No. 24-34

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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SAMANTHA ALARIO, et al.,
*Plaintiffs–Appellees*,

and

TIKTOK INC.
*Consolidated Plaintiff–Appellee*,

v.

AUSTIN KNUDSEN, *in his official capacity as Attorney General of Montana*
*Defendant-Appellant*.

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On Appeal from the United States District Court for the District of Montana
Case Nos. CV 23-56-M-DWM CV 23-61-M-DWM (Hon. Donald W. Molloy)

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# BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLEES

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## INTEREST OF AMICUS CURIAE

The Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association founded by journalists and media lawyers in 1970. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

As an organization that defends the news media, amicus has a strong interest in ensuring that courts scrupulously apply constitutional protections against regulations that burden a small group of speakers or, as here, one speaker.

## SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiffs-Appellees, Consolidated Plaintiff-Appellee, and Defendant-Appellant have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

## FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amicus declares that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than amicus, its members or its counsel, contributed money intended to fund preparing or submitting the brief.

## SUMMARY OF ARGUMENT

TikTok is not a news organization. But this case implicates an essential constitutional rule that protects the press from efforts by public officials to suppress news coverage perceived as critical through measures that may, on their face, appear to be ordinary economic regulations. That is, Montana has sought not to burden social media companies as a group. Rather, it has sought to ban one single social media company among many. And that aspect of SB 419, An Act Banning TikTok in Montana (hereinafter, "the Act"), demands that this appeal receive the closest constitutional scrutiny because the Montana law carries a similar censorial danger as a line of cases on which appellees rely, where courts have invalidated taxes that burden news organizations more than other businesses.

The U.S. Supreme Court has invalidated these laws out of concern that the "power to tax differentially . . . gives a government a powerful weapon against the taxpayer selected." *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). Indeed, in *Minneapolis Star*, the Court held that "recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents *such a potential for abuse* that no interest suggested by Minnesota can justify the scheme." 460 U.S. at 592 (emphasis added). That kind of "differential treatment . . . suggests

that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585.

For news organizations, which can face regulatory pressures driven by public officials who perceive their coverage as unfavorable, this kind of close judicial scrutiny of regulations that single out individual speakers within a medium is essential, especially in cases where invidious intent may not be present on its face. *Cf.* Br. of Reporters Comm. for Freedom of the Press as Amicus Curiae, *United States v. AT&T*, 916 F.3d 1029 (D.C. Cir. 2019) ("Even subtle regulatory intimidation on a targeted company can impact the exercise of editorial freedom."). Other communications platforms that distribute news merit these presumptions of the strictest judicial scrutiny as well.

Additionally, this is a case where a single state has sought to regulate the free flow of information to its residents and across its borders based on what it has, unilaterally, identified as a national security concern. It is crucial for the news media that states not be allowed to "establish[] [their] own foreign policy," *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 964 (9th Cir. 2010), lest protections for information flows from abroad be weakened in the guise of state regulation. *See* 50 U.S.C. § 1702(b)(3) (stripping President of "authority to regulate or prohibit, directly or indirectly . . . the importation . . . of any information or informational materials . . . ."); *Am. Ins. Ass'n v. Garamendi*, 539

U.S. 396, 413–14, 424 (2003) (essential that federal government "speak for the Nation with one voice"). That Congress also recently passed, and the President signed, a federal law mandating that ByteDance divest TikTok or face a national ban on the platform underscores how Montana's effort to trench on foreign affairs presents an independent ground to affirm the district court's decision. *See Alario v. Knudsen*, No. CV 23-56-M-DWM, 2023 WL 8270811, *1 (Nov. 30, 2023) ("In showing its foreign affairs hand, the State has identified the Achilles' heel of SB 419.").

Accordingly, amicus urges the Court to affirm the district court's decision below.

## ARGUMENT

### I. Montana's selective ban of TikTok poses an acute threat to decades of First Amendment law protecting the news media from heavy-handed regulatory discrimination.

In *Minneapolis Star*, the Supreme Court established a crucial precedent for the free press. There, the Court considered a constitutional challenge to a state "use tax" on paper and ink that not only burdened the press specifically by taxing the implements of its trade, but also discriminated against a subset of the press by exempting the first $100,000 worth of paper and ink in a calendar year, meaning that only a "handful of publishers pa[id] any tax at all." *Id.* at 591. Despite the absence of any discernable "censorial motive," the Court nonetheless invalidated

the tax, finding that "power to tax differentially . . . can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id.* As such, differential treatment, "unless justified by some special characteristic of the press" is "presumptively unconstitutional." *Id.*[1] And the Court found especially concerning the exemption in the tax that, in practice, meant that only a small subset of publishers paid it. *Id.* at 591–92.

That driving concern—that a burden not just on a channel or mode of expression, but on particular speakers within that channel or mode, carries an acute danger of censoring disfavored views—recurs in the *Minneapolis Star* line of cases. As early as *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court invalidated a tax that was, on its face, an ordinary, content-neutral economic regulation, but that targeted only "a selected group of newspapers." *Id.* at 251. In

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[1] The district court found that the legislature's interests were limited to those stated in the bill's preamble: "protecting Montanans from Chinese corporate and business espionage" and "protecting Montana youth from dangerous content on TikTok." *Alario*, 2023 WL 8270811, at *8. The state, however, contended below that data privacy concerns animate the legislation. *Id.* The district court found that unpersuasive, citing the recent passage of a separate comprehensive data privacy law in Montana. *Id.* Amicus takes no position on the data privacy or "espionage" questions. As explained more fully in its brief filed in the district court below, amicus does submit that laws that restrict minors' access to constitutionally protected speech, with only limited exceptions related to sexually explicit content, have been routinely invalidated by the Supreme Court. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011).

doing so, the Court underlined that the law's structure was "in itself suspicious" for First Amendment purposes and that the law was, in fact, retaliatory and suppressive by design. *Id.* The Court found that it had been passed with the "plain purpose of penalizing" newspapers that had criticized Sen. Huey Long. *Id.* at 250–51; *Minneapolis Star*, 460 U.S. at 579–80 ("All but one of the large papers subject to the tax had 'ganged up' on Senator Huey Long, and a circular distributed by Long and the governor to each member of the state legislature described 'lying newspapers' as conducting 'a vicious campaign' and the tax as 'a tax on lying, 2c [sic] a lie.").

Applying this framework, the Court has continued to invalidate laws that "single[] out the press, or that target[] individual publications within the press," *Minneapolis Star*, 460 U.S. at 592–93, like a measure that "treat[ed] some magazines less favorably than others," *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987) (finding sales tax on general interest magazines that exempted newspapers and religious, professional, trade, and sports journals unconstitutional). And while these cases have come out of the news media world, the *Minneapolis Star* principle rests on the broader insight that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns" because of the risk that selective regulation will distort the marketplace of ideas. *Turner Broad. Sys. v. FCC*, 512

U.S. 622, 659 (1994). That kind of "differential treatment . . . suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star*, 460 U.S. at 585.

This presumption of unconstitutionality applies even absent "invidious intent," and even in the context of otherwise content-neutral economic regulation. *Koala v. Khosla*, 931 F.3d 887, 897 (9th Cir. 2019); *Ark. Writers' Project*, 481 U.S. at 228 (finding selective taxation unconstitutional even with no evidence of "improper censorial motive" because of "particular danger of abuse by the State"). As much so as a law that "targets individual publications," *Minneapolis Star*, 460 U.S. at 592–93, Montana's TikTok ban triggers the closest First Amendment scrutiny because its "form"—a unique burden on an individual company that distributes news, among other content—"is in itself suspicious," *Grosjean*, 297 U.S. at 251. As one First Amendment scholar put it, "resort to laser-beam precision legislation . . . is, in the apt words of the DC Circuit Court of Appeals, 'bound to raise a suspicion that the law's true target is the message' which of course would make the law unconstitutional." Lucas A. Powe, Jr., The Fourth Estate and the Constitution 226 (1991) (quoting *News Am. Publ'g., Inc. v. F.C.C.*, 844 F.2d 800, 805 (D.C. Cir. 1988)).

Additionally, the district court enjoined SB 419 on various bases related to the fact that SB 419 intrudes on the federal government's exclusive authority to

regulate foreign affairs. *Cf. Bd. of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1979) (emphasizing the importance that "with respect to foreign intercourse and trade the people of the United States act through a single government"). The danger in intra-media discrimination is amplified in this case by the fact that this is a single state purporting to close its borders to speech over a specific communications platform. Were each state able to regulate the flow of news and other information across its borders, all news organizations could be faced with a patchwork regulatory landscape, and domestic news organizations could be denied access to foreign sources of information based on the whims of individual state governments.

Given these First Amendment interests, for more than half a century, the Supreme Court has recognized that the press and public has a First Amendment right to receive news and views from abroad—even from what the state sees as "adversar[ies] of the United States." An Act Banning TikTok in Montana, SB 419 (2023); *see also Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965). And, crucially, Congress has made the same judgment, in the context of the International Emergency Economic Powers Act ("IEEPA"), that "no prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First Amendment." *Cernuda v. Heavey*, 720 F. Supp. 1544, 1548 (S.D. Fla. 1989) (quoting H.R. Rep. No. 40, 100th Cong., 1st Sess, pt. 3, at 113

(1987)). SB 419, by its terms, interferes with Congressional prerogatives vis-à-vis IEEPA, and the Berman amendments to IEEPA were enacted explicitly to ensure that the flow of news cannot be impeded through the exercise of emergency economic authority. *See TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 109 (D.D.C. 2020) (rejecting an effort to restrict access to TikTok that would likewise have empowered the government to "stop[] the flow of news" across U.S. borders). That fact underscores the danger in permitting one state to effectively regulate the flow of information across international and national borders on claimed national security grounds.

Finally, while this appeal was pending, Congress passed, and the President signed, the Protecting Americans from Foreign Adversary Controlled Applications Act, H.R. 815, which would prohibit TikTok from operating within the United States unless the President approves a divestiture. Pub. L. No. 118-50, 138 Stat. 895 (Apr. 24, 2024). That Congress has now expressly legislated on TikTok highlights the danger of individual states taking it upon themselves to restrict the flow of information from foreign sources. As the district court found, Montana's "showing its foreign affairs hand" in SB 419 is the "Achilles' heel" of the law, and provides ample basis for the injunction the court entered. *Alario*, 2023 WL 8270811, at *1.

## CONCLUSION

For the foregoing reasons, amicus respectfully urges the Court to affirm the decision below.

Dated: May 6, 2024

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Bruce D. Brown, do hereby certify that I have filed the foregoing Brief of Amicus Curiae electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on May 6, 2024.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 6, 2024

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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

I am the attorney for amicus curiae the Reporters Committee for Freedom of the Press.

**This brief contains 2,086 words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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