No. 24-34

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMANTHA ALARIO; HEATHER DIROCCO; CARLY ANN GODDARD; ALICE HELD; DALE STOUT; TIKTOK INC.,

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, Nos. 23-cv-00056, 23-cv-00061

BRIEF FOR *AMICUS CURIAE* NETCHOICE, LLC IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

NetChoice, LLC certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

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INTEREST OF *AMICUS CURIAE*

NetChoice is a national trade association of online businesses that works to protect free expression and promote free enterprise online. NetChoice is engaged in litigation, *amicus curiae* work, and political advocacy to support those ends. NetChoice is currently a plaintiff in seven federal lawsuits challenging state laws that chill free speech and stifle commerce on the internet, each in different and potentially incompatible ways. NetChoice has a strong interest in this litigation to ensure the internet stays innovative and free, rather than stifled and balkanized.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Montana's attempt to ban TikTok outright is part of a long line of recent efforts by state governments to impose crippling restrictions on businesses that operate over the internet. But because the internet is a global network that enables communication and commerce across state and national borders, courts have long held that the federal government is better suited than the states to regulate this medium. *See, e.g.*, *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *Am. Civ. Liberties Union v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999). State-by-state regulation threatens to fragment the internet by imposing a patchwork of

[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. All parties consent to filing of this brief.

regulation over an inherently borderless technology, harming commerce and the free exchange of information alike. It is thus no surprise that courts have largely enjoined the slew of recent efforts by states to regulate access to online services like TikTok. *See, e.g.*, *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196 (11th Cir. 2022); *NetChoice, LLC v. Yost*, 2024 WL 555904 (S.D. Ohio 2024); *NetChoice, LLC v. Griffin*, 2023 WL 5660155 (W.D. Ark. 2023); *Volokh v. James*, 656 F.Supp.3d 431 (S.D.N.Y. 2023); *NetChoice, LLC v. Bonta*, 2023 WL 6135551 (N.D. Cal. 2023).

While the federal government is better suited to regulate the internet in most cases, the argument for national rather than state legislation is overwhelming in this particular case. Montana does not purport to restrict TikTok because of any quintessential local concern. It seeks to ban TikTok on the grounds that the "People's Republic of China is an adversary of the United States and Montana," and that "TikTok's continued operation in Montana serves as a valuable tool to the People's Republic of China to conduct corporate and international espionage in Montana." S.B. 419 at 1-2. The U.S. Constitution, however, does not allow us to have fifty different foreign policies, but commits matters of foreign affairs and national security to the political branches of the federal government. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434 (1979). "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with

unified and adequate national power." *Bd. of Trustees v. United States*, 298 U.S. 48, 59 (1933).

There is no question that Montana's effort to ban TikTok interferes with the federal government's ability to "speak with one voice" when it comes to foreign affairs and national security. *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 328 (1994). Congress just passed (and President Biden just signed) a bill that regulates TikTok's foreign ownership in ways that differ materially from Montana's effort. While the federal government's attempt to restrict TikTok's foreign ties will undoubtedly face its own constitutional challenges, there is no question that if any government has the authority to address foreign policy concerns with TikTok, it is the federal government—not Montana.

The district court correctly held that Montana's effort to ban TikTok cannot withstand legal scrutiny. Indeed, it does not come close. The ban not only violates the First Amendment, but also intrudes on the proper balance of authority between the federal government and the states demanded by the U.S. Constitution. The law interferes with the federal government's exclusive authority over foreign affairs, discriminates against foreign commerce on its face, and it impermissibly burdens interstate commerce to boot.

The ban also balkanizes an inherently interstate and international medium. If this Court sanctions Montana's state-specific approach to internet regulation,

nothing will stop other states from following Montana's lead. In fact, numerous states have already passed their own laws regulating various aspects of the internet, and dozens of other potential state laws await in the wings. The proliferation of state regulation threatens to splinter the internet and undermine the vibrant and competitive free market that characterizes it today. This court should affirm.

ARGUMENT

I. State Regulation Threatens To Fragment The Internet, Harming Commerce And The Free Flow Of Information.

A. Montana's TikTok Ban is Just One of Many Recent State Laws That Seek to Regulate the Internet.

Congress recognized long ago that the internet has "flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. §230(a)(4). To "promote the continued development of the Internet," Congress declared it "the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet … unfettered by Federal or State regulation." *Id.* §230(b). That hands off federal policy has worked: the Internet has grown tremendously over the last few decades and fostered "a revolution of historic proportions." *Packingham v. N. Carolina*, 582 U.S. 98, 105 (2017). It has facilitated trillions of dollars in commerce, provided hundreds of millions of Americans with access to information, and helped billions of people across the globe communicate almost instantaneously.

NetChoice members are at the forefront of that revolution. Services like TikTok, Facebook, YouTube, and X (formerly known as Twitter) "allow[] users to gain access to information and communicate with one another about it on any subject that come to mind." *Id.* at 107. "On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos." *Id.* at 104. "On LinkedIn users can look for work, advertise for employees, or review tips on entrepreneurship." *Id.* "And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner." *Id.* at 104-05.

In recent years, however, states across the country have enacted a slew of laws that threaten to hinder that innovation. Montana's TikTok ban is just one example. Florida, Texas, New York, California, Arkansas, Louisiana, Utah, and Ohio have all enacted laws that regulate TikTok, Facebook, YouTube, and similar services in various ways. Some of those laws restrict how those companies exercise editorial discretion over what content to disseminate on their services and how. *See, e.g.*, *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196 (11th Cir. 2022); *Volokh v. James*, 656 F.Supp.3d 431 (S.D.N.Y. 2023). Others seek to restrict access to those services based on concerns that they harm minors. *See, e.g.*, *NetChoice, LLC v. Yost*, 2024 WL 555904 (S.D. Ohio 2024); *NetChoice, LLC v. Griffin*, 2023 WL 5660155 (W.D. Ark. 2023); *NetChoice, LLC v. Bonta*, 2023 WL 6135551 (N.D. Cal. 2023). While courts have largely prevented those laws from taking effect, efforts to police

speech on online services and to regulate access to innovative services are spreading. At least 34 states have introduced bills aiming to regulate how companies like Facebook and TikTok handle their users' posts. *See* Rebecca Kern, *Push to Rein in Social Media Sweeps the States*, Politico (July 1, 2022), https://tinyurl.com/57zh8y8b. And at least 35 states have introduced legislation that seeks to restrict access to various online services based on concerns that they harm minors. *See* Nat'l Conference of State Legislatures, *Social Media and Children 2023 Legislation* (Jan. 26, 2024), https://tinyurl.com/4drhv8re.

B. A Fragmented Internet Would be Detrimental to Commerce and the Free Flow of Information.

The impending proliferation of state laws threatens to fragment the internet—harming commerce and the free flow of information alike. Because the internet is an inherently borderless technology, state regulation will almost always affect commerce and communications beyond a particular state's borders. Montana's TikTok ban, for example, affects small businesses in Idaho who wish to communicate with potential customers in the Treasure State. It likewise affects Montana businesses that hope to attract customers in neighboring states. *See infra* III. Ohio's parental consent statute makes it more difficult for an enterprising teenager in that state to reach followers in Indiana and Kentucky. A New York statute that seeks to limit the dissemination of "hate speech" might prevent New Yorkers from seeing posts by a British author who espouses heterodox views about

controversial topics. *See* Liam Stack, *J.K. Rowling Criticized After Tweeting Support for Anti-Transgender Researcher*, N.Y. Times (Dec. 19, 2019), https://tinyurl.com/yeya3y83. And a California statute that purports to ban the dissemination of "misinformation" might prevent its residents from hearing the views of a sitting senator from another state who espouses a debatable theory that ultimately turns out to be true. *Compare* Paulina Firozi, *Tom Cotton Keeps Repeating a Coronavirus Fringe Theory That Scientists Have Disputed*, Washington Post (Feb. 17, 2020), https://tinyurl.com/38fkb85h, *with* Michael R. Gordon, *Lab Leak Most Likely Origin of Covid-19 Pandemic, Energy Department Now Says*, Wall Street Journal (Feb. 26, 2023), https://tinyurl.com/58aa7c5t. Because virtually every state regulation of the internet will have national (indeed, global) impacts on commerce and communications, the recent proliferation of such regulations threatens to undermine the "vibrant and competitive free market," "true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" that the internet is supposed to foster. 47 U.S.C. §§230(a)(3), (b)(2).

Indeed, courts have long recognized that "[h]aphazard and uncoordinated state regulation can only frustrate the growth of cyberspace," which is why the "Internet … requires a cohesive national scheme of regulation." *Am. Libraries Ass'n v. Pataki*, 969 F.Supp.160, 182-83 (S.D.N.Y. 1997); *see also Am. Booksellers Found.*

v. Dean, 342 F.3d 96, 103-04 (2d Cir. 2003) (predicting that "the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they imperatively demand a single uniform rule"); *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1160-61 (10th Cir. 1999) (similar). Unlike brick-and-mortar businesses, it is not always easy for companies that operate over the internet to control the distribution of their services and content by geography, thus making it difficult to conform their practices to different state laws. The internet, after all, is borderless and largely "insensitive to geographical distinctions." *Pataki*, 969 F.Supp. at 170. "Once a provider posts content on the Internet," it is generally "available to all other Internet users worldwide." *Id.* at 167. Because it is difficult for companies to "foreclose access" from "certain states" or "send differing versions" of their online services to "different jurisdictions," companies must typically "comply with the regulation imposed by the state with the most stringent standard"—in effect allowing a handful of states to set internet policy for the entire Nation and turning the proper division of federal-state authority on its head. *Id.* at 183.

To be sure, developments over the last few decades have made it technologically feasible for online services like TikTok to determine where their users are located—making it easier for them to tailor their products and services to comply with different state laws. *See generally* Jack Goldsmith & Eugene Volokh,

State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation, 101 Tex. L. Rev. 1083 (2023). But that requires collecting real-time location data from its users—something that is neither easy nor cheap to do. *See generally* David Post, *The Internet and the Dormant Commerce Clause: A Reply to Goldsmith and Volokh*, 101 Tex. L. Rev. Online 157 (2023). Real-time location data is not always accurate, and consumers often use tools like VPN to evade location detection. *See, e.g.*, Marketa Trimble, *Geoblocking, Technical Standards and the Law* in Geoblocking and Global Video Culture 54-63 (2016). And while large companies may be able to foot the bill, deploying real-time location technology can be cost prohibitive for many smaller companies. Faced with a choice between deploying costly location technology and risking liability under a patchwork of state laws, a company may well choose to structure its operations nationwide to "comply with the regulation imposed by the state with the most stringent standard." *Pataki*, 969 F.Supp. at 183.

To make matters worse, state laws often conflict with each other, making compliance with all of them impossible. *Id.* at 182-83. That is not particularly surprising, as different states will invariably have different opinions about how to solve a particular problem. For example, state A might restrict sending pornographic material into the state in a way that children can easily access it, while state B might

make service providers quasi-common carriers that are barred from blocking such material.

Such conflicts are not just hypothetical. To take a real-life example, a Florida statute (that is currently enjoined) prohibits online services from "post[ing] an addendum to any content or material posted by a user," Fla. Stat. §501.2041(2)(j), while a New York statute (that is also enjoined) requires online services to provide "a mechanism for social media users to file complaints about instances of 'hateful conduct,'" N.Y. Gen. Bus. Law §394-ccc(2). If the New York courts interpret the New York statute to require online services to offer a "report hateful conduct" button on user posts, complying with the New York statute would arguably violate the Florida statute. To take another real-life example, the same Florida law prohibits online services from applying or using "post-prioritization or shadow banning algorithms for content and material posted by or about … a candidate," Fla. Stat. §501.2041(2)(h), while a California law (that is also enjoined) requires online services to "eliminate the risk" that children might "witness … potentially harmful conduct" "before the online service … is accessed by children," Cal. Civ. Code §1798.99.31(a)(1)(B)(iii), (a)(2). An online service that attempts to comply with California's mandate by restricting content depicting violence against political candidates would arguably violate the Florida statute. *See* Herman Wong, *CNN Cuts Ties With Kathy Griffin Amid Controversy Over Comedian's Gruesome Anti-Trump*

Photo, Washington Post (May 31, 2017), https://tinyurl.com/87v4xfmu. Those irreconcilable conflicts unquestionably hinder commerce and the free exchange of information. After all, companies facing irreconcilable state laws must choose between "taking [their] chances" or withdrawing from the market altogether. *Pataki*, 969 F.Supp. at 183.

While the federal government is better suited to regulate the internet in most cases, the argument for national rather than state legislation is overwhelming in this case. Montana's TikTok ban implicates foreign policy and national security—subjects that are the exclusive province of the federal government, not the states. *See, e.g.*, The Federalist No. 80, pp. 535-36 (J. Cooke ed. 1961) (A. Hamilton) (explaining that "the peace of the WHOLE ought not to be left at the disposal of a PART"); *id.* No. 44, at 299 (J. Madison) (emphasizing "the advantage of uniformity in all points which relate to foreign powers"); *id.*, No. 42, at 279 (J. Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations").

Indeed, whether and how to regulate TikTok's foreign ties is the epitome of the sort of question that the federal government is better suited to decide. The only way for TikTok to comply with Montana's state-specific ban is to collect real-time location data from its users across the country, something that it does not currently do. But by Montana's own telling, the ban seeks to prevent TikTok from "shar[ing]

user information, *including real-time physical location of users*," with the Chinese Communist Party. S.B. §419 at 1 (emphasis added). To the extent Montana's concerns hold any water at all, the effect of its state-specific ban is to subject users across the United States to the very same data privacy risks from which it seeks to protect its own residents. And residents of neighboring states who suffer the consequences of Montana's decisions have no way of holding Montana officials accountable. *Cf. New York v. United States*, 505 U.S. 144, 168-69 (1992).

II. Montana's TikTok Ban Cannot Be Squared With The Proper Division Of Authority Between The Federal Government And The States.

Given the national and global effects of Montana's state-specific TikTok ban, it is no surprise that the district court concluded that the ban undermines "the proper division of authority between the Federal Government and the States" established by the U.S. Constitution. *New York*, 505 U.S. at 149. Indeed, the law upsets the proper federal-state balance in multiple ways. It interferes with the federal government's exclusive authority over foreign affairs, discriminates against foreign commerce on its face, and impermissibly burdens interstate commerce to boot.

A. Montana's TikTok Ban Impermissibly Intrudes on the Federal Government's Exclusive Authority Over Foreign Affairs.

Montana's TikTok ban is unconstitutional because it interferes with the federal government's authority over foreign affairs. "The Constitution gives the federal government the exclusive authority to administer foreign affairs." *Movsesian v.*

Victoria Versicherung AG, 670 F.3d 1067, 1071 (9th Cir. 2012) (en banc). State laws that "intrude[] on the field of foreign affairs without addressing a traditional state responsibility" are "preempted." *Id.* at 1071-72. Indeed, "even when the federal government has taken no action on a particular foreign policy issue, the state generally is not free to make its own foreign policy on that subject." *Id.*; *see also Zschernig v. Miller*, 389 U.S. 429 (1968). When it comes to foreign policy, the Nation needs to speak with one voice, not fifty.

There is no question that Montana's TikTok ban intrudes on the federal government's exclusive authority over foreign affairs. Indeed, it does not even hide its forbidden intent to speak for the federal government on an issue of intense national concern. It boldly decrees "the People's Republic of China" an "adversary of the United States and Montana." S.B. 419 at 1. It complains that China "has an interest in gathering information about" its users "to engage in corporate and international espionage." *Id.* at 1. And it expresses concern that "TikTok's continued operation in Montana serves as a valuable tool to the People's Republic of China to conduct" that espionage. *Id.* at 2. The statute is not "merely expressive" of a distinct foreign policy. *Movsesian*, 670 F.3d at 1077. It "imposes a concrete policy" by banning TikTok in the state unless it is "sold to a company that is not incorporated in any other country designated as a foreign adversary." S.B. 419 §4. The law thus establishes a particular foreign policy for Montana—one that decries the actions of

a "foreign adversary" and seeks to prevent it from engaging in "international espionage" by cutting off access to TikTok. S.B. 419 at 1-2.

The fact that S.B. 419 fails to address a "traditional state responsibility" reinforces the conclusion that it intrudes on the federal government's exclusive authority over foreign affairs. *Movsesian*, 670 F.3d at 1075-76. The state insists that S.B. 419 is just a "consumer protection law" because it prevents TikTok from harvesting user data. Montana.Br.50-52. But by the state's own admission, it seeks to prevent TikTok from harvesting user data not because of an especial interest about the unique privacy concerns of Montanans, but specifically because it is worried that TikTok will provide that information to a foreign adversary to facilitate "international espionage." Montana.Br.52. ("SB419's consumer protection interest is clear: it bars TikTok from operating in Montana *only while the threat of harvesting Montanans' personal data and providing at-will access for the CCP remains*." (emphasis added)).

The absence of distinct consumer privacy concerns is underscored by the divestment option. No change in TikTok's data privacy practices can save TikTok under Montana's law if it does not sever its foreign ties. Conversely, if TikTok severs its foreign ties, the law does not require TikTok to change its data privacy practices. S.B. 419, moreover, is not a generally applicable consumer protection statute that applies to all similar services. It singles out TikTok while leaving services like

Facebook, X, and YouTube untouched. That under-inclusiveness "raises great doubt" that Montana is in fact pursuing the general consumer protection interest it invokes, rather than meddling in foreign policy. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 426 (2003); *see also Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 964 (9th Cir. 2010) (explaining that California law "cannot be fairly categorized as a garden variety property regulation" because it "does not apply to all claims of stolen art," but instead "addresses only the claims of Holocaust victims and their heirs").

That conclusion follows directly from the Supreme Court's decision in *Garamendi*. There, California tried to justify a law requiring disclosure of information about Holocaust-era insurance policies as protecting "legitimate consumer protection interests in knowing which insurers have failed to pay insurance claims." 539 U.S. at 426. The Court rejected that argument, explaining that "unlike a generally applicable" consumer protection provision, the California law "effectively singles out only policies issued by European companies." *Id.* "Limiting the public disclosure requirement to these policies raises great doubt that the purpose of the California law is in evaluation of corporate reliability in contemporary insuring in the State." *Id.* The obvious "state interest actually underlying" the statute, the Court explained, "is concern for the several thousand

Holocaust survivors said to be living in the state." *Id.* The same reasoning applies here.

Montana's intrusion on the federal government's exclusive authority over foreign affairs is even more obvious now that the federal government has enacted a statute that addresses the very same national security issues that Montana seeks to address here, albeit in distinct ways. Just a few weeks ago, Congress passed and the President signed the Protecting Americans From Foreign Adversary Controlled Applications Act ("H.R. 815"), a bill designed to protect the national security of the United States from the threat posed by "foreign adversary controlled applications" like TikTok. Like the Montana ban, H.R. 815 seeks to force TikTok to undergo a divestiture that removes it from "foreign adversary" control. But H.R. 815 differs from Montana's ban in numerous ways. Whereas Montana would ban TikTok in the state immediately, H.R. 815 gives TikTok nine months to find a buyer before its restrictions kick in and gives the President the authority to extend that deadline by another three months if he sees fit. H.R. 815, div. H, §§2(a)(2)-(3). While Montana imposes liability on TikTok if it continues to operate in the state, H.R. 815 imposes penalties on app stores and internet hosting services that continue to provide services to TikTok. *Id.* §2(a)(1). H.R. 815 requires the President to approve any potential divestment through an interagency process, whereas Montana's ban does not include any similar requirement. *Id.* §2(g)(6). H.R. 815 will no doubt prompt constitutional

objections of its own. But for present purposes what matters is that, when it comes to foreign affairs, Montana cannot chart "a different course" than the federal government. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 378 (2000). Yet that is just what Montana has done here.

To be sure, both the federal government and the state agree that TikTok's foreign ownership presents national security concerns, and both laws seek to compel TikTok to sever its foreign ties. But the "fact of a common end hardly neutralizes conflicting means." *Id.* at 379. The Supreme Court's decision in *Crosby* illustrates the point. There, the Court struck down a Massachusetts law that imposed a slew of sanctions on companies that did business with Burma. Even though the federal government imposed its own set of sanctions, the Court nevertheless held that the Massachusetts statute served as an "obstacle to the accomplishment of Congress's full objectives" because the sanctions regimes differed. *Id.* at 379-80. The state law, the Court explained, was "at odds" with the federal government's choice of "the right degree of pressure to employ," and "the inconsistency of sanctions … undermines the congressional calibration of force." *Id.* The "differences between the state and federal Acts in scope and type of sanctions," moreover, "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Id.* at 381. After all, "the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national

economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics." *Id.* "When such exceptions do qualify his capacity to present a coherent position on behalf of the national economy, he is weakened, of course, not only in dealing with the Burmese regime, but in working together with other nations in hopes of reaching common policy and 'comprehensive' strategy." *Id.* at 381-82. So too here. By imposing different restrictions than the federal government on TikTok, Montana's ban "undermines the congressional calibration of force" and weakens the President's capacity in "dealing with" China by limiting his bargaining power. *Id.* at 380.

B. Montana's TikTok Ban Violates the Commerce Clause.

Montana's TikTok ban not only intrudes on the federal government's exclusive authority to regulate foreign affairs. It also violates the Commerce Clause by discriminating against foreign commerce and burdening interstate commerce.

1. Article I, Section 8, Clause 3 of the U.S. Constitution provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States." In granting Congress power over commerce with foreign nations, the Constitution implied that the states have no such power. *See Japan Line*, 441 U.S. at 449; *see also* 2 The Records of the Federal Convention of 1787 (Max Farrand ed. 1966), at 625 (James Madison grew "more & more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under

one authority"). Just like other aspects of foreign affairs, "[f]oreign commerce is preeminently a matter of national concern." *Japan Line*, 441 U.S. at 448. The "Federal Government must speak with one voice when regulating commercial relations with foreign governments," and the "need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause." *Id.* at 448-49.

State laws that "facially discriminate against foreign commerce" therefore "violate[] the Foreign Commerce Clause." *Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, 505 U.S. 71, 82 (1992); *see also Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 750 (5th Cir. 2006) (same); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 66-67 (1st Cir. 1999) (same); *cf. Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997) (explaining that laws that facially discriminate against interstate commerce are "virtually per se invalid"). Montana's TikTok ban does just that. It singles out TikTok for disparate treatment because it is "a wholly owned subsidiary of ByteDance, a Chinese corporation," S.B. 419 at 1, while leaving similar services owned by domestic corporations entirely outside its scope. Its restrictions apply so long as TikTok is owned by a company that is "incorporated in" a "country designed as a foreign adversary," but ceases to apply as soon as it is not. S.B. 419 §4. That is discrimination against foreign commerce through and through.

The state barely resists that conclusion. The best it can do is to claim that the law "addresses harms from a domestic corporation's harmful data practices that allow the CCP to access that data." Montana.Br.64. But just as the "flow of value between" a U.S.-based parent "and its foreign subsidiaries clearly constitutes foreign commerce," the flow of value between a U.S.-based subsidiary and its foreign parent constitutes foreign commerce as well. *Kraft*, 505 U.S. at 76. After all, the law does not seek to restrict TikTok from allowing domestic affiliates to access its data. Its requirements kick in because TikTok allegedly allows its *foreign* parent to access its data. The state's efforts to distract from that reality do not change the analysis.

2. The district court also acted well within its discretion when it concluded that the law's burdens on interstate commerce likely outweigh its local benefits. ER-47 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). As the evidence in the district court demonstrated, the burdens on interstate commerce are immense. The law makes it far more difficult for businesses in neighboring states to reach potential customers in Montana. *See supra* I.B. It also makes it more difficult for businesses in Montana to reach potential customers in other states. *See infra* III. The law also forces TikTok to collect detailed real-time location data from its users across the entire country in order to comply. *See supra* I.B.

In contrast to the evidence of burdens, Montana did not present "any evidentiary support" of the law's local benefits. ER-47. Instead, it relies on

speculation based on "news stories" about the "many ways that TikTok could harm Montanans." Montana.Br.5. But just as a plaintiff's "conjecture" of "'hypothetical' burdens" on interstate commerce is "no replacement for the kind of proof of real burdens" needed to sustain a challenge under *Pike*, *Garber v. Menendez*, 888 F.3d 839, 845 (6th Cir. 2018), the state's speculation about potential *benefits* is no substitute for evidence of actual benefits needed to defend a law under such a challenge. Courts have repeatedly held that *Pike* balancing requires *evidence* of burdens and benefits. *Id.*; *see also Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 157-59 (4th Cir. 2016); *Baude v. Health*, 538 F.3d 608, 612-13 (7th Cir. 2008). As the district court concluded, Montana failed to present any evidence at the preliminary injunction stage.

III. Montana's Statewide Ban Will Harm Local Businesses.

While the ban will have far-reaching national and international effects, its harms will be especially acute at home. Like the myriad online services offered by NetChoice members, TikTok not only empowers individuals to communicate with large audiences and express themselves by, for example, sharing entertaining videos and personal stories; it also empowers small businesses to thrive. Indeed, one of TikTok's core attractions is that it enables businesses to reach a broad audience of potential customers for advertising and direct sales. By one count, six thousand small businesses use TikTok in Montana. *See* Christine Lagorio-Chafkin, *Small*

Businesses React to the Montana TikTok Ban, Inc. (May 18, 2023), https://tinyurl.com/y5es48ah. Shutting off TikTok in Montana will undoubtedly harm those businesses.

Cari Olson, for example, would lose a critical advertising medium for her real estate business if the ban were to take effect. *See* Cari Olson, *Governor Must Protect Montana Small Businesses by Vetoing TikTok Ban*, Billings Gazette (May 10, 2023), https://tinyurl.com/yemky7ur. Olson, who describes TikTok as "a game-changer for countless Montana small business owners," uses TikTok for business "to help increase sales, expand customer base, and for market trends." *Id.* Through TikTok, she has reached an audience that would not have been available with traditional media. *Id*. Olson worries that "[t]he long-term implications of this ban [will be] devastating." *Id*. Olson implored Governor Gianforte to veto the ban, explaining that, "[a]s a small business owner," she is acutely aware of "the significant harms that would befall [Montana] and its people should this ban become law." *Id*. With the ban set to take effect if the Court lifts the district court's injunction, Olson will lose her "direct line of communications with customers" and predicts that small businesses across Montana, including hers, will experience a "strain on operations" and may "be forced to lay off employees." *Id*.

Caroline Nelson and her husband also stand to lose their main source of advertising if the ban is allowed to take effect. They use TikTok to market their

small business, Little Creek Lamb and Beef, which currently sells products across the United States. See Kristin Merkel, *Montana Business Owners Say They're Concerned by Possible Tiktok Ban in the State*, 7 KBZK Bozeman (Mar. 15, 2023), https://tinyurl.com/5xancs77. As first-generation ranchers, Nelson and her husband rely solely on social media to sell their products, and they have had incredible success through TikTok. For example, when one video Nelson posted went viral, "it allowed [Little Creek Lamb and Beef] to double one whole arm of [its] business, doubled literally overnight." *Id*. Nelson fears the ban will "take [them] out at the knees." *Id*.

Others, like Keri Williams, the founder of Branded Pinto custom-designed hats, would see her business plummet overnight if the ban were to take effect. *See* Christine Lagorio-Chafkin, *Small Businesses React to the Montana TikTok Ban*, Inc. (May 18, 2023), https://tinyurl.com/y5es48ah. For Williams, TikTok proved to be her muse. Williams posted videos of herself practicing her "hobby of burning hand-drawn designs into wool hats." *Id*. When they went viral, she was inspired to turn her hobby into a business, and Branded Pinto was born. If the ban takes effect, Williams will lose access to the source of "90 percent of [her] business." *Id*.

Nicole O'Shea likewise worries about what the ban means for her and her livelihood. After losing her home and car in 2022 flooding, O'Shea "had to rebuild everything from scratch." *See* Madison Malone Kircher, *In Montana, Creators*

Await—and Dread—a TikTok Ban, N.Y. Times (May 18, 2023), https://tinyurl.com/c2pzmn99. She looked to TikTok to help launch her business as a developer of product promotion videos suitable for social media platforms. For O'Shea—like thousands of other small business owners in Montana—the potential fallout from the ban may be life-changing: "[I]f I am a law-abiding Montanan who has to walk away from TikTok, then that takes away a very big chunk of my income . . . It takes away my ability to provide for my kids." *Id*.

In short, the ban not only threatens harm to interests far outside Montana's regulatory sphere, but will cause significant injuries within the state as well. This Court should affirm the preliminary injunction and reiterate that states have no business intruding on sensitive foreign policy matters.

CONCLUSION

For the reasons set forth above, this Court should affirm.

Respectfully submitted,

s/Paul D. Clement
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May 6, 2024

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5,677 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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May 6, 2024

s/Paul D. Clement
Paul D. Clement

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I hereby certify that on May 6, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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