intermediate scrutiny while emphasizing the government's long-recognized authority to address threats posed by foreign adversaries.⁵⁴

[26] In doing so, the Court echoed its reasoning in *Holder v. Humanitarian Law Project*, where it upheld a restriction on speech-related conduct that was tied to foreign terrorist organizations, again citing deference to the executive in matters of national security.⁵⁵ The Court stressed that the TikTok bill was not aimed at silencing speech or punishing users, but rather at limiting the influence of a foreign-controlled platform that, in the government's view, posed a credible risk of espionage and manipulation.⁵⁶ Because the law was framed in a content-neutral way and narrowly targeted ownership structures, rather than individual expression,

⁵¹ See Eric K. Yamamoto, Carly Minner & Karen Winter, *Contextual Strict Scrutiny*, 49 How. L. J. 241, 247 (2006).

⁵² *TikTok Inc. v. Garland*, 604 U.S. 56, 71 (2025).

⁵³ *Id.*

⁵⁴ *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

⁵⁵ *Holder v. Humanitarian L. Project*, 561 U.S. 1, 10–12 (2010).

⁵⁶ *TikTok Inc.*, 604 U.S. at 74–75.

the Court held that intermediate scrutiny was sufficient and that the law was substantially related to an important governmental interest.⁵⁷

B. Concurring Opinions: Gorsuch and Sotomayor on Digital Expression

[27] However, the concurring opinions offered distinct perspectives on how courts should approach First Amendment claims in the context of new technologies and foreign threats. Notably, Justice Gorsuch's concurrence stands out as a reflective examination of the evolving nature of digital speech and its intersection with enduring First Amendment principles.

[28] In his concurrence, Justice Gorsuch expressed discomfort with several aspects of the majority's reasoning. His first concern centered on the government's invocation of "covert content manipulation."⁵⁸ Justice Gorsuch warned that this justification risks blurring the line between national security concerns and protected editorial discretion.⁵⁹ As he noted, "one man's 'covert content manipulation' is another's 'editorial discretion.'"⁶⁰ Citing Justice Brandeis's famous concurrence in *Whitney v. California*, Justice Gorsuch echoed the classical liberal view that the remedy for dangerous ideas is more speech, not censorship.⁶¹

[29] Justice Gorsuch also raised red flags about the Court's satisfaction with classifying the law as content-neutral. Though he stopped short of a full dissent, Justice Gorsuch made clear that he "harbors serious reservations" about bypassing strict scrutiny in a case involving a law that

⁵⁷ *Id.* at 69.

⁵⁸ *Id.* at 81 (Gorsuch, J., concurring in judgment).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

effectively shuts down a central speech platform.⁶² In this view, speech that occurs through a foreign-owned channel remains speech, and suppressing that channel may still warrant the Court’s most exacting review. Beyond the doctrinal labels of “strict” and “intermediate” scrutiny, Justice Gorsuch voiced concern that these tiers can distract from more profound constitutional questions, describing them as “litigation categories [that] can sometimes take on a life of their own and do more to obscure than clarify.”⁶³

[30] In contrast, Justice Sotomayor’s concurrence parted ways with the majority only on a technical point: she would not have merely assumed that the TikTok Act implicated First Amendment concerns, but rather, she would have affirmatively held that it did.⁶⁴ Citing recent cases, *Moody v. NetChoice* and *Arcara v. Cloud Books*, Justice Sotomayor emphasized that TikTok, through its content curation and algorithmic personalization, is engaged in expressive conduct.⁶⁵ For her, that expressive function triggered heightened scrutiny from the start, even though she ultimately agreed that the law survived such scrutiny.⁶⁶

[31] However, the Court ultimately grounded its analysis in the government’s asserted national security interest. This justification played a central role in shaping both the scope of judicial review and the outcome of the case.

⁶² *TikTok Inc. v. Garland*, 604 U.S. 56, 82 (2025) (Gorsuch, J., concurring).

⁶³ *Id.* at 83.

⁶⁴ *Id.* at 80 (Sotomayor, J., concurring in part and concurring in the judgment).

⁶⁵ *Moody v. NetChoice, LLC.*, 603 U.S. 707, 731–32 (2024); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704 (1986).

⁶⁶ *TikTok Inc.*, 604 U.S. at 80–81 (Sotomayor, J., concurring in part and concurring in the judgment).

IV. HISTORICAL TENSIONS BETWEEN NATIONAL SECURITY AND FREE SPEECH

A. From *Korematsu* to the Pentagon Papers

[32] The tension between national security and free speech is not a new phenomenon. The American judiciary has long grappled with whether, and to what extent, the government can restrict civil liberties in the name of national security. The most illustrative examples of this balancing act are *Korematsu v. United States*, *New York Times Co. v. United States*, and *Holder v. Humanitarian Law Project*.⁶⁷ Importantly, these cases all sit at different points along the spectrum of judicial deference.

[33] In *Korematsu v. United States*, the Supreme Court notoriously upheld the internment of Japanese Americans during World War II, accepting the government's assertion that national security concerns justified what was effectively racial discrimination.⁶⁸ The majority deferred almost entirely to the military's judgment, citing the risk of espionage and sabotage, even though the government offered no concrete evidence of disloyalty by the plaintiff or others.⁶⁹ Decades later, the Court would repudiate *Korematsu*, with Chief Justice Roberts calling it "gravely wrong the day it was decided."⁷⁰ Yet the case remains a stark reminder of how far the judiciary can go in yielding to national security claims, especially during moments of fear.

[34] By contrast, in *New York Times Co. v. United States*, the Court took a firm stand for press freedom despite the government's warning that

⁶⁷ See *Korematsu v. United States*, 323 U.S. 214 (1944); see also, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); see also *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010).

⁶⁸ *Korematsu*, 323 U.S. 214, 223 (1944).

⁶⁹ *Id.*

⁷⁰ *Trump v. Hawaii*, 585 U.S. 667, 710 (2018).

publishing classified Vietnam War documents would endanger national interests.⁷¹ There, the government sought a prior restraint in the form of an injunction to block publication altogether, but the Court refused, holding that such censorship would violate the First Amendment.⁷² While the justices offered different rationales in their concurrences, the consensus was clear: vague and speculative harms to national security do not override core constitutional protections without compelling, immediate justification.⁷³

B. Watered-Down Scrutiny and Contemporary Challenges

[35] More recently, in *Holder v. Humanitarian Law Project*, the Court upheld a federal statute criminalizing forms of speech and association with designated foreign terrorist organizations, even when the speech in question was peaceful advocacy aimed at promoting nonviolence.⁷⁴ Applying strict scrutiny, the Court nonetheless deferred heavily to the government's predictive judgments about national security, accepting the possibility that even benign forms of support could inadvertently legitimize or bolster terrorist groups.⁷⁵ Together, these three cases illustrate the Court's evolving approach to balancing national security and constitutional rights. In the contemporary era, as new technologies and global rivalries reshape the landscape, the *TikTok* decision revives enduring questions about the permissible limits of liberty in the name of security and about which institutions should bear responsibility for drawing those boundaries.

⁷¹ *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

⁷² *Id.*

⁷³ *Id.* at 714 (per curiam); see also *N.Y. Times Co.*, at 717, 719–20, 725–26 (Black, J., concurring) (Brennan, J., concurring) (emphasizing the narrow scope of the national security exception to prior restraints).

⁷⁴ *Holder v. Humanitarian L. Project*, 561 U.S. 1, 36–37, 39–40 (2010).

⁷⁵ *Id.*

V. THE COURT'S APPLICATION OF INTERMEDIATE SCRUTINY AND ITS LIMITS

[36] Following decades of jurisprudence balancing free speech against national security, the Supreme Court's majority opinion in *TikTok Inc. v. Garland* took a cautious, narrowly tailored approach to resolving the First Amendment claims raised by TikTok and its U.S.-based users. Yet, in choosing to apply intermediate scrutiny while assuming rather than deciding that the law implicated expressive rights, the Court sidestepped critical questions regarding the capacity of national security to overshadow digital speech.

[37] The *TikTok* opinion begins by acknowledging the expressive interests at stake.⁷⁶ The Court noted that the platform enables users to engage in a wide range of protected activities: from content creation and dissemination to forming communities and expressing identity.⁷⁷ While the law in question does not directly prohibit users from speaking, the Court accepted that it effectively burdens speech by conditioning TikTok's continued operation on a politically fraught divestment.⁷⁸ This indirect path of regulating corporate structure rather than speech content became central to the Court's rationale.

A. Regulating Ownership Rather Than Speech

[38] Despite recognizing the expressive burden, the Court avoided taking a definitive stance on whether the law directly regulated speech or expressive conduct. Citing *Arcara v. Cloud Books* and *R.A.V. v. City of St.*

⁷⁶ *TikTok Inc. v. Garland*, 604 U.S. 56, 56 (2025)

⁷⁷ *Id.* at 63, 80.

⁷⁸ *Id.* at 69.

Paul, the Court characterized the Act as a regulation of conduct that only incidentally burdens speech.⁷⁹

[39] Rather than articulate a new rule for how such indirect burdens should be treated in the context of foreign-controlled digital infrastructure, the Court assumed, without explicitly articulating, that the law triggered First Amendment scrutiny. But this assumption alone marked a departure from the more assertive approach taken in *New York Times v. Sullivan*, where the Court squarely engaged with the government's proffered justifications for restricting access to speech.⁸⁰

[40] From there, the Court turned to the question of applicable scrutiny, ultimately rejecting strict scrutiny and applying intermediate scrutiny instead.⁸¹ They reasoned that it was content-neutral: it did not target the content of any user's speech, nor did it suppress particular viewpoints.⁸² Instead, it was motivated by the government's desire to prevent data harvesting by a foreign adversary, which does not depend on what users are saying but on who controls the infrastructure through which they communicate.

[41] Under intermediate scrutiny, a law must further an important government interest in a way that is substantially related to that interest without burdening substantially more speech than necessary.⁸³ The Court found both prongs satisfied.⁸⁴ Preventing China's access to the personal data of 170 million U.S. users, the Court concluded, was not only an important

⁷⁹ *Id.* at 67–68 (citing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

⁸⁰ *See N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

⁸¹ *TikTok Inc.*, 604 U.S. at 69.

⁸² *Id.* at 71.

⁸³ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 660, 662 (1994).

⁸⁴ *TikTok Inc. v. Garland*, 604 U.S. 56, 73 (2025).

interest but a compelling one.⁸⁵ It cited extensive findings from Congress about the Chinese government’s legal authority to compel data sharing, past evidence of espionage, and the scale of information TikTok collects.⁸⁶

B. Deference Without Deep Review

[42] Yet, the Court did not independently scrutinize the government’s claims or weigh competing expert analyses. Instead, they deferred to Congress’s findings and accepted its predictive judgments without examining how substantial, likely, or imminent the alleged national security harms might be. In so doing, the Court reaffirmed a pattern of judicial deference to national security justifications, as seen before in *Holder v. Humanitarian Law Project*, but without engaging with the classified evidence or adversarial testing that might have contextualized those claims.⁸⁷

[43] The tailoring prong of the analysis followed suit. The Court emphasized that the law did not impose an outright ban on TikTok but instead created a path to compliance through “qualified divestiture.”⁸⁸ The Court found that this demonstrated that the government had chosen a less restrictive alternative than it might have: TikTok could continue to operate if it severed ties with ByteDance.⁸⁹ The Court further dismissed suggestions that other regulatory mechanisms, such as data localization, export controls, or algorithm audits, would be equally effective, finding that Congress had the latitude to choose among policy tools without the judiciary second-guessing those choices.⁹⁰

⁸⁵ *Id.*

⁸⁶ *Id.* at 63–64, 74–75, 80; H.R. REP. NO. 118-417 at 4, 6, 8 (2024).

⁸⁷ See *Holder v. Humanitarian L. Project*, 561 U.S. 1, 34–35 (2010); *TikTok Inc.*, 604 U.S. at 74 n.3.

⁸⁸ *TikTok Inc.*, 604 U.S. at 77.

⁸⁹ *Id.*

⁹⁰ *Id.* at 78.

[44] What the Court ultimately constructed was a narrow, deferential framework: one that accepted intermediate scrutiny, declared the law content-neutral, and minimized the expressive consequences of cutting off access to a globally dominant speech platform. The Court's reasoning leaves unanswered a critical set of questions: What standards of evidence or urgency should be required when the government uses national security concerns to justify restrictions on speech infrastructure? Should the First Amendment allow foreign ownership alone to serve as a basis for limiting access to digital forums? And at what point does a content-neutral regulation become functionally content-based when it effectively removes a channel for mass expression?

[45] By declining to treat the case as requiring strict scrutiny and by not directly confronting the full scope of national security claims, the Court left the doctrine underdeveloped. In doing so, it created space for future laws to evade robust First Amendment review so long as the government frames them as regulating infrastructure rather than expression. At present, that choice may appear narrow and pragmatic. However, over time, it can open the door to broader state control over digital spaces, justified by the mere invocation of foreign influence.

VI. OVERLOOKED NATIONAL SECURITY THREATS AND THEIR FIRST AMENDMENT IMPLICATIONS

[46] To fully grasp the consequences of the Court's underdeveloped analysis, it is necessary to consider the national security arguments it failed to address. Although the Court framed the government's interest narrowly as focusing on preventing Chinese access to user data, the litigation and legislative records reveal a broader set of strategic and intelligence concerns. Drawing from amicus briefs, expert assessments, and public disclosures, the following section examines these overlooked dimensions to show how deeper engagement with the government's justification could

have meaningfully informed the Court's application of First Amendment scrutiny.

[47] National security experts emphasized that the TikTok platform, beyond passive data collection, could serve as a vector for information operations, including algorithmic manipulation, targeted influence campaigns, and disinformation efforts directed at U.S. populations.⁹¹ Unlike traditional surveillance concerns, these risks involve the covert shaping of public discourse do adversarial states historically wield a tool to destabilize democracies. The National Security Agency and cybersecurity experts pointed to evidence suggesting that TikTok's content recommendation systems, tightly controlled through proprietary algorithms developed in China, could be weaponized to subtly amplify divisive narratives, suppress certain viewpoints, or tilt political conversations in ways that are difficult to detect and even harder to reverse.⁹²

A. Beyond Privacy: Control of the Information Environment

[48] Despite these concerns, the Court treated the national security threat almost exclusively as a data privacy issue. They acknowledged that the large-scale collection of personal information could endanger U.S. persons but did not address the more dynamic risks that arise when a foreign adversary controls a platform's content distribution architecture.⁹³ Yet control over information flows has long been recognized as a potent form of geopolitical influence, particularly in an environment where algorithmic

⁹¹ See Brief for Former National Security Officials as Amici Curiae Supporting Respondents at 7–9, *TikTok Inc. v. Garland*, 122 F.4th 930 (D.C. Cir. 2024).

⁹² Multi-State Info. Sharing & Analysis Ctr., Cyber Threat Intel. Team, *TikTok: Influence Ops, Data Practices Threaten U.S. Security*, CTR. FOR INTERNET SEC. (Mar. 9, 2023), <https://www.cisecurity.org/insights/blog/tiktok-influence-ops-data-practices-threaten-us-security> [<https://perma.cc/4GUK-SMBD>].

⁹³ *TikTok Inc. v. Garland*, 604 U.S. 56, 74–75 (2025).

curation invisibly shapes public opinion.⁹⁴ The omission of this argument left the Court's analysis of harm incomplete, focusing narrowly on potential future espionage rather than the present and ongoing vulnerabilities posed by foreign-controlled communications platforms.

[49] Furthermore, the record showed that even with localized data storage, risks would persist because source code, algorithmic decision-making processes, and update mechanisms remained under ByteDance's control, and by extension, subject to Chinese legal mandates requiring cooperation with intelligence services.⁹⁵ As the U.S. Cybersecurity and Infrastructure Security Agency (CISA) noted, data at rest in the United States does little to mitigate threats if the software operating the platform is still remotely managed or updated by entities in adversarial jurisdictions.⁹⁶ The Court acknowledged the difficulty of enforcement but did not squarely address how deeply integrated technological dependencies could undermine seemingly surface-level safeguards.

B. Strategic Influence

[50] Finally, publicly available national security assessments also raised concerns about the broader strategic implications of TikTok's widespread use in the United States. With a user base exceeding 170 million Americans, the platform has become deeply embedded in the country's cultural, political, and social spheres, offering its owners an unprecedented window into U.S. public life.⁹⁷

⁹⁴ See Jack Goldsmith & Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* 147–51 (2006) (arguing that nations increasingly use control over digital information flows to project power and maintain social stability).

⁹⁵ See *TikTok Inc.*, 604 U.S. at 64–65.

⁹⁶ See Press Release, Cybersecurity & Infrastructure Sec. Agency, *CISA Releases 2023 Year in Review Showcasing Efforts to Protect Critical Infrastructure* (Jan. 17, 2024), <https://www.cisa.gov/news-events/news/cisa-releases-2023-year-review-showcasing-efforts-protect-critical-infrastructure> [<https://perma.cc/P6NR-33Z6>].

⁹⁷ *TikTok Inc.*, 604 U.S. at 63.

[51] In a national security context, such dominance in the digital information ecosystem is not merely a commercial success; it constitutes a strategic asset for any state actor capable of leveraging it. However, the Court declined to articulate a framework for when and how ownership structure and market scale might present a constitutionally cognizable threat. This omission leaves open difficult questions for future cases.

[52] These overlooked arguments, taken together, point to a broader reality: the risks presented by foreign-controlled platforms like TikTok are not limited to the surveillance of individual users but also encompass a systemic threat to the integrity of American public discourse and the security of political processes. The Court's decision to limit its analysis narrowly to personal data collection left these dimensions largely unaddressed, missing an opportunity to establish more explicit doctrinal guideposts for addressing emerging forms of digital national security threats within First Amendment law.

VII. THE CONSEQUENCES OF JUDICIAL UNDERREACH

[53] The failure to engage with these broader national security threats is not merely a missed analytical opportunity. Instead, this choice poses significant risks for the future of First Amendment jurisprudence. Justice Gorsuch's concurrence, while agreeing in the judgment, sheds critical light on these dangers by warning against superficial judicial review when expressive platforms are at stake.⁹⁸ When courts overlook the structural and systemic ways in which national security concerns intersect with modern speech architecture, they leave critical gaps in constitutional protection. The following section explores why this omission matters and how a narrow focus on traditional surveillance models undercuts the First Amendment's ability to safeguard democratic discourse in the digital age.

⁹⁸ *Id.* at 81–84 (Gorsuch, J., concurring in judgment).

A. Gorsuch's Warnings

[54] Although he ultimately agreed with the judgment, Justice Gorsuch cautioned against accepting government justifications at face value, especially when they involve regulating access to platforms that facilitate widespread speech.⁹⁹ His warning resonates even more sharply when considered against the broader set of national security arguments the Court largely ignored.

[55] By applying intermediate scrutiny based on a simplified understanding of the government's interest, characterized primarily as preventing data harvesting, the Court missed an opportunity to engage with the more profound and systemic threats raised by continued foreign control of key digital infrastructure.¹⁰⁰ As the record reflected, the potential for algorithmic manipulation, covert influence operations, and foreign ownership of mass communications channels raises qualitatively different concerns than mere privacy violations.¹⁰¹ These are threats to the structure of democratic discourse itself, not merely to the security of individual users.

[56] A proper application of First Amendment scrutiny in cases implicating national security should have recognized the hybrid nature of the government's interest: part privacy protection and part safeguarding of political independence and the resilience of public opinion against foreign influence. This broader framing would have required the Court to ask whether intermediate scrutiny was even adequate, or whether the magnitude and complexity of the risk justified a higher level of judicial inquiry, even within a content-neutral framework.

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 73–75.

¹⁰¹ *See* Brief for Former Federal Communications Commission and Treasury Officials as Amici Curiae in Support of Respondent, *TikTok Inc. v Garland*, 122 F.4th 930 (D.C. Cir. 2024).

B. A Vulnerable Doctrinal Landscape

[57] Further, Justice Gorsuch’s warning about the dangers of rigid “litigation categories” becoming detached from the underlying constitutional principles is particularly instructive in this context.¹⁰² By treating the case as a straightforward application of intermediate scrutiny to a data privacy regulation, the Court left unresolved important questions about foreign state control over information architecture. This leaves First Amendment doctrine vulnerable: under the Court’s reasoning, any future government action targeting infrastructure linked to expressive platforms could evade strict scrutiny simply by invoking ownership or security concerns, no matter how closely the platform is tied to core expressive activities.

[58] Suppose the judiciary is to preserve its role as a meaningful check on state power in the digital age. In that case, it must require a more exacting showing when the government invokes national security to justify burdens on expressive platforms. Courts must distinguish between speculative harms and demonstrated threats to democratic processes, rather than deferring reflexively to governmental assertions. The Court’s failure to fully engage with the national security dimensions presented in *TikTok Inc. v. Garland* marks a missed opportunity to develop a more rigorous doctrinal framework that can protect free expression against the evolving threats of the twenty-first century.

VIII. CONCLUSION

[59] The Court’s decision in *TikTok Inc. v. Garland* reflects a moment of profound uncertainty in First Amendment jurisprudence. As new technologies reshape the nature of public discourse, the traditional frameworks courts use to evaluate speech restrictions become increasingly strained. Rather than adapting to the complexity of modern digital

¹⁰² See *TikTok Inc. v. Garland*, 604 U.S. 56, 83 (2025) (Gorsuch, J., concurring in the judgment).

communication, the Court narrowed its field of vision, treating a platform that mediates the speech of millions as a mere object of ownership regulation. That analytical choice carries consequences far beyond the immediate fate of TikTok.

[60] Protecting free speech today requires more than simple, rigid adherence to inherited doctrinal categories; it demands an active, context-sensitive inquiry into the structures that enable or endanger open discourse. As courts in the future confront cases involving foreign-controlled platforms, algorithmic governance, and digital sovereignty, they will need to address the gaps *TikTok* left. Whether the First Amendment can serve as protection against both overt censorship and subtle forms of control will depend not merely on the principles the Court invokes, but on the rigor with which it scrutinizes the realities those principles must govern.